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REPORTS OF CASES

DECIDED BETWEEN
MARCH 12, 1949 AND DECEMBER 6, 1949

IN THE

Supreme Court of Nebraska

JANUARY AND SEPTEMBER TERMS, 1949

VOLUME CLI

WALTER D. JAMES
OFFICIAL REPORTER

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By WALTER D. JAMES, REPORTER OF THE SUPREME COURT

For the benefit of the State of Nebraska

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CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

JANUARY TERM, 1949

ANN K. GORMAN, APPELLEE, v. VERNE L. DALGAS, APPELLANT.
36 N. W. 2d 561

Filed March 18, 1949. No. 32521.

1. **Streets.** When used as a measurement of distance, and nothing appears to the contrary, the commonly accepted meaning of a block is 300 feet.
2. **Highways: Streets.** When a person enters an intersection of two streets or highways he is obligated to look for approaching cars and to see those within that radius which denotes the limit of danger.
3. **Automobiles.** When a person fails to see an automobile not shown to be in a favorable position, the presumption is that its driver will respect his right-of-way and the question of his contributory negligence in proceeding to cross the intersection is a jury question.
4. ———. Before a verdict can be properly directed in such a case the position of the defendant's car must be definitely located in a favored position, otherwise the question becomes one for the jury.
5. ———. Where a person looks and does not see an approaching vehicle, or, seeing one, erroneously misjudges its speed or distance, or for some other reason assumes that he can proceed and avoid a collision, the question of negligence is usually one for the jury.
6. ———. Where two motorists approach an intersection at or about the same time, the driver approaching from the right has the right-of-way, and he may ordinarily proceed to cross,

having a legal right to assume that his right-of-way will be respected by the other driver, but if the situation is such as to indicate to the mind of an ordinarily careful and prudent person in his position that to proceed would probably result in a collision, then he should exercise ordinary care to prevent an accident, even to the extent of waiving his right-of-way.

7. **Municipal Corporations.** A municipality has no authority to enact or enforce any rule or regulation contrary to the provisions of section 39-751, R. S. 1943.

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

A. J. Luebs, for appellant.

Walter P. Lauritsen and *Harold A. Prince*, for appellee.

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

SIMMONS, C. J.

This is an action to recover for personal injuries and property damage arising out of a collision of two automobiles in a street intersection. Issues were made and trial had to a jury, resulting in a verdict for the plaintiff. Defendant appeals from an order overruling a motion for judgment notwithstanding the verdict or, in the alternative, for a new trial. We affirm the judgment of the trial court.

We summarize plaintiff's evidence. The accident occurred in the city of Grand Island about 6 p. m. on a June evening. The weather was clear; it was fully daylight; and there were no unusual driving conditions. The two intersecting streets were 36 feet wide and the intersection a 36-foot square. The east and west street on which plaintiff was driving was practically level. The north and south street had a slight down grade. Plaintiff's car weighed approximately 3,300 pounds and was 17 feet long.

Plaintiff was proceeding west on the right side of the street at a speed which she estimated to be 15 miles an hour. She expected her daughter and a niece to be

walking west either on that street or one of the adjoining streets. Plaintiff was looking for these children. At a point "about three car lengths" to the east of the intersection she looked to the north and saw the defendant's car proceeding south on the right side of the street at about the alley or "about a half a block" away. She did not change her speed or direction. She looked to the south, then to the west, and again to the north when she saw defendant's car "ready to hit my car." She was not certain but thought in reaching for the brake she may have stepped on the gas. The point of collision was 21 feet west of the east line of the intersection and 16 feet south of the north line of the intersection, placing the collision in the northwest quarter of the intersection. Plaintiff's car was struck behind the right front wheel and about the front door. The pictures show a considerable area of the right side of the car pushed in toward the center and considerable glass broken. Plaintiff's car traveled 45 feet farther southwest, over a curb, and came to a stop partly turned up against a tree and headed north. Defendant's car turned to the west, moved in a circular direction, and came to a stop 16 feet from the point of impact. Defendant's car made distinct skid marks for 9 feet before the impact.

We summarize defendant's evidence as to the matters wherein it differs from that of the plaintiff. Defendant was driving south at a speed of about 20 miles an hour. His car weighed less than 2,800 pounds and was 15 feet in length. As he approached the intersection he looked to the west, and when about 3 car lengths or 45 to 50 feet from the intersection he looked to the east. He saw plaintiff's car coming "exceedingly fast"—about 40 miles an hour—and about 6 car lengths or 90 feet from the intersection. The driver was looking to the south. After she entered the intersection she looked up, made no change in speed, swerved to the left, and hit the left side of his car. Defendant did not change his course previous to the collision. He watched plaintiff's car coming the

whole distance and when he saw that plaintiff did not see him he put on his brakes and came "practically" to a stop before the collision. The left headlight, fender, grille, and bumper of defendant's car were broken and pushed "straight across" toward the center. There are no pictures of defendant's car. The cost of repair was $20. Defendant's car remained in position at approximately the point of impact except that the front end was pushed to the southwest.

Plaintiff alleged six particular grounds of negligence. The trial court submitted the case to the jury as to two grounds of alleged negligence of the defendant: (1) That he failed to have his car under such control that he could avoid a collision with plaintiff's automobile; and (2) that he failed to yield the right-of-way to the plaintiff notwithstanding the fact that she was first to enter the intersection.

Defendant's first assignment of error is that plaintiff was guilty of negligence more than slight, and sufficient to bar her recovery as a matter of law, and that the trial court erred in overruling a motion made for a directed verdict at the close of plaintiff's case and at the close of all the evidence. Defendant argues that he, approaching the intersection from the right, had the right-of-way; that there is no evidence that plaintiff entered the intersection first, and none from which such an inference can be drawn; and that plaintiff was negligent in entering the intersection with knowledge that his car was approaching and without watching for it.

Defendant's contention is that there is no evidence as to the location of his car when plaintiff first saw him, in that plaintiff's testimony that he was about "half a block" away is meaningless because there is no standard length of a block. It is a matter of common knowledge that in the settlement of the Plains States, of which Nebraska is one, urban areas were platted generally in squares or blocks of 300 feet on each side, and that, when used as a measurement of distance and nothing appears to the

contrary, the commonly accepted meaning of "a block" is 300 feet. It requires no evidence to show what that meaning is in this state. See State v. Berard, 40 La. Ann. 172, 3 So. 463. Without objection or explanation one of defendant's witnesses used the word "block" as a measurement of distance in this case. Plaintiff's testimony then that defendant's car was about half a block away translated into feet means about 150 feet away. Thus while plaintiff was traveling a distance of 51 feet to reach the intersection, defendant's car, according to plaintiff's testimony, would have had to travel a distance almost 3 times that to reach the intersection first. We think the plaintiff's evidence sufficient to take the case to the jury as to which car entered the intersection first.

The rules in this state are: "* * * when a person enters an intersection of two streets or highways he is obligated to look for approaching cars and to see those within that radius which denotes the limit of danger. * * * If he fails to see an automobile not shown to be in a favorable position, the presumption is that its driver will respect his right of way and the question of his contributory negligence in proceeding to cross the intersection is a jury question. * * * Before a verdict can be properly directed in such a case the position of the defendant's car must be definitely located in a favored position, otherwise the question becomes one for the jury. * * * Where he looks and does not see an approaching vehicle, or, seeing one, erroneously misjudges its speed or distance, or for some other reason assumes that he can proceed and avoid a collision, the question is usually one for the jury." Whitaker v. Keogh, 144 Neb. 790, 14 N. W. 2d 596.

As defendant contends, plaintiff was looking for the children. It is patent that she was also observing other users of the highway for she saw defendant's car at a distance which was not "within that radius which denotes the limit of danger" as a matter of law. She then looked to the left, to the front, and then back to the right. We see no ground for a holding that plaintiff was guilty of

negligence as a matter of law. The assignment is not sustained.

Defendant next assigns as error the giving of instruction No. 1 including the two alleged acts of negligence hereinbefore set out, and contends that there was no evidence that he failed to have his car under such control that he could avoid a collision with plaintiff's automobile. As to this, the defendant's evidence is that when he was within 45 or 50 feet of the intersection he looked to the east and saw plaintiff at a point about twice that distance from the intersection, proceeding at a speed of 40 miles an hour, and not looking to the right. Defendant testified that he proceeded without changing his speed or course (it is not shown that he gave a warning signal), and that he applied his brakes, under one construction of his testimony, as he entered the intersection, and it is a fair inference from his testimony that at that time plaintiff also was entering the intersection. His speed was such that his car skidded 9 feet although he testified that he could stop his car in 9 feet.

We have held that "Where two motorists approach an intersection at or about the same time, the driver approaching from the right has the right of way, and he may ordinarily proceed to cross, having a legal right to assume that his right of way will be respected by the other driver, but if the situation is such as to indicate to the mind of an ordinarily careful and prudent person in his position that to proceed would probably result in a collision, then he should exercise ordinary care to prevent an accident, even to the extent of waiving his right of way." Roberts v. Carlson, 142 Neb. 851, 8 N. W. 2d 175.

Under the best interpretation of defendant's evidence from his viewpoint, his failure to have his car under control was a jury question for it could well have been found that he delayed efforts to control his car for several feet after it was apparent that to proceed would probably result in a collision, and that he did not exercise ordinary care to prevent it.

Defendant further assigns as error the submission of the first-into-the-intersection issue. We have heretofore discussed the plaintiff's evidence as to that question. Defendant's evidence as to that justified presenting that issue. He testified that plaintiff's car was about twice the distance of his own from the intersection; that plaintiff's speed was twice his own; and that plaintiff did not reduce her speed and, as may be inferred from a part of his testimony, he did not reduce his speed or apply brakes before entering the intersection. If the jury accepted that version of the facts, both cars reached the intersection about the same time. However, on direct examination and again on cross-examination he testified that he applied his brakes and had them on before he reached the intersection. Accepting those statements as true, as well as his statements as to the speed and location of the two cars when he first saw plaintiff, the jury could well have found that plaintiff entered the intersection first. The trial court did not err in submitting the two issues to the jury.

In his amended answer and cross-petition defendant alleged certain parts of the traffic regulations of the city of Grand Island and alleged that plaintiff drove her automobile in violation of the provisions pleaded. Section 1, as pleaded, provided that when two automobiles approach or enter an intersection at approximately the same time, the driver on the left shall yield the right-of-way to the driver on the right. Section 18, as pleaded, provided that it shall be unlawful for any person to operate a vehicle on any street within the city at a rate of speed greater than is reasonable and prudent under the conditions then existing, and that it shall be unlawful at any time or under any conditions to operate a vehicle at a speed greater than 15 miles an hour in the congested district, 25 miles an hour on arterial streets outside of the congested district, and 20 miles an hour on all other streets. Section 20, as pleaded, dealt with careless driving. Plaintiff in reply denied this allegation.

At the trial defendant offered and there were received in evidence "traffic regulations of the City of Grand Island, Ordinance No. 1926." The bill of exceptions recites that sections 1 and 18 were read to the jury. Section 1, as read to the jury, contained the qualifying clause, not pleaded in the amended answer, "except as otherwise herein provided." Section 18 as read to the jury was in the language pleaded in the amended answer.

The trial court instructed as to the city ordinances in two regards. The instruction as to section 18, about which there is no objection, omitted the arterial street provision. It was not claimed that either of the streets involved was in that classification. He further instructed that the ordinances provided: "When two vehicles approach or enter an intersection at approximately the same time, the driver of the vehicle on the left shall yield the right of way to the vehicle on the right, *except that the driver of any vehicle traveling at an unlawful rate of speed shall forfeit any right of way which he might otherwise have.*"

Defendant assigns as error the giving of the emphasized part of the instruction, contending first that it was not shown to have been any part of the ordinances of the city of Grand Island, and second that there was no evidence of an unlawful speed on his part.

As to the first contention the bill of exceptions indicates that the entire ordinance was introduced and only two sections read to the jury. The entire ordinance is not in the bill and we are not able to determine whether the exception is in the ordinance or not. The trial judge certified that the bill of exceptions contained all the evidence, although the omission of the ordinance was not called to the attention of the court by either party in settling the bill. We need not resolve that matter. The instruction given is in almost the exact language of and in accord with section 39-751, R. S. 1943. A municipality has no authority to enact or enforce any rule or regulation contrary to the provisions of section 39-751, R. S.

1943. See §§ 39-741 and 39-767, R. S. 1943. It follows that the giving of the instruction, if not a part of the ordinance, was error without prejudice as it was in accord with applicable state law.

Defendant further argues that there was no evidence of unlawful speed on his part, and hence the giving of the emphasized portion of the instruction was error. To that there are two answers. It is not claimed that either of the streets involved was an arterial street. The defendant pleaded and proved the city ordinance provision applicable here that any speed above 20 miles an hour was an unlawful rate of speed. The trial court so instructed the jury. The defendant does not object to that part of the instruction.

From the facts hereinbefore discussed a rate of speed of the defendant in excess of the legal limit is clearly inferable. The defendant and his witness put his speed at the legal limit under the ordinance. But the instruction does not apply to the defendant alone. It applies also to the plaintiff and whether or not she had forfeited any right-of-way that she might otherwise have. Defendant testified that plaintiff's speed was 40 miles an hour or double the legal limit. The giving of the instruction was not error.

The judgment of the district court is affirmed.

AFFIRMED.

MARION TYLER O'CONNOR, APPELLANT, V. BURNS, POTTER & COMPANY ET AL., APPELLEES.
36 N. W. 2d 507

Filed March 18, 1949. No. 32244.

1. **Sales.** A transaction for the sale or purchase of securities between a customer and a dealer in stocks and bonds is ordinarily that of buyer and seller.
2. **Trusts.** Ordinarily a trust is not created where the transaction is as consistent with another relationship as with that of a trust.

3. ———. A trust, when not qualified by the word "charitable," "resulting," or "constructive," is a fiduciary relationship with respect to property, subjecting the person by whom the property is held to equitable duties to deal with the property for the benefit of another person, which arises as a result of a manifestation of an intention to create it.
4. ———. The manifestation of intention of the settlor is the external expression of his intention as distinguished from his undisclosed intention.
5. ———. In construing an agreement to determine if it created a trust, regard will be had to its provisions as expressed and the interpretation given it by the parties as manifested by their acts and conduct in performing it.
6. **Principal and Agent: Trusts.** Agency is formed with the thought of constant supervision and control by the principal. Trust is based on the idea of discretion in the trustee and guidance by the settlor or cestui only to a limited extent and when expressly provided for.
7. **Trusts.** The use of the terms "trust," "trustee," or "trust fund" is not essential to the creation of an express trust where facts exist which establish that a trust actually existed. Likewise, the use of these terms does not create a trust where the evidence establishes that a trust was not intended.
8. ———. The use of the words "held in trust" in letters and receipts, and the use of symbols representing such words in the books and records of the party alleged to be a trustee, constitute evidence of a trust relation. They are not conclusive, however, and may be explained.
9. **Principal and Agent: Trusts.** The use of the words "for safekeeping" and "investment" in an agreement is not controlling in determining whether the party charged is a trustee or an agent. They will be considered together with all the other facts and circumstances in determining that question.
10. **Principal and Agent.** Where a party to an agreement is designated as "manager" of funds and securities, he will be considered an agent unless other evidence and circumstances are sufficient to show that a different relationship was intended.
11. ———. The fact that an agreement is subject to cancellation on thirty-days notice by either party does not establish that the party charged was either a trustee or an agent. It is a circumstance which may be considered with all the other evidence in determining that fact.
12. **Principal and Agent: Trusts.** The power to "invest or re-invest the funds from time to time and buy, sell or exchange any of my securities at such times and prices as your best judgment may dictate" is consistent with both an agency and trust

relation. It, also, may be considered with all the other evidence in the case in determining that question.

13. **Contracts.** Where the purpose of the agreement is plainly stated, it will be given great weight in determining the intention of the parties when the agreement was made.

14. **Principal and Agent.** Where the agreement states that the purpose of the arrangement is to relieve the settlor of handling his investment affairs, it ordinarily evidences a principal and agent relation, although it is not conclusive.

15. **Trusts.** Where the legal title and control of the property involved is not transferred, an essential element of a trust is lacking.

16. ———. Where the evidence shows that the title to securities was transferred only for purposes of convenience, control remaining with the owner to be exercised when and if he desired, a trust relation is not ordinarily created.

17. **Principal and Agent: Trusts.** The agreement before us, when viewed with all the evidence and circumstances shown by the evidence, is held to be a managerial agreement and not a trust.

18. ———: ———. The high degree of care required of a trustee cannot properly be imposed upon a managerial agent except by contract.

19. **Principal and Agent.** An agent is required to act in good faith and exercise reasonable skill, care, diligence, and judgment in acting for his principal.

20. ———. Where an agent holds himself out as specially skilled in the undertaking assumed, he is required to exercise that degree of care and skill which would ordinarily be exercised at the time by one performing similar functions under like circumstances.

21. ———. In the absence of specific instructions to the contrary, an agent is not required to change the nature of the securities in which his principal has invested, if he acted in good faith upon the information available to him.

22. ———. In the absence of instructions to so do, a managerial agent is not required to diversify the securities of his principal when he follows the general pattern of investment pursued previously by such principal and acted in good faith upon available information.

23. ———. An agent is not liable in the absence of bad faith for losses sustained by investing in open-end investment trust stocks, foreign bonds, utility, industrial and rail stocks, or local bonds where they were the subject of investment by the principal and no instructions to discontinue the purchase of such securities were given.

24. ———. An economic depression does not excuse negligence or

bad faith. It is a condition, however, which may be considered in determining whether or not a breach of duty and its consequent liability has been established.

APPEAL from the district court for Douglas County: JAMES T. ENGLISH, JUDGE. *Affirmed.*

William Ritchie, for appellant.

Kennedy, Holland, DeLacy & Svoboda, for appellees.

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

CARTER, J.

This is a suit for an accounting of the acts and doings of the defendants in relation to the cash and securities delivered to them under an agreement and understanding between plaintiff and the defendants, and for a judgment for losses suffered by the plaintiff resulting from violation of the agreement and the duties and obligations owing to the plaintiff by the defendants growing out of the relationship created by such understanding and agreement, and inhering therein. The trial court found for the defendants and the plaintiff appeals.

The evidence shows that Burns, Potter & Company was a partnership prior to January 1, 1932, composed of Arthur C. Potter, Plummer P. Purdham, and Cedric Potter, which partnership continued in existence until the death of Cedric Potter in 1939. On January 1, 1932, Burns, Potter & Company was incorporated under the laws of Nebraska for the purpose of taking over all the assets and assuming all the liabilities of the partnership. Such transfer of assets and assumption of liability was perfected and the liability of the corporation for the obligations of the partnership is not in issue here. Defendants Arthur C. Potter and Plummer P. Purdham, the sole surviving members of the partnership, are and have been since January 1, 1932, the managing officers of the corporation. Both the partnership and the cor-

poration carried on a stock and bond business in Omaha and the latter is presently engaged in said business.

The plaintiff, prior to 1930, had engaged in the buying and selling of stocks and bonds as a matter of investment and reinvestment of assets inherited from her father. Plaintiff claims that she reposed great trust and confidence in the ability and integrity of Arthur C. Potter and made investments including the purchase and sale of stocks and bonds on the advice and at the suggestion of Potter. Because of this relationship she says she transacted all of her investment business since 1927 with Burns, Potter & Company.

On February 13, 1930, plaintiff turned over to Burns, Potter & Company all her securities and cash to be held by it for investment and reinvestment in accordance with the best judgment of said Burns, Potter & Company with the further understanding that the remuneration should be $1.00 per $1,000 face value per annum for such securities as were held by the defendant in addition to the usual profit in buying or selling securities from and to customers. Such understanding is evidenced by a certain letter-agreement which will be discussed in detail in a subsequent portion of the opinion.

Plaintiff asserts that she turned over to Burns, Potter & Company, pursuant to the aforesaid agreement, between February 13, 1930 and January 1, 1932, securities and cash of the value of $79,722.80. She alleges also that from January 1, 1932 to November 30, 1939, securities and cash delivered to or collected for her by Burns, Potter & Company amounted to $24,867.27. Interest and dividends collected on certain mortgages and on sold securities during this period amounted to $5,858.35. A tax refund of $184.37 is alleged to have been collected. Plaintiff claims that a fair, reasonable, and proper return to plaintiff from a proper investment of these funds is 3½ percent per annum and that such earnings, so calculated, amount to $29,761.82. The total amount

for which plaintiff claims that the defendants should account amounts to $140,394.61.

It is the contention of plaintiff that the defendant Burns, Potter & Company accepted and held plaintiff's funds and securities in trust and that the duties and obligations of Burns, Potter & Company to the plaintiff were those of a trustee; that Burns, Potter & Company handled said funds and securities from February 13, 1930 to November 30, 1939, without informing plaintiff in detail as to their condition; that the company concealed the fact that most purchases and sales resulted in a substantial loss; that they invested in stocks and bonds which were highly speculative and not true investments; that sales were made too frequently and the reinvestments were therefore made too often in view of the financial resources of the plaintiff; and that many of such sales were apparently made for the benefit of the company, evidently to assist the company to sell its own securities to avoid loss to itself, or those of other customers, or those in which the company or its officers were personally interested. It is further asserted that the company purchased securities for plaintiff which were palpably unsafe in the face of a steadily declining market, that they were held for an unreasonable length of time, and that large unwarranted losses resulted. It is claimed that the company failed to properly diversify the investments and spread the risk. It is claimed also that the company sold to plaintiff from its own portfolio at profits which were excessive in view of the character of the securities. Negligence and fraud are asserted in the handling of certain specified investments.

Plaintiff admits the following credits: Payments paid to plaintiff from her account for living expenses, $47,719.23; amount invested in Union Pacific Railroad stock at plaintiff's specific direction, $24,311.34; a total of $72,030.57. Plaintiff admits that interest and other cash items in the amount of $1,361.15 have been de-

livered to her since the agreement was canceled, leaving a balance due of $67,002.89, and for which amount she prays judgment.

In answer to the foregoing the defendants allege that on or about February 14, 1930, plaintiff and defendants entered into an agreement whereby Burns, Potter & Company would act as manager for such funds and securities as plaintiff would deliver to them for safekeeping, and invest and reinvest the same according to their best judgment as provided in the letter-agreement of February 14, 1930. Defendants deny any confidential or fiduciary relationship between the parties at any time. They contend it was agreed that defendants would in no way be responsible for the safety of the funds invested, that the risk was plaintiff's, and that the purpose of the arrangement was to relieve the plaintiff of the inconvenience of handling her own investment affairs. Defendants deny the existence of a trust relationship or that one was intended. Defendants deny that any of the transactions were concealed and allege that a typewritten confirmation of each transaction was sent to the plaintiff and that through conversations, consultations and other means, plaintiff at all times knew of the condition of her account. Defendants admit selling securities to plaintiff on occasion at a rate higher than the cost to them, but allege they never sold to plaintiff at a price higher than the market price on the day in question, nor did they ever take a profit in excess of the normal and usual profit as agreed to in the letter-agreement. Defendants allege that the losses sustained were the result of a steadily declining market in the depression years from 1929 to 1938 when all investments suffered heavy market shrinkages. Defendants claim that plaintiff had full knowledge of the losses taken and at various times advised with defendants regarding additional purchases to recoup losses taken. Defendants allege that plaintiff took credit for all losses in her annual income tax returns to the federal govern-

ment and never complained or demanded an accounting until 1938. Defendants allege that plaintiff has been given access to their records and, under the circumstances shown, defendants can give no different accounting than that to which plaintiff has been given access.

It will be readily observed that the nature of the agreement made by the parties, under which the plaintiff turned over and the defendants accepted the securities and funds of the plaintiff, is of the utmost importance in determining the rights of the parties. We think the situation of the parties and the circumstances surrounding them prior to and at the time of the execution of the letter-agreement of February 14, 1930, becomes important in determining the intentions of the parties. We make no distinctions between the oral agreement of February 13, 1930, and the letter-agreement of February 14, 1930, for the reason the evidence shows them to be identical insofar as their relation to this litigation is concerned.

The evidence shows that Burns, Potter & Company was an investment dealer. It purchased securities on its own account for resale to the purchasing public. The profits of the company consisted of the difference in the buying and selling price of such securities and the volume of turnover it was able to obtain. The company carried on a limited brokerage business in that it would handle orders for its customers on the New York Stock Exchange, adding a loading charge for its service to the customer in addition to the regular commission charged by the New York Stock Exchange. In other words it was an over-the-counter dealer in securities much the same as a retailer of merchandise. The company was not a member of any stock exchange with listed securities. It did participate frequently in syndicate agreements with other dealers by which the syndicate obtained blocks of securities or even a whole issue in accordance with the subscriptions of the participating members of the syndicate. This was accomplished

either by outright purchase by the syndicate or by selling agreements made by the syndicate with the corporation owning or issuing the securities. The profit from these transactions was usually fixed by the syndicate and was determined by the kind and character of the security and the financial standing of the issuer. The corporation did not carry on a general brokerage business and it was not authorized to act as trustee. This, then, was the type of institution with which plaintiff was dealing during the times herein mentioned.

The record shows that C. R. Tyler, the father of the plaintiff, had been a successful flour miller in Council Bluffs, Iowa. He had accumulated three farms in Iowa, some city residences, and had invested substantial sums of money in stocks and bonds. The record shows both by the evidence of witnesses and the type of securities in which he invested, that he demanded securities returning a high yield to the holder. Plaintiff was an only child and the sole heir of C. R. Tyler. Before his death he turned over his stocks and bonds to the plaintiff. There is evidence in the record that plaintiff accompanied her father to the office of Burns, Potter & Company on several occasions and sat in on the discussions held by her father and the defendant Potter. In the summer of 1928 plaintiff began handling the securities of her father. They were all transferred to plaintiff prior to the death of the father in 1933 and handled by her from and after 1928.

Plaintiff asserts that she relied upon the advice of A. C. Potter because of a close relationship between him and plaintiff's family. The evidence shows in this respect that plaintiff's mother and the mother of Potter had attended the same girls school and had had some association throughout the years. The record does not show that plaintiff and Potter were particularly close except for the business relationship which existed. It will be noted also in this respect that plaintiff followed in

the footsteps of her father in dealing with Potter, and with Burns, Potter & Company.

When Tyler placed the stocks and bonds in his portfolio in the care of the plaintiff, practically all of them were high-yielding securities. They were of the type in which safety of investment had been sacrificed to some extent for a high return. We do not infer from this statement that they were not sound or wise investments, but merely that they did not represent the type of investment in which security and safety were the primary consideration. Among the securities turned over to the plaintiff were numerous foreign bonds, local bonds and stocks bearing high rates of return, and industrial stocks not highly rated in financial circles. The number and amount of foreign bonds were particularly noticeable.

The record shows that plaintiff continued to advise with Potter and followed his recommendations to a great extent. This, Potter admits. But Potter asserts that during this period plaintiff made the final decisions and acted entirely on her own. The plaintiff does not contend otherwise until after the letter of agreement of February 14, 1930.

Commencing in August 1928, and continuing until the execution of the letter-agreement of February 14, 1930, plaintiff bought and sold stocks and bonds from and to Burns, Potter & Company. She advised with Potter before making most of these transactions. The securities purchased were generally of the same character as those which her father had previously purchased. There was, however, a class of securities in which she invested that deviated from the general pattern of her purchases. They are listed in the record as Incorporated Investors, Incorporated Equities, and Second Incorporated Equities. Due to the part these three stocks play in this litigation before and after the letter-agreement of February 14, 1930, we deem it advisable to discuss their general nature.

The evidence is that investments in common stocks became very popular in the 1920's. The general demand for common stocks brought about the creation of investment trusts. The assets of an investment trust ordinarily consisted of a number of high grade common stocks. The stock of the investment trust represented, therefore, a corresponding interest in the group of common stocks held by the investment trust corporation. Insofar as the type of investment trust involved in the present litigation was concerned, the common stocks held consisted of high grade industrial, rail, and utility stocks. Various types of investment trusts sprang up. The fixed trust was one where the common stocks to be purchased by it were fixed in advance and were not subject to change during the life of the investment trust corporation. The second type was known as the management type investment trust in which the stocks to be purchased and held by it were left to the judgment of the managerial officers of the investment trust corporation. The latter type could be open-end or closed as the corporation chose. The stocks here involved designated as Incorporated Investors, Incorporated Equities, and Second Incorporated Equities fell within the classification of open-end investment trusts.

The evidence shows that Burns, Potter & Company in 1928 investigated the nature and reliability of Incorporated Investors, including the common stocks held by it, its earning statements, and the statements and the personnel charged with its management. As a result of these investigations, Burns, Potter & Company concluded to sell Incorporated Investors stock to customers desiring this type of investment. The testimony shows that plaintiff purchased 50 shares of Incorporated Investors stock at 76½ on September 5, 1928, after a full and complete discussion with Potter as to their nature, safety, and yield. She had full knowledge of the structure of the Incorporated Investors corporation, the list of the primary investment stocks which it held, the

record of earnings, and the financial statements of this company. On October 3, 1928, plaintiff purchased 70 shares of Incorporated Equities. This latter corporation was organized for the purpose of purchasing and holding the stock of Incorporated Investors only. The plan of this corporation was to purchase Incorporated Investors stock, borrow approximately 50 percent of its capital investment on the Incorporated Investors stock already purchased and invest the money thus borrowed in additional Incorporated Investors stock. The evidence of Potter is that he advised plaintiff fully regarding this stock and that she herself determined to make the purchase. The record discloses that on November 20, 1928, 30 shares of Incorporated Equities were purchased by plaintiff; on January 23, 1929, or shortly prior thereto, plaintiff purchased 100 shares of Incorporated Equities and 11 shares of Incorporated Investors; and on July 3, 1929, she purchased 125 shares of Second Equities. On November 19, 1929, 2 shares of Incorporated Investors were purchased. On December 20, 1929, plaintiff purchased 275 shares of Incorporated Investors. In early January 1929, plaintiff purchased 625 shares of Second Incorporated Equities direct from the issuing company.

The record discloses that as a result of the great demand for Incorporated Investors and Incorporated Equities stocks which could not be supplied, the stock known in this record as Second Incorporated Equities was placed on the market. It was similar to Incorporated Equities in that its investment was in Incorporated Investors stock exclusively. Instead of being a borrowing company for the purpose of increasing its investment in Incorporated Investors stock, it accomplished the same end by issuing a collateral trust bond issue in which its Incorporated Investors stock was used as collateral. The stock of Incorporated Equities and Second Incorporated Equities was, consequently, very similar in all respects. Plaintiff therefore held Incorporated Investors, Incorporated Equities, and Second Incorporated Equities stocks,

in addition to various stocks and bonds of the nature heretofore described, when the agreement of February 14, 1930, was made.

The evidence is that the purchase of the 275 shares of Incorporated Investors stock on December 20, 1929, was an attempt to recoup losses accruing as a result of the stock market crash which reached its peak on November 13, 1929. On that date Incorporated Investors dropped to 41½. On November 19, 1929, it had gained strength and was then worth 50. After a complete discussion of the situation with Potter, plaintiff sold sufficient foreign bonds to buy the 275 shares of Incorporated Investors. In late 1929, Second Incorporated Equities came out with a plan to sell additional stock to existing stockholders at $5 a share, limited to 5 shares for each share previously held. After a complete discussion of the matter with Potter, plaintiff purchased 625 shares direct from the issuing corporation. This was clearly a recoupment move on the part of the issuing corporation as well as on the part of the plaintiff herself. The assertions of bad faith and negligence in the handling of other stocks and bonds are no different than in the handling of the investment trust stocks.

The industrial, rail, and utility stocks held by plaintiff suffered materially in the stock market crash. Uncertainty was everywhere in the financial field. Defendant Potter testifies that, after the stock market crash had reached its peak on November 13, 1929, there was a general feeling that the worst was over and that the moderate increases in stock market prices which followed indicated this fact. Numerous financial journals and opinions of recognized experts appearing in the record sustain this view. Plaintiff was advised of these facts by Potter before the recoupment purchases were made.

The record shows that plaintiff was fully aware of the financial danger in which she found herself. She made many trips to the offices of Burns, Potter & Company during the four-month period preceding the agree-

ment of February 14, 1930, not only to advise with them but to deliver stocks and bonds which had been sold and to receipt for those which had been purchased. The matter of eliminating the inconvenience of these trips to the office of Burns, Potter & Company and to and from her own safety-deposit box was discussed several times with the defendant Potter before an agreement was finally decided upon. This, then, was the situation existing between the parties when the letter-agreement of February 14, 1930, was made.

On February 14, 1930, Potter caused a letter, addressed to Burns, Potter & Company, to be prepared for signature by the plaintiff. It provides as follows:

"With reference to my securities and funds which you are holding for safe-keeping for me, it is my understanding that you will act as manager for such funds and securities. You will invest or reinvest the funds from time to time and buy, sell or exchange any of my securities at such times and prices as your best judgment may dictate.

"Your remuneration shall be as follows: $1.00 per $1,000.00 face value per annum for such securities of mine as you may be holding. You will receive no other remuneration, other than the usual profit which you may have in the securities which you sell me, or sell for me.

"I understand that you are in no way responsible for the safety of the funds invested, and that the risk is mine, the purpose of this arrangement being to relieve me of the inconvenience of handling my own investment affairs.

"This agreement is subject to cancellation by either party on thirty-days notice."

The foregoing letter was signed by plaintiff and accepted in writing by Burns, Potter & Company. Plaintiff testifies that she signed it in the office of Burns, Potter & Company at the time it was first presented to her. Potter says that she took the letter with her and that it was mailed to Burns, Potter & Company on March

10, 1930, after she had been requested by mail to return it. This testimony is corroborated by the receiving date stamped on the letter and the evidence of the employee who wrote the letter requesting the return of the letter-agreement. We think the evidence preponderates in favor of the defendants on this issue. We find, therefore, that plaintiff had the letter-agreement in her possession almost a month before she signed and returned it to Burns, Potter & Company. The agreement was canceled pursuant to its terms on December 1, 1939.

Upon the execution of this letter-agreement plaintiff turned over all of her securities to Burns, Potter & Company, the character of which has been previously referred to. In addition thereto the plaintiff paid $28,817.80 to Burns, Potter & Company for a group of preferred stocks which she had purchased on February 5, 1930. This was new money derived from the sale of a farm. These preferred stocks were also left with Burns, Potter & Company under the terms of the letter-agreement.

The evidence shows a continued course of dealing which was very similar to that which had taken place before the letter-agreement was made. It is the contention of Potter that he continued to act only on the advice of the plaintiff just as in previous times except that it was often done by telephone or letter. The securities were all held by Burns, Potter & Company in such form that plaintiff was not required to endorse them. The necessity for plaintiff to bring in the securities as they were sold, to affix her endorsement thereon, and to receipt for new securities purchased, was eliminated by the new method of handling. Defendants contend that this was all that was intended to be accomplished by the agreement. Plaintiff contends otherwise, and this poses the primary issue in the case. The record shows also that the keeping of records became burdensome to the plaintiff and the necessity of making continuous settlements after each sale or purchase caused her great

inconvenience. This resulted in a further arrangement on or about May 1, 1930, whereby Burns, Potter & Company opened a ledger account with plaintiff. Thereafter all sales and purchases were credited or debited to the account of the plaintiff. In accordance with this understanding, Burns, Potter & Company placed such amounts as she needed in plaintiff's bank account for her living expenses. No dispute arises concerning the amounts thus paid by Burns, Potter & Company. It is only as it bears upon the whole situation that it is of any importance here. Potter contends that confirmations of sales and purchases of plaintiff's securities were regularly mailed to the plaintiff. Copies of these confirmations are in the record, addressed to the various places at which plaintiff resided during this period. Plaintiff admits receiving some of these confirmations and denies receiving those, generally speaking, from February 14, 1930 until 1938. Plaintiff denies that she knew anything about all these transactions and that they were handled solely by Burns, Potter & Company. There are in evidence, however, the annual income tax returns signed by the plaintiff. Attached to each is a detailed list of losses sustained on stock and bond investments. This situation continued during the depression years in the early 1930's. It was common knowledge that stocks and bonds, as well as everything else, had slipped materially in value. Notwithstanding her knowledge of this type of investment, and we think the record shows she had considerable, she voiced no complaint, and made no attempt to cancel the agreement made. It is evident from this record that plaintiff desired to deal in second grade securities in order to obtain a higher yield on her investments. The investments made after the letter-agreement follow the same pattern as those made previously by plaintiff and her father. The stock and bond markets were up and down, but over the period here involved it was definitely a declining market. High grade securities suffered along with those of lesser financial ratings. The market was

very uncertain and the opinions of financial experts showed great divergence. Plaintiff suffered large losses in her investments as did all heavy investors. High-yield investments dropped in value in greater proportion than the higher grade securities returning a lesser yield, a result that is to be expected and generally known. It is for losses thus sustained which plaintiff claims should have been guarded against by Burns, Potter & Company under the agreement which she made.

Plaintiff contends that the agreement created a trust relationship with Burns, Potter & Company as trustee. A trust, when not qualified by the word "charitable," "resulting," or "constructive," is a fiduciary relationship with respect to property, subjecting the person by whom the property is held to equitable duties to deal with the property for the benefit of another person, which arises as a result of a manifestation of an intention to create it. Restatement, Trusts, § 2, p. 6; Parker v. Bourke, 131 Neb. 617, 269 N. W. 102. "The manifestation of intention of the settlor is the external expression of his intention as distinguished from his undisclosed intention." Restatement, Trusts, comment a, § 4, p. 16. In view of the situation that existed on February 13, 1930, we are called upon to determine if its effect was to create an express trust.

This record shows a course of dealing prior to February 14, 1930, between a dealer in stocks and bonds and a customer. Plaintiff purchased and sold securities at the market price in accordance with decisions which she herself made. It is true that she advised with Potter and that she had great confidence in him as an adviser in this field. No fiduciary relationship existed although the evidence does show the existence of a confidential relation between plaintiff and Potter. Plaintiff, however, made the final decision and assumed full responsibility for resulting profits or losses. Potter charged no fee for this advisory service. His sole interest was any profit Burns, Potter & Company might make in making an

over-the-counter sale at the established market price. But, as we have heretofore recited, plaintiff's operations during this period required her to make numerous trips to the offices of Burns, Potter & Company to consummate sales or purchases, the obtaining of securities sold from her safety-deposit box and the return of those purchased thereto, including the receipting for securities purchased and the endorsing of those sold. Financial adjustments had to be made after each transaction. All this drew heavily upon the time of the plaintiff and caused her great inconvenience. It was this, as the record shows, that led up to the letter-agreement of February 14, 1930, and not any dissatisfaction with the conduct of her investment business. We think the evidence shows that the purpose of the letter-agreement was to avoid this inconvenience by moving her securities from her safety-deposit box to the more convenient custody of Burns, Potter & Company. Her securities were endorsed in street form or carried in the name of Potter for short periods to eliminate the inconvenience she had theretofore experienced in this respect. It was her thought, as we think the evidence discloses, that as she was relying on the experience and training of Potter in the handling of her investments that she might as well fix it so as to eliminate all the inconvenience which appeared useless to her under the circumstances. There is nothing in the record to indicate that she intended in any way to change the nature of her investments or the legal status of Potter from that which it had been before. She talked with Potter about her investments; she received summaries of purchases and sales made in her behalf; and annually signed income tax returns, which revealed her annual profit and loss, without any complaint being made. The letter-agreement indicates, we think, an intention to permit Potter to exercise his own judgment instead of her acting upon his advice. This is supported by the terms of the letter-agreement which provided that Burns, Potter & Company were in no way responsible

"for the safety of the funds invested, and that the risk is mine." The remuneration provided as a safekeeping charge was one dollar per thousand dollars of securities, a modest charge from which a trust relation and its consequent responsibility and liability could not be inferred. Burns, Potter & Company were to receive any profit accruing to them from the sale of securities to plaintiff at the established market price, this being the same arrangement which had existed previous to the execution of the agreement of February 14, 1930. We conclude therefore that there is no external expression of intent on the part of the plaintiff to establish a trust at the time the agreement was made.

The appellant contends, however, that a trust relationship is established by the interpretation which the parties subsequently gave to the agreement. In this respect the record shows that the receipt for the securities delivered into the hands of Burns, Potter & Company the day after the agreement was made contained the words "to be held in trust." In setting up the account on the books it was denominated an "H I T" account, meaning "held in trust" account. The term "held in trust" appears incidentally a few additional places in the evidence. The use of this expression is explained in the record. The evidence is that any securities left by any customer for safekeeping was listed on their books as an "H I T" account. This was done solely to separate it from the inventory of Burns, Potter & Company. The expression was not used in its legal sense but purely as a matter of identifying the securities as belonging to the designated party rather than Burns, Potter & Company. The use of the term "trust" is not necessary to the creation of a trust and the use of the word "trust" does not always create the legal relation of trustee and beneficiary, although it is a circumstance to be considered in determining whether or not such a relation was in fact created. The explanation offered is not successfully refuted by the record. Waters v. Phelps, 81 Neb. 674, 116 N. W. 783; Price v. Treat, 29

Neb. 536, 45 N. W. 790. The use of the term "H I T" was discovered by plaintiff only after the preparations for this litigation were going forward. It is nothing, therefore, which in any way misled the plaintiff. We hold after a review of all the facts and circumstances disclosed by the record that the use of the expression "held in trust" and the symbol "H I T" did not of themselves evidence the establishment of a trust relationship. Parker v. Bourke, *supra*.

The use of the words "for safe-keeping" and "investment" in the letter-agreement is not a controlling factor in determining whether Burns, Potter & Company was a trustee or an agent. It is a circumstance, however, to be considered with all the evidence in the case. The agreement before us makes no reference to a trust, a trustee, or a trust fund. The use of such terms is not necessary to the creation of a trust if facts exist which establish that a trust actually existed. Simon v. Simon, 141 Neb. 839, 5 N. W. 2d 140. But where, as here, the written portion of the agreement designates one as "manager" of funds and securities, it will not be held to be a trust in the absence of further evidence that a trust relationship was intended. Standing alone it is insufficient. The fact that a written provision of the agreement provided that it was "subject to cancellation by either party on thirty-days notice" does not negative the existence of either the trust or agency relationship. Restatement, Trusts, comment d, § 334, p. 1013. On the other hand, it is consistent with a principal and agent relationship and is a circumstance which may be considered. To a similar effect is the use of the words "you will act as manager for such funds and securities," although standing alone it tends to support a principal and agent relation.

When all the provisions of the agreement before us are considered, we think it is a managerial contract which creates a principal and agent relationship. The written portion indicates that the title to the securities was to

remain in the plaintiff by the use of the words "my securities and funds which you are holding for safe-keeping for me" and "you will act as manager for such funds and securities." It provides that Burns, Potter & Company will "invest or re-invest the funds from time to time and buy, sell or exchange any of my securities at such times and prices as your best judgment may dictate," a provision as consistent with a principal and agent relationship as with that of a trust. The clause in the letter-agreement that "I understand that you are in no way responsible for the safety of the funds invested, and that the risk is mine," conflicts with the trust theory and tends to support the theory of principal and agent although it is not conclusive. The exculpatory effect of the foregoing language will not be discussed. Under the findings made it is not important. The stated purpose of the agreement that "the purpose of this agreement being to relieve me of the inconvenience of handling my own investment affairs," clearly points to the principal and agent relation. That plaintiff felt she had control of the securities placed in the possession of Burns, Potter & Company is evidenced by the fact that she directed the sale of all her bonds and securities in the hands of Burns, Potter & Company before the termination of the agreement pursuant to its terms and directed their reinvestment in Union Pacific Railroad stock. While stocks were taken in the name of Potter, it was solely for the purpose of immediately placing them in street form by his endorsement. The evidence does not indicate that it was done to vest the legal title in him but rather to relieve plaintiff of inconvenience. There is no oral evidence nor does the letter-agreement contain any words indicating a transfer of the legal title to plaintiff's securities to Burns, Potter & Company. Ordinarily, this is essential to the creation of an express trust, although particular words are not necessary to establish it. An analysis of the agreement and all the facts and circumstances surrounding it convince us that Burns, Potter & Company was a

managerial agent and not a trustee of the securities placed in their possession. Stephens v. Detroit Trust Company, 284 Mich. 149, 278 N. W. 799; DeMott v. National Bank of New Jersey, 118 N. J. Eq. 396, 179 A. 470.

"Agency is formed with the thought of constant supervision and control by the principal. Trust is based on the idea of discretion in the trustee and guidance by the settlor or cestui only to a limited extent and when expressly provided for." 1 Bogert, Trusts and Trustees, § 15, p. 50.

The high degree of care required of a trustee cannot properly be required of Burns, Potter & Company while acting as a managerial agent. As agent it would be required to act in good faith and exercise reasonable skill, care, diligence, and judgment in acting for its principal. And where, as here, the agent held itself out as specially skilled in the undertakings it assumed, it was obligated to use that degree of care and skill which would ordinarily be exercised at that time by one performing similar functions under like circumstances. 3 C. J. S., Agency, § 160, p. 38. The conduct of the parties and the transactions had during the life of the principal and agent relationship is important in determining whether the defendants defaulted in their duties under the foregoing rules.

We have previously described the type of securities in which plaintiff invested when she handled it herself. The record discloses that Burns, Potter & Company invested her money in the same types of stocks and bonds. She had purchased foreign securities and so did the company. She had purchased second grade common and preferred stocks and so did the company. She had purchased local bonds and so did the company. She had purchased investment trust stocks and so did the company. In the absence of specific instructions to change the nature of the investments and where the agent acted in good faith upon the information that it could obtain, the agent cannot be held for losses sus-

tained under an agreement such as we have here. We find nothing in the evidence to sustain a finding of bad faith on the part of the agent.

It is urged, particularly, that liability arose out of the purchase of stock of Incorporated Investors, Incorporated Equities, and Second Incorporated Equities. The primary corporation was Incorporated Investors, an open-end investment trust company. While we think the information available justified the action of Burns, Potter & Company in purchasing these stocks in view of a lack of instructions to the contrary and plaintiff's previous attitude in respect to them, without subjecting it to the charge of negligence or bad faith, there is another reason that leads to the same conclusion. The ultimate control of plaintiff's securities was in the plaintiff. When plaintiff desired to control the sale or purchase of her securities she did so.

In May 1938, arrangements had been completed to sell 400 shares of Broad Street stock and to purchase 400 shares of Century Shares Trust. Plaintiff canceled this transaction and directed that the funds derived from the sale of Broad Street stock be used in the purchase of Union Pacific common stock. In fact, the record shows that plaintiff in April of 1938 ordered the sale of all the securities she then held and directed their reinvestment in Union Pacific common stock. The instructions were complied with. This occurrence was more than 18 months prior to the cancellation of the agreement of February 14, 1930. The orders and directions of the plaintiff and compliance on the part of Burns, Potter & Company evidences the principal and agent relationship. It is incompatible with the existence of a trust. It evidences, further, that plaintiff acquiesced in the type of investments previously made when she failed to give counter instructions to her agent as she did in April 1938. What we have said with relation to the selection of securities by the agent applies as well to the diversification of her investment. The pattern established by

plaintiff's father and plaintiff herself was generally followed. The balance between common and preferred stocks, foreign and domestic bonds and stocks, and between bonds and stocks generally, shifted materially from time to time. Diversification of investments did not appear important to the plaintiff either before or after the agreement of February 14, 1930. Although plaintiff had the ultimate control of these securities, she voiced no complaint about the diversification of investments until the agreement was canceled and preparations for this litigation were under way. Economic conditions were bad, especially in 1929 and 1937 when stock-market losses were the greatest in the history of the country. While stock-market crashes and economic depressions do not excuse negligence and bad faith, they do constitute conditions to be considered in determining whether or not improper conduct has been established.

Many transactions are set out in the voluminous record of this case. The parties attempt to draw favorable conclusions from them. A specific discussion of each would unduly lengthen this opinion. We conclude by stating that the agreement, when considered with the circumstances existing at the time it was made and the conduct of the parties thereafter, establishes a relationship of principal and agent, and not that of trustee and cestui. We conclude further that the evidence does not establish that the agent failed to act in good faith or to exercise reasonable skill, care, diligence, and judgment in acting for the plaintiff. The evidence indicates that Burns, Potter & Company and its officers gave the plaintiff the benefit of the information they had on stock-market conditions generally and on specific investments as well. The proof does not disclose any bad faith on the part of the defendants in so doing. Under these findings, liability on the part of the defendants does not exist. The trial court was therefore correct in so holding and its judgment is affirmed.

AFFIRMED.

PAINE, J., not participating.

JOSEPH MILLER, APPELLEE, v. EDWARD SCHLERETH, APPELLANT.
36 N. W. 2d 497

Filed March 18, 1949. No. 32518.

1. **Workmen's Compensation.** With respect to the provisions of the Workmen's Compensation Act, the public has an interest in its due enforcement and observance which it is the duty of the court to protect, even without regard to the wishes of the parties.
2. ———. The Workmen's Compensation Act creates new remedies and new liabilities. The manner in which it operates is to be found under the legislation itself.
3. ———. In all questions under the Workmen's Compensation Act, it is our duty to avoid rules of technical construction as much as possible, and to determine the intention of the Legislature from the language of the act as a whole, rather than from the loose words or phrases of isolated paragraphs.
4. ———. The provisions of the Workmen's Compensation Act are exclusive of all other liability as to those subject to it.
5. ———. In entering into an agreement under the Workmen's Compensation Act to discharge the employer from all liability for a permanent disability of the employee upon payment of a lump sum in lieu of periodical payments, the parties are not at liberty to make a settlement at variance with statutory terms.
6. ———. Section 48-136, R. S. 1943, provides in part that a copy of the settlement shall be filed with the compensation court and no settlement shall be binding unless it is in accord with the provisions of the Workmen's Compensation Act.
7. ———. Section 48-140, R. S. 1943, requires in part that all settlements by agreement of the parties with the approval of the compensation court shall be final and not subject to readjustment, provided, however, no settlement shall be final unless there is conformity with the provisions of this act, a finding by the compensation court, the district court, or appellate court.
8. **Appeal and Error.** In order to entitle a party to appeal there must have been a final order or judgment rendered in the cause.
9. ———. An order is not final so as to be appealable when the substantial rights of the parties involved in the action remain undetermined, and when the cause is retained for future action.
10. **Judgments.** Section 25-2001, R. S. 1943, vests the district court with power to vacate or modify its own judgments after the term at which such judgments were made, and where fraud is practiced by the successful party in obtaining the judgment.
11. **Workmen's Compensation.** As provided in section 48-181, R. S.

1943, as amended, where in a compensation case a rehearing before the compensation court is waived and appeal had direct to the district court, the trial is de novo in the district court, and the court shall have the authority to try, hear, and determine the cause as in equity.

12. **Judgments.** Proceedings to vacate a judgment after the term at which the judgment was entered must be commenced within two years of the date of rendition of such judgment, as required by section 25-2008, R. S. 1943.

13. ———. To vacate or set aside a judgment the party seeking to do so must file a petition in the district court verified by affidavit, setting forth the judgment sought to be set aside, and alleging the grounds upon which the same should be vacated or set aside, and summons shall be issued thereon and served as in the commencement of an action, as required by section 25-2002, R. S. 1943.

14. **Workmen's Compensation: Judgments.** When the district court, as provided for in section 48-181, R. S. 1943, as amended, is authorized to try a workmen's compensation case de novo as in equity, sections 25-2001 through section 25-2008, R. S. 1943, are applicable.

15. **Statutes.** The word "may" when used in a section of the statute, means "must" whenever third persons or the public have an interest in having the act done, or have a claim de jure that the power shall be exercised.

16. **Judgments.** When a judgment is vacated and set aside it is nullified so that the resulting situation is precisely the same as if the judgment had never existed.

17. ———. The effect of setting aside or vacating a judgment, generally speaking, is to leave the matter in controversy open for future determination, and that determination must afford the parties in interest the right of a fair trial.

18. ———. Under section 25-2004, R. S. 1943, the court may first try and decide upon the grounds to vacate a judgment, before trying or deciding upon the validity of the cause of action, however this section of the statute does not authorize or empower the court to determine the merits of the controversy.

APPEAL from the district court for Richardson County: VIRGIL FALLOON, JUDGE. *Affirmed in part; reversed in part; and remanded with directions.*

John C. Mullen and *Bayard T. Clark*, for appellant.

Jean B. Cain and *Paul P. Chaney*, for appellee.

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

MESSMORE, J.

This is a workmen's compensation case. On the 2d day of October, 1945, the plaintiff received personal injuries arising out of and in the course of his employment. He was employed by the defendant as a laborer, and while engaged in dismantling an electric refrigerator the unit exploded causing the liquid to penetrate his eyes and to enter his lungs. He filed a petition in the Nebraska Workmen's Compensation Court and the case was heard before a judge of said court. On January 17, 1946, an award was entered, finding the plaintiff's wages to be in the amount of $23.56 a week; finding further that the plaintiff was temporarily totally disabled from and after the 2d day of October, 1945, until January 8, 1946, a period of 14 weeks, for which the plaintiff had been compensated; and that from January 8, 1946, the plaintiff suffered 90 percent permanent partial disability to his right eye, and 80 percent permanent partial disability to his left eye, making an average of 85 percent permanent partial disability for which the plaintiff was entitled to compensation at the rate of $13.35 a week for 286 weeks, and thereafter compensation at the rate of $9.01 a week for the rest of his life.

The defendant waived rehearing before the compensation court and gave notice of appeal to the district court for Richardson County. The plaintiff entered his voluntary appearance and submitted to the jurisdiction of the district court. On January 30, 1946, the defendant filed a petition in the district court requesting a trial de novo. The petition set forth the history of the accident and the procedure before the compensation court; alleged that the findings of fact by the compensation court were not conclusively supported by the evidence; and prayed the court to hear the matter on a trial de novo. It was stipulated that the case be heard

in the district court on the pleadings in the compensation court.

On March 23, 1946, a stipulation between the parties was filed in the district court which recited the history of the accident and the proceedings had with reference to compensation, and that at the present time doctors would testify that it was impossible to determine the exact disability plaintiff suffered by reason of the injury to his eyes. To settle the controversy it was agreed that competent doctors would agree that plaintiff had suffered the following maximum disability to his eyes: 85 percent to his left eye and 20 percent to the right eye; that the average total disability to both eyes was 52.5 percent; that the plaintiff's wages were in the amount of $23.56 a week and under the Workmen's Compensation Act he would normally be entitled to $15.70 a week for a period of 286 weeks; that plaintiff has been paid 11 weeks, in the amount of $133.50, leaving remaining 275 weeks; that 52.5 percent of $15.70 is $8.24 a week for 275 weeks which amounts to $2,326, and that the present value of $2,326 is $1,928.03; that the plaintiff has a life expectancy of 21 years, and for the period of his natural life he is entitled to $4.50 a week for permanent disability, which sum amounts to $4,914, but that the present worth thereof is $2,999.88; and that said sums total $4,927.91. It was agreed that judgment be entered for the total amount in full and complete settlement for all injuries sustained.

The defendant waived his right to file a motion for new trial and his right to appeal.

On the same day the district court entered judgment in conformity with the stipulation, and also on the same day the plaintiff released the judgment as paid and satisfied. At the time the plaintiff signed the release of judgment, the defendant paid him $1,000 in cash, and gave him a promissory note secured by a mortgage on real estate in the amount of $2,000. The total sum of $3,000 was paid to the plaintiff as settlement in full.

On October 31, 1947, the plaintiff filed a motion in the district court for an order requesting the court to cancel and set aside the stipulation, the judgment entered thereon on March 23, 1946, and the satisfaction thereof of the same date. We deem it unnecessary to set forth the allegations of this motion, the pleadings filed in opposition thereto, or the proceedings had in connection therewith for the reason that on February 14, 1948, the plaintiff filed a petition in the district court in the original action to set aside and vacate the stipulation, the judgment entered in accordance therewith, and the satisfaction of the judgment. These proceedings were brought under sections 25-2001 and 25-2002, R. S. 1943.

The petition filed February 14, 1948, in the district court set forth the compensation award of the Nebraska Workmen's Compensation Court entered January 17, 1946, and the proceedings leading up to and including the judgment entered by the district court in accordance with the stipulation March 23, 1946, which in fact constitutes a lump sum settlement. The alleged settlement of the judgment in the amount of $3,000 was not presented to the district court for its approval or disapproval, and the transcript fails to show that such settlement was presented to the Nebraska Workmen's Compensation Court for its approval or disapproval. Additional allegations of the petition pertinent to a determination of this appeal will be considered later in the opinion as occasion requires.

The prayer of the petition is that the stipulation and the judgment entered thereon and satisfaction thereof be canceled, set aside, and held for naught, and that the matter be set for hearing de novo. The summons issued made returnable February 23, 1948, contained the same language as appears in the prayer of the petition, and that upon default of the defendant judgment would be taken accordingly.

On April 6, 1948, the defendant demurred to the plaintiff's petition, his principal grounds being that the court

had no jurisdiction over the person of the defendant or the subject matter of the action; that the plaintiff had no legal capacity to sue; that plaintiff's petition failed to contain sufficient facts to constitute a cause of action; and set forth the stipulation, the judgment entered thereon, and the satisfaction thereof in the amount of $3,000 in full and complete settlement. On April 27, 1948, the demurrer was submitted to the court, was overruled, and the defendant given five days to answer. On April 30, 1948, defendant filed a motion after the court overruled his demurrer, requesting the court to enter a final order on said ruling to enable him to appeal. On May 11, 1948, one of the attorneys representing the defendant filed a motion to withdraw as counsel. Thereafter a written request for a continuance until May 17, 1948, was filed, setting forth that one of the counsel for the defendant could not be present for trial on May 11, 1948, and the defendant would be without representation. This motion for continuance was supported by affidavit of counsel for defendant who withdrew from the case and other counsel, showing that it would be impossible for counsel representing the defendant to be present due to his absence from the state on legal matters. The trial court overruled the motion for continuance and the case proceeded to trial. We find that the court in so ruling did not abuse his judicial discretion.

The decree of the district court filed May 13, 1948, recited that the defendant's demurrer having been overruled and the defendant having filed his election to stand upon his demurrer, the default of the defendant was taken, and evidence was taken in behalf of the plaintiff. The court found in favor of the plaintiff and against the defendant; that the stipulation of the parties, the judgment entered thereon on March 23, 1946, and the satisfaction thereof be set aside and vacated. The court further found that the plaintiff suffered injuries to his lungs, as well as to his eyes as the result of his

employment on October 2, 1945, and the accident; that the plaintiff suffered 100 percent permanent total disability as of May 11, 1948, by reason of disability to his eyes and the injuries to his bronchial tubes, which is based upon the evidence offered by the plaintiff when the hearing was had on May 11, 1948, wherein the doctors testified to the degree of the disability of the plaintiff from which the trial court found that the plaintiff should have and recover from the defendant the sum of $13.35 a week for 69 weeks and 5 days from and after January 8, 1946, and thereafter the sum of $15.70 a week for 216 weeks and 2 days, and thereafter $10.60 a week for the remainder of his life, his medical bills and costs, and allowed the defendant credit for $3,000 paid by the defendant to the plaintiff March 23, 1946, as heretofore set out.

On May 27, 1948, defendant's motion for new trial was overruled, whereupon the defendant appeals to this court.

For convenience the appellant will be referred to as the defendant, the appellee as the plaintiff.

At the outset we deem it advisable to set forth briefly certain aspects of the Nebraska Workmen's Compensation Act.

With respect to the provisions of the Workmen's Compensation Act, the public has an interest in its due enforcement and observance which it is the duty of the court to protect, even without regard to the wishes of the parties. The act creates new remedies and new liabilities. The manner in which it operates is to be found under the legislation itself. See, Perry v. Huffman Automobile Co., 104 Neb. 211, 175 N. W. 1021, 179 N. W. 501; Ashton v. Blue River Power Co., 117 Neb. 661, 222 N. W. 42.

"In all questions under the workmen's compensation law, it is our duty to avoid rules of technical construction as much as possible, and to determine the intention of the legislature from the language of the act as a whole,

rather than from the loose words or phrases of isolated paragraphs." Dobesh v. Associated Asphalt Contractors, 138 Neb. 117, 292 N. W. 59.

Under the law we give a broad and comprehensive meaning to all statutes in order to arrive at the legislative intent. See Ray v. Sanitary Garbage Co., 134 Neb. 178, 278 N. W. 139.

The defendant contends that the judgment entered by the district court on March 23, 1946, upon the stipulation of the parties, was conclusive; that the judgment was satisfied and settled; and that no motion for new trial was filed and no appeal taken therefrom.

In this connection the defendant relies upon that part of section 48-181, R. S. 1943, amended in 1945, as follows: "* * * Provided, however, upon the written stipulation of the parties in the case, the matter may be submitted to the district court of any county in the state * * * which court shall have the authority to try, hear and determine the cause as in equity. * * * In such cases the trial in the district court shall be a trial de novo. All findings, orders, awards and judgments of the said court shall be conclusive upon all parties at interest unless * * * modified upon appeal * * *."

The law is well established in this jurisdiction that where employer and employee are operating under the Workmen's Compensation Act, and the employee suffers injury by reason of an accident, arising out of and in the course of his employment, he must look exclusively to the compensation act for his remedy. The provisions of the Workmen's Compensation Act are exclusive of all other liability as to those subject to it. See, Avre v. Sexton, 110 Neb. 149, 193 N. W. 342; Duncan v. A. Hospe Co., 133 Neb. 810, 277 N. W. 339; Jones v. Rossbach Coal Co., 130 Neb. 302, 264 N. W. 877.

While the authority to approve a lump sum settlement for a permanent disability has been committed to the district court, it seems to have been the intention of the Legislature, as disclosed by the entire act, to require

the parties to submit their agreement to the workmen's compensation court before asking the district court to approve the commutation, at least it was probably contemplated by the Legislature that the opinion of the workmen's compensation court would be of value to the courts to which these settlements are committed. Provision was made whereby the courts would be advised of such opinion. See Perry v. Huffman Automobile Co., *supra*.

In determining whether or not lump sum settlements shall be permitted in cases where the injury results in permanent disability, the final power lies in the district courts, subject only to exercise according to the terms of the statute, and to reversal or modification on appeal. See Jackson v. Ford Motor Co., 115 Neb. 758, 214 N. W. 631.

"Commutation or payment in a lump sum by approved agreement of the parties is a departure from the general rule and should only be sanctioned upon compliance with the statutory terms relating to the exception." Perry v. Huffman Automobile Co., *supra*.

In entering into an agreement under the Workmen's Compensation Act to discharge the employer from all liability for a permanent disability of the employee upon payment of a lump sum in lieu of periodic payments, the parties are not at liberty to make a settlement at variance with statutory terms; and ascertainment of the amounts of compensation payable periodically under the law is a prerequisite to a contract for commutation. See Perry v. Huffman Automobile Co., *supra*.

In a case of total disability, the injured employee cannot, for the purpose of making a lump sum settlement, agree upon a percentage of disability less than he actually has at that time. See Miller v. Central Coal & Coke Co., 129 Neb. 739, 263 N. W. 120.

"The spirit and intention of the compensation act is to safeguard a compensation award. Commutation of a

lump-sum payment should be approved by the courts only for strong and urgent reasons." Troxcil v. Morris & Co., 107 Neb. 817, 186 N. W. 978. See, also, Perry v. Huffman Automobile Co., *supra;* Bailey v. United States Fidelity & Guaranty Co., 99 Neb. 109, 155 N. W. 237.

As heretofore pointed out, the transcript in the record does not show that there was an application for lump sum settlement filed with the Nebraska Workmen's Compensation Court, that an application for lump sum settlement was filed with the district court, or that the district court had a chance to approve or disapprove such settlement.

It appears from the record on the trial had May 11, 1948, to vacate and set aside the stipulation, judgment entered thereon dated March 23, 1946, and the satisfaction of the judgment in the amount of $3,000, that the matter of a lump sum settlement in the amount of $3,000 had been presented to the Nebraska Workmen's Compensation Court and refused as not a fair settlement.

Section 48-136, R. S. 1943, provides in substance that a copy of the settlement shall be filed with the compensation court and no settlement shall be binding unless it is in accord with the provisions of this act.

Section 48-140, R. S. 1943, requires, in substance, that all settlements by agreement of the parties with the approval of the compensation court shall be final and not subject to readjustment, provided, however, no settlement shall be final unless there is a conformity with the provisions of this act, a finding by the compensation court, the district court, or any appellate court.

It is apparent from the proceedings had and the authorities heretofore set forth that the alleged lump sum settlement was not in accordance with the provisions of the Workmen's Compensation Act as required by law. The defendant's assignment of error is without merit.

The defendant contends when he filed a motion requesting the trial court to enter a final order upon the overruling of his demurrer, the court should have done so and permitted him to appeal, and the court thereafter

was without the power or authority to proceed further in the case.

When no further action of the court is required to dispose of the cause pending, the order becomes final and from which an appeal or proceedings in error will lie. However, an order is not final when the substantial rights of the parties involved in the action remain undetermined and when the cause is retained for future action. See, Lincoln Joint Stock Land Bank v. Barnes, 143 Neb. 58, 8 N. W. 2d 545; Barry v. Wolf, 148 Neb. 27, 26 N. W. 2d 303.

In the instant case substantial rights of the parties involved in the action remained undetermined and the court had not disposed of the case on its merits. The court did not err in overruling the defendant's demurrer to the plaintiff's petition as will hereinafter appear.

This brings us to the proposition as to whether or not the plaintiff's petition filed February 14, 1948, states a cause of action; if so, the demurrer was properly overruled; if not, the defendant's demurrer should be sustained.

In addition to the substance of the plaintiff's petition heretofore summarized, the plaintiff alleged in his petition to set aside the judgment of the district court of March 23, 1946, in substance, that subsequent to the award entered in the Nebraska Workmen's Compensation Court which was on January 17, 1946, and prior to March 23, 1946, when the district court entered judgment on the stipulation of the parties which is sought to be vacated, the plaintiff and defendant had submitted a joint application for lump sum settlement to the Nebraska Workmen's Compensation Court, which was denied by said court, and no further action was taken thereon by either party; that such alleged agreement for lump sum settlement, as disclosed by the record, was not presented to the district court for approval nor any showing made that the same had been presented to the compensation court; that the proceedings under the Workmen's Compensation Act must be in conformity with Chapter 48,

article 1 of the Revised Statutes of Nebraska, 1943, and the sections of the statutes pertinent thereto; that not having so presented the matter to the district court the proceedings had, upon which the district court entered judgment on March 23, 1946, are contrary to law, and for the other reasons as contended for by the plaintiff under the previous assignment of error and as set forth in a discussion of the same as heretofore appears; and that such matters constituted a fraud upon the plaintiff and upon the district court, and as a consequence the judgment entered by the district court on March 23, 1946, should be vacated and set aside. The petition, in addition, sets forth that the plaintiff suffered an increase in disability from the accident which arose out of and in the course of his employment with the defendant. The increased disability is alleged to be total and permanent.

From an examination of the petition, we conclude it states a cause of action against the defendant on the issues as contended for by the plaintiff.

As previously stated, the plaintiff, on February 14, 1948, filed a petition in the district court, verified by affidavit, setting forth the judgment entered by that court on March 23, 1946, and alleged the grounds upon which he sought to vacate such judgment, which were for fraud practiced by the successful party in obtaining the judgment. Summons was issued and served as in the commencement of an action, as required by section 25-2002, R. S. 1943. These proceedings to vacate the judgment entered by the district court on March 23, 1946, were commenced within two years from the date of the rendition of such judgment, as required by section 25-2008, R. S. 1943.

Section 25-2001, R. S. 1943, vests the district court with power to vacate or modify its own judgments after the term at which such judgments were made. One of the grounds for so doing is for fraud practiced by the successful party in obtaining judgment.

As provided in section 48-181, R. S. 1943, as amended,

where in a compensation case rehearing is waived and appeal is had direct to the district court, the trial is de novo in the district court, and the court shall have the authority to hear and determine the cause as in equity. The instant case being one triable in equity, it is apparent that sections 25-2001 through 25-2008, R. S. 1943, are applicable to workmen's compensation cases.

To justify a trial court in setting aside a decree rendered at a former term on the grounds of fraud, it is not necessary that actual fraud should be found, but it is sufficient if facts and circumstances are proven from which constructive fraud can be inferred, if by reason of such facts and circumstances the party seeking to avoid the decree was induced by the successful party to make a settlement not in accord with the provisions of the workmen's compensation law. See Arnout v. Chadwick, 74 Neb. 620, 104 N. W. 942.

From the evidence adduced with reference to vacating and setting aside the stipulation and judgment entered thereon March 23, 1946, and the satisfaction thereof, we conclude that the ruling of the trial court did not constitute prejudicial error in such respect.

The defendant contends that the trial court was without power or authority to try and determine the issues involving the extent of disability which the plaintiff claims he suffered by virtue of the accident. In this connection we cite section 25-2004, R. S. 1943, which provides: "The court may first try and decide upon the grounds to vacate or modify a judgment or order, before trying or deciding upon the validity of the defense or cause of action."

Section 29-510, 3 Arkansas Statutes Annotated, 1947, under Judgments and Decrees, is exactly like section 25-2004, R. S. 1943. Section 470 under Issues, Trial and Judgment, Remington's Revised Statutes of Washington, Annotated, is likewise in exactitude with section 25-2004, R. S. 1943. Both states have statutes which pro-

vide that a judgment may be set aside for fraud practiced by the successful party.

Section 11636, Gardner's Ohio Civil Code Annotated, is analogous to the foregoing sections of the statutes cited, except the words "The court must try * * *" instead of "The court may try * * *."

The defendant applies the word "may" in section 25-2004, R. S. 1943, as "must."

In general, the word "may," used in statutes, will be given ordinary meaning, unless it would manifestly defeat the object of the statute, and when used in a statute is permissive, discretionary, and not mandatory. See, Lansdown v. Faris, 66 F. 2d 939; Rowenhorst v. Johnson, 48 S. D. 325, 204 N. W. 173.

The word "may" means "must" whenever third persons or the public have an interest in having the act done or have a claim de jure that the power shall be exercised. See Smalley v. Paine, 102 Tex. 304, 116 S. W. 38.

As heretofore mentioned, in this case involving the Workmen's Compensation Act, any recovery that may be had thereunder with reference to a lump sum settlement and approval of the same, or under the act in general as the same affects rights of the parties, the public has an interest.

A petition for the vacation of a judgment filed pursuant to section 11631 of the Civil Code of Ohio, is in the nature of an application for a new trial, and is filed in the action in which the judgment sought to be vacated is rendered. See Shedenhelm v. Myers, 77 Ohio App. 385, 68 N. E. 2d 331.

An order or decree which is vacated is nullified so that the resulting situation is precisely the same as if the order or decree had never existed. The result of the vacating of the decree was to remit the parties in all respects to the position which they occupied immediately succeeding the original filing of the pleadings in the district court. The effect of setting aside or vacating a judgment, generally speaking, is to leave the matter in

controversy open for future determination, and that determination must afford the parties in interest the right to a fair trial. See, Dorman v. Usbe B. & L. Assn., 115 N. J. Law 337, 180 A. 413; Aycock v. Kimbrough, 71 Tex. 330, 12 S. W. 71, 10 Am. S. R. 745; In re Estate of Grube, 162 Misc. 267, 294 N. Y. S. 311; 15 R. C. L., Judgments, § 178, p. 724.

In the case of the Knights of Maccabees of the World v. Gordon, 83 Ark. 17, 102 S. W. 711, the court held, in a statute exactly like ours, in speaking about the truth of defenses as not being finally tried in the proceedings to vacate the judgment: "* * * enough evidence to make a prima facie showing of the truth or existence of the defenses would be sufficient to authorize the court to vacate the judgment. When this is done, the judgment should be set aside and a new trial granted in the action in which the judgment was rendered. Hunton v. Euper, 63 Ark. 323; Chambliss v. Reppy, 54 Ark. 539."

In the case of State ex rel. Nelms v. Superior Court, 148 Wash. 24, 267 P. 775, in interpreting the section of the statute in Washington heretofore mentioned analogous to section 25-2004, R. S. 1943, the court held that proper construction of the section of the statute permitting the vacation of orders or judgments for stated reasons, is that on such a hearing the court does not determine the merits of the controversy, but merely whether or not there is a substantial defense offered. The same would be true if there were a valid cause of action existent. See, also, Williams v. Breen, 25 Wash. 666, 66 P. 103; Harju v. Anderson, 125 Wash. 161, 215 P. 327; Brandt v. Little, 47 Wash. 194, 91 P. 765, 14 L. R. A. N. S. 213.

In an action to set aside a judgment rendered at a prior term, if the court finds that the defendant has a valid defense, it does not render judgment in the original action but makes an order suspending the judgment that had been rendered until such time as the issues in the original action can be joined and determined as if no

judgment had ever been entered. At a hearing of action to set aside judgment rendered at a prior term, court does not decide the merits of the original controversy, but determines whether there is one of the grounds set forth in the statute for the vacation of the judgment and whether there is a valid defense or a valid cause of action as the case may be. See, Washington v. Levinson, 66 Ohio App. 461, 35 N. E. 2d 161; Minetti v. Einhorn, 36 Ohio App. 310, 173 N. E. 243.

"The granting of an application to vacate a judgment leaves the matters in controversy open for future determination." 31 Am. Jur., Judgments, § 793, p. 319.

We conclude the trial court was not in error in entering the defendant's default, and in hearing the evidence on the vacating and setting aside of the stipulation, judgment entered in accordance therewith March 23, 1946, and satisfaction thereof, and concluding from the evidence that such stipulation, judgment, and satisfaction thereof be vacated and held for naught.

We believe that the trial court was in error in setting the case for hearing on its merits at the same time that he heard the matter with reference to the vacation of the stipulation, judgment entered thereon, and the satisfaction of the judgment.

We deem it unnecessary to discuss other assignments of error raised.

The judgment of the trial court insofar as it set aside and vacated the stipulation, the judgment entered thereon of March 23, 1946, and the satisfaction of such judgment, is affirmed. In all other respects, the judgment of the district court is reversed and the cause remanded to the district court with directions that the cause be set for hearing on its merits on a trial de novo.

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

PAINE, J., not participating.

GEORGE W. SMITH, APPELLEE, v. PLATTE VALLEY PUBLIC POWER AND IRRIGATION DISTRICT, A PUBLIC CORPORATION, APPELLANT.

36 N. W. 2d 478

Filed March 18, 1949. No. 32418.

1. **Trial.** In testing the sufficiency of evidence to support a verdict it must be considered in the light most favorable to the successful party, that is, every controverted fact must be resolved in his favor and he should have the benefit of every inference that can reasonably be deduced therefrom.
2. ———. When evidence is in conflict and such that reasonable minds can draw different conclusions therefrom it presents a jury question.
3. **Waters.** Under section 70-671, R. S. 1943, a public power district is liable for seepage when and if it accrues, damages therefor to be recovered in one action.
4. ———. The measure of damages for any injury thus caused to lands is the difference in the fair market value thereof, if any, immediately before and immediately after the seepage, taking into consideration all the uses to which the land was put and for which it was reasonably adaptable. In addition thereto recovery may be had for damages to any annual crops growing thereon at the time.
5. ———. In an action for damages to growing crops alleged to have been caused by seepage resulting from the construction and operation of an irrigation canal it is necessary to establish a causal relationship between the water in the canal and that causing the seeped condition on plaintiff's lands.
6. **Trial.** A conflict in the testimony of qualified experts presents a question for the jury.
7. **Waters.** A cause of action for damages arising from seepage accrues when the lands are visibly affected thereby. In establishing the damage thereto the owner is entitled to show the manner and extent to which the lands have been affected. In doing so the owner may show the quantity and quality of the crops produced thereon both before and after the seepage, up to the time of trial.
8. **Interest.** If the right to damages is a matter of reasonable litigation and the amount to be recovered, if any, is unliquidated and must be fixed, not by mere computation but by suit, interest may not be allowed for time precedent to the settlement of the right to a recovery and the ascertainment of the amount.

APPEAL from the district court for Lincoln County: J. LEONARD TEWELL, JUDGE. *Affirmed.*

Crosby & Crosby and *R. H. Beatty,* for appellant.

Carr & Hoagland and *C. L. Baskins,* for appellee.

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

WENKE, J.

George W. Smith brought this action in the district court for Lincoln County against the Platte Valley Public Power and Irrigation District, a public corporation. The action was brought to recover damages caused to plaintiff's lands and crops by seepage waters which plaintiff claims escaped from defendant's works. Plaintiff recovered a verdict of $9,000 and judgment was entered thereon. Defendant's motion to set aside this verdict and for judgment notwithstanding or in the alternative for new trial having been overruled, it appeals. Plaintiff has cross-appealed.

The principal question raised by the appeal is the sufficiency of the evidence to sustain the verdict.

In considering this question we apply the following rule: "In testing the sufficiency of evidence to support a verdict it must be considered in the light most favorable to the successful party, that is, every controverted fact must be resolved in his favor and he should have the benefit of every inference that can reasonably be deduced therefrom." Remmenga v. Selk, 150 Neb. 401, 34 N. W. 2d 757.

This is, in effect, the same as the following rule: " 'A motion for a directed verdict must for the purpose of decision thereon be treated as an admission of the truth of all material and relevant evidence submitted on behalf of the party against whom the motion is directed. Such party is entitled to have every controverted fact resolved in his favor, and to have the benefit of every inference that can reasonably be deduced from the evidence.'

Roberts v. Carlson, 142 Neb. 851, 8 N. W. 2d 175." Spaulding v. Howard, 148 Neb. 496, 27 N. W. 2d 832.

However, it should be remembered that if the evidence is in conflict and such that reasonable minds can draw different conclusions therefrom then it presents a question for a jury's determination.

Under section 70-671, R. S. 1943, the appellant is liable for seepage when and if it accrues. See, Applegate v. Platte Valley Public Power and Irrigation District, 136 Neb. 280, 285 N. W. 585, and Heiden v. Loup River Public Power District, 139 Neb. 754, 298 N. W. 736. Such damages must be recovered in one action. Applegate v. Platte Valley Public Power and Irrigation District, *supra.*

The measure of damages for any injury thus caused to the land is the difference in the fair market value thereof, if any, immediately before and immediately after the seepage, taking into consideration all the uses to which the land was put and for which it was reasonably adaptable. In addition thereto recovery may be had for damages to any annual crops growing thereon at the time. Applegate v. Platte Valley Public Power and Irrigation District, *supra;* Asche v. Loup River Public Power District, 138 Neb. 890, 296 N. W. 439; Heiden v. Loup River Public Power District, *supra.*

Appellant contends the record is absent of competent evidence to prove that the waters escaping from its works have damaged or affected the appellee's lands; that appellee has failed to establish a causal connection or relationship between the escaped waters and the seeped condition; and that the verdict must necessarily be based on guess or speculation.

As stated in Lincoln Joint Stock Land Bank v. Platte Valley Public Power and Irrigation District, 140 Neb. 316, 299 N. W. 485: "In an action for damages to growing crops alleged to have been caused by seepage resulting from the construction and operation of an irrigation canal, it is necessary to establish a causal relationship between the water in the canal and that causing the

seeped condition on plaintiff's lands. * * * Proof which merely leaves the matter to be established in the realm of speculation and conjecture is not sufficient to sustain a judgment."

Appellee's petition, and the evidence offered in support thereof, show his theory of the case to be that when appellant put water in its reservoir and canal that large amounts thereof escaped and caused the level of the ground water under his lands to rise and thereby caused them to become seeped, resulting in the damages of which he here complains. Appellant's theory, as evidenced by its answer and the evidence offered in support thereof, is that the water escaping from its works could not and never did reach appellee's lands and that the seeped condition of appellee's lands was the result of natural conditions caused by abnormally high rainfall and low evaporation and transpiration.

It should be here stated that the evidence relating to the fact that the lands of appellee became seeped in 1942 and continued to be in that condition until the date of trial is undisputed and admitted.

Both parties used engineers as experts to establish the cause of this seeped condition. There was a conflict in the testimony of these experts and consequently it was the province of the jury to determine whether the conclusions of appellee's or appellant's experts were correct. See, Crouch v. National Livestock Remedy Co., 210 Iowa 849, 231 N. W. 323; Chippewa Falls Hotel Co. v. Employers L. A. Corp., 208 Wis. 86, 241 N. W. 380; E. L. Chester Co. v. Wisconsin Power & Light Co., 211 Wis. 158, 247 N. W. 861.

What was said in Chippewa Falls Hotel Co. v. Employers L. A. Corp., *supra,* is applicable here. Therein the court said: "Counsel argue very persuasively from the facts which are mostly not in dispute in support of their respective theories. Each points out why in his opinion his own theory is correct and that of his opponent is untenable. From careful consideration of all facts and

arguments we are unable to perceive that the theory of plaintiff is irreconcilable with the admitted physical facts or the established laws of physics applicable to them. We cannot see that any useful purpose would be served by stating in detail these facts or laws. Defendant's counsel also urge that at most it is uncertain whether the injuries were caused as claimed by the plaintiff or as claimed by defendant, and that the finding of the jury rests upon speculation. But duly qualified experts produced by plaintiff testified positively that in their respective opinions, in view of all the facts, the injuries were caused as claimed by plaintiff. Experts produced by defendant, also duly qualified, testified with equal positiveness that in their respective opinions, in view of all the facts, the injuries were caused as claimed by the defendant. Each gave his reasons for his opinion, and his reasons more or less extended for considering the contrary opinion erroneous. We cannot assume that these duly qualified experts were not reasonable men, or that they did not honestly entertain the opinions expressed. And it is fundamental that when reasonable men may honestly draw from the facts different conclusions upon the ultimate question of fact at issue, the determination of that question is for the jury."

We think all the evidence, when considered as a whole, presented a question of fact for the jury as to the cause of the seepage. In this respect we have not overlooked the fact that appellee, in his petition, alleged that the water escaping from appellant's works had seeped under his lands. There is proof tending to show that the waters escaping from these works had not reached the lands but had, by hydrostatic pressure on the ground water, raised the level thereof, thereby causing the lands to become seeped and waterlogged. Considering the manner in which the trial was had and the jury instructed, we do not think there is such a variance between the pleadings and proof as to have prejudiced the appellant. Both relate themselves to the waters escaping from the appel-

lant's works as being the cause of the seeped condition on appellee's lands which, according to the pleadings and evidence, was the issue involved. This issue the appellant endeavored to meet by showing that it could not be caused thereby but that it was the result of natural forces. We find the issue to have been fairly tried and submitted and that appellant was in no manner prejudiced thereby.

Appellant further complains that witnesses for the appellee were allowed to testify, over objection, as to crop damages for the years of 1943 to 1947, inclusive. A cause of action for damages caused by seepage arises where the lands are visibly affected thereby and crop damages are limited to the annual crops then growing thereon. By its instructions the trial court properly so limited the appellee's right of recovery. However, in order to establish the damage to his lands the owner is entitled to show the manner and extent to which it has been affected by showing the quantity and quality of the crops produced thereon both before and after the seepage, up to the time of trial. See, Applegate v. Platte Valley Public Power and Irrigation District, *supra,* and Heiden v. Loup River Public Power District, *supra.* This evidence was properly admitted for that purpose.

Appellant contends appellee wholly failed to offer any proof in separation or allocation of damages from natural causes and from artificial causes attributable to the defendant. It is true that appellee failed to offer any proof in separation or allocation of such damages but proceeded and rested his case entirely on the proposition that the damages were caused solely by the seepage attributable to the appellant.

In this respect the court instructed the jury as follows: "You cannot allow any damage that arose from seepage that was caused from rainfall or surface water accumulating in ponds or swails (swales) upon the surface of the plaintiff's lands or upon lands in the vicinity of the plaintiff's lands. The defendant can only be held liable

for damage that would not have occurred except on account of leakage from its said canals or reservoirs. If you find that water from the defendant's canals or reservoirs have combined with waters from other sources for which defendant would not be responsible, and find that such combined waters have caused damage to the plaintiff's land, then before the plaintiff can recover it is encumbent upon him either to show that such damages would have occurred from such waters from the defendant's canals or reservoirs alone without any water from other sources, or to allocate and separate the amount of damage done by waters from such other sources."

This correctly instructed the jury as to appellant's liability. See, Robinson v. Dawson County Irrigation Co., 142 Neb. 811, 8 N. W. 2d 179; Seibold v. Whipple, 143 Neb. 167, 9 N. W. 2d 154; Faught v. Dawson County Irrigation Co., 146 Neb. 274, 19 N. W. 2d 358; Faught v. Platte Valley Public Power and Irrigation District, 147 Neb. 1032, 25 N. W. 2d 889; Wichita County Water Improvement District v. Pearce, (Tex. Civ. App.) 59 S. W. 2d 183; Woodland v. Portneuf-Marsh Valley Irrigation Co., 26 Idaho 789, 146 P. 1106. However, whether the damage was caused by the combined sources of water, and would not have occurred from the waters of the appellant's canals or reservoir alone, was a question for the jury. If they so found then, under this instruction, they would be required to deny appellee any recovery herein. This fully protected the appellant's rights. We find no error in the manner in which this issue was submitted.

We also find no merit in appellant's contention that the verdict is the result of passion and prejudice. That the water table under appellee's land had risen and that there were damages resulting therefrom is undisputed. The amount of the verdict is well within the limits of the evidence offered by the appellee and the jury having viewed the premises it finds ample support in the record.

The cross-appeal presents the question of the date from which the interest should be computed. The trial court fixed the date thereof as December 6, 1947. The appellee contends the amount of the verdict should draw interest from the date the cause of action accrued: to wit, October 1, 1942. It cites in support thereof holdings of other jurisdictions to the effect that: "If the land is permanently injured, but not totally destroyed, the owner will be entitled to recover the difference between the market value of the land at the time immediately preceding the injury and the market value of the land in its immediate condition after the injury, with legal interest thereon to the time of the trial." Fuller v. Fair, 202 Ala. 430, 80 So. 814. See, also, Houston & T. C. R. Co. v. Wright, (Tex. Civ. App.) 195 S. W. 605; and Zorn v. Britton, 120 Fla. 304, 162 So. 879.

We said in Missouri, Kansas & Texas Trust Co. v. Clark, 60 Neb. 406, 83 N. W. 202: "Regardless of the character of the action, interest is recoverable in all cases for the use or destruction of property when the amount which is due the plaintiff may be known or ascertained approximately by reference to market values." See, also, Parkins v. Missouri P. Ry. Co., 76 Neb. 242, 107 N. W. 260.

However, here not only the amount is unliquidated but the liability, if any, must first be ascertained. Under these circumstances we think the following statement from Wittenberg v. Mollyneaux, 59 Neb. 203, 80 N. W. 824, is applicable: "If the right to damages for breach of a contract is matter of reasonable litigation, and the amount to be recovered, if any, is unliquidated and must be fixed, not by mere computation but by suit, interest may not be allowed for time precedent to the settlement of the right to a recovery and the ascertainment of the amount." See Gee v. City of Sutton, 149 Neb. 603, 31 N. W. 2d 747.

For the reasons herein stated we find the verdict of

the jury and judgment entered thereon to be correct. They are affirmed.

AFFIRMED.

PAINE, J., not participating.

GERHARD D. L. FRESE ET AL., APPELLEES, V. JOE MICHALEC, APPELLANT.
36 N. W. 2d 494

Filed March 18, 1949. No. 32539.

1. **Receivers.** District courts are authorized by section 25-1081, R. S. 1943, after judgment or decree, to appoint a receiver to carry the judgment or decree into execution.
2. ———. Pursuant to section 25-1087, R. S. 1943, every such order appointing a receiver should contain special directions in respect to his powers and duties.

APPEAL from the district court for Thurston County: SIDNEY T. FRUM, JUDGE. *Affirmed.*

Mark J. Ryan and *Alfred D. Raun,* for appellant.

Robert G. Fuhrman, for appellees.

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 Thurston County appointing a receiver to carry into effect the terms and provisions of its decree herein entered on August 7, 1946, which decree, on appeal, was affirmed by this court. See Frese v. Michalec, 148 Neb. 567, 28 N. W. 2d 197.

For the purpose of this appeal the parties will be referred to herein as they appeared in the trial court.

The decree sought to be enforced contains the following terms and provisions: "* * * that the defendant herein, Joe Michalec, be and he is hereby permanently and perpetually enjoined from keeping and maintaining the

dike or embankment now located on the east or right bank of Rattlesnake Creek on his land, from the point where said Creek enters his land, around the east or right bank of said creek to a point thereon 800 feet south of the north line of the South Half of the Northeast Quarter of Section 17, in Township 25, North, Range 6, East of the 6th P. M., in Thurston County, Nebraska; that the defendant is hereby ordered and directed, within a period of ninety days from and after the entry of this decree, to remove all and every part of said dike on the east or right bank of Rattlesnake Creek from the point where it enters his land on the south around the east or right bank thereof, to a point on said creek 800 feet south of the north line of defendant's land, and that in so removing said dike or embankment the soil or dirt forming the same shall be so disposed of by said defendant as not to raise the elevation of the land on defendant's north quarter section tract at any point thereon so as to prevent the natural drainage of water from the overflow area of said creek to the northeast corner of defendant's land, and further that in so removing said dike the natural bank along the east or right bank of Rattlesnake Creek when the work is completed, shall be restored as nearly as can be done to the original elevation of the creek bank over that area and so that the work when completed will leave the east or right bank across the base of the cut-off V or horseshoe to the south as nearly as can be done, of the same elevation as the original bank of said horseshoe over and out of which overflow waters originally flowed, * * *."

On October 13, 1947, we issued our mandate directing the trial court to carry into effect its decree.

Thereafter the plaintiffs filed their application in the district court, subsequently amended, setting forth that the defendant had failed to properly remove the dike, as by the decree required, and had otherwise failed to comply with the terms and provisions thereof. Therein

plaintiffs alleged that they believed defendant never would remove the dike and comply with the decree without the work being done under the supervision of the court or someone appointed by it for that purpose. Plaintiffs, because thereof, asked for an order requiring the defendant to show cause why he should not be adjudged in contempt of court, why a receiver should not be appointed to carry the decree into effect, or why a special execution should not issue to carry out the decree.

Defendant filed objections to the application and at the hearing thereon resisted it on the grounds that he had complied with the terms and provisions of the decree.

Hearing on the application, as amended, and the objections thereto was had on May 5, 1948. Pursuant thereto, on July 14, 1948, the court appointed a receiver for the purpose of carrying into effect the terms and provisions of the decree herein dated August 7, 1946. It further directed the receiver "to employ a qualified engineer to take all necessary levels and make all necessary surveys to determine the work necessary to be done upon said lands for a fair and reasonable compliance with the terms of said decree of August 7, 1946, and that upon the completion of said levels and surveys said receiver shall make his report to the Court for the Court's further order thereon."

Defendant filed a motion for rehearing and from the overruling thereof appealed.

District courts are authorized by section 25-1081, R. S. 1943, after judgment or decree, to appoint a receiver to carry the judgment or decree into execution.

Pursuant to section 25-1087, R. S. 1943, every such order appointing a receiver should contain special directions in respect to his powers and duties.

As a basis for its order appointing the receiver and made a part of its decree the trial court made the following finding: "That it is visible to the naked eye of the ordinary layman, and without engineering ex-

perience, that the straightening of Rattlesnake Creek through the defendant's land, which new channel as a part of the straightening of said creek cut across the base of horseshoe, V's or other extensions of the creek eastward into defendant's lands, is upon higher ground than the most easterly points of the original horseshoes or bends of the creek eastward into defendant's lands; that the soil taken from the newly constructed channel across such bases was used to form the dike which defendant was required by the decree to remove; that defendant and his employees in the removal of the dike have moved the dirt from the dike easterly and northeasterly and while the said dike may have been and probably was as shown by the testimony removed to the grass line of the newly constructed ditch, the Court is of the opinion and finds that said grass line is of higher elevation than the original easterly or right bank along and around the V's or horseshoes in the creek as the same were before any work was done by the defendant in the construction of the new channel of the creek through his land and the dike on the right or easterly bank thereof, and that therefore though there has been an apparent effort to comply in some measure with the provisions of the decree, that portion of the decree which provides that the defendant be required 'to remove all and every part of said dike on the east or right bank of Rattlesnake Creek from the point where it enters his land on the south around the east or right bank thereof, to a point on said creek 800 feet south of the north line of defendant's land, and that in so removing said dike or embankment, the soil or dirt forming the same shall be disposed of by said defendant as not to raise the elevation of the land on defendant's north quarter section tract at any point thereon so as to prevent the natural drainage of water from the overflow area of said creek to the northeast corner of defendant's land, and further that in so removing said dike the natural bank along the east or right bank of Rattlesnake Creek when the work is completed, shall be restored as

nearly as can be done to the original elevation of the creek bank over that area, and so that the work when completed will leave the east or right bank across the base of the cut-off V or horseshoe to the south as nearly as can be done, of the same elevation as the original bank of said horseshoe over and out of which overflow waters originally flowed', has not been complied with and that in order that there be a fair and reasonable compliance with the terms of the decree above quoted further work must be done on defendant's land to accomplish that purpose."

In this respect the record shows the court inspected the premises and the work done thereon by defendant in his effort to comply with the terms and provisions of the decree.

The evidence in the record discloses that the defendant has not complied with the terms and provisions of the decree. It fully supports the trial court's findings to that effect. It discloses that the appointment of a receiver was not only proper and justified but undoubtedly necessary in order to put the decree into force and effect.

In view of the defendant's failure, after ample opportunity, to carry out the terms and provisions of the decree we find the taxing of costs to him to be proper. For the reasons stated we affirm the judgment of the trial court.

AFFIRMED.

RICHARD BLACK, APPELLANT, CROSS-APPELLEE, V. STERLING ROMIG, APPELLEE, CROSS-APPELLANT, IMPLEADED WITH LAURAMAY MILLER, APPELLANT, CROSS-APPELLEE.
36 N. W. 2d 772

Filed April 1, 1949. No. 32533.

1. **Deeds.** Whether or not a deed has been delivered is largely a question of intent to be determined by the facts and circumstances of the particular case.
2. ———. Where a grantor instructs an escrow agent to safely

keep deeds until his death and then to deliver them to the named grantees, and there is no evidence of any reservation of a right of possession by word or act before the death of the grantor, there is a delivery of the deeds sufficient to pass title.

APPEAL from the district court for Madison County: FAY H. POLLOCK, JUDGE. *Affirmed.*

Elmer Rakow and *Bernard Ptak,* for appellants.

Frederick M. Deutsch, for appellee.

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

CARTER, J.

This is a suit to quiet title to an interest in a residence property in Norfolk, Nebraska. The defendant, Sterling Romig, claims title to the property by virtue of a deed from his mother, Grace Romig Black, executed and delivered prior to her marriage to the plaintiff. The trial court found against the plaintiff, Richard Black, and the defendant Lauramay Miller, and they appeal.

The evidence shows that on January 17, 1945, Grace Romig obtained title to the residence property in question by warranty deed. This was pursuant to an agreement to purchase entered into on November 15, 1944. The evidence shows that upon payment of all amounts due on January 13, 1945, to the Allied Securities of Norfolk, the agent of the grantor in making the sale, Grace Romig on the same date executed a deed to the property to her son, Sterling Romig. Whether or not there was a valid delivery of this deed constitutes the question to be here determined. The evidence shows that Grace Romig had completed the transaction at the time she executed the deed to her son, even though the deed to her was executed and delivered on January 17, 1945, four days later. For the purposes of this suit, Grace Romig was the owner of the property at the time the deed to Sterling Romig was executed.

Grace Romig was a widow at the time she obtained

title to the property and at the time she executed the deed to her son. The defendant Lauramay Miller was the adopted daughter of Grace Romig. On April 25, 1945, Grace Romig married the plaintiff Richard Black. Grace Romig Black died intestate on July 29, 1947. At the time of her death she and the plaintiff were occupying the property in question as their home. Plaintiff claims that he is entitled to a one-fourth interest in the fee title and a life estate in the whole of it as the husband of Grace Romig Black. Lauramay Miller claims a three-eighths interest in the fee, subject to the life estate of the plaintiff husband. She further alleges that the defendant Sterling Romig has a similar interest as an heir of his mother. The decision necessarily turns on the validity of the deed under which the defendant Sterling Romig claims title.

The evidence shows that Stella Ehrenberg was a long-time friend of Grace Romig. They had visited and corresponded with each other since their childhood days. She testified that on one occasion they were talking about how they would leave their property and she told Grace Romig that her husband had "left a will and a deed; and all I had to do was to go and record my deeds, and everything was mine, and when I opened the will why the will was the same and there was no need of probating the will, so it was not probated." Grace Romig then said: "I believe I will do that, I don't want to leave things around here, I don't know who would be messing around in my stuff first." Stella Ehrenberg testified also that Grace Romig told her that Sterling was her son and she wanted him to have the Norfolk property and that "I think I will leave her (Lauramay Miller) the property in Neligh." The date of this conversation was fixed as the last part of February 1945.

Stella Ehrenberg testified that shortly before her return to St. Louis "* * * she (Grace Romig) handed me an envelope that had some papers in it and said, 'Well, I got my papers all fixed, now what am I going to do with

them?' I said, 'I wouldn't know. They are supposed to be delivered to somebody.' She says, 'That is what they told me, so I guess I will deliver them to you.'" She further testified that Grace Romig told her to take care of them, to lock them up where they would be safe, and she took them home with her and placed them in her safety deposit box in a bank vault where they remained until after Grace Romig's death on July 29, 1947. In response to a further question as to what she was to do with these deeds, she stated that Grace Romig said: "Now all there is to do if I should die first, you hand those to Sterling and Lauramay." Stella Ehrenberg testified that shortly thereafter she went to St. Louis and returned the day previous to the marriage of Grace Romig to Richard Black on April 25, 1945, and that therefore she knew positively that the deeds were in her possession before the marriage took place. She testified that neither Grace Romig nor anyone else, other than herself, had access to the safety deposit box. Grace Romig never requested the return of the deeds, or claimed any right to recall them. The only other evidence bearing upon delivery was some evidence elicited from Sterling Romig on cross-examination. He was asked what was written on the envelope containing the deeds, to which he replied: "To be delivered after my death." The record shows that the envelope had been destroyed and consequently is not available as evidence. This constitutes the evidence to support the claim of the defendant Sterling Romig that a valid delivery of the deed was made.

There is evidence that the property described in the deed to Lauramay Miller which was held by Stella Ehrenberg was conveyed on June 12, 1945, by Grace Romig Black and Richard Black to Frank E. Romig, a relative of Grace Romig Black's first husband. There is evidence that she owned other lots in Neligh in the vicinity of those conveyed. The confusion of these deeds is not explained in the record. The deed identified as

the one held for Lauramay Miller by Stella Ehrenberg bears the date of May 4, 1943, a date inconsistent with the testimony adduced. We do not deem this discrepancy in the evidence to be a controlling factor on the issue before us.

We are of the opinion that the facts recited are sufficient to sustain a finding that a delivery of the deed to the Norfolk property was made. Whether or not a delivery of a deed has been made is largely a question of intent. Brittain v. Work, 13 Neb. 347, 14 N. W. 421; Smith v. Black, 143 Neb. 244, 9 N. W. 2d 193. Anything done by the grantor from which it is evident that a delivery was intended, by words or acts, is sufficient. Kellner v. Whaley, 148 Neb. 259, 27 N. W. 2d 183. Where a grantor instructs an escrow agent to safely keep deeds until his death and then deliver them to the grantees therein named, and there is no evidence of any reservation of a right to repossess them either by word or act before the death of the grantor, there is a valid delivery sufficient to pass the title to the lands described therein. Smith v. Black, *supra*. This is so whether the grantee knew of the escrow arrangement or not. Smith v. Black, *supra*.

The appellee cross-appeals from the finding of the trial court that the plaintiff, Richard Black, was entitled to recover the sum of $726.41 which he paid toward the satisfaction of the mortgage on the property here involved. The record shows that this payment was made by Black without knowledge that a deed to the property had been made to Sterling Romig prior to the marriage of Grace Romig to Richard Black. The evidence sustains the conclusion reached by the trial court on the issue raised by the counterclaim.

We conclude that the evidence sustains the judgment of the trial court.

AFFIRMED.

BEULAH DORSEY, ADMINISTRATRIX OF THE ESTATE OF PADDY JO DORSEY, DECEASED, APPELLANT, V. JOHN A. YOST, APPELLEE.

36 N. W. 2d 574

Filed April 1, 1949. No. 32545.

1. **Death.** In an action by the personal representative of a deceased child, for the benefit of a parent, to recover damages for negligently causing the death of the child, the measure of damages is the present worth in money of the contributions having monetary value of which the parent is shown by the evidence with reasonable certainty to have been deprived.
2. **Damages.** Contributions which are speculative or conjectural may not be properly included in fixing the amount of such damage.
3. **Appeal and Error.** Where the evidence is in conflict as to whether or not deceased suffered pain between the time of the accident and the time of death, the verdict of the jury thereon will not ordinarily be disturbed on appeal.
4. **Parent and Child.** The legal obligation of a child to support his parents is limited to the conditions prescribed by section 68-101, R. S. 1943, and cannot be enforced in an action against a third person.
5. **Death: Damages.** The amount of damages accruing to a next of kin because of the wrongful death of a minor child is difficult to estimate. Such damages are peculiarly within the province of the jury to determine and, unless clearly wrong, a reviewing court will not interfere with the verdict.

APPEAL from the district court for Scotts Bluff County: EDMUND P. NUSS, JUDGE. *Affirmed.*

Bertrand V. Tibbels, for appellant.

Neighbors & Danielson, for appellee.

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

CARTER, J.

This is an action by the administratrix of the estate of Paddy Jo Dorsey for damages for the wrongful death of the deceased, who was 11 years of age at the time of her death. The verdict and judgment were for the

plaintiff in the amount of $1,500.60. The plaintiff appeals.

The record shows that the deceased child was riding in an automobile driven by Gaylord E. Chase on June 24, 1947. As they proceeded south on U. S. Highway No. 26 at a point a few miles north of Minatare, Nebraska, the car in which they were riding collided with the Ford truck being operated by the defendant. The jury in weighing the evidence found in effect that the accident was due to the negligence of the defendant. The correctness of this finding is in no manner challenged by this appeal.

The plaintiff's petition alleges two causes of action. The first cause was for the recovery of damages to the next of kin and for the medical, hospital, and funeral expenses resulting from defendant's negligence. The second cause was for the recovery of damages to the deceased for the pain and suffering resulting from defendant's negligence. The jury awarded plaintiff $1,500.60 on the first cause of action and nothing on the second cause of action. Plaintiff assigns the inadequacy of the verdict and the giving of certain instructions alleged to be erroneous as grounds for reversal.

The evidence in support of the first cause of action is not in dispute. Plaintiff established the amount of hospital, medical, and funeral expenses at $900.60. There was evidence that the deceased was 11 years of age at the time of her death. She lived with her mother, Beulah Dorsey, and her 10-year-old sister. The mother was divorced from her husband in 1938 and had received no support for the children as provided by the divorce decree. The mother was 34 years of age at the time of the accident. Life expectancy tables were offered in evidence for persons 11 and 34 years of age. The evidence shows that Beulah Dorsey was employed at a salary of $135 a month. She had no other income or property other than her household goods. The deceased attended school during the school year during the usual

hours. The testimony shows that deceased washed dishes, swept floors, made beds, helped prepare meals, waxed and dusted furniture, hung out and gathered clothes, and assisted with the ironing. Plaintiff had expenses in supporting the deceased for clothing, food, school supplies, and occasional spending money. The value of domestic service as performed by the deceased was fixed at 40 to 50 cents an hour. Upon this evidence the jury returned a verdict for $1,500.60, which the plaintiff claims to be inadequate.

The measure of damages in an action such as we have before us is the pecuniary loss which the parent sustains by reason of being deprived of the child's services during his minority and the loss of contributions that might reasonably be expected to be made after reaching his majority. Contributions which are speculative or conjectural may not properly be included. It is for the jury to determine the pecuniary value of the child's services which would have accrued to the parent but for the accident. The amount to which a parent is entitled cannot be accurately determined because of the numerous contingencies involved. The amount being very problematical, it is peculiarly for the jury to determine, after hearing all the evidence bearing upon the situation, including the parent's position in life, the physical and mental condition of the child, his surroundings and prospects, and any other matter that sheds light upon the subject. Members of juries generally have children of their own and have information as to the pecuniary value of children's services and the expense involved in their care and education. A jury is peculiarly fitted to determine the loss sustained by a parent in such a case. At best, the verdict can only be an approximation as no yardstick exists by which the correct answer can be found with exactness. The record in the present case does not show that the jury was improperly influenced or that it acted other than upon the evidence before it. The alleged inadequacy of the verdict does not therefore have merit

as a basis for a new trial. Johnson v. Missouri Pacific Ry. Co., 18 Neb. 690, 26 N. W. 347; Draper v. Tucker, 69 Neb. 434, 95 N. W. 1026; Crabtree v. Missouri Pacific Ry. Co., 86 Neb. 33, 124 N. W. 932, 136 Am. S. R. 663.

Plaintiff complains of the refusal of the trial court to give that part of plaintiff's requested instruction No. 12 which reads as follows: "You may also consider the fact that under the laws of this State a child is under a legal obligation to support and maintain his parents, when due to illness or advanced age they are unable to support themselves." Upon this point the court instructed as follows: "You are instructed that for the purposes of this case no legal obligation rested upon the daughter to make contributions of money or services to the mother after the daughter should marry or become of legal age." Plaintiff relies upon section 68-101, R. S. 1943, to sustain her position. This question was determined contrary to the theory advanced by the plaintiff in Spomer v. Allied Electric & Fixture Co., 120 Neb. 399, 232 N. W. 767, wherein it is said: "The legal liability of an adult son to support his parents does not extend beyond the terms of the statute. The right to enforce the obligation at law is granted to the county board and to the indigent person in an action against the relative who fails to perform the statutory duty, but the statute does not provide for a recovery in an action against a third person. Allen v. Trester, 112 Neb. 515, Emel v. Standard Oil Co., 117 Neb. 418." There is no merit to plaintiff's assignment of error on this point.

Relative to the quantum of proof involved, the trial court instructed the jury that they must be "satisfied by the greater weight of the evidence" both on the question of liability and of damage. Plaintiff complains that the court departed from this rule in instructions Nos. 7 to 11, inclusive, by limiting the recovery of damages to the mother to such an amount of monetary benefits that would with "reasonable certainty" have resulted to her from the continued life of the daughter. Objection is

also made to the use of the word "probable" in the following language used in these instructions: "Such financial benefits, however, that are only probable or conjectural may not be included in the amount of such recovery * * *." There is no error in the use of these expressions in the instructions. In Fisher v. Trester, 119 Neb. 529, 229 N. W. 901, we said: "In an action such as this, where the life expectancy of the deceased exceeded that of the next of kin, and the next of kin are the parents of the deceased, the measure of damage is the present worth in money of the contributions having a monetary value of which the preponderance of the evidence shows with reasonable certainty the next of kin have been deprived by the act of the defendant that creates the liability. That which is only probable, estimated or conjectural may not be considered in determining the pecuniary loss. * * * Instructions Nos. 12, 13, 16 and 19, when read together, make the probable pecuniary loss, rather than the pecuniary loss shown by the evidence with reasonable certainty, the basis for determining the pecuniary loss, and to that extent, when instructions free from such interpretation were tendered by the defendant, were erroneous." See, also, Greenwood v. King, 82 Neb. 17, 116 N. W. 1128; Burkamp v. Roberts Sanitary Dairy, 117 Neb. 60, 219 N. W. 805.

Plaintiff assigns as error the giving of instruction No. 13. The portion complained of reads: "You are not bound to take the testimony of any witness as absolutely true, and you should not do so if you are satisfied from the facts and circumstances proved on the trial that such witness is mistaken in a matter testified to by the witness, or that for any other reason the testimony of such witness is untrue or unreliable." Plaintiff contends that this language permits the jury to disregard the testimony of witnesses for reasons outside the record, or to arbitrarily do so for no reason at all. No such strained construction can properly be drawn from the language used. The words "if you are satisfied from the facts and

circumstances proved on the trial" limit, not one, but both clauses which follow in the same sentence. The language objected to, when given a fair and reasonable interpretation, is free from error.

Plaintiff contends that the failure of the jury to return a verdict on the second cause of action constitutes reversible error. Whether or not the deceased suffered any pain from the time of the accident until her death was an issue upon which the evidence was highly conflicting. It was the contention of the defendant that the deceased never regained consciousness. The witnesses who saw her at the scene of the accident and those who took her to the hospital testified that she was unconscious during that period. Three supervising nurses testified that she never became conscious before she died. This evidence, although disputed, is sufficient to sustain the verdict of the jury.

We conclude that plaintiff's assignments of error are without merit.

AFFIRMED.

IDELLE HOLMAN, APPELLANT, V. PETER KIEWIT SONS' INC., APPELLEE.
36 N. W. 2d 569

Filed April 1, 1949. No. 32562.

Deeds: Mortgages. Evidence in support of an allegation that an absolute deed was intended as a mortgage must be clear, convincing, and satisfactory.

APPEAL from the district court for Cass County: HENRY J. BEAL, JUDGE. *Affirmed.*

Francis M. Casey, for appellant.

Fraser, Connolly, Crofoot & Wenstrand, William H. Wright, and *Hird Stryker, Jr.,* for appellee.

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

CARTER, J.

This is a suit to cancel a deed to a tract of real estate in Cass County and to quiet plaintiff's title therein. The trial court found for the defendant and dismissed the action. The plaintiff appeals.

The real estate here involved contains 1.66 acres and is described in the record as Lot 30. It was acquired by plaintiff and her husband from the Lyman-Richey Sand & Gravel Company as a part of a larger tract of 35 acres. The contract of purchase was entered into on February 25, 1933, and the deed delivered on April 21, 1939, vesting the title in plaintiff and her husband, hereafter referred to as Holman, as tenants in common. During this period plaintiff and Holman were recognized by Lyman-Richey Sand & Gravel Company as owners, the delay in the delivery of the deed being due to certain proceedings in which the Lyman-Richey Sand & Gravel Company were involved under the provisions of section 77-B of the Federal Bankruptcy Act.

In the spring of 1934 defendant commenced work on the construction of the approaches to a highway overpass located immediately west of Lot 30. Defendant negotiated with Holman for the right to use the land to secure the materials to build these approaches. For this plaintiff and Holman were to receive $249. Defendant decided to make a recreation park for company employees on Lot 30 and requested a deed to this tract of unimproved river land. Plaintiff and Holman, not having the legal title for reasons heretofore stated, entered into a lease-agreement in writing wherein it is said in part: "As a further part of the consideration for said sum of $249.00, above referred to, a lease of said lands unto the said Peter Kiewit Sons Company, is hereby granted for a period of thirty (30) years following

the date hereof, if the said Loyd Holman and Idelle Holman does not deed said above described real estate to said Company on completion of pumping of said sand and gravel. In the event that said parties do deed said real estate to said Company, the consideration referred to shall apply to such deed."

In the fall of 1934 defendant began improving the property. The land was fenced and landscaped, a cabin was moved in and remodeled, and a caretaker was installed. Wells were sunk and pipes laid to water the newly planted grass. The road and parking place were paved. Playground equipment was installed and a sand beach constructed. The evidence shows a total expenditure of $15,000 in improvements up to the time this suit was commenced.

On June 27, 1935, plaintiff and Holman executed a deed to Lot 30 to the defendant. This deed was retained and not recorded by the defendant until May 2, 1947. Plaintiff denied her signature on the deed in the trial court but expressly waived this defense on appeal. She here contends that the deed was given as security for a loan and that it is nothing more than a mortgage.

The evidence shows that on June 26, 1935, Holman borrowed $350 from the defendant and gave a chattel mortgage on four horses and five cattle as security for the loan. Holman admits that the value of the mortgaged property was in excess of $650. He testifies, however, that defendant insisted upon the deed to Lot 30 as additional security.

The evidence shows that all during the period when defendant was improving Lot 30, plaintiff and Holman lived on an adjacent property. They made no claim of title at any time. The evidence shows admissions by Holman during this period that defendant was the owner. He never demanded the deed back, even though the indebtedness it was allegedly given to secure had been paid. Neither plaintiff nor Holman were ever in pos-

session of the property after February 25, 1933, the date of the written lease-agreement. It is true that Holman paid the taxes on this property during this period, but the evidence shows that it was included with his other lands because the lands stood in the names of plaintiff and Holman. The evidence shows that they were paid by mistake and not as owner. The total taxes paid on Lot 30 over the 12-year period amounted to the total sum of $5.25.

The consideration in the deed given the defendant was $249. This was in accordance with that part of the lease-agreement herein quoted. If the deed had been intended as security for the $350 chattel mortgage loan, that sum would naturally be shown as the consideration in the deed. This constitutes convincing evidence that the deed was given pursuant to the terms of the lease-agreement and not as additional security for the chattel mortgage loan.

We think the trial court was correct in finding that the evidence was insufficient to hold the deed to be a mortgage. A deed given for the purpose of securing a loan will be treated as a mortgage. The evidence in support of such an allegation, however, must be clear, convincing, and satisfactory. Anderson v. Lincoln Joint Stock Land Bank, 131 Neb. 150, 267 N. W. 355. The trial court came to the conclusion that the evidence was not sufficient to meet the requirements of this rule. We find no error in the conclusion reached by the trial court.

AFFIRMED.

CHARLES E. CLOUGH, APPELLEE, V. NORTH CENTRAL GAS COMPANY, A CORPORATION, APPELLANT, KENNETH P. GRIER ET AL., APPELLEES.
36 N. W. 2d 573

Filed April 1, 1949. No. 32469.

APPEAL from the district court for Scotts Bluff County: CLAIBOURNE G. PERRY, JUDGE. On oral argument on motion for rehearing. See 150 Neb. 418, 34 N. W. 2d 862, for original opinion. *Former opinion modified. Motion for rehearing overruled.*

Mothersead & Wright and *Robert G. Simmons, Jr.*, for appellant.

Atkins & Lyman and *True R. Ferguson*, for appellee Charles E. Clough.

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

MESSMORE, J.

We deem it advisable to clarify the original opinion reported in 150 Neb. 418, 34 N. W. 2d 862, in the following respect so that there be no misunderstanding as to our holding therein. Therefore, syllabus 2 of the original opinion is withdrawn and in lieu thereof the following is substituted:

2. When secondary evidence becomes admissible the passage of an ordinance may be shown by proof of the published official proceedings of a city council showing the action taken with reference to the passage thereof. Proof of the publication of an ordinance sworn to by the publisher of the newspaper in which such publication was printed, where such ordinance has been lost or destroyed, constitutes sufficient secondary evidence to prove the publication thereof.

The motion for rehearing is overruled.

BEN DOLEN, PLAINTIFF IN ERROR, V. STATE OF NEBRASKA, DEFENDANT IN ERROR.
36 N. W. 2d 566

Filed April 1, 1949. No. 32548.

Witnesses. The former testimony of a witness cannot be used if the witness is still available for the purpose of testifying at the present trial. What the witness testified to on the first trial constitutes hearsay on the second trial, and could not be introduced as substantive testimony by the party calling him unless it came within some well-established exception to the rule regarding hearsay evidence.

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

Jack Hayward and *L. R. Doyle*, for plaintiff in error.

James H. Anderson, Attorney General and *Homer L. Kyle*, for defendant in error.

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

MESSMORE, J.

The plaintiff in error, Ben Dolen, hereafter referred to as defendant, was convicted of the crime of receiving stolen property, and sentenced to imprisonment in the penitentiary. Defendant brings error proceedings to this court.

This case was previously before this court and is reported in 148 Neb. 317, 27 N. W. 2d 264. We reversed the judgment and remanded the cause for further proceedings for the reason that the trial court abused his judicial discretion in failing to grant a continuance to allow defense counsel sufficient time to prepare for trial and to obtain the presence of an absent witness material to the defense.

It appears from the record that during the night of February 3, 1946, a retail liquor store in the city of Lincoln was broken into, entered, and robbed of certain merchandise by two men who later turned out to

be Lew Wilson and Rollin Curtiss. They took this stolen merchandise to a house in West Lincoln where it was stored in the basement with the consent of the lessee, the lessee having no knowledge of the nature of the stolen property or that it was stolen. The defendant is alleged to have received the stolen property at that place and to have paid the men in part for it, and arranged to pay more at a later time. Subsequently Wilson and Curtiss were apprehended and charged with the crime of burglary, and each entered their separate pleas of guilty to such crime and were sentenced to the penitentiary. It appears that each of these self-confessed burglars had been previously tried and convicted of felonies for which they served terms in the penitentiary.

The official court reporter who had taken stenographic notes of the testimony of both Wilson and Curtiss at the first trial of this case, transcribed certain portions of such testimony given by these witnesses at that trial and made the same into an exhibit for use by the State in the examination of these two witnesses at the second trial, or the instant case.

Lew Wilson and Rollin Curtiss were both present at the instant trial, were sworn, and testified. The county attorney used the exhibit containing the testimony of these witnesses in the first trial in examining them. Their testimony at the instant trial was to the effect that all they knew about the burglary was what appeared in the transcript of the evidence taken in the first trial which was furnished to them by the county attorney to read. They did not remember any of the facts or events leading up to the breaking and entering, or the taking of any of the property from the store, or what happened thereafter, and had no personal or independent recollection of any of the events with reference to the burglary, or remembered any facts connected therewith. One of these witnesses testified that he drank heavily of intoxicating liquor before the burglary and did not remember anything with reference to it. The other testi-

fied he was addicted to the excessive use of intoxicating liquor and for some time while incarcerated in the penitentiary was under the care of a physician for treatment of his condition, and had no personal or independent recollection of any of the events or facts with reference to the burglary. These two witnesses testified that they did not remember any transaction had with the defendant as to the purchasing of the merchandise from them, or that they saw him or were at the house in question where the stolen merchandise was stored.

The State relies on the cases of Koenigstein v. State, 103 Neb. 580, 173 N. W. 603; Brunke v. State, 105 Neb. 343, 180 N. W. 560; Meyers v. State, 112 Neb. 149, 198 N. W. 871; Trobough v. State, 122 Neb. 7, 238 N. W. 771; and Jackson v. State, 133 Neb. 786, 277 N. W. 92, to the following effect: Where the witness has previously been examined in open court with opportunity for cross-examination which has been fully availed of and the witness cannot be produced for examination at the second trial or because of mental or physical disability is unable to testify, his evidence, given at a former trial for the same offense, may be used at the second trial.

The State argues that the mental disability of these two witnesses produced by chronic alcoholism places them in a position where they are unable to testify with any degree of competency, and, therefore their evidence given at the first trial should be admitted upon the second trial. We are not in accord with the State's contention and argument in such respect. There is nothing in the record to show that these two witnesses were insane, or had become senile by virtue of old age and infirmity, or were incompetent in a manner to testify.

"No one has ever doubted that the *former testimony* of a witness cannot be used if the witness is *still available* for the purpose of testifying at the present trial." 5 Wigmore on Evidence (3 ed.), § 1415, p. 191.

What Lew Wilson and Rollin Curtiss testified to on the first trial was hearsay on the second trial, and could

not be introduced as substantive testimony by the party calling them, unless it came within some well-established exception to the rule regarding hearsay evidence. Merely because it was given at a former trial of the same case involving the same issues, and between the same parties, where the witnesses were cross-examined, did not make their testimony admissible as their evidence on this trial. Instead of the State making its case by evidence given on this trial, the State was permitted to do so by evidence given at another trial. The testimony of Wilson and Curtiss in behalf of the State which called them, was what they said on this trial of the case, and not what they said on the former trial unless for some good reason their testimony on the former trial was allowed to become their evidence on this trial. This could only be done under some established exception to the rule regarding hearsay testimony. We therefore turn to the exceptions to the rule for the authority to admit this evidence. Authority may be found for holding that testimony properly preserved and authenticated, given at a former trial where there has been ample opportunity to cross-examine the witness, may be used at the subsequent trial of the same case between the same parties in cases where the witness is dead, when the witness is absent from the jurisdiction of, or out of reach of the court's process, or where the witness is absent on account of the procurement of the opponent, where the witness is so sick he cannot attend, where the witness is insane, or where the witness has suffered loss of memory by disease or old age. Without committing this court to all the exceptions mentioned, it is sufficient in this case to say that the evidence given by these two witnesses at the former trial comes within none of the exceptions to the hearsay rule as heretofore mentioned. The two witnesses, Wilson and Curtiss, were present in court, sworn, and testified at the present trial. See Rio Grande Southern R. R. Co. v. Campbell, 55 Colo. 493, 136 P. 68, Ann. Cas. 1914C 573.

As stated in Velott v. Lewis, 102 Pa. 326: "He but failed to recollect what he had previously sworn to, but if this were enough to admit the notes of a former trial, we might as well abandon original testimony altogether, and supply it with previous notes and depositions. It would certainly be an excellent way to avoid the contradiction of a doubtful witness, for he could always be thus led to the exact words of his former evidence."

In Stein v. Swensen, 46 Minn. 360, 49 N. W. 55, 24 Am. S. R. 234, the court said: "We do not think his failure to recollect the particular facts justifies proving his former testimony. When failure of memory amounts to mental imbecility, the witness is as one dead or insane, and, as his testimony cannot then be taken, his testimony upon a former trial of the same issues, between the same parties, may be resorted to. To admit it in any less case would continually present the question, what degree of forgetfulness shall be required?" See, also, 20 Am. Jur., Evidence, §§ 702, 703, pp. 590, 591; annotation in 91 Am. S. R. 194, subdivision (b), on the admissibility of evidence given on former trial. See, also, Robinson v. Gilman, 43 N. H. 295.

As stated in Drayton ads. Wells, 1 Nott & McC. (S. C.) 409, 9 Am. D. 718: "In the first place, the cases must be very few, in which third persons will recollect better what a witness said, than he will himself. Such cases must be anomalies, for which, it will not be worth providing. * * * In the next place, it may be very dangerous. In the last view of it, there is danger that you will substitute rash confidence for prudent hesitation. That which was spoken with the impartiality of truth, may be reported with the heat of controversy. *The ear hears too often as the mind thinks;* and that which is wished, appears to be said. But if we were to receive this testimony, because the witness says he has forgotten what he formerly deposed, could we refuse to receive testimony where he denied what he had said, not from turpitude, but want of memory? I think not.

Then, in all cases where a second examination was had, we might, and in many we certainly would, have suppletory testimony of this kind."

In Turner v. Missouri-Kansas-Texas R. R. Co., 346 Mo. 28, 142 S. W. 2d 455, 129 A. L. R. 829, it was said: " 'The mere fact that a witness who is not mentally incapacitated has forgotten the facts to which he formerly testified or that he fails to recollect particular facts will not admit proof of his testimony at a former trial.' " See, also, 22 C. J., Evidence, § 522, p. 436; 18 C. J., Depositions, § 214, p. 691; 3 Jones' Commentaries on Evidence (2 ed.), pp. 2176, 2177.

In consideration of the record and the authorities herein cited, the verdict and judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

IN RE ESTATE OF MARY BOWER HARRINGTON, DECEASED. THE PRESBYTERIAN THEOLOGICAL SEMINARY AT OMAHA, A CORPORATION, APPELLEE, V. ARTHUR S. HARRINGTON, EXECUTOR OF THE ESTATE OF MARY BOWER HARRINGTON, DECEASED, APPELLEE, IMPLEADED WITH BOARD OF NATIONAL MISSIONS OF THE PRESBYTERIAN CHURCH IN THE UNITED STATES OF AMERICA, APPELLANT.

36 N. W. 2d 577

Filed April 1, 1949. No. 32578.

1. **Charities.** A bequest to a charitable corporation by name, without further restriction or limitation as to use, is in fact not a bequest to the corporation as such, but to the objects and purposes for which such corporation was organized.
2. ———. Such a gift to a charitable corporation is equivalent to a bequest to a charitable trust, and is ordinarily governed by the same rules of law, for the reason that want of the trust relation in the former is overcome by the fact that the objects and purposes of the charitable corporation coincide with the charitable purposes of the gift.

3. ———. The intent of the donor in a bequest to a charitable corporation must be gathered from the four-corners of the will, but the objects and purposes for which such a donee was incorporated may be considered in determining the construction and legal effect of such bequest.
4. ———. A bequest to a charitable corporation "if in existence; but if not in existence at the death of the survivor of said testators" then to another, passes to the latter if the former has at the death of the surviving testator ceased to carry out the objects and purposes for which it was incorporated, although still legally existent as a corporation.

APPEAL from the district court for Pawnee County: VIRGIL FALLOON, JUDGE. *Reversed and remanded with directions.*

Will H. Thompson, for appellant.

Morsman & Maxwell and *Barton, Barton & Colwell,* for appellees.

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

CHAPPELL, J.

On October 28, 1930, George A. Harrington and Mary Bower Harrington, husband and wife, executed a joint will. Insofar as important here, the will provided: "In sincere appreciation of the love of God, our Heavenly Father, in permitting us to enjoy the conforts of life, and with a hope that we shall be able to leave at our death some of that which He has permitted us to accumulate, to benefit others, and desiring to show our appreciation of the wonderful provisions made for us in the Will of our Lord, and Savior, Jesus Christ, in making us heirs of God and joint heirs with Him, we GEORGE A. HARRINGTON AND MARY BOWER HARRINGTON, husband and wife, of Pawnee City, Nebraska, being of sound mind and memory, do make, publish and declare this to be our joint LAST WILL AND TESTAMENT, hereby revoking all other wills and codicils heretofore made by us or either of us."

The survivor of them was thereafter devised and bequeathed absolutely all property of the first deceased. Upon death of such survivor, the named executor was directed to sell and reduce to money all of his or her property, and, after payment of certain items, the remainder was to be paid and distributed among designated distributees in the shares set opposite their names. The distributees here involved were:

"Two-Fifteenths thereof to the BOARD OF NATIONAL MISSIONS OF THE PRESBYTERIAN CHURCH, U. S. A.; * * *.

"One-Fifteenth thereof to the PRESBYTERIAN THEOLOGICAL SEMINARY at Omaha, Nebraska, *if in existence; but if not in existence at the death of the survivor of said testators,* then to said BOARD OF NATIONAL MISSIONS OF THE PRESBYTERIAN CHURCH, U. S. A. * * *." The last-quoted paragraph, as italicized by us, is the part of the will in controversy here.

A joint codicil thereto was executed on January 24, 1935, and a codicil disposing of her personal effects was executed by the surviving wife on November 27, 1942. However, neither codicil in any manner affected the aforesaid bequests.

After the death of the husband the joint will and codicil were admitted to probate as his will on October 19, 1939. Thereafter, on July 27, 1946, following the death of the wife on June 23, 1946, the joint will and codicil, and her codicil thereto, were admitted to probate as her will.

On April 26, 1947, prior to final decree, the Board of National Missions of the Presbyterian Church, U. S. A., hereinafter called defendant, filed an application and showing, praying for distribution of the one-fifteenth interest to it as legatee, primarily upon the ground that at the death of the survivor, the Presbyterian Theological Seminary at Omaha, hereinafter called plaintiff, was not in existence within the meaning of the will.

After hearing upon issues thus presented, the county court in its final decree filed April 30, 1947, found generally for defendant and adjudged that plaintiff "at the date of the death of said testatrix, June 23, 1946, was a corporate entity, but was not then operating a theological seminary at Omaha, Nebraska; that its school had been closed for several years; that the disposition of its trust funds and endowments have been in litigation in the District Court of Douglas County, Nebraska; and at the date of the death of said testatrix said Presbyterian Theological Seminary at Omaha, Nebraska, was not in existence within the meaning of the word as used in said will; and that the clear intent and desire of said testators, as set forth in said will, is that said one-fifteenth interest in said residue, towit, $2792.82, shall be paid to, and the court finds that it should be paid to said BOARD OF NATIONAL MISSIONS OF THE PRESBYTERIAN CHURCH, U. S. A., * * *."

Plaintiff appealed therefrom to the district court, where the issues presented by plaintiff's petition, substantially reciting salient facts hereinafter set forth, and defendant's answer thereto, were decided in the light of a written stipulation of undisputed facts, entered into by the parties and offered in evidence by the plaintiff. The trial court, in its decree, reversed the judgment of the county court and found generally for plaintiff at defendant's costs. Motion for new trial was overruled, and defendant appealed, assigning substantially that the judgment was contrary to law and not sustained by the undisputed evidence. We sustain those assignments.

The stipulation of the parties discloses that on March 13, 1895, an application was filed by plaintiff in the probate court of Douglas County, in conformity with what is now section 21-701, et seq., R. S. 1943, to form a body corporate under the name and style of "The Presbyterian Theological Seminary at Omaha." As stated in the application: "The object of such corporation shall be to establish and maintain in Omaha, Douglas County,

Nebraska, a theological seminary to be connected with and under the jurisdiction and control of the General Assembly of the Presbyterian Church in the United States of America. * * * the object and purpose for which this association is formed and to be incorporated is the professional and ecclesiastical education of candidates for the christian ministry according to the faith and doctrines set forth in the standards of the Presbyterian Church of the United States of America as now or hereafter interperted by its General Assembly."

Appraisers were appointed as prayed, who duly made favorable return of the assets of the proposed corporation and the probate judge by order granted plaintiff permission to file articles of association and become a religious and educational body corporate, in conformity with the statutes. Articles of incorporation were duly prepared and filed of record, which articles reflected the aforesaid name, location, functions, objects, and purposes under amenable jurisdiction and control of the General Assembly.

The articles provided for a board of directors having power to elect officers, fill vacancies, create an executive committee, "elect and transfer professors, lecturers, instructors and such other officers and agents as may be necessary," and fix their compensation. The board had power to enact by-laws in accordance with the terms and provisions of the charter, which also provided for a seal bearing upon its face the words "The Presbyterian Theological Seminary at Omaha."

The corporation, by and through its directors and officers, had power to invest and dispose of its funds and property "unless otherwise prevented by the terms and conditions by which it became seized and possessed of said property, in each and every case, however, for the sole use of said Seminary and the promotion of the objects for which it is established, and in conformity to the provisions of these articles."

In order to give the Presbyterian Church in the United

States of America power to exercise proper control over the teachings and property of the corporation, it was provided that: "All funds and property of every name and nature, and the income and proceeds thereof, which may at any time belong to, or be held by the said 'The Presbyterian Theological Seminary at Omaha,' shall be held by it in trust for the Presbyterian Church in the United States of America, and be used only for theological education in the faith and doctrine set forth in the standards of the Presbyterian Church in the United States of America, as now or hereinafter interpreted by its General Assembly, and for no other purpose, and this provision governing all said funds or property shall be irrevokable and inviolable."

The election of every director, and the election, appointment, or transfer of every professor, instructor, or teacher, who were each required to be ministers or members in good standing of the Presbyterian Church in the United States of America, were subject to approval of the next succeeding General Assembly. Power and authority were given and granted to such church "to provide, through and by its General Assembly, at any meeting thereof, such manner and means as said General Assembly may deem wise and prudent for the enforcement of the provisions of these articles of incorporation, and may do so in the name of such person or corporation as it may direct by resolution certified by its clerk in any civil court having jurisdiction over this corporation or its property." By-laws were duly adopted, but they are of no importance here.

In May 1943, the General Assembly adopted the recommendations of its Special Committee on Theological Education "to the effect that plaintiff's said seminary in its location in said City of Omaha, with the type of program theretofore carried on, and as a seaparate institution, should be discontinued, and further, that a joint committee, composed of the Board of Directors of plaintiff and said Special Committee, should explore and study the

possibilities of using the assets owned by plaintiff and used in connection with said seminary, for the furtherance of theological education * * *" elsewhere, and report back in 1944.

Thereafter, at a meeting of said joint committee on June 29, 1943, a subcommittee of six, consisting of three from plaintiff's board of directors and three from the General Assembly's special committee, was appointed "to explore the possibilities of properly liquidating the affairs of this plaintiff in accordance with the action taken by said General Assembly" because of which "it became and was and is now impossible for this plaintiff to further carry on and conduct its said seminary in the instruction of candidates for the christian ministry in their professional and ecclesiastical education therefor, and by reason thereof, the educational work of said seminary was discontinued by this plaintiff at the close of the school year in 1943, and the doors of plaintiff's said seminary were then closed in conformity with the action taken by said General Assembly."

Thereafter, in February 1944, the special committee recommended to plaintiff's board of directors: "That plaintiff's assets owned, and used by it in connection with its operation and maintenance of its said seminary, should remain in the custody of plaintiff" but that "the net income from such assets should be sent to * * * McCormick Theological Seminary in Chicago, to be used for special training of the ministry of the rural church, and with particular reference to the needs of the Middle West." The Chicago seminary was to "report annually as to the use of these funds to plaintiff and to said General Assembly" and "at the expiration of ten years, the General Assembly should restudy the matter and make such changes as might then seem advisable."

Plaintiff's board of directors, upon consideration of said recommendations, voted to amend same, reducing the period of time to five years instead of ten, and to provide "that all actions which might be taken in connection

therewith should be subject to the approval of the courts having proper jurisdiction thereof * * *." All such recommendations, with proposed amendments thereto, were thereafter submitted to, and as amended, were adopted by the General Assembly in May 1944.

In conformity therewith and predicated upon the foregoing admitted facts, recited in its petition therein, plaintiff, on December 9, 1944, filed a class action under section 25-319, R. S. 1943, in the district court for Douglas County, naming as defendants the following persons, to wit: The Attorney General, as the person charged with the duty of supervising and protecting charitable trusts, certain designated donors of its charitable trusts, and "All persons having or claiming any interest in the property, real and personal, of plaintiff constituting a charitable trust fund of the book value of $430,409.95 for distribution by application of the judicial *cy pres* doctrine, real names unknown * * *."

The Attorney General's answer denied generally, but admitted that plaintiff had possession of a charitable trust subject to the control and direction of the district court for Douglas County, under its equity powers, admitted the existence of the judicial cy pres doctrine as to charitable trusts in this state, but denied its application in the case then at bar, and alleged that if found applicable by the court, said charitable trust funds and property should not be permitted to be withdrawn from this jurisdiction, but should at all times be held subject to the order and direction of the district court. Some designated defendants answered and another party intervened, but the contents of their pleadings do not appear in the record.

That cause was tried on the merits July 23, 1945, whereat intervener and certain named defendants were represented by counsel, while others defaulted, and the cause was continued to permit filing of briefs. Thereafter, on October 19, 1946, the cause was argued and submitted to the court, and on November 13, 1946, the

decree of the court was entered. It found generally for plaintiff and that the allegations of plaintiff's petition were true. It ordered the return of one certain gift, the retention of which would amount to constructive fraud, and two others because of non-claims by plaintiff. However, it denied the return of others, approved retirement allowances for plaintiff's faculty members, and ordered their continued payment.

The decree specifically found that all of plaintiff's other property and funds (except certain described funds) constituted "a charitable trust fund, and that the use and control of said fund by the plaintiff is subject only to the general supervision of the State of Nebraska by and through the Attorney General of this state, and subject to the jurisdiction and judgment of this court in the application by the Court of the judicial *cy pres* doctrine, to be disposed of pursuant to the decree and orders of this Court in its application of said judicial *cy pres* doctrine, and that the title to all of said property constituting the property of the plaintiff effectually passed out of the donors thereof without condition, except as to the use thereof." It also found that "in view of the possibility that within the five-year period some arrangements might be made to re-open the plaintiff seminary, the Court specifically finds that it need not at this time determine any absolute and final disposition of the entire trust fund" but ordered the income therefrom to be delivered annually to the McCormick Theological Seminary at Chicago to be used by it for the purposes set forth in the aforesaid recommendations during the then 1946 fiscal year and four more years, or until further order of the court, with jurisdiction of the subject matter continuously thereafter retained, "to be exercised when and as it may be invoked by any party hereto, including the Attorney General of the State of Nebraska." Motions for new trial were filed by three defendants. They were overruled, but no appeal

was ever taken from that decree, and it has never been modified or vacated.

A department of rural church was established at McCormick Theological Seminary, having a visiting professor and resident instructor, with three courses offered in Chicago at the seminary and four in the extension school at Lincoln, two by the faculty of the Nebraska Agricultural College, and two by the seminary's resident instructor. The income received for 1946 and an accounting for its uses was reported by the Chicago seminary on September 25, 1947.

In the foregoing situation, the question is whether or not plaintiff was in existence on June 23, 1946, the date of the death of testatrix, within the meaning of the provisions of her will. Plaintiff contended that it was in existence simply because it was still a legal corporate entity. On the other hand, defendant argued that when plaintiff admittedly closed its doors, discharged and retired its faculty members, discontinued the objects and purposes for which it was incorporated and the use for which the bequest was given, and sought a decree under the judicial cy pres doctrine because it was impossible to carry out the charitable objects and purposes for which it was incorporated, that it then ceased to exist as a seminary at Omaha within the meaning of the will of testatrix, in which event the bequest should go to defendant. We sustain that contention.

While the intent and wishes of the donor must be determined from the four-corners of the will, it is also the rule that in the construction and determination of the legal effect of donations to charitable corporations, which plaintiff was conceded to be, the objects and purposes for which the donee was incorporated may be considered. 14 C. J. S., Charities, § 11, p. 438. That is true because a gift, donation, or bequest by name, without further restriction or limitation as to use, to a corporation organized and conducted solely for charitable purposes, will be deemed to have been made for

the objects and purposes for which the corporation was organized. 11 C. J., Charities, § 11, p. 307, § 24, p. 320. It is also the rule that a gift to a charitable corporation is equivalent to a bequest to a charitable trust, and will ordinarily be governed by the same rules, because "the want of the trust relation in the former is overcome by the fact that the purpose of the charitable corporation coincides with the charitable purpose of the gift." School District v. Wood, 144 Neb. 241, 13 N. W. 2d 153. In other words, the bequest at bar was in effect a gift to the objects and purposes of plaintiff corporation, and not to the corporation itself. It was in legal effect a charitable donation impressed with a public trust specifically imposed by plaintiff's articles of incorporation. Matter of Phoebe E. Mills, 121 Misc. 147, 200 N. Y. S. 701. Plaintiff was, in the final analysis, simply selected as an agency to carry out the intent and wishes of testatrix, which were in fact the objects and purposes of plaintiff corporation.

Existence means: "That which exists, that which actually is an individual thing; an actuality." 35 C. J. S., Existence, p. 200. Exist means to live, to have life or animation; to be or continue to be, in fact; have actual being; to be in present force, activity, or effect; or a continuing when applied to a condition or situation at a given time. 35 C. J. S., Exist, p. 199; Black's Law Dictionary (2d ed.), p. 464, (3d ed.), p. 722.

Following the logic in In re Hagan's Will, 234 Iowa 1001, 14 N. W. 2d 638, 152 A. L. R. 1296, the language of the will here involved: "One-Fifteenth thereof to the PRESBYTERIAN THEOLOGICAL SEMINARY at Omaha, Nebraska, if in existence; but if not in existence at the death of the survivor of said testators, then to said BOARD OF NATIONAL MISSIONS OF THE PRESBYTERIAN CHURCH, U. S. A." means to plaintiff if in existence as a seminary at Omaha, and as such educating candidates for the Christian ministry under the jurisdiction and control of and in conformity with the faith

and doctrines of the General Assembly of the Presbyterian Church of the United States of America at the time of the death of the testatrix, but if not in existence as such an operative charitable educational institution at that time, then to defendant.

In cases cited and relied upon by plaintiff, with one exception distinguishable upon the facts, the donee was at the appointed time continuing to function and carry out the intent and wishes of testator or the objects and purposes of the gift, although even operating under different articles of incorporation or in a different name. None of them were charitable corporations which had admittedly ceased to function and carry out the objects and purposes for which they were formed and had sought and obtained advantage of the benefit of the judicial cy pres doctrine by reason of their inability to do so.

The meat of the matter here is not whether plaintiff was a legal corporate entity at the death of testatrix, but whether or not it was then existing as a seminary, thus carrying out the objects and purposes for which the gift was given. As stated in In re Walter's Estate, 150 Misc. 512, 269 N. Y. S. 400: "The corporation discontinued the conduct and operation of its hospital and clinic and has entirely ceased to function. It is not necessary that the corporation be judicially dissolved to make the gift ineffectual. It is sufficient if the charitable purposes for which it was formed cannot be carried out. Matter of Mills' Will, 121 Misc. 147, 200 N. Y. S. 701. Furthermore, the charitable intentions of the testatrix in making the bequest can no longer be effectuated." See, also, In re Walter's Estate, 150 Misc. 512, 269 N. Y. S. 402.

We conclude that testatrix never intended to give her estate to a mere named non-functioning corporation which, at her death, had admittedly ceased to and was unable to function and carry out the objects and purposes for which it had been incorporated and for which her bequest was given, whose charitable trust property and

funds were under the jurisdiction and control of the state or a court with judicial power already exercised, as plaintiff concedes, to divert its property, including the gift here involved, to another seminary in another city and state. To hold otherwise would alter and make ineffectual the objects and purposes of her gift.

The question before us here is not whether the gift lapsed or should be applied under the judicial cy pres doctrine. Discontinuance of the maintenance and operation of the seminary prevented carrying out the objects and purposes of the gift. The testatrix specifically provided for such a contingency by giving it to defendant in that event. To hold otherwise would also alter the expressed intent and wish of testatrix.

It is elementary that cy pres does not apply until it clearly appears that the will or wish of the donor cannot be given effect, and, of course, the doctrine can have no existence when the donor himself, as in the case at bar, has provided for application of the bequest in the event of failure of the charitable use to which he in the first instance directed that it should be devoted. Hicks Memorial Christian Assn. v. Locke, 178 Ark. 892, 12 S. W. 2d 866; 14 C. J. S., Charities, § 52, p. 516; 11 C. J., Charities, § 77, p. 362; 10 Am. Jur., Charities, § 124, p. 676. To permit plaintiff to recover herein would be a violation of the latter rule.

The mere possibility that plaintiff may re-establish and maintain or operate its seminary at some vague time in the future is not controlling under the foregoing circumstances. The fact is that plaintiff had admittedly ceased to exist as a seminary on the date of the death of the surviving testatrix, and that is the controlling factor.

For the reasons heretofore stated, the judgment of the trial court should be and hereby is reversed and the cause is remanded with directions to enter a judgment for defendant.

REVERSED AND REMANDED WITH DIRECTIONS.

ELIZABETH WRIGHT ET AL., APPELLEES, V. EARL BARCLAY ET AL., APPELLANTS.
36 N. W. 2d 645

Filed April 1, 1949. No. 32510.

Landlord and Tenant: Vendor and Purchaser. An option contained in a lease to purchase the property and so destroy the tenancy is not one of the terms of the tenancy itself. While it may be made a provision of a lease and incorporated therein it is, nevertheless, a provision outside of the terms which regulate the relations between the parties as landlord and tenant. It is not one of the terms of the original tenancy which will be incorporated into the tenancy created by a tenant holding over after the expiration of the lease unless, by apt language therein, it is so provided.

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

James F. Begley, A. L. Tidd, Max Kier, and *J. T. Stanton,* for appellants.

Emmet L. Murphy and *John N. Baldwin,* for appellees.

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

WENKE, J.

Elizabeth Wright and Roland Pruess commenced this action in the district court for Cass County against Earl Barclay, E. P. Stewart, and Nyle C. Stewart. The purpose of the action is to obtain the specific performance of a provision in a lease which plaintiffs claim gives them an option to purchase certain real property. From a decree in favor of the plaintiffs the defendants have appealed.

For the purpose of this opinion the parties will be referred to as they appeared in the lower court or by their proper names.

While the record discloses considerable conflict in the evidence on immaterial matters it shows little, if any,

dispute on matters material to the issues. The parties have either admitted by their pleadings or the evidence establishes the following: That Barclay was the owner of the west one-half of Lot 9, Block 29, in the city of Plattsmouth, Cass County, Nebraska; that this property is located in the main business part of the city; that on it is a two-story building with a full basement; that the ground floor is used for business and, at the time herein involved, was being operated as a restaurant; and that the second floor consists of seven rooms and was being used as living quarters by the plaintiffs and their families.

On October 17, 1945, Barclay entered into a written lease on these premises for a period of one year. This lease was with Ben A. and Ida M. Hull and extended from November 1, 1945, to November 1, 1946. The consideration therefor was $840 payable at the rate of $70 a month. The monthly payments were payable on the first of each month, in advance, at the Plattsmouth State Bank located in Plattsmouth. This lease contained no provision for either an extension or renewal.

This lease contained the following provision: "Should party of the first part wish to sell this property during the term of this lease he agrees to give parties of the second part the option of purchase at the highest price offered."

If this option was in force and effect when Barclay sold these premises to the Stewarts then it was sufficiently definite to be enforced. See, Harper v. Runner, 85 Neb. 343, 123 N. W. 313, and Anderson v. Stewart, 149 Neb. 660, 32 N. W. 2d 140.

Subsequent to the execution of the lease the plaintiffs purchased the restaurant business being operated therein from the Hulls and they assigned their interest in the lease to the plaintiffs by endorsement thereon as of February 14, 1946. This assignment was agreed to and approved by Barclay by written endorsement thereon dated February 15, 1946. Pursuant thereto the plaintiffs went into possession of the building and have, ever since,

operated the restaurant and lived in the rooms on the second floor. It would appear they have conducted it as a family business and have been very successful in the operation thereof.

This assignment, approved by Barclay, gave the assignees all of the lessees' rights in and to the lease, including the option. See, Myers v. Stone & Son, 128 Iowa 10, 102 N. W. 507, 111 Am. S. R. 180, and Berrien County Fruit Exchange v. Pallas, 314 Mich. 66, 22 N. W. 2d 74.

Sometime prior to June 1946, the plaintiffs had leases prepared for these premises covering the period from November 1, 1946, to November 1, 1947. They provided for the same rental terms. These leases are dated March 23, 1946, but were not offered to Barclay until sometime in June of that year. In addition to the foregoing provisions they also provided that the lessee should have the right to extend the lease for an additional period of one year, to November 1, 1948, and in addition thereto it contained an option giving the lessee the right to purchase the property during the term thereof, or the extension, if lessor should wish to sell. The option to purchase was phrased in the same language as in the original lease.

This proposed lease was never executed nor was any other lease entered into. The plaintiffs, after the expiration of the written lease which had been assigned to them, continued to hold over and pay rent to Barclay. This they continued to do from November 1, 1946, up to and including April 1, 1947.

On March 31, 1947, without consulting the plaintiffs or notifying either of them, Barclay entered into a contract for the sale of these premises to A. J. Trilety of Plattsmouth. Trilety was, at that time, a real estate agent and purchasing the property for the defendants E. P. and Nyle C. Stewart. At that time Barclay received $1,000 of the purchase price, which was $5,000. Thereafter, on April 11, 1947, Barclay received the balance of the purchase price and conveyed the property to the Stewarts.

As a result of the sale this litigation developed because

plaintiffs contend they had an option to purchase the premises by reason of their lease and by this action seek to enforce it.

Much of the evidence in the record relates itself to the conduct of the parties after the sale. Such conduct is immaterial for the plaintiffs were in actual possession of the property and such possession would be notice to any purchaser of whatever rights they had. See, Scharman v. Scharman, 38 Neb. 39, 56 N. W. 704, and Dengler v. Fowler, 94 Neb. 621, 143 N. W. 944. However, if they had no option rights at the time the Stewarts, through Trilety, bought the premises from Barclay they acquired none by the conduct of the parties subsequent thereto.

Since there was no agreement in the lease for an extension or any agreement entered into by the parties for the renewal thereof, the first question for our consideration is what are the rights of the appellees, as tenants holding over their term, as they relate to the option provision in the written lease?

We have said: " * * * in this jurisdiction, by legislative action (Comp. St. 1929, sec. 49-101), we have adopted the common law of England as governing the relation of landlord and tenant." Roberts v. Rogers, 129 Neb. 298, 261 N. W. 354. Section 49-101, Comp. St. 1929, is now section 49-101, R. S. 1943.

Options should be strictly construed and not extended beyond the express provisions thereof. If the parties desire to extend an option in a lease beyond the term thereof they can easily use language expressly so providing but the law should not do so for them.

We have said: "The option is part of the lease, and every provision in that instrument is supported by the identical consideration that vitalized all other parts thereof. Hall v. Center, 40 Cal. 63; Frank v. Stratford-Handcock, 13 Wyo. 37, 77 Pac. 134." Harper v. Runner, *supra*. However, in Mauzy v. Elliott, 146 Neb. 865, 22 N. W. 2d 142, we said: "The latter was not an essential covenant of the 1942 lease as such but an independent option there-

in, * * *." See Carter v. Frakes, 303 Ky. 244, 197 S. W. 2d 436. The provision in the written lease herein involved is not an essential covenant thereof but an independent option therein for the term of the lease.

"When a tenant with the consent of his landlord, express or implied, holds over his term, the law presumes a continuation of the original tenancy for another like term and upon the same conditions." Bradley v. Slater, 50 Neb. 682, 70 N. W. 258.

"* * * when a term stipulated in a written lease for a year has ended, and the landlord recognizes him as tenant thereafter by receiving rent or in any other way, showing that both parties regard the relation of landlord and tenant as still continuing, and there is no further agreement as to the terms of the tenancy, defendant is to be considered as holding for another term upon the same conditions as specified in the original lease." Krull v. Rose, 88 Neb. 655, 130 N. W. 272.

We think an option contained in a lease to purchase the property and so destroy the tenancy is not one of the terms of the tenancy itself. While it may be made a provision of a lease and incorporated therein it is, nevertheless, a provision outside of the terms which regulate the relations between the parties as landlord and tenant. It is therefore not one of the terms of the original tenancy which will be incorporated into the tenancy created by a tenant holding over after the expiration of the lease. See, subdivision 3 of Annotation, 37 A. L. R. 1246; Andreula v. Slovak Gymnastic Union Sokol Assembly, 140 N. J. Eq. 171, 53 A. 2d 191; Napper v. Rice, 127 W. Va. 157, 32 S. E. 2d 41; In re Leeds & Batley Breweries Limited, 2 Ch. D. (1920) 548.

We recognize there are holdings contrary to this view. See, subdivision 3 of Annotation, 163 A. L. R. 712, and Gressitt v. Anderson, 187 Md. 586, 51 A. 2d 159. But options should be strictly construed and not extended beyond the express provision thereof. If the parties to a lease desire that an option contained therein should

extend beyond the term thereof, to a tenant holding over, they can easily use apt language to express that purpose but the law should not, by implication, enlarge the legal rights of a tenant holding over beyond the terms and conditions necessary to continue the landlord tenant relationship.

In view of what we have said it is apparent that the option to purchase, contained in the written lease dated October 17, 1945, terminated on November 1, 1946, and that the appellees had no rights thereunder as tenants holding over the term fixed therein. Such being true the trial court was in error in granting appellees specific performance thereof.

The decree of the trial court is therefore vacated and set aside and the cause remanded with directions to enter judgment in favor of the appellants and dismiss appellees' cause of action. Costs are taxed to appellees.

REVERSED AND REMANDED WITH DIRECTIONS.

JAMES F. HILTON, APPELLEE, V. THE FIRST TRUST COMPANY OF YORK, YORK, NEBRASKA, A CORPORATION, AS EXECUTOR, ET AL., APPELLANTS.
36 N. W. 2d 571

Filed April 1, 1949. No. 32516.

1. **Executions.** An execution issued by the clerk of a district court upon a transcripted judgment of a justice of the peace or county judge of the same county and delivered to the sheriff and by him returned unsatisfied will prevent the judgment from becoming dormant.
2. **Judgments.** When a judgment has been rendered by the county court and a transcript thereof filed in the district court of the same county then the district court may properly transcript such judgment to any other district court.
3. **Executions.** In an equity suit in aid of execution, in the absence of any showing to the contrary, the plaintiff's burden of showing the exhaustion of his legal remedies is satisfied by proof of an execution returned unsatisfied.

APPEAL from the district court for York County: H. EMERSON KOKJER, JUDGE. *Affirmed.*

Kirkpatrick & Dougherty, for appellants.

Perry & Ginsburg and *John D. Zeilinger,* for appellee.

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

WENKE, J.

James F. Hilton brought this action in the district court for York County against The First Trust Company of York, of York, Nebraska, as such, and as executor of the estate of Anna J. Morrison, deceased, and Thomas C. Bradley, Jr.

The purpose of the action is to impound a sufficient amount of the funds due Bradley, under and by virtue of a legacy provided for him in the last will and testament of Anna J. Morrison, deceased, and which are in the hands of the executor of said estate, to satisfy an unsatisfied judgment rendered by the county court of Box Butte County in favor of Hilton and against Bradley. The estate of Anna J. Morrison, deceased, is being probated in the county court of York County.

The trial court entered its decree in favor of the plaintiff. The defendants filed their motion for new trial and appeal from the overruling thereof.

The facts are not in dispute. On March 3, 1936, the appellee obtained a judgment in the county court of Box Butte County, Nebraska, against the appellant, Bradley, in the amount of $321.05 with interest and costs. Thereafter, on March 4, 1940, that court issued an execution thereon which was returned unsatisfied.

Afterward, on January 13, 1945, a certified transcript of that judgment was filed in the office of the clerk of the district court for Box Butte County, and, on February 9, 1945, that court issued an execution thereon. This execution was returned unsatisfied.

On January 16, 1945, there was filed in the office of

the clerk of the district court for York County, Nebraska, a certified transcript of this judgment from the district court for Box Butte County. Execution was issued thereon by the clerk of the district court for York County on January 16, 1945, and was by the sheriff of that county returned unsatisfied.

On July 19, 1947, the appellee brought this action against the executor of the estate to reach assets of his judgment debtor; a sufficient amount being then in its possession to satisfy the judgment, interest, and costs.

"A creditors' suit may be maintained to impress a lien upon the distributive share of a judgment debtor in a decedent's estate, which is in process of administration in the county court, and to require the administrator or executor to account for it, after order of distribution by the county court, to the clerk of the district court or to a receiver appointed for that purpose." Fremont Farmers Union Cooperative Assn. v. Markussen, 136 Neb. 567, 286 N. W. 784, 123 A. L. R. 1287. See Emerson-Brantingham Implement Co. v. Hallgren, 146 Neb. 530, 20 N. W. 2d 501.

The first question presented by the appeal is, did the issuance of an execution by the district court for Box Butte County on the judgment transcripted to it from the county court thereof and returned unsatisfied keep that judgment from becoming dormant?

In Godman v. Boggs, 12 Neb. 13, 10 N. W. 403, we said: "An execution issued by the clerk of a district court upon a transcript of a judgment of a justice of the peace or county judge and delivered to the sheriff, and by him levied upon real estate, and afterwards, before the sale, returned unsatisfied by order of the creditor in execution, will prevent the judgment becoming dormant." See, also, Glenn v. Glenn, 79 Neb. 68, 112 N. W. 321.

For further discussion and authority as to the right to revive in either the district or county court, when a judgment of a county court has been transcripted to

the district court of the same county, see Dennis v. Omaha National Bank, 19 Neb. 675, 28 N. W. 512; Garrison v. Aultman & Co., 20 Neb. 311, 30 N. W. 61; Creighton & Morgan v. Gorum, 23 Neb. 502, 37 N. W. 76; Furer v. Holmes, 73 Neb. 393, 102 N. W. 764; Bussing v. Taggert, 73 Neb. 787, 103 N. W. 430.

The second question raised by the appellants is, may a judgment rendered by a county court and transcripted therefrom to the district court of the same county be, by the district court, transcripted to the district court of any other county?

In view of our holding in Lamb v. Sherman, 19 Neb. 681, 28 N. W. 319, we find such procedure to be proper. Therein we held: "A judgment was rendered in the county court of J. county, and a transcript thereof filed in the district court of said county, and a duly certified transcript from the district court of J. county was filed in the district court of T. county Feb. 19, 1876. In January, 1878, the debtor and his wife conveyed their real estate in T. county to one S., the deed being acknowledged and recorded May 6th, 1878. Held, That the real estate was subject to the lien of the judgment."

Even if the statutes cited by appellants with reference to the foregoing could be otherwise construed we would not, in the absence of legislative change relating directly thereto, overrule the long established judicial construction thereof, which holdings may affect vested property rights, unless such holdings are clearly wrong. Such we do not find to be the fact.

In an equity suit in aid of execution, in the absence of any showing to the contrary, the plaintiff's burden of showing the exhaustion of his legal remedies is satisfied by proof of an execution returned unsatisfied.

As stated in Thompson v. La Rue, 59 Neb. 614, 81 N. W. 612: "The judgment creditor, having had his execution duly issued and returned wholly unsatisfied, is entitled to maintain his equity action for the satisfaction of his debt; * * *." See, also, Cochran v. Cochran, 62

Neb. 450, 87 N. W. 152, and Coffield v. Parmenter, 2 Neb. (Unoff.) 42, 96 N. W. 283.

We find no error in the trial court's proceedings and judgment and the same are therefore affirmed.

AFFIRMED.

RICHARD J. ANDERSEN ET AL., APPELLANTS, V. TOWN OF MAPLE, DODGE COUNTY, NEBRASKA, APPELLEE.
36 N. W. 2d 620

Filed April 7, 1949. No. 32486.

1. **Waters.** Water flowing in a well-defined watercourse may not lawfully be diverted and cast upon the lands of adjoining landowners where it was not wont to run according to natural drainage.
2. **Injunction.** Equity will afford relief by injunction against a continuing injury to land caused by an unlawful diversion of the waters of a natural watercourse by a township board.

APPEAL from the district court for Dodge County: RUSSELL A. ROBINSON and H. EMERSON KOKJER, JUDGES. *Reversed and remanded with directions.*

Spear & Lamme and *Robert L. Flory*, for appellants.

Charles H. Yost and *Cook & Cook*, for appellee.

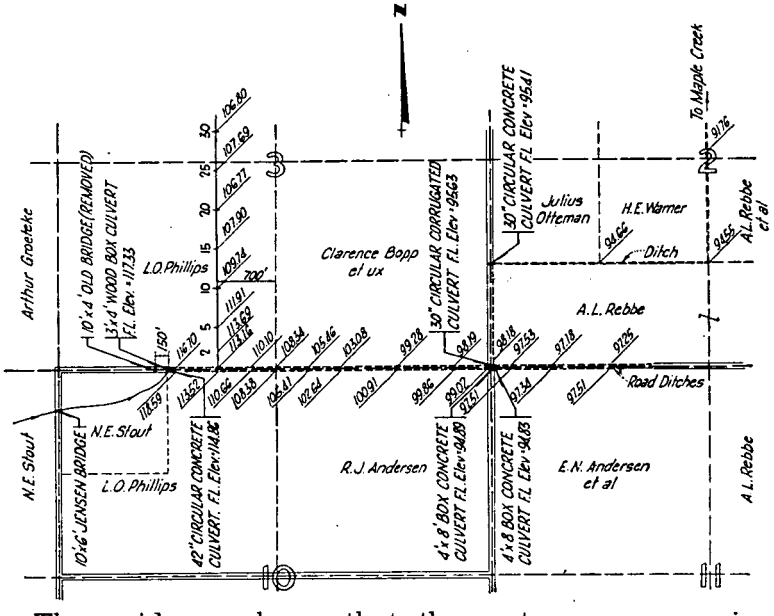
Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

CARTER, J.

This is a suit for a mandatory injunction to compel the defendant township to construct an opening across a township road to permit the waters of a natural watercourse to pass across or under the road as they were wont to do in its natural state. The defendant denied generally the allegations of plaintiffs' petition and alleged that the waters of the natural watercourse had

flowed where they now flow since 1905 and that the defendant has done nothing to interfere with the flow of the waters in the natural watercourse. The trial court found for the defendant and plaintiffs appeal.

The record shows that R. J. Andersen, one of the plaintiffs, was the owner of the northeast quarter of Section 10. The plaintiffs, E. N. Andersen, Carrie Mulloy, and Alice M. Andersen, are the owners of the northwest quarter of Section 11. This quarter section will hereinafter be referred to as the E. N. Andersen land. The plaintiffs, August L. Rebbe and Louis J. Rebbe, are the owners of the south half of the southwest quarter of Section 2, and other lands not material to this litigation. The road in question runs east and west along the north side of Sections 10 and 11 and along the south side of Sections 3 and 2. The southwest quarter of Section 3 and the south half and northeast quarter of the northwest quarter of Section 10 are owned by L. O. Phillips. The northwest quarter of the northwest quarter of Section 10 is owned by N. E. Stout and will hereafter be referred to as the Stout forty. The record shows that a natural watercourse entered the Stout land from the west and crossed this 40-acre tract in a northeasterly direction. At the time of the commencement of this litigation the watercourse crossed the township road at the northeast corner of the Stout forty. At this point there is a wood-box culvert across the road. This culvert is 3 feet by 4 feet. Near the point of crossing there is also a 42-inch circular, concrete culvert in the ditch along the south side of the road. The floor of the wood-box culvert is approximately 2½ feet higher in elevation than the floor of the concrete culvert. This results in a drainage of water to the east onto the lands of the plaintiffs and affords the basis of this suit. For convenience a plat showing the locality and certain facts testified to in the evidence is here shown.



The evidence shows that the watercourse crossing the Stout forty originates in Section 9 and drains an area of 640 acres or more. It follows a well-defined course across the Stout forty and carries a large amount of water when heavy rains fall in its drainage area. Many witnesses who have known the conditions existing in this area for long periods of time testified that these surface and flood waters formerly crossed the road west of the northeast corner of the Stout forty onto the lands of L. O. Phillips. For many years there was a bridge about 150 feet west of the northeast corner of the Stout forty. This bridge was 10 feet by 4 feet and was removed in about 1915. After this old bridge was removed, culverts were constructed at other points between the site of the old bridge and the north-

east corner of the Stout forty. During this period water flowed onto the Phillips land on the north side of the road through the culverts and over the road after heavy rains. It is evident, also, that the natural drainage course had a tendency to work its way east. In 1941 the wood-box culvert was built across the road at the northeast corner of the Stout forty. It is clear, from the record, that water crossed the road onto the Phillips land up to this time whenever heavy rainfall occurred in the drainage area of the watercourse. The evidence is that it would go northeast on the Phillips land for a distance of 20 rods or so and then make its way in a southeasterly direction toward the lands belonging to the plaintiffs. There is no direct evidence that this water ever found its way to Maple Creek by traveling across the Phillips land in a northeasterly direction.

The evidence shows that the lands of the plaintiffs near the common point of their intersection have always been a saucer-shaped, low area. Some water has stood on these lands after rainfalls, during the memory of the witnesses who have long been familiar with it. This situation resulted in the construction of a small drainage ditch from this intersection north along the county road for a quarter of a mile, then east for a half mile, then north to Maple Creek, as shown on the map. In the intersection of the township road with the county road at this point three culverts have been built in an attempt to drain this area through the drainage ditch to Maple Creek. A 4 foot by 8 foot concrete culvert was constructed across the county road in the south ditch along the south side of the township road. A similar culvert was constructed across the township road on the east side of the intersection into the drainage ditch running north. A 30-inch, circular, corrugated, iron culvert was placed in the ditch along the north side of the township road in this same intersection. The township road east of the intersection gradually increased in elevation, with the result that the only drainage of this area was

through the old drainage ditch heretofore described.

While the evidence shows a tendency of the watercourse on the Stout forty to work its way east, as we have heretofore explained, the evidence shows that the grading of the township road made some contribution to this result. In 1941 the defendant through its board of supervisors graded and graveled the township road and increased its elevation about a foot. It also installed the culvert across the road near the northeast corner of the Stout forty at this time. The bottom of this culvert was 2½ feet higher than the culvert in the south road ditch leading to the east from this point. The road ditches were cleaned out as part of the road-grading project. There is evidence that dirt was removed to permit the waters from the watercourse to flow east from this point, although the person or persons responsible for this dirt removal are not shown by the record. There is evidence also that wire netting was placed in the wood-box culvert to divert the water to the east along the south side of the township road. The perpetrator of this act also is not shown by the record. The construction of the box culvert at a higher elevation than the culvert in the south ditch, the raising of the elevation of the road over which water flowed after heavy rains, and the assistance rendered by unknown persons to divert this water to the east through the south-road ditch constitutes convincing evidence that the water from the natural watercourse, or substantial portions thereof, were diverted from their natural course to the east along the township road.

The evidence shows that the elevation of the south ditch along the township road had considerable fall to the east for approximately a half mile when it leveled off into a comparatively flat area. This resulted in the slowing up of the water, its consequent depositing of sediment and debris, and a spreading of the water over the lands of the Andersens which it had not previously invaded. Sediment lodged in the culverts in the common intersection and materially reduced their efficiency. The

evidence is clear that after 1941 more water accumulated over a larger area of the lands of this plaintiff than had been the case before that date. It is quite evident that the diversion of the water to the east, the increased velocity over that from which it was wont to flow in its natural state, and the consequent piling up of waters on plaintiffs' lands with their already limited drainage facilities have operated to damage the lands of these plaintiffs.

The evidence is convincing that the natural drainage across the Stout forty was to the northeast, as shown by the plat, and that its course was so defined on the surface of the ground as to constitute a natural watercourse. We conclude also that the natural watercourse continued across the township road and entered the Phillips land, where it lost its well-defined course and discharged its flow upon the Phillips land. Some of it percolated away, some was trapped in a low area, and some found its way to the southeast onto the low area on these plaintiffs' lands. The Phillips land is therefore burdened with the water discharged from this natural watercourse. Born v. Keil, 146 Neb. 912, 22 N. W. 2d 175. Water flowing in a well-defined watercourse cannot be lawfully diverted and cast upon the lands of others where it was not wont to run in the course of natural drainage. Kane v. Bowden, 85 Neb. 347, 123 N. W. 94; Keifer v. Stanley, 111 Neb. 822, 198 N. W. 144; Born v. Keil, *supra*. Where an obstruction in a natural watercourse constitutes a continuing and permanent injury to other landowners, such landowners may, on a proper showing, obtain a decree ordering the removal of the obstruction. Leaders v. Sarpy County, 134 Neb. 817, 279 N. W. 809; Born v. Keil, *supra*.

The fact that the waters discharged from the natural watercourse upon the Phillips land may find their way to the lands of the plaintiffs does not constitute a defense in the present case. If the Phillips land could be relieved of the burden of receiving the waters from the natural

watercourse without damage to other landowners, we think there would be no right to injunctive relief. But where, as here, the diversion results in the concentration of the waters into a ditch and an increase in their velocity, resulting in a piling up of the waters on the lands of plaintiffs because of the limited drainage facilities in that area, the plaintiffs are entitled to relief from the damage thus caused. The claim of the defendant that it has an easement by prescription to divert the waters of the natural watercourse into the south road ditch has no merit. The statutory period of ten years since the building of the wood-box culvert at the northeast corner of the Stout forty and the increase in elevation of the township road occurred less than ten years prior to the commencement of this suit. The basis for an easement by prescription does not exist.

There is evidence in the record that if the drainage ditch referred to in the evidence were properly maintained the flooding of plaintiffs' lands would be averted. Assuming that this is true, plaintiffs are not required to assume such burden in order to free their lands of the waters which the defendant has unlawfully dumped upon them. Injunction affords the proper remedy in such a case. Jacobson v. Van Boening, 48 Neb. 80, 66 N. W. 993, 58 Am. S. R. 684, 32 L. R. A. 229; Born v. Keil, *supra*.

The judgment of the district court is therefore reversed and the cause remanded with instructions to issue a mandatory injunction as prayed for by the petitioners, and for such other relief as justice and equity may require.

REVERSED AND REMANDED WITH DIRECTIONS.

GLADYS MAY THOMPSON, APPELLEE, V. PHILO P. THOMPSON, APPELLANT.
36 N. W. 2d 648

Filed April 7, 1949. No. 32590.

1. **Officers.** The purpose of section 23-1206, R. S. 1943, is to protect the public by making certain that the duties of county attorneys are not influenced by private interest.
2. **Trial.** Where a county attorney participates in the trial of a civil action and no objection is made by opposing counsel, who has full knowledge of the facts upon which disqualification is based, its assertion for the first time in a petition to vacate the decree comes too late. Any right the opposing party may have had under the statute is waived.

APPEAL from the district court for Dixon County: SIDNEY T. FRUM, JUDGE. *Affirmed.*

Carlos W. Goltz and *Mark J. Ryan*, for appellant.

Harry N. Larson, for appellee.

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

CARTER, J.

This is a proceeding to vacate a decree of divorce for the reason that plaintiff's attorney was disqualified from so acting under the provisions of section 23-1206, R. S. 1943. The trial court refused to set the decree aside and the defendant appeals.

The plaintiff, Gladys May Thompson, filed her petition for divorce against the defendant, Philo P. Thompson, on July 9, 1947, on the ground of extreme cruelty. The petition was filed by John E. Newton who was at the time the county attorney of Dixon County. The defendant filed his amended answer and cross-petition on October 25, 1947, wherein he set out in part the following: "that on or about the month of October, 1945, the plaintiff went to the County Attorney of Dixon County and falsely accused the defendant of having beaten her and caused a complaint to be filed charging him with

assault and battery." To this complaint the defendant entered a plea of guilty. The amended answer and cross-petition also alleged "That on the 7th day of July, 1947, the plaintiff again caused a similar complaint to be filed against this defendant * * *." The defendant pleads that he left the county until this prosecution was abandoned by the plaintiff. No objection to the participation of John E. Newton was made and, after trial, a divorce was granted the plaintiff.

On May 3, 1948, the defendant filed a petition in the divorce action to vacate the decree of divorce on the ground that John E. Newton, the attorney for the plaintiff, was at the time the county attorney of Dixon County; that John E. Newton had twice prosecuted him for assault and battery against his wife; and that as attorney for plaintiff he used the same evidence in this action that he had used in the criminal prosecutions. It is asserted that the criminal complaints and the charge of cruelty in the divorce action depended upon the same state of facts and that John E. Newton, under such circumstances, was disqualified from representing the plaintiff by virtue of section 23-1206, R. S. 1943. Defendant further alleges that he was prejudiced thereby and that the decree rendered in the divorce action was a nullity because of the participation of John E. Newton as counsel for the plaintiff.

By her answer plaintiff denied that the criminal complaints and the suit for a divorce depended upon the same state of facts, or upon facts investigated by John E. Newton in his capacity as county attorney. Plaintiff further alleges that defendant and his counsel were before and throughout the trial familiar with the participation of John E. Newton as plaintiff's attorney, that no objection was made, that any objection that might have been made was waived, and that defendant is now estopped to have the decree of divorce vacated for the purpose of securing a new trial.

The pertinent part of section 23-1206, R. S. 1943,

provides: "No prosecuting attorney * * *; nor shall he act or be concerned, as an attorney or counsel for either party, other than for the state or county, in any civil action depending upon the same state of facts upon which any criminal prosecution, commenced or prosecuted, shall depend, or depending upon the same state of facts, investigated by him, while acting as county coroner."

The purpose of the foregoing statute is the protection of the public by making certain that a county attorney's duties shall not be influenced by private interest. Ress v. Shepherd, 84 Neb. 268, 120 N. W. 1132. It is a wholesome rule that should be followed by attorneys filling the position of county attorney, and enforced by courts in cases where the statute is infringed. But a party to a civil suit, having full knowledge of the facts, is required to make his objection to the participation of the disqualified attorney to the trial court. He may not sit by and take his chances on a favorable judgment and then claim the disqualification as prejudicial error entitling him to a new trial.

In Webber v. Barry, 66 Mich. 127, 33 N. W. 289, 11 Am. S. R. 466, a case involving a statute similar to the one here involved, the court said: "It would have been the most proper course, it seems to me, for the defense to have objected to Davitt's taking any part in the trial at the beginning. Instead of this, they sat by and allowed him to participate in selecting the jury without any demur or protest. They knew then as well as afterwards the part he had taken in the criminal prosecutions. * * * If, when they pleaded to Davitt's declaration, he had taken part in the criminal proceedings, their plea was a waiver of any objection they might have to his commencement of the suit; and, if they found it out later, it was their duty to move at once. In my opinion they waived by their acts all legal objection, if there was any, to the commencement of suit by Davitt, or his participation in selecting the jury." The following cases are to

the same effect: Snyder v. Tribune Co., 161 Iowa 671, 143 N. W. 519; State v. Smith, 108 Iowa 440, 79 N. W. 115.

The quotations cited from the defendant's answer and cross-petition show conclusively that defendant and his counsel were familiar with the facts. No objection was made until the petition to vacate the decree of divorce was filed. The objection comes too late. Assuming without deciding that the evidence was sufficient to bring John E. Newton within the purview of the statute, the violation was waived insofar as the defendant is concerned. The trial court was right in denying the petition praying for the vacation of the decree of divorce.

Plaintiff, Gladys May Thompson, is allowed an attorney's fee for services rendered in this court in the amount of $150.

AFFIRMED.

NAOMI E. JENKINS ET AL., APPELLEES, v. JAY O. JENKINS ET AL., APPELLANTS.
36 N. W. 2d 637

Filed April 7, 1949. Nos. 32494, 32495.

1. **Attorney and Client.** When two or more persons employ the same attorney in relation to the same business, their communications are not privileged between themselves, even though their interests may be diverse, where the disclosures are made in the presence of all parties concerned, or are intended for the information of all parties.
2. **Trusts.** A constructive trust is a relationship with respect to property subjecting the person by whom the title is held to an equitable duty to convey it to another on the ground that his acquisition or retention of the property is wrongful and that he would be unjustly enriched if he were permitted to retain the property.
3. ———. The law is well established that each case is to be determined from the facts, circumstances, and conditions, as presented therein.
4. **Frauds, Statute of.** The burden is on the party claiming the estate of a person deceased under an alleged oral contract, to

prove such contract, the terms of which must be clear, satisfactory, and unequivocal, and that the acts of such party constituting performance were such as were referable solely to the contract sought to be enforced, and not such as might be referable to some other or different contract.

APPEAL from the district court for Lincoln County: J. LEONARD TEWELL, JUDGE. *Affirmed.*

Beatty, Clarke & Murphy and *Earl E. Morgan,* for appellants.

C. L. Baskins and *E. H. Evans,* for appellees.

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

MESSMORE, J.

This appeal involves two actions in equity, one for the partition of certain real estate, the other to quiet title to an undivided two-fifths interest therein of Pearl E. Crable, deceased.

It appears from the record that from and after 1902, until 1941, William H. Jenkins was the owner of the northwest quarter and the southwest quarter of Section 19, Township 14 North, Range 32 West, sixth principal meridian, situated in Lincoln County, Nebraska, except a strip of land conveyed to the state for road purposes and a strip of land conveyed to a drainage district and occupied by it for right-of-way across said lands, subject to two mortgages in the amount of $16,000. William H. Jenkins departed this life in 1941. By his will he devised this land to his children, Elmer R. Jenkins, Lizzie LaFevers who predeceased him her share going to Dorthey Leatherwood her daughter and sole surviving heir at law, Pearl E. Crable, Harry E. Jenkins an adjudged incompetent, and Jay O. Jenkins, each an undivided one-fifth interest, and to his daughter Laura E. Bales he devised the residue of his estate consisting of real estate and personal property. The mortgage indebtedness was compromised with the approval of the

district court by the administrator with the will annexed, giving a mortgage to one A. E. Holtgren in the amount of $12,000. After the distribution of the estate of William H. Jenkins, Dorthey Leatherwood and her husband conveyed her one-fifth interest in this land to Jay O. Jenkins and Pearl E. Crable for $2,500, and on the same day Jay O. Jenkins, his wife, and Pearl E. Crable, gave to Dorthey Leatherwood a mortgage for $1,850 as part of the purchase price of her interest in the land, subject to a $12,000 mortgage to A. E. Holtgren. The deed was subject to the same mortgage.

On August 10, 1944, Elmer R. Jenkins commenced a suit for partition of this land, alleging that he and Harry E. Jenkins each owned an undivided one-fifth interest therein and that Jay O. Jenkins and Pearl E. Crable each owned an undivided three-tenths interest therein, the entire estate being subject to the Holtgren mortgage of $12,000, and the one-fifth interest acquired by Jay O. Jenkins and Pearl E. Crable from Dorthey Leatherwood being subject to a $1,850 mortgage.

At the refere 's sale held November 1, 1944, Jay O. Jenkins bid $34,000 which included the mortgage indebtedness to Holtgren upon which there was due approximately $10,000. This bid was subject to drainage district assessments in the amount of $2,695 exclusive of the mortgage. The sale was confirmed on February 5, 1945. After deducting the mortgage indebtedness and the expenses of the proceedings there was a net sum of $23,469.84 for distribution among the owners of the land: To Harry E. Jenkins and Elmer R. Jenkins each the sum of $4,693.94, and to Jay O. Jenkins and Pearl E. Crable each the sum of $7,040.95 subject to the mortgage interest of Dorthey Leatherwood in the sum of $450 which sum was to be deducted equally and proportionately from the shares otherwise due Jay O. Jenkins and Pearl E. Crable. The referee filed receipts showing distribution of the proceeds of the sale, including the release of the Dorthey Leatherwood mortgage.

The Holtgren mortgage was released on February 9, 1945, and on the same day Jay O. Jenkins and wife, and Pearl E. Crable gave a mortgage to Holtgren on this land for $18,400 to secure their notes for that sum. Ten thousand dollars of this sum represented the balance due Holtgren on the prior mortgage and $8,400 was paid to the referee upon the bid of Jay O. Jenkins to satisfy it.

On February 9, 1945, the referee's deed was executed in favor of Jay O. Jenkins and was recorded March 19, 1945. On the same day Jay O. Jenkins and wife executed a deed to an undivided two-fifths interest in the land to Pearl E. Crable, "subject to first mortgage to A. E. Holtgren for $18,400.00 which both parties have executed upon the entire premises and of which said mortgage grantee assumes and agrees to pay two-fifths thereof as between the parties hereto." The deed recites a consideration of "one dollar and assumption of indebtedness."

Before confirmation of the sale Elmer R. Jenkins was dissatisfied with the amount to be paid by Jay O. Jenkins and threatened to file objections to confirmation of the sale. By agreement between Jay O. Jenkins and Elmer R. Jenkins, the latter was to receive $5,000 for his one-fifth interest in consideration of permitting the sale to be confirmed without objections on his part so, on November 25, 1944, when this agreement was made, Jay O. Jenkins gave his check for $1,500 to Elmer R. Jenkins to apply on the agreement. On December 6, 1944, Elmer R. Jenkins and wife executed a warranty deed to Elmer R. Jenkins' one-fifth interest to Jay O. Jenkins.

Pearl E. Crable died March 10, 1946, intestate. Her estate was administered in the county court of Lincoln County. She left as her sole and only heirs at law Elmer R. Jenkins, Harry E. Jenkins, Jay O. Jenkins, Laura E. Bales, and Dorthey Leatherwood, niece, and whatever estate she owned at the time of her death descended to her said heirs each an undivided one-fifth interest. At the time of her death Pearl E. Crable was the guardian of Harry E. Jenkins, incompetent. The

inventory filed by the administrator for Pearl E. Crable's estate listed an undivided two-fifths interest in the land heretofore described.

After the administration of his father's estate, Jay O. Jenkins managed the farm, collected the rents, and paid the expenses, certain amounts on the principal, and interest on the mortgage. On March 15, 1943, Pearl E. Crable gave a power of attorney to Jay O. Jenkins with respect to the management of her interest in the land left to her by her father. Another agreement appears in the record under date of December 23, 1941, between the parties and the mortgagee A. E. Holtgren, appointing him to manage and operate the land during the term of the mortgage and until the same was fully discharged.

The defendant Jay O. Jenkins, in his answer and cross-petition in the two actions, alleges that he is the sole fee simple title owner of all the real estate described in the plaintiffs' petition, and that none of the parties have any interest or acquired any title thereto, and prayed title be quieted in him.

In the partition action the defendant Jay O. Jenkins, in his cross-petition, alleged an oral agreement made between himself and Pearl E. Crable to the effect that he should have the absolute fee simple title in the land, and in consideration of the same he was to assist Pearl E. Crable during her lifetime with reference to taking care of her and managing her financial affairs for the reason that she was in poor health; and, further, the agreement provided that upon his death his wife would have the life estate, and upon her death the land would go to Pearl E. Crable. Pursuant to and in the performance of the understanding of such agreement, the deed to Pearl E. Crable was never delivered to her nor recorded, but left within the exclusive possession of Jay O. Jenkins.

The defendant Jay O. Jenkins further alleged that he had never been repaid by Pearl E. Crable for any part of the interest purchased by him from Dorthey Leather-

wood, nor any part of other moneys expended by him for said real estate. The prayer was to quiet title to the real estate in Jay O. Jenkins, and that all the other parties to the action be adjudged to have no title or interest therein.

The record discloses that the deed from Jay O. Jenkins and his wife to Pearl E. Crable conveyed an undivided two-fifths interest in the land in question, subject to the first mortgage of A. E. Holtgren for $18,400, was signed and acknowledged in the presence of a notary by the grantors and was transmitted by letter dated February 13, 1945, to Pearl E. Crable by counsel who prepared the deed. The note and mortgage to A. E. Holtgren and the deed to Pearl E. Crable were executed about the same time.

Jay O. Jenkins testified that Pearl E. Crable gave her personal check dated February 10, 1945, to Elmer R. Jenkins for $306.03 to pay up the balance of the partition proceedings. One-half of the balance of Dorthey Leatherwood's mortgage of $450 was deducted from Pearl E. Crable's share of the amount due her on the partition sale, and the remaining amount to Pearl E. Crable of $6,815.95 was left as part of the purchase price of the land bid in by Jay O. Jenkins. Pearl E. Crable assumed two-fifths of the Holtgren mortgage. One-half of the balance of the Dorthey Leatherwood's mortgage of $450 was deducted from Jay O. Jenkins' share of the amount due him in the partition action. The balance of $6,815.95, constituting his share in the sale of the land, was left in the land to enable him to bid it in. He assumed three-fifths of the Holtgren mortgage. He gave a check signed by himself to the referee in the partition sale dated February 9, 1945, in the amount of $450, evidencing the balance due on Dorthey Leatherwood's mortgage. At the same time he gave a check signed by himself to A. E. Holtgren in the amount of $18.10, the difference on the principal of the mortgage to enable the new mortgage to be made in round figures.

There are 20 checks signed by Jay O. Jenkins in the record dating from September 8, 1942, through December 20, 1944, evidencing payments made to Dorthey Leatherwood for her interest in the land, totaling $2,055.38.

On May 15, 1943, the date the transaction was had with Dorthey Leatherwood, Pearl E. Crable gave to Jay O. Jenkins a check for $200 which stated on its face: "Payment Dorthey's share of farm." Jay O. Jenkins testified that he borrowed this amount from Pearl E. Crable for the reason that he was running short on some supply house bills, and that he paid her back in cash from time to time. There is nothing in the record to disclose what part, if any, of this amount he paid back.

It clearly appears from what has been heretofore set forth that Pearl E. Crable purchased a two-fifths interest in the land in controversy and of which she died seised.

Jay O. Jenkins testified in addition that he and Pearl E. Crable decided they wanted to keep the land if they could, and that he would like to have the farm; that the two of them did take it over; and that they so informed Mr. Evans, the counsel who handled the litigation, with reference to their agreement and how they proposed to handle the same. After the deed to Pearl E. Crable and the mortgage to Holtgren were made, the deed was left in Evans' office and thereafter Pearl E. Crable brought it to Jay O. Jenkins' office and handed it to him. She never asked for it thereafter, and he had possession of it at all times. He further testified that Pearl E. Crable's health was not good and that he and his wife looked after her whenever they knew there was anything wrong with her, because she had said that if anything happened to her it was up to them to look after her. He testified that Pearl E. Crable told a Mr. VanCleave, in his presence, that she knew if she became ill it would be up to Jay and his wife to look after her. He further testified: "She said that if anything happened to her, her interest

was to come to me; and if anything happened to myself, my wife would be taken care of and my interest was to go to her." She tried to see attorney Evans on several occasions but was not able to contact him. Pearl and her sister Mrs. Laura E. Bales did not get along very well due to a claim that Pearl had filed against their father's estate for caring for him when Mrs. Bales had moved out of the state. He further testified that Pearl did not discuss her personal financial matters with him, but did discuss matters relating to the farm, and when she sold her house she sought his advice. He further testified that he discussed the matter with Pearl about the property going to him, his wife, or Pearl by right of survivorship, in Mr. Evans' office, and after that time; that Mr. Evans was in and out of the room, but before they got through they told him about the whole transaction, what their agreement was and their plans to have survivorship deeds made. They never got around to making survivorship deeds.

Ella Holtgren testified that she knew the Jenkins family; that in a conversation when Pearl E. Crable was talking about the farm and the rents she said that neither she nor Jay O. Jenkins had ever obtained any profit from it so far, but they hoped they would; that she was having a survivorship deed made; and that she and Jay had agreed to have survivorship deeds made providing in case she should pass away first her part was to go to Jay and his wife, and they in turn were having a survivorship deed made which would go to her in case they passed away first.

The witness VanCleave who had been acquainted with Pearl E. Crable for ten years testified that he had conversations with her wherein she told him that she and Jay were planning to buy the farm between them and go fifty-fifty; that if anything should happen to her it would go to Jay, and if anything happened to Jay it was supposed to come to her; that she was going to have Evans prepare the papers in accordance with the

agreement; that Jay was managing the farm in good shape; that she was ill at the time; and that this and other conversations of like nature occurred several times.

George L. Jorgensen testified that after the partition sale Pearl E. Crable came out to the farm, he being a tenant thereon, and stated that she was satisfied with the manner in which Jay O. Jenkins was handling things; that they were going to have survivorship deeds made so if anything happened to her the farm would go to Jay O. Jenkins, and if anything happened to him it would go to her.

To like effect was the testimony of Jennie Wooley, a friend of Pearl E. Crable's. This witness testified that when Pearl got the deed for her two-fifths interest she was going to leave it with Jay O. Jenkins and not have it recorded; that about a week prior to the time she died she told this witness that she had not had the papers made out but she still wanted Jay and his wife to have everything that she had; and that she was feeling badly at the time. She further testified that Jay O. Jenkins and his wife helped Pearl Crable when she was ill, and this witness, with Jay's wife took care of her and carried things for her to eat; and that Jay's wife did her laundry, which she had been doing for several years. Pearl told this witness that if she should get sick and not be able to work it would fall upon Jay and his wife to take care of her. Pearl E. Crable also told this witness about the trouble with her sister, Mrs. Bales, and that the agreement between Jay O. Jenkins and herself was for survivorship deeds to be made.

The witness Clinton Cox testified to substantially the same set of facts as other witnesses regarding the disposition of the land owned by Pearl E. Crable, also that he had seen a memorandum which she had intended to give to the attorney preparing her will wherein she wanted Jay O. Jenkins to have the land and his wife to have her car.

A cousin of the Jenkins children testified to having

met Pearl E. Crable in a market where she told this witness that she had been unable to contact her attorney to have papers made up providing for a survivorship deed between Jay O. Jenkins and herself in accordance with their agreement, and that she was going to do this right away on account of the doctor's advice that she was ill.

On rebuttal Emit Bales, a brother-in-law of Pearl E. Crable, testified that he was in Evans' office after Pearl E. Crable's funeral with Jay and Elmer Jenkins, Mrs. Bales, and Elmer's wife, and heard a conversation between Evans and Jay O. Jenkins relative to whether there was a will, and whether there was a deed showing the ownership that Pearl E. Crable had in the farm, and Jay told them that he did not know anything about a deed to Pearl.

Attorney E. H. Evans testified that he handled the William Jenkins estate, the partition proceedings, the estate of Pearl E. Crable, the guardianship of Harry E. Jenkins, and represented William H. Jenkins during his lifetime. He further testified with reference to certain proceedings had in connection with the land between the parties; that he made the settlement in the partition proceedings, and the referee's deed was delivered to Jay O. Jenkins closing that matter. He drew a deed from Jay O. Jenkins and his wife to Pearl E. Crable under their instructions. He understood, according to the agreement between Jay O. Jenkins and Pearl E. Crable, that they were going to hold the land bid in in partition in equal shares, but Pearl E. Crable was unable to handle her half of it so it developed that Jay O. Jenkins would retain three-fifths of the land and Pearl E. Crable two-fifths. He saw Pearl E. Crable several times in the county judge's office after the deed transaction, when she was guardian of her brother Harry's estate. She did not qualify as guardian until after the partition sale, then she was in his office on two or three occasions in the evening, relative to guardianship matters. He never

heard anything about a survivorship deed as between Jay O. Jenkins and Pearl E. Crable. He handled Pearl E. Crable's estate. He withdrew from the cases involved here at the time of trial, to participate as a witness. He further testified that Jay O. Jenkins came to his office after Pearl E. Crable's death and asked if she had made a will, and said that the deed to Pearl was not on record and the title was entirely in his name, which indicated that Pearl intended he should have her interest in the land. Mr. Evans showed the heirs the copy of the letter of transmittal of the deed to Pearl E. Crable. At that time Jay O. Jenkins did not say anything about whether or not he knew about the deed. Jay told him about the arrangements between himself and Pearl substantially as has been heretofore set out. He further testified that he heard of no such arrangement until after Pearl E. Crable's death.

The trial court found generally in favor of the plaintiffs and against the defendants upon the plaintiffs' petition, and generally against the defendants and in favor of the plaintiffs upon the defendants' answer and cross-petition; that Pearl E. Crable died intestate the owner of an undivided two-fifths interest in the land and left as her heirs her remaining brothers and sisters and one niece; that there never was an oral agreement between Pearl E. Crable and Jay O. Jenkins and his wife whereby Pearl E. Crable was to make a survivorship deed to Jay O. Jenkins and his wife; that if any such matter was agreed upon after the execution and delivery of the deed it was void under the statute of frauds and there was no part performance to take it out of the statute of frauds, and to enforce such contract would enrich Jay O. Jenkins at the expense of the other heirs; and that the title to the said lands should be quieted in the following proportions: Jay O. Jenkins, seventeen twenty-fifths; Dorthey M. Leatherwood, two twenty-fifths; Naomi E. Jenkins, the widow of Elmer R. Jenkins, two twenty-fifths; Harry E. Jenkins, two twenty-fifths; and Laura E. Bales, two

twenty-fifths. The cross-petition of Jay O. Jenkins was dismissed and title quieted in accordance with the findings.

Upon the overruling of the motion for new trial, the defendants appeal.

The appellants contend that the trial court committed prejudicial error in admitting the testimony of attorney Evans.

We have previously summarized the matters between the parties to this appeal handled by this attorney. The appellants objected to the testimony of this witness on the ground that it called for a privileged communication which was not waived in writing or in open court; and further, that such testimony was incompetent because the relation of attorney and client existed as between this witness and Pearl E. Crable.

Appellants rely on section 25-1201, R. S. 1943, as follows: "The following persons shall be incompetent to testify: * * * (3) an attorney concerning any communication made to him by his client in that relation or his advice thereon, without the client's consent in open court or in writing produced in court; * * *."

Appellants also rely on section 25-1206, R. S. 1943, which provides in part: "No practicing attorney, counselor, * * * shall be allowed in giving testimony to disclose any confidential communication, properly entrusted to him in his professional capacity, and necessary and proper to enable him to discharge the functions of his office according to the usual course of practice or discipline."

"When two or more persons employ or consult the same attorney in the same matter, communications made by them in relation thereto are not privileged inter sese. By selecting the same attorney, each party waives his right to place those communications under the shield of professional confidence. Either party may introduce testimony concerning the same as against the other, or his heirs or representatives. The reason assigned for

the rule is that, as between the clients, communications made for the mutual benefit of all lack the element of confidentiality which is the basis of privileged communications. Ordinarily, the attorney for both parties is not the depositary of confidential communications from either party which ought to be withheld from the other. And this is usually the case even though the parties have adverse interests." 58 Am. Jur., Witnesses, § 496, p. 277. See, also, annotation in 141 A. L. R. 554, 555.

It is sufficient to state that the testimony of an attorney as to a transaction in which two or more parties consult him, for their mutual benefit, is not privileged in an action between such parties or their representatives, involving such transaction. Communications made in the presence of others do not constitute a privileged communication. A confidential communication must necessarily be a secret one, and secrecy is enjoined, either actually or by implication. Such a communication is inherently private, and it is not intended or contemplated that it shall become known by others. See Crawford v. Raible, 206 Iowa 732, 221 N. W. 474.

Where two or more persons employ the same attorney in the same business, their communications with the attorney in relation to the business are not privileged between themselves, even though their interests may be diverse, where the disclosures are made in the presence and hearing of all parties concerned, or are intended for the information of all parties. See, Lewis v. Beh, 206 Iowa 281, 218 N. W. 944; Wallace v. Wallace, 216 N. Y. 28, 109 N. E. 872; Wahl v. Cunningham, 320 Mo. 57, 6 S. W. 2d 576, 67 A. L. R. 489, 504.

In the light of the record and the foregoing authorities, we conclude that the testimony of the attorney was not a privileged communication as contemplated by the sections of the statutes cited by the appellants.

The appellants contend the evidence is sufficient to establish a constructive trust.

"A constructive trust is a relationship with respect to

property subjecting the person by whom the title to the property is held to an equitable duty to convey it to another on the ground that his acquisition or retention of the property is wrongful and that he would be unjustly enriched if he were permitted to retain the property." O'Shea v. O'Shea, 143 Neb. 843, 11 N. W. 2d 540. See, also, Wilcox v. Wilcox, 138 Neb. 510, 293 N. W. 378; Box v. Box, 146 Neb. 826, 21 N. W. 2d 868; Pollard v. McKenney, 69 Neb. 742, 96 N. W. 679, 101 N. W. 9; 1 Restatement, Trusts, p. 5, § 1e.

The law is well established that each case is to be determined from the facts, circumstances, and conditions as presented therein. See, Damkroeger v. James, 95 Neb. 784, 146 N. W. 936; Lennox v. Anderson, 140 Neb. 748, 1 N. W. 2d 912; Lunkwitz v. Guffey, 150 Neb. 247, 34 N. W. 2d 256.

Sections 36-103 and 36-104, R. S. 1943, constitute a part of the statute of frauds. The former section recognizes the creation of an interest in land "by operation of law." The latter section provides that section 36-103 shall not be construed in any manner to prevent any trust from arising by implication or operation of law. Thus, trusts arising by implication or operation of law are excepted from the operation of the statute of frauds. See, O'Shea v. O'Shea, *supra;* Pollard v. McKenney, *supra.*

The appellants contend that from an analysis of the evidence, when the father of Pearl E. Crable and Jay O. Jenkins died, the highest of confidential and even fiduciary relations existed between this brother and sister, they were tenants in common of the estate devised by their father and partners therein, and Jay was Pearl's agent with respect to the management of the farm; that Jay O. Jenkins was the sole fee simple title owner of the land and transferred by deed the undivided interest of Pearl upon her oral agreement to convey or to give to him the right of survivorship in the land conveyed in the event of her death before his.

Pearl E. Crable, the transferee, failed to perform the agreement but held the interest upon a constructive trust for Jay because she was, at the time of the transfer, in a confidential relation to him. She died intestate without having repudiated her promise but intending always to perform it; that it is unreasonable to believe, having a dislike for one of her sisters, that she would want this sister to participate in a distribution of her estate; and that in consideration of the mutual promises between this brother and sister as to the disposition of the land, the heirs of Pearl E. Crable are obligated to carry out the constructive trust.

The appellants further contend that the oral agreement as between Jay O. Jenkins and Pearl E. Crable was in part performed by Jay's management of the farm, the collection of the rents and the application of the same to taxes, expenses and mortgage indebtedness as agreed in the oral contract, and was directly referable to the contract sought to be enforced; and, also, that on occasions during her illness Jay and his wife took care of Pearl, and Jay's wife did her laundry.

The burden is on the party claiming the estate of a person deceased under an alleged oral contract, to prove an oral contract the terms of which are clear, satisfactory, and unequivocal, and that his acts constituting performance were such as were referable solely to the contract sought to be enforced, and not such as might have been referable to some other or different contract. See, Lunkwitz v. Guffey, *supra;* Overlander v. Ware, 102 Neb. 216, 166 N. W. 611; Riley v. Riley, 150 Neb. 176, 33 N. W. 2d 525; Caspers v. Frerichs, 146 Neb. 740, 21 N. W. 2d 513.

In view of the foregoing authorities we conclude that the appellants have failed to prove this oral contract by clear, satisfactory, and convincing evidence, and failed to prove such part performance as would take the case out of the statute of frauds. There is nothing in the evidence to indicate that the deed was not to be de-

livered to Pearl E. Crable. There is an indication by Jay O. Jenkins that it was the understanding of the parties not to record it. It is apparent that Pearl E. Crable did not have any thought that the disposition of her property had been determined by a binding agreement. She believed she would have to dispose of it by deed or by will. Jay O. Jenkins continued to manage the farm rentals and pay them out the same as he always had before he and Pearl E. Crable became owners of the land, and his wife continued to do Pearl's laundry as she had for a number of years before any oral contract was alleged to have been made. According to the memorandum that Pearl E. Crable had on one instance, as testified to by a witness, for doing her laundry for a long time she wanted to give Jay's wife her car, as a favor. Jay admitted that he never took any steps to create a survivorship relation for Pearl in this matter. After her death he went to the courthouse to ascertain whether or not Pearl had ever recorded the deed, then he went to attorney Evans' office to find out if she had made a will, and while there informed Evans that her failure to record the deed showed that she intended he should have the farm. We believe that these actions on the part of Jay O. Jenkins are not such as to show a binding oral contract for the conveyance of real estate had with a deceased person.

We conclude that the appellants' evidence failed to establish a constructive or resulting trust as required by law.

We have examined the evidence of Jay O. Jenkins as to the conversations had with his sister Pearl E. Crable with reference to the oral agreement and the understanding between the two, and the objections as to the competency of said testimony made by appellees. We conclude that under section 25-1202, R. S. 1943, Jay O. Jenkins had a direct legal interest in the result of the action, and no exception occurred therein that would permit this testimony to be received, and it was error

not to sustain the appellees' objections thereto; further, by cross-examination on the appellees' part, they did not waive their objections to this testimony.

"When objection to the admission of evidence as to transactions or conversations with deceased has been properly made by the representative of a deceased person and erroneously overruled, the party making such objection does not waive his rights under the statute by cross-examining the witness on the same matters or offering direct evidence thereon to meet that erroneously admitted." In re Estate of House, 145 Neb. 866, 18 N. W. 2d 500, 159 A. L. R. 401.

In view of our holding, other assignments of error need not be discussed, and are without merit. The judgment of the trial court is affirmed.

AFFIRMED.

ROBERT B. PLUMB, APPELLEE, v. SUMNER W. BURNHAM ET AL., APPELLANTS.
36 N. W. 2d 612

Filed April 7, 1949. No. 32508.

1. **Trial.** A motion for directed verdict must, for the purpose of decision thereon, be treated as an admission of the truth of all material and relevant evidence submitted on behalf of the party against whom the motion is directed. Such party is entitled to have every controverted fact resolved in his favor, and to have the benefit of every inference that can reasonably be deduced from the evidence, and, by analogy, the same rule applies to a motion for judgment notwithstanding the verdict.
2. **Negligence.** If contributory negligence is relied upon by defendant as an affirmative defense, the burden is upon him to prove it by a preponderance of the evidence pertinent to that issue contained in the whole record, except insofar as the same may appear in the evidence adduced for the plaintiff.
3. **Automobiles: Negligence.** As a general rule, it is negligence as a matter of law for a motorist to drive an automobile so fast on a highway at night that he cannot stop in time to avoid collision with an object within the area lighted by his lamps,

but there are well-established exceptions thereto, dependent upon the nature or condition of the object in relation to conditions on or adjacent to the highway, adversely affecting immediate visibility of the object.

4. ———: ———. The violation of statutes regulating the use and operation of motor vehicles upon the highway is not negligence per se, but evidence of negligence, which may be taken into consideration with all the other facts and circumstances in determining whether or not negligence is established thereby, and where the evidence is such that reasonable minds may draw different conclusions therefrom, the questions of negligence and contributory negligence are for the jury.
5. **Highways.** A user of the highways may assume, unless and until he has warning, notice, or knowledge to the contrary, that other users of the highways will use them in a lawful manner, and until he has such warning, notice, or knowledge, he is entitled to govern his actions in accord with such assumption.
6. **Automobiles: Negligence.** The mere stalling of a motor vehicle temporarily upon the highway, caused by an exhaustion of the gas supply, would not ipso facto constitute negligence as a matter of law, but a failure to use ordinary care in removing the stalled vehicle from the highway within a reasonable time when it was possible to do so, would be negligence.
7. **Trial: Appeal and Error.** Instructions must be considered and construed together, and if they are not sufficiently specific in some respects, it is the duty of counsel to offer requests for instructions that will supply the omission, and, unless this is done, the judgment will not ordinarily be reversed for such defects.
8. ———: ———. A verdict may be set aside as excessive by the trial court or on appeal only when it is so clearly exorbitant as to indicate that it was the result of passion, prejudice, mistake, or some means not apparent in the record, or it is clear that the jury disregarded the evidence or rules of law.

APPEAL from the district court for York County: STANLEY BARTOS, JUDGE. *Affirmed.*

A. J. Luebs, for appellants.

Kirkpatrick & Dougherty, for appellee.

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

CHAPPELL, J.

Plaintiff brought this action to recover for personal

injuries and property damage resulting from an accident wherein plaintiff's car, traveling east, collided with the rear of a one-and-one-half-ton Studebaker truck, owned by defendant Sumner W. Burnham, but driven and allegedly parked unlawfully upon the highway east of York by his employee, defendant John Worman. The issues of defendants' negligence and plaintiff's contributory negligence, respectively alleged to have proximately caused the accident, together with the amount of plaintiff's alleged damages, were tried and submitted to a jury, whereat plaintiff recovered a verdict for $4,502.33.

Judgment was entered thereon, and defendants' motion for judgment notwithstanding the verdict, or, in the alternative, for a new trial, was overruled. Defendants appealed, assigning as error substantially that: (1) The trial court erred in overruling defendants' motion for directed verdict made at the conclusion of plaintiff's evidence and at the conclusion of all the evidence, and erred in overruling defendants' motion for judgment notwithstanding the verdict respectively made upon the ground that plaintiff had failed to prove any negligence by defendant driver proximately causing the accident, and because plaintiff's own negligence was more than slight as a matter of law; (2) erred in giving instructions Nos. 2, 4, 9, 10, 11, and 12; and (3) the verdict was excessive. We conclude that the assignments should not be sustained.

In connection with the first assignment, the applicable rule is that: "A motion for a directed verdict must for the purpose of decision thereon be treated as an admission of the truth of all material and relevant evidence submitted on behalf of the party against whom the motion is directed. Such party is entitled to have every controverted fact resolved in his favor, and to have the benefit of every inference that can reasonably be deduced from the evidence." Dickman v. Hackney, 149 Neb. 367, 31 N. W. 2d 232; Kipf v. Bitner, 150 Neb. 155, 33 N. W. 2d 518. By analogy, the same rule applies to a motion for

judgment notwithstanding the verdict. Remmenga v. Selk, 150 Neb. 401, 34 N. W. 2d 757.

It is also the rule that: "If contributory negligence is relied upon by defendant as an affirmative defense, the burden is upon him to prove it by a preponderance of the evidence pertinent to that issue contained in the whole record, except in so far as the same may appear in the evidence adduced for the plaintiff." Roberts v. Carlson, 142 Neb. 851, 8 N. W. 2d 175.

In the light thereof, we have examined the record. By virtue of the answer, it was admitted that defendant, Sumner W. Burnham, hereinafter called defendant, was on December 10, 1946, the date of the accident, the owner of the truck, and that defendant John Worman, hereinafter called defendant driver, was operating the same as an employee of defendant within the scope and course of his employment, hauling a load of shelled corn in an easterly direction over concrete U. S. Highway No. 34, state highway No. 2, east of York, where plaintiff's car collided with it sometime after defendant driver had stopped the truck partly on the paved portion of the highway. It was stipulated that the time of sunset on December 10, 1946, was 5:03 p. m.

There was competent evidence adduced in plaintiff's behalf from which a jury could reasonably have concluded as follows: Plaintiff, an independent automobile accessory salesman, was driving his Chevrolet car "in A Number 1 shape all over" from the west on the right side of the highway at about 40 miles an hour. The traffic was heavy. It was dark, and plaintiff's lights were on. The collision occurred at about 5:50 p. m., as plaintiff approached a point on the concrete paved highway about two and three-quarter miles east of York. Just before the accident, a car with its lights on, came from the east. As it approached plaintiff, the driver thereof dimmed his lights, then plaintiff dimmed his lights. At that instant, and at a time when the other car was so close that plaintiff could not turn out, the gray rear end of defend-

ant's truck loomed up in front of plaintiff, where defendant driver, out of gas, had parked and left it, without lights on the truck or the display of any flares, fuses, flags, or other warning, directly on the right side of the 20-foot concrete pavement, which had a traversable 8-foot shoulder to the south thereof. The defendant driver admitted to the sheriff after the accident that he had run out of gas and parked partly on the pavement, without having any flares or flags to put out. The evidence discloses, without dispute, that he had pleaded guilty in the county court when charged with failure to put out flags.

Plaintiff, upon seeing the truck, swung hard to the left, applied his brakes, and slowed down three or four miles an hour, but the right front side of his car collided with the left rear of defendant's truck. Plaintiff's car was badly damaged, from the right front back and across the radiator, right fender, cowl, and door. Plaintiff received serious and permanent personal injuries, requiring hospitalization, surgery, medical care, and causing pain and suffering which still continued, although abated at the time of the trial. Also, as a result thereof, plaintiff suffered a complete loss of time from his employment for four months, and partial loss thereof for two months thereafter.

After the accident, plaintiff's car was on the pavement facing east, with the left wheels north over the black center line, while the truck was in the ditch south of the pavement, facing southeast, approximately 30 feet from plaintiff's car. There was broken glass on the south lane of the pavement, and some of the shelled corn had spilled from the truck, about half on the south side of the pavement and half on the shoulder.

Evidence adduced in defendant's behalf controverted the exact time of the accident, whether or not there were lights burning on the truck, and the then general extent of visibility. Defendant driver had been operating trucks for some 26 to 28 years, and was thoroughly familiar with the highway and traffic thereon. He thought the engine

on his truck was going to stop several lengths of the truck before it did, and just west of the point of the accident the engine killed abruptly, whereupon the truck went about 30 feet, when the driver cut slightly to the south, but the shoulder was soft, and when the two front wheels were off the pavement and the right rear was off about a foot, the truck stopped and he was unable by its own power to move it further.

It was then 4:40 p. m., and for the first time the driver looked for flags and flares, but found that he had none. He testified that he had driven the truck between the elevator and the place where he was shelling corn, seven miles north of U. S. Highway No. 34, state highway No. 2, and one mile east of U. S. Highway No. 81, several trips during the day. He did not fill the truck with gas when he took it in the morning because someone else filled it the night before. He put no gas in the truck during the day. He said he looked at the gauge before he left the place where they were shelling corn, because he had a couple more trips to drive, and the gas gauge then showed half full. It had theretofore been accurate, and he depended upon it without looking in the tank. However, when the truck stopped on the highway, the gas gauge showed empty, and the tank was empty. There was no evidence of gas leakage or other withdrawal, although a seam in the tank was found to be cracked after the accident.

He testified that the rear of the truck was red in color, with a clean white endgate, and that after the truck stopped, he turned on the lights. At about 4:50 p. m. he left and caught a ride in another truck back to York. He did not ask the driver thereof to push his truck off the highway, and on the way passed several nearby filling stations where he could have obtained gas, and several places where he could have telephoned for help. At the employer's regular station in York he obtained gas, and, in a pick-up, started back to the point where he had left his truck. He said that he had been gone about three-

quarters of an hour. He testified that at a point about 1,000 feet from the truck, without the aid of lights, he observed his truck roll off the highway into the ditch. Upon arrival, he found the plaintiff injured, pinned in his car. They removed him therefrom to a car driven by a lady who was already upon the scene. She took plaintiff to the hospital. Defendant driver said that plaintiff's car was then facing east, south of the center line, and that his truck, with its lights still burning, except the left boundary light, was headed south, southeast of the car, clear to the fence line. Gas was later put in the truck and it was driven out of the ditch, over the shoulder, and back on the pavement.

In the foregoing situation, in order to determine whether or not plaintiff was guilty of negligence as a matter of law, we must apply well-established legal principles. In Floyd v. Edwards, 150 Neb. 41, 33 N. W. 2d 555, it was held: "As a general rule, it is negligence, as a matter of law, for a motorist to drive an automobile so fast on a highway at night that he cannot stop in time to avoid collision with an object within the area lighted by his lamps, but there are well-established exceptions thereto, dependent upon the nature or condition of the object in relation to conditions on or adjacent to the highway adversely affecting immediate visibility of the object."

The exceptions aforesaid and their application as well were discussed at length in Buresh v. George, 149 Neb. 340, 31 N. W. 2d 106, Pierson v. Jensen, 150 Neb. 86, 33 N. W. 2d 462, and Miers v. McMaken, 147 Neb. 133, 22 N. W. 2d 422. We will not repeat them here. It is sufficient to say that the case at bar comes squarely within such exceptions to the general rule, which "has no application in those cases where reasonable minds may differ on the question of whether or not the operator of an automobile exercised the care, caution, and prudence required of him under the circumstances of the particular situation" in which cases

"the issue of negligence on the part of the operator is one of fact to be determined by a jury." Miers v. McMaken, *supra*. We conclude, therefore, that plaintiff was not guilty of contributory negligence more than slight, as a matter of law.

We turn then to the question of whether or not plaintiff adduced any competent evidence that defendants were negligent. As heretofore observed, there was competent evidence in the record from which the jury could reasonably have found that defendants violated sections 39-757, 39-778, and 39-7,118, R. S. 1943. Admittedly, they violated section 39-7,119, R. S. 1943.

In that connection, the two last-cited sections required defendant's truck to display flags between one-half hour before sunrise and one-half hour after sunset, and flares from one-half hour after sunset until one-half hour before sunrise, in the manner required therein, whether the truck was parked on the highway voluntarily or was involuntarily stopped thereon temporarily.

Of course, the violation of statutes regulating the use and operation of motor vehicles upon the highway is not negligence per se, but evidence of negligence which may be taken into consideration with all the other facts and circumstances in determining whether or not negligence is established thereby, and where the evidence is such, as in the case at bar, that reasonable minds may draw different conclusions therefrom, the questions of negligence and contributory negligence are for the jury. Gleason v. Baack, 137 Neb. 272, 289 N. W. 349; Anderson v. Robbins Incubator Co., 143 Neb. 40, 8 N. W. 2d 446; Pierson v. Jensen, *supra*. We conclude, therefore, that the first assignment of error has no merit.

Instruction No. 2 submitted the respective claims of the parties, and thus presented to the jury the issues made by the pleadings, which were supported by the evidence heretofore set forth. Instruction No. 9 correctly recited the respective statutes applicable to the parties, under the evidence. Defendants argued that

instructions Nos. 2 and 9 were prejudicially erroneous primarily upon the theory that there was no competent evidence that the accident occurred between one-half hour after sunset and one-half hour before sunrise. Therefore, that issue was erroneously submitted in instruction No. 2, and the statutes recited in instruction No. 9 had no application. We conclude otherwise, and in that regard find that instructions Nos. 2 and 9 were not prejudicially erroneous.

Instruction No. 3, it is conceded, clearly set forth the material allegations of plaintiff's petition, all of which, as stated in instruction No. 5, plaintiff had the burden of proving by a preponderance of the evidence, before he could recover. Among such material allegations was the plea that defendants were negligent in some manner as alleged, and that such negligence was the proximate cause of injuries and damages to plaintiff. Instruction No. 4 simply set forth clearly the issues of fact ultimately to be determined by the jury. Instruction No. 4 could not be subject to the criticism that the court therein assumed that defendants were negligent. As a matter of fact, the issues were thus presented in a clear, logical, and concise manner.

Instruction No. 10 instructed the jury that the driver of an automobile upon the public highways "is required to have his automobile under such reasonable control as will at all times enable him to avoid collision with other vehicles being *lawfully* operated on the highway," but that "the law does not require such driver to anticipate negligence or violation of traffic regulations by another, in the absence of notice, warning or knowledge of such condition." (Italics ours) Defendant claimed that the court erred in using the word "lawfully," which implied that plaintiff could not be guilty of contributory negligence or negligence more than slight as a matter of law if the other vehicle was unlawfully or negligently operated. In Spomer v. Allied Electric & Fixture Co., 120 Neb. 399, 232 N. W. 767, it was held: " 'A driver of

an automobile should have his car under such reasonable control as will enable him to avoid collision with other vehicles, assuming that the drivers thereof will exercise due care.' " In other words, a user of the highways may assume, unless and until he has warning, notice, or knowledge to the contrary, that other users of the highways will use them in a lawful manner, and, until he has such warning, notice, or knowledge, he is entitled to govern his actions in accord with such assumption. See, also, 5 Am. Jur., Automobiles, § 169, p. 600, and Sidle v. Baker, 52 Ohio App. 89, 3 N. E. 2d 537. The instruction was not prejudicially erroneous.

Instruction No. 11 told the jury that generally a motorist was negligent as a matter of law if he operated a motor vehicle in the nighttime on a public highway at such a rate of speed that he could not stop and avoid an obstruction within the range of his lights. Therein, the jury was also told that if they found from the evidence that plaintiff violated that rule, "taking into consideration the color of the truck, of the pavement and all of the surrounding circumstances, then as a matter of law the plaintiff was negligent and cannot recover." Defendant contended that instruction No. 11 was erroneous because it used the language last above quoted, and that instruction No. 2 was erroneous because it used comparable language when there was no evidence of the color of the pavement. In that regard, the undisputed evidence shows that the pavement was concrete. It is common knowledge in this jurisdiction that concrete pavement is light to dark gray in color, and in the absence of evidence to the contrary, it was not erroneous for the court to take judicial notice thereof. 31 C. J. S., Evidence, § 94, p. 690. We conclude that defendant's contentions in that regard were without merit.

We turn then to instruction No. 12. In that connection, instruction No. 2, which submitted the respective allegations of negligence proximately causing the accident as pleaded by the parties, set forth in part that defendants

negligently failed to have a sufficient supply of gasoline and "permitted the said truck to continue its course until the supply of gasoline was completely exhausted" and "that after said truck was so parked the said defendants neglected to remove the same from said highway or to summon help to remove said truck, knowing that said highway was a main, traveled cross-country highway." Instruction No. 12, about which defendants complained, related to those allegations.

Turning to the evidence, it will be observed that defendants' truck was not mechanically disabled. Admittedly, all that it needed to remove it from the highway was gas power, the obtaining of which was not beyond but within the driver's immediate control. Admittedly, the truck was first stalled and parked as it was on the highway in the daytime, solely for lack of gas. Thereafter, defendant driver not only admittedly failed to have or display flags or flares, but also there was evidence that he did not temporarily leave the truck unguarded in that position, to immediately obtain gas and replenish the supply at a conventient place and thereby or otherwise attempt to remove it from the highway within a reasonable time. Rather, he admittedly did not request the driver of a truck who came upon the scene in a few moments to push it off the highway or notify others of his need for gas, but defendant driver got in that truck, passed several gas stations on the "Y" north of York, passed several opportunities near at hand to phone for aid, and went clear on into York, to return therefrom with gas three-quarters of an hour later. In the meantime it grew darker, and the truck so parked became more hazardous for vehicles traveling upon the highway, and thus the accident occurred.

In that situation, instruction No. 12 recited substantially the first paragraph appearing in 2 Blashfield, Cyclopedia of Automobile Law and Practice, § 824, p. 3, to wit: "Generally speaking, it is the duty of an automobile driver on the public highway to see that his car

is maintained in such condition as to fuel supply that it may not become a menace to, or obstruction of, other traffic by stopping on the road, and failure to exercise a reasonable degree of care to keep it in proper condition in this respect, resulting in his stalling for want of a sufficient supply of gasoline or other motor fuel, is negligence."

The text then went on to state, in a second paragraph: "But, if a motorist has done all that can be reasonably expected of a person of ordinary prudence to put his vehicle in proper condition, and an unforeseen failure of his gasoline supply occurs, it does not necessarily follow that he must be deemed negligent as a matter of law."

Huddy, Cyclopedia of Automobile Law (9th ed.), vol. 3-4, § 79, p. 133, states the foregoing rule in substantially the same language. See, also, 5 Am. Jur., Automobiles, § 333, p. 681; Keller v. Breneman, 153 Wash. 208, 279 P. 588, 67 A. L. R. 92, distinguished in Chapin v. Stickel, 173 Wash. 174, 22 P. 2d 290; Rath v. Bankston, 101 Cal. App. 274, 281 P. 1081; Casey v. Gritsch, 1 Cal. App. 2d 206, 36 P. 2d 696.

Defendants did not object to the issue as pleaded and submitted in instruction No. 2, but simply contended with regard to instruction No. 12, that the trial court erred in failing to give only the second paragraph of the Blashfield rule, or erred in failing to tell the jury in any event that a violation of the duty stated in paragraph No. 1 would not be negligence but only evidence of negligence.

As a matter of course, the mere stalling of a motor vehicle temporarily upon the highway caused by an exhaustion of the gas supply, would not ipso facto constitute negligence as a matter of law. Chapin v. Stickel, *supra*. On the other hand, however, a finding by the jury of failure to use ordinary care to replenish the vehicle with gas thereafter, and thereby remove the stalled vehicle from the highway within a reasonable time when it was possible to do so, would be negligence.

The question of proximate cause with relation thereto was not discussed by defendants, but instructions Nos. 2, 3, 4, 5, 7, and 15 made it crystal clear that before plaintiff could recover, he had the burden of proving by a preponderance of the evidence that defendants were negligent in some manner alleged, and that such negligence was the proximate cause of the accident.

It may be conceded that the instruction of itself was not sufficiently explicit, but defendants made no request for any instruction upon the issue. In that connection, the rule is that: "'A party desiring a more explicit instruction than that given should offer such an instruction.'" Hannah v. American Live Stock Ins. Co., 111 Neb. 660, 197 N. W. 404. As held in Christensen v. Tate, 87 Neb. 848, 128 N. W. 622: "Instructions must be considered and construed together. If they are not sufficiently specific in some respects, it is the duty of counsel to offer requests for instructions that will supply the omission. And, unless this is done, the judgment will not ordinarily be reversed for such defects." Likewise, in Edwards & Bradford Lumber Co. v. Lamb, 95 Neb. 263, 145 N. W. 703, this court held: "Where an instruction is given to a jury, which it is claimed did not fully state the rule of law upon the subject involved therein, but did not misstate any rule to be applied, the attention of the court should be called to the omission, as claimed, by an instruction containing the alleged omission. If not, there can be no ground for reversal therefor."

We conclude that instruction No. 12, when considered and construed in connection with the evidence aforesaid and all the other instructions, more particularly Nos. 2, 3, 4, 5, 7, 15, and 9, paragraph 2 of which recited the exception or exculpatory provision of section 39-757, R. S. 1943, the equivalent of the second paragraph of the Blashfield rule, could not have affected the substantial rights of defendants, and would, in the light of section 25-853, R. S. 1943, not be prejudicially erroneous.

Defendants argued in the brief that the trial court erred

in refusing to receive in evidence two certain described exhibits. However, the alleged errors in that regard were not assigned as such. By Rules of the Supreme Court, 8 a 2 (4): "* * * consideration of the cause will be limited to errors assigned and discussed. However, the court may, at its option, notice a plain error not assigned." We have examined the record and conclude that the alleged errors argued by defendants were not plain errors not assigned, and we will not give them further consideration.

Finally, we have examined the record in connection with defendants' contentions that the verdict was excessive. It is generally the rule that: "A verdict may be set aside as excessive by the trial court or on appeal only when it is so clearly exorbitant as to indicate that it was the result of passion, prejudice, mistake, or some means not apparent in the record, or it is clear that the jury disregarded the evidence or rules of law." Horky v. Schroll, 148 Neb. 96, 26 N. W. 2d 396. In the light thereof, we conclude that the assignment has no merit.

We find no prejudicial error in the record, and since the verdict was amply supported by competent evidence, the judgment of the trial court should be and hereby is affirmed.

AFFIRMED.

IN RE ESTATE OF WILLIAM E. BAINBRIDGE, DECEASED. RICHARD O. JOHNSON, EXECUTOR ET AL., APPELLEES, V. RHODA OTLEY ET AL., APPELLANTS.
36 N. W. 2d 625

Filed April 7, 1949. No. 32543.

1. **Wills.** A motion of proponents on the trial of a will contest made at the close of the evidence of the contestants to withdraw from consideration of the jury the issue of undue influence admits the truth of all material and relevant evidence submitted by the contestants, and they are entitled to have it and all in-

ferences fairly deducible therefrom viewed in the most favorable light in testing the correctness of the ruling of the court granting the motion.

2. ———. In determining whether or not the court on motion of proponents was justified in withdrawing from consideration of the jury the issue of undue influence at the close of the evidence of the contestants on the trial of a will contest, this court will wholly disregard the evidence of the proponents in opposition to the evidence of the contestants.
3. ———. The essential elements of undue influence sufficient to defeat a will are that opportunity to exercise it exists; that the testator was susceptible to such influence; that there was a disposition to exercise it for an improper purpose; and that the result clearly appears to be the effect of such influence.
4. ———. The burden is on contestants in a will contest to produce evidence tending to prove each of the four essential elements of undue influence as a prerequisite to their right to have the issue submitted to a jury for determination.
5. ———. Undue influence sufficient to defeat a will must be referable directly to the will and be of such a nature as to control the will and action of the testator in the making of his will.
6. ———. Undue influence is largely a matter of inferences from facts and circumstances surrounding the testator, his life, character, and mental condition, and the opportunity existing for the exercise of improper control.
7. ———. If a will contains unnatural provisions, it deserves close scrutiny.
8. ———. The fact that a beneficiary was a comparative stranger to the testator is a suspicious circumstance to be considered on the issue of undue influence.

APPEAL from the district court for Lancaster County: RALPH P. WILSON, JUDGE. *Reversed and remanded.*

Flansburg & Flansburg and *John J. Wilson,* for appellants.

Towle, Young & Mattson and *Pierson & Scheele,* for appellees.

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

BOSLAUGH, J.

This is an appeal from the judgment of the district court of Lancaster County, Nebraska, admitting to pro-

bate as the will of William E. Bainbridge, deceased, an instrument dated June 11, 1945.

William E. Bainbridge was a resident of that county and died on the 25th day of November, 1945. He left an instrument purporting to be his will, and proceedings had in the county court resulted in its probate. Contestants Rhoda Otley, Lurena Derieg, and George Derieg, appellants, appealed. The proponents, Richard O. Johnson, named in the will as executor, Guy Stickney, and Helen Seng, named in the will as beneficiaries, are the appellees. The grounds of the contest were that the deceased at the time of the execution of the document in question did not have testamentary capacity and that it was obtained through undue influence exerted upon the deceased by Guy Stickney. The court found and instructed the jury that there was no evidence from which it could find or determine that the purported will was in any manner the result of undue influence exercised upon the deceased, and the question for its determination was whether or not the deceased had testamentary capacity at the time he executed the alleged will. The trial resulted in a judgment sustaining the instrument as the will of the deceased. The motion of contestants for a new trial was denied.

An important inquiry, as this case is presented, is whether or not the trial court was justified in withdrawing from the jury the right to consider and determine the issue of undue influence. The answer to this is decisive of this case. It depends on whether or not the evidence of the appellants standing alone and accepted as true has probative force sufficient to make a prima facie case for them. The right to have the issue of improper influence resolved by a jury depends on the evidence submitted by appellants, and since a verdict was directed against them, they are entitled to have their evidence and all inferences fairly deducible therefrom viewed in the most favorable light. It is not permissible for this court to determine that undue influence

did or did not exist, but it may only decide whether or not sufficient evidence was produced to compel the submission of that issue to the jury and to sustain a finding that the will was the product of undue influence to which the testator was subjected. The court is therefore not concerned with the nature or the extent of the evidence of the appellees presented in opposition to or contradiction or explanation of the testimony of appellants. Any evidence in conflict with the testimony favorable to the appellants must be totally disregarded. Guyette v. Schmer, 150 Neb. 659, 35 N. W. 2d 689; In re Estate of Farr, 150 Neb. 615, 35 N. W. 2d 489; In re Estate of Noren, 119 Neb. 653, 230 N. W. 495; In re Estate of Bowman, 143 Neb. 440, 9 N. W. 2d 801; Phelps v. Metropolitan Utilities District, 120 Neb. 337, 232 N. W. 785.

Appellees concede this as the rule of law in this respect, but they claim that the assignments of error relate in part to instructions of the trial court on the issue of testamentary capacity as well as undue influence, and because thereof, the testimony of the witnesses of the appellees must be considered. The insufficiency of this contention is that appellants do not argue any assignment of error made by them except as it pertains to the error of the trial court in failing to submit the issue of undue influence to the jury; neither do they attempt to use any of the evidence offered by the appellees except as it bears upon the issue of undue influence. A determination that the trial court was correct in deciding the issue of undue influence as a matter of law would compel an affirmance, and a conclusion that the trial court was not justified in that regard would require a reversal.

The evidence proper now to be considered tends to establish that:

George and Mary Bainbridge, the parents, and Elizabeth, their oldest child and a sister of the testator William E. Bainbridge, were natives of England, migrated to

the United States and settled about four miles northwest of Waverly, Nebraska, about the year 1871. The parents had eight children, four of whom died during childhood, and the four who survived until the death of the testator were: Elizabeth, also referred to as Lizzie; Rhoda, also referred to as Rhodie; Lurena; and Ed, referred to as William E. The testator and his sisters lived in the family home and attended the same school.

Elizabeth helped with the work on the farm and did sewing for other persons. She married, became Mrs. Gillham, and moved to a farm west of Waverly. Later she and her husband separated. They had no children. She worked as a seamstress, and solicited and made sales of Avon Cosmetics. Her father gave her 160 acres of unimproved land near Waverly. She owned a residence where she made her home and a "town house" in Lincoln. She continued after the separation from her husband to sell cosmetics and work as a seamstress. She and her brother, the testator, had no quarrels or disagreements and at all times sustained friendly relations. No reason was known why he had any animosity towards her. On occasions Anna, the wife of the testator, called Elizabeth in Lincoln and she procured and took groceries from Lincoln to the home of her brother. She was a frequent visitor of her brother. Her father, George Bainbridge, died in 1930. His will was contested. She, her brother, and sister Lurena were the contestants. Her sister Rhoda was the proponent. There was in excess of $40,000 worth of property given to Rhoda by the will of her father. This angered the contestants and they tried to get a part of it. The contest resulted in prolonged litigation and was terminated in the Supreme Court. Elizabeth died in 1947, after the death of the testator.

Rhoda married Arthur Otley and they lived on a farm adjoining the farm of her father. Testator was not friendly with his sister Rhoda and entirely ignored her from the time of the contest over the will of their

father. "She has * * * lots of land"—300 acres north of Waverly, the land her father gave her, and she and her husband acquired more land.

Lurena married and became Mrs. Derieg about 1900, moved to a farm about four miles north of Waverly, and went to Oklahoma in 1906. She had seven children, all very young at the time of the death of their father in 1910. He homesteaded 160 acres of land near Carnegie, Oklahoma, about 75 miles west of Oklahoma City. The father of Mrs. Derieg a considerable time afterwards gave her 160 acres of land adjoining the land of her husband, $500 in cash, and after her husband's death paid a $1,400 mortgage on the Oklahoma property. The income from the land was not sufficient to meet the requirements of the family and it was very difficult for her to support and care for herself and her children. Her health failed and it was necessary to sell 80 acres of the land given to her by her father to meet "health expenses and bills." The testator knew of her burdens and difficulties. She was a frequent visitor at the home of her brother. She was in Lincoln, Nebraska, at the home of her son George several months each year for five years, from about 1941 until the death of the testator. During these years she, her son George, his wife and his children, were at the home of the testator almost every Saturday. There was a "natural feeling of brotherly love" existing between her and her brother and she was friendly with her sisters. When she was at the home of her brother, commencing in 1941 and continuing until his death, she observed that he drank beer and wine all through the day and kept them by his bed at night. He drank lots of wine. He said beer didn't agree with him. She saw lots of jugs and bottles around his premises—counted 50 jugs one day—most of them gallon and half-gallon size. Testator was sleepy, stupid, and laid around. When she saw him during 1944 and 1945 he would drink all during her visits. She was a contestant of the will of her father, paid no part of the

expenses of the contest, was a witness at the trial, and testified that her father was incompetent when he made his will. She saw testator in May of 1945, about a month before his death, about two weeks before his death, and on the night before and the day of his death, November 25, 1945. Lurena Derieg was 70 years old at the time of her brother's death.

Testator did not move around normally. He walked "stooped and * * * wobbly," could only walk very slowly, would stagger, stumble, and occasionally fall down, was unsteady, would set one foot and then the other to keep from falling down. He shuffled or trailed his feet and gave the impression that he was feeling his way along. He didn't take much interest in anything, complained his stomach hurt him. He would get up, walk around, go back and lie down, slept most of the time during the last two years. He ate very little—would go to the table, eat a few bites, and drink a glass of milk—ate less as he got older, and the last two years did not eat solid foods or much of anything but soup. He frequently became nauseated during meals when he tried to eat and would eject the contents of his stomach through his mouth on the table before he could withdraw, go outdoors and not come back. His conversations in later life were few and limited, generally concerning what he claimed some neighbors had done to him. He would say that they were not treating him square, were robbing him. He accused a boy who did chores for him of stealing his oats, did not talk normally, could not stay on one subject, could hardly tell anything. His mind "would drift from subject to subject" and sometimes he would hardly know anyone. He continued to drive his automobile though he had difficulty in operating it, would drive it off the road into the ditch, and on one occasion into and on the abutment of a bridge. He attended general farm sales and at one in 1917 a team of mules—one crippled—was offered for sale. No one seemed to want them. He bid and bought them for $525. Years later at another sale one of a

team of horses was offered with privilege to purchaser to take the team at double his bid. He bid $125 on the one offered and thought he was bidding on and buying the team. He had to pay double the amount for the team. When he bid at an auction sale he continued against all opposition until he purchased.

From the time he was about 20 years old until his death he habitually drank whisky, beer, and wine, except in the latter years he drank beer and wine. His drinking habits were "lifelong" and his indulgence in intoxicating liquor constant and continuous.

During the latter part of his life he was drunk all the time—didn't know what he was doing. His drinking and condition got progressively worse during the last twenty years. He was intoxicated everywhere, even when attending church and funerals. His appearance, color, and condition changed, and he became "puffy," "pasty," and "sort of yellow," and would shake all over. With one exception testator did not drink intoxicating beverages with any other person, and no one but testator drank intoxicating beverages on his farm.

The testator in the latter years of his life had weeping and whimpering spells. He indulged in self-pity about his sickness and stomach condition and "was very complaintive and * * * would weep sometimes and cry about his condition and about the way people treated him and such." After 1938 he was despondent much of the time and would whimper and whine and assert that he wasn't going to be here long—he was going to die, and sometimes he would "lay on the ground and would have to be helped up during his whimpering spells."

Guy Stickney became a tenant of testator in the spring of 1944, and had been a tenant on the Shea farm, southwest of Waverly, before that. Three witnesses stated they had not heard him mention Guy Stickney before he moved on the farm of the testator as his tenant. The testator was afraid to drive his car and after he ceased operating it Stickney would sometimes drive his car

when the testator was not with him, and on other occasions Stickney and sometimes his wife drove testator's car for him and would bring him groceries and supplies and would drive him to and from his farm, and on these occasions empty beer bottles were taken to the car by Mrs. Stickney and full ones brought home by Mr. Stickney. Other persons—tenants, neighbors, friends, and a relative—performed like services and rendered him the same or similar assistance, including the handling of his beverages and the containers thereof. Clarence Veeder, a tenant of the testator before Stickney became his tenant, and Mr. Stickney made a trip in the fall of 1944 to Lincoln and Havelock to get machine repairs, and Stickney bought two half-gallons of wine for testator. He was friendly with the testator, they would sometimes visit at the place where Stickney was working on the farm and the testator would assist while they visited. He was with testator on one of his visits to his doctor. Guy Stickney did not drink intoxicating liquors.

There were no improvements made on or to any building or structure on the land of testator from 1934 to 1944 except he furnished $10 for wallpaper. Shortly after Guy Stickney became his tenant, a chicken house and garage were built, a little shed on the barn was remodeled, the cribs and cow barn were fixed up, and the house painted.

George E. Derieg, son of Lurena Derieg, a nephew of testator, lived in Lincoln from 1927, and visited many times at the farm of his uncle. He husked corn there in 1927 or 1928. His early visits were social and about twice monthly until 1935. From then to 1938 about weekly, and from then until 1945 once and sometimes two and three times each week. His wife and later their children accompanied him. About 1938 testator asked his nephew to make a garden on the Bainbridge farm so both their families could share the produce raised. From then until the spring of 1945 Derieg and his family visited the farm of his uncle during off-duty

hours—he was a nurse—prepared the ground, planted, and cared for a vegetable garden of an acre or more, planted trees, made a chicken lot, fixed fences, and did other similar work. Testator on occasions hauled cases of beer out to his farm in his car and was not able to carry them into the house, and his nephew, George E. Derieg, carried the cases of beer into the basement and carried the empties out and put them into the car of the testator at his request. Mrs. Derieg was at the farm with her husband quite regularly until 1941 and occasionally until February of 1945, and assisted her aunt, Mrs. Bainbridge, who was badly crippled, in getting meals and cleaning the house when she needed help. Neither George E. Derieg nor his wife expected compensation and received none except such vegetables as they took from the garden. They enjoyed getting out of the city and working in the open air, the sunshine, and the earth, and their uncle and aunt needed their assistance. The friendly relations between Derieg and his uncle changed "during the later years" when he was going to the farm of his uncle. The difference of attitude of the testator was not so much as to his nephew as towards the other members of his family. It was more apparent and demonstrated during the last year of the life of the testator. He became suspicious of Derieg and his family and would inspect their car before it left his farm. Testator suspected the boys of Derieg of taking his saw and hammer. Mrs. Derieg, the wife of George E. Derieg, last saw the testator in February of 1945 at his home when all the members of her family and Lurena, her mother-in-law, were present, and she could not remember when she was there before that date. There was a rather violent disagreement between testator and his nephew George E. Derieg in the spring of 1945—probably May—and he "bid Mrs. Bainbridge goodbye; and we departed and didn't return."

Testator consulted and was treated by a physician at his office eight times, commencing with May 28, 1945,

to and including October 25, 1945. The treatment was vitamin B complex, prescribed for chronic alcoholism, in capsule form taken by mouth, and later administered by injection into a vein. Hospitalization was advised as essential, but was refused. His history, symptoms, and conditions were: Pain in the upper right quadrant of the abdomen over the liver area; vomiting; muscular tremor; drinking several bottles of beer and wine each day; inability to eat and assimilate ordinary foods; eyeballs yellow; tongue trembled; fell to the floor in removing his coat; had to be helped off and on the table in the doctor's office; and was intoxicated when he came to the office. The last time he was at the office he was very shaky, had been vomiting for a week, unable to retain ordinary food but able to drink intoxicating beverages, practically living on liquor, was quite bloated, his belly, face, feet and legs were enlarged. He was very dropsical and suffered from cirrhosis of the liver, caused by alcoholism. Diagnosis was chronic inebriacy.

The doctor testified alcohol is a poison and alcoholism a disease; affects the central nervous system and all organs of the body; one of the causes of cirrhosis of the liver is alcoholism; most chronic alcoholics experience morning vomiting, muscular tremor, and a causeless mental restlessness; the testator experienced all of these; the will and power of a person to resist the influence of others is weakened by chronic alcoholism; and the normal reaction of the victim to persons who attempt to induce a reduction or discontinuance of his drinking activities is the victim usually refuses to do so and may become the enemy of the one making the suggestion. A chronic alcoholic is more inclined to befriend a person who assists him in satisfying his desire for intoxicants. The discontinuance of drinking alcoholic beverages by a chronic alcoholic for a short period would not restore his normal faculties. These are restored only by a course of treatment, and it may be impossible to obtain a restoration of them. It was the opinion of the doctor

that on June 11, 1945, testator was not mentally capable of understanding the effect and nature of the instrument offered for probate; that he did not have the power to realize the ties of blood relationship.

A specialist in neurology and psychiatry stated: Alcoholism, acute or chronic, is a disease. Chronic alcoholism causes defects in judgment and changes in personality make-up, often spoken of as mental deterioration, because of which the will is weakened, emotional control is lessened, and defects in judgment occur. The seriousness of the effect on the mental faculties of the use of intoxicating beverages depends upon the length of time of the use. Duration of use is a most important factor. The effect is more likely to be deleterious upon the mental faculties of the steady, persistent drinker. Chronic alcoholism may result in permanent impairment of mental faculties, and the permanency of the impairment depends to a great degree upon the duration and extent of the alcoholism. A short period of abstinence from the use of intoxicating beverages would have small effect upon the restoration of a chronic alcoholic of his normal mental faculties, but would make him more emotional and unsteady, because of the absence of the sedative effect of alcohol to which he is accustomed. The length of time required through abstinence to regain normal mental faculties, if regainable, depends very much on the length and duration of the period of drinking and the chronic character of the alcoholism. The effect of chronic alcoholism is to increase the personality defects and eccentricities of the person affected. If he has been emotional, he will be more emotional; if he has been subject to mood swings, he will probably be more that way. Alcohol is a sedative and it calms the person temporarily who has become accustomed to its use, and an alcoholic may by virtue of his indulgences be apparently normal, but in fact be suffering from physical and mental unbalance. He might carry on ordinary business transactions in a seemingly normal

manner. A chronic alcoholic often walks in a shuffling manner—unsteady and stumbling—and this may be evidence of the effect of alcoholism upon his nervous system, and damage to it results in impairment of the natural faculties. A chronic alcoholic is apt to befriend those who drink with him and aid him in keeping up his habits. He is likely to be antagonistic to those who try to help him reduce his drinking and because of his judgment defects he is more easily led—more susceptible to outside influence. Alcoholism is not easily controlled or disciplined by direct approach, but if an idea can be planted in the mind of the subject, he can carry it through with determination. In evaluating the extent of alcoholism in any instance, the presence of bloating of the ankles and face, a swelling of the abdomen, cirrhosis of the liver, inability of the subject to retain solid foods, and his subjection to vomiting spells, are given consideration and their existence indicates a very marked involvement. Alcoholism affects the body primarily through the vascular system and when it has existed for a time and to a degree sufficient to upset the circulation so that the kidneys and liver are involved, this causes the bloating, and thereby it is known that the vascular organism is involved and that every organ in the body is affected, including the brain, and this all indicates that there has been a great deal of vascular deterioration. This specialist expressed the opinion that the mental capacity of the testator in June of 1945 was such that he could not understand the nature and effect of the instrument intended to be his last will and testament.

Testator was a farmer and stockman. He owned about 600 acres of land. He rented some of his land. He did no actual field work, but he managed all of his business until the time of his death. His parents deeded him Lots 1 and 2 in the northeast quarter, and the southeast quarter of the northeast quarter of fractional Section 6, Township 11 North, Range 8 East, of the 6th P. M.,

about 113 acres, on June 7, 1907, for a consideration as recited in the deed of $8,000; and the northwest quarter of Section 5, Township 11 North, Range 8 East, of the 6th P. M., about 160 acres, on January 22, 1910, for a consideration as recited in the deed of $16,000; George A. Balis and Laura M. Balis deeded him the south half of fractional Section 6, including Lot 4 therein, containing 134.8 acres, and the west half of the southwest quarter of Section 5, containing 80 acres, all in Township 11 North, Range 8 East, of the 6th P. M., on March 3, 1913, for a consideration as recited in the deed of $28,998, subject to a first mortgage thereon of $4,000 given to Union Central Life Insurance Company, and testator gave to George A. Balis a second mortgage, bearing date of March 3, 1913, on the land last above described, for the sum of $10,000. There is evidence that testator stated that his father gave him the "Bayless farm." His father deeded him Lots A and B in Stephen B. Clark's plat of the south half of Section 18, Township 11 North, Range 8 East, of the 6th P. M., about 100 acres, on May 29, 1925, for a consideration as recited in the deed of one dollar and love and affection.

Testator made a will on February 11, 1942, by which he gave his personal property and a life estate in his real property to his wife, Anna L. Bainbridge, and subject thereto he devised his real estate as follows: To his nephew, George Derieg, the east half of the southeast quarter, and Government Lot 4 in the southeast quarter of Section 6, and the west half of the southwest quarter of Section 5, all in Township 11 North, Range 8 East, of the 6th P. M., Lancaster County, Nebraska, and Lots A and B of Stephen B. Clark plat of Section 18, Township 11 North, Range 8 East, of the 6th P. M., Lancaster County, Nebraska; to Helen Johnson Seng, the northwest quarter of Section 5, and the southeast quarter of the northeast quarter and Lots 1 and 2 in the northeast quarter of Section 6, all in Township 11 North, Range 8 East, of the 6th P. M.

He made another will, the subject of this litigation, on the 11th day of June, 1945, by which he gave his household furniture, goods, and personal effects in the home, and a life estate in his real estate to his wife, Anna L. Bainbridge; $100 to his sister Elizabeth; $25 to his sister Lurena; nothing to his sister Rhoda; $5 to each of his nephews, George Derieg and Michael A. Derieg, and subject thereto he devised real estate as follows: To Helen Seng (nee Johnson) the northeast quarter of Section 5, Township 11 North, Range 8, Lancaster County, Nebraska, containing 159.13 acres; and the west half of the northeast fractional quarter of Section 6, Lancaster County, Nebraska, containing 70.51 acres; and the southeast quarter of the said northeast quarter in said Section 6, Township 11 North, Range 8, Lancaster County, Nebraska, containing 40 acres; to Guy Stickney, the west half of the southwest quarter of Section 5, Township 11 North, Range 8, Lancaster County, Nebraska, containing 80 acres; and the east half of the southwest quarter of Section 6 in Township 11 North, Range 8, Lancaster County, Nebraska, containing 8 acres; and all of Government Lot 4 in the south half of Section 6, Township 11 North, Range 8, Lancaster County, Nebraska, containing 54.08 acres, described otherwise as fractional south half of Section 6, Township 11 North, Range 8, Lancaster County, Nebraska; and Lots A and B of Stephen B. Clark's plat of the south half of Section 18, Township 11 North, Range 8, Lancaster County, Nebraska, containing 100.53 acres. Guy Stickney was named as residuary legatee and devisee and all former wills were revoked.

Testator did not own the northeast quarter of Section 5 attempted to be devised to Helen Seng. He did own the northwest quarter of said Section 5. Likewise, testator did not own the southwest quarter of the northeast quarter of fractional Section 6, also known as Lot 3, attempted to be devised to her. He did own Lot 1 in the northeast quarter of said Section 6, which is not mentioned in exhibit 1.

The east half of the southwest quarter of Section 6, described in exhibit 1, was not owned by the testator. There is no such property in Lancaster County, Nebraska, because Section 6 is a fractional section—is less than a half-section, and all there is of it is in the east half of the section.

William E. Bainbridge died on November 25, 1945, leaving surviving him his wife, Anna Bainbridge, who died in the year 1946, his sisters, Elizabeth Gillham, Lurena Derieg, and Rhoda Otley, as his heirs. Helen Seng was related to the testator by affinity only—she was a niece of his wife.

The essential elements of undue influence sufficient to defeat a will are: That opportunity to exercise it exists; that the testator was susceptible to such influence; that there was a disposition to exercise it for an improper purpose; and that the result clearly appears to be the effect of such influence. In re Estate of Farr, *supra;* In re Estate of Keup, 145 Neb. 729, 18 N. W. 2d 63; In re Estate of George, 144 Neb. 887, 15 N. W. 2d 80; In re Estate of Bowman, *supra.*

The burden is on contestants to produce evidence tending to prove each of the four elements stated above, as a prerequisite of their right to have the issue submitted to a jury for determination. In re Estate of Farr, *supra*; In re Estate of George, *supra.* If any one of the essential elements enumerated is not supported by evidence or reasonable inference drawn from a fact or facts otherwise established, the contention of undue influence must be rejected. The evidence must tend to show undue influence directly in reference to the will in question, and be of such a nature as to control the will of the testator and cause him to do something that he did not intend. Suspicion or supposition of undue influence is not sufficient to require the submission of the question to a jury or to sustain a verdict. In re Estate of Bayer, 119 Neb. 191, 227 N. W. 928; In re Estate of Keup, *supra;* In re Estate of George, *supra.* Whether or not the evi-

dence and the inferences permitted to be deduced therefrom are sufficient to provide a question of fact on the issue of undue influence depends upon the facts and circumstances of each case and this must be determined by applying thereto the law governing this class of cases. In re Estate of George, *supra*.

In evaluating the testimony and proper inferences therefrom, it is not always possible to apply the evidence tending to establish improper influence which is referable to the will solely to one of the essential elements. Parts of the evidence tending to show undue influence may have probative value as to the existence of one or more of the elements thereof. A will containing unnatural provisions and gross inequality of distribution of the estate of the testator inconsistent with his duty to the members of his family, may afford evidence or inference that the testator was a person susceptible to influence, a disposition on the part of the beneficiary under the will to influence him, and that the result of the will may have been brought about by the exercise of improper influence. Evidence of ill health and mental defects of the testator may tend to support the element of susceptibility of the maker of the will and when supplemented by evidence of a contribution to the diseased condition of the mind of the testator by the person charged with having exercised illegal influence such as assisting him in continuing his excessive indulgences, the evidence becomes indicative also of the disposition of the person charged with improper conduct to exert improper influence over the testator. The fact that the person against whom undue influence is asserted is a very substantial beneficiary of the will under consideration, and also a recent acquaintance of the testator at the time of the execution of the will, may tend to prove that he was susceptible to influence, that the beneficiary had a disposition to exercise influence upon the testator, and that the result shows that the will was the effect of improper influence. Likewise, evidence tending to show that the regard and

affection of the maker of the will for those named by him in a previous will as beneficiaries was destroyed during the time the testator was in association with and under obligation to the person against whom influence is charged may have probative value in justifying a finding that the testator was subject to improper influence, that the person charged therewith may have had a disposition to exercise such influence, and that the will was the result of the influence so exercised. It is permissible therefore not to strive to separate each fact supported by evidence offered as proof of undue influence and allocate it under one or more of the four essential elements requisite to establish the exercise of undue influence, but to view the entire evidence offered by the contestants as proof of this issue and rest the decision upon whether or not the evidence as a whole is of such a substantial nature as to contain some proof of each of the essential elements, and to require that the issue of undue influence be submitted to and determined by a jury.

Guy Stickney moved on the land of the testator as a tenant in March, 1944, and continued that status until the death of the testator on November 25, 1945. The will in question was made on June 11, 1945. The acquaintance of the testator and Guy Stickney before he became the tenant was casual and limited. There is evidence that the testator had not spoken of Stickney before he moved on the farm. There were two sets of buildings on the land. The tenant lived in the house on what is referred to in the evidence as the north farm, and the testator lived in the house on what is referred to in the evidence as the south farm, or the Balis land. The houses were about three-quarters of a mile apart. The land was in a farming community and surrounded both houses. Testator and Stickney were friendly. They sometimes visited at the place on the land where Stickney happened to be working on the farm when the testator was out on the land, and he would assist while they

visited. Stickney sometimes drove the automobile of the testator when he did not accompany it. On other occasions Stickney and sometimes his wife drove the car of the testator for him on trips to and from his farm and would bring him groceries and supplies, and on some occasions Mrs. Stickney was seen to carry empty beer bottles to the car of the testator and Mr. Stickney was seen to bring full beer bottles to the Bainbridge home. He, in the fall of 1944, was known to have purchased in Havelock two half-gallon bottles of wine for the testator. It is a permissible inference from this evidence that Guy Stickney aided testator in reference to his intoxicating beverages and in one instance purchased wine for him; that testator traveled with great difficulty the last years of his life, but was at all times bountifully supplied with intoxicating beverages, and that Stickney was the one who did errands for him; that Stickney assisted the testator in securing and having all the intoxicating beverages he desired; he must have known the deplorable physical and mental condition of the testator and he must have had a motive for what he did in this regard, and it is reasonable to infer that his motive may not have been entirely free from selfishness. He was with testator on one of his visits to his doctor. He had frequent access to personal contact and association with the testator. The evidence of contestants tends to show that opportunity existed for Guy Stickney to have exercised undue influence over the testator, in reference to his will.

There is evidence tending to show that testator from the time he was about 20 years of age habitually drank intoxicating beverages and his indulgences in this regard and his physical and mental condition resulting therefrom got progressively worse during the last twenty years of his life; that during the latter part of his life he was continuously under the influence of intoxicating beverages; he could eat and assimilate only liquids, most foods nauseated him, and he substantially lived on wine; he was sleepy, stupid, and nearly bedfast much of the time;

his conversations were limited, filled with expressions of unjustified suspicion and charges of misconduct of others, and characterized with lack of continuity of thought and expression; he was morose—indulged in self-pity—complained and would weep at times about his condition, and, without foundation in fact, the way he was treated; he became despondent, would whimper, whine, and assert that he would not be here long—he was going to die; he became discolored, bloated, and afflicted with muscular tremor, dropsy, and cirrhosis of the liver; he was a chronic alcoholic; all of the organs of his body were affected and he sustained mental defects and deterioration; he was a victim of weakened will and emotional control and was subject to defects in judgment; and he had in all respects degenerated physically and mentally. He had lived all his life on or near the land he owned at the time the will was made. All of it except the Balis land—the west half of the southwest quarter of Section 5, and the south half of fractional Section 6, Township 11 North, Range 8 East, of the 6th P. M.—was acquired by him from his father. He failed to devise about 200 acres of the land he owned; he attempted to devise three parcels of land he did not own. The evidence of contestants tends to show that the testator was susceptible to undue influence.

The conduct of Guy Stickney and his wife in assisting testator in having continuously the intoxicating liquor he desired, as indicated by the evidence and reasonable inferences therefrom as above noted, may have had the effect on the testator of imbuing him with a great sense of gratitude and obligation to Guy Stickney. There is evidence to the effect that this could be the result of such conduct; that a chronic alcoholic such as the testator would take into his confidence and feel an affection and obligation towards anyone who assisted or encouraged him in the continuance in his indulgences in intoxicants and aided him in satisfying his desire for such beverages; that the extent and duration of the drinking of a chronic

alcoholic determines the extent of the damage to and impairment of his mental faculties and the degree of the destruction of his normal will power, the longer and the more he indulges, the more susceptible he may become to suggestions and desires of others. There is evidence indicating that Stickney was subservient to the wishes and desires of the testator as indicated by his assisting him with his intoxicants, operating his automobile for him, making Mrs. Stickney available for this purpose, and in securing and taking to his home groceries and supplies and performing similar services. That the testator was disposed to reciprocate might be found from the evidence that during the period of 1934 to 1944 he did not make much needed improvements on the structures on his farm where his tenants lived, and made only a nominal contribution for wallpaper for the dwelling, but soon after Stickney moved on the farm, two new small buildings were added, repairs made to other buildings, and the house painted. Guy Stickney was made the beneficiary of a large part of the estate of the testator in place of his nephew, George Derieg, to whom he had by a former will, executed about three years previous, devised the exact properties now given to Mr. Stickney by the provisions of the contested will. The former will was revoked on June 11, 1945, when the last will was made, and after Mr. Stickney had been tenant of the testator about fifteen months, and, as the evidence indicates, after the affection and regard of the testator for his nephew had been destroyed during the period of the tenancy of Mr. Stickney. The change in the attitude of the testator, if the last will is sustained, reduced George Derieg, the nephew, from the beneficiary of about 315 acres of land to a legacy of $5, practically disinherited all of the near relatives of the testator and changed a tenant, a stranger to the testator, to a landowner of about 315 acres. This indubitably reveals a striking change in attitude of the testator. It is possible, of course, that this, great and strange as it was, might have resulted naturally,

and if so, the testator had a right to disinherit his relatives, and refrain from any gift to his nephew whom he had felt justified in remembering so generously in a former will. It must be appreciated that it might have been brought about by the exercise of undue influence on the part of Guy Stickney. It must also be recognized that the interest which he took in the testator may be attributed to kind and benevolent motives, but it could be that such interest did spring from selfish and mercenary motives. It is because of such alternatives, concerning which reasonable minds do differ, that a question of fact arises which is proper for the consideration of a jury. It cannot be said as a matter of law that there is no evidence in this case of the disposition of the beneficiary to exercise undue influence over the testator.

There is evidence from which it could be found that a considerable part of the land owned by the testator at the time of his death came from his father. Notwithstanding this, he, by his last will, disregarded his nearest relatives, his sisters, and also one of his nephews whom he had not so long before recognized as a deserving object of his bounty, and he substituted strangers to his blood, a niece of his wife, and a tenant of short acquaintance, as his beneficiaries. This is not a case of unequal division between relatives of the testator, but the enrichment of a stranger. It could be found that there were good reasons why the testator excluded his sister Rhoda, but his revulsion of feeling as to his sisters Elizabeth and Lurena, with whom he had always, even to the hour of his death, sustained friendly relations and frequent contacts, is not so easily explained, and is not convincingly accounted for in this record. It could have been outside influence improperly exercised over the testator as charged herein. The evidence that George Derieg, nephew of the deceased, was for a considerable time a favorite of the testator, to whom he appealed when he needed assistance and from whom he accepted many kindnesses, is of peculiar importance in

this connection. The record indicates this nephew was in financial need of the consideration of his uncle. There is, of course, a reason why he refused that consideration. It could have been improper influence. There is evidence tending to establish the essential element that the result as shown by the will of the testator may have been the effect of improper influence.

Undue influence is largely a matter of inferences from facts and circumstances surrounding the testator, his life, character, and mental condition, and the opportunity existing for the exercise of improper control. In re Estate of Noren, *supra*. If a will contains unnatural provisions, it deserves close scrutiny. In re Estate of Bowman, *supra*. The fact that a beneficiary was a comparative stranger to the testator is a suspicious circumstance to be considered on the issue of undue influence. In re Estate of Paisley, 91 Neb. 139, 135 N. W. 435; In re Estate of Frederick, 83 Neb. 318, 119 N. W. 667.

The judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

CARTER, J., dissenting.

I am not in accord with the majority opinion. It is the law of this state that the elements necessary to be established to warrant the rejection of a will on the ground of undue influence are: That the testator was subject to such influence, that the opportunity to exercise it existed, that there was a disposition to exercise it, and that the result appears to be the effect of such influence.

It is my contention that the facts shown in the majority opinion fail to show by sufficient evidence that there was a disposition on the part of the devisee, Stickney, to exercise undue influence. Every statement in the majority opinion on this point is as consistent with Stickney's relationship to the testator as tenant or neighbor as it is with that of substituting his will for that of

Bainbridge in the testamentary disposal of the latter's property.

I submit that there must appear in the record somewhere, if undue influence is to be submitted to the jury, some evidence which can be accounted for only on the basis of a disposition on the part of Stickney to exercise undue influence. No such evidence is set forth in the majority opinion.

We have repeatedly held that every sane person is entitled to will his property as he sees fit, except where he has been limited by statute. He has a right to give it to relatives, to strangers, or to charity. If the conclusion reached by the majority is correct, the jury is entitled to pass upon the question of undue influence where the relationship of the parties is put before them, even if there is not a syllable of evidence which can be accounted for only on the basis of a disposition of the one charged, to influence the making of the testator's will. The practical effect of such a holding is to make the execution of any will subject to the approval of a jury where undue influence is charged.

The right of a person to dispose of his property by will rests on a much more secure foundation than this. Isaac v. Halderman, 76 Neb. 823, 107 N. W. 1016; In re Estate of Bose, 136 Neb. 156, 285 N. W. 319; In re Estate of Scoville, 149 Neb. 415, 31 N. W. 2d 284. This case is very important to those who desire to make a testamentary disposal of their property. One who desires to make an unnatural disposition of his property, for reasons best known to himself, is seriously restricted by the majority opinion. Juries are inclined to sustain charges of undue influence in the drafting of wills which they deem to be unfair to the natural objects of testator's bounty. But the maker of a will has a right to be unfair in disposing of his property without revealing his reasons therefor. I submit that if evidence is not required, which can be accounted for solely on the basis of a disposition to influence the testator, there is no

question of undue influence, as a matter of law, to be submitted to a jury. Undue influence cannot be inferred alone from motive or opportunity, and mere suspicion of undue influence on the testator is insufficient to require submission of the question to the jury or to sustain a verdict and judgment. In re Estate of Inda, 146 Neb. 179, 19 N. W. 2d 37; In re Estate of Woodward, 147 Neb. 270, 23 N. W. 2d 75. See, also, In re Estate of Heineman, 144 Neb. 442, 13 N. W. 2d 569.

In my judgment, the trial court correctly analyzed the evidence and properly directed a verdict in favor of the plaintiff.

The judgment should be affirmed.

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

WESTERN LAND ROLLER COMPANY, APPELLEE, V. LEO M. SCHUMACHER ET AL., APPELLANTS.
36 N. W. 2d 777

Filed April 14, 1949. No. 32561.

1. **Contracts.** The words "as quickly as possible" in a contract for the construction of an irrigation well mean with reasonable diligence or without unreasonable delay.
2. ———. The failure to commence work by the date specified in a contract constitutes a breach thereof for which liability ordinarily exists for all damages proximately resulting therefrom.
3. **Damages.** In such a case there must be a causal relationship between the damages asserted and the breach relied upon. Proof which leaves this issue in the realm of speculation and conjecture is insufficient to support a judgment.
4. **Trial.** In any equity suit, triable de novo in this court, where the oral evidence of witnesses is conflicting and cannot be reconciled, this court will consider the fact that the trial judge observed the witnesses and had a better opportunity to determine their credibility.

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

Morrow, Lovell & Bulger, for appellants.

Bruckman & Dunmire, Mothersead & Wright, and *Robert G. Simmons, Jr.,* for appellee.

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

CARTER, J.

This is a suit to foreclose a mechanic's lien for the balance due on two contracts for the drilling of two irrigation wells. The defendants alleged that the first well was not in accordance with the agreement and deny liability therefor. They also allege that the second well was not constructed within the time specified and they counterclaim for damages resulting to growing crops because of said breach. The trial court found that there was nothing due plaintiff for drilling the first well, found that there was $1,654.95 due for drilling the second well, and dismissed the counterclaim for damages to crops.

The defendant, Leo M. Schumacher, as executor of the estate of his father, Mathias Schumacher, had the possession and management of 424 acres of land in Sections 18 and 13, the complete legal descriptions of which are accurately set forth in the pleadings. He was also a lessee of a portion of the lands in Section 18. Substantial portions of these lands were irrigable and lay within the boundaries of the Pathfinder Irrigation District. The record shows that a shortage of irrigation water was anticipated during the growing season of 1940.

On December 8, 1939, the defendant Leo M. Schumacher entered into a written agreement with the plaintiff for the constructon of an irrigation well on the lands leased by him in Section 18. This well was drilled and cased and a test made to determine the amount of water it would produce. The test showed that its capacity was approximately 750 gallons per minute. This amount was not satisfactory to the defendant and it was not

accepted. The trial court found that there was nothing due for drilling this well. No appeal or cross-appeal was taken from this finding and consequently the trial court's disposition of this phase of the case is final.

On May 11, 1940, Leo M. Schumacher as executor of the estate of Mathias Schumacher entered into an agreement with the plaintiff to drill and equip a second well. This agreement provided that the well would be drilled and equipped for use for $1,710.30, with additional charges if the depth of the well exceeded 125 feet, and for a reduction for each foot less than the estimated depth. The amount claimed by the plaintiff for drilling the well and furnishing the pump, including the drilling of test wells, is $1,654.95. This amount is not challenged by the appeal. The sole question for determination is the correctness of the court's findings on the counterclaim for damages to the growing crops.

The issue here presented turns primarily on a provision of the agreement of May 11, 1940, providing as follows: "The Seller agrees to begin drilling the well on or before May 25 and complete the Well and install the Pump as quickly as possible."

The evidence shows that a test well was drilled before the contract was entered into for the second well. It shows, also, that plaintiff deemed it advisable to use a rotary or hydraulic drill as a result of the conditions shown to exist when the test well was completed. Plaintiff's representative informed the defendant Schumacher that plaintiff had such a well-drilling outfit operating at Lodgepole, Nebraska, and that he would move it on this job as soon as the Lodgepole job was completed. Unfavorable conditions developed on the Lodgepole job, and the hydraulic drill did not commence work on Schumacher's second well until June 4, 1940. This was ten days after the time agreed upon in the contract. The evidence shows that after drilling 32 feet an obstruction was encountered which the hydraulic drill could not penetrate. An orange peel and small drill

bar were successively used without success. The final result was that a blind casing drill had to be obtained to drill the well. The evidence shows that the second outfit commenced work on July 17 and completed the drilling and installation of the well casings on July 27. The test of the well's capacity was made within two or three days thereafter. The pump could not be assembled until the capacity of the well and height of the lift were first ascertained. The pump was subsequently installed and the well completed on August 19, 1940.

It is shown by the record that plaintiff installed a pump in the first well on July 10, 1940, which defendants were permitted to use while the second well was being drilled and the pump installed. It operated continuously, except when irrigation water was flowing in the ditch, until it was removed at the time or a few days before the second well was ready to operate.

The evidence shows further that the water from the first pump was discharged directly into an irrigation lateral which was located close to this pump. The second well was approximately 440 feet from this lateral. Defendant Schumacher, in order to make proper use of the water from the second well, found it necessary to install a pipeline to this same lateral. He purchased the pipe and caused the pipeline to be constructed. It was not completed until August 27, 1940, at which time the second well and pump were ready to operate. It was upon this evidence that the trial court found no basis for a claim for crop damage.

The contract provides that plaintiff will complete the well and install the pump as quickly as possible. The words "as soon as possible" mean with all reasonable diligence or without unreasonable delay. In Childs & Co. v. Omaha Paraphernalia House, 80 Neb. 673, 114 N. W. 941, we said: "We do not think that an order sent to a manufacturing company to manufacture a special article 'as soon as possible' means 'immediately,' or that the company must stop all its other work and devote

itself to that particular order; but that, as stated in Rhodes v. Cleveland Rolling-Mill Co., 17 Fed. 426, cited by appellant, the term 'as soon as possible' means 'with all reasonable diligence' or 'without unreasonable delay.' "

The defendant Schumacher contends that a suitable irrigation well was to be drilled and the pump installed for the 1940 irrigating season. The only provision in the contract indicating any such intent is the requirement that the drilling should commence on or before May 25. There is no provision fixing the time when it was to be completed except that it was to be done as quickly as possible. Plaintiff was not required to cease work on other jobs and to immediately commence work on the Schumacher well. The defendant knew that the hydraulic drill was completing a job at Lodgepole and that it would be moved to his place as soon as that job was finished. The delay caused by striking an obstruction which the drill could not penetrate is an exigency for which plaintiff is not responsible under the contract as drawn. The evidence shows that he procured a blind casing drill to dig the well as soon as the job on which it was being used was completed. The well crew worked 24 hours each day in two 12-hour shifts. The completed well was tested, the pump assembled and installed within a reasonable time thereafter. The failure to commence drilling, however, on or before May 25, 1940, constituted a breach of the contract. The question remaining is whether or not this breach resulted in the damages for which the defendant counterclaims. In this respect the record shows that the well was constructed and the pump installed before the defendant was ready to make use of the water. No use could be made of the well after August 19, 1940, the date the pump was installed, until August 27, 1940, the date the defendant completed the construction of the pipeline from the pump to the irrigation lateral. The delay of the defendant was a contributing factor in the damage claimed, the extent of which the

record does not show. The evidence shows further that the defendant Schumacher failed to use the water from the first well during the time that water was being delivered by the irrigation district because of a shortage of help to apply the water to the land. The failure to make use of this water was a contributing cause of the damage, the extent of which is not shown. The record shows that a minimum of 8 days pumping was thus lost. Time evidently was not of the essence of the contract as the pipeline could have been constructed long prior to the completion of the irrigation well. Whether the claimed damage resulted from the failure of plaintiff to commence work at the time stipulated by the contract, or from the failure to use the water from the first well during the time it was available for use, or from the neglect of the defendant Leo Schumacher in not having his pipeline ready for use when the well was constructed and the pump installed, or from a combination of two or more of these factors, is not ascertainable from the record. It requires speculation and conjecture to arrive at a conclusion. This will not, of course, afford a basis for a judgment. Lincoln Joint Stock Land Bank v. Platte Valley Public Power & Irrigation Dist., 140 Neb. 316, 299 N. W. 485; Snyder v. Platte Valley Public Power & Irrigation Dist., 144 Neb. 308, 13 N. W. 2d 160, 160 A. L. R. 1154. The trial court evidently came to a similar conclusion in finding against the defendant personally and as executor on the issues raised by the counterclaim.

The evidence was in some respects in direct conflict. In this respect the controlling rule is: In an equity suit, triable de novo in this court, where the evidence is conflicting and cannot be reconciled, this court will consider the fact that the trial judge saw the witnesses and had a better opportunity to judge as to their credibility. Under such circumstances the fact that the trial court accepted one version of the evidence rather than the other is of importance in determining the issue on appeal. Reetz v.

Olson, 146 Neb. 621, 20 N. W. 2d 687; Beskas v. Calkins, 135 Neb. 323, 281 N. W. 29.

We conclude that the evidence shows that the breach of the contract in failing to commence work on the stipulated date was not proven as the cause of the damages asserted in the counterclaim. The damages, if any, were the result of unforeseen conditions, for which plaintiff was not liable under the terms of the contract and the unmeasured contributions which the defendant Leo Schumacher himself made to the claimed injury. The trial court came to the same conclusion and the judgment of that court is affirmed.

AFFIRMED.

THE SECURITY INVESTMENT COMPANY, TRUSTEE, APPELLEE, V. GEORGE GOLZ ET AL., APPELLANTS, IMPLEADED WITH WILLIAM H. GOLZ ET AL., APPELLEES.
36 N. W. 2d 862

Filed April 14, 1949. No. 32534.

1. **Equity.** 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.
2. **Estates.** As between the life tenant and the owner of the fee, it is the duty of the former to pay all taxes charged against the land during the continuance of his estate.
3. ———. The life tenant must pay taxes that accrued within the time of the life estate though before he possessed it.
4. **Mortgages: Estates.** A mortgagee of a life estate takes it cum onere and must devote the rents to the payment of taxes due from said estate before acquiring the mortgage as well as those imposed subsequent thereto.
5. ———: ———. Where the mortgagee of a life estate prior to acquiring the mortgage thereon purchased tax sale certificates upon the land held by the life tenant, it being the life tenant's duty to pay the taxes it likewise becomes the duty of the mortgagee to pay all taxes thereon, which amounts to the redemption of the same.

6. Mortgages: Taxation. One who is under an obligation to pay the taxes on land, such as a mortgagee in possession thereof, cannot strengthen his title thereto by buying in the tax title when the property is sold as a consequence of his omission to make such payment. In such a case the sale will merely operate as a payment of the taxes and the title will be the same as it was before the sale, except that the lien for taxes is discharged.
7. ———: ———. A mortgagee who takes possession of a life tenant's estate and pays the taxes thereon from the rents and profits, and prior to taking such mortgage purchased tax sale certificates on the land and holds the same in abeyance for a period of ten years or until the mortgage obligation has been paid in full then presses his action to foreclose the same, is not in equity and good conscience entitled to a decree of foreclosure as against the remainderman or the life tenant's grantee.

APPEAL from the district court for Lancaster County: RALPH P. WILSON, JUDGE. *Reversed and dismissed.*

Lloyd E. Chapman, for appellants.

Louis B. Finkelstein and *Clinton J. Campbell,* for appellees.

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

MESSMORE, J.

This is an appeal from a decree of foreclosure of two tax lien certificates. The defendant George Golz was the owner of a life estate in 260 acres of land adjoining the village of Sprague, Nebraska, described as Lot 1, northwest, Lot 3 and west half of northeast quarter and northeast quarter of northeast quarter, Section 33, Township 8, Range 6, except right-of-way of the Missouri Pacific Railway Company. George Golz conveyed his life estate to Cammie Golz and Ida Lesoing in 1937.

George Golz, Cammie Golz, wife of George Golz, Ida Lesoing, sister of George Golz, and Joseph Lesoing, husband of Ida Lesoing, are appellants. William H. Golz, the remainderman, and Emma Golz, his wife, are appellees and cross-appellants. The Security Investment Company, Trustee, is the plaintiff and appellee. The

Security Investment Company is also a defendant and an appellee.

The undisputed facts shown by the record follow. Prior to 1933, George Golz, the owner of the life estate in the real estate hereinbefore described, was indebted to The Security Investment Company. On November 5, 1934, the county treasurer of Lancaster County sold and delivered two tax sale certificates for the delinquent taxes of 1933 to one Glen Foe in the amounts of $54.80 and $116.55. On May 21, 1935, the purchaser of the tax sale certificates paid the first half of the 1934 taxes thereon in the amount of $24.91. On August 26, 1936, Glen Foe assigned and transferred the two tax sale certificates and taxes paid thereon to The Security Investment Company, Trustee, for the amount of $289.30, as evidenced by a check dated August 26, 1936, given by such company. The Security Investment Company, Trustee, on September 4, 1936, paid the last half of the 1934 taxes and all of the 1935 taxes on the tax sale certificates in the amounts of $85.40 and $173.65.

On October 8, 1936, George Golz and his wife executed and delivered to The Security Investment Company a mortgage agreement conveying his life estate for indebtedness he owed the mortgagee in consideration of the sum of $8,961.05, to draw interest at five percent per annum, payable annually, which was filed of record October 9, 1936. The mortgage provided, in addition to the conveyance, the following: "It is further contracted and agreed by and between George Golz and Cammie Golz, that from the date of this instrument until such time as the above described note in the amount of $8961.05 is paid in full, together with interest, that the said Security Investment Company—shall have charge of renting, collect all rentals, control, and manage the premises herein described upon which the said George Golz has a life estate without charge, and that all of the rentals accruing from said premises shall be applied as follows: First, for the payment of taxes accruing thereon

levied by the State of Nebraska, Lancaster County, and also insurance on the buildings in the amount of $____ or insurable value. Second, for the payment of interest on the above described note and the balance remaining to be applied on the principal of said note hereinbefore described. It is further agreed and contracted between the parties that unless mutually agreed to between the parties in writing, that this method of payment of the above described note shall be exclusive and binding upon each of the parties."

On May 14, 1937, The Security Investment Company, Trustee, paid the first half of the 1936 taxes on the tax sale certificates in the amounts of $28.81 and $59.95. All subsequent taxes on the above-described real estate were paid by The Security Investment Company from the income and receipts from the real estate as provided for in the mortgage agreement.

On August 19, 1937, The Security Investment Company, Trustee, filed its petition in the district court for Lancaster County to foreclose the tax sale certificates and the taxes paid thereunder.

On July 25, 1946, the amount of indebtedness for which the mortgage on the life estate was given was paid in full and a balance paid to the owner of the life estate, George Golz.

The articles of incorporation of The Security Investment Company were filed in the office of the county clerk of Lancaster County, December 29, 1932. The Security Investment Company, Trustee, and The Security Investment Company were one and the same entity during all of the foregoing transactions. The secretary of The Security Investment Company testified that tax sale certificates were purchased in the name of The Security Investment Company, Trustee, so that the same might be sold to a client if call should be had for the same.

The Security Investment Company, during the period from October 8, 1936, to July 25, 1946, when the amount

of the indebtedness evidenced by the mortgage was paid by the owner of the life estate, was also the owner of the tax sale certificates and the tax payment receipts on such certificates as hereinbefore set out.

The Security Investment Company had its offices with the Martell State Bank to which the life tenant was indebted, and each had the same officers during the time the transactions were had in this case.

On June 15, 1948, the trial court entered a decree finding generally in favor of the defendant The Security Investment Company upon its cross-petition, and against the defendants George Golz and Cammie Golz, Ida Lesoing and Joseph Lesoing, William H. Golz and Emma Golz; further decreed that "in case the defendants George Golz and Cammie Golz, Ida Lesoing and Joseph Lesoing, William H. Golz or Emma Golz or either of them shall fail for twenty days from the entering of this decree, to pay to The Security Investment Company the sum of $1264.68 with interest thereon at the rate of nine percent per annum from this date and $126.47 as Attorney's Fees for the attorney of The Security Investment Company and the costs paid out by The Security Investment Company in this action; that the equity of redemption of the defendants George Golz and Cammie Golz, Ida Lesoing and Joseph lesoing, William H. Golz and Emma Golz be foreclosed and said premises shall be sold as upon execution for the satisfaction of the aforesaid sums; that an order of sale for such purpose issue * * *." The decree further provided for the manner of the distribution of the funds.

The plaintiff, The Security Investment Company, Trustee, and defendants George Golz and Cammie Golz, Ida Lesoing and Joseph Lesoing, filed motions for new trial. Upon the overruling of the same, the defendants George Golz and Cammie Golz, Ida Lesoing and Joseph Lesoing, appealed.

The appellants assign as error that the decree of the district court is contrary to law for the reason that appel-

lee, The Security Investment Company, violated its trust when as a mortgagee in possession of the mortgaged premises it was obligated to pay all taxes thereon, it held tax sale certificates to the mortgaged premises, paid taxes on such tax sale certificates, and consequently cannot be permitted to strengthen its title in an action not involving its mortgage.

In the brief of the appellee and cross-appellant, The Security Investment Company, Trustee, the statement is made that the appellees William H. Golz and Emma Golz have not appealed from the judgment of the district court and that the same is final as against them.

Section 25-1913, R. S. 1943, provides that a cause shall be docketed in the Supreme Court under the same title it had in the district court, that the party or parties asking the reversal, vacation, or modification of such judgment, decree, or final order shall be designated as appellant or appellants, and that the adverse party or parties shall be designated as appellee or appellees.

The appellees William H. Golz and Emma Golz filed their brief in this court as appellees and cross-appellants. Section 1 d, Revised Rules of the Supreme Court of Nebraska, provides: "The filing of an appeal shall vest in an appellee the right to a cross-appeal. The cross-appeal need only be asserted in appellee's brief in the manner provided by Rule 8b 4." which provides: "Where the brief of appellee presents a cross-appeal, it shall be set forth in a separate division of the brief. This division shall be headed 'Brief on Cross-Appeal' and shall be prepared in the same manner and under the same rules as the brief of appellant."

The appellees William H. Golz and Emma Golz complied with the foregoing stated rule. The following authorities are pertinent.

"It is the practice of courts of equity when they have obtained jurisdiction of a case to administer all of the relief which the nature of the case and the facts demand, and to bring such relief down to the close of litigation

between the parties." Best & Co., Inc. v. City of Omaha, 149 Neb. 868, 33 N. W. 2d 150.

"It is a well-settled principle of equity jurisprudence that 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." Buchanan v. Griggs, 20 Neb. 165, 29 N. W. 297. See, also, Glissmann v Bauermeister, 139 Neb. 354, 297 N. W. 617, 299 N. W. 225.

All the parties to this litigation are before this court as appellants, appellees, or appellees and cross-appellants. The entire record involving all the issues presented in the district court is here for determination on trial de novo, as provided for in section 25-1925, R. S. 1943.

The law is well established in this jurisdiction "As between the life tenant and the owner of the fee, it is the duty of the former to pay all taxes charged against the land during the continuance of his estate." Spiech v. Tierney, 56 Neb. 514, 76 N. W. 1090. See, also, Disher v. Disher, 45 Neb. 100, 63 N. W. 368; King v. Boettcher, 96 Neb. 319, 147 N. W. 836; Criswell v. McKnight, 120 Neb. 317, 232 N. W. 586, 84 A. L. R. 1361.

In view of the foregoing authorities, when The Security Investment Company obtained a mortgage on the life tenant's estate and entered into possession of the land under the mortgage, it became the legal duty of such mortgagee to pay the taxes on the land as the law required the life tenant to pay, unless an exception was made thereto by the parties at interest. However, the appellee, The Security Investment Company, contends that in accordance with the provisions of the mortgage agreement it was obligated to pay the taxes accruing thereon levied by the State of Nebraska, Lancaster County; and that the language "taxes accruing thereon" is subject to one interpretation, and refers to taxes which are levied and accrue in the future, and does not refer to taxes levied and due prior to the obtainance of its mort-

gage. The case of Hartsfield Co. v. Shoaf, 184 Ga. 378, 191 S. E. 693, is cited to the following effect: After an analysis and interpretation of the verb "accrue" the court concluded that "accrue," "accrued," and "accruing," in their generally accepted sense are used to denote something which is to be added to or attached to something else, citing 1 C. J. S., 759.

Webster defines the word "accrue" as "2. To come by way of increase * * *; to arise or spring as a growth or result; * * *." Black's Law Dictionary defines the word "accruing" as meaning in the process of maturing; that which may or will ripen into a vested right, an available demand, or an existing cause of action. Black's Law Dictionary (3d ed.), p. 30. See, also, Johnson v. Humboldt Ins. Co., 91 Ill. 92, 33 Am. R. 47. The meaning of the word is dependent somewhat on the facts of each case and the objects to be accomplished either by the statute or contract in which the word is used. See, Hartsfield v. Shoaf, *supra;* Johnson v. Humboldt Ins. Co., *supra;* Dempster v. Atwood, 118 Neb. 579, 225 N. W. 683, 227 N. W. 451.

In contracts wherein one party agrees to pay taxes, the meaning of the term "taxes" must be determined by the particular facts involved. See National Bank of Kentucky v. Minary, 221 Ky. 798, 299 S. W. 985.

Therefore, The Security Investment Company, appellee, argues, having purchased the tax sale certificates six weeks or more prior to procuring the mortgage on the life estate, it was only required to pay taxes on the land from the date of the mortgage as indicated by the mortgage agreement, and could not use any of the income from the real estate in its possession under the mortgage to pay any funds or claims except as set forth therein.

In furtherance of its contention The Security Investment Company directs attention to section 77-1822, R. S. 1943, which provides in part that certificate of purchase shall be assignable by endorsement, and an assignment

thereof shall vest in the assignee all the right and title of the original purchaser.

A tax certificate may be assigned by endorsement, and an assignee of a tax certificate acquires all the rights thereunder of the assignor. See Green v. Hellman, 61 Neb. 875, 86 N. W. 912.

Consequently, as assignee The Security Investment Company acquired all the right, title, and interest of Glen Foe, the original purchaser of the tax sale certificates, which included the right to foreclose the same without obligation to the owner of the life estate or remainderman.

It appears from the record that The Security Investment Company instituted this action to foreclose the tax sale certificates and the taxes paid thereon on August 19, 1937. It also appears from the record that on May 14, 1937, after the mortgage was in effect, The Security Investment Company, as the owner and holder of the tax sale certificates, made a payment of taxes on the same for the half year of 1936, which payment of taxes is included in the foreclosure proceedings. Approximately ten years later, when the mortgage indebtedness had been fully paid and a balance over and above the indebtedness was paid to the life tenant who agreed to pay the amounts due on the tax sale certificates from a corn crop he was raising but failed to do so, The Security Investment Company then pressed this suit.

It being the duty of the holder of the life estate to pay the taxes, he cannot as against the remainderman acquire a title derived from a sale of the lands for the payment of taxes. See Annotation in 17 A. L. R. 1399.

"Where a mortgagor owes a duty to the mortgagee to pay taxes upon the mortgaged property, neither he nor his assigns can acquire any right against such mortgage by purchasing the property at a judicial or administrative sale * * *." Pitman v. Boner, 81 Neb. 736, 116 N. W. 778.

The converse of the situation is also true. "A mort-

gagee in possession seeking to enforce his mortgage upon real estate by a decree of foreclosure and sale, occupies a trust relation in regard to the property, and cannot as against the mortgagor, while treating the mortgage as valid, hold adversely as to him." McKeighan v. Hopkins, 19 Neb. 33, 26 N. W. 614.

The life tenant must pay taxes that accrued within the time of the life estate though before he purchased. See, King v. Boettcher, *supra;* Watkins v. Green, 101 Mich. 493, 60 N. W. 44; Criswell v. McKnight, *supra.*

We deem a summary of the pertinent facts in the case of King v. Boettcher, *supra,* appropriate to this appeal, and review a part of such facts. Before the purchase from O'Reilly (the life estate) there could have been no duty upon the part of Boettcher to pay the taxes; whenever Boettcher did make the purchase, then he bought what O'Reilly had to sell, and nothing more. O'Reilly was bound to keep up the taxes because he was the owner of the life estate, and that duty was enjoined upon the owner of such estate, whoever he might be, because it was a legal burden which belonged to the life estate itself, and was inseparable from it. For that reason, O'Reilly could not release the life estate by selling it to Boettcher, and Boettcher bought it subject to the burden which O'Reilly had permitted to accumulate. If O'Reilly could convey the life estate separate from the legal burden enjoined upon it, then he could transfer to Boettcher a greater interest than he himself enjoyed. Concert of action between O'Reilly and Boettcher should not be permitted to destroy the interest of the remainderman or to lessen its value.

"It is a general principle of law that one who is under an obligation to pay the taxes on land, such as * * * a mortgagee, cannot strengthen his title thereto by buying in the tax title when the property is sold as a consequence of his omission to make such payment. In such a case the sale will merely operate as a payment of the taxes and the title will be the same as it was before the

sale, except that the lien for taxes is discharged. It appears that this exclusion extends likewise to persons standing in a relation of trust to the owner." Annotation to 123 A. L. R. 398. See, also, 26 R. C. L., Taxation, §§ 370, 372, pp. 412, 415.

"A purchaser, at a sale under a judgment, of the estate for life, takes it cum onere, and must devote the rents to the payment of taxes due from said estate before the purchase, as well as those imposed subsequent thereto." Murch v. Smith Mfg. Co., 47 N. J. Eq. 193, 20 A. 213. It was said in the opinion: "The life estate of John H. Murch, when purchased by defendant, was liable to the extent of its rental value for the taxes in arrear; the income has been sufficient to keep down the taxes and pay those in arrear; the defendant, as purchaser, took the estate cum onere, and must apply a sufficient amount of the rents to the discharge of said tax liens." See, also, Holmes v. Danforth, 83 Me. 139, 21 A. 845.

In Rich v. Allen, 226 Iowa 1304, 286 N. W. 434, the court held that a judgment creditor of a life tenant who levied execution on a life estate, and purchased the life estate on execution sale, assumed all the duties of the life tenant and was obligated to pay delinquent taxes or else lose the advantage of the life estate. The case cited Murch v. Smith Mfg. Co., *supra;* King v. Boettcher, *supra.*

In Mathews v. O'Donnell, 289 Mo. 235, 233 S. W. 451, the court said: "The purchase of land at its sale for taxes, by the life tenant or by the life tenant's grantee, inures to the benefit of the remaindermen, and operates only as a payment of the taxes. Such purchaser occupies a fiduciary relation to the remaindermen, and is bound to exercise every reasonable precaution to preserve the property intact for transmission to them upon the termination of the life estate." The court further held: "* * * the record of title showing he had only a life estate is constructive notice to his grantee, and the

tax deed informs such grantee that the life tenant had suffered the land to be sold for delinquent taxes which the law required him to pay."

In the instant case The Security Investment Company had actual notice, and devised a deliberate plan to deprive the remainderman of his estate by suit for the sale for taxes.

Even though the purchaser of the life tenant is one who has previously purchased tax titles held upon sales for taxes which it was the life tenant's duty to pay, it becomes his duty to make the payment, and his acceptance of the deed from the life tenant operates as a redemption from or extinguishment of his tax lien. See, Little v. Edwards, 84 Wis. 649, 55 N. W. 43; Annotation in 17 A. L. R. 1397. See, also, Brodie v. Parsons, 23 Ky. L. 831, 64 S. W. 426; Jones v. Merrill, 69 Miss. 747, 11 So. 23; 1 Restatement of the Law, Property, § 149, p. 488; 51 Am. Jur., Taxation, § 1054, p. 919, cases cited under note 10 thereof too numerous to cite; 33 Am. Jur., Life Estates, Remainders, Etc., § 443, p. 972; 36 Am. Jur., Mortgages, § 247, p. 814.

Section 77-1403, R. S. 1943, provides in part: "The mortgagee or his assigns may pay the tax levied on the interest of the owner and have a lien thereon secured by the mortgage to the extent of the amount so paid with lawful interest thereon."

The Security Investment Company apparently did not elect to follow the foregoing section of the statute.

In Burchard v. Roberts, 70 Wis. 111, 35 N. W. 286, 5 Am. S. R. 148, in referring to sections of the statute in Wisconsin, 1878 Revised Statutes, §§ 1158, 1160 inclusive, which is analogous to the provisions of section 77-1403, R. S. 1943, the court said in the opinion that in the present case the purchase of the land at the tax sale for the mortgagees, and the taking of the tax certificates thereon, must be regarded as for the protection of the estate and the mutual benefit of the mortgagees and mortgagor. Then, in speaking of the statu-

tory provisions as above cited, the court said: "These statutory provisions give the mortgagee an adequate remedy to reimburse himself for the taxes thus paid by him, and are inconsistent with the idea that he may cut off the mortgagor's equity of redemption in the mortgaged premises by acquiring an adverse title thereto under tax proceedings."

As heretofore stated, the use of the language in the mortgage agreement which includes the word "accruing" and, as stated in Hartsfield v. Shoaf, *supra,* the meaning of the word is dependent somewhat on the facts of each case and the objects to be accomplished either by the statute or contract in which the word is used, and, where a party in purchasing agrees to pay taxes, the meaning of the term "taxes" must be determined by the particular facts or agreement involved. In considering the record in the instant case and in the light of the authorities cited, we conclude that equity and good conscience will not permit The Security Investment Company to a decree of foreclosure of tax sale certificates, and require the life tenant or his successor in title to pay the amounts due thereon to redeem, or require the remainderman to pay the amounts due thereon to redeem.

The possessory contract or mortgage agreement should be given a reasonable construction. The reasonable intendment was that all taxes should be paid from the income. It is a highly technical construction that the life tenant intended existing taxes to remain unpaid. The only fair construction, consistent with honesty, is that he meant that any taxes first should be paid. Otherwise there was concerted effort between the holder of the life estate and The Security Investment Company to waste the remainder estate. Obviously the plan and scheme of The Security Investment Company was to divert the income from the life estate to the payment of indebtedness of the life tenant and to use the pending but dormant foreclosure suit to collect the taxes,

with penalty interest, from the remainderman, if necessary. This was a clear breach of duty to the remainderman. As pointed out in the cases above cited, in law and equity, its tax payments were redemption payments. While the factual situations in the cited cases may be dissimilar to those of the instant case, the principles of law announced therein are pertinent to a determination of this appeal, as heretofore pointed out.

In view of our holding, it is unnecessary to determine the cross-appeal of the appellee and cross-appellants, The Security Investment Company, Trustee.

For the reasons given herein, the judgment of the district court is reversed and the cause dismissed.

REVERSED AND DISMISSED.

LESLIE D. CARTER, SPECIAL ADMINISTRATOR OF THE ESTATE OF HANS JOHNSON, DECEASED, APPELLANT, V. WALTER ZDAN, APPELLEE.
36 N. W. 2d 781

Filed April 14, 1949. No. 32509.

1. **Appeal and Error.** Errors assigned but not discussed will not be considered by this court.
2. **Negligence.** In order to recover under the doctrine of last clear chance there must be sufficient evidence to sustain a finding that the party invoking the doctrine was by his own negligence immediately before the accident in a position of peril from which he could not escape by the exercise of ordinary care; that the party against whom it is asserted knew or ought to have known of the other's peril; that the party against whom the doctrine is invoked had the present ability with the means at hand to avoid the accident without injury to himself or others; that the failure to avoid the accident was due to a want of ordinary care on the part of the person against whom the doctrine is invoked and that such want of ordinary care was the proximate cause of the accident; and that the negligence of the party imperiled is neither active nor a contributing factor in the accident.
3. **Evidence: Negligence.** The evidence of an ordinance not pleaded

and of its violation is admissible under a general averment of negligence where the question is material.

APPEAL from the district court for Douglas County: ARTHUR C. THOMSEN, JUDGE. *Affirmed.*

Wear, Boland & Nye and *Leslie D. Carter,* for appellant.

Harold W. Kauffman and *Gross & Welch,* for appellee.

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

YEAGER, J.

This is an action which was instituted by Hans Johnson, plaintiff, against Walter Zdan, defendant, to recover damages on account of personal injuries sustained by plaintiff as the result of a collision between plaintiff and an automobile owned and operated by the defendant. The action was tried to a jury. A verdict was rendered in favor of the defendant upon which judgment was rendered. Motion for new trial was duly filed. Subsequent to the filing of the motion for new trial plaintiff died. The action was revived in the name of Leslie D. Carter, Special Administrator. After revivor the motion for new trial was overruled. From the judgment and the order overruling the motion for new trial the special administrator has appealed.

The grounds of appeal are that the trial court erred in refusing to submit to the jury an instruction on the doctrine of last clear chance, although the same was pleaded and there was evidence to sustain the applicability of the doctrine and the case was tried on that theory, and that the court erred in admitting in evidence an ordinance of the city of Omaha, Nebraska.

There are two other assignments of error noted in the brief but they are not discussed hence they will not be discussed here. See Little v. Loup River Public Power District, 150 Neb. 864, 36 N. W. 2d 261.

Before it may be said that the appellant is entitled under the last clear chance doctrine to prevail on this

appeal the evidence in support of the cause of action must be shown to have met the requirements of the following rule which is the latest expression of this court on this subject:

"In order to recover under the doctrine of the last clear chance in this state there must be sufficient evidence to sustain a finding (1) that the party invoking the doctrine was by his own negligence immediately before the accident in a position of peril from which he could not escape by the exercise of ordinary care, (2) that the party against whom it is asserted knew or ought to have known of the other's peril, (3) that the party against whom the doctrine is invoked had the present ability with the means at hand to avoid the accident without injury to himself or others, (4) that the failure to avoid the accident was due to a want of ordinary care on the part of the person against whom the doctrine is invoked and that such want of ordinary care was the proximate cause of the accident, and (5) that the negligence of the party imperiled is neither active nor a contributing factor in the accident." Whitehouse v. Thompson, 150 Neb. 370, 34 N. W. 2d 385. See, also, Reynolds v. Omaha & C. B. St. Ry. Co., 108 Neb. 26, 187 N. W. 92; Nielsen v. Yellow Cab & Baggage Co., 130 Neb. 457, 265 N. W. 420; Hughes v. Omaha & C. B. St. Ry. Co., 143 Neb. 47, 8 N. W. 2d 509; Donald v. Heller, 143 Neb. 600, 10 N. W. 2d 447.

The facts upon which the decision in this respect must depend are substantially the following: L Street is a street of the city of Omaha extending east and west. The paved portion of this street is 53 feet wide and has four traffic lanes, two for east-bound and two for west-bound traffic. The place on this street of particular concern in this case is the vicinity of the intersection of it by a thoroughfare known as Dahlman Boulevard. Dahlman Boulevard intersects from the northwest. The intersection is approximately four blocks east of Thirty-third Street. There is no outlet to the south across L

Street. At a point not made certain by the evidence but generally south of the place where Dahlman Boulevard intersects L Street is located a sign indicating a stop where passengers are received and discharged by east-bound streetcar buses which regularly traverse L Street. From somewhere near this location L Street inclines upward for some considerable distance both to the east and to the west. The decedent was on and prior to December 14, 1946, employed by the Sutherland Lumber Company as a night watchman. The place of his employment was on the north side of L Street and a distance estimated to be about 100 feet east of Dahlman Boulevard. On the morning of December 14, 1946, at about 6:45 a. m. before daylight but while day was breaking, the decedent left his place of employment, went out to the north side of L Street to a point not made certain by the evidence and started either in a fast walk or slow run across L Street to the south with the purpose of boarding an east-bound bus which he saw approaching from the west. The direction taken is not certain but it reasonably appears that it was southwesterly. He testified that he looked in both directions before starting but saw nothing between the tops of the east and west inclines.

He did not testify positively that he did not look thereafter but did testify that he saw nothing after he left the north side of L Street until he was struck by appellee's automobile. The only reasonable inference to be drawn is that he did not look. He collided with the left front part of appellee's automobile which automobile was moving eastward, somewhere south of the center line of L Street and an estimated distance of from 25 to 50 feet east of the bus stop on the south side of L Street. The direct evidence indicates that the contact of decedent with the automobile was at about the center of the left fender. The only thing to the contrary is an inference drawn by the appellant that the contact was with the bumper. The inference is based

on the fact that decedent's legs were broken.

The appellee came from the west on his right side of the street at a rate of speed estimated at from 18 to 45 miles an hour. His automobile was lighted and in good operating condition. He testified that he never saw decedent until he was within a few feet of him when he suddenly swerved to the right, blew his horn, and set his brakes, whereupon the decedent ran into his left front fender.

L Street west to Thirty-third Street was open and unobstructed at the time and the grade the entire distance is gradual.

If the appellant is entitled to have this case submitted to a jury under the doctrine of the last clear chance the right must flow from the evidence, of which we think the foregoing is a fair summary, and an application thereof to the rule as stated in Whitehouse v. Thompson, *supra.*

The doctrine has no application unless the person claiming its benefit puts himself in the position of admitting that immediately before the accident he found himself in a place of peril through his own negligence from which he could not escape by the exercise of ordinary care.

Thus on appellant's theory it must be said that decedent negligently placed himself in a position of peril immediately before this accident. Could he have escaped by the exercise of ordinary care? Clearly he could have stopped or, if need appeared, stepped back out of the path of the oncoming automobile which he could have seen if he had exercised an appropriate degree of care for his own safety. The following appears in the opinion in Reynolds v. Omaha & C. B. St. Ry. Co., *supra,* which we think apropos here: "There was no time that deceased in crossing the street could not have avoided the injury to himself by merely looking for an approaching car, * * *."

An application of this element denies appellant the

right to have this action submitted to a jury under the doctrine of the last clear chance, therefore it is unnecessary to discuss either the other elements or the question of whether or not there was evidence of negligence on the part of appellee.

In the light of the foregoing determination upon the evidence it is not necessary to determine whether or not the petition sufficiently pleaded a cause of action under the doctrine of the last clear chance.

It may be well to interpolate here that the cause was submitted to a jury on the theory of negligence under the comparative negligence rule and a verdict was returned on which judgment was rendered unfavorable to the decedent and of this no complaint is made here.

In support of his contention that the court erred in admitting in evidence a provision of the ordinances of the city of Omaha without the same having been pleaded, the appellant relies upon the decisions in Nebraska cases, cases from other jurisdictions, and statements of certain text writers. The Nebraska cases are Foley v. State, 42 Neb. 233, 60 N. W. 574, and Spomer v. Allied Electric & Fixture Co., 120 Neb. 399, 232 N. W. 767.

These Nebraska cases are not authority upon the proposition contended for. They go only to the proposition that the district court will not take judicial notice of municipal ordinances.

It does not become necessary to refer to the decisions of other jurisdictions and texts further than to say that in them is found some support for the contention, since this court has spoken directly on the question adversely to appellant.

In Omaha St. Ry. Co. v. Larson, 70 Neb. 591, 97 N. W. 824, a case wherein a like question was presented, this court said: "It is also contended that the trial court erred in admitting in evidence an ordinance of the city of Omaha, limiting the speed of street cars upon certain streets of the city, including Military avenue. This was objected to on two grounds: (1) That

it was not pleaded in the petition that the car was being run in violation of the ordinance; (2) that it was immaterial under the issues. As to the first ground of objection, we think that evidence of an ordinance, and its violation, is admissible under a general averment of negligence, where this question is material in a case."

There was a general averment of negligence on the part of decedent in the answer of appellee therefore no error was involved in the admission of the provision of the ordinance in question in evidence.

The judgment of the district court is affirmed.

AFFIRMED.

MYRTLE HARRIS, APPELLEE, v. BERNARD HARRIS, APPELLANT, DAN WAEGLI ET AL., INTERVENERS, APPELLEES.
36 N. W. 2d 849

Filed April 14, 1949. No. 32556.

1. **Parties: Divorce.** Ordinarily there is no right of intervention by third parties in an action for divorce.
2. ———: ———. In a divorce action where intervention becomes necessary to secure justice or to protect rights intervention becomes proper.
3. **Divorce.** Upon granting a decree of divorce the court may make such further decree as it shall deem just and proper concerning the care, custody, and maintenance of the minor children of the parties.
4. ———. After a decree of divorce has been granted if the circumstances of the parties shall change or if it shall be to the best interests of their children the court may on its own motion revise or alter the decree so far as it concerns the care, custody, and maintenance of the children.
5. ———. The proceeding when it is sought to revise or alter a divorce decree insofar as it concerns the care, custody, and maintenance of children is ancillary in the original action and is not controlled by the statute relating to intervention.
6. **Parties: Divorce.** A third party may properly by petition intervene after divorce decree to invoke the control which the statute gives to courts over the care, custody, and maintenance of children of divorced persons.

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

William G. Whitford, for appellant.

Elmer C. Rakow, for appellees.

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

YEAGER, J.

A determination of the questions presented by the appeal herein requires a statement of the history of antecedent proceedings in this case. On August 13, 1947, Myrtle Harris, plaintiff, filed a petition for divorce from Bernard Harris, defendant, and for custody of the seven minor children of the parties. A decree was entered on October 10, 1947, granting a divorce to plaintiff. She was also awarded the custody of the children. On April 30, 1948, the defendant filed a petition in which he requested that the custody of three of the children of the parties be awarded to him. On August 6, 1948, pursuant to the prayer of the petition and on stipulation of the parties the decree was modified whereby defendant was awarded the custody of LeRoy Harris, one of the children.

Thereafter on August 13, 1948, on oral motion Dan Waegli and Margaret Waegli, who are husband and wife, were permitted to file in this action what they termed a petition in intervention in which it was stated that LeRoy Harris was born on January 14, 1936, and that they obtained custody of him in May 1946, and had retained such custody thenceforth. The prayer of the petition was for a modification of the decree and an award of his custody to them.

To this petition plaintiff entered her voluntary appearance but filed no pleading. She did not in anywise resist the relief sought by Dan Waegli and Margaret Waegli in the district court and she has made no appearance in this court.

The defendant filed a motion to strike the petition in

intervention on the ground that Dan Waegli and Margaret Waegli had no right to intervene for the reason that they were not proper parties.

Reserving the objection of his motion to strike, the defendant then filed a motion to require that the petition in intervention be made more definite and certain.

Thereafter defendant filed a demurrer on the ground that the petition in intervention did not state a cause of action in favor of Dan Waegli and Margaret Waegli.

These two motions and the demurrer were in regular order overruled.

On the overruling of the demurrer the defendant filed an election to stand on his demurrer and a refusal to further plead.

A trial was had to the court on the petition in intervention at the conclusion of which the custody and control of LeRoy Harris was awarded to Dan Waegli and Margaret Waegli. From this order the defendant has appealed. Dan Waegli and Margaret Waegli will be referred to hereinafter as interveners.

There is no attack upon the order awarding custody of the child to interveners except that which inheres in the contention of the motion to strike and of the demurrer that the interveners had no right and were not proper parties to intervene. In other words on the record presented the only question for consideration here is the propriety of the ruling of the district court on the demurrer.

The theory on which the appeal is presented is that the right of intervention is controlled by statute in Nebraska, that under the statute only those who have or claim an interest in the matter in litigation or in the success of a party or parties to the action may intervene, and that this being an action for divorce there can be no other person or persons having an interest in the matter in litigation, therefore intervention was not permissible and could not properly be allowed.

The statute allowing intervention is the following:

"Any person who has or claims an interest in the matter in litigation, in the success of either of the parties to an action, or against both, in any action pending or to be brought in any of the courts of the State of Nebraska, may become a party to an action between any other persons or corporations, either by joining the plaintiff in claiming what is sought by the petition, or by uniting with the defendants in resisting the claim of the plaintiff, or by demanding anything adversely to both the plaintiff and defendant, either before or after issue has been joined in the action, and before the trial commences." § 25-328, R. S. 1943.

It is true that ordinarily there is no right of intervention by third parties in an action for divorce. 27 C. J. S., Divorce, § 91, p. 673; Keehn v. Keehn, 115 Iowa 467, 88 N. W. 957; Hulett v. Hulett, 152 Miss. 476, 119 So. 581; Broduer v. Broduer, 53 R. I. 450, 167 A. 104. In a divorce action however where intervention becomes necessary to secure justice or to protect rights intervention becomes proper. 27 C. J. S., *supra;* Wagenseller v. Wagenseller, 29 Pa. Dist. 75, 48 Pa. Co. 106; Elms v. Elms, 4 Cal. 2d 681, 52 P. 2d 223, 102 A. L. R. 811; Greene v. Greene, 220 Ala. 395, 125 So. 640.

We think however that the decision is not to be controlled by either this general rule or the exceptions thereto.

The statutes relating to divorce and custody of children contain the following provisions:

"Upon pronouncing a sentence or decree of nullity of a marriage and also upon decreeing a divorce, whether from the bonds of matrimony or from bed and board, the court may make such further decree as it shall deem just and proper concerning the care, custody, and maintenance of the minor children of the parties, and may determine with which of the parents the children or any of them shall remain. * * *." § 42-311, R. S. 1943.

"If the circumstances of the parties shall change, or it shall be to the best interests of the children, the court

may afterwards from time to time on its own motion or on the petition of either parent revise or alter, to any extent, the decree so far as it concerns the care, custody and maintenance of the children or any of them." § 42-312, R. S. 1943.

It is observable from these provisions of the statutes that while the divorced parents are granted the right to petition for change of the custody, care, and maintenance of minor children at the same time the court is granted the right to exercise control thereover.

How may the court in the first instance become informed of the necessity or apparent necessity for the exercise of this control? The procedure is not defined or prescribed in our statutes and neither is it pointed out by whom the grounds shall be presented to the court.

Elsewhere it has been held that third persons may intervene where it is contended that the parent to whom custody of children was awarded has become unfit for the trust. Stone v. Duffy, 219 Mass. 178, 106 N. E. 595. Reason supports this holding.

It has also been held that the application may be by motion. Corbett v. Corbett, 123 Ohio St. 76, 174 N. E. 10; Newkirk v. Newkirk, 129 Ohio St. 543, 196 N. E. 146; 27 C. J. S., Divorce, § 317, p. 1192.

The proceeding is a supplementary or auxiliary proceeding in the original action having no purpose to review or otherwise affect the determinable issue therein, that of divorce. Bridges v. Bridges, 227 Ala. 144, 148 So. 816; Franklin v. Bonner, 201 Iowa 516, 207 N. W. 778; Thornton v. Thornton, 221 Mo. App. 1199, 2 S. W. 2d 821; Cushing v. Cushing, 126 N. J. Eq. 271, 8 A. 2d 363; Smith v. Frates, 116 Wash. 108, 198 P. 732.

In this light we conclude that the petition here is not within the meaning of the statute a petition in intervention. It is an ancillary petition in an action where there had been a full and complete adjudication of the issues there presented. The purpose of the proceeding was not to disturb the judgment on the issues tried in the

action but to invoke action of the court in regard to a subject matter over which the court pursuant to statute retained jurisdiction and control.

We conclude further that, since the Legislature has failed to prescribe procedure to invoke action of the district court in such circumstances, the procedure followed herein was proper and should be and is approved.

The district court did not err in overruling the demurrer.

AFFIRMED.

ERIC H. REHN, APPELLEE, V. ARTHUR BINGAMAN, ADMINISTRATOR OF THE ESTATE OF ALVIN A. BINGAMAN, DECEASED, APPELLANT, IMPLEADED WITH JOHN P. MAINELLI, DOING BUSINESS UNDER THE NAME AND STYLE OF MAINELLI CONSTRUCTION COMPANY, APPELLEE.

36 N. W. 2d 856

Filed April 14, 1949. No. 32592.

1. **Courts: Constitutional Law.** In view of the self-executing provisions of Article I, section 13, Constitution of Nebraska, courts of this state must be open at all times to afford a remedy by due course of law for any injury done a party in his person, without denial or delay, and without reference to and wholly unaffected by the subsequent death of the wrongdoer or the party wronged.
2. ———: ———. Where exclusive jurisdiction of a subject matter is constitutionally conferred on county courts, and where relief sought in an action pertaining thereto but instituted in a district court is such that the county court, under powers so conferred, is authorized to grant it, the district court will be deemed to have no original jurisdiction in the premises.
3. **Executors and Administrators.** The word "claim" includes every species of liability which an executor or an administrator of an estate can be called upon to pay, or provide for payment, out of the general fund of the estate.
4. ———. A contingent claim against an estate is one where the liability depends upon some future event or contingency which may or may not ever occur, and which therefore makes it wholly

uncertain whether or not there ever will be a liability. Such contingency does not relate simply to the amount which may be recovered but to the uncertainty of whether or not the future event will ever occur to thereby effect a right of action or liability.

5. **Torts: Executors and Administrators.** Liability upon an unliquidated claim for damages arising out of a tort does not depend for its creation upon the occurrence of some uncertain event in the future, and is not a contingent claim, since of necessity such a claim must be based upon the theory that the event, the tort giving rise to liability, has already occurred, and that a cause of action has already accrued and is in existence.
6. **Abatement and Revival.** A cause of action for personal injuries alleged to have been proximately caused by negligence of a decedent during his lifetime survives, and when no action was brought thereon during his lifetime, it must be prosecuted by a claim filed against the estate of decedent in the county court which has exclusive original jurisdiction thereof.
7. **Negligence: Workmen's Compensation.** A party's right of action for negligence against a third person with whom he has no contractual relation as employer and employee, is not a right given by section 48-118, R. S. 1943, but a common-law right previously existent and preserved thereby.
8. **Workmen's Compensation.** The term "third person," appearing in section 48-118, R. S. 1943, means any person other than the employer or those whom the Workmen's Compensation Act makes an employer, and thus includes fellow employees.

APPEAL from the district court for Douglas County: FRANK M. DINEEN, JUDGE. *Reversed and dismissed.*

Cranny & Moore, for appellant.

Emmet L. Murphy, E. Melvin Kennedy, and *G. H. Seig,* for appellees.

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

CHAPPELL, J.

This original action was filed in the district court for Douglas County against Arthur Bingaman, administrator of the estate of Alvin A. Bingaman, deceased, to recover damages for personal injuries alleged to have been proximately caused by the negligence of deceased

during his lifetime. John P. Mainelli, doing business as Mainelli Construction Company, was made defendant for the sole purpose of protecting his right to subrogation as provided in section 48-118, R. S. 1943, of the Workmen's Compensation Act.

After trial to a jury, plaintiff was awarded a verdict and judgment. Defendant administrator's motions for judgment of dismissal notwithstanding the verdict, and for new trial, were overruled, whereupon he appealed. His brief contains some 32 assignments of error, but as we view the record, only two propositions of law require discussion and decision to dispose of the cause. They both relate to jurisdiction of the subject matter, and are respectively: (1) Did plaintiff's cause of action survive the death of Alvin A. Bingaman, in other words, was there then existent a subject matter over which any competent court could exercise jurisdiction, and if so, (2) did the district court have original jurisdiction of the subject matter in any event, since the alleged tort occurred and plaintiff's alleged cause of action arose during the lifetime of Alvin A. Bingaman, but no action thereon was filed until after his death, and was then brought against the administrator of his estate. We conclude that the cause of action survived, but that the district court did not have original jurisdiction of the subject matter thereof.

This court has heretofore affirmatively adjudged the question of survival under almost identical circumstances, but has never directly passed upon the question of the district court's original jurisdiction of causes like the one at bar.

In re Estate of Grainger, 121 Neb. 338, 237 N. W. 153, 78 A. L. R. 597, a claim for damages for personal injuries alleged to have been proximately caused by negligence of deceased during his lifetime, was, after his death resulting from the same accident, filed against his estate in the county court for Lancaster County. Demurrer thereto was sustained and the claim was dis-

missed. Appeal therefrom was taken to the district court where an amended demurrer to the first cause of action for personal injuries, as pleaded in the petition on appeal, was sustained and the cause dismissed. An appeal therefrom was taken to this court, where the judgment was reversed.

In doing so, it was held: "An action for personal injuries may be prosecuted against the estate of a decedent whose negligence is alleged to have been the proximate cause of the injury.

"The right to an action for personal injury does not abate by reason of the death of the wrongdoer before the action was brought."

Likewise, in Wilfong v. Omaha & C. B. St. Ry. Co., 129 Neb. 600, 262 N. W. 537, after citing with approval and quoting from In re Estate of Grainger, *supra*, and Waller v. First Savings & Trust Co., 103 Fla. 1025, 138 So. 780, it was held: "In view of the self-executing provisions of section 13, art. 1 of our Constitution, courts of this state must be open at all times to afford a remedy by due course of law for any injury done 'a party' in his person, without denial or delay, and without reference to and wholly unaffected by the subsequent death of the wrongdoer or the party wronged."

Admittedly, there are authorities from other jurisdictions which have reached contrary conclusions, but it appears that they have done so either under statutes or constitutional provisions different from our own, or regardless, have applied strictly the common-law rule of "actio personalis moritur cum persona" to the full extent of its original scope, which in the light of its conflict with our organic law and statutes, as well as our modern needs and conditions, this court has refused to do.

Contrary to defendant's contention, In re Estate of Samson, 142 Neb. 556, 7 N. W. 2d 60, 144 A. L. R. 264, did not by any manner or means overrule, modify, or

repudiate the conclusions reached in In re Estate of Grainger, *supra,* and Wilfong v. Omaha & C. B. St. Ry. Co., *supra,* to which we still adhere.

That case is clearly distinguishable upon the facts. Therein a claim for widow's allowance was denied in the county court. She appealed, but died while the appeal was pending in the district court. The executor of her estate then sought revivor, to which a plea in abatement was overruled, and the cause of action was revived in the name of her executor. This court, upon appeal therefrom, reversed the judgment and dismissed the action, concluding that the cause of action did not survive the widow's death, hence there was nothing to revive since the widow's claim for allowance was purely a personal right to support, created by statute, section 30-103, R. S. 1943, which she alone could enjoy during her survival, and then only for a limited period in any event. In other words, on a par with Williams v. Williams, 146 Neb. 383, 19 N. W. 2d 630, the subject matter, the widow's status of personal survival which formed the basis of her cause of action for support while living, was destroyed by her death, and there was nothing left to survive thereafter.

In re Estate of Samson, *supra,* held in part: "A cause of action created by statute does not survive unless declared so to do by the statute itself or by provisions for its survival made by some other statute."

In the light thereof, defendant herein argued that since plaintiff's cause of action was one created by section 48-118, R. S. 1943, then In re Estate of Samson, *supra,* controlled the case at bar, citing Muncaster v. Graham Ice Cream Co., 103 Neb. 379, 172 N. W. 52, relied upon in O'Donnell v. Baker Ice Machine Co., 114 Neb. 9, 205 N. W. 561. We cannot so hold.

In that connection, it will be observed that the proviso contained in section 48-118, R. S. 1943, was added thereto by Chapter 135, Laws of Nebraska, 1929, p. 489, after the foregoing opinions were written, thereby mak-

ing ineffective the obiter dicta appearing in Muncaster v. Graham Ice Cream Co., *supra,* to the effect that such section gave "to the injured employee a right of action where the injury complained of grew out of carelessness or negligence of a third party, * * *."

The proviso now reads: "* * * that nothing in this section or act shall be construed to deny the right of an injured employee or of his personal representative to bring suit against such third person in his own name or in the name of the personal representative based upon such liability, * * *." It then simply directs that "in such event an employer having paid or paying compensation to such employee or his dependents shall be made a party to the suit for the purpose of reimbursement, under the above provided right of subrogation, of any compensation paid."

As we view it, the concurring opinion in Muncaster v. Graham Ice Cream Co., *supra,* to the effect that "plaintiff's right of action, if any, against * * * a third person with whom he had no contractual relations, is not given by the workmen's compensation act" was confirmed by the 1929 amendment, as the original legislative intent. See Oliver v. Nelson, 128 Neb. 160, 258 N. W. 69.

We conclude that the employee's right of action against third persons for negligence proximately causing his injuries was a common-law right already existent outside of and notwithstanding the Workmen's Compensation Act. In other words, section 48-118, R. S. 1943, not only preserved the employee's common-law right to recover from third persons as it was before the act, but also, in the final analysis, simply gave the right of legal subrogation to his employer without depriving the employer of his right to equitable subrogation under circumstances requiring its application. Burks v. Packer, 143 Neb. 373, 9 N. W. 2d 471.

Defendant argued that deceased was not an independent contractor but a fellow employee of plaintiff, and

thus not a third person within the purview of section 48-118, R. S. 1943. Whether deceased was an independent contractor or a fellow employee we are not required to decide. In any event, whether he was the one or the other is of no importance because he would be such a third person in any event. Concededly, an independent contractor would be such a third person, and it is generally the rule that a fellow employee would also be such person regardless of the capacity of his employment, so long as he did not occupy the relationship of employer of plaintiff. 57 C. J. S., Master and Servant, § 578, p. 348; 35 Am. Jur., Master and Servant, § 525, p. 954, and § 526, p. 955; Annotation, 99 A. L. R. 422; Hudson v. Moonier, 94 F. 2d 132, 102 F. 2d 96.

In McGonigle v. Gryphan, 201 Wis. 269, 229 N. W. 81, citing other cases, and quoting from Zimmer v. Casey, 296 Pa. 529, 146 A. 130, it was said: " 'When the term "third party" is mentioned in the workmen's compensation act, it means any person other than the master, or those whom the act makes master, and the employee who is seeking compensation under their agreement. The act is careful to preserve the status of a third person by not defining the term; so the presumption must be that the law as to third persons in every respect stands as it was before the act.' " See, also, Allen v. Trester, 112 Neb. 515, 199 N. W. 841, and Fonda v. Northwestern Public Service Co., 134 Neb. 430, 278 N. W. 836, indicating the same conclusion. To hold otherwise would unjustly confer upon every employee freedom to neglect his duty toward a fellow employee and thus escape with impunity from all liability for damages proximately caused by his own negligence.

Since the cause of action survived, we turn to the question of whether or not the district court had original jurisdiction of the subject matter thereof. In doing so, we conclude that it did not, but that, as argued

by defendant, the plaintiff's remedy, if any, was by claim originally filed in the county court against the estate of Alvin A. Bingaman, deceased.

In that connection, Article V, section 16, Constitution of Nebraska, provides: "County courts shall be courts of record, and shall have original jurisdiction in all matters of probate, settlement of estates of deceased persons, and in such proceedings to find and determine heirship; appointment of guardians, and settlement of their accounts; and such other jurisdiction as may be given by general law: * * *."

In discussing the foregoing constitutional provisions and the exclusive original jurisdiction thereby vested in the county court, it was said in Williams v. Miles, 63 Neb. 859, 89 N. W. 451: "To it resort must first be had for the protection of any right or the granting of any relief to which a party may be entitled, growing out of or arising from the subjects mentioned. In view of the authority and jurisdiction thus conferred on county courts as courts of record having original jurisdiction, can it be seriously doubted that such court is empowered to grant the relief to which a party may be entitled, whether founded upon either legal or equitable grounds, or whether the character of the action is such as properly may be denominated either an action at law or in equity? * * * On principle and authority the conclusion, we think, is inevitable that in granting the relief to which a party is entitled, or the protection of his rights when the subject of litigation comes within the jurisdiction of the county court, it may exercise all the powers of a court of general jurisdiction, either legal or equitable, which pertain to the subject over which it is given such jurisdiction." See, also, In re Estate of Statz, 144 Neb. 154, 12 N. W. 2d 829, with relation to the constitutional provision aforesaid, and sections 24-503 and 24-504, R. S. 1943, discussed *infra*.

Section 24-503, R. S. 1943, provides: "The county court shall have exclusive jurisdiction of the probate

of wills, the administration of estates of deceased persons, * * *." Section 24-504, R. S. 1943, also provides: "The county court shall have power (1) to hear and determine claims and set-offs in the matter of estates of deceased persons; * * *." Section 30-601, R. S. 1943, provides: "When letters testamentary or of administration, or of special administration shall be granted by any court of probate, or during any appeal from such order, it shall be the duty of the judge of the court to receive, examine, adjust and allow all lawful claims and demands of all persons against the deceased; * * *."

2 Woerner, The American Law of Administration (3d ed.), § 391, p. 1265, lists 28 states, including Nebraska, "in which the power to try claims has been conferred upon courts of probate jurisdiction: * * *." Thereafter, in § 392, p. 1268, it is said: "But the power to try claims against the estates of deceased persons includes all actions upon which a money judgment can be rendered, whether growing out of contract or tort, whether legal or equitable in their nature."

In Hendreschke v. Harvard High School District, 35 Neb. 400, 53 N. W. 204, it was held: "Where a statute upon a particular subject has provided a special tribunal for the determination of questions pertaining to such subject, the jurisdiction of such tribunal is exclusive, unless otherwise expressed or clearly implied from the act." See, also, Armstrong v. Mayer, 60 Neb. 423, 83 N. W. 401. Here, such a tribunal, the county court, was not only expressly provided by statute but also by the organic law of this state.

As held in In re Estate of Edwards, 138 Neb. 671, 294 N. W. 422: "The word 'claim' includes every species of liability which an executor or an administrator of an estate can be called upon to pay, or provide for payment of, out of the general fund of the estate." See, also, 34 C. J. S., Executors and Administrators, § 367, p. 95.

As stated in Stevenson v. Valentine, 38 Neb. 902, 57 N. W. 746: "In the district court no claim against the

estate of a deceased person is provable, originally, except upon appeal as to the same from the county court."

In Craig v. Anderson, 3 Neb. (Unoff.) 638, 92 N. W. 640, it was held: "The district courts of this state have no original jurisdiction to allow claims against the estate of a decedent or to order the payment of such claims out of funds in the hands of the administrator." See, also, Dame, Probate and Administration (3d ed.), § 385, p. 400.

Therefore, particularly applicable is the holding in Stewart v. Herten, 125 Neb. 210, 249 N. W. 552: "Where exclusive jurisdiction of a subject-matter is conferred on county courts, and where relief sought in an action pertaining thereto but instituted in a district court is such that the county court under these powers so conferred is authorized to grant it, the district court will be deemed to have no original jurisdiction in the premises."

Section 30-801, R. S. 1943, provides: "No action shall be commenced against the executor or administrator except actions to recover the possession of real or personal property, and actions for relief other than for the recovery of money only, and such actions as are permitted in sections 30-704, 30-705, 30-706 and 30-714; * * *."

Clearly, plaintiff's cause of action, including his employer's right to subrogation as well, come within the prohibition of the aforesaid section as actions for the recovery of money only. Drainage District v. O'Neill, 109 Neb. 552, 191 N. W. 685; Krotine v. Link, 36 Ohio App. 537, 173 N. E. 443; Reed v. Ramey, 82 Ohio App. 171, 80 N. E. 2d 250.

We are confronted with the question then of whether or not plaintiff's right, as argued by him, was a contingent claim within the provisions of sections 30-704, 30-705, 30-706, and 30-714, R. S. 1943, which was required to be first made absolute by a decree of the district court before presentation against the estate of deceased in the county court. We conclude that it was not.

A contingent claim against an estate is one where the liability depends upon some future event or contingency

which may or may not occur, and which therefore makes it wholly uncertain whether there ever will be a liability. The contingency does not relate simply to the amount which may be recovered, but to the uncertainty of whether or not the future event will ever occur, to thereby effect a right of action or liability. In re Estate of Bolton, 121 Neb. 737, 238 N. W. 358; Parker v. Luehrmann, 126 Neb. 1, 252 N. W. 402; 21 Am. Jur., Executors and Administrators, § 356, p. 582; 34 C. J. S., Executors and Administrators, § 377, p. 122; Dame, Probate and Administration (3d ed.), p. 425, § 415.

As stated in Pierce v. Johnson, 136 Ohio St. 95, 23 N. E. 2d 993, 125 A. L. R. 867: "A liability on an unliquidated claim for damages arising out of a tort does not depend for its creation upon the occurrence of some uncertain event in the future. On the contrary, such claim is, as of necessity it must be, based on the theory that the event, the tort, giving rise to liability, has already occurred, and that a cause of action has already accrued and is in existence. A claim thus grounded cannot be said to be contingent." See, also, Hicks v. Wilbur, 38 R. I. 268, 94 A. 872, wherein it was said: "Whether the claimant in tort will recover is uncertain; but this is true of all claimants, whatever be the nature of their claims, whether for liquidated or unliquidated damages, or whether the claim arises in tort or in contract; and, if such claimants are allowed to recover, the amount of the damages which may be awarded is uncertain, but these circumstances do not render their claims contingent. A contingent claim within the meaning of the statute is one that depends for its effect upon some future event which may or may not happen. Until that event happens a right of action upon said claim does not arise."

We conclude, therefore, that although plaintiff's cause of action survived, the district court had no original jurisdiction of the subject matter thereof, and in conformity with our holding in Schmidt v. Henderson, 148 Neb. 343, 27 N. W. 2d 396, and Lippincott v. Wolski, 147

Neb. 930, 25 N. W. 2d 747, 169 A. L. R. 1236, the judgment herein should be and hereby is reversed and the cause is dismissed.

REVERSED AND DISMISSED.

WALTER W. GOUGER ET AL., APPELLANTS, V. COUNTY OF SARPY, APPELLEE.
36 N. W. 2d 775

Filed April 14, 1949. No. 32559.

1. **Taxation.** A redemption by the owner of real estate foreclosed under section 77-2040, Comp. St. 1929, is required to be made in accordance with section 20-1530, Comp. St. 1929, which requires that the person entitled to redeem shall pay the amount of the decree, interest, and costs, and, if sold to a person not a party to the suit, the person redeeming must pay in addition thereto interest at 12 percent per annum on the amount of the purchase price from the date of the sale to the date of redemption.
2. **Judgments.** A finding is not conclusive on the parties in a subsequent suit unless a judgment is entered thereon, or it is incorporated into or covered by a judgment.

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

Fischer, Fischer & Fischer, for appellants.

Orville Entenman, for appellee.

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

WENKE, J.

Walter W. Gouger and Mary Jean Gouger brought this action in the district court for Sarpy County against the County of Sarpy. The purpose of the action is to quiet their title in and to Lots 5 and 6, Block 130, in the City of Bellevue, Sarpy County, Nebraska, together with the vacated streets and alleys adjoining, as against certain tax liens in favor of the county of Sarpy. The trial court

dismissed plaintiffs' petition and found in favor of the defendant for the amount of its tax liens, applying the amount paid for redemption of the bids as part payment thereon. Their motion for new trial having been overruled, plaintiffs appeal.

The facts are not in dispute. On July 1, 1938, tax sale certificates on these lots covering taxes for the years of 1925 to 1936, inclusive, were issued to appellee. Thereafter, and more than two years after they had been issued, a foreclosure action was brought in the district court for Sarpy County on these and other tax sale certificates held by appellee. This action was filed on December 10, 1940, and included 84 causes. Causes of action Nos. 82 and 83 relate to the properties herein involved.

On February 28, 1941, decree was entered therein which found that in cause of action No. 82 the county of Sarpy had a first lien on Lot 5 in the sum of $358.47 plus interest and costs and in cause of action No. 83 it had a first lien on Lot 6 in the sum of $1,160.19 plus interest and costs. Pursuant to the provisions of the decree the sheriff of Sarpy County offered these, and other premises therein foreclosed, at public sale and, on May 24, 1941, sold Lot 5 to Pauline F. Friedman for $57 and Lot 6 to the same bidder for $300. The sheriff, on May 28, 1941, made his return to that effect.

Thereafter, on June 3, 1941, C. J. Southard tendered into court the sum of $359.02, representing the bids received on these lots, plus interest at 12 percent. He requested that he be permitted to redeem the properties.

The foreclosure of these properties was conducted pursuant to section 77-2040, Comp. St. 1929, and the attempted redemption for the amount of the bid was not on the proper basis. See County of Sarpy v. Wright, 146 Neb. 193, 19 N. W. 2d 146, wherein we said: "A redemption by the owner of real estate being foreclosed under section 77-2040, Comp. St. 1929, is required to be made in accordance with section 20-1530, Comp. St. 1929, which

requires that the person entitled to redeem shall pay the amount of the decree, interest and costs, and, if sold to a person not a party to the suit, the person redeeming must pay in addition thereto interest at 12 per cent per annum on the amount of the purchase price from the date of sale to the date of redemption. Knox County v. Perry, 142 Neb. 678, 7 N. W. 2d 475; Madison County v. Crippen, *supra.*"

On June 3, 1941, the sales had in the different causes of action, as shown by the sheriff's return, came up for confirmation. In the decree the court made the following finding as to causes of action Nos. 82 and 83: "Redemption having been made by owners of the following described lots, to-wit:

Cause of Action	Description		Purchaser	Bid
* * *	(Lot)	(Block)		
82nd	" 5	" 130	Pauline F. Friedman	57.00
83rd	" 6	" 130	" "	300.00

and the full purchase price having been paid by the owners of this property to the Sheriff, the sale of same is not confirmed."

Although the court, in its decree relating to confirmation of sales had in various of the causes of action in the tax foreclosure proceeding, made the finding hereinbefore set out it did not make any order or judgment with reference to these causes of action which relate to the property herein involved. In the absence thereof there has been no adjudication of the issues of redemption or confirmation.

As stated in Brounty v. Daniels, 23 Neb. 162, 36 N. W. 463: "A finding of fact is not a judgment."

A finding is not conclusive on the parties in a subsequent suit unless a judgment is entered thereon or it is incorporated into or covered by a judgment. 50 C. J. S., Judgments, § 697, p. 153; 30 Am. Jur., Judgments, § 196, p. 938; 1 Van Fleet, Former Adjudications, § 27, p. 119.

For the reasons stated we find the judgment of the trial court correct and it is affirmed.

AFFIRMED.

DELONE RAE HUDSON, APPELLEE, V. MARVIN DELYLE HUDSON, APPELLANT.
36 N. W. 2d 851

Filed April 14, 1949. No. 32567.

1. **Marriage.** Marriage is a civil contract which, if procured by fraud, may, under certain conditions, be set aside. Sections 42-101, 42-118, and 42-119, R. S. 1943.
2. **Parent and Child: Bastards.** A child born in wedlock is presumed to be the legitimate offspring of the husband and wife, and this is so even though the birth of the child happens so soon after the marriage as to render it certain that it was the result of coition prior thereto.
3. ———: ———. This presumption of legitimacy may be rebutted by competent proof that the husband had no access to the wife, or that he was absent at such time as in the course of nature the child was begotten; that he was impotent, or other circumstances showing that he could not have been the father of the child.
4. ———: ———. The wife is not permitted to testify to facts which would bastardize her child and her declarations cannot be used in evidence to prove the same fact.
5. ———: ———. When a husband admits he has had intimate relations with his wife before their marriage and within the probable period of gestation of a child which was conceived before but born after the marriage and he is informed of the pregnancy prior thereto he cannot deny its paternity but must submit to the marriage and the presumed paternity of the child.
6. **Divorce.** The trial court is vested with sound discretion in determining whether a divorce from bed and board or an absolute divorce should be granted, but ordinarily an absolute divorce is to be preferred.

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

Towle, Young & Mattson, for appellant.

Reller, McArthur & Davis, for appellee.

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

WENKE, J.

DeLone Rae Hudson commenced this action in the district court for Lancaster County on November 6, 1947, against Marvin DeLyle Hudson. The purpose of the action is to obtain an absolute divorce, custody of their minor son, and an allowance for his support. The basis of the action is extreme cruelty.

The defendant, by his father and next friend, filed a cross-petition. The purpose thereof is to obtain an annulment of their marriage. The basis on which he seeks annulment is that he was induced to enter into the marriage through fraud practiced upon him by the plaintiff. This alleged fraud relates itself to the paternity of the unborn child which plaintiff was carrying at the time of their marriage.

On May 28, 1948, the trial court entered its decree wherein it dismissed defendant's cross-petition; denied plaintiff a divorce; awarded custody of the minor child, Kim DeLyle Hudson, to plaintiff with defendant given the right to visit the son at reasonable times and places; directed defendant to pay $25 a month for the care and maintenance of the son; and taxed costs, including $100 additional attorney's fee, to defendant.

From the overruling of his motion for new trial the defendant appeals and plaintiff cross-appeals.

The record discloses that the parties started going together in the early part of 1946 while attending high school. Appellee was then apparently about 16 years of age and appellant 17 years of age for the record discloses she was 17 and he was 18 at the time of their marriage. By Christmas of that year they had become sweethearts and were going steady. They were married on July 12, 1947, and, for a short time thereafter, lived with his parents. About the first of August they established a

home of their own at 525 South 25th Street in Lincoln, Nebraska. They lived in this home until shortly after the baby was born. The baby was born in St. Elizabeth's Hospital on October 24, 1947. Appellee never returned to their home thereafter except on November 3, 1947, when she returned for the purpose of getting her apparel and other personal things. This action was instituted shortly thereafter.

As to the appeal from the dismissal of his cross-petition the appellant states the question involved to be, is a man entitled to an annulment of a marriage into which he enters because of the fraudulent representations by the woman that the child of which she is pregnant is his, when in fact it is the child of another?

Marriage is a civil contract which, if procured by fraud, may, under certain conditions, be set aside. See sections 42-101, 42-118, 42-119, R. S. 1943.

The difficulty with appellant's position in this regard is that no such factual situation exists. The record discloses that appellee and appellant were sweethearts and going together steady. That during this period, and within the probable period of gestation, they became intimate. The admitted intimacy occurred on February 4, 1947, and the baby was born on October 24, 1947. See Souchek v. Karr, 78 Neb. 488, 111 N. W. 150. There is no evidence that appellee was ever intimate with anyone else. Subsequently, when appellant was informed by appellee of her then condition he recognized himself as the father of their unborn child. Later, in the forepart of July 1947, after she had gone to Spokane in the state of Washington to give birth to the child, he asked her, by telephone, to come back and be married. This she did and they were married on July 12, 1947. The record shows he had full knowledge of all the facts, which were of his own making, and with such knowledge he entered into the marriage. We find no fraudulent misrepresentations on the part of the appellee to induce the marriage.

However, appellant calls our attention to certain dec-

larations made by appellee, after the birth of the child, to the effect that appellant was not the father of the child and she married him only for the purpose of giving the child a name. This evidence, denied by appellee, relates itself to statements she is purported to have made first, on October 29, 1947, to appellant alone, and thereafter, on November 3, 1947, to appellant in the presence of others. If it were competent for us to consider this evidence which was admitted without objection, which it is not for the reasons as hereinafter set forth, we do not think the facts disclosed by the record are sufficient to sustain appellant's position under the rule that: " 'Where a trial is had to the court, and the evidence on a particular point is in irreconcilable conflict, the court will, in its determination of that question, consider the findings of the trial court, although it is required by statute to try the case on the record de novo.' Greusel v. Payne, 107 Neb. 84. See McGill v. McGill, 114 Neb. 636; In re Estate of Waller, 116 Neb. 352; Jones v. Dooley, 107 Neb. 162; Corn Exchange Nat. Bank v. Jansen, 70 Neb. 579." Allen v. Allen, 121 Neb. 635, 237 N. W. 662.

There is another reason why the evidence contained in the record, if competent, would be insufficient. Section 42-335, R. S. 1943, requires: "No decree of divorce and of the nullity of a marriage shall be made solely on the declaration, confessions or admissions of the parties, but the court shall, in all cases, require other satisfactory evidence of the facts alleged in the petition for that purpose." Appellee denied that she had ever made such statements but even had these conversations occurred and such admissions made, under the provisions of the foregoing statute, such evidence alone would not be sufficient to entitle the appellant to the annulment of the marriage contract, the record containing no other satisfactory evidence thereof. See O'Reilly v. O'Reilly, 120 Neb. 720, 234 N. W. 916.

That such evidence, under the situation as here disclosed, is not competent for our consideration has been

fully, and we think properly, determined by this court.

We said in Schmidt v. State, 110 Neb. 504, 194 N. W. 679: "The question is thus fairly presented whether a child born in wedlock can be proved to be a bastard by the testimony or declaration of the wife. In the early history of jurisprudence the rule upon this question swayed back and forth. It will serve no useful purpose to enter upon a discussion of the ancient rules, and the reasons given therefor. They can readily be found in any of the standard text-books on evidence. We think the rule settled by the weight of decisions in this country is that a child born in wedlock is presumed to be the legitimate offspring of the husband and wife, and this is so even though the birth of the child happened so soon after the marriage as to render it certain that it was the result of coition prior thereto. This rule is based in the main upon the reason that to permit such testimony would be against public policy. The following cases support this rule: Dennison v. Page, 29 Pa. St. 420, 72 Am. Dec. 644, and note, p. 649; Wilson v. Babb, 18 S. Car. 59; Zachmann v. Zachmann, 201 Ill. 380; Tioga County v. South Creek Township, 75 Pa. St. 433.

"This presumption of legitimacy may be rebutted by competent proof that the husband had no access to the wife, or that he was absent at such time as in the course of nature the child was begotten; that he was impotent, or other circumstances showing that he could not have been the father of the child."

Then, after discussing the basis for the rule by quoting from 1 Jones, Commentaries on Evidence, § 97, we held: "It is quite clear that, if the wife would not be permitted to testify to facts which would bastardize her child, her declarations could not be used in evidence to prove the same fact."

This same principle has most recently been announced in In re Estate of Oakley, 149 Neb. 556, 31 N. W. 2d 557: "* * * the rule settled by the weight of decisions

in this country is that a child born in wedlock is presumed to be the legitimate offspring of the husband and wife. See, Schmidt v. State, 110 Neb. 504, 194 N. W. 679; In re Estate of McDermott, 125 Neb. 179, 249 N. W. 555.

" 'This presumption of legitimacy may be rebutted by competent proof that the husband had no access to the wife, or that he was absent at such time as in the course of nature the child was begotten; that he was impotent, or other circumstances showing that he could not have been the father of the child.' Schmidt v. State, *supra.* See, also, Wright v. Hicks, 12 Ga. 155; Powell v. State, 84 Ohio St. 165, 95 N. E. 660; State v. Lavin, 80 Iowa 555, 46 N. W. 553; Eversley on Domestic Relations (4th ed.), c. VI, p. 582."

When, as here, the husband admits he had intercourse with the wife before their marriage and within the probable period of gestation of the child which is conceived before but born after the marriage and he is informed of the pregnancy prior thereto he cannot deny its paternity but must submit to the marriage and the presumed paternity of the child.

The appellee's cross-appeal relates itself to that part of the decree denying her a divorce. The provisions of the decree awarding her the custody of the minor child, directing appellant to pay $25 a month for its support and providing him the right of visitation at reasonable times and places are, in effect, a divorce from bed and board as provided by section 42-302, R. S. 1943.

There is no question but what the record contains sufficient evidence to sustain a finding that appellant was guilty of extreme cruelty within the meaning of the provisions of the foregoing statute.

We have said: " 'The trial court is vested with sound discretion in determining whether a divorce from bed and board, or an absolute divorce, should be granted, and in a majority of the cases an absolute divorce is to be preferred.' Wetenkamp v. Wetenkamp, 140 Neb. 392, 299 N. W. 491. See, also, Sutherland v. Sutherand, *supra;*

Phillips v. Phillips, 135 Neb. 313, 281 N. W. 22." Sell v. Sell, 148 Neb. 859, 29 N. W. 2d 877.

In view of the ages of the parties, the circumstances under which the marriage occurred, the brief period of its duration, the charges made in this litigation, the nature of the evidence produced, and the feeling between the families, we do not think a reconciliation will ever be possible. To leave these young people in a legal position where it will not be possible to rehabilitate themselves by establishing a home of their own without such a reconciliation does not seem desirable. We have come to the conclusion that the appellee's prayer for absolute divorce should be granted.

The decree of the trial court is therefore modified by granting appellee an absolute divorce but otherwise affirmed. Costs in this court, including an allowance of $150 to appellee for attorney's fee, are taxed to appellant.

AFFIRMED AS MODIFIED.

GEORGE FOLTZ, APPELLEE, V. FLOYD H. F. BRAKHAGE ET AL., APPELLANTS.

36 N. W. 2d 768

Filed April 14, 1949. No. 32583.

1. **Ejectment.** Ejectment is an action at law triable to a jury, unless the right is waived, notwithstanding any equitable matters presented in the case.
2. **Juries.** The effect of a stipulation of the parties for a transfer of an action at law to the equity docket of the court is a waiver of a trial thereof by jury.
3. **Appeal and Error.** Findings of court in a law action in which a jury is waived have the effect of a verdict of a jury and will not be disturbed unless clearly wrong.
4. **Boundaries.** Original corners, as established by the government surveyors, if they can be found, or the places where they were originally established, if they can be definitely determined, are conclusive on all persons owning or holding with reference thereto, without regard to whether they were located correctly

or not, and must remain the true corners by which to determine boundaries.

5. **Boundaries: Adverse Possession.** When the owner of two contiguous tracts of land conveys one of them to a grantee and subsequently conveys the other to a different grantee, in a contest between the grantees concerning the boundary line between the two tracts, the second grantee cannot, for the purpose of establishing title by adverse possession against the prior grantee, tack his possession to that of the common grantor.
6. **Limitations of Actions: Adverse Possession.** The statute of limitations does not run in favor of an occupant of real estate unless his occupancy and possession are adverse to the true owner and he has manifested an intent and purpose to claim title for himself against the true owner.
7. **Adverse Possession.** Title to land by adverse possession must be proved by actual, open, hostile, and continuous possession under claim of ownership for the full statutory period.

APPEAL from the district court for Lancaster County: JEFFERSON H. BROADY, JUDGE. *Affirmed.*

Frederick J. Patz, for appellants.

Perry & Perry, for appellee.

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

BOSLAUGH, J.

This is an action in ejectment brought by George Foltz, appellee, against Floyd H. F. Brakhage and Clarice Brakhage, appellants, to recover possession of a tract of land south of and adjacent to the north line of a quarter section of land owned by appellee.

Appellee alleged that he was the owner and entitled to possession of the southwest quarter of Section 11, Township 10 North, Range 5 East, of the 6th P. M., Lancaster County, Nebraska; that appellants unlawfully withheld possession since the 27th day of November, 1944, of a part thereof, described as: Commencing at the northeast corner of the southwest quarter, thence south along the east line thereof a distance of 24 feet, thence approximately west to a point in the west bound-

ary line of said quarter section 71.8 feet south of the northwest corner thereof, thence north 71.8 feet to the northwest corner, thence east to the place of beginning; claimed damages in the sum of $1,000; and asked to recover possession and damages.

Appellants denied that appellee was the owner of the land last described and claimed that they were the owners thereof by deeds and adverse possession; alleged that a fence had been constructed along the south boundary of the land last described, and for more than 40 years had been recognized and treated by all the owners of the southwest quarter and the northwest quarter of said Section 11 as the true line between the two quarters of the west half of that section; that the owners had occupied and used the land relying upon the fence as the north line of the southwest quarter and as the south line of the northwest quarter of said section; that appellee was estopped from claiming otherwise; that the claim of appellee constituted a cloud on the title of appellants to the disputed strip, and ask that the title thereto be quieted in appellants.

Appellee denied the claims of appellants and asserted that while Carl Ninneman, under whom appellants claim, was the owner of the northwest quarter of Section 11, he disclaimed ownership of any land in the southwest quarter thereof, and a survey was made establishing the true line with his consent; that while the west half of the section was owned by one person, appellee purchased all of the southwest quarter and received a conveyance thereof from the owner; that thereafter the same person as owner sold and conveyed the northwest quarter of the section to appellants, at which time they had knowledge of all of the facts, and knew that appellee had acquired title to all of the southwest quarter; that later in an attempt to defraud appellee, the appellants secured a pretended deed to the land in dispute from Carl Ninneman and his wife, and caused it to be recorded; that this constituted a cloud

on the title of appellee, and he asks to have his title to the disputed strip quieted and confirmed.

This case was by agreement of the parties transferred to the equity docket, trial was had to the court without a jury, and the court found that Bernice C. Butler and his wife were the owners of the west half of said Section 11 and conveyed all of the southwest quarter to George Foltz and John Jennes, and thereafter John Jennes conveyed all of his interest therein to appellee, who was at the time of commencement of this action the owner of the whole of the southwest quarter, and therefore the owner of the disputed strip; that at a later date Bernice C. Butler and his wife conveyed only the northwest quarter of the section to appellants; that appellee was entitled to have his title quieted, to a judgment of ejectment, and to recover nominal damages. A judgment was entered in accordance with the findings. The appeal is from that judgment.

Ejectment is an action at law and triable to a jury, unless the right is waived, notwithstanding any equitable matters presented in the case. § 25-1104, R. S. 1943; 31 Am. Jur., Jury, § 18, p. 568; 18 Am. Jur., Ejectment, § 116, p. 93; Peterson v. Sucro, 93 F. 2d 878, 114 A. L. R. 890; Atkinson v. J. R. Crowe Coal & Mining Co., 80 Kan. 161, 102 P. 50, 39 L. R. A. N. S. 31, 18 Ann. Cas. 242; Jacobs v. Goodrich, 90 Neb. 478, 134 N. W. 171. The effect of the stipulation by the parties for a transfer of the case to the equity docket was consent to a trial of the case to the court without a jury. The findings of a court in a law action have the effect of a verdict of a jury and will not be interfered with unless they are clearly wrong. The weight of evidence or credibility of witnesses is not a concern of this court in the review of such a case except to determine that the findings and judgment are supported by evidence and are not contrary to law. Barnhart v. Henderson, 147 Neb. 689, 24 N. W. 2d 854; State v. Neimer, 147 Neb. 284, 23 N. W. 2d 81.

The appellee has shown a complete chain of title to all of the southwest quarter of Section 11, Township 10 North, Range 5 East, of the 6th P. M., Lancaster County. There is no claim that there is any defect or failure in the continuity of his paper title as disclosed by the public records of the county, commencing with the patent from the United States and continuing to the deed from Bernice C. Butler and Elcie Butler to him and John Jennes, and the deed from him to appellee. The title thereto which he claims is further evidenced by proceedings in the district court for Lancaster County to quiet the title, and a decree on June 17, 1929, quieting title thereto, against the claims of all persons, in Luther C. Smith, the immediate grantor of Bernice C. Butler and Elcie Butler. The record title of the appellee to the southwest quarter of this land is definitely established.

There is evidence that the quarter section lines of Section 11 had been surveyed in April of 1936, at the request of Bernice C. Butler, and May 7, 1947, on the order of the appellant, Floyd Brakhage, and on June 7, 1947, a further survey was made which determined the north line of the southwest quarter of Section 11. The northwest corner and the northeast corner of the southwest quarter and the center of the section were found. A straight line was run between the northeast corner and the northwest corner of the southwest quarter, and this established the north line of the southwest quarter of this section. These surveys in reference to location of the north line of the southwest quarter and the fence on the south of the disputed strip are shown on a plat which accurately depicts the measurements from the north line of the southwest quarter to the fence line. The distance at the east line is 24 feet, and the distance 33 feet east of the west line is 71.8 feet. The fence line on the south of the disputed strip and the disputed area are each within the southwest quarter of the section. This section was surveyed in 1883, and the markers left

by the United States surveyors in 1858-1860 were located according to the field notes on file in Lancaster County, and the county surveyor followed the 1883 survey and from the field notes ascertained definitely that the corners recognized by him followed the original United States government survey. The approved method was followed in locating the center of the section and the north line of the southwest quarter of the section in question. Original corners, as established by the government surveyors, if they can be found, or the places where they were originally established, if they can be definitely determined, are conclusive on all persons owning or holding with reference thereto, without regard to whether they were located correctly or not, and must remain the true corners by which to determine the boundaries. 11 C. J. S., Boundaries, § 11, p. 552; Runkle v. Welty, 86 Neb. 680, 126 N. W. 139; 43 U. S. C. A., §§ 751, 752.

The title to the southwest quarter was quieted by decree of court on June 17, 1929, in Luther C. Smith. He and his wife conveyed it by warranty deed recorded February 17, 1931, to Bernice C. Butler and Elcie Butler; they conveyed it by warranty deed on December 30, 1943, to appellee and John Jennes; and Jennes and his wife on March 24, 1944, conveyed all their interest therein by warranty deed to appellee. Bernice C. Butler and Elcie Butler, when they conveyed the southwest quarter to appellee and John Jennes, were the record owners of all of the west half of Section 11, and were in exclusive possession thereof. Bernice C. Butler was the common owner of the southwest quarter and the northwest quarter of Section 11, and, with his wife, in the exclusive possession thereof from March 28, 1942, until the southwest quarter was sold on October 5, 1943, to appellee and John Jennes, and he could sell any part of the west half that he saw fit, and he did sell all of the southwest quarter as above stated. His grantees bought at auction sale, and the land sold was the southwest quarter, 160 acres, by the acre, $87.00 an acre, a total of $13,920.

Butler could not hold adversely to himself, and during the time he was a common owner of the northwest quarter and the southwest quarter of Section 11 his possession of one was in nowise adverse to his ownership of the other. When the owner of two contiguous tracts of land conveys one of the tracts to a grantee, and subsequently conveys the other tract to a different grantee, in a contest between the grantees concerning the boundary line between the two tracts, the second grantee cannot for the purpose of establishing title by adverse possession against the prior grantee tack his possession to that of the common grantor. Goozee v. Grant, 81 Neb. 597, 116 N. W. 508; Sluyter v. Schwab, 73 Neb. 370, 102 N. W. 757; 2 C. J. S., Adverse Possession, § 130, p. 687.

When the appellee and John Jennes bought the southwest quarter of Section 11, Carl Ninneman was not in possession of any part of Section 11, and had not been since about October of 1941. He had no claim to any part of this land of record, and made no claim of which the purchasers had any notice or knowledge. The equities strongly favor appellee.

A record title to the northwest quarter of Section 11 originating with patent from the United States and continuing to Carl Ninneman is shown. He and his wife on October 22, 1941, conveyed this land by warranty deed to The Security Mutual Life Insurance Company, together with all the tenements, hereditaments, and appurtenances thereunto belonging, and they then surrendered possession and have not since had or claimed any possession, control, use, benefit, rights to or responsibility for, any land in Section 11, except that they gave for a nominal consideration of $5 a pretended deed to appellants on July 18, 1947, for any "interest in this strip of land which may not heretofore have been conveyed by us." The offer in evidence of this instrument was on the objection of the appellee excluded, and the appellants have made or discussed no assignment of error because of its exclusion.

The appellants failed to show any record or paper title in them to any part of the land in dispute.

The only land in Section 11 owned by appellants was the northwest quarter of Section 11 acquired by them by deed dated November 25, 1944, from Bernice C. Butler and Elcie Butler. They intended to and did sell and convey to appellants only the northwest quarter, and no part of the southwest quarter, and they made no representation to their grantees as to the true line between these quarter sections. The record does not show that any owner of the northwest quarter prior to Bernice C. Butler at any time made any claim, adverse or otherwise, to any part of the southwest quarter until 1936 or 1937, at the time when Bernice C. Butler told Carl Ninneman that the fence line was not in the proper place and he would like to change it, and Ninneman said if it was not where it belonged it was satisfactory with him to straighten it out. Butler then had a survey made by the county engineer to determine the true boundary. He told Ninneman the result and the location of the true line between these quarter sections of land, and instructed his tenant to move the fence north to the true boundary line. Ninneman prevented this being done. "I told him to stay off till I found out whose it was." That was in the spring of 1936 or 1937, and out of that a lawsuit developed. He was sued by Butler "about the fence line." Until that time he thought the northwest quarter extended south to the fence line, and never claimed he had any interest in the southwest quarter. What he bought was described in the deed from The Security Mutual Life Insurance Company as the northwest quarter of Section 11, and he thought the deed to the northwest quarter extended "to the fence line. * * * I thought that all belonged to the Northwest Quarter." The first time he told anyone he owned any part of the southwest quarter was after he had trouble with Butler in 1936 or 1937. "I figured it was mine and I was going to get something out of it some day." That was the earliest time the

evidence shows anyone claiming to hold the disputed land by adverse possession.

The statute of limitations will not run in favor of an occupant of real estate unless the occupancy and possession are adverse to the true owner and the possessor has and has manifested the intent and purpose to claim title for himself against the true owner. Title to land by adverse possession must be proved by actual, open, hostile, and continuous possession under claim of ownership for the full statutory period. Conkey v. Knudsen, 135 Neb. 890, 284 N. W. 737; Ryan v. City of Lincoln, 85 Neb. 539, 123 N. W. 1021.

Carl Ninneman conveyed to The Security Mutual Life Insurance Company on October 22, 1941, the northwest quarter "together with all the Tenements, Hereditaments and Appurtenances thereunto belonging" and surrendered possession of all land he claimed in Section 11 in 1941, "Soon after the deed was executed" and before March of 1942, and he did not thereafter regain or have possession or assert any right thereto, except he executed the pretended deed to appellants for the disputed area on July 18, 1947. The Security Mutual Life Insurance Company, his grantee, conveyed the same land and rights transferred to it by the Ninneman deed to Butler, and he conveyed the identical property to the appellants, and this vested title to the northwest quarter in them.

The appellants substantially disclaimed title by adverse possession. Their only claim is by virtue of the deed from Bernice C. Butler and Elcie Butler to them, and the pretended deed from Carl Ninneman and Marie Ninneman. The record does not show any title or right of possession of the disputed land in appellants at any time.

AFFIRMED.

EMIL PLACEK ET AL., APPELLANTS, V. M. D. EDSTROM, AS COUNTY ATTORNEY OF SAUNDERS COUNTY, NEBRASKA, APPELLEE.

37 N. W. 2d 203

Filed April 22, 1949. No. 32588.

1. **Banks and Banking: Constitutional Law.** Chapter 11, Laws of Nebraska, 1945, is a fair and reasonable exercise of police power with relation to banking, a business pre-eminently public in nature, and thus does not impair the obligation of contracts or unreasonably deprive state banks of their right to contract or deprive them of due process or equal protection of the laws.
2. **Banks and Banking.** The act does not prohibit state banks from collecting legitimate exchange charges from their own customers or depositors for making their funds available, by one recognized mode or another, at distant places for their own purposes.
3. ———. The act does not compel drawee state banks to donate the use of their services or property without compensation, but simply requires that if they clear checks, it must be done at par, without deduction of any exchange charges whatever from remittances to forwarding banks.
4. ———. "Special collection items" within the purview of the act, are those which are sent to a bank for collection only, and which in fact actually require the employment of unusual and individual treatment or services in the act or process of collection and remittance thereof, as distinguished from those which require only the treatment or services ordinarily involved or employed in the general course of clearance transactions between a forwarding bank and the drawee bank.
5. **Constitutional Law.** Private rights must yield to the public welfare, and one whose rights are appropriately declared and defined by a valid legislative enactment under the police power of the state cannot, by purported contractual authority or otherwise, avoid observance thereof or make such legislation ineffectual.

APPEAL from the district court for Saunders County: STANLEY BARTOS, JUDGE. *Affirmed.*

Peterson & Devoe, for appellants.

James H. Anderson, Attorney General, *Homer L. Kyle,* and *M. D. Edstrom,* pro se, for appellee.

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

CHAPPELL, J.

Plaintiffs filed this action in the district court for Saunders County to obtain a declaratory judgment construing and applying Chapter 11, Laws of Nebraska, 1945, p. 110, now appearing as sections 8-163.01 and 8-163.02, R. S. Supp., 1947, commonly known as the "par-check law," but hereinafter designated as the act, contesting its constitutionality as applied to three types of banking transactions respectively pleaded in separate causes of action, and to enjoin threatened enforcement of the act by prosecution or otherwise, with relation to such transactions.

Defendant demurred generally to each cause of action, separately and severally. The trial court, after hearing thereon, sustained defendant's demurrer to the first and second causes of action, and overruled demurrer to the third. Each party in open court elected to stand upon their respective pleadings, and it was stipulated that the trial court should proceed to enter a decree adjudicating the issues raised thereby. Thereupon, a decree was entered, dismissing plaintiffs' first and second causes of action, adjudging that the act had no application to the transaction set forth in the third cause of action, and permanently enjoining defendant from prosecuting plaintiffs on account thereof. Therefrom, plaintiffs appealed and defendant cross-appealed. We affirm the judgment of the trial court.

Heretofore, in Placek v. Edstrom, 148 Neb. 79, 26 N. W. 2d 489, 174 A. L. R. 856, an action similar in its primary aspects with that at bar, this court not only construed the act involved, but also particularly designated the field of its application, and affirmatively adjudged its constitutionality. With reference to constitutionality, we concluded that the act was a fair and reasonable exercise of the police power of the state to

promote the public welfare with relation to banking, a business pre-eminently public in nature, and thus the act did not impair the obligation of contracts or unreasonably deprive these same plaintiffs or other state banks of their right to contract, or deprive them of due process or equal protection of the laws.

In that connection, our conclusions and the reasons therefor will not be generally repeated in this opinion, but included only by reference, because, as we view the matter, the sole question presented here is whether or not the act prohibits the banking transactions set forth in plaintiffs' three respective causes of action. We conclude that it prohibited the first and second but not the third.

Section 8-163.01, R. S. Supp., 1947, provides: "All checks drawn on any bank or trust company organized under the laws of this state shall be cleared at par by the bank or trust company on which they are drawn; Provided, the foregoing direction shall not be applicable where checks are sent to banks or trust companies as special collection items."

Section 8-163.02, R. S. Supp., 1947, provides: "Any officer or employee of any such bank or trust company who violates the provision of section 8-163.01 shall be guilty of a misdemeanor and, upon conviction thereof, shall be fined not less than five dollars nor more than ten dollars for each offense."

As disclosed by plaintiffs' petition, after the judgment in Placek v. Edstrom, *supra*, became final, plaintiff bank, by plaintiff Emil Placek, its president, mailed a notice to "All Correspondent Banks And Federal Reserve Bank" notifying them that on and after July 31, 1947, all checks drawn on it would be paid at par, only over the counter of its banking house in Prague, Nebraska, and that if a remittance by draft was requested, then their cash mail letters for collection and remittance should clearly indicate that plaintiff bank would be permitted and authorized to make a charge of 10 cents per $100 or fraction

thereof for issuing and remitting by draft, otherwise all items would be returned.

Enclosed with such notice was a letter stating in effect that, in conformity therewith, all checks drawn upon plaintiff bank would be paid at par only over its counter, and if such banks desired to save the expense of bringing such checks to its banking house for payment, it would be necessary that they mail plaintiff bank a letter permitting and authorizing it to make such exchange charges for issuing and mailing a draft to cover items sent to it.

Plaintiffs' first cause of action alleged substantially that such a notice and letter were mailed to its correspondent, First National Bank of Kansas City. On July 31, 1947, it replied that effective August 1, 1947, plaintiffs would be authorized to assess the aforesaid exchange charges, but that in keeping with the Federal Reserve Bank Regulation "Q" such charges "will be assessed to our endorsers should the accumulated totals amount to $2.00 and over for a current month."

Thereafter, upon several designated occasions, checks drawn on plaintiff bank by its depositors, were forwarded in cash mail letters by said correspondent for collection and remittance of their aggregate proceeds. Upon each such occasion, in conformity with its purported contractual authority, plaintiff bank remitted the aggregate amount of the checks contained in each such cash mail letter, less exchange charges upon the total amount thereof, as aforesaid, by draft drawn on a correspondent bank.

For its second cause of action, plaintiffs alleged substantially that it mailed a like letter and notice to its correspondent, First National Bank of Omaha. On July 28, 1947, it replied, acknowledging receipt of the notice that such exchange charges would be made effective August 1, 1947, but stating that "When depositors instruct that items be sent you as 'special collection', any charge for remitting will be charged to the endorser."

Thereafter, upon several designated occasions, checks drawn on plaintiff bank by its depositors were forwarded in cash mail letters by said correspondent for collection and remittance of their aggregate proceeds. Each such cash mail letter contained a slip listing the checks enclosed, and at the bottom of the slip appeared the words "Special Collection." Upon each such occasion, in conformity with its purported contractual authority, plaintiff bank remitted the aggregate amount of the checks contained in each such cash mail letter, less exchange charges upon the total amount thereof, as aforesaid, by draft drawn on a correspondent bank.

For their third cause of action plaintiffs alleged substantially that by letter dated August 14, 1947, Omaha Provision Company, as payee of two described checks aggregating $110.46, drawn on plaintiff bank by two of its depositors, wrote plaintiff bank, "Will you please issue a draft drawn on First National Bank, Omaha to cover enclosed checks." Pursuant thereto, plaintiff issued and mailed a draft for the total amount of the two checks less a charge of 20 cents for issuance of the draft, postage, and other expenses in connection therewith.

Under date of August 14, 1947, plaintiffs notified defendant of the aforesaid banking transactions and practices, requesting his consideration concerning validity thereof, contending that they were not a violation of the act, and permissible under the holding in Placek v. Edstrom, *supra*. On August 20, 1947, defendant replied, assuming a contrary view in conformity with an opinion of the Attorney General, dated July 30, 1947, and informing plaintiffs that he would, in response to official duty, take such appropriate steps as were necessary to enforce the law. Plaintiffs thereafter filed the case at bar.

For the purpose of brevity and clarity, we will dispose of the respective causes of action inversely.

With reference to the third cause of action involved in defendant's cross-appeal, it was said in Placek v. Edstrom, *supra:* "Before checks came into such general usage,

banks naturally collected legitimate exchange charges from their customers or depositors for making their funds available, by one recognized mode or another, at a distant place where the customers wished to use them in making a purchase or paying a debt, and they are not now prohibited by the act or by any other law from doing so with profit to themselves. * * * there is nothing in the act which prevents the bank from charging its customer or depositor for such services rendered to him for his benefit. Therefore, the act does not compel such a bank to donate the use of its services or property without compensation. It is not thereby, or by any law related thereto, as will be hereinafter observed, compelled to do anything without compensation. Such banks are simply told that if they do clear checks, it must be done at par without deduction of a so-called exchange charge from remittances to forwarding banks."

In speaking of the act, it was also said in Placek v. Edstrom, *supra:* "The requirement is not that all checks shall be paid at par, nor that they shall be collected at par. It is the manner in which all checks must be cleared by all state banks, and not that they must be paid or collected at all events, that is prescribed by the act. It is par clearance which is required."

Beyond question, the Omaha Provision Company had a right to present the checks of which it was the payee or holder at the counter of plaintiff bank, and assuming their validity, demand and receive payment in full therefor if there was sufficient money on deposit to pay the same, or it had a right, over plaintiffs' counter, to request the issuance of a draft on a specific bank for the proceeds of the checks, the equivalent of cash, less the regular charge for issuance of a draft. In such a situation, plaintiff bank would in fact be rendering services to its own customer for his benefit and would be entitled to make a legitimate charge therefor.

The act never intended to prohibit the payee or holder from doing the same directly by mail. It was in effect

the same transaction as presenting the checks in person over plaintiffs' counter and requesting issuance of a draft for the proceeds thereof. Such a transaction would not in any sense be a bank clearance between a forwarding bank and a drawee bank, within the purview of the act. The purpose of the act was to uniformly and economically facilitate the availability of money or credit by the use of checks in other places, and make uniform all bank clearance transactions in connection therewith, by requiring drawee state banks to make all remittances to forwarding banks upon cash mail letters in full without any deduction therefrom of arbitrary so-called exchange charges which were customarily charged back by the forwarding bank to the payee or holder, who not only lived in but transacted his business in another city as a depositor or customer of the forwarding bank, but was neither a depositor nor customer of the drawee bank.

We conclude that plaintiffs' third cause of action was a transaction completely outside the realm of the act, as construed in Placek v. Edstrom, *supra.*

Plaintiffs argued that the transactions set forth in their second cause of action were "special collection items." We cannot so hold.

It will be noted that section 8-163.01, R. S. Supp., 1947, contains a proviso that the direction to clear checks at par "shall not be applicable where checks are sent to banks * * * as special collection items." The words "special collection items," undefined therein, must be understood and applied, of course, in their ordinary and nontechnical sense.

"Special" is defined by Webster's New International Dictionary, (2d ed.), Unabridged, as: "Distinguished by some unusual quality; uncommon; noteworthy; extraordinary; * * *. Relating to a single thing or class of things; having an individual character or trait; particular; peculiar; unique. * * * opposed to general," as distinguished from "ordinary, usual, exceptional; typical." "Collection" is therein defined as the "Act or process of

collecting," or, "That which is obtained in payment of demands." The word "items," of course, simply has reference to the articles to be collected.

By analogy, "special collection items" are those which are sent to a bank for collection only, and which in fact actually require the employment of unusual and individual treatment or services in the act or process of collection and remittance thereof, as distinguished from those which require only the treatment or services ordinarily involved or employed in the general course of clearance transactions between a forwarding bank and the drawee bank.

For aught that appears, the checks involved in the second cause of action were drawn on plaintiff bank by its own depositors having ample funds on deposit with which to pay them. The transactions were handled in exactly the same manner as they would have been handled had the words "special collection" never appeared on the forwarding slip. It was simply a clearance transaction between the forwarding bank and the drawee bank which charged the checks to the accounts of its depositors and paid itself as agent for the holder or forwarding bank, and thereafter held such funds in a fiduciary capacity as such agent exactly as it would in the usual course of bank clearance transactions.

In other words, the checks were in fact cleared in the regular course, and merely placing the words "Special Collection" on the forwarding slip in cash mail letters, as instructed by the depositor or otherwise, could not and did not in the slightest change the factual nature or character of the transactions, but simply, by purported contractual arrangement, violated the act. To hold otherwise would give the law no force or effect and permit its avoidance by indirection.

With regard to the first and also the second causes of action, it was evidently plaintiffs' theory that by obtaining express contractual authority from forwarding banks to make the so-called exchange charges, it would

take the transactions outside the purview of the act and that otherwise the act would be unconstitutional as repugnant to due process. We cannot so hold.

In Placek v. Edstrom, *supra,* that identical question was raised by plaintiffs and disposed of contrary to their contentions. Our reasoning and conclusions in that connection were therein supported by numerous cited texts, state and federal authorities, which will not be repeated here.

Before the enactment of the par-check law, the so-called exchange charges were of necessity, in order to have any semblance of legality, deducted by drawee banks from remittances to forwarding banks in clearance transactions, by virtue of either express or implied contractual authority. It was that purported authority which the act sought to legislatively restrain in the interest of the public welfare. Checks are cleared at par only "when the proceeds received therefrom by the drawee bank are properly remitted in full to the forwarding bank as required by Chapter 11, Session Laws of Nebraska, 1945." Placek v. Edstrom, *supra.*

In that regard, the act is mandatory. The violation thereof is a misdemeanor, and any failure or refusal of a state bank to clear checks at par is just as much a violation of the law, whether it be done under an implied or express contract, as it would be under no contract at all.

It is elementary that "One whose rights, such as they are, are subject to state restriction, cannot remove them from the power of the State by making a contract about them." Hudson Water Co. v. McCarter, 209 U. S. 349, 28 S. Ct. 529, 52 L. Ed. 828.

As stated in Union Dry Goods Co. v. Georgia Public Service Corp., 248 U. S. 372, 39 S. Ct. 117, 63 L. Ed. 309, 9 A. L. R. 1420: "That private contract rights must yield to the public welfare, where the latter is appropriately declared and defined and the two conflict, has been often decided by this court." See, also, Lincoln

Federal Labor Union v. Northwestern Iron and Metal Co., 149 Neb. 507, 31 N. W. 2d 477, affirmed on appeal by the Supreme Court of the United States in 335 U. S. 525, 69 S. Ct. 251, 93 L. Ed. 201.

In other words, we conclude that plaintiffs and other state banks must obey the mandates of Chapter 11, Laws of Nebraska, 1945, duly enacted to promote the public welfare, and it follows that they could not and cannot, by contract or otherwise, avoid observance or make ineffectual the police power of the state, thus fairly and reasonably exercised in accord with constitutional methods.

The judgment of the trial court should be and hereby is affirmed.

AFFIRMED.

CRAIG BENSON, DOING BUSINESS UNDER THE FIRM NAME AND STYLE OF BENSON HARDWARE COMPANY, APPELLEE, V. GENERAL IMPLEMENT CORPORATION, A CORPORATION, APPELLANT.

37 N. W. 2d 223

Filed April 22, 1949. No. 32628.

1. **Judgments.** Ordinarily, where a judgment has been entered by default and a prompt application made at the same term to set it aside with tender of an answer disclosing a meritorious defense, the court should, on reasonable terms, sustain the motion and permit the cause to be heard upon the merits.
2. **Courts.** It is the spirit and policy of the law to give every party an opportunity to prosecute or defend his case in court, and courts will never deny such right except for the fault, lack of diligence, or gross laches of such party or his authorized attorney.
3. **Judgments.** However, where a default has been regularly entered, it is largely within the discretion of the trial court to say whether or not the defendant shall be permitted to come in afterwards and make his defense, and unless an abuse of discretion is made to appear, this court will not interfere.
4. ———. The exercise of the power to set aside a default and

judgment, being a matter of judicial discretion by the trial court, is governed by the facts of each particular case as disclosed in the showing therefor.

5. **Appeal and Error.** Affidavits or other evidence used or adduced in the district court in support of a motion to set aside a default and judgment or for new trial, must be appropriately included in and presented by a bill of exceptions to be available for a review by this court of its sufficiency to sustain the grant or denial of such motion.

6. ———. Where the record contains no authentic bill of exceptions, or the bill of exceptions has been quashed, no question will be considered by this court the determination of which necessarily involves an examination of the evidence adduced in the trial court, and in such a situation, if the pleadings are sufficient to support the judgment it will be affirmed.

APPEAL from the district court for Thurston County: SIDNEY T. FRUM, JUDGE. *Affirmed.*

Baylor, Evnen & Baylor, for appellant.

Robert G. Fuhrman, for appellee.

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

CHAPPELL, J.

On October 23, 1947, plaintiff filed a bill of particulars in the county court of Thurston County, to recover alleged "over-charges made and collected" from plaintiff by defendant in a contractual purchase of merchandise. Defendant entered its general appearance on October 29, 1947, but the cause was not tried on the merits until May 17, 1948, whereat plaintiff adduced evidence and rested, but defendant offered no evidence. On that date the county court entered judgment for plaintiff and against defendant for $69 and costs, awarding plaintiff $50 attorneys' fees as a part thereof.

On the same date, defendant filed notice of appeal to the district court. May 22, 1948, supersedeas bond was filed, and on June 3, 1948, transcript was filed in the district court. On June 15, 1948, plaintiff filed his petition on appeal, copy of which with notice of its filing,

was, as found by the trial court, then sent to defendant's attorneys.

That defendant, having entered a general appearance in the county court, although it offered no affirmative proof, had a right to appeal to the district court, there can be no doubt. Baier v. Humpall, 16 Neb. 127, 20 N. W. 108; Crumay v. Henry, 40 Neb. 716, 59 N. W. 369; National Supply Co. v. Chicago & N. W. R. R. Co., 108 Neb. 326, 187 N. W. 917.

However, on September 8, 1948, opening day of the next term of the district court, time for filing answer or other pleading by defendant had long since expired, and defendant was then in default of any pleading. Thereat, the trial court entered defendant's default, evidence was adduced by plaintiff, and judgment was entered against defendant for $70.46 and costs, awarding plaintiff $100 attorneys' fees as a part thereof, specifically finding "that under the pleadings and the evidence plaintiff is entitled to have an attorney's fee taxed for the services of his attorney, * * *." Thereafter, because of miscalculation of interest, plaintiff filed a remittitur of 56 cents from the judgment.

On October 2, 1948, defendant filed a motion "that the court enter an order setting aside and vacating the default judgment heretofore entered in the above entitled action; and that the court grant the said defendant right to file the proposed attached answer in said action; and that the court set a date for trial of the issues in said action." On the same date two affidavits of counsel for defendant, purportedly supporting the motion, were filed.

On November 15, 1948, plaintiff filed resistance to defendant's motion, alleging five factual reasons why the motion should be overruled, because of the fault, negligence, and lack of diligence in the premises by defendant's attorneys. It alleged also that defendant's proposed answer did not state a meritorious defense to plaintiff's action.

On January 10, 1949, after hearing upon the issues thus presented by plaintiff's motion and defendant's resistance, whereat, concededly, evidence was adduced, the trial court entered an order overruling defendant's motion. A memorandum accompanied the order, wherein, after detailing at length the history of the litigation in the county court and the district court, the court, in the light of the entire record before it, made findings of fact and gave reasons for overruling defendant's motion, among which, of importance here, were substantially that plaintiff's attorney had extended every required courtesy to defendant's attorneys, but that they were at fault, having been guilty of negligence and lack of diligence in the premises.

On January 18 and 19, 1949, defendant respectively filed a motion to set aside the order overruling its motion to set aside the default and judgment, and a motion for new trial, for the reasons, substantially, that there was irregularity in the proceedings, abuse of discretion by the trial court, that the judgment was not sustained by the evidence, and was contrary to the law and the evidence. Both motions were respectively overruled, and defendant appealed to this court, assigning substantially that the trial court erred in entering the default judgment and refusing to set it aside. We conclude that the assignments should not be sustained.

At the outset, it should be noted that there is no bill of exceptions filed in this court as there was in Taylor v. Trumbull, 32 Neb. 508, 49 N. W. 375; Coates v. O'Connor, 102 Neb. 602, 168 N. W. 102; Lacey v. Citizens Lumber & Supply Co., 124 Neb. 813, 248 N. W. 378; and Barney v. Platte Valley Public Power and Irrigation District, 147 Neb. 375, 23 N. W. 2d 335, relied upon by defendant, wherein this court's conclusions were reached in the light of the evidence appearing in their respective bills of exceptions.

It is generally the rule in this jurisdiction that: "Where a default has been regularly entered it is largely

within the discretion of the trial court to say whether the defendant shall be permitted to come in afterwards and make his defense and, unless an abuse of discretion be made to appear, this court will not interfere.

"It is the spirit and policy of the law to give every party an opportunity to prosecute or defend his case in court and courts will never deny such right except for the fault or gross laches of such party or his authorized attorney.

"Ordinarily, where a judgment has been entered by default and a prompt application made at the same term to set it aside, with a tender of an answer disclosing a meritorious defense, the court should, on reasonable terms, sustain the motion and permit the cause to be heard upon the merits." Barney v. Platte Valley Public Power and Irrigation District, *supra*.

The application of the foregoing general rules, however, is dependent entirely upon the facts appearing in each particular case. In other words, the factual showing made by the parties determines whether or not the trial court has abused its discretion. As stated in Sang v. Lee, 20 Neb. 667, 31 N. W. 85, approved in Barney v. Platte Valley Public Power and Irrigation District, *supra:* "It is certainly within the power of the court at any time during the term at which a judgment by default has been rendered to set the same aside, and allow an answer setting up a meritorious defense to be filed. But the exercise of such power is a matter of discretion on the part of the court, to be governed by the facts of the case as set out in the showing. This discretion is a legal one, the abuse of which would be corrected by the appellate court."

In that connection, it will be observed, however, that since there is no bill of exceptions in the case at bar, then there is no evidence before this court upon which such determination can be made. In a similar situation, it was held in Lichtenberger v. Worm, 41 Neb. 856, 60 N. W. 93: "It is the duty of the district court to af-

ford to defendants a full opportunity to present their defense, but it is also its duty to prevent unnecessary delays and discourage frivolous proceedings. In reviewing orders affecting the procedure in a case this court will presume, in the absence of evidence to the contrary, that the district courts have acted with due regard to both principles."

As held in Beard v. Ringer, 41 Neb. 831, 60 N. W. 95: "Affidavits used in the district court in support of a motion to set aside a default and judgment must be embodied in a bill of exceptions if it is desired that this court shall pass upon their sufficiency for the purposes for which they were used in the court below." See, also, McMurtry v. State, 19 Neb. 147, 26 N. W. 915.

As recently as Dryden & Jensen v. Mach, 150 Neb. 629, 35 N. W. 2d 497, this court, after citing numerous authorities, held: "Where the record contains no authentic bill of exceptions or the bill of exceptions has been quashed, no question will be considered, the determination of which necessarily involves an examination of the evidence adduced in the trial court, and in such a situation, if the pleadings are sufficient to support the judgment, it will be affirmed.

"This court will not review testimony in the form of affidavits used in the trial court on the hearing of a motion for new trial, unless such affidavits have been offered in evidence and appropriately included in and presented by a bill of exceptions."

The situation therein was identical in principle with that at bar, and controlling here. In other words, without a bill of exceptions, the only question which can be presented to this court for decision is the sufficiency of the pleadings to support the judgment.

In conformity with the foregoing rules, we have examined the pleadings and conclude that they were sufficient. Therefore, the judgment should be and hereby is affirmed.

Plaintiff's motion for an allowance of attorneys' fees

under section 25-1801, R. S. 1943, is sustained, and $50 is hereby allowed, taxable to defendant as costs.

AFFIRMED.

MESSMORE and YEAGER, JJ., participating on briefs.

SIMMONS, C. J., dissenting.

I do not agree with the basis of the court's opinion as to the necessity of a bill of exceptions. In denying the motion to set aside the default judgment, the trial court made an extended finding of facts in the form of a memorandum. This memorandum formed the basis of and was specifically referred to in the court's order. The findings of fact are here as a part of the transcript. The appellant does not challenge those findings. It accepts them. The appellee here adopts those findings. The appellant here challenges the correctness of the order based upon those findings. It submits questions of law and not fact. Under these circumstances "an examination of the evidence adduced in the trial court" is not required. The reason for the rule requiring a bill of exceptions has no application to this situation. It would be a futile thing, a needless expense, and encumber the record to bring up a bill of exceptions containing the showing upon which the findings are based.

The absence of a bill of exceptions raises a presumption that the evidence supports the findings of fact made by the trial court. Joyce v. Tobin, 126 Neb. 373, 253 N. W. 413. This presumption becomes conclusive when the time for preparing, serving, settling and filing a proper bill of exceptions has passed. Adkisson v. Gamble, 143 Neb. 417, 9 N. W. 2d 711. So we have here a conclusive presumption that the evidence supports the findings of fact, reinforced by the fact that both parties so hold. Obviously, there is no need for a bill of exceptions, and no occasion to resort to a rule that requires a bill of exceptions to find out what the facts are. It is assignments of error that require an examination of the evidence that will not be considered here in the absence of a bill of exceptions. Anthony Doll & Co. v. Strien, 121

Neb. 43, 236 N. W. 149; In re Estate of Abts, 122 Neb. 714, 241 N. W. 270.

In Reigle v. Cavey, 107 Neb. 446, 186 N. W. 323, we said: "When a case is brought to the supreme court on appeal without a bill of exceptions or special findings, the only question that can be considered by this court is the sufficiency of the pleadings to sustain the judgment of the lower court." In Clarke v. Penn Mutual Life Ins. Co., 128 Neb. 107, 257 N. W. 667, following the Reigle case, we said: "The rule is well settled that, in the absence of a bill of exceptions or special findings, only the sufficiency of the pleadings to sustain the judgment will be considered." In Plantz v. Peony Park, 129 Neb. 338, 261 N. W. 826, we affirmed this ruling, and did so again in Slosburg v. Hunter, 132 Neb. 529, 272 N. W. 571.

Authoritative texts state the rule as follows: "Where the error sought to be remedied appears upon the record, the party aggrieved may avail himself of it on appeal or writ of error without bill of exceptions, case, statement, or other statutory remedy, and in such case it is improper to bring a bill of exceptions, case, or other substitute therefor, to the appellate court. Accordingly, no bill of exceptions, case, or statement is necessary where the matters presented for review sufficiently appear from the pleadings and proceedings of record, such as the question whether the pleadings or findings support the judgment, * * *." 4 C. J. S., Appeal and Error, § 785, p. 1268. "If there is no bill of exceptions or settled case the findings are ordinarily controlling on appeal, and the only question for review is whether the pleadings and findings sustain the judgment, or the proper construction of the order appealed from." 4 C. J. S., Appeal and Error, § 788, p. 1276. "Where the facts are specially found by the court, no bill of exceptions is necessary." 3 Am. Jur., Appeal and Error, § 625, p. 240.

We should answer the questions of law presented, so far as necessary to determine the appeal.

IN RE ESTATE OF FRED BEDNAR, DECEASED. ARTHUR A. KRAUSS, EXECUTOR, APPELLEE, V. JOSEPHINE BEDNAR, APPELLANT.

37 N. W. 2d 195

Filed April 22, 1949. No. 32589.

1. **Executors and Administrators.** The representative of an estate has capacity to maintain an appeal to the district court, without entering into a bond, from an order of the county court granting the widow of the deceased an allowance for her support and maintenance.
2. **Appeal and Error: Executors and Administrators.** The right of appeal from an order of a county court made in the exercise of its probate jurisdiction is statutory, and the requirements of the statute must be timely and substantially performed to vest jurisdiction in the appellate court.
3. ———: ———. An appeal to the district court from an order of a county court in an estate matter should be dismissed if appellant by inattention took no action to take an appeal within thirty days after the making of the order.
4. ———: ———. The provision that an appeal shall be taken within thirty days after the decision complained of requires that some action be taken within that period clearly and unequivocally indicating that appellant will prosecute an appeal from the order in question to the district court.
5. **Courts.** An entry made in a probate fee book of a county court cannot be considered for the purpose of ascertaining what were the proceedings, or when taken in that court, or to contradict an order of that court as it appears in a properly authenticated transcript in this court.
6. ———. The act of the clerk of a county court in furnishing information to a member of the bar as to the date of action previously taken by the court is not the performance of an official duty, and in doing so as a courtesy to counsel the clerk acts as his agent, and any error therein cannot be an excuse for failure of counsel to take timely action in any matter required by law.
7. **Appeal and Error: Courts.** It is a fundamental rule applicable to appellate proceedings that the record of a court from whence the case comes when properly authenticated imports verity and cannot be contradicted, varied, or changed by any extrinsic evidence.
8. ———: ———. If the record of a lower court is incorrect or incomplete, the remedy is appropriate proceedings to secure a correction thereof in that court.

APPEAL from the district court for Gage County: CLOYDE B. ELLIS, JUDGE. *Reversed and remanded with directions.*

Hubka & Hubka, for appellant.

Leslie H. Noble, for appellee.

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

BOSLAUGH, J.

The county court of Gage County, by order entered on the 28th day of February, 1944, in the matter of the estate of Fred Bednar, deceased, made an allowance to Josephine Bednar, the widow of the deceased, for her maintenance and support. She made application for an additional allowance on December 16, 1947, to which objections were interposed by the administrator and by two of the sons of the deceased. The county court by order made on the 20th day of April, 1948, set aside the original order of February 28, 1944, and granted to Mrs. Bednar a larger amount than was allowed her in the original order. The administrator took no action to appeal from the order of April 20, 1948, until the 21st day of May, 1948, when he filed a notice of appeal in the county court. The transcript was filed in the district court on the 29th day of May, 1948. The appellant, Josephine Bednar, moved the district court to dismiss the appeal for the reason appellee in his representative capacity as administrator had no pecuniary interest affected by the judgment of the county court and that it was not taken within the time provided by law. The motion was denied and the order of the county court of April 20, 1948, increasing the amount of the widow's allowance was reversed, the original order of February 28, 1944, was reinstated, and the application of the widow for an increased allowance was dismissed. Motion for new trial was made and denied.

The appellant claims error because of the action of the

court overruling the motion to dismiss the appeal of Arthur W. Krauss, as administrator with will annexed of the estate of Fred Bednar, deceased, appellee, on the ground that he in his representative capacity had no pecuniary interest affected by the judgment of the county court. The correctness of the denial of the motion depends on whether the appellee in his representative capacity was aggrieved by the order from which the appeal was attempted to be taken. The order did not affect appellee as an individual, and as such he had no right of appeal. The estate of the deceased was affected by the allowance made to the appellant by the county court by the order of April 20, 1948. If it became final and was complied with or enforced, the assets of the estate would be reduced by the amount required thereby to be paid to appellant. The suggestion of appellant that the appeal by appellee was taken solely for the benefit of "two heirs" is not persuasive. Any appeal taken by the representative of an estate from an order, the effect of which is to reduce the assets of the estate, is for the benefit of the beneficiaries thereof. In re Estate of Dovey, 99 Neb. 744, 157 N. W. 915. A representative of an estate occupies a trust relation, and in appealing from a judgment affecting the trust he acts in a fiduciary capacity. When he in good faith in the exercise of a reasonable judgment believes the interest of the estate requires him to prosecute an appeal, the duties imposed by his trust are not discharged unless he resorts to that procedure. A different rule would lead to hardship and might result in disaster. Even a prudent representative of an estate would hesitate in cases of doubt from assuming the personal liability imposed by an appeal bond, and the degree of hesitation would be increased by any doubt as to the ultimate solvency of the estate. Kerr v. Lowenstein, 65 Neb. 43, 90 N. W. 931. A representative of an estate has a legal duty and responsibility to protect the estate from unjust, improper, or doubtful claims asserted against it without regard to the identity of the claimant.

If he has no personal interest, he may in his representative capacity appeal from allowance thereof without giving an undertaking on appeal. §§ 30-1603, 30-808, R. S. 1943; In re Estate of Dovey, *supra;* Herman v. Beck, 68 Neb. 566, 94 N. W. 512. If the appeal is taken in furtherance of his individual interest, he is required, as other suitors, as a condition of an effective appeal to furnish an appeal bond. In re Estate of Vetter, 139 Neb. 307, 297 N. W. 554; In re Estate of Mathews, 125 Neb. 737, 252 N. W. 210; In re Estate of Nelson, 108 Neb. 296, 187 N. W. 916. The application of appellant for an allowance from the estate of her husband for her maintenance was a claim against his estate, the amount granted to her thereon was a debt of the estate, and under the circumstances set forth in the statute this amount was a debt with preference for payment subject to prior payment of any amount due the State of Nebraska and the expenses of administration. § 30-103, R. S. 1943. The appellant was qualified to appeal from the allowance without an appeal bond. In re Estate of Maag, 119 Neb. 237, 228 N. W. 537.

The appellant claims that the district court acquired no jurisdiction because the appeal was not taken within 30 days after the decision complained of was made. The right of appeal to the district court from final probate orders of the county court is statutory. § 30-1601, R. S. 1943; In re Estate of Mathews, *supra.* The applicable provisions of the statute must be timely and substantially complied with to vest jurisdiction in the district court. A case removed to the district court from a final order of a county court in an estate matter is rightly dismissed if appellant by his laches took no action to appeal within 30 days of the order. The statute is mandatory that all appeals in probate shall be taken within 30 days after the decision complained of. §§ 30-1602 to 30-1605, R. S. 1943; Drier v. Knowles Vans, Inc., 144 Neb. 619, 14 N. W. 2d 222; Security Mutual Life Ins. Co. v. Gilliam, 143 Neb.

673, 10 N. W. 2d 670; In re Estate of Jurgensmeier, 142 Neb. 188, 5 N. W. 2d 233.

The order of the county court was made on the 20th day of April, 1948. Appellee did nothing to appeal until the 21st day of May, 1948. This was not within 30 days after April 20, 1948, but was 31 days. The record shows no legal explanation or excuse for the inactivity or inattention of appellee. The law requires diligence and alertness in the exercise of the right of appeal, and this is indispensable to an effective appeal when the limit prescribed is jurisdictional. Initial action 31 days after the order of a county court in probate proceedings intended to be challenged by an appeal is not an effective proceeding. Drier v. Knowles Vans, Inc., *supra;* In re Estate of Jurgensmeier, *supra;* People's Building, Loan & Saving Assn. v. Cook, 63 Neb. 437, 88 N. W. 763.

Appellee, as he contends, was not required to file notice of appeal. Bazzo v. Wallace, 16 Neb. 293, 20 N. W. 314; Malick v. McDermot's Estate, 25 Neb. 267, 41 N. W. 157. No other specific thing was required of him within the 30-day period, but it was necessary for an appeal from the order of April 20, 1948, to "be taken within thirty days" after that date. Appellee was not required to "enter into bond" because he was acting in his representative capacity. Bazzo v. Wallace, *supra.* He could have taken an appeal within the time limited by filing a notice of appeal and making a request for a transcript to be prepared, by filing a praecipe for a transcript, or by any other action clearly and unequivocally indicating the fact that he was going to prosecute an appeal from the order in question to the district court, and that he desired a transcript prepared for that purpose. The statute is not so specific as to prescribe the single action sufficient to show that an appeal has been taken when the filing of an undertaking on appeal is excused, but it seems clear that to accomplish certainty and freedom from dispute it would be sufficient and advisable practice for the party intending to

appeal to file in the county court a notice of appeal containing a request for the preparation of a transcript or to file a praecipe for the preparation of a transcript.

Matters suggested by appellee to avoid the default in compliance with the plain provision of the statute as to the time for taking the appeal are these:

1. Appellee gave an oral notice of appeal. The record contradicts this and shows the statement referred to was that probably the appellee would sometime in the future give notice of appeal—"In all probability there will be a notice of appeal given." This was not a notice of appeal.

2. The taking of an appeal by appellee, since he was excused from making bond, was regular and complete, if he filed the transcript within 40 days from April 20, 1948. This contention is without substance. The appeal must "be taken within 30 days." If a bond is required, it must be filed "within 30 days" and after the bond is filed "the appeal shall be granted." "When such appeal is taken" within 30 days "the county court shall" transmit to the district court a certified transcript. §§ 30-1603 to 30-1605, R. S. 1943.

3. The probate fee book No. 20 shows that April 23, 1948, has been changed to April 20, 1948; that the clerk of the county court, in a telephone conversation had with counsel for appellee when he inquired the date of the order granting appellant the allowance, told him the date was April 23, 1948. The record contains a photostat of the fee book, and it shows the date of the order as April 20, 1948. The evidence does not show what, if any, other date there was in this place in the record when the cipher in the 20 was written therein. This is not important because the date shown by the order as it appears in the certified transcript could not be contradicted by anything in such a record as the fee book. Barker v. State, 54 Neb. 53, 74 N. W. 427. It was not an official duty or act for the clerk to furnish counsel information as to the date of any action previously taken

by the court, and in doing so as a courtesy to counsel, she acted as his agent and any error therein was the responsibility of counsel, and could not be an excuse for his failure to take timely action in any matter required by law. Oppenheimer v. McClay, 30 Neb. 654, 46 N. W. 915; Stewart v. Raper, 85 Neb. 816, 124 N. W. 472; Howard v. Goodrich Lodge Hall Association, 41 Neb. 700, 60 N. W. 82.

4. Appellee introduced evidence in the district court to the effect that the date of April 20, 1948, as shown by the transcript, was not the correct date the order was made by the county court, but that it was made at a later date. Any evidence of this character was improper. It is a fundamental rule applicable to all appellate proceedings that the record of a court where a matter originated or was tried when properly authenticated imports absolute verity and cannot be contradicted, varied, or changed by oral testimony or any extrinsic evidence. An issue of fact cannot be made in this court as to any matter properly shown by the records of the court where the case originated or was tried from whence the case comes to this court for review. Drier v. Knowles Vans, Inc., *supra;* Morgan v. State, 51 Neb. 672, 71 N. W. 788; Merchants Savings Bank v. Noll, 50 Neb. 615, 70 N. W. 247; Ford v. State, 46 Neb. 390, 64 N. W. 1082. Regularity of the record of the court where a case is commenced, or in which the trial thereof is had, is conclusively presumed until overcome by affirmative proof in the records of that court. Omaha Loan & Trust Co. v. Hogeboom, 47 Neb. 7, 66 N. W. 14; Jones v. Cleary, 2 Neb. (Unoff.) 541, 89 N. W. 386. The law neither commands nor authorizes this court to amend the record of an inferior court in a case presented for review. Thompson & Sons Mfg. Co. v. Nicholls, 52 Neb. 312, 72 N. W. 217. If the record of a lower court is incorrect or incomplete, the remedy is appropriate proceedings to secure a correction thereof in that court. Drier v. Knowles Vans, Inc., *supra;* Reno

v. State, 69 Neb. 391, 95 N. W. 1042; State ex rel. Cochran v. Hopewell, 35 Neb. 822, 53 N. W. 990.

The judgment of the district court is reversed with instructions to dismiss the appeal of appellee in that court and to certify the judgment of dismissal to the county court of Gage County.

REVERSED AND REMANDED WITH DIRECTIONS.

YEAGER, J., participating on briefs.

JENNIE M. PARROTT, APPELLANT, V. GEORGE G. HOFMANN ET AL., APPELLEES.
37 N. W. 2d 199

Filed April 29, 1949. No. 32554.

1. **Trusts: Frauds, Statute of.** A high degree of proof is required in order to establish a trust by parol evidence. The proof must be clear, convincing, and satisfactory.
2. **Appeal and Error.** Actions in equity, on appeal to this court, are triable de novo in conformity with section 25-1925, R. S. 1943, 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.

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

Thomas J. Sheehan, Jr., for appellant.

J. C. Travis, for appellees.

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

SIMMONS, C. J.

In this action plaintiff seeks to establish by parol evidence an alleged agreement of the defendants to hold real estate as a constructive trust. The trial court found

generally for the defendants. We affirm the judgment of the trial court.

These facts appear in the record without serious dispute.

Plaintiff is an elderly widow, and at the time this action was brought in 1947 was 72 years of age. The defendants George G. and Bernice I. Hofmann are husband and wife. The defendant Bernice I. Hofmann is plaintiff's stepdaughter, the plaintiff and Bernice's father having married when defendant Bernice was 9 years of age. The relationship between plaintiff and defendants was friendly until 1941.

In 1936, plaintiff was the owner of a lot in the city of Omaha which had on it a building described as a combined store and residence. It was renting for $55 a month. Its value was from $4,000 to $4,500. The property was mortgaged and there were due upon the mortgage, principal and several years' delinquent interest, totaling about $3,570. There were also delinquent taxes in the amount of approximately $800. Both taxes and mortgage were subject to foreclosure, and that action was threatened, including a suggestion of a receivership.

The matter was discussed between plaintiff and defendants. Defendant George G. Hofmann talked the matter over with the mortgage holders. They agreed to discount the mortgage indebtedness, to accept a new mortgage from defendants for $3,000 and a cash payment which, when made, was for $208.25, or a total of $3,208.25.

On February 10, 1936, the parties met in an attorney's office in Omaha. The attorney had previously represented both plaintiff and defendants in separate matters. On that day plaintiff executed a warranty deed to the premises conveying the same to the defendants, subject to the mortgage, outstanding tax sale certificate, and delinquent taxes beginning with the year 1931. On that day the parties also executed what is termed an option, wherein the defendants granted to plaintiff and to Ruth G. Parrott, stepdaughter, the right to purchase the

property. The agreement contained these two provisions: "2. The option price of said property is $3208.25, and upon election to purchase, shall be due and payable in cash, together with interest at the rate of six (6%) per cent per annum on $208.25 and at the rate of five (5%) per cent per annum on the remaining $3000.00, said interest to be computed on the time elapsing between the date hereof and the date of election to purchase. In the event said first party between the date hereof and the date of electing to exercise said option shall have expended money in the repair and improvement of said premises, then and in that event there shall become due and owing on the date of said election to purchase such sum as shall have been so expended, not, however, to exceed the sum of $200.00, also such sums as shall have been expended in payment of taxes and assessments levied against said property, or of insurance premiums and in excess of the rentals received from said property, said sums so expended for repairs, improvements, taxes and/or assessments to likewise bear interest at the rate of six (6%) per cent per annum from the date of expenditure to the date of purchase of said property under this option. * * * 5. That the option herein granted shall be for a period of two years from the date hereof, unless exercised prior thereto, and shall at the expiration of said time, without further notice from the first party to second party automatically terminate."

Likewise on February 10, 1936, defendants paid to the mortgage holders the amount of $208.25, and executed their promissory note for $3,000 secured by a mortgage on the property involved. The note bore 5 percent interest and was payable at the rate of $50 a month until principal and interest were paid.

Thereafter the defendants collected the rent upon the property, paid the delinquent and current taxes and insurance, and the new mortgage indebtedness.

In October 1936 or 1937, the year being in dispute between plaintiff and her witness, plaintiff approached a

broker asking for a loan on the property. He testified that plaintiff asked for $4,000 and that she told him she had an option to buy the property here involved. The loan was not completed.

In 1938, the rent on the property was reduced to $50 a month.

In late 1941, a dispute arose between plaintiff and defendants over amounts which defendants claimed plaintiff owed them for advances of money and items in converting other property into rental apartments. Cordial relations then ceased. Defendants requested a mortgage for the amounts involved, which plaintiff refused to give, stating that defendants had beaten her out of the property here involved. This dispute resulted in litigation in 1941 in an action by defendants against plaintiff for the recovery of money. By answer filed in that action on January 5, 1943, plaintiff admitted owing defendant George G. Hofmann the sum of $570. On April 15, 1943, plaintiff tendered to defendant George G. Hofmann the sum of $20 to apply on that indebtedness. An amended petition was filed in that action on June 7, 1943, and an amended answer and counterclaim was filed on July 2, 1943. By the counterclaim in that action plaintiff undertook to secure an accounting and recovery of the property here involved. The counterclaim was stricken upon motion.

In October 1945, defendants sold the property here involved for $5,500, the sale netting them $5,239.26. Plaintiff learned of the sale in the spring of 1946. This action was commenced in May 1947.

Plaintiff alleged that in 1936, when facing financial difficulties with reference to this property, defendants expressed a desire to help her; that defendants were to advance her approximately $200 with which to pay the delinquent installments on the mortgage indebtedness, were to collect the rents, make payments on the mortgage then aggregating approximately $3,000, make repairs, pay taxes and insurance, and to advance such sums in

excess of rents collected to pay taxes and insurance; and that "when the rents thus collected had been sufficient to pay off said mortgage indebtedness, said taxes, insurance, repairs (said repairs not to exceed $200.00), and advances and interest thereon, the defendants would convey said real estate to the plaintiff as her own and absolute property." Plaintiff further alleged that defendants stated they should have a contract wherein plaintiff for the stipulated consideration of $3,208.25 and advances for delinquent installments and taxes would have the right to repurchase the premises. Plaintiff further alleged that relying on the promises she executed and delivered the warranty deed and option. She alleged that in January 1938, she was able to pay the consideration recited in the option; that defendants objected to her paying the expenses of refinancing and agreed to "give the property back to the plaintiff when the rents therefrom had paid for it"; and that she accordingly took no steps to exercise the option agreement.

Plaintiff prayed for a decree that the defendants held the property in trust for her, for an accounting of rents and the proceeds of the sale, and for judgment for the amount found due.

Defendants pleaded that the deed and option represented the entire contract and that the action was barred by the statute of limitations.

The trial court found generally for the defendants and dismissed the action. From that decree plaintiff appeals.

We find some difficulty in determining from the petition whether plaintiff relies upon a parol agreement prior to the deed and option, or a subsequent parol agreement, or upon both of said alleged agreements. Plaintiff here contends that defendants were constructive trustees. It is noted that the prior parol agreement pleaded is substantially that contained in the option, except as to the two-year provision contained in paragraph 5 above set out.

Testifying over objection as to the prior agreement,

plaintiff said that "* * * I would sign it just like a mortgage to them, and when the mortgage was paid I could have the place back" and that the "mortgage" was to be paid "in two years." Plaintiff referred to the option to buy when undertaking to secure the loan within the two-year period. It seems clear from the record that plaintiff understood that her rights in the property were limited to a two-year period. The attorney who drew the papers testified that they represented the agreement of the parties as related to him by both plaintiff and defendant George G. Hofmann, although plaintiff denies that she had anything to do with the drafting of the papers. Her testimony as to what the prior agreement was so far as she relates it corresponds with the option, save as to the two-year clause. Admittedly she was in the attorney's office with defendants when the papers were discussed before being signed.

As to the subsequent parol agreement, plaintiff testified that in 1937, she told defendant George G. Hofmann that she could get the money to pay the indebtedness and that he told her "* * * 'Oh, just let it ride, I will never take the place away from you; just let it ride. What do you want to pay any more commission for' " and that she relied upon that statement. Defendant denies that conversation. So, as to that, there is a direct conflict. However, it is not disputed that in 1943, seven years after the conveyance to defendants and two years after she testified she told defendants they had beaten her out of this property, plaintiff by letter tendered the defendants $20 on the admitted $570 debt and promised to make like payments monthly until the total of the $570 had been paid.

Under these circumstances the trial court resolved the issues of fact against the plaintiff.

A high degree of proof is required in order to establish a trust by parol evidence. The proof must be clear, convincing, and satisfactory. Holbein v. Holbein, 149 Neb. 281, 30 N. W. 2d 899; McCormick v. McCormick, 150

Neb. 192, 33 N. W. 2d 543; Maca v. Sabata, 150 Neb. 213, 34 N. W. 2d 267.

"Actions in equity, on appeal to this court, are triable de novo in conformity with section 25-1925, R. S. 1943, 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." O'Brien v. Fricke, 148 Neb. 369, 27 N. W. 2d 403.

It is our conclusion that the evidence of the plaintiff fails to meet the test as to quality required under the above rules as to the essential fact questions involved.

The judgment of the district court is affirmed.

AFFIRMED.

IN RE TRUST ESTATE OF WILLIAM P. MYERS, DECEASED. THE OMAHA NATIONAL BANK, SUCCESSOR TRUSTEE OF THE TRUST ESTATE OF WILLIAM P. MYERS, DECEASED, AND T. PORTER BENNETT, APPELLANTS, V. RUTH W. DENNIS ET AL., APPELLEES.

37 N. W. 2d 228

Filed April 29, 1949. No. 32563.

1. **Courts: Appeal and Error.** On appeal to the district court from the county court where the county court had no jurisdiction of the subject matter such appeal confers no jurisdiction upon the district court.
2. **Trusts: Courts.** The county court is without jurisdiction to interpret instruments creating trusts or to determine the rights of rival claimants of trusts and matters of like import.
3. **Wills: Courts.** The county court has no jurisdiction to construe wills to determine rights of devisees or legatees as between themselves.
4. ———: ———. The jurisdiction of the county court in the construction of a will is limited to a construction for the benefit of the executor in carrying out the terms of the will but no such

construction is binding on the heirs, legatees, or other persons interested in the distribution of the corpus of the estate.

5. **Trusts: Courts.** Article 18, chapter 30, R. S. 1943, confers only concurrent jurisdiction of the county court with the district court in supervision over administration of testamentary trusts.

APPEAL from the district court for Richardson County: VIRGIL FALLOON, JUDGE. *Reversed and remanded.*

Wiltse & Wiltse, Homer G. Wiltse, Brown, Crossman, West, Barton & Quinlan, and *Raymond M. Crossman, Jr.,* for appellants.

Archibald J. Weaver, for appellees.

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

YEAGER, J.

On December 26, 1904, William P. Myers made and executed a will. He died testate January 17, 1905. He left surviving him Helen E. Myers, widow, Miranda S. Myers and Martha W. Myers, daughters, and Lawrence W. Myers, a son. An executor was named in the will. It was provided that the executor should be trustee of the estate. Provision was made for action by successor trustee or trustees in case of unwillingness or inability of the designated executor to act as trustee.

Except as to specific disposition of a small portion thereof the estate was placed in trust with the executor for the period covered by the life of the last survivor of the widow and three children and for 20 years thereafter. These four were beneficiaries of the income of the trust in their respective lifetimes in a manner and to a degree not necessary to be mentioned here. It is important however to point out here that by the terms of the will no one of these was capable of at any time receiving any part of the body of the trust. The will provided that upon the expiration of 20 years after the death of the four the estate should vest absolutely in the issue of the children or the descendants of such issue.

The will made no provision for disposition of the trust estate in case of failure of issue and descendants of issue of the three children of the testator.

The grant of the trust as it appears in the will is the following:

"I give, bequeath, will and devise unto my executor named in this will, who is to be trustee of my estate, and to his successors, in trust for the use and benefit of my beloved wife, Helen E. Myers, and my beloved children, Miranda S., Martha W. and Lawrence W. Myers, as provided and directed in this will, all the property of which I die seized whether personal, real or mixed."

The estate was probated in the county court of Richardson County, Nebraska, and the named executor qualified as executor and acted as trustee of the estate until his death, when the Omaha National Bank was designated successor trustee by the county court. The estate was at all times administered pursuant to the terms of the will and under the control and jurisdiction of the county court. While it is a matter of no consequence in the determination of the questions involved herein, it appears that for a time Lawrence W. Myers and Miranda S. Bennett acted as joint trustees.

Helen E. Myers did not again marry. She died November 6, 1906. Martha W. Myers did not marry. She died October 30, 1925. Lawrence W. Myers did not marry. He died November 9, 1942. Miranda S. Myers was married to T. Porter Bennett. She died without issue on August 31, 1947. On the death of the last survivor of the three children of the testator there was left no issue or survivor of issue.

After the death of Miranda S. Myers Bennett, Ruth W. Dennis, Lawrence M. Weaver, and Archibald J. Weaver filed a petition in the probate proceeding wherein the will of the testator had been probated setting forth substantially that the purposes of the trust had terminated with the death of said Miranda S. Myers Bennett

and, since there was no one designated by the will to take, the trust should be terminated and the corpus thereof distributed to those entitled thereto. They alleged that they, together with a large number of other persons some of whom are grandchildren of Martha A. Weaver, a deceased sister of the testator, and some of whom are grandchildren of Frederick Benham Myers, a deceased brother of the testator, are the persons entitled to distribution. They prayed for termination of the trust and distribution in accordance with the allegations of the petition.

To this petition the Omaha National Bank, successor trustee, filed an answer and cross-petition. With regard to both the answer and cross-petition it alleged that the county court was without jurisdiction to try the question of termination of the trust and distribution of the corpus of the trust and that the district court has exclusive original jurisdiction of those matters. It also contended that the trust was not subject to termination except at the expiration of the trust period as fixed by the terms of the will.

Otherwise to the extent that it needs to be referred to here the answer was a general denial.

By the cross-petition the successor trustee asked instruction as to the care and disposition of the income of the trust property; it asked for a construction of the will and an adjudication as to ultimate distribution of the corpus of the estate; it asked for an interpretation and application of the Administrative Trust Act in several particulars; and it further asked for instructions with regard to administration of the trust pending the determination of the matters involved in this proceeding. The prayer conformed to the allegations of the answer and cross-petition. Otherwise the prayer was for dismissal of the petition and for equitable relief.

Notice to all parties concerned and not before the court was given by publication.

A hearing was had and judgment rendered by the

county court. It was adjudged that the county court had jurisdiction over the subject matter; that the trust set up by the will was terminated; that the successor trustee holds the trust estate upon a resulting trust for the heirs of the testator as of August 31, 1947; that the heirs as of that date are the descendants of Martha A. Weaver, deceased, and Frederick Benham Myers, deceased; and distribution was allocated. There was also a judgment upon the matters on which the successor trustee sought instruction but the details in this respect are not of importance here since this phase of the litigation was not in dispute in the district court and is not in dispute here.

From the judgment of the county court T. Porter Bennett, husband of the deceased Miranda S. Myers Bennett, and the successor trustee perfected an appeal to the district court.

In the district court on appeal T. Porter Bennett filed pleadings wherein he sought termination of the trust as of the date of the death of his wife and distribution of one-half of the corpus of the trust to him.

The contention of the pleadings was that since the will made no provision for anyone to take in case of the death of the three children without issue and the three having died without issue that the corpus of the trust should pass as intestate property as of the death of the testator.

It should be pointed out here that the widow of the testator as well as his three children died intestate.

The effect of the pleadings of T. Porter Bennett was to say that the corpus of the trust passed under the laws of descent and distribution as of the date of the death of the testator first to all the heirs and from each as he or she died to those remaining until in the end it came in whole to Miranda S. Myers Bennett, and then on her death without issue he as her husband and heir became entitled to one-half of it.

Ruth W. Dennis, Lawrence M. Weaver, Arthur J.

Weaver, and others of this class filed a petition renewing the claims made by Ruth W. Dennis, Lawrence M. Weaver, and Archibald J. Weaver in their petition in the county court.

The substantial difference between their contention and that of T. Porter Bennett is that they contend that the corpus of the trust passed to those in the status of heirs of the testator at the date of the death of Miranda S. Myers Bennett whereas T. Porter Bennett contends that it passed to the heirs of Miranda S. Myers Bennett.

The successor trustee filed an answer and cross-petition substantially the same as was filed in the county court.

Issues were joined and a trial was had to the court and decree entered. The decree to the extent necessary to be noted here was substantially the same as the judgment of the county court as hereinbefore set out.

The appeal here is by the successor trustee and T. Porter Bennett.

The first question requiring consideration here is that of jurisdiction. It is the contention of the successor trustee that the county court had no jurisdiction over the interpretation of the trust provision of the will and the disposition of the corpus of the trust but that the district court has original and exclusive jurisdiction thereof; and that the county court not having had such jurisdiction the district court was without jurisdiction on appeal.

The question of jurisdiction does not go to the matters on which the successor trustee asked instructions from the county court and later on appeal from the district court and there being no error assigned here in those respects the decree to that extent shall be treated as not appealed from and as remaining in full force and effect, or affirmed. This is proper since these were matters over which the county court clearly had jurisdiction.

If the county court had no jurisdiction over the matter of the interpretation of the trust provision and the dispo-

sition of the corpus of the trust it follows that the district court had none on appeal from the county court. It was said in In re Estate of Wilson, 97 Neb. 780, 151 N. W. 316: "An appeal, therefore, from the county court to the district court gives that court no general equitable jurisdiction."

On the questions of the interpretation and application of instruments creating trusts, the determination of the rights of rival claimants to the corpus thereof, and subjects of like import this court has repeatedly held that the county court is without jurisdiction and that the jurisdiction thereover resides in the district court. The theory of the cases is that such matters are equitable in character and require in case of controversy the intervention of a court of equity; and that by Constitution, and inherently, the district court has exclusive original jurisdiction in equity.

Article VI, section 9, of the Constitution of 1875, insofar as it was applicable to the matter involved herein was the following: "The district courts shall have both chancery and common law jurisdiction, and such other jurisdiction as the legislature may provide; * * *." This provision has not been changed and it now appears in Article V, section 9, of the Constitution. This provision was quoted in Lacey v. Zeigler, 98 Neb. 380, 152 N. W. 792, and commented upon in the opinion as follows: "The equitable jurisdiction of the district court is therefore beyond the power of the legislature to limit or control. It may give the district court 'such other jurisdiction' as it may deem proper, but it cannot take away from such court its broad and general jurisdiction in chancery which the constitution has conferred upon it."

In Gotchall v. Gotchall, 98 Neb. 730, 154 N. W. 243, it was said: "Appellant contends that the district court has no jurisdiction, the action being within the sole original jurisdiction of the county court. We are of a contrary view. The construction of the will is only incidental to the real purpose of the action, which was

to declare a trust in the administrator, to determine the extent of the duties of the trustee, to settle the question as to whether a life estate in the land existed in George Gotchall, and to recover possession for the trustee. Under section 16, art. VI of the Constitution, the county court has no jurisdiction to determine such issues."

In Matteson v. Creighton University, 105 Neb. 219, 179 N. W. 1009, it was said: "Under the state Constitution, district courts have equity jurisdiction, and it may be exercised without legislative enactment."

In In re Estate of Frerichs, 120 Neb. 462, 233 N. W. 456, it was said: "Had there been such a showing in the county court, there might have been a different order there; for, while that court has exclusive original jurisdiction of estates, yet 'In exercising that jurisdiction it may incidentally determine equitable questions, but the county court has no general equitable jurisdiction.' " The quotation within the pronouncement is from In re Estate of Wilson, *supra.*

In Burnham v. Bennison, 121 Neb. 291, 236 N. W. 745, it was said: "Indeed, this court is committed to the view that, not only is equity jurisdiction conferred by the terms of the Constitution, but as thus conferred it is beyond the power of the legislature to limit or control. That, while the legislature may grant such other jurisdiction as it may deem proper, it cannot limit or take from such courts their broad and general jurisdiction which the Constitution has conferred upon them. * * * One of the well-recognized grounds of equity jurisdiction thus conferred on, and available in, courts of this state, by virtue of this constitutional provision, is the supervision of the administration of trusts." See, also, John A. Creighton Home v. Waltman, 140 Neb. 3, 299 N. W. 261.

This court has said: "The county court has jurisdiction to construe wills when necessary for the benefit of the executor in carrying out the terms of the will, but has no jurisdiction to construe wills to determine rights

of devisees or legatees as between themselves, and where under the terms of the will an executor can assign the property without a construction of the will and does not request a construction, the court has no authority to bind the heirs or legatees by any construction." Merrill v. Pardun, 125 Neb. 701, 251 N. W. 834; Jones v. Shrigley, 150 Neb. 137, 33 N. W. 2d 510.

This court has also said: "The construction of the will in such a case (in probate court), is for the information and benefit of such executor or administrator only, in order to advise him what course to pursue. It adjudicates nothing beyond his rights and liabilities in the execution of his office; controversies between adverse claimants under the devise or between the executor or administrator and persons claiming adversely to the estate, will not be affected thereby." Youngson v. Bond, 69 Neb. 356, 95 N. W. 700; Jones v. Shrigley, *supra*.

It has been suggested that in the opinion in In re Estate of Grblny, 147 Neb. 117, 22 N. W. 2d 488, this court expressed a view contrary to those expressed in the cases cited and quoted from herein. We think the opinion therein may not be so interpreted. In that opinion the provisions of article 18, chapter 30, R. S. 1943, relating to jurisdiction of the county court over testamentary trusts were considered and discussed but the court went no further than to say that the county court and the district court have concurrent jurisdiction in supervision over the administration of testamentary trusts.

Supervision over the administration of a testamentary trust is not involved in that portion of this case which has come here on appeal but, to the contrary, involved here is the interpretation of a will setting up an express testamentary trust; a declaration upon the period of its existence; the question of whether or not a resulting trust came into being on the death of the last survivor of those having a beneficial interest in the express trust; and a determination of interested parties and interests of

such parties on an appropriate adjudication of the issues presented.

We conclude that the county court was without jurisdiction to determine the issues which have been presented by this appeal and for that reason the district court was without jurisdiction on appeal.

This conclusion we think correct notwithstanding from reading the opinion in In re Estate of Mooney, 131 Neb. 52, 267 N. W. 196, it appears that this court determined similar issues on a like procedure. In that case the question of jurisdiction was not called to the attention of this court and obviously for that reason it was overlooked.

For want of jurisdiction as is indicated as to the subjects presented by the appeal the decree of the district court is reversed.

REVERSED AND REMANDED.

SELMER A. SOLHEIM, APPELLEE AND CROSS-APPELLANT, V. HASTINGS HOUSING COMPANY, APPELLEE AND CROSS-APPELLEE, KEARNEY CONSTRUCTION COMPANY AND ANCHOR CASUALTY COMPANY, APPELLANTS.

37 N. W. 2d 212

Filed April 29, 1949. No. 32540.

1. **Workmen's Compensation.** It is the policy of this court to give a liberal construction to the workmen's compensation law so that its beneficent purposes may not be thwarted by technical refinement of interpretation.
2. **Workmen's Compensation: Appeal and Error.** Where a retrial has been had before the full compensation court the appeal authorized to the district court is limited in scope and is primarily in the nature of an error proceeding.
3. ———: ———. On any appeal to this court in a workmen's compensation case the cause will be here considered de novo upon the record.
4. **Workmen's Compensation.** In order to entitle an employee to recover under the compensation act he has the burden of establishing that the injury arose out of and in the course of his employment for the party from whom he seeks such recovery.

5. ———. Where an employee, in the performance of his duties, is required to travel and an accident occurs while he is so engaged it arises out of and in the course of his employment and within the scope of the Workmen's Compensation Act.
6. **Corporations.** A corporation is a complete entity, separate and distinguishable from its stockholders and officers, and if it sees fit to have one of the latter serve it in the capacity of an ordinary employee there is nothing to prevent it from so doing.
7. **Workmen's Compensation.** In order to constitute a joint employment there must have been some joint arrangement between the two employers as to the employment by each. In the absence of any showing that there was any joint arrangement as to salary, wages, hours of employment or term of service there cannot be any joint employment within the meaning of section 48-129, R. S. 1943.
8. **Master and Servant.** Where an employee leaves the place where his duties are to be performed or where his service requires his presence to engage in other objectives, not incident to his employment, the relation of employee and employer does not exist until he returns to a place where, by the terms of his employment, he is required to perform services.
9. ———. But the mission of the master must be the major factor in the journey or movement, and not merely incidental thereto, that is to say, if incidental to the main purpose of going to or from the place of employment it would not bring such person under the protection of the act.
10. **Workmen's Compensation: Corporations.** An executive officer of a corporation is not, as such, its employee in the ordinary use of the word and, in the absence of express statutory provisions so providing, does not come within the provisions of the Workmen's Compensation Act covering only employers and employees.
11. ———: ———. A person holding the position of an executive managing officer and, at the same time, holding a job as an employee and performing the work thereof should be allowed to draw only compensation based on wages received by him in the latter capacity.
12. **Workmen's Compensation.** The provisions of section 48-126, R. S. 1943, with reference to allowances made to an employee for board, lodging, or similar advantages, although the money value of such advantages is fixed by the parties at the time of hiring, contemplate that such allowances shall represent a real and reasonably definite economic gain to the employee, and so intended by the parties, before it can be considered as wages for the purpose of computing compensation under the act.
13. ———. When the claimant, although only an executive officer of a corporation, is actually required to and does perform duties

of an employee within the contemplation of the act and is injured in an accident while so engaged he is entitled to compensation thereunder.

14. **Opinion clarified.** The opinion in Maryland Casualty Co. v. Geary, 123 Neb. 851, 244 N. W. 797, clarified.

APPEAL from the district court for Lancaster County: RALPH P. WILSON, JUDGE. *Reversed and remanded with directions.*

Chambers, Holland & Groth, and *John R. Dudgeon,* for appellants.

Davis, Stubbs & Healey, for appellee.

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

WENKE, J.

This is an action arising under and by virtue of the Workmen's Compensation Act. Selmer A. Solheim, as plaintiff, seeks to recover compensation benefits for injuries he claims he suffered in an accident while employed by the Kearney Construction Company and the Hastings Housing Company. The Anchor Casualty Company was made a party defendant because it is the workmen's compensation insurance carrier for both of the other defendants.

On June 30, 1945, the Nebraska Workmen's Compensation Court rendered a one judge award finding that at the time of the accident on February 11, 1944, plaintiff was in the employ of both the Hastings Housing Company and the Kearney Construction Company; that while engaged in the performance of his duties as such employee he sustained personal injuries in an accident arising out of and in the course of such employment; that as a result of the accident plaintiff was temporarily totally disabled for a period of 20 weeks; that such temporary total disability was followed by a 25 percent permanent partial disability to his right foot and a 25 percent permanent partial disability to his body as a

whole; and that plaintiff, at the time of the accident, was receiving $69.23 a week.

Based on these findings it awarded plaintiff the sum of $15 each week for a period of 20 weeks temporary total disability; the sum of $15 each week for a period of 37½ weeks because of the 25 percent permanent partial disability of his right foot; and the sum of $11.53 each week for a period of 242½ weeks because of the 25 percent permanent partial disability of his body. The award was joint and several against all of the defendants.

The award also allowed all medical, surgical, and hospital expenses had by plaintiff as a result of the injuries he received.

All parties to the proceeding filed petitions for rehearing of the matter before the compensation court as provided for in section 48-179, R. S. 1943, therein setting forth the errors complained of.

On September 29, 1945, the compensation court entered its award on rehearing. This award was the same, insofar as it fixed the amount of plaintiff's benefits, but did change the nature of defendants' liability. In place of holding as in the one judge's award, that both the Hastings Housing Company and the Kearney Construction Company were jointly and severally liable for the full award it held that the Hastings Housing Company was liable for two-thirds thereof, based on the fact that it paid plaintiff $200 a month as its construction manager, and the Kearney Construction Company for one-third thereof, based on the fact that it paid plaintiff $100 a month as its construction manager. The Anchor Casualty Company, being the compensation insurance carrier for both corporations, was held liable for the full award.

Thereafter the Hastings Housing Company, the Kearney Construction Company, and the Anchor Casualty Company, pursuant to stipulation of the parties, appealed to the district court for Lancaster County, as provided for by section 48-182, R. S. 1943. They filed verified

petitions, as by statute required, setting forth the contentions upon which they relied for reversal.

Thereafter, on July 7, 1948, the district court entered its judgment finding that on February 11, 1944, at the time of the accident, plaintiff was not in the course of his employment by the Hastings Housing Company; that at the time of the accident he was in the course of his employment by the Kearney Construction Company; that he was then in the pursuance of his duties thereof as president and construction manager; that as president he was receiving the sum of $100 a month, as construction manager he was receiving the same amount, and in addition thereto he was receiving the sum of $100 a month for board, lodging, and incidental expenses, thus making a total remuneration from the Kearney Construction Company of $300 a month for the services he was then performing. The court further found that on February 11, 1944, while so employed and engaged in the performance of the duties as such employee and officer, the plaintiff was injured in an accident resulting in his disability, the extent of which the court found to be the same as fixed by the compensation court award.

Based on these findings the court entered a judgment in favor of the Hastings Housing Company by setting aside and holding for naught the Nebraska Workmen's Compensation Court award against it; that plaintiff have and recover from the Kearney Construction Company and the Anchor Casualty Company compensation in the sum of $15 a week for 20 weeks of temporary total disability, the sum of $15 a week for 37½ weeks as compensation for the 25 percent permanent partial disability of plaintiff's right foot, and the sum of $11.53 a week for 242½ weeks as compensation for his 25 percent permanent partial body disability; and that all medical and hospital bills, as in the judgment set forth, be paid. The court also allowed plaintiff the sum of $300 as attorney's fee.

Plaintiff filed separate motions for new trial as to the

Kearney Construction Company and Anchor Casualty Company and the Hastings Housing Company and Anchor Casualty Company. These were overruled on July 7, 1948. The Kearney Construction Company and Anchor Casualty Company also filed their motion for new trial. It was overruled on July 8, 1948. From the overruling of their motion for new trial the Kearney Construction Company and Anchor Casualty Company appealed and the plaintiff has cross-appealed.

For the purpose of this opinion the parties will be referred to as they appeared in the lower court or by their proper or corporate names.

The facts are not in dispute. Plaintiff was president, a director, and the general manager in charge of construction of the Hastings Housing Company. The Hastings Housing Company is a corporation that was organized for and engaged in the construction of emergency defense housing in Hastings, Nebraska.

The minutes of the board of directors of the Hastings Housing Company dated October 15, 1942, showed the appointment of plaintiff as its construction manager "with the authority to contract for the purchase of building materials and labor required in the construction of defense homes * * * in Hastings, Nebraska and to subcontract with others for assistance in construction, architecture and sales in connection with said homes."

Plaintiff was also president, a director, and the general manager in charge of construction of the Kearney Construction Company. The Kearney Construction Company is a corporation that was organized for and was engaged in the construction of emergency defense housing in Kearney, Nebraska.

The minutes of the board of directors of the Kearney Construction Company dated April 26, 1943, showed the appointment of plaintiff as its construction manager "with the authority to contract for purchase of building materials and labor required in the construction of defense homes * * * in Kearney, Nebraska, and to sub-

contract with others with reference to the construction of said homes."

At the time herein involved both corporations had the same stockholders, directors, and officers but were separate corporations organized to obtain priorities for the building of defense housing in the respective cities of Hastings and Kearney. The principal or home office of these corporations was in Lincoln, Nebraska, but the field and construction operations were carried on from headquarters located on the project in Hastings. Field operations included traveling to other places, such as Endicott, Grand Island, and Omaha, for the purpose of procuring materials, arranging priorities, and generally looking after the interests of the companies. Construction operations were on the separate projects and, as occasion demanded, required traveling between Hastings and Kearney.

It was plaintiff's custom to leave Lincoln, Nebraska, where he lived, on Monday morning and stay in the field until Saturday afternoon, headquartering at the Clarke Hotel in Hastings. Accordingly he left Lincoln on Monday, February 7, 1944, and headquartered that week at the Clarke Hotel.

On the afternoon of Friday, February 11, 1944, at about 3 p. m. plaintiff left headquarters on the project site at Hastings to drive to Kearney. He used his own car for this purpose. He was going to Kearney for the purpose of taking the Kearney payroll, which had been prepared at headquarters in Hastings for Saturday's pay day; to deliver some supplies, including hardware and building material, to the Kearney project; and to pick up estimates of subcontractors on the Kearney project for the purpose of making payments based thereon.

Plaintiff had a typewriter in his car which was intended for use at Kearney in making out some purchase orders. He was also carrying some excess material in his car, including purchase order forms used by both companies in ordering material, loan forms used on the

Kearney project and a check writer, all of which he planned to take to Lincoln on Saturday.

Plaintiff arrived at Kearney about 5 p. m. and went directly to the project site. There he delivered the payroll, the hardware, and the building material. He then took dimensions for and made plans of kitchen cabinets. These were to be installed in the houses on the Kearney project. The Standard Planing Mill in Lincoln was fabricating these and he was going to deliver the plans to them. He then checked the work that had been done on the project and called on the subcontractors to find out when they would probably complete their work. He also got in touch with some lumber dealers in regard to building material needed on the project at Kearney.

While in Kearney plaintiff got in touch with the Tollefson-Elliott Company, lumber dealers, by telephone. He called them from headquarters on the project site. He contacted them in regard to lumber and other materials needed on the Hastings job and ordered certain materials, consisting of siding and flooring, and directed them to send it to the Hastings project. Plaintiff admits no trip was necessary for this purpose, as he could just as well have called from Hastings and given the order, and that he did not and would not have made a trip for that purpose but called while in Kearney solely because he happened to be there on other business.

Plaintiff was through with his work in Kearney about 6:30 p. m. He then ate dinner and left Kearney about 9 p. m. to return to Hastings. He was returning to Hastings that evening in order to be able to mail his plans for the kitchen cabinets to the Standard Planing Mill in Lincoln, hoping to get the mail on the Burlington Denver Zephyr. Upon his return he also planned to check the estimates of the subcontractors on the Kearney project for the purpose of preparing and mailing them their checks, to prepare the payroll for the Hastings

project for Saturday's pay day and, if any time was left, to check some invoices on the Hastings project.

A few miles out of Kearney plaintiff's car ran into a bridge and he was injured. That the accident happened and the extent of the injuries, as fixed by the court below, is not questioned by any of the parties on this appeal.

The first question raised is the nature of the appeal authorized by sections 48-182 and 48-184, R. S. 1943, from an award on rehearing by the full compensation court; that is, did the district court, in the absence of a petition on appeal or cross-appeal by the plaintiff, have authority to modify the award of the full compensation court by increasing the amount for which the Kearney Construction Company was liable?

The record discloses that the district court increased the amount for which the Kearney Construction Company was liable over that awarded by the full compensation court, which only considered plaintiff's wages as construction manager in determining the amount thereof. The district court did this by including as part of his wages, in addition to what he received as construction manager, the salary he received as president and his allowance for expenses. The result happens to be that the total allowed plaintiff is the same but in place of the Kearney Construction Company being liable for only one-third thereof, as determined by the compensation court, it is liable for the full amount.

In construing the Workmen's Compensation Act we have long adhered to the policy of giving it a liberal construction so as not to defeat its purpose by technical refinement of interpretation. This is stated in Ludwickson v. Central States Electric Co., 135 Neb. 371, 281 N. W. 603: " 'It has long been the policy of this court to give a liberal construction to the workmen's compensation law, so that its beneficent purposes may not be thwarted by technical refinement of interpretation. Maryland Casualty Co. v. Geary, 123 Neb. 851,

244 N. W. 797.' Wilson v. Brown-McDonald Co., 134 Neb. 211, 278 N. W. 254."

We have said, with reference to the provisions of the Workmen's Compensation Act, which are now sections 48-182 and 48-184, R. S. 1943, that: "It will be noted that, where a retrial has been had before the full compensation court, the appeal authorized to the district court is limited in scope and is primarily in the nature of an error proceeding. * * * The joint requirement for a transcript and bill of exceptions shows that it was intended to be limited to appeals in the nature of error proceedings, following a trial before the compensation court en banc." Hansen v. Paxton & Vierling Iron Works, 135 Neb. 867, 284 N. W. 352. And in Schmidt v. City of Lincoln, 137 Neb. 546, 290 N. W. 250, we said: "Because a rehearing was had in the compensation court, the appeal which defendant took to the district court was necessarily, under section 48-174, Comp. St. Supp. 1939, in the nature of an error proceeding."

However, although the district court was so limited that fact is of little consequence for, on any appeal to this court under section 48-185, R. S. 1943, we consider the cause de novo upon the record. As stated in Werner v. Nebraska Power Co., 149 Neb. 408, 31 N. W. 2d 315: "In this, a workmen's compensation case, the cause is considered de novo upon the record * * * ." See, also, Schmidt v. City of Lincoln, *supra*.

In order to entitle an employee to recover under the Workmen's Compensation Act he has the burden of establishing that the injury arose out of and in the course of his employment for the party from whom he seeks such recovery. Weitz v. Johnson, 143 Neb. 452, 9 N. W. 2d 788, and Huston v. Gage County Electric Co., 134 Neb. 805, 279 N. W. 797.

Where an employee, in the performance of his duties, is required to travel and an accident occurs while he is so engaged it arises out of and in the course of his employment and within the scope of the Workmen's

Compensation Act. Coster v. Thompson Hotel Co., 102 Neb. 585, 168 N. W. 191; Murphy Construction Co. v. Serck, 104 Neb. 398, 177 N. W. 747; Aeschleman v. Haschenburger Co., 127 Neb. 207, 254 N. W. 899; Kirkpatrick v. Chocolate Sales Corporation, 127 Neb. 604, 256 N. W. 89.

Plaintiff testified that it was part of his duties as construction manager for each company to determine the amount of pay due each employee and make out the payroll accordingly, to check invoices, supervise construction, purchase materials, secure labor, pick up estimates of subcontractors, check and issue checks therefor, acquire sites for building homes, arrange the financing of the projects, secure insurance, and secure priorities.

There is no question but that plaintiff, in going to and from Kearney from Hastings, was performing services as construction manager for the Kearney Construction Company. And, although he was also president of that corporation, we think his employment as construction manager and his duties of that position were separate and brought him within the act. As stated in Skouitchi v. Chic Cloak & Suit Co., 230 N. Y. 296, 130 N. E. 299, 15 A. L. R. 1285: "A corporation is a complete entity separate and distinguishable from its stockholders and officers and if it sees fit to have one of the latter serve it in the capacity of an ordinary employee we see nothing to prevent it from so doing." And, as stated in Zurich G. A. & L. Ins. Co. v Industrial Comm., 193 Wis. 32, 213 N. W. 630: "It is conceded that besides holding the office of president of the company and discharging the duties pertaining to that office, he also acted as superintendent of construction upon the works. This constituted an employment palpably separate and distinct from the official duties falling upon him as president of the company. While performing such duties he stood in the same relation to the company that any other superintendent of construction in the employ of the company would occupy. That such person is under the provisions of the

workmen's compensation act is not seriously challenged, and we conclude that, while acting as superintendent of construction, the deceased was plainly an employee of the company." See, 71 C. J., Workmen's Compensation Acts, § 239, p. 507; Kuehnl v. Industrial Commission, 136 Ohio St. 313, 25 N. E. 2d 682; Manfield & Firman Co. v. Manfield, 95 Ind. App. 70, 182 N. E. 539; Annotation, 81 A. L. R. 645; Donaldson v. William H. B. Donaldson Co., 176 Minn. 422, 223 N. W. 772; Annotation 15 A. L. R. 1288; Higgins v. Bates Street Shirt Co., 129 Me. 6, 149 A. 147.

Was the plaintiff, during the trip from Hastings to Kearney and return, engaged in duties relating to his employment as construction manager of the Hastings Housing Company?

The record discloses that his employment by these corporations was separate and not within the provisions of section 48-129, R. S. 1943. As stated in Suverkrubbe v. Village of Fort Calhoun, 127 Neb. 472, 256 N. W. 47: "There is no evidence that at the time he was in the performance of any duty for the power company. The burglar, or robber, was not shown to have been in any way interfering with any property of the power company, but had broken into a store building. It necessarily follows that the injury did not arise out of and in the course of his employment by the power company. * * * In order to constitute a joint employment, there must have been some joint arrangement between the two employers as to the employment by each. In the absence of any showing that there was any joint arrangement as to salary, wages, hours of employment or term of service, there cannot be any joint employment, within the meaning of section 48-129, Comp. St. 1929 (now section 48-129, R. S. 1943)." Nor does the fact that plaintiff was returning to Hastings to do some work for the Hastings Housing Company within his duties as construction manager thereof place him within the scope of his employment in that capacity.

See Luke v. St. Paul Mercury Indemnity Co., 140 Neb. 557, 300 N. W. 577.

Where an employee leaves the place where his duties are to be performed or where his service requires his presence to engage in other objectives, not incident to his employment, the relation of employee and employer does not exist until he returns to a place where, by the terms of his employment, he is required to perform services.

Here there were no duties relating to his employment as construction manager of the Hastings Housing Company required or planned to be performed on the Kearney trip. He went to Kearney to perform duties relating to his employment as construction manager of the Kearney Construction Company. The only thing he did while at Kearney relating to the Hastings Housing Company was the telephone call relating to siding and flooring for the Hastings job. The nature of that call has been hereinbefore set forth. Plaintiff admits he would not have made the trip to Kearney for that purpose and could just as well have called from Hastings and accomplished the same thing. He only made the call from the project site in Kearney because he happened to be there in connection with his duties as construction manager for the Kearney Construction Company. We think this telephone call was only incidental to the principal purposes of the trip and falls within the rule: " 'But the mission (of the master) must be the major factor in the journey or movement, and not merely incidental thereto, that is to say, if incidental to the main purpose of going to or from the place of employment it would not bring such person under the protection of the act. * * *.' London Guarantee & Accident Co. v. Industrial Accident Commission, 190 Cal. 587." Babcock v. School District, 123 Neb. 491, 243 N. W. 831. See, also, Hammond v. Keim, 128 Neb. 310, 258 N. W. 478.

We do not think the acts performed by plaintiff on this trip for and in behalf of the Hastings Housing Company were of such a nature as to bring him within the scope of

his employment therewith at the time the accident happened. Nor would the fact that the insurance carrier, prior to the filing of this claim and before any adjudication thereof was had, paid to plaintiff, in behalf of the Hastings Housing Company, compensation in the sum of $180 for 12 weeks of temporary total disability and medical and hospital bills in the sum of $832.55 estop the Hastings Housing Company from asserting its claim that plaintiff's injuries did not arise out of and in the course of his employment with it. We find that plaintiff, on the trip from Hastings to Kearney and return, was not performing duties relating to the Hastings Housing Company such as to bring him within the scope of his employment with that company. He therefore has no basis for claim against it.

Plaintiff was employed by the Kearney Construction Company as president, a director, and as construction manager. The duties in each capacity were different and the employment separate. For each position so occupied he was paid a separate salary. The record shows his salary as president and director continued after February 1944, but that his salary as construction manager ceased with that month.

Under the situation here, as disclosed by the record, can the salary plaintiff received as president of the Kearney Construction Company be included as wages and added to what he received as construction manager? This raises the question of whether the salaries of executive officers, as such, are within the scope of the Workmen's Compensation Act. It is apparently not specifically covered by the act, which relates to that of employer and employee. See Chapter 48, article 1, R. S. 1943.

As has already been herein stated there is nothing to prevent such officer from serving in the capacity of an ordinary employee if such relationship is actually entered into with the company.

While certain duties plaintiff performed in the field, such as signing checks, related to his duties as president,

the record does not show he performed or intended to perform any such duties on the trip to and from Kearney. These duties were performed or intended to be performed at headquarters in Hastings.

But even if he had performed such duties on the trip we do not think he would come under the act. An executive officer of a corporation is not, as such, its employee in the ordinary use of the word and, in the absence of express statutory provisions so providing, does not come within the provisions of the Workmen's Compensation Act covering only employers and employees.

"When the president of a corporation acts only as such, performing the regular executive duties pertaining to his office he is not an employee within the meaning of the Statutory definition. Donaldson v. Donaldson Co. (Minn.), 223 N. W., 772; Aitchison v. Industrial Commission (Wis.), 205 N. W., 806; Skouitchi v. Cloak and Suit Co., 230 N. Y., 296, 130 N. E., 299. See to same effect an exhaustive note citing many authorities in 15 A. L. R., page 1288." Higgins v. Bates Street Shirt Co., *supra*. See, also, 13 Am. Jur., Corporations, § 866, p. 854; Bowne v. S. W. Bowne Co., 221 N. Y. 28, 116 N. E. 364; Manfield & Firman Co. v. Manfield, *supra;* Donaldson v. William H. B. Donaldson Co., *supra;* Brown v. Conway Electric Light & Power Co., 82 N. H. 78, 129 A. 633; Hodges v. Home Mortgage Co., 201 N. C. 701, 161 S. E. 220; Ryan v. State Auto Parts Corporation, 255 Ill. App. 422; Carville v. A. F. Bornot & Co., 288 Pa. 104, 135 A. 652.

It logically follows that: "A person holding the title of an executive managing official and at the same time being an employee and performing the work of such should be allowed only to draw compensation based on wages received by him in the latter capacity." Skouitchi v. Chic Cloak & Suit Co., *supra*.

The Workmen's Compensation Act provides that every employer coming under its provisions assumes certain

risks and liabilities. The policy of compensation insurance issued by the Anchor Casualty Company to the Kearney Construction Company was for the purpose of covering its risks and liabilities thereunder.

This policy contains the following provision: "If this Employer is a corporation, the entire remuneration of the President, any Vice-President, Secretary, Treasurer and other executive officers elected or appointed in accordance with the charter and by-laws of such corporation shall be disclosed and premium shall be paid thereon, subject to a minimum individual remuneration of $30 per week, if the actual remuneration is less than such amount, and to a maximum individual remuneration of $100 per week, if the actual remuneration is greater than such amount. The remuneration so determined of each executive shall be assigned without division to the classification which is applicable to the actual operations in which such executive officer is primarily engaged, provided the remuneration so determined of each executive officer who performs such duties as are ordinarily undertaken by a superintendent, foreman or workman, or whose duties include direct charge of the actual performance of any operations of this Employer, shall be assigned without division to the highest rated classification which is applicable to any such duties undertaken by such executive officer for any part of his time." Premium was collected in accordance therewith.

As stated, the policy only seeks to cover the risks and liabilities of the Kearney Construction Company under the act and does not endeavor to broaden its liabilities thereunder. These provisions are not intended to cover a situation where there is no liability under the act but in situations where the act applies. Such a situation would be where the claimant, although only an officer, is, because of the duties which he is required to and does perform, actually an employee within the contemplation of the act and entitled to compensation. See, Southern Surety Co. v. Childers, 87 Okl. 261, 209 P. 927, 25 A. L. R.

373; and Enid Sand & Gravel Co. v. Magruder, 148 Okl. 67, 297 P. 271.

Should the plaintiff be entitled to consider as a part of his wages, for the purpose of determining his compensation under the act, the sum of $100 a month he received from the Kearney Construction Company for expenses?

The evidence of plaintiff shows that this allowance was not intended to cover traveling expenses, including that of his car, but was for the purpose of reimbursing him for meals, hotels, and all other incidental expenses he had while in the field. It was anticipated that his expenses for these items would probably be about that much and the allowance was intended to compensate him therefor but it was not intended that he should make any profit therefrom.

Section 48-126, R. S. 1943, provides in part as follows: "Wherever in this act the term 'wages' is used, it shall be construed to mean the money rate at which the service rendered is recompensed under the contract of hiring in force at the time of the accident, * * * nor shall it include board, lodging or similar advantages received from the employer, unless the money value of such advantages shall have been fixed by the parties at the time of hiring; Provided, that if the insurance carrier shall have collected a premium based upon the value of such board and lodging and similar advantages then the value thereof shall become a part of the basis of determining compensation benefits."

The record does not show that any premium was collected by the insurance carrier based upon the amount so allowed.

It is stated in 58 Am. Jur., Workmen's Compensation, §§ 310 and 311, p. 796, that: "As a general rule, * * * amounts paid an employee as reimbursements for expenditures which he is called upon to make in the course of his employment, in activities which he has no occasion to pursue when not employed, are not part of his earn-

ings for the purpose of fixing workmen's compensation. * * * The general rule appears to be that, in the absence of any provision to the contrary, the value of board and lodging furnished to any employee, or allowances made for such purpose, is to be considered in determining the amount of the employee's wages. It has been said, in this connection, that the test to be applied in determining whether allowances made for board and lodging to an employee who is taken away from his home by the business of his employer should be considered as part of his earnings in computing workmen's compensation is whether the allowance represents a real and reasonably definite economic gain to the employee, reasonably within, or at least not contrary to, the fair intent of the parties."

"While fixed sums allowed for board and lodging while away from home may be included in earnings, whether an allowance for board and lodging constitutes part of earning of an employee taken away from home on his employer's business depends on whether such allowance represents a real and reasonably definite economic gain to the employee within, or not contrary to, the intent of the parties." 71 C. J., Workmen's Compensation Acts, § 523, p. 805. See 84 A. L R. 184 and annotations on page 188.

We think the quoted provisions of section 48-126, R. S. 1943, with reference to allowances made to an employee for board, lodging, or similar advantages, although the money value of such advantages is fixed by the parties at the time of hiring, contemplate that such allowances shall represent a real and reasonably definite economic gain to the employee, and so intended by the parties, before it can be considered as wages for the purpose of computing compensation under the act.

The fact that the parties fixed the value of these expenses at the time of hiring, as by statute required, is not, of itself sufficient to entitle an employee to have the amount thereof considered as part of his wages when

he is entitled to compensation under the Workmen's Compensation Act. In addition thereto he must show that such allowance represents a real and reasonably definite economic gain to him.

Our holding in City of Omaha v. Casaubon, 138 Neb. 608, 294 N. W. 389, in effect, followed these principles. Therein board, lodging, and washing furnished claimant while a janitor and utility man at the City Emergency Hospital, which were understood by the parties to have a value of $40 a month, was considered a part of his wages within the meaning of the compensation law. It did represent a real and definite economic gain to the employee and was so intended and understood by the parties at the time of the hiring.

In Maryland Casualty Co. v. Geary, 123 Neb. 851, 244 N. W. 797, it appears that the allowance made to claimant, a trucker, for board and lodging while so employed was primarily for these items while he was on the road. Although this question was not directly involved therein, if it can be said that the opinion holds that any amount allowed an employee for meals and lodging while traveling away from home in the performance of his duties, under an agreement made at the time of hiring to pay for such items, is a part of his wages within the meaning of the workmen's compensation law without showing that such allowance represents a real and reasonably definite economic gain to the employee, and so intended by the parties, we think it is contrary to the real intent and proper construction of the quoted provisions of section 48-126, R. S. 1943.

The record does not disclose that the amount here fixed by the parties represents any real and reasonably definite economic gain to the plaintiff. In fact, it discloses the exact opposite and was so intended by the parties at the time it was fixed. We find it should not have been considered as a part of plaintiff's wages for the purpose of fixing his allowance under the act.

Did the district court, under the provisions of the act,

have the right to allow plaintiff an attorney's fee and, if it did, was the amount excessive?

The allowance of attorney's fees in workmen's compensation cases is purely statutory and provided for, under certain conditions, by section 48-125, R. S. 1943.

With reference to its application we have said: " 'We are of the opinion that the words "in like manner" limit the power granted and refer to the provision in the same sentence with reference to the granting of fees in the district court; and that this court shall allow fees in like manner as shall the district court, that is to say, in the event the employer appeals to this court from an award against him in the district court and fails to "obtain any reduction in the amount of such award" in this court, then a reasonable attorney's fee shall be allowed here.' (Rexroat v. State, 143 Neb. 333, 9 N. W. 2d 305)." Faulhaber v. Roberts Dairy Co., 147 Neb. 631, 24 N. W. 2d 571.

In view of the provisions in the statute the allowance of an attorney's fee by the district court was proper and we do not find the amount thereof to be excessive. However, in view of our holdings herein, the statute does not authorize the allowance of any fee by this court.

We find that the trial court was correct in dismissing plaintiff's claim against the Hastings Housing Company; that the trial court was correct in holding that the plaintiff was injured in an accident arising out of and in the course of his employment with the Kearney Construction Company as its construction manager; that the disability resulting from the injury was as determined and fixed by the trial court; that plaintiff is entitled to receive compensation under the act based on his salary of $100 a month as construction manager; that plaintiff is not entitled to have his salary of $100 a month as president of the Kearney Construction Company and his allowance of $100 a month for expenses as its construction manager considered as part of his wages in determining the compensation to which he is entitled; and

that the attorney's fee allowed by the district court was proper and not excessive but that no attorney's fee can be allowed here.

The action of the district court is therefore reversed with directions to enter a decree awarding plaintiff compensation in accordance with the foregoing findings.

REVERSED AND REMANDED WITH DIRECTIONS.

BOSLAUGH, J., not participating.

HAROLD R. SCHLUTER, PLAINTIFF IN ERROR, V. STATE OF NEBRASKA, DEFENDANT IN ERROR.
37 N. W. 2d 396

Filed May 3, 1949. No. 32485.

1. **Criminal Law: Trial.** An instruction in a criminal case that "Yet you have no right to reject the testimony of any of the witnesses without good reason, and should not do so, unless you find it irreconcilable with other testimony which you find to be true," held to be erroneous and ordinarily prejudicial.
2. **Criminal Law: Appeal and Error.** Section 29-2308, R. S. 1943, is not effective to sustain a conviction where a substantial right of a defendant has been invaded or abridged.

ERROR to the district court for Douglas County: JAMES T. ENGLISH, JUDGE. *Reversed and remanded.*

Bernard J. Boyle and *Hugh J. Boyle,* for plaintiff in error.

James H. Anderson, Attorney General, for defendant in error.

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

SIMMONS, C. J.

This is an appeal from a judgment and sentence based upon a jury's verdict finding the defendant guilty of manslaughter. We reverse the judgment and remand the cause because of prejudicial error in an instruction.

Before discussing the details of the evidence, we deem it necessary to set out the issues that were submitted to the jury.

The information charged two offenses in two counts. As originally filed, the first count charged that the defendant unlawfully and feloniously, but without malice, did kill and slay one Freddie Freelin. The second count charged the defendant with leaving the scene of the accident. This need not be further mentioned for the jury found defendant not guilty as to the second count. At the beginning of the trial defendant demanded a bill of particulars. Thereupon the county attorney amended the information and alleged that the unlawful acts of the defendant which caused the death were: (1) Operating his motor vehicle while under the influence of intoxicating liquor; (2) operating his motor vehicle at a high, dangerous, and reckless rate of speed and at a rate of speed not proper under existing circumstances, to wit: 60 miles per hour; and (3) operating his motor vehicle on the wrong or left side of said highway.

The trial court set out these three allegations and instructed the jury that if it found that the defendant did commit "any of the unlawful acts charged," subject to other qualifications not necessary to be mentioned, the jury should find the defendant guilty of manslaughter.

After having deliberated for some time, the jury returned to the court room and inquired if the defendant would be guilty of manslaughter if he committed one of the acts charged in the manslaughter count. The jury further asked to be advised as to the meaning of the "to-wit 60 miles an hour" phrase. The court advised the jury to return to the jury room. The defendant was present at this time. His attorneys were not. Thereafter defendant's attorneys arrived and orally requested that the jury be instructed, if its verdict were guilty on the manslaughter charge, that it indicate by

the verdict which one of the alleged unlawful acts was committed by the defendant. The trial court refused the request. The court then instructed the jury that the three unlawful acts charged were separate and distinct acts, and that if the jury found that the defendant had committed any one of the alleged unlawful acts and thereby caused the death, the jury should find the defendant guilty of manslaughter. The court further instructed that "to-wit 60 miles an hour" meant "namely 60 miles an hour." After several hours of deliberation, the jury returned a verdict of guilty of manslaughter, and not guilty of leaving the scene of an accident. To the verdict the jury added a recommendation of clemency and that defendant "be examined by a psychiatrist and be given adequate treatment." When the jury was polled, one juror called specific attention to these two recommendations.

There is no way to tell from this record which one or more of the alleged unlawful acts are the foundation for the verdict of guilty.

Generally the events of the evening resulting in the death of Mr. Freelin are as follows. The defendant purchased a case of beer about 6:30 in the evening. Four boys and a girl were then in the party with two automobiles, coupés, as conveyances. They went to a secluded place and the four boys drank the beer during a period of 45 minutes to an hour or more. They then got the sister of the girl, and the defendant bought another case of beer, and the six drove in the two cars to a park, where a part of the second case of beer was consumed by the four boys. About 10:30 in the evening a dispute arose resulting in a fight between the defendant and one of the boys, during which the windshield and one headlight of defendant's car and a beer bottle were broken. It appears that one of the boys took the keys from the ignition of defendant's car and the fight arose because of it. The State's contention is that the keys were taken because the boys thought defendant

was too intoxicated to drive. It is defendant's contention that he wanted to go home; that the others wanted to remain; and that the keys were taken to compel him to remain until the others were ready to leave, so that the five would not have to return home in a one-seated car. In this connection, defendant's mother testified that defendant was a nervous, easily-irritated child, subject to lack of control of temper, and when irritated became at times somewhat violent. Defendant got the keys and, alone in his car, left the park and entered a highway that was not well lighted.

Two teams drawing hayracks carrying groups of students out for a ride were then on the highway. One wagon had stopped on the road, preparatory to turning around, and some of the students had gotten to the ground and were standing on the black-top roadway beside the wagon. The other wagon with its party was several hundred feet beyond.

The defendant came down the highway and when a few feet from the standing wagon suddenly turned his car toward it, striking the rack on the left front corner and sideswiping it. Mr. Freelin was standing beside the rack and was killed. Defendant in his car went a few hundred feet on down the road, where he was either thrown or got out of his car. The driverless car went on and finally collided with the second hayrack.

The trial court instructed the jury that "It is your duty to scrutinize carefully and to weigh dispassionately, the testimony of all the witnesses giving the several parts of the evidence such weight as in your judgment they should receive.

"Weight of evidence depends upon the credibility of witnesses, their accuracy of observing and remembering, their interest, bias or prejudice, if any, and their means of knowing the matters concerning which they testify.

"You are the sole judges of the credibility of the witnesses, and the weight to be given their evidence. You are not bound to accept as true any statement simply

because it is sworn to by the greater number of witnesses, nor are you bound to accept the testimony of any witness as absolutely true, if for any good reason it appears to you unreliable or untrue. *Yet you have no right to reject the testimony of any of the witnesses without good reason, and should not do so, unless you find it irreconcilable with the other testimony which you find to be true.*" (Emphasis supplied here.)

The giving of this instruction was assigned as error in the motion for a new trial and in the petition in error here.

Defendant's brief was filed here on November 13, 1948. In his assignments of error defendant did not make complaint as to this instruction.

On November 26, 1948, our opinion in Wilson v. State, 150 Neb. 436, 34 N. W. 2d 880, was filed; on February 11, 1949, our opinions in Frank v. State, 150 Neb. 745, 35 N. W. 2d 816, and Swanson v. State, 150 Neb. 761, 35 N. W. 2d 826, were filed; on February 25, 1949, our opinion in Knihal v. State, 150 Neb. 771, 36 N. W. 2d 109, was filed; and on March 3, 1949, our opinion in Jennings v. State, 150 Neb. 828, 36 N. W. 2d 268, was filed. In each of these cases we held that the giving of an instruction containing substantially the same language as the last sentence above quoted was erroneous and under the facts and circumstances of each case was prejudicial.

By supplemental brief filed herein on March 4, 1949, defendant presents the giving of this instruction as prejudicial error requiring reversal. By supplemental brief the State joins issue and requests that we reexamine and limit the application of the holdings as to when the giving of the instruction constitutes prejudicial error.

While not directly stated in the cited cases, it is clear the holding is that the giving of an instruction containing the language here involved is erroneous under all circumstances. An erroneous instruction should not be given in any case. The State does not contend other-

wise. It contends rather that the instruction should be held to be prejudicial only in those cases where the State's evidence stands uncontradicted, and held to be not prejudicial in cases where there has been testimony both by the State and the defendant touching on the same facts at issue. In short, it is the State's contention that the instruction is not prejudicial where it applies with equal force to the State and to the defendant, and that such is the effect of our holdings in the Wilson, Knihal, and Jennings cases, *supra*.

The State would have us hold that this instruction, when applied to uncontradicted evidence of the State, is prejudicial, but cannot be prejudicial if applied to contradicted evidence. The effect of that contention is to say that contradicted evidence stands in a better probative position and is entitled to more weight than uncontradicted evidence. To so state it is to answer the contention. Likewise, to so hold would be to say in effect that the instruction is erroneous only under an uncontradicted evidence situation. The State overlooks the fact that by a plea of not guilty, maintained throughout the trial, the defendant challenges all the State's evidence.

Upon a plea of not guilty the defendant is clothed with the presumption of innocence which stands as evidence in his favor until the State by its proof shows him to be guilty beyond a reasonable doubt, and all doubts must be resolved in his favor. Behrens v. State, 140 Neb. 671, 1 N. W. 2d 289.

Contrary to the State's contention the cited cases do not so limit the holdings there made. In the Wilson case, *supra*, there was no testimony for the defendant in contradiction of the State's evidence. The plea of not guilty challenged it. We said in the Wilson case: "The testimony of no witness, especially if the witness be an accomplice, is surrounded with such sanctity as to require it to be accepted by triers of fact as true in the absence of controversion by other witnesses or con-

flict with other testimony." This is but a particular application of the rule stated in Chezem v. State, 56 Neb. 496, 76 N. W. 1056, that "* * * the triers of fact are not required to accept as true all sworn testimony, though not directly impeached or contradicted." See, also, Teresi v. Filley, 146 Neb. 797, 21 N. W. 2d 699. We further said in Wilson v. State, *supra*: "This court has consistently held that in cases tried to them juries are the judges of the credibility of witnesses and of the weight to be given to their testimony and, within their province, they have the right to credit or reject the whole or any part of the testimony of a witness in the exercise of their judgment. * * * The right of a defendant in a criminal case, or in truth the right of a litigant in any case triable to a jury, to have the jury weigh the evidence free from interference, we think, is a substantial right and a restriction upon or abridgement of that right by the trial court in instructions to a jury amounts to the deprivation of the benefits of this substantial right."

While, under the facts of the Wilson case, the State's evidence stood uncontradicted, the decision does not limit the prejudicial error holding to that situation. The Knihal case, *supra,* does not limit the question of prejudicial error to uncontradicted evidence. We specifically held there that prejudicial error followed when considering both contradicted and uncontradicted testimony of the State's witnesses. We find nothing in the Jennings decision, *supra,* to sustain the State's position.

The State, quoting from the Chezem case, *supra,* asserts that in cases where the State's evidence is contradicted by the defendant's evidence, the instruction is not prejudicial because it is "alike applicable to all the witnesses in the case whether examined on behalf of the prosecution or defense." There are several answers to this contention. The burden of the State and the defendant is not the same. The State is required to prove guilt beyond a reasonable doubt. The defendant has

no such burden. The defendant may, without offering evidence, submit the cause to the jury on the contention that the State has not met its burden of proof, or he may offer evidence and submit his cause to the jury on the ground that a reasonable doubt exists in the light of all the evidence.

In Frink v. State, 56 Fla. 62, 47 So. 514, where the evidence was conflicting, the jury was instructed that it had a right to reject any testimony which it could not reconcile with other testimony. The instruction was held clearly erroneous, the court stating that "The jury has no right to reject testimony because they are unable to reconcile it with other testimony, irrespective of whether that other testimony carries conviction to their minds. The testimony of the State may connect a defendant with the crime charged. The defendant's testimony may show he had no connection with it. The testimony is, therefore, irreconcilable, for a defendant cannot be at the same time guilty and not guilty. Under such circumstances a defendant might be entitled to an acquittal under the rule of reasonable doubt."

The State overlooks the sentence in the Chezem case, *supra,* next following the sentence it quotes which is: "The court by this instruction in no manner criticised, or cast reflections upon, the testimony of the accused, but properly allowed the jurors to decide for themselves the weight his testimony should receive." The vice of the instruction here is that it does not allow the jurors to decide for themselves the weight the defendant's testimony is to receive.

But the State argues that under the instruction the jury is not to believe the State's witnesses unless it first finds that the evidence of the defendant's witnesses is untrue. We are not here determining whether or not the instruction may be prejudicial to the State, but whether or not it may be prejudicial to the defendant.

In Donner v. State, 72 Neb. 263, 100 N. W. 305, 117 Am. S. R. 789, we said: "Indeed common experience

teaches us that juries are prone to view the evidence of one who is on trial for a criminal offense with suspicion, and the court should not, by his conduct or instructions, in any manner disparage the evidence of the accused." We there held prejudicial, as disparaging the testimony of the accused, an instruction which told the jury that it was not required to receive the testimony of the defendant as true, but could consider that it might have been given in bad faith and for the purpose of avoiding a conviction.

In Burk v. State, 79 Neb. 241, 112 N. W. 573, we considered and criticized an instruction which told the jury that in considering the credibility of the defendant as a witness it had a right to consider " '* * * the fact that he has been contradicted by other witnesses, if the jury believe from the evidence that he has been so contradicted, but the degree of credit given to each and all of the witnesses is a question for the jury alone, and not for the court.' " We there said: "But the vice of the instruction lies in that part of it by which the jury were told that if the defendant had been contradicted by other witnesses, if they should believe from the evidence that he had been so contradicted, that fact should be considered in determining the degree of credit to be given to his testimony. That part of the instruction seems to be an invasion of the legal rights of the defendant."

In Holmes v. State, 85 Neb. 506, 123 N. W. 1043, in considering an instruction dealing with the testimony of a defendant we said: "The court should not attempt to discredit him and destroy the effect of his evidence, but should leave its weight and credibility to the jury without unfavorable comment."

But it is argued that the instruction deals only with the credibility of witnesses and not with the burden of proof, and that our reason, given in the Frank, Knihal, and Jennings cases, *supra,* that the instruction, when applied to the State's witnesses, imposes a burden upon

the defendant which he is not required to carry, is erroneous. The matter of the credibility of a witness goes to the weight to be given to his evidence, and the weight to be given to evidence goes to the question of whether or not the State has met the burden of proof. The credibility of the witness is an element in the process of determining the ultimate question of whether or not the burden of proof of the State has been met.

In this as in all criminal cases upon a plea of not guilty the State is required to establish beyond a reasonable doubt every material allegation in the information. The State undertakes to do that by producing the testimony of witnesses. The jury then weighs that testimony to determine whether or not the State has met that burden. The weight of that evidence depends, among other things, upon the credibility of the witnesses. Naturally, for it is the evidence first produced, and under the instruction properly, the jury is first to determine the credibility of the State's witnesses. If it determines that their testimony is not to be credited, then its verdict is for the defendant.

But here the jury in that process of determining whether or not the State has met its burden of proof is confronted by an instruction which, when applied to the State's witnesses, directs that it should not reject the evidence of the State's witnesses which is irreconcilable with the defendant's evidence, unless it first finds the defendant's evidence is true. The jury then is required first to find whether or not the evidence for the defendant is true. The question of the credibility of the State's witnesses is made to depend upon the credibility of the defendant's witnesses. If the jury finds that defendant's evidence is not true, then the instruction requires that the jury accept the evidence of the State as true. When the jury reaches that point in its deliberations, if it finds that the defendant's evidence is not true, then the case stands with the jury considering, in effect, the uncontradicted evidence of the State, and the disapproval of

the instruction as applied in the Wilson case and the Knihal case (in part) comes into force.

Accordingly we find no merit in the State's contention that the instruction can be prejudicial only in those cases where the evidence of the State stands uncontradicted.

We said in a syllabus point in the Frank case, *supra,* that the giving of such an instruction in a criminal case was "ordinarily" prejudicial error. We there recognized that cases might arise where the giving of the erroneous instruction might not be prejudicial to the defendant. Asbra v. State, 144 Neb. 146, 12 N. W. 2d 845, was such a case. There we found that the facts and circumstances were such that the instruction was not prejudicial to the defendant. Contrary to the State's contention that decision does not hold that the giving of the instruction was not error.

We come then to this question, was the giving of the instruction without prejudicial error in this case?

The evidence is in conflict as to whether or not defendant was under the influence of intoxicating liquor. There is no dispute but that during the approximately four hours involved, the defendant drank beer. The State's witnesses who were with defendant do not agree as to the number of bottles of beer defendant drank. Most of the witnesses fix the amount consumed by defendant at 10 to 12 bottles. The liquid content in a bottle is not shown, nor is the alcoholic content, if any. The defendant fixes the number of bottles he drank at 4 or 5. The State's witnesses testified that in their opinion the defendant was under the influence of intoxicating liquor when he left the park just before the accident. The defendant testified that he was not. It is in evidence, however, by a statement given some hours thereafter that he admitted he was "feeling" the liquor and was "a little dizzy." A blood sample was taken an hour or two after the accident and alcohol found. The accuracy of the analysis is questioned by the chemist

who made it. Assuming it is correct, the experts are in disagreement as to whether or not it shows a sufficient amount to be the basis of a finding that defendant was under the influence of intoxicants. They likewise are in disagreement as to whether the amount of beer consumed, as testified by the State's witnesses, in the time involved would have produced a condition within the requirement of being under the influence of liquor.

The State's witnesses fixed the speed of defendant's car at 50 to 60 miles an hour by various forms of expression. Defendant testified that his speed was 25 to 30 miles an hour.

The evidence as to operating on the wrong or left side of the highway is not in conflict. All the witnesses testify that defendant came toward them driving on his own or right side of the highway and that when he was within a few feet of the horses he pulled suddenly to the left and struck the rack. The only lights on the front of the rack were electric, manually operated. There is a dispute as to whether or not they were turned on and showing at the time. Defendant testified that he came down the highway and saw two large objects on the black-top road; and that then he saw people going across the highway to the right, and he turned to the left to avoid hitting them and struck the rack. There is a dispute as to the location of the rack. The State's witnesses put it on its extreme right side of the road. The defendant produced a witness who testified to having seen its location at the time of the accident and to having checked the next morning the steel wheel marks where it turned. He positively stated the rack was in the middle of the road.

The rule is: "It is presumed a jury followed the instructions given in arriving at its verdict and, unless it affirmatively appears to the contrary, it cannot be said that such instructions were disregarded." Webber v. City of Scottsbluff, 150 Neb. 446, 35 N. W. 2d 110. We must presume then that in weighing the evidence

the jury followed the court's instructions and did not reject the State's evidence, and that because it found that the defendant's evidence was not true. It necessarily follows that the giving of the instruction was prejudicial error.

The State cites section 29-2308, R. S. 1943, and argues that no substantial miscarriage of justice has actually occurred, and hence that the judgment should not be reversed because of the instruction. The provision of the statute relied upon is as follows: "No judgment shall be set aside, or new trial granted, or judgment rendered in any criminal case, on the grounds of misdirection of the jury, or the improper admission or rejection of evidence, or for error as to any matter of pleading or procedure, if the Supreme Court, after an examination of the entire cause, shall consider that no substantial miscarriage of justice has actually occurred." § 29-2308, R. S. 1943.

In the Wilson case, *supra,* we restated the holding that where a substantial right of a defendant has been invaded or abridged this statute may not be effective to sustain a conviction. The statute has no application where the province of the jury is prejudicially invaded. See Kleinschmidt v. State, 116 Neb. 577, 218 N. W. 384. See, also, Scott v. State, 121 Neb. 232, 236 N. W. 608.

In Strasheim v. State, 138 Neb. 651, 294 N. W. 433, we considered a similar contention based upon the same statute. We there said: "To do as the state suggests would be for this court to usurp the function of the jury. It is not our task to determine the guilt or innocence of the accused. That is the function of the jury. It is not for us to attempt to determine what the jury's verdict might have been had no error been committed. Our task is to determine whether or not a fair trial has been had and whether or not prejudicial error has been committed. It being manifest that a substantial invasion of defendant's rights has occurred, and that prejudicial error was committed by the trial court, the examination

of further assignments of error becomes unnecessary, and the cause is reversed and remanded."

Of the other assignments of error made, one obviously will not arise upon a new trial, three have to do with the foundation for the admission of evidence, and three with instructions requested by the defendant and not given by the court. It does not appear certain that these questions here presented will arise upon a new trial and hence they are not determined.

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

REVERSED AND REMANDED.

YEAGER, J., concurring.

I have joined with the majority in the opinion adopted in this case because I think it goes far enough for the purpose, on the record, of determining the issues presented by the appeal. However as to the instruction which is brought into question I am persuaded that its giving in any civil or criminal case is prejudicial error and that it would have been well to so state in the opinion. I cannot conceive of a case wherein it could be said that it could not be calculated to be misleading and confusing to a jury.

If by its terms it may be said that the instruction is confusing, conflicting, and calculated to mislead, I fail to see how this court can say that it did not so confuse and mislead.

This court has never departed from the proposition that to give, on material matters, contradictory or conflicting instructions is prejudicial error. It cannot be any the less error if the contradiction or conflict appears in a single instruction. I think it a fair statement that where it is clear that an instruction could have misled a jury such instruction must be deemed prejudicial. This proposition is axiomatic.

The portion of the instruction complained of in this case is the following: "Yet you have no right to reject the testimony of any of the witnesses without good rea-

son, and should not do so, unless you find it irreconcilable with the other testimony which you find to be true." This is a sentence of an instruction which earlier therein correctly informed the jury that they were the sole judges of the credibility of the witnesses and of the weight to be given their testimony.

Can this sentence be anything less than a restriction upon and an inhibition against the right of a jury to test the credibility of each witness on his own merits? Does it not effectually inform the jury that they must accept the testimony of each and every witness as true in the absence of other testimony found to be both irreconcilable and true?

It was held in Wilson v. State, 150 Neb. 436, 34 N. W. 2d 880, and I think correctly, that notwithstanding the earlier directions, explanations, and admonitions of the instruction, this portion of the instruction failed to leave the jury free to reject testimony as false or incredible even though they may have disbelieved it or had a reasonable doubt as to its falsity or credibility. I am of this opinion notwithstanding a contrary holding of this court in dealing with this particular instruction in this same connection in Moore v. Pacific Mutual Life Ins. Co., 128 Neb. 605, 259 N. W. 916. A question propounded in the opinion therein is as follows: "Besides, how could they decide that any witness had testified falsely except by comparison of his testimony with other facts testified to or by the implication of other testimony?" It imports its own answer but the imported answer is insufficient. It fails to embrace, for instance, the discredit which may appear from the very nature of the testimony under a given set of circumstances or which may result upon cross-examination.

In a criminal case conviction may be had only on evidence and the proof must be beyond a reasonable doubt. This instruction, in a criminal case where the State has adduced evidence on an element or elements necessary to be proved and the defendant adduces none, requires

that the jury shall accept the evidence of the State as true. It does not under such circumstances permit of rejection of all or any part of such evidence no matter how fantastic or incredible it may appear on its face and no matter that it may have been completely discredited by cross-examination.

A defendant in a criminal case is not required to prove his innocence. He is not required to disprove his guilt or any of the elements of the charge against him. If the charge or any of its elements lacks proof by evidence beyond a reasonable doubt, he may not properly be found guilty.

In application of the inhibition of this instruction to the following hypothesis let us see what the end result would be. A witness for the State has testified with regard to an element of a criminal charge and nothing appears from the witness or his testimony to suggest incredibility. The defendant or a witness then gives directly opposite testimony which testimony has the appearance of incredibility yet it has enough of quality and substance to cause the jury, not to accept it as true, but to have a reasonable doubt as to its truth or falsity. Certainly the defendant is entitled to the benefit of that doubt, but the jury are told by this instruction that in such circumstances they may not reject the testimony of the witness for the State unless they find that the testimony of the defendant or his witness is true.

In a case where witnesses testify on opposite sides of a case and to opposite effect and it is readily apparent to the jury that the testimony of each is fully and equally incredible the inhibition of the instruction is that neither may be rejected for the explicit reason that the opposite is not found to be true.

If it be suggested that prejudicial error does not exist in a case where the testimony which under the instruction must be accepted as true is testimony of the defendant or his witnesses, a sufficient answer is that any instruction with regard to the manner of weighing testi-

mony and credibility of witnesses applies to witnesses for the State as well as to a defendant and his witnesses. The State has as much right to expect that a jury in a criminal case will be instructed correctly and properly as the defendant. It may not well be said and it does not follow that error against the State may not be regarded as prejudicial because from an adverse verdict it may not on appeal obtain a reversal of the judgment on such verdict.

MESSMORE and BOSLAUGH, JJ., concurring.

WENKE, J., dissenting.

I dissent from that part of the majority opinion which holds that the giving of instruction No. 15, particularly the last sentence thereof, "was prejudicial error." It likewise follows that I do not agree with the concurring opinion which holds the giving of this instruction, in any civil or criminal case, would be prejudicially erroneous and require reversal.

I do not necessarily dissent from that part of the majority opinion which reverses and remands the cause to the district court for retrial. This, for the reason that there are other errors complained of which might or might not make such decision proper. However, in view of the majority holding, it would serve no useful purpose to decide that question.

Instruction No. 15, as given by the court, is as follows:

"It is your duty to scrutinize carefully and to weigh dispassionately, the testimony of all the witnesses giving the several parts of the evidence such weight as in your judgment they should receive.

"Weight of evidence depends upon the credibility of witnesses, their accuracy of observing and remembering, their interest, bias or prejudice, if any, and their means of knowing the matters concerning which they testify.

"You are the sole judges of the credibility of the witnesses, and the weight to be given their evidence. You are not bound to accept as true any statement simply because it is sworn to by the greater number of witnesses,

nor are you bound to accept the testimony of any witness as absolutely true, if for any good reason it appears to you unreliable or untrue. Yet you have no right to reject the testimony of any of the witnesses without good reason, and should not do so, unless you find it irreconcilable with the other testimony which you find to be true."

This instruction deals with the credibility of witnesses and the weight of their evidence. It is for the purpose of informing the jury of their duty and responsibility in regard thereto. That is strictly a jury duty and function and should not be encroached upon by the trial judge either by comment or otherwise. I agree that the trial court was in error by adding these words to the last sentence of this instruction: "* * * and should not do so, unless you find it irreconcilable with the other testimony which you find to be true." This language erroneously qualified the jury's privilege of rejecting the testimony of any witness for good reason.

But every error does not necessarily require reversal. Before a reversal should be entered because thereof it must appear from the record that the error complained of can be said to have prejudicially affected the rights of the party complaining thereof.

We have recently dealt with this instruction in cases where the same or similar language was used.

In Wilson v. State, 150 Neb. 436, 34 N. W. 2d 880, we held, where there was no irreconcilable testimony or testimony to the contrary, that the giving of such an instruction was prejudicially erroneous. This, in my opinion, is correct in a criminal case.

In Frank v. State, 150 Neb. 745, 35 N. W. 2d 816, we held that it is ordinarily prejudicial error to give such an instruction. This case was reversed on other grounds and, necessarily, no occasion arose to discuss whether the instruction was prejudicially erroneous. In my judgment that case did not decide the question now before us. It only sought to advise the trial judge not to use the same

language on retrial. The same is true of the companion case of Swanson v. State, 150 Neb. 761, 35 N. W. 2d 826.

In Knihal v. State, 150 Neb. 771, 36 N. W. 2d 109, we held the giving of such an instruction prejudicial error but brought it within the scope of our holding in Wilson v. State, *supra,* although language is used therein which supports the holding of the majority.

In my opinion the only case we have decided directly sustaining the majority view is that of Jennings v. State, 150 Neb. 828, 36 N. W. 2d 268. Therein we considered the instruction to be such a plain error that we took note thereof and, under a factual situation similar to that in the case at bar, held the giving of the instruction to be "prejudicially erroneous." I now think we were in error in doing so.

In both the Knihal and Jennings cases the giving of this instruction was not here presented as error but under our rule 8 a 2 (4) we took note thereof.

It seems significant to me that in the cases recently decided which support the majority opinion, wherein we did not have the advantage of briefs because we took note of this instruction as a plain error under our rules, we did not take into consideration our previous holdings on similar or like instructions wherein, under situations such as here, we held them not to be prejudicially erroneous.

In Moore v. Pacific Mutual Life Ins. Co., 128 Neb. 605, 259 N. W. 916, which is a civil suit on an insurance policy, the court said: "Appellant criticizes the last sentence only, which reads: 'Yet you have no right to reject the testimony of any of the witnesses without good reason, and should not do so until you find it irreconcilable with other testimony you may find to be true.'

"Appellant says that this part of the eighth instruction tells the jury they must accept testimony they have found under the sixth instruction to be false because there may be no other testimony on the particular matter and therefore no testimony with which to compare it

and decide it 'irreconcilable.' This is splitting hairs too fine for us to believe the parts could be seen by the jury. Besides, how could they decide that any witness had testified falsely except by comparison of his testimony with other facts testified to or by the implication of other testimony? In our opinion the error assigned is not tenable. The instruction complained of is held free from prejudicial error."

And in Asbra v. State, 144 Neb. 146, 12 N. W. 2d 845, which is a criminal action, this court said: "On the matter of the credibility of witnesses the trial court instructed the jury, in part, as follows: 'You are the sole judges of the credibility of the witnesses and of the weight to be given their testimony. You are not bound to accept as true any statement simply because it is sworn to by the greater number of witnesses, nor are you bound to accept the testimony of any witness as absolutely true, if for any good reason it appears to you unreliable or untrue. Yet you have no right to reject the testimony of any of the witnesses without good reason and should not do so unless you find it unreconcilable with other testimony which you find to be true.' The defendant attacks the last sentence of this instruction and argues that the jury have the right for good reason to reject the testimony of any witness and that, as a condition to rejection, it is not necessary that the jury find it 'unreconcilable with other testimony' which they 'find to be true.' We are unable to see where the instruction was prejudicial to the defendant. The evidence was circumstantial and there was in it but little dispute on material matters. The question to be determined from the circumstantial evidence was whether or not the defendant was guilty of the offense. *The defendant testified in his own behalf and denied that he had 'anything to do with the setting of the fire.' When applied to his denial the jury were directly instructed that they should not reject his denial as untrue unless it was found un-*

reconcilable with other testimony which they found to be true." (Italics mine.)

Here the evidence is in conflict on issues which determine the guilt or innocence of the defendant. It was the jury's duty and function to consider this irreconcilable conflict and decide which side was telling the truth. That, in my judgment, is the effect and purpose of the language used. While the court should not have instructed the jury as it did, nevertheless, the language applies equally to the evidence on both sides and, when so applied, it does not, in my judgment, prejudice the defendant in any of his rights.

In my opinion our prior holdings, particularly in the Asbra case, are correct and should be followed. Certainly they justified the trial court in using the language which is here held to be prejudicially erroneous.

CARTER, J., concurring in this dissent.

IN RE PETITION OF THE SCHOOL DISTRICT OF OMAHA, IN THE COUNTY OF DOUGLAS, IN THE STATE OF NEBRASKA, TO CONDEMN PROPERTY FOR SCHOOL PURPOSES. AUGUST ROSSCHEART ET AL., APPELLANTS, V. SCHOOL DISTRICT OF OMAHA, IN THE COUNTY OF DOUGLAS, IN THE STATE OF NEBRASKA, APPELLEE.

37 N. W. 2d 209

Filed May 3, 1949. No. 32552.

1. **Appeal and Error: Eminent Domain.** The words "in the same manner as appeals are prosecuted in the civil actions" in section 79-1709, R. S. 1943, apply alike to appeals from the county court to the district court and from the district court to this court.
2. ———: ———. Section 79-1709, R. S. 1943, requires the appellant to file an appeal bond within 10 days from the filing of the appraisers' award, as provided in section 27-1302, R. S. 1943.
3. ———: ———. Section 79-1709, R. S. 1943, requires the appellant to deliver a transcript of the proceedings to the clerk of the district court within 30 days from the filing of the appraisers'

award, as provided in section 27-1303, R. S. 1943.

4. ———: ———. The filing of the appeal bond and the delivery of the transcript within the times limited are essential to confer jurisdiction of the cause upon the district court.

APPEAL from the district court for Douglas County: FRANK M. DINEEN, JUDGE. *Affirmed.*

Gross & Welch, and *Arthur W. Scribner,* for appellants.

King & Haggart, for appellee.

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

SIMMONS, C. J.

This is an appeal from an order of the district court dismissing on jurisdictional grounds an appeal from the county court in an eminent domain action. We affirm the judgment of the district court.

The proceedings were conducted under the provisions of Chapter 79, article 17, R. S. 1943.

The appeal is by the owners of the real estate involved. The question presented is whether or not the appellants complied with the provisions of section 79-1709, R. S. 1943, so as to vest the district court with jurisdiction of the cause.

The transcript shows the following proceedings in the county court. The report of the appraisers was filed December 17, 1947. On January 16, 1948, appellants filed an appeal undertaking in the sum of $200, which contained a notice of appeal. On January 17, 1948, the appellants paid for a transcript. On January 19, 1948, the transcript was made.

The transcript shows the following proceedings in the district court. On January 21, 1948, the transcript of the proceedings was filed in the district court and on the same day a petition on appeal was filed. On February 2, 1948, the school district filed objection to the jurisdiction of the court for the reasons that the appeal was not prosecuted within 30 days from the filing of the

award of damages, and that the appeal bond was not filed within 10 days from the filing of the award, and moved to dismiss the appeal. On July 19, 1948, the motion to dismiss was sustained and the appeal dismissed.

Appellants assign as error the order of the trial court dismissing the appeal.

Section 79-1709, R. S. 1943, so far as applicable here, provides: "Any person who may have any interest in land taken under the provisions of sections 79-1701 to 79-1710, may prosecute an appeal to the district court within thirty days from the filing of the award of damages, and either party may appeal from the district court to the Supreme Court, in the same manner as appeals are prosecuted in the civil actions, * * *."

Appellants contend that the words "in the same manner as appeals are prosecuted in the civil actions" refer only to appeals from the district court to this court and that accordingly the statute contains no requirement for the filing of a transcript in the district court.

Appellants rely upon the rule that "One canon of construction, known as the doctrine of the 'last antecedent clause,' is that relative and qualifying words or phrases are to be applied to the words or phrases immediately preceding, and as not extending to or including other words, phrases or clauses more remote, unless such extension or inclusion is clearly required by the intent and meaning of the context, or disclosed by an examination of the entire act." Nebraska State Railway Commission v. Alfalfa Butter Co., 104 Neb. 797, 178 N. W. 766. See, also, 59 C. J., Statutes, § 583, p. 985; 50 Am. Jur., Statutes, § 269, p. 258.

Appellants would have us hold that the Legislature provided the procedure for appeal to this court from the district court, but made no provision for the procedure on appeal from the county court to the district court, except that the appeal must be prosecuted "within thirty days from the filing of the award of damages"

and that the courts are left to supply the procedure and determine what constitutes the prosecution of an appeal within 30 days.

The procedure for the taking is specified in the statute beginning with a requirement that the school board pass a resolution of the necessity of acquiring the property, the filing of a petition, the service of notice of the time and place of a hearing, the appointment of appraisers, the taking by them of an oath, and a report of their findings. It provides the procedure to be followed by the school district if the assessment is satisfactory to it, and likewise the procedure if not satisfactory. It provides for an appeal by the landowner. It fixes who shall pay the costs both in the county court and on appeal. It provides the amount and character of the lands that may be taken and for the advancement of the cause for trial in the district court and on appeal in this court. An examination of the entire act negatives any legislative intent to leave a void in this one step of the eminent domain procedure.

In Kerr v. Lowenstein, 65 Neb. 43, 90 N. W. 931, we had for construction a statute which provided: " 'Every executor or administrator who may have given bond in this state, with surety agreeably to law, shall be authorized, in all cases of appeal from one court to another by him made, to prosecute the same without filing an appeal bond, such appeal to be prosecuted to the district court as appeals are now taken from courts of justices of the peace.' " It was urged that the last clause beginning with "such appeal to be prosecuted" was restrictive and limited the right of the administrator or executor to appeal without giving an appeal bond only to appeals from the county court to the district court. We said: "It may be admitted that, as a general rule of grammatical construction, relative words must ordinarily find their antecedents in the next preceding word or words to which they may refer; but this rule is subject to the exception that, if such construction would

involve an absurdity, do violence to the plain intent of the language, or if the context for other reason requires a deviation from the rule, it will be necessary and proper to look for another antecedent." We denied the contention there made. The analogies in the situation there and here presented may be observed from the opinion.

We think it clear and hold that the language "in the same manner as appeals are prosecuted in the civil actions" in section 79-1709, R. S. 1943, applies alike to appeals from the county court to the district court and from the district court to this court. As we said in Kerr v. Lowenstein, *supra*, the statute directs the person, interested in the land taken, who desires to appeal "to look to the statute governing appeals" in civil actions and to "follow the procedure therein indicated."

The question then comes, what are the requirements of the provision?

Section 24-544, R. S. 1943, provides that in civil actions either party may appeal from the judgment of the county court, in the manner as provided by law in cases tried and determined by justices of the peace.

Section 27-1302, R. S. 1943, provides that on appeal from the final judgment of a justice of the peace to the district court "The party appealing shall, within ten days from the rendition of the judgment, enter into an undertaking to the adverse party, * * *." We have held that "The statute is mandatory. The giving of the appeal bond is essential to confer jurisdiction of the cause upon the appellate court." Drier v. Knowles Vans, Inc., 144 Neb. 619, 14 N. W. 2d 222. The appeal bond was not filed here within the time limited by the statute.

Section 27-1303, R. S. 1943, provides for the justice of the peace to make a transcript and deliver it to the appellant who in turn is required to deliver it to the clerk of the court to which the appeal is taken "within thirty days next following the rendition of such judgment." Thirty days from December 17, 1947, is the last day which the law gave appellants to file their transcript in

the district court. Beard v. Ringer, 41 Neb. 831, 60 N. W. 95. The statute requires the appeal to be taken within 30 days next following the rendition of the judgment and when the transcript is not filed within the 30-day period the appeal is subject to dismissal on motion. Price v. Fouke, 90 Neb. 736, 134 N. W. 525. To so hold gives definite meaning to the "within thirty days" provision of section 79-1709, R. S. 1943.

The trial court properly dismissed the appeal. Its judgment is affirmed.

AFFIRMED.

YEAGER, J., participating on briefs.

WILLIAM D. JACK, APPELLEE, V. J. H. TEEGARDEN, APPELLANT.
37 N. W. 2d 387

Filed May 3, 1949. No. 32538.

1. **Appeal and Error.** The right of an appellee in an action to have reviewed a portion of a judgment or decree against him depends upon whether or not he has perfected a cross-appeal and has assigned error in relation thereto agreeable to the provisions of statute and the rules of this court.
2. **Waters.** Surface water is that which is diffused over the surface of the ground, derived from falling rains or melting snows, and continues to be such until it reaches some well-defined channel in which it is accustomed to and does flow with other waters, whether derived from the surface or springs, and it then becomes the running water of a stream and ceases to be surface water.
3. ———. A watercourse is generally defined as a stream of water with a well-defined existence which makes it valuable to the riparian owners along its course. To such streams riparian rights attach.
4. ———. Where an artificial channel is substituted for the natural channel of a stream, or created in such circumstances as indicate that it is designed to be permanent, riparian rights may attach to it.
5. ———. Water flowing in a well-defined watercourse may not lawfully be diverted and cast upon the lands of an adjoining

landowner where it was not wont to run according to natural drainage.

6. **Injunction: Waters.** For such injury injunction is a proper remedy and an injured party may recover such damages in the same action as he may have sustained by such wrongful act.

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

Lloyd E. Peterson and *Betty Jean Peterson Sharp,* for appellant.

Armstrong & McKnight, for appellee.

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

WENKE, J.

William D. Jack brought this action in the district court for Nemaha County against J. H. Teegarden. The purpose of the action is to require defendant to remove obstructions from and restore a watercourse on his lands to a sufficient capacity to carry the water that naturally flows therein, to lower or remove a dike constructed thereon just west of the ditch so that it is no higher than the level of his land, and to permanently enjoin the defendant from again either blocking the watercourse or building a dike. In addition to this injunctive relief plaintiff asked for damages in the sum of $300.

The court found generally for the plaintiff and entered its decree directing the defendant to remove the obstructions from the ditch so as to provide therein a carrying capacity for drainage of waters of 36 square feet and to continue to maintain it, free of obstruction, at substantially that capacity. Plaintiff was denied any recovery for damages.

From the overruling of his motion for new trial the defendant appealed. Plaintiff did not cross-appeal from the disallowance of his claim for damages; consequently, that issue is not here for our consideration.

"The right of an appellee in an action to have reviewed

a portion of a judgment or decree against him depends upon whether or not he has perfected a cross-appeal and has assigned error in relation thereto agreeable to the provisions of statute and the rules of this court." Bastian v. Weber, 150 Neb. 709, 35 N. W. 2d 791.

On February 8, 1949, pending appeal but before submission, the appellant died but the action has been revived in the name of R. C. Teegarden, administrator c.t.a. of his estate.

Appellee owns the east half and the appellant the west half of the northeast quarter of Section 10, Township 6, Range 13, in Nemaha County. These eighty-acre tracts will be herein referred to as the Jack land and the Teegarden land.

North of this land is an area of some 160 to 200 acres which drains to the south and southwest. Originally this drainage area also included some 12 to 15 acres in the northwest corner of the Jack land. It all drained south and southwest onto the Teegarden land.

The balance of the Jack land is drained by a swale, which enters it from the east. This swale drains to the south and southwest, leaving the Jack land at the extreme southwest corner. There it enters the continuation or extension of the watercourse hereinafter referred to as extending along the entire east edge of the Teegarden land.

A county road was opened and graded along the north side of this land. The record does not show when this was done. This road caused the water draining from the area to the north to collect against it. As it did so that which collected east of where the bridge was built in the road flowed toward the west and that which collected west thereof flowed toward the east. To permit this water to escape the county built the bridge already referred to. This bridge was located at a point in the road just north of the division line between these two eighties. It was a 10-foot bridge with an 8 by 4½ foot opening thereunder. The west end thereof is immedi-

ately north of the division line between these tracts of land, if extended.

To prevent this water from running onto the Teegarden land, as it would naturally have done, the owners of the Teegarden land built a channel or ditch along the entire east side thereof, throwing the dirt therefrom on the west bank. This ditch was admittedly dug as long as 18 years ago but appears to have been put in sometime before 1912. It developed a channel from 10 to 15 feet wide and from 3 to 5 feet deep with an average capacity of about 36 square feet. This channel continues to the south and west, after leaving the Teegarden land, until it empties into the Little Nemaha River.

At the extreme north end, for some 50 to 100 feet, the channel of this ditch slants slightly to the east and partially onto the Jack land. This was apparently done so that the ditch would properly approach the opening of the bridge.

The evidence shows that in 1940 appellee's agent paid $11.83 or one-half the cost of cleaning out this ditch. It had been cleaned out in 1939. The evidence also shows that in 1945 appellee's agent made a tender of $10 for the same purpose, that is, to pay for some work done in cleaning out the ditch that year. However, the evidence does not establish any agreement between appellee, or his agents, and appellant relating to the construction or maintenance of this ditch.

This ditch on the Teegarden land continued in full use and operation until June 1947. In the spring of that year appellant caused to be cut a 10 to 12 foot hedge that was growing along the ditch between it and the division fence. The brush resulting therefrom was thrown in and along the bank of the ditch and also between it and the division fence. At about the same time appellant built a high dike on his land just west of the ditch. The top of this dike was about 2 feet higher than the Jack land and about 5 feet higher than the bottom of the ditch. It extended for the full length

of the ditch and also about half way across the Teegarden eighty to the west along the north side.

A heavy rain in June 1947 washed silt and debris on top of this brush. This caused the channel of the stream to fill up so its depth was not over a foot. As a result the water flowing in the channel raised, and the dike preventing it from flowing on the Teegarden land, where it would naturally flow, it spread out over the Jack land and did substantial damage to it. Appellant thereafter burned the brush that had not been covered by the silt and debris. He also attempted to remove what was in the ditch but was not successful in doing so. As a result the ditch remains filled with the silt and debris which was deposited there in June 1947.

The evidence shows that the carrying capacity of the ditch, because of the fill, is now not over 12 square feet; that, under conditions normally to be expected, it should have a carrying capacity of at least 36 square feet in order to be able to carry the water coming through the bridge from the drainage area to the north; that before the fill it had sufficient capacity to do so; and that if permitted to remain in its present condition that with every heavy rain, because of the reduced capacity of the channel and the construction of the dike, the Jack land will be seriously damaged by recurring floods. It is against this condition that appellee seeks relief. After personally inspecting the premises the trial court granted the relief.

Applicable here is the following from Probert v. Grint, 148 Neb. 666, 28 N. W. 2d 548: " 'When an action in equity is appealed, it is the duty of this court to try the issues de novo and to reach an independent conclusion without reference to the findings of the district court. Comp. St. 1929, § 20-1925 (this section being now 25-1925, R. S. 1943). But in a case wherein the trial court has made a personal examination of the physical facts, and where, in the same case, the oral evidence in respect of material issues is so conflicting that it cannot be recon-

ciled, this court will consider the fact that such examination was made and that such court observed the witnesses and their manner of testifying, and must have accepted one version of the facts rather than the opposite.' City of Wilber v. Bednar, 123 Neb. 324, 242 N. W. 644. See, also, State v. Delaware-Hickman Ditch Co., 114 Neb. 806, 210 N. W. 279; Greusel v. Payne, 107 Neb. 84, 185 N. W. 336.

" 'The trial court is required to consider any competent and relevant facts revealed by a view of premises as evidence in the case, and a duty is imposed on this court on review of findings made by the trial court to give consideration to the fact that the trial court did view the premises; provided, that the record contains competent evidence to support the findings.' Columbian Steel Tank Co. v. Vosika, 145 Neb. 541, 17 N. W. 2d 488." See Carter v. Parsons, 136 Neb. 515, 286 N. W. 696.

" '* * * Surface water is that which is diffused over the surface of the ground, derived from falling rains or melting snows, and continues to be such until it reaches some well defined channel in which it is accustomed to and does flow with other waters, whether derived from the surface or springs, and it then becomes the running water of a stream, and ceases to be surface water.' (Crawford v. Rambo, 44 O. St. 279, 7 N. E. 429)." Morrissey v. Chicago, B. & Q. R. R. Co., 38 Neb. 406, 56 N. W. 946.

"A watercourse is generally defined as a stream of water with a well-defined existence which makes it valuable to the riparian owners along its course. See, also, section 31-202, R. S. 1943. To such streams riparian rights attach. Where water appears upon the surface of the ground in a diffused state with no permanent source of supply or regular course, its flow is valuable to no one and it is regarded as surface water. But where such waters flow into and become a part of a stream, they cease to be surface waters and are then a part of the running water of the stream." Cooper v. Sanitary

District No. 1, 146 Neb. 412, 19 N. W. 2d 619. See, also, Mohatt v. Olson, 146 Neb. 764, 21 N. W. 2d 516.

Section 31-202, R. S. 1943, defines a watercourse as follows: "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."

We said in Morrissey v. Chicago, B. & Q. R. R. Co., *supra*: " 'To constitute a water-course it must appear that the water usually flows in a particular direction and by a regular channel, having a bed with banks and sides and (usually) discharging itself into some other body or stream of water. It may sometimes be dry. It need not flow continuously, but it must have a well defined and substantial existence.' (Morrison v. Bucksport & B. R. R. Co., 67 Me. 353)."

And in Miksch v. Tassler, 108 Neb. 208, 187 N. W. 796, we said: "This court in several well considered cases has given its interpretation of the requirements of a watercourse and has held that to constitute a watercourse the size or velocity of the stream is not material, but that it must, however, be a stream in fact as distinguished from mere temporary surface drainage occasioned by freshets or other extraordinary causes, although the flow of water need not be continuous or great in amount. Pyle v. Richards, 17 Neb. 180; Morrissey v. Chicago, B. & Q. R. Co., 38 Neb. 406; Town v. Missouri P. R. Co., 50 Neb. 768."

"Water which has a definite source and which takes a definite channel is a 'watercourse.' " Snyder v. Platte Valley Public Power and Irrigation District, 144 Neb. 308, 13 N. W. 2d 160, 160 A. L. R. 1154.

In Whipple v. Nelson, 143 Neb. 286, 9 N. W. 2d 288, we approved the following from Cloyes v. Middlebury Electric Co., 80 Vt. 109, 66 A. 1039, 11 L. R. A. N. S. 693: "Where an artificial channel is substituted for the natural channel of a stream, or created in such circumstances as indicate that it is designed to be permanent,

riparian rights may attach to it; and where such change is made by mutual action of the riparian owners, their rights and duties in respect of the artificial channel will be the same as if it were the natural one." See, also, Glenn v. Line, 155 Mich. 608, 119 N. W. 1097; Mauvaisterre Drainage & Levee Dist. v. Wabash Ry. Co., 299 Ill. 299, 132 N. E. 559, 22 A. L. R. 944.

Under the facts as disclosed by the record, which we have set forth herein, it is apparent that this artificial channel was created under such circumstances as to clearly indicate that it was designed to be permanent and that riparian rights would and have attached themselves thereto.

"A party seeking an injunction must establish by competent evidence every controverted fact necessary to entitle him to relief, and injunction will not lie unless the right is clear, the damage is irreparable, and the remedy at law is inadequate to prevent a failure of justice." Faught v. Platte Valley Public Power & Irrigation District, 147 Neb. 1032, 25 N. W. 2d 889.

" 'Where water, be it surface water, the result of rain or snow, or the water of springs, flows in a well-defined course, be it ditch or swale or draw in its primitive condition, and seeks its discharge in a neighboring stream, its flow cannot be arrested or interfered with by a landowner to the injury of the neighboring proprietors.' Roe v. Howard County, 75 Neb. 448." Graham v. Pantel Realty Co., 114 Neb. 397, 207 N. W. 680.

" '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.' (Leaders v. Sarpy County, 134 Neb. 817, 279 N. W. 809)." Seibold v. Whipple, 143 Neb. 167, 9 N. W. 2d 154.

"Water flowing in a well-defined watercourse may not lawfully be diverted and cast upon the lands of an adjoining landowner where it was not wont to run

according to natural drainage." Born v. Keil, 146 Neb. 912, 22 N. W. 2d 175. See, also, Andersen v. Town of Maple, *ante* p. 103, 36 N. W. 2d 620.

" 'For such injury injunction is a proper remedy and an injured party may recover such damages in the same action as he may have sustained by such wrongful act.' Graham v. Pantel Realty Co., 114 Neb. 397, 207 N. W. 680." Seibold v. Whipple, *supra.*

"When water has a definite source and takes a definite channel, it is a watercourse, and no person through whose land it flows has a right to divert it from its natural channel so as to cause injury to another landowner by the diversion." Snyder v. Platte Valley Public Power and Irrigation District, *supra.* See, also, Leaders v. Sarpy County, 134 Neb. 817, 279 N. W. 809; Born v. Keil, *supra;* Andersen v. Town of Maple, *supra.*

Under these principles the appellee was entitled to the relief granted and the decree of the trial court is affirmed.

AFFIRMED.

YEAGER, J., participating on briefs.

OTTO H. SCHMIDT, APPELLANT, v. CITY OF LINCOLN, APPELLEE.
37 N. W. 2d 500

Filed May 13, 1949. No. 32555.

1. **Release.** General words in a release are sufficient to bar a claim which had accrued at the date of the execution of the release, or a claim known to exist by the party signing it.
2. **Pensions.** Where a claim to a fireman's pension is grounded on the total disability of the claimant resulting from an accident, a release of the claim of disability for a valid consideration arising under the Workmen's Compensation Act or any other law, and all claims, demands, actions, causes of action, and rights of every name arising from such accident, is a bar to a claim for a fireman's pension.

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

Miles W. Johnston, Van Pelt, Marti & O'Gara, and *W. K. Dalton,* for appellant.

John E. Jacobson and *A. A. Whitworth,* for appellee.

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

CARTER, J.

Plaintiff seeks to recover from the City of Lincoln firemen's pension benefits provided for in sections 2439 and 2441, Comp. St. 1922, contending that he is totally and permanently disabled as the result of a disability arising out of his employment as a fireman by the city. The trial court directed a verdict for the defendant and plaintiff appeals.

The plaintiff entered the employ of the city as a fireman on December 8, 1928. On January 3, 1937, he was indefinitely suspended from such employment, and the city has not recognized him as its employee or paid any salary to him since that date. The plaintiff asserts that on August 29, 1936, he fell on his right hip while carrying hose into a basement at a fire. He claims that he suffered injuries to his right hip, back, and sacroiliac region. A more detailed account of the alleged accident and claimed injuries can be found in the opinion written in a former appeal of a case involving the same accident. Schmidt v. City of Lincoln, 137 Neb. 546, 290 N. W. 250. Without reviewing the evidence in detail, we assume for the purposes of this case that the plaintiff suffered some disability as a result of the accident.

The evidence shows that on July 8, 1940, plaintiff executed and delivered a receipt and release to the city as a full settlement of any and all claims due him by the city. The pertinent parts of the instrument are as follows:

"That I, Otto H. Schmidt * * * for and in consideration

of the sum of $1829.00 paid to the clerk of the District Court of Lancaster County, Nebraska, $1829.00 of which was disbursed for me pursuant to an order and judgment of the District Court of Lancaster County, Nebraska, and the receipt of all of which is hereby acknowledged in full accord and satisfaction of my disputed claims, do hereby for myself, * * * forever, release and discharge the said City of Lincoln, Nebraska, * * * of and from any and all claims, demands, actions, causes of action and suits at law or in equity for and on account of any and all known and unknown injuries, disabilities, physical and mental, diseases, damages, losses and expenses sustained by me * * * as a result of an accident sustained by me on August 29, 1936, or as a result of any other accident sustained by me, the said Otto H. Schmidt, while employed by the City of Lincoln, Nebraska, a municipal corporation, including herein any and all future injuries, damages, losses and expenses resulting or to result from any other such accident, not now known or anticipated, but which may later develop or be discovered, with all the effects and consequences thereof.

"It is my intention that this receipt and release shall, and the same hereby does, fully, finally and completely settle, satisfy and discharge all of my claims, demands, actions, causes of action and rights of every name, nature and description against the parties herein discharged under the Workmen's Compensation Law of Nebraska, or any other law or laws, arising or to arise from said accident of August 29, 1936, or from any other accident sustained by me, the said Otto H. Schmidt, while employed by the said City of Lincoln, Nebraska, a municipal corporation."

The evidence shows that the foregoing release was executed after plaintiff was fully informed of its contents. He read it before he signed. His attorney signed a release of attorney's lien contained on the same instrument. Under the record here made, plaintiff will not be heard to say that he did not know what he had signed.

The release is clearly a settlement of any and all claims growing out of the accident of August 29, 1936, and any other claim plaintiff might have as well. To recover under the pension act, plaintiff must establish total disability arising from the accident of August 29, 1936. No other basis for a pension is asserted. By the release, however, he released all claims, demands, actions, causes of action and rights of every name, nature, and description under the Workmen's Compensation Act, or any other law or laws, arising out of the claimed accident sustained while in the employ of the city.

It is claimed that the parties never contemplated that more serious disability may have latently existed at the time the release was signed. The record will not sustain such an assertion. The plaintiff had claimed that he was totally disabled up to the very time he settled his claim on the basis of a 35 percent permanent partial disability. Plaintiff is in no position to assert that injuries existed wholly unknown to him. Under these circumstances, the rule announced in Simpson v. Omaha & C. B. St. Ry. Co., 107 Neb. 779, 186 N. W. 1001, and Collins v. Hughes & Riddle, 134 Neb. 380, 278 N. W. 888, and similar cases, has no application.

It will be borne in mind that on February 9, 1940, approximately five months before the release was executed, this court had handed down its opinion finding that plaintiff was not totally disabled and remanded the cause for a new trial on the question of a partial disability. The plaintiff had not served as a fireman since January 3, 1937. These circumstances confirm his evident intent to settle any and all claims he had against the city for the sum of $1,829.00. Clearly, the release was intended to include his compensation claim, pension claim, or any other claim arising under any other law growing out of the accident of August 29, 1936. It is valid and binding, and a complete defense to plaintiff's claim.

The conclusion reached makes it unnecessary for us to determine if the suit is barred by the statute of

limitations or if the plaintiff is in fact totally disabled as a result of the accident.

AFFIRMED.

YEAGER, J., participating on briefs.

WILLIAM F. HOERGER ET AL., APPELLEES, V. CITY STATE BANK, SUTTON, NEBRASKA, APPELLANT.
37 N. W. 2d 393

Filed May 13, 1949. No. 32577.

1. **Trial.** When a motion is made by a defendant at the close of plaintiff's evidence for a directed verdict or for dismissal for want of sufficient evidence to make a prima facie case every fact alleged which the evidence tends to prove, for the purposes of the motion, will be considered as proved.
2. **Contracts.** Where negotiations take place between parties which result in their reaching an agreement in reference to the subject matter of the negotiations, and the parties reduce their agreement to writing, sign and deliver the same, such writing, in the absence of fraud, mistake, or ambiguity in the writing, constitutes the best and only competent evidence of the contract.

APPEAL from the district court for Clay County: STANLEY BARTOS, JUDGE. *Affirmed.*

John A. Bottorf and *H. J. Rothrock*, for appellant.

Stiner, Boslaugh & Stiner, and *D. B. Massie*, for appellees.

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

YEAGER, J.

This is a forcible detainer action originally instituted in the county court of Clay County, Nebraska, by plaintiffs against the defendant to recover possession of a certain lot of land and improvements located thereon in the city of Sutton, Clay County, Nebraska. The action was instituted by the filing of a complaint. A trial

was had at the conclusion of which judgment was rendered in favor of the defendant.

From the judgment of the county court plaintiffs appealed to the district court where the action was tried on the same issues as were presented to the county court. A jury was impaneled but at the conclusion of the evidence on motion of plaintiffs the case was removed from consideration by the jury. The jury was discharged and the court rendered judgment in favor of plaintiffs, that is, it was adjudged that plaintiffs were entitled to restitution of the premises.

From this judgment and an order overruling a motion for new trial the defendant has taken an appeal to this court.

The grounds asserted in the assignments of error are numerous, however only one requires separate and specific consideration. The remaining ones will be treated generally and collectively.

The one requiring separate consideration is an assertion that the court erred in overruling defendant's motion to dismiss the action at the close of plaintiffs' testimony.

This assignment deals with the question of whether or not the plaintiffs adduced evidence on the elements necessary to be proved in an action for forcible detention to sustain a judgment for recovery of possession of property, or in other words whether or not the evidence of plaintiffs was prima facie sufficient to sustain a judgment.

The evidence which was before the court at the time the motion was made and overruled came from witnesses and exhibits and the report of a pre-trial conference. The evidence, viewed in the light most favorable to plaintiffs, as it properly must have been for the purposes of the motion, which motion must be treated the same as a motion for a directed verdict, showed that defendant had been in possession of the premises up to April 1, 1948, under a written lease which expired on

that date; that the defendant was in possession after the expiration of the lease without any other lease, oral or written, and without any claim of right of possession on account of holding over the term specified in the lease; that due and timely notice to vacate had been given; and that plaintiffs had refused to accept rent for any period after April 1, 1948.

The controlling rule when a motion is made by a defendant at the close of plaintiff's evidence for a directed verdict or for dismissal for want of sufficient evidence to make a prima facie case is that every fact alleged which the evidence tends to prove will, for the purposes of the motion, be considered as proved. Union Stock Yards Co. v. Conoyer, 38 Neb. 488, 56 N. W. 1081, 41 Am. S. R. 738; Harris v. Lincoln Traction Co., 78 Neb. 681, 111 N. W. 580; Wheeler v. Abbott, 89 Neb. 455, 131 N. W. 942; Curtice Co. v. Estate of Jones, 111 Neb. 166, 195 N. W. 930.

On all elements necessary to be proved plaintiffs adduced evidence, therefore the court did not err in refusing to dismiss the action at the close of plaintiffs' case.

The remaining assignments of error relate to the defense which was interposed to plaintiffs' cause of action.

On May 8, 1918, a written lease was entered into for the premises herein involved. Katie E. Burke, then owner, was lessor and the defendant herein was lessee. The term of the lease was ten years from April 1, 1918. The lease contained an option which permitted the lessee on notice prescribed in the lease to have it extended not to exceed fifteen years beyond the ten-year term. The lessee was privileged to exercise the option for periods of not less than five years but not to exceed the total of fifteen years. If the option was exercised notice was required of the intention in each instance. The defendant exercised the option for two successive five-year periods but for the last five years it failed to do so.

Instead of exercising the option for the last five years the parties on May 11, 1938, entered into a written

agreement named "AGREEMENT FOR EXTENSION OF LEASE." This agreement was for a term beginning April 1, 1938, and ending April 1, 1948. This agreement, among other provisions, contained the following:

"WHEREAS, it is the desire of the parties hereto that said lease be continued for an additional term and to evidence that intention, and their mutual agreement, this written memorandum is entered into;

"IT IS MUTUALLY AGREED:

"That said original lease be and is hereby extended for an additional term of ten years from the 1st day of April, 1938, to the 1st day of April, 1948, under the same conditions, provisions and requirements as in said original lease contained, except:

"(1) That the extended term herein granted shall expire on April 1, 1948;

"(2) That the rental to be paid by Second Party to First Party as a consideration for said lease, shall be $90.00 per month instead of $130.00 per month as in said original lease provided.

"That in all other respects the covenants in said original lease shall continue to be binding upon the parties hereto, to the same effect as if fully incorporated herein.

"That this agreement shall be executed in duplicate and each party hereto shall attach this agreement to the original lease, so that it may all be construed as one instrument, with the exceptions as above noted.

"IT IS ESPECIALLY AGREED that all of the rights and obligations, and all property rights of the parties under the original lease shall be and remain the same, except in the particulars above mentioned."

From an order on pre-trial conference appearing in the transcript it is shown that the plaintiffs became the owners of the real estate in question and the assignees of the rights of Katie E. Burke under the lease of May 8, 1918, and the agreement of May 11, 1938.

The trial court decided in effect after the conclusion

of the evidence that the agreement of May 11, 1938, conclusively fixed the date of the expiration of defendant's tenancy as April 1, 1948, that from that date forward it was holding over without right, that plaintiffs were entitled to restitution, and rendered judgment accordingly.

Against this the defendant in substance contends that by the terms of the agreement of May 11, 1938, read with the lease of May 8, 1918, it had, in addition to the term of ten years named in the agreement, an option for renewal thereof for an additional term of fifteen years which it was privileged to exercise on notice given pursuant to the terms of the original lease. It contends that notice was accordingly given for a term of five years, therefore it was rightfully in possession of the premises.

To support the contention reference was had to the terminology of the two instruments. Also to support it oral evidence that such was the intention of the parties when the agreement of May 11, 1938, was entered into was offered. This evidence was rejected.

The rejection of this evidence was proper. In Sylvester v. Carpenter Paper Co., 55 Neb. 621, 75 N. W. 1092, it was said: "Where negotiations take place between parties which result in their reaching an agreement in reference to the subject-matter of the negotiations, and the parties subsequently reduce their agreement to writing, sign and deliver the same, then, in the absence of fraud or mistake or an ambiguity in the writing, it constitutes the best and only competent evidence of the contract originally made." See, also, Theno v. National Assurance Corporation, 133 Neb. 618, 276 N. W. 375; Arman v. Structiform Engineering Co., 147 Neb. 658, 24 N. W. 2d 723.

It is not contended that any fraud was involved here and it cannot reasonably be said that there was any legally recognizable mistake or that there is any ambiguity in the writing.

It is difficult to see how the parties could have more explicitly limited the term of the lease agreement of May 11, 1938, to ten years than they did. It is explicitly stated that the extension shall be to April 1, 1948. This is followed immediately by a declaration that the term granted shall expire on April 1, 1948. Clearly this is a double declaration that all rights of the defendant under the two instruments should expire and come to an end April 1, 1948.

The judgment of the district court is affirmed.

AFFIRMED.

UNION TRANSFER COMPANY, A CORPORATION, APPELLEE, V. CARL W. RENSTROM AND CATHERINE A. RENSTROM, CO-PARTNERS, DOING BUSINESS AS TIP-TOP PRODUCTS COMPANY, A CO-PARTNERSHIP, APPELLANTS.

37 N. W. 2d 383

Filed May 13, 1949. No. 32574.

1. **Carriers.** While an interstate common carrier's duly approved, filed, and published tariff over a stipulated or designated route is in force and effect, the classifications and rates named therein are binding by statute upon both the carrier and shipper, and any statements, agreements, or conduct of the carrier or its agents concerning such classifications and rates or the shipper's ignorance of them will not estop or prevent such carrier from collecting, or relieve the shipper from liability for, the proper published rate of which he is presumed to have knowledge.
2. ———. The reason for the rule is that the rights and duties of the carrier and shipper prescribed by the Interstate Commerce Act and the Motor Carrier Act are for the good of the public, to protect it against secret rebates and discriminations, rather than for the enrichment of either the carrier or shipper at the expense of others, and any direct or indirect evasion of such rights and duties by either is expressly prohibited by the acts.
3. **Courts: Carriers.** When the reasonableness, discriminatory character, or validity of approved, filed, and published tariff rates is not assailed, and no question affecting the power or administrative discretion or judgment of the Interstate Commerce Commission already exercised or to be exercised is in-

volved, but the controversy merely involves the question of whether or not the carrier has exacted the rate prescribed in its tariff, courts have jurisdiction of the subject matter.

4. **Trial: Appeal and Error.** Where a jury is waived in a law action and the case is tried to the court, the court's findings have the effect of a jury's verdict, and will not be set aside on appeal unless clearly wrong.

APPEAL from the district court for Douglas County: FRANK M. DINEEN, JUDGE. *Affirmed.*

Schall, Robinson, Hruska & Garvey, Gerald M. Vasak, and *Charles A. Nye,* for appellants.

Jack W. Marer and *Norman H. Denenberg,* for appellee.

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

CHAPPELL, J.

Plaintiff, a duly authorized motor vehicle common carrier engaged in interstate commerce, brought this action to recover the difference between its duly approved, filed, and published applicable tariff rate and the rate paid by defendants, based upon alleged false descriptions in bills of lading furnished plaintiff by defendants for shipments of steel stampings loose in barrels and transported by plaintiff upon designated occasions from Omaha to St. Paul, Minnesota, and return. The items were concededly described and transported as "unfinished stampings" and if such, concededly carried a rate of 69 cents per 100 pounds, for which shipments defendants paid plaintiff a total of $1,274.31.

However, plaintiff alleged that the items transported were in fact "finished stampings," that is, they were steel "Blanks, Shapes or Stampings of 17 Gauge or thinner," subject to the rating for "Sheet Steel Ware, N. O. I. (not otherwise indexed) * * * Not nested, in barrels, metal baskets, boxes or crates," as provided in plaintiff's tariff, which, if such, concededly required the exaction of a first-class rate of $1.38 per 100 pounds, for which trans-

portation defendant should have paid $2,497.69, or a difference of $1,223.38, with interest at 6 percent from August 25, 1944. Plaintiff prayed judgment for that amount.

Defendants answered, denying generally that the items shipped came within the classification or were subject to the rate claimed by plaintiff. Also, in paragraphs 4 and 5 of defendants' answer, plaintiff's demurrer to which was sustained by the trial court, it was substantially alleged: (4) That plaintiff was estopped to deny that the rate of 69 cents per 100 pounds was correct and estopped from charging or collecting a higher rate because plaintiff quoted, agreed to, and did carry such shipments at the lower rate; and (5) that defendants, relying thereon, shipped the items to a firm in St. Paul, Minnesota, to be galvanized for protection from rust when they could have shipped them and had that done by firms in other cities under a tariff rate approximating 69 cents per 100 pounds. Therefore, defendants prayed that if, under the law, plaintiff was entitled or required to charge a higher rate, then defendants should be entitled to set off against such charges any part thereof exceeding the rate of 69 cents per 100 pounds.

Jury was waived, and upon trial to the court a decree was entered which found generally for plaintiff and against defendants upon the issues presented, and awarded plaintiff a judgment as prayed. Motion for new trial was overruled, and defendants appealed, assigning substantially that: (1) The trial court erred in sustaining plaintiff's demurrer to the 4th and 5th paragraphs of their answer; (2) the judgment was not sustained by the evidence; and (3) the trial court erred in refusing to sustain defendant's motion, made at the conclusion of all the evidence, to dismiss plaintiff's action, because in any event the district court had no jurisdiction of the subject matter, since it was exclusively vested in the Interstate Commerce Commission. We conclude that defendants' contentions should not be sustained.

With reference to the first assignment, it is generally the rule, by virtue of the provisions of the Interstate Commerce Act, and as more particularly applicable here, the Motor Carrier Act of 1935, being part II of the Interstate Commerce Act and cited as Title 49, Chapter 8, sections 301 to 326, inclusive, U. S. C. A., that while a motor vehicle common carrier's duly approved, filed, and published tariff over a stipulated or designated route is in force and effect, the classifications and rates named therein are binding by statute upon both the carrier and shipper. In the light thereof, any statements, agreements, or conduct of the carrier or its agents concerning such classifications and rates or the shipper's ignorance of them will not estop or prevent such carrier from collecting, or relieve the shipper from liability, for the proper published rate of which he is presumed to have knowledge. By analogy, that would also be conversely true, where the shipper sought to recover an overcharge from the carrier.

The reason for the rule is that the rights and duties of the carrier and shipper prescribed by the acts are for the good of the public, to protect it against secret rebates and discriminations, rather than for the enrichment of either the carrier or shipper at the expense of others, and any direct or indirect evasion of such rights and duties by either is expressly prohibited by the acts. Therefore, our conclusion is that the first assignment has no merit. See, 13 C. J. S., Carriers, § 393, p. 873; Artic Roofings v. Travers, 42 Del. 293, 32 A. 2d 559; Western & Atlantic R. R. v. Aiken, 37 Ga. App. 271, 139 S. E. 914; Savannah, Florida & Western Ry. Co. v Bundick, 94 Ga. 775, 21 S. E. 995; Sheldon v. Chicago, B. & Q. R. R. Co., 184 Iowa 865, 169 N. W. 189; Kanotex Refining Co. v. Atchison, T. & S. F. Ry. Co., 142 Kan. 139, 46 P. 2d 16; and Edenton Cotton Mills v. Norfolk Southern R. R. Co., 178 N. C. 212, 100 S. E. 341.

The controlling principles aforesaid are also discussed and applied in cases from this jurisdiction. See, Fremont

Milling Co. v. Chicago & N. W. Ry. Co., 101 Neb. 362, 163 N. W. 331; Brown Consoldiated Milling Co. v. Chicago & N. W. Ry. Co., 101 Neb. 365, 163 N. W. 333; Chicago & N. W. Ry. Co. v. Mallory, 147 Neb. 548, 23 N. W. 2d 735.

The last-cited case is also authority for the applicable rule that: "Where a jury is waived in a law action and the case tried to the court, the court's findings have the effect of a jury's verdict and will not be set aside on appeal unless clearly wrong."

There was primarily no dispute in the evidence upon matters material to the issues. It was stipulated, to wit: That the respective shipments involved were made of the items "designated by the defendants in the Bills of Lading therefor prepared by defendants, as 'Unfinished Stampings' " and that "the defendants paid to the plaintiff for said shipments freight charges at the rate of 'unfinished stampings' being in the total sum of $1274.31." Also, "That the plaintiff did at all times herein mentioned file and maintain on file with the Interstate Commerce Commission, as required by the Motor Carrier Act of 1935, and the rules and regulations of the Interstate Commerce Commission, proper tariffs covering 'finished stampings', the tariff rate therefor being $1.38 per 100 pounds from St. Paul, Minnesota, to Omaha, Nebraska, and from Omaha, Nebraska, to St. Paul, Minnesota, and covering 'unfinished stampings' the tariff rate therefor being 69¢ per 100 pounds from St. Paul, Minnesota to Omaha, Nebraska, and from Omaha, Nebraska to St. Paul, Minnesota."

The primary issue of fact then was simply the nature and character of the items shipped, i. e., were they "unfinished stampings" or "finished stampings." In that connection, defendant Carl W. Renstrom, called as a witness for plaintiff, identified samples like in form to the items shipped loose in barrels. He explained the method of their manufacture from flat steel plates running through a machine, whereby the items were thus stamped, manufactured, or finished in one operation,

except that thereafter they were tumbled in sawdust or other material before shipment, to remove rough edges that might appear thereon, or after being galvanized they were, upon return from St. Paul, so tumbled to clean or polish, and make them more attractive before subsequent assemblage and sale as hair curling devices.

Witnesses engaged in the transportation rate field, who testified for both plaintiff and defendants, identified the items shipped as completed steel stampings, admittedly 17 gauge or thinner, and classified them as "finished stampings" subject to the first-class rate of $1.38 per 100 pounds, as claimed by plaintiff. That conclusion was also supported by other competent evidence. We conclude that the judgment was amply sustained by the evidence.

In the light of the foregoing, the judgment must be affirmed, unless, as contended by defendants, the trial court had no jurisdiction of the subject matter. In giving that question consideration, we conclude that defendants' contention has no merit.

The Interstate Commerce Act, as adopted and thereafter amended from time to time, never purported to exclusively confine the field of jurisdiction to the Interstate Commerce Commission, but as a matter of fact was cumulative and actually reserved to the shipper and carrier all common law and statutory remedies not repugnant to its provisions. Title 49, § 22, U. S. C. A. of the Interstate Commerce Act specifically provides: "and nothing in this chapter contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies: * * *."

The Motor Carrier Act of 1935 specifically recognized the rights preserved under the foregoing section. In that regard, Title 49, § 317 (b) thereof states: "Provided, That the provisions of sections 1 (7) and 22 of this title shall apply to common carriers by motor vehicles subject to this chapter." The case of Artic Roofings v. Travers,

supra, discussed and made obvious the aforesaid objects and purposes of such sections.

It is generally the applicable rule that when the reasonableness, discriminatory character, or validity of approved, filed, and published tariff rates is not assailed, and no question affecting the power or administrative discretion or judgment of the Interstate Commerce Commission already exercised or to be exercised is involved, but the controversy merely involves the question of whether or not the carrier has exacted the rate prescribed in its tariff, courts have jurisdiction of the subject matter. See, 15 C. J. S., Commerce, § 143, p. 519; Great Western Oil Refining & Pipe Line Co. v. Chicago, M. & St. P. Ry. Co., 275 Ill. 56, 113 N. E. 876; Coad v. Chicago, St. P., M. & O. Ry. Co., 171 Iowa 747, 154 N. W. 396; Thomas v. Chicago, B. & Q. R. R. Co., 127 Kan. 326, 273 P. 451, 64 A. L. R. 322; Kellogg Huff Grain Co. v. Chicago, R. I. & P. Ry. Co., 127 Kan. 577, 274 P. 272; Wolverine Brass Works v. Southern Pacific Co., 187 Mich. 393, 153 N. W. 778; Reliance Elevator Co. v. Chicago, M. & St. P. Ry. Co., 139 Minn. 69, 165 N. W. 867; Hardaway v. Southern Ry. Co., 90 S. C. 475, 73 S. E. 1020, Ann. Cas. 1913D 266; Payne v. White House Lumber Co., (Tex. Civ. App.), 231 S. W. 417; American Railway Express Co. v. Price Bros., 54 F. 2d 67; Pennsylvania R. R. Co. v. Fox & London, 93 F. 2d 669, 304 U. S. 566, 58 S. Ct. 949, 82 L. Ed. 1532; Texas & Pacific Ry. Co. v. Sonken-Galamba Corp., 100 F. 2d 158, 306 U. S. 655, 59 S. Ct. 644, 83 L. Ed. 1053; Great Northern Ry. Co. v. Merchants Elevator Co., 259 U. S. 285, 42 S. Ct. 477, 66 L. Ed. 943. Cases relied upon by defendants are distinguishable upon the facts, and when read in their true light support plaintiff's contentions.

Generally, words used in rate schedules required to be filed and published, are to be given their commonly understood meaning. American Railway Express Co. v. Price Bros., *supra*. In that respect, the applicable terms of plaintiff's published tariff were clearly unambiguous and without any peculiar trade usage or mean-

ing. Whether the items shipped by defendants were one or the other of two things, both plainly classified under proper tariffs in force and effect as stipulated by the parties, was the issue required to be resolved by the court by reference to the tariffs published, treating and construing them as established law like a statute, and thereafter applying the appropriate rate on the basis of the nature and character of the items at the time of their shipment. In other words, the only factual issue presented was the nature and character of the items shipped, i. e., were they "unfinished stampings" or "finished stampings," in the light of plaintiff's published tariffs. If the former, concededly plaintiff could not recover, but if the latter, concededly plaintiff could recover. Such a case presented factual and legal questions in nowise different from any other factual or legal issue determinable by courts and juries, and courts have original jurisdiction to try such cases.

We conclude that the district court did have jurisdiction of the subject matter; that the trial court did not err in sustaining plaintiff's demurrer to paragraphs 4 and 5 of defendant's answer; and that the judgment was amply sustained by the evidence. Therefore, the judgment should be and hereby is affirmed.

AFFIRMED.

YEAGER, J., participating on briefs.

STATE OF NEBRASKA EX REL. STATE RAILWAY COMMISSION, PLAINTIFF, V. JAMES D. RAMSEY, AS DIRECTOR OF AERONAUTICS OF THE STATE OF NEBRASKA, ET AL., DEFENDANTS.

37 N. W. 2d 502

Filed May 13, 1949. No. 32576.

1. **Declaratory Judgments.** Proceedings for a declaratory judgment extend to the validity of a statute where there is a justici-

able, determinable controversy between parties in respect to rights thereunder.

2. **Constitutional Law: Carriers.** The State Railway Commission is authorized by the Constitution to regulate rates and service and to have general control of common carriers, within the state, as the Legislature may provide by law, and in the absence of specific legislation its powers and duties are unqualified.
3. ———: ———. The powers and duties of the State Railway Commission are derived from and an independent part of the Constitution, and are administrative, legislative, and judicial.
4. **Constitutional Law.** A Constitution is intended to respond and be applied to any conditions and circumstances as they arise in the course of the progress of the state.
5. ———. The powers granted by a Constitution do not change, but they do apply in different periods to all things to which they are in their nature applicable.
6. **Carriers: Aircraft.** Common carriers by air are indistinguishable from other common carriers with respect to the policy of the law.
7. ———: ———. Any person or organization engaged in transportation by air for hire is a common carrier.
8. **Constitutional Law.** Legislative and official interpretation long acquiesced in is entitled to weight in seeking the meaning of a doubtful constitutional provision.
9. ———. The meaning of a constitutional provision is to be determined as of the time of its adoption, and the intent and understanding of its framers and the people who adopted it is the principal inquiry in construing it.
10. ———. It is permissible in determining the meaning of language of a Constitution to consider the facts of history, the evil intended to be overcome, the objects sought to be accomplished, and the scope of the remedy its terms include.
11. **Public Utilities: Carriers.** The authority of the State Railway Commission to regulate and control common carriers as the Legislature may provide by law, means in the manner in which the Legislature provides by specific legislation.
12. **Constitutional Law.** The word "specific" as used in the phrase in the constitutional amendment providing for the State Railway Commission means the opposite of "general" and is synonymous with "particular."
13. ———. LB 247, Sixtieth Session of Nebraska Legislature, is general and not specific legislation, is in conflict with the provisions of Article IV, section 20, of the Constitution of Nebraska, and is invalid.

Original proceeding by the state on the relation of

State Railway Commission against James D. Ramsey, as Director of Aeronautics of the State of Nebraska. *Judgment for plaintiff.*

James H. Anderson, Attorney General, and *Bert L. Overcash,* for plaintiff.

Peterson & Devoe, for defendant.

Beynon, Greenamyre & Hecht, amicus curiae.

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

BOSLAUGH, J.

Original action by plaintiff, State of Nebraska ex rel. State Railway Commission, against defendants, James D. Ramsey, as Director of Aeronautics of the State of Nebraska, Department of Aeronautics of the State of Nebraska, and W. W. Cook, D. D. Mapes, Harold N. Jessen, Wendell Harding, M. M. Myers, as members of Nebraska Aeronautics Commission, to secure an adjudication that LB 247, Sixtieth Session of Nebraska Legislature, (§§ 3-109 and 75-201, R. S. Supp., 1947) is invalid; that the State Railway Commission has general control of intrastate common carriers by air, including regulation of rates and service; and to secure an injunction prohibiting defendants from taking or continuing any action or proceeding with reference to the regulation or control of common carriers by air. The answer admits the allegations of fact in the petition. The State Railway Commission will be designated commission.

Proceedings for a declaratory judgment extend to the validity of a statute when there is a justiciable, determinable controversy between parties in respect to rights thereunder. Such proceedings have frequently been sustained to determine disputes as to the validity of statutes. §§ 25-21,149 to 25-21,164, R. S. 1943; Thorin v. Burke, 146 Neb. 94, 18 N. W. 2d 664.

The act of the Legislature challenged herein (LB 247,

Laws 1947, c. 9, p. 71, appearing as §§ 3-109 and 75-201, R. S. Supp., 1947) amended sections 3-109, R. S. Supp., 1945 and 75-201, R. S. 1943, and contains these provisions:

"The Department of Aeronautics shall exercise general control over all aeronautics within this state, including the regulation of rates and services in connection with aeronautics for hire. It may (1) perform such acts, (2) issue and amend such orders, (3) make, promulgate, and amend such reasonable general or special rules, regulations, and procedure, (4) establish such minimum standards, (5) fix, modify, annul or otherwise revise such schedules of rates or services, and (6) permit, certify, prohibit or suspend such intrastate operations of aircraft, consistent with the provisions of this act, as it shall deem necessary to carry out the provisions of this act and to perform its duties hereunder; * * *.

"The State Railway Commission shall have the power to regulate the rates and services of, and to exercise a general control over, all railroads, express companies, car companies, sleeping car companies, freight and freight-line companies, and all other common carriers engaged in the transportation of freight or passengers within this state; *Provided,* that the commission shall have and exercise no control over aeronautics, and sections 75-101 to 75-512 shall be construed to have no application to the transportation of persons or property by aircraft."

The position of the plaintiff is that the quoted parts of the act conflict with and violate the part of Article IV, section 20, of the Constitution of Nebraska, which provides: "* * * The powers and duties of such commission shall include the regulation of rates, service and general control of common carriers as the Legislature may provide by law. But, in the absence of specific legislation, the commission shall exercise the powers and perform the duties enumerated in this provision." The Constitution includes among the powers

and duties of the commission the regulation of rates, service, and general control of common carriers as the Legislature may provide by law, but in the absence of specific legislation its powers and duties as enumerated are absolute and unqualified. The commission has administrative, legislative, and judicial powers. These were bestowed upon it by an independent part of the Constitution which created the commission, and not as an amendment to the executive, legislative, or judicial articles thereof. The Constitution, in the absence of specific legislation, is self-executing, and is to be liberally construed. Chicago & N. W. Ry. Co. v. County Board of Dodge County, 148 Neb. 648, 28 N. W. 2d 396; In re Yellow Cab & Baggage Co., 126 Neb. 138, 253 N. W. 80; Furstenberg v. Omaha & C. B. St. Ry. Co., 132 Neb. 562, 272 N. W. 756; Petersen v. Beal, 121 Neb. 348, 237 N. W. 146. This court has heretofore remarked concerning the "broad, far reaching, and important powers" of the commission. State ex rel. Quinn v. Marsh, 141 Neb. 436, 3 N. W. 2d 892. The commission is a regulatory body of constitutional origin not amenable to legislative interruption or limitation of its status or powers except by specific legislation, and, since the amendment to the Constitution creating it is an independent one, it is not construed as other sections of the article to which it has been assigned by the compiler. State ex rel. Shields v. Hall, 103 Neb. 17, 170 N. W. 173; Omaha & C. B. St. Ry. Co. v. City of Omaha, 125 Neb. 825, 252 N. W. 407.

The term "common carriers" includes all forms of transportation for hire, and the amendment providing for the commission was intended to control the common carrier business to which it relates at all times and under all developments. It was determined in this state more than half a century ago that a street railway company became a common carrier by undertaking the transportation of passengers for hire. Spellman v. Lincoln Rapid Transit Co., 36 Neb. 890, 55 N. W. 270, 38 Am. S. R. 753,

20 L. R. A. 316; East Omaha Street Ry. Co. v. Godola, 50 Neb. 906, 70 N. W. 491. Transportation is the important fact, and the form or method thereof is immaterial. Arkadelphia Milling Co. v. Smoker Mdse. Co., 100 Ark. 37, 139 S. W. 680. The commission since its creation has had jurisdiction and power of control by virtue of the Constitution when the problem presented involved regulation of public transportation service. In re Application of Chicago, B. & Q. R. R. Co., 138 Neb. 767, 295 N. W. 389; State v. Union Stock Yards Co., 81 Neb. 67, 115 N. W. 627. A Constitution is intended to meet and be applied to any conditions and circumstances as they arise in the course of the progress of the community. The terms and provisions of constitutions are constantly expanded and enlarged by construction to meet the advancing affairs of men. While the powers granted thereby do not change, they do apply in different periods to all things to which they are in their nature applicable. Pensacola Telegraph Co. v. Western Union Telegraph Co., 96 U. S. 1, 24 L. Ed. 708; 11 Am. Jur., Constitutional Law, § 51, p. 660; 9 Am. Jur., Carriers, § 4, p. 430. These principles have been held to be applicable to transportation by air. "Transportation, as its derivation denotes, is a carrying across, and, whether the carrying be by rail, by water or by air, the purpose in view and the thing done are identical in result." Curtiss-Wright Flying Service v. Glose, 66 F. 2d 710, certiorari denied, 290 U. S. 696, 54 S. Ct. 132, 78 L. Ed. 599. See, also, Hotchkiss, The Law of Aviation, (2d ed.), § 45, p. 62; Fixel, The Law of Aviation, (3d ed.), §§ 372, 375, pp. 361, 364; McCusker v. Curtiss-Wright Flying Service, Inc., 269 Ill. App. 502. A statute of this state defines common carriers as any corporation or other carrier engaged in the transmission of messages or transportation of passengers or freight for hire. § 75-301, R. S. 1943. Common carriers by air are indistinguishable from other common carriers with respect to the policy of the law. Any person or organization

engaged in transportation by air for hire is a common carrier.

Until the act of 1947 (LB 247, §§ 3-109 and 75-201, R. S. Supp., 1947) jurisdiction over and the power to regulate and control common carriers by air was recognized as vested by the Constitution in the commission. The Legislature first acted with reference to aeronautics by directing the manner in which the commission should regulate the aircraft industry, principally as to certain safety matters, and directed the adoption of local rules similar to the federal rules in that regard, but made no mention of rates, charges, or general service of common carriers by air. Laws 1929, c. 34, p. 145. Six years later it created a Nebraska Aeronautics Commission, imposed an aviation gasoline tax, delegated certain administrative duties to the commission, but included nothing as to regulation of rates, service, and the general control of aeronautics. Laws 1935, c. 3, p. 59. Ten years after that it created a Department of Aeronautics, a Nebraska Aeronautics Commission, the office of director thereof, enlarged the duties of the commission especially as to airport development, but expressly again recognized and respected the constitutional jurisdiction of the State Railway Commission by a provision therein that whenever a hearing was to be held before the State Railway Commission with respect to any intrastate carrier operating aircraft, it should be its duty to notify the Department of Aeronautics of the time and place of the hearing to permit it to intervene and set up the interest of that department therein. Laws 1945, c. 5, p. 75. The State Railway Commission has granted authority to operate as common carrier by air; applications for certificates of convenience and necessity, by those who desire to operate as common carriers by air, have been made to and are pending before it; and the last revision made in March 1947, of its rules and regulations pertaining to aeronautics have not been changed and are in force to the extent of its authority.

The commission, under the Constitution, has original jurisdiction and sole power to grant, deny, amend, revoke, or transfer common carrier certificates of convenience and necessity. In re Application of Effenberger, 150 Neb. 13, 33 N. W. 2d 296. The rules and regulations concerning aeronautics promulgated after June 1948, and filed with the Secretary of State by the defendant, the Nebraska Aeronautics Commission, is the first time in more than 40 years that any agency of the government of Nebraska, other than the State Railway Commission, has claimed any jurisdiction to regulate and control common carriers. Legislative and official interpretation, long acquiesced in, is entitled to weight in seeking the meaning of doubtful constitutional provisions. State ex rel. Sorensen v. Chicago, B. & Q. R. R. Co., 112 Neb. 248, 199 N. W. 534; 16 C. J. S., Constitutional Law, §§ 32 to 35, pp. 70-75; Chadwick v. City of Crawfordsville, 216 Ind. 399, 24 N. E. 2d 937, 129 A. L. R. 469; Van Gilder v. City of Madison, 222 Wis. 58, 267 N. W. 25, 105 A. L. R. 244.

A determination of the meaning of the amendment of the Constitution creating the State Railway Commission (Art. IV., § 20), at the time it was adopted, will be decisive of the problem presented by this case. First Trust Co. v. Smith, 134 Neb. 84, 277 N. W. 762. The intent and understanding of its framers and the people who adopted it as expressed in the instrument is the main inquiry in construing it. Baker v. Moorhead, 103 Neb. 811, 174 N. W. 430; Mekota v. State Board of Equalization and Assessment, 146 Neb. 370, 19 N. W. 2d 633; State ex rel. Johnson v. Marsh, 149 Neb. 1, 29 N. W. 2d 799. The words of a constitutional provision will be interpreted and understood in their most natural and obvious meaning unless the subject indicates or the text suggests they are used in a technical sense. The court may not supply any supposed omission, or add words to or take words from the provision as framed. It must be construed as a whole, and no part will be rejected as

meaningless or surplusage, if it can be avoided. If the meaning is clear, the court will give to it the meaning that obviously would be accepted and understood by the layman. Mekota v. State Board of Equalization and Assessment, *supra;* State ex rel. Johnson v. Chase, 147 Neb. 758, 25 N. W. 2d 1. It is permissible to consider the facts of history in determining the meaning of language of the Constitution. State v. Sheldon, 78 Neb. 552, 111 N. W. 372; State ex rel. Johnson v. Chase, *supra.* It is also appropriate and helpful to consider, in connection with the historical background, the evil and mischief attempted to be remedied, the objects sought to be accomplished, and the scope of the remedy its terms imply. State ex rel. Sorensen v. Chicago, B. & Q. R. R. Co., *supra*; First Trust Co. v. Smith, *supra*; 12 C. J., Constitutional Law, § 43, p. 700.

The Legislature of 1883 obtained from the members of the Supreme Court an opinion as to the validity of a "railroad commission law" that: "The legislature have no power under the constitution to create railroad commissioners. The supervision of railroads by a commission would be proper, but the power must be conferred on executive offices already existing." In re Railroad Commissioners, 15 Neb. 679, 50 N. W. 276. The Legislature, after receiving this advice, proposed a constitutional amendment for a "board of railway commissioners" as a part of the executive department of government, without constitutional functions or power. Laws 1883, c. CVII, p. 378. It failed of adoption. A proposal of the Legislature of 1891 for an amendment providing for "three railroad commissioners" as a part of the executive department, "whose powers and duties shall be such as may be prescribed by law" was rejected by the voters. Laws 1891, c. 1, p. 63. A third attempt to amend the Constitution to secure "railroad commissioners" as executive officers, was submitted by the Legislature of 1895. Laws 1895, c. 107, p. 430. It was disapproved. Regulatory laws enacted in 1885 and 1887 (Laws 1885, c. 65,

p. 288; Laws 1887, c. 60, p. 540) were invalidated for defects in enactment. State v. Burlington & M. R. R. Co., 60 Neb. 741, 84 N. W. 254. There was no regulation in this field by any agency of government from 1901 (Laws 1901, c. 50, p. 403) until the adoption of the State Railway Commission Amendment (Art. IV, § 20). Many futile attempts to provide effective regulation and control of common carriers was the background for the proposal in 1905 (Laws 1905, c. 233, p. 791), and the adoption on November 6, 1906, of the amendment vesting constitutional powers, duties, and authority in the State Railway Commission as an independent, permanent agency endowed with executive, legislative, and judicial attributes, limited only as the Legislature may provide otherwise by specific legislation. The desire and necessity for a strong, regulatory, constitutional body is indicated by the practically unanimous vote of the Legislature in submitting the proposal, the endorsement thereof by the platforms of the three principal political parties, the thorough and favorable discussion of its merits throughout the state, and its adoption by a very large majority of the voters participating in the election. State ex rel. Thompson v. Winnett, 78 Neb. 379, 110 N. W. 1113, 10 L. R. A. N. S. 149. The pertinent legislative history confirms these views. The bill (Senate File 196) originally provided: "There shall be a State Railway Commission" and its "powers and duties * * * shall include *such* regulation of rates, service and general control of common carriers as the legislature *shall* provide * * *." (Emphasis supplied) Senate Journal 1905, pp. 405, 681. The language was changed before final approval by substituting "the" for "such" before the word "regulation"; "may" for "shall" preceding the word "provide"; and by adding the sentence "but in the absence of specific legislation, the commission shall exercise the powers and perform the duties enumerated in this section." Senate Journal 1905, pp. 1277, 1481; Art. IV, § 20, Constitution of Nebraska. The substitutions and additions made clearly eliminate

any conclusion that it was intended that the powers of the commission should include only such regulations and control as the Legislature shall provide or permit by law. The language finally adopted positively provides that the powers of the commission shall include the regulation of all the enumerated matters with the right of the Legislature to control the manner in which the commission shall perform its independent constitutional duties, or to enter the field itself to the extent of "specific legislation." The conclusion is logical, if not inescapable, that the Legislature would not have proposed, and the people would not knowingly have approved, an addition to the Constitution creating a commission with power only to regulate and control common carriers to the extent and for the time provided or permitted by the Legislature, in view of the history attesting that the attempts at regulation by it had been disappointing and ineffective, and that the people had rejected three proposals of the Legislature to amend the fundamental law to provide for executive officers to regulate and control common carriers only as prescribed by it. The legislative record of the bill shows the type of activity which was comprehended by the word "specific." The House rewrote it to enumerate the "specific legislation." It was: To establish, modify, and enforce reasonable rates and charges for transportation of persons and freight; prevent discrimination and abuses; and adjust and determine controversies in respect to transportation facilities, charges, and discrimination. The House, by its draft, provided that the power of the commission should extend over all common carriers in the state; that it should have such other duties as the Legislature should confer upon it; and the Legislature should provide the method of enforcing its findings. House Journal 1905, p. 1036. The intention was that the commission should have authority to carry out this program in the absence of "specific legislation." That this was the legislative intention is indicated by the acts passed in the 1907 and

1909 sessions of the Legislature, as contained in chapters 74 and 75 of the statutes. The final draft of the bill as presented to the people retained the term "specific legislation," as expressing this purpose of the Legislature and of the people.

The amendment provides that the commission shall have constitutional authority to regulate common carriers "as the Legislature may provide by law," and "in the absence of specific legislation" the commission may exercise all such duties and powers. The right to regulate "as" the Legislature may provide means the right to regulate in the manner in which the Legislature provides. The word "as" is used in its adverbial sense as a relative adverb. In 6 C. J. S., As, p. 780, the text states: "In its purely adverbial sense, the word has been defined as meaning in like manner, in the manner in which, in the same manner, like, of the same kind, similar to; * * *." The word "specific" in the phrase "in the absence of specific legislation" is synonymous with the word "particular." The term implies a definite restriction on the kind and extent of legislation over common carriers which is permissible by the Legislature. It is defined in 58 C. J., Specific, p. 826 as follows: "Definite, or making definite; limited or precise; precisely formulated or restricted; tending to specify or make particular. Although the term is a relative one, it is limited to a particular, definite or precise thing, and hence is the very opposite of 'general'." It was not intended by the use of these words to authorize unlimited, broad, general legislation in reference to the control and regulation of common carriers. Bouvier's Law Dictionary defines general statutes as those "which relate to persons and things as a class." LB 247 by its terms includes all common carriers by air. It undertakes to legislate completely and generally with reference to that entire class of carriers.

The Legislature by the "Two-Cent Fare Act" fixed two cents a mile as the maximum passenger fare for transportation by railroad. Later it passed the "Railway

Commission Act" by which the commission was authorized to "regulate the rates and services of, and to exercise a general control over all railroads * * * and all other common carriers * * * within the state." A writ of mandamus was sought in State ex rel. Missouri P. Ry. Co. v. Clarke, 98 Neb. 566, 153 N. W. 623, to compel the commission to pass on the merits of a petition by relator for an increase in existing railroad rates for the transportation of passengers. The defense of the commission was it had no power to increase such rates because of the Two-Cent Fare Act. Relator insisted that power to increase passenger rates had been delegated to the commission by the Legislature in the passage of the Railway Commission Act. The court determined that the Two-Cent Fare Act was specific legislation, and the Railway Commission Act was general legislation. "It is in the absence of specific legislation that the state railway commission may exercise such authority. It follows that, since passenger rates were fixed by statute, authority of the state railway commission to increase them must be found in legislative action. * * * In the 'Two-Cent Fare Act' the legislature dealt with a specific subject limited to passenger rates. In the subsequent act relating to the state railway commission and conferring upon it authority over rates, the legislation is general. The specific provisions control * * *. The general power of the state railway commission, as applied to passenger traffic, is limited to rates below the maximum fixed by the two-cent fare law. The legislature, in specifically fixing a maximum passenger rate and in conferring generally upon the state railway commission power to regulate or abolish passenger rates, left the state railway commission free to change or abolish rates within the bounds thus set by the lawmakers." The court nearly twenty years later approved the description of specific as opposed to general legislation by the statement: "The distinction between specific and general legislation is drawn in State v. Clarke, 98 Neb. 566." In re Yellow Cab

& Baggage Co., *supra*. There have been many instances of specific legislation on subjects within the jurisdiction of the commission directing the manner in which it may exercise its power. Petersen v. Beal, *supra;* Rodgers v. Nebraska State Railway Commission, 134 Neb. 832, 279 N. W. 800; State v. Chicago & N. W. Ry. Co., 147 Neb. 970, 25 N. W. 2d 824; Chicago & N. W. Ry. Co. v. County Board of Dodge County, *supra*. Rivett Lumber & Coal Co. v. Chicago & N. W. Ry. Co., 102 Neb. 492, 167 N. W. 570, was a suit to compel the defendant to construct a sidetrack for the use of plaintiff by virtue of a statute purporting to give the court jurisdiction to hear and determine that kind of a proceeding, and to grant any appropriate relief. § 5978, R. S. 1913. Defendant contended the court was without jurisdiction: "* * * that the question is one for inquiry and control by the state railway commission." The court sustained the position of the defendant, reversed the judgment of the district court, and dismissed the case. It said: "While the Constitution authorizes the legislature to provide by law how these powers and duties of the commission shall be exercised, it was clearly not intended that the legislature should confer the general power to regulate rates, service or control generally of common carriers upon some other body or jurisdiction. If the legislature under the Constitution could confer jurisdiction upon the courts either to regulate rates or service or to control generally common carriers, it follows that it could confer jurisdiction to do all of the things enumerated in the railway commission statute, and the constitutional provision establishing a railway commission would then become nugatory. * * * It seems clear to us that the object of plaintiffs' action is not to prevent discrimination between persons and associations, but to regulate the service of the railroad company, and is therefore entirely within the jurisdiction of the state railway commission." That case was decided in 1918. The Constitutional Convention of 1920 gave much consideration to the part of the Constitution

involved in this case. Proc. Const. Conv., 1920, Vol. 2, pp. 1651, 1840, 1848, 1850, 1882, 2394, 2401 to 2408. The Public Service Corporations Committee reported to the convention overwhelming sentiment of the committee against changing the language of the Railway Commission Amendment, and the chairman of the committee said, "It was not the sense of the committee that the Legislature might give a city administration the right to regulate a carrier such as a street railway company, that is chiefly within the boundaries of the city," and near the close of the convention an unsuccessful attempt was made to specifically amend the Railway Commission provision "* * * giving the cities of the metropolitan class the right to regulate the service of street cars within the city limits." Proc. Const. Conv., 1920, Vol. 2, pp. 1843, 2548. The convention left the constitutional provision creating the commission and defining its jurisdiction in the identical language as adopted by the people in 1906. It is presumed that the members of that convention—nearly half of whom were lawyers—knew the interpretation made by the court, and that it would remain in effect on failure of any change in this part of the Constitution.

The question presented by this case is of vital importance. It is recognized that there is a presumption that a legislative act is valid and will not be adjudged invalid unless its invalidity has been plainly demonstrated. There is a strong inclination of the court not to interfere with the acts of other departments of government. However, the Constitution is the supreme law, and a limitation of power of all departments and all officials, and it is the duty and function of the court to trace the line which marks the limit of power, and to cause compliance with it.

The Legislature has no power to divest the State Railway Commission of its constitutional jurisdiction to regulate and control common carriers by air by transferring it to another body or jurisdiction. LB 247, Sixtieth Session of Nebraska Legislature, is invalid because it

violates the Constitution of the state. Defendants have no legal right to exercise control over or impose regulations on common carriers by air, and they should be enjoined from attempting to do so.

JUDGMENT FOR PLAINTIFF.

YEAGER, J., participating on briefs.

WILLIAM E. CLARK, PLAINTIFF IN ERROR, V. STATE OF NEBRASKA, DEFENDANT IN ERROR.
37 N. W. 2d 601

Filed May 19, 1949. No. 32595.

1. **Criminal Law.** The venue in a criminal case may be established by circumstantial evidence.
2. ———. One cannot be convicted of a felony upon his own unsupported extrajudicial confession that a crime has been committed. Such confession may be sufficient to prove the defendant's connection with the criminal act, but there must in all cases be proof aliunde of the essential facts constituting the crime.
3. ———. While a voluntary confession is insufficient, standing alone, to prove that a crime has been committed, it is competent evidence of that fact, and may, with slight corroborative circumstances, be sufficient to warrant a conviction.
4. ———. Circumstances capable of an innocent construction may be interpreted in the light of the defendant's confession, and the fact under investigation be thus given a criminal aspect.
5. ———. The corpus delicti may be proved either by direct or circumstantial evidence.
6. ———. The intent with which an act is committed is purely a mental process and difficult to establish by direct proof. It is generally a conclusion that must be drawn after a consideration of the actions of the defendant, viewed in the light of the attendant circumstances.
7. **Criminal Law: Trial.** Where, in an instruction dealing with a written statement signed by an accused and received in evidence, the jury is told that if it found that the statement was freely and voluntarily given and signed without fear, compulsion, or inducements, the jury should consider it the same as any other evidence, it is not necessary that the court include in the instruction the requirement that the jury so find beyond a reasonable

doubt where the court in other instructions had told the jury that the State was required to prove each and every material allegation of the information beyond a reasonable doubt and defined a reasonable doubt.

8. **Larceny: Trial.** Where an instruction requires the jury to find beyond a reasonable doubt that a defendant did unlawfully and feloniously steal, take, and carry away certain property of another, and that such taking was with the intent to permanently deprive the owner of said property, it requires the jury to find that the property was taken with a felonious intent.
9. **Trial.** In the absence of a request therefor the trial court is not required to give a cautionary instruction relative to the weighing of circumstantial evidence.
10. **Appeal and Error: Trial.** It is not the province of this 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.
11. ———: ———. Where there is substantial evidence sustaining the jury's verdict, it will not be set aside.

ERROR to the district court for Brown County: DAYTON R. MOUNTS, JUDGE. *Affirmed.*

Ely & Ely, for plaintiff in error.

James H. Anderson, Attorney General, and *Jane E. Moyer,* for defendant in error.

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

SIMMONS, C. J.

The State, by information, charged that the defendant on June 8, 1948, in Brown County did unlawfully and feloniously steal, take, and carry away a black cow (particularly described in the information), the personal property of one L. E. Wantz, and of the value of $35 and upwards. The defendant pleaded not guilty. Trial was had resulting in a verdict of guilty. The jury fixed the value of the cow stolen at $136.80. Motion for a new trial was filed and overruled. Defendant was sentenced to imprisonment for a period of 3 years. Defendant appeals. We affirm the judgment of the trial court.

At the close of the State's case-in-chief and again at the

close of the case, the defendant moved for a directed verdict of not guilty on the ground that the State had not produced sufficient competent evidence to show the commission of the crime charged in the information. The motions were overruled.

Defendant's first assignment of error is that the court erred in overruling these motions and by argument advances these contentions: (1) That the venue of the alleged offense is not shown; (2) that no corpus delicti was proved; and (3) that there is no evidence that the cow was taken and carried away by defendant with a felonious intent to convert it to his own use.

At the close of the State's case-in-chief, evidence had been received from which the following facts could have been found by the jury.

The defendant and the complaining witness, hereinafter referred to as Wantz, were tenants of adjoining ranch land. The Wantz pasture adjoined the defendant's pasture to the north for one mile. Wantz lived in Johnstown in Brown County. The Wantz pasture was two and a fraction miles from the Wantz home. The location of the buildings on defendant's property is not shown.

At the northwest corner of his land, Wantz had constructed a dam across a ravine to impound spring water for his cattle. There was no other water on the Wantz land. Across the fence line about 100 feet there was a creek of running water on defendant's land, and his garden was nearby. On occasion defendant's cattle got on the Wantz property, as did the Wantz cattle on defendant's property.

On June 6, Wantz had 29 head of cattle of mixed breeds in this pasture, including a bobtailed, three-year-old cow, one-fourth Holstein and three-fourths Angus.

Prior to June 8, defendant made arrangements with a trucker at Wood Lake to haul cattle to a sales barn at Atkinson. On the morning of June 8, the trucker came to defendant's place. The cattle were then in a catch

pen. They got out of the catch pen twice and mingled with other cattle not to be shipped, but were finally loaded in the truck by defendant and his two minor sons.

The trucker's receipt, admitted in evidence without objection, shows that there were "Loaded at Clark Ranch" 2 cows and 8 yearling heifers. The trucker without instructions wrote the receipt to "W. L. Clark" as owner and the post office address as "Wood Lake." The defendant signed the receipt "W. L. Clark." The cattle were delivered in about two hours at Atkinson. One of the cows was the black cow in question. It was sold on June 8 to a Mr. Moses of O'Neill for $136.80 and taken by him to his ranch. Wantz testified that the value of the cow was about $135.

On June 9, defendant drove to Atkinson, receipted for and collected the money. On June 10, Wantz discovered that 10 of his cattle were missing. He searched for them and on two or more occasions visited with defendant about his missing cattle. Defendant said nothing about any knowledge as to this cow.

Wantz advertised for his cattle and on June 30 reported the loss to the officers of Brown County and the state. They traced the cow through the sales barn records and on July 7 found and identified it in the Moses herd. It was returned to Wantz.

The officers then contacted defendant in Ainsworth, told him what they knew, and informed him he was to be charged with stealing the cow. He voluntarily told them the story, and on that day voluntarily signed a statement prepared by one of the officers. The statement was received in evidence without objection, and is as follows: "I, William E. Clark, being first duly sworn on oath do depose and say that:

"On the morning of June 8, 1948, at my place in Brown County, Nebraska, I, with the help of two of my boys and the trucker, Merl Sturgeon from Wood Lake, Nebraska, loaded ten head oof (sic) cattle in the truck

of Merl Sturgeon, consigned to the salle (sic) at Atkinson, Nebr.

"Two of these cattle belonged to L. E. Wantz, my neighbor. They were balck (sic) cattle and were not branded. I signed the truckers (sic) permit book. I drove to Atkinson on the 9th of June 1948, and signed a bill of sale for a heifer that belonged to my boy Earl and picked up the check for the rest of the catle (sic) at the same time. My wife and little girl were with me that day. I used the money to pay debts and other things I owed. The total amount of the check was better than a thousand dollars but I cant (sic) tell the exact ammount (sic).

"Wantz's cattle have been getting in my pasture for several years. This year they have been in there off an (sic) on all the time. Just before the 8th of June, several of them were in my pasture and that is how I come to ship a couple of them with my bunch to Atkinson. I know I shouldnt (sic) have done this.

"This is the first time I have ever sold another mans (sic) cattle in my life.

"This is a true story and I have told it without threts (sic) or promises to Sheriff Browns and Otho Kime."

He was charged formally with the offense on that day and released on bond.

On August 26, defendant's attorney paid Moses $136.80 and $25 expense and care money, and Moses made out and delivered to the attorney a bill of sale to Wantz for the cow. Wantz had no knowledge of and did not consent to the taking, transporting, or selling of the cow.

In summary the evidence of the defendant is that he lived 3 miles west of Johnstown in Brown County; that his residence and buildings were situated 40 to 50 rods west of the water hole on the Wantz land; that the Wantz cattle repeatedly got through the fence and trespassed upon his property principally to get water; and that the Wantz cattle were found repeatedly with the defendant's

cattle. He told also of trouble with Wantz over the cutting of trees.

Defendant further testified that on the evening of June 7, his sons brought some 35 or 40 head of cattle into the corral preparatory to shipping some the next day; that there were 12 or 15 Wantz cattle in the bunch; that among those he intended to ship the next day was a black cow; that this cow was among those in the catch pen and escaped; that he thought he had the cow back in and that he shipped it; that the next morning he found his (defendant's) black cow still on the ranch; that he then knew he had shipped the Wantz cow by mistake; that he immediately went to Atkinson to see if the cow was still there; that he found out it was not; that he collected the money for the Wantz cow, kept it separate and eventually delivered it to his attorney; that he told no one about selling the cow or receiving the money; that he was afraid to do so, and intended sometime in some way to pay Wantz, and subsequently did so by paying for the cow.

We return to defendant's assignments of error above stated.

The rule is that the venue in a criminal case may be established by circumstantial evidence. Weinecke v. State, 34 Neb. 14, 51 N. W. 307; Hawkins v. State, 60 Neb. 380, 83 N. W. 198; Booton v. State, 86 Neb. 114, 125 N. W. 144; Clarke v. State, 125 Neb. 445, 250 N. W. 551; Greenough v. State, 136 Neb. 20, 284 N. W. 740. We consider the evidence of the State above recited sufficient to submit the issue of venue to the jury.

The next contention is that the corpus delicti had not been established independent of the oral and written admissions of defendant. The rules are: "One cannot be convicted of a felony upon his own unsupported extrajudicial confession that a crime has been committed. Such confession may be sufficient to prove the defendant's connection with the criminal act, but there must in all cases be proof aliunde of the essential facts constitut-

ing the crime. * * * But, while a voluntary confession is insufficient, standing alone, to prove that a crime has been committed, it is competent evidence of that fact, and may, with slight corroborative circumstances, be sufficient to warrant a conviction. * * * Circumstances capable of an innocent construction may be interpreted in the light of the defendant's confession, and the fact under investigation be thus given a criminal aspect." Sullivan v. State, 58 Neb. 796, 79 N. W. 721.

The corpus delicti may be proved either by direct or circumstantial evidence. Andersen v. State, 141 Neb. 306, 3 N. W. 2d 447. See, also, Blacker v. State, 74 Neb. 671, 105 N. W. 302, 121 Am. S. R. 751; Egbert v. State, 113 Neb. 790, 205 N. W. 252; Whomble v. State, 143 Neb. 667, 10 N. W. 2d 627; Maher v. State, 144 Neb. 463, 13 N. W. 2d 641.

Tested by these rules it is patent that the evidence of the State was sufficient to take the issue of proof of the corpus delicti to the jury.

Defendant next argues that there is no evidence that the cow was taken and carried away with a felonious intent.

In Severin v. State, 146 Neb. 506, 20 N. W. 2d 377, we held: "The intent with which an act is committed is purely a mental process and difficult to establish by direct proof. It is generally a conclusion that must be drawn after a consideration of the actions of the defendant, viewed in the light of the attendant circumstances"; and, repeating from Sullivan v. State, *supra*: "Circumstances capable of an innocent construction may be interpreted in the light of the defendant's confession, and the fact under investigation be thus given a criminal aspect."

Applying these rules to the State's evidence, we hold that evidence from which the conclusion of a criminal intent could be drawn was received. Accordingly we find no merit in defendant's contention that the trial court erred in denying his motions for a directed verdict.

Defendant's next two assignments of error may properly be considered together. The trial court instructed the jury as to the consideration to be given to the signed statement of defendant if it found that the statement was given and signed "without fear, compulsion or any inducements freely and voluntarily." Defendant tendered an instruction, the purpose of which was that unless the jury found beyond a reasonable doubt that the statements, both oral and written, were voluntarily made, then they should be disregarded. The trial court in accord with a request of defendant instructed separately as to the consideration to be given to oral statements and admissions. Defendant assigns the giving of the instruction and refusal to give the tendered instruction as error.

In Furst v. State, 31 Neb. 403, 47 N. W. 1116, we approved an instruction that did not contain the "beyond a reasonable doubt" element. There the voluntary nature of the statement was not seriously challenged. In Ringer v. State, 114 Neb. 404, 207 N. W. 928, we approved an instruction that contained the "beyond a reasonable doubt" element. There the voluntary nature of the statement was directly challenged. We suggested that the instruction was "perhaps, more favorable to the accused than he was entitled to." In neither the Furst nor the Ringer cases was the necessity for the "beyond a reasonable doubt" element in the instruction directly presented.

In Hardesty v. State, 95 Neb. 839, 146 N. W. 1007, a confession was admitted in evidence. Evidence that it was voluntarily made was uncontradicted. It was consistent with the State's direct evidence. There the court gave a proper instruction as to the credibility of witnesses and the weight of evidence. It was held that it was not necessary to give a special instruction on the law applicable to proof of a confession.

In the instant case the State offered evidence which was clearly sufficient to establish a foundation as to the voluntary nature of both the oral admissions and the

written statement. That evidence was not challenged on cross-examination as to foundation. The oral statements and the written statement were admitted in evidence without objection. The defendant testified in his own behalf and did not deny that the written statement was voluntary. He testified that he wanted to make certain that the truck driver and his sons would not become involved in a matter for which he alone was responsible and that he signed the statement when he came to the conclusion from what the officers told him that he was guilty. He did not testify to any false statements that he claimed the officers made. He did not mention fear, threats, or promises. He challenged only the correctness of two statements contained in the writing. One was that he later determined that only one of the cattle belonged to Wantz, and not two. He testified also that he did not use the Wantz money to pay debts, etc., but rather segregated and held it, and later paid it to Wantz.

Here the trial court instructed the jury, as it did in the Hardesty case, *supra*, as to the credibility of witnesses and the weight to be given to their testimony. The instruction is not challenged. Here the trial court instructed the jury that the State was required to prove each and every material allegation of the information beyond a reasonable doubt before the defendant could be found guilty. What constituted a reasonable doubt was defined in the instructions. No exception is taken to those instructions. Under these circumstances it was not necessary for the trial court to repeat the "beyond a reasonable doubt" element in the specific instruction given.

The trial court instructed the jury that "The burden of proof is upon the State to prove to you by the evidence beyond a reasonable doubt the truth of each and every one of the material allegations contained in the information, which are: 1. That the defendant, on or about the 8th day of June, 1948, in Brown County, Nebraska, he then and there being did then and there unlawfully and

feloniously steal, take and carry away one black three year old cow described in the information; and that said cow was then and there of some value. 2. That such taking by the defendant was with the intent to permanently deprive the owner of said property, and with the intention to convert the said property to his own use and benefit. 3. That the taking of said property was without the knowledge or consent of the owner, and against his will. 4. That the cow described in the information was the personal property of L. E. Wantz, named in the information. If the State has proven each and every one of the foregoing material allegations by the evidence beyond a reasonable doubt, then it will be your duty to find the defendant guilty. If you are not so satisfied then your verdict should be not guilty."

Defendant contends that the above instruction is erroneous "* * * because it attempts to cover the whole case yet omits the essential element of felonious intent as a necessary ingredient to larceny."

The defendant requested the giving of an instruction which included the element of felonious intent. The court refused the request. Defendant assigns the refusal to give the requested instruction as error.

So far as the question presented by the instruction given is concerned, substantially the same instruction and the same assignment were determined in McIntosh v. State, 105 Neb. 328, 180 N. W. 573, 12 A. L. R. 798. We there held that the instruction clearly required the jury to find beyond a reasonable doubt that the property was taken with a felonious intent before a verdict of guilty could be returned. That decision is decisive here.

In addition to the above, the court as requested by defendant, instructed the jury that "You are instructed that, if you believe from the evidence that the cow described in the information came upon defendant's land as an estray, mingled with the cattle of the defendant and was shipped to market and sold by the defendant along with other cattle belonging to him, without knowl-

edge on his part that the cow described in the information was included in said shipment and sale, and that at and before such sale the defendant had no intention of stealing said animal, your verdict shall be 'Not guilty', even though the evidence shows that the defendant thereafter learned that said cow was not his own." We see no basis for the error assigned either in the instruction given or refused.

Defendant's next assignment of error is that the trial court failed to instruct the jury that circumstantial evidence is not sufficient to sustain a verdict of guilty unless it is of such a character as to exclude every reasonable hypothesis of innocence. We find no request for such an instruction. The rule is: "In the absence of a request therefor the trial court is not required to give a cautionary instruction relative to the weighing of circumstantial evidence." Fetty v. State, 121 Neb. 228, 236 N. W. 694. See, also, Nunnenkamp v. State, 129 Neb. 264, 261 N. W. 418; Doerffler v. State, 129 Neb. 720, 262 N. W. 678.

Finally the defendant argues that the evidence is insufficient to support the jury's verdict. It is not the province of this 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. Where there is substantial evidence sustaining the jury's verdict, it will not be set aside.

The judgment of the trial court is affirmed.

AFFIRMED.

YEAGER, J., participating on briefs.

JEANNETTA MYERS TUCKER, APPELLEE, V. THE HEIRS, DEVISEES, LEGATEES, PERSONAL REPRESENTATIVES, AND ALL OTHER PERSONS INTERESTED IN THE ESTATE OF CHARLES MYERS, DECEASED, REAL NAMES UNKNOWN, APPELLANTS.

37 N. W. 2d 585

Filed May 19, 1949. No. 32608.

1. **Wills.** It is the court's duty in the construction of a will to give effect to the true intent of the testator so far as it can be ascertained from the whole instrument, if such intent is consistent with applicable rules of law.
2. **Trusts: Wills.** A precatory trust may be charged against property devised to another absolutely, provided the intention of the testator to so charge it appears from the will.
3. **Trusts.** When, by will, property is given absolutely to a person, and the same person is by the testator "recommended," "entreated," "requested," "wished," or "desired" to dispose of that property in favor of another, the recommendation, entreaty, request, wish, or desire will be held to be imperative and to create a trust, if the subject and objects of the trust are certain.
4. **Judges.** The qualifications of a de facto county judge to act may not be collaterally attacked. His acts, unless directly attacked, are valid and binding upon the parties.
5. ———. A county judge is prohibited by Article V, section 14, of the Constitution from practicing law in any court in any matter arising in or growing out of any proceeding in his own court.

APPEAL from the district court for Box Butte County: EDMUND P. NUSS and EARL L. MEYER, JUDGES. *Affirmed.*

Helen C. Myers and *William H. Hein*, for appellants.

P. E. Romig and *Albert T. Reddish*, for appellee.

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

CARTER, J.

This is a suit praying for the construction of the last will and testament of Charles Myers, deceased, and to quiet the title to the real estate owned by Myers at the time of his death in those persons found to be entitled

thereto under the will. The trial court found for the plaintiff and defendants appeal.

The will here involved was executed on August 24, 1914. The wife of the testator preceded him in death by approximately three years. No children were born to the testator and his wife, Anna Myers. At the time of the execution of the will the deceased, Charles Myers, had three brothers and two sisters living, namely, Edgar Myers, Nellie Myers Riggen, Winfield Myers, William J. Myers, and Jeannetta Myers Tucker. All brothers and sisters preceded Charles Myers in death except Jeannetta Myers Tucker, the plaintiff in this suit. The defendants-appellants are the sons and daughters of the deceased brothers of the testator, the deceased sister leaving no issue. The question to be determined is whether the plaintiff is the sole beneficiary under the will of Charles Myers, or whether the defendants as the children of the deceased brothers are entitled to share per stirpes in the claimed interest of their fathers in said estate as the brothers of Charles Myers, deceased.

The pertinent portions of the will of Charles Myers provide as follows:

"After the payment of such funeral expenses and debts, I give, devise and bequeath unto my beloved wife, Anna Myers, all personal property of any kind whatsoever, and all real estate of which I may die possessed of, to her and her heirs of her body forever.

"Provided that in the event that I shall die leaving a child or children of my body, then such child or children to take two-thirds of my property, both real and personal, and my said beloved wife Anna Myers to take one third of said property, both real and personal. But if I shall leave no children of my body, then my said beloved wife Anna Myers shall have the property both personal and real estate, that I die possed (possessed) of, to be hers in fee simple. * * * It is my desire that my beloved wife Anna Myers, in case there be no heirs of our bodies, make a will and bequeath the property

I leave her to my brothers and sisters, to be distributed equally amoung (among) thoes (those) living at the time of her death."

The county court does not have jurisdiction to construe a will except in an advisory capacity to the personal representative of the deceased. Gotchall v. Gotchall, 98 Neb. 730, 154 N. W. 243; In re Estate of Stieber, 139 Neb. 36, 296 N. W. 336. The proper forum in which to construe a will, to determine the title to real property devised therein, is the district court. Hahn v. Verret, 143 Neb. 820, 11 N. W. 2d 551; Hiatt v. Hiatt, 146 Neb. 652, 20 N. W. 2d 921. It is elementary also that the provisions of a will take effect and become operative at the time of the death of the testator. Smullin v. Wharton, 83 Neb. 328, 119 N. W. 773, 121 N. W. 441; Lacy v. Murdock, 147 Neb. 242, 22 N. W. 2d 713. It is also the rule in this state that in the construction of a will, the court will give effect to the intent of the testator, so far as it can be ascertained from the whole instrument if such intent is consistent with controlling rules of law. Lacy v. Murdock, *supra;* In re Estate of Zents, 148 Neb. 104, 26 N. W. 2d 793; Olson v. Lisco, 149 Neb. 314, 30 N. W. 2d 910.

In giving effect to the rule that the intent of the testator will be gleaned from the four corners of the will, it has been held that an absolute devise of real estate in one paragraph of a will which is followed by another paragraph devising a remainder interest, the two paragraphs will be construed together and effect given to the latter paragraph, even though it restricts the former. Merrill v. Pardun, 125 Neb. 701, 251 N. W. 834; Annable v. Ricedorff, 140 Neb. 93, 299 N. W. 373.

It is the contention of the plaintiff in the present case that the testator in devising and bequeathing his property to his wife in fee simple and, in a subsequent paragraph, expressing a desire that his wife make a will and bequeath the property he left her to his living brothers and sisters, created a trust of the property re-

maining at the death of his wife in favor of his brothers and sisters then living. It is elementary, of course, that the death of the trustee will not destroy a trust. The death of the wife, therefore, did not have the effect of destroying the trust, if a trust was in fact established.

It cannot be questioned that the testator intended his wife to have the use of all of his property in the event of no issue being born to them. She was not only to have the use of the income but, if necessary, the whole or any part of the principal for her support. The use of the expressions in the will "to her and her heirs of her body forever" and "to be hers in fee simple" imply a power of alienation. The defendants claim, however, that the use of these expressions and the use of the words "It is my desire that my beloved wife" make a will and bequeath the property that testator left her to his living brothers and sisters, that an intent that the wife have his property in unrestricted and unqualified fee simple is demonstrated, and, since she predeceased him, this constitutes a lapse. There being no residuary clause, it would then follow that the property would go to testator's heirs under the laws of descent and distribution. Unless the paragraph of the will expressing a "desire" that his wife make a will has some effect, the position of the defendants is undoubtedly correct. Consequently, the result hinges on the effect of the following language of the will: "It is my desire that my beloved wife * * * make a will and bequeath the property I leave her to my brothers and sisters, to be distributed equally amoung (among) thoes (those) living at the time of her death."

The general rule in this state is that, in construing a will, where the will in one clause makes an apparently absolute bequest of property, but a subsequent clause makes a further bequest of the remainder after the death of the legatee taking under the first clause, the two clauses are to be construed together to ascertain the true character of the estate in fact granted by the

first clause; and in such case, contrary to the ancient rule at common law, the second clause is effective and operates to define and limit the estate granted by the first as a life estate with power of disposition, and the second is effective and operative to grant an estate in remainder in the unused, unexpended, or undisposed property granted for life by the first. Merrill v. Pardun, *supra;* In re Estate of Darr, 114 Neb. 116, 206 N. W. 2; Krause v. Krause, 113 Neb. 22, 201 N. W. 670; Annable v. Ricedorff, *supra.*

It is urged, however, that the use of the word "desire" indicates merely a suggestion or recommendation. Apt language was used in Merrill v. Pardun, *supra,* which states the correct rule: "The question as to when a trust may be implied where precatory expressions are employed is one which has caused considerable difficulty in the courts and is the subject of an extended annotation in 49 A. L. R. 10. In the case of In re Hochbrunn's Estate, 138 Wash. 415, 49 A. L. R. 7, the court said: 'Where a person makes a special request of another who is independent of him, it may be altogether ignored; but if in making a bequest to him capable of being fulfilled, and, in the same instance, specially requests that a portion of it be paid to another at a time sufficiently definite, the courteous language used makes it no less imperative than if he had commanded or ordered it to be paid. There is no technical meaning of the words "special request," or even the simple word "request," inconsistent with its being a common word that any one, whether layman or lawyer, may use in his will to express his intention of imposing an obligation.' " What has been here said applies as well to the word "desire" as to the word "request."

It is then argued that a "desire" that his wife make a will and bequeath the remaining property to his living brothers and sisters was not within the foregoing rule. In Knox v. Knox, 59 Wis. 172, 18 N. W. 155, 48 Am. R. 487, this point is adequately determined in the following

language: "Remembering, as was said by Chief Justice Marshall in the case of Smith v. Bell, 6 Pet., 75, that 'the first and great rule in the exposition of wills, to which all other rules must bend, is, that the intention of the testator expressed in his will shall prevail, provided it be consistent with the rules of law,' we have no hesitation in saying that it is clear to us from the language used by the testator that he did not intend to give his estate to his wife absolutely. Had such been his purpose, why did he take pains to point out so particularly what should be done with his estate when his wife died? If he intended that she should use it as she saw fit, and not limit her to the use of the income thereof, and simply intended to advise her as to what he thought she ought to do with what might be left of it at her death, why did he say that 'all the proceeds of my said property, real and personal, goods and chattels, hereby bequeathed' should be divided equally among his children? If we give any consideration to that part of the testator's language which follows the devise and bequest to his wife, in arriving at his intent, we are forced to conclude that he intended his request, as to its final distribution among his children, should bind his wife. It is clear that his will was that his children should take the property after the death of his wife. The language being clearly sufficient to show that such was his will, his request to his wife to so distribute his property must be construed as directory, and not simply as advisory."

In Deacon v. Cobson, 83 N. J. Eq. 122, 89 A. 1029, the court considered the following provision in a will: " 'And in case any of the last aforesaid persons, except Mary B. Borden, should be deceased, leaving lawful issue at the time of the death of my daughter, I desire said deceased persons share to go to his, her or their child or children, their heirs or assigns, share and share alike.' " The court said: "The question for determination is whether the words 'wish', 'desire' and 'request,' as used

in that will and codicil, are operative to create a trust in favor of the persons named by testatrix.

"A rule of construction early adopted by the English court of chancery was to the effect that when, by will, property is given absolutely to a person, and the same person is by the testator 'recommended,' 'entreated,' 'requested' or 'wished' to dispose of that property in favor of another, the recommendation, request or wish will be held to be imperative and to create a trust, if the subject and objects of the trust are certain. That rule of construction was adopted by our court of last resort more than half a century ago, and has since been uniformly recognized by the courts of this state; it cannot be now questioned in this court (citing cases). It necessarily follows that the requests of testatrix in the will and codicil here in question must be given the same force as though the language adopted by testatrix had been, wherever the word 'request' occurs, it is my will and I do hereby order and direct." See, also, Eddy v. Hartshorne, 34 N. J. Eq. 419.

In Schmucker's Estate v. Reel, 61 Mo. 592, the rule is stated as follows: "Courts of equity have frequently discussed the question as to the force of words or expressions of recommendation in wills in regard to the use to which the testators might desire persons to whom they had given legacies to put the same. The prevailing doctrine is, that no particular form of expression is requisite in order to create a binding and valid trust; and that words of recommendation, request, entreaty, wish or expectation, will impose a binding duty upon the devisee by way of trust, provided the testator has pointed out with sufficient clearness and certainty both the subject matter and the object of the trust." See, also, Noe v. Kern, 93 Mo. 367, 6 S. W. 239, 3 Am. S. R. 544.

In Colton v. Colton, 127 U. S. 300, 8 S. Ct. 1164, 32 L. Ed. 138, it is said: "And in such a case as the present, it would be but natural for the testator to suppose that a request, which, in its terms, implied no alternative,

addressed to his widow and principal legatee, would be understood and obeyed as strictly as though it were couched in the language of direction and command."

It is clear, we think, that testator intended to provide for the support of his wife to the extent that the estate would permit. In accomplishing that result it is clear that he intended to give her the property for life with right of disposition. It appears reasonable that he did not want any question raised as to his wife's power of disposition such as might have been raised had he given her an ordinary life estate with remainder to his brothers and sisters. Having confidence in his wife's regard for his wishes, he deemed the word "desire" was sufficiently mandatory to cause her to leave the remainder of his estate to his living brothers and sisters. It was the death of the wife before that of the testator which intervened to raise the issue. If the wife had survived the testator, the desire of the testator would probably have been voluntarily carried out. The fact that she predeceased him will not defeat the result he made clear in his will.

It is urged that the failure of testator to draw a new will after the death of his wife evidences an intent that his property was to go to his heirs at law rather than his surviving brothers and sisters. The only objects of his bounty expressed in his will were his wife and his surviving brothers and sisters. The death of the wife could not bring any new beneficiaries into the will, and we are obliged to assume that he so reasoned. If he had intended that new beneficiaries should take, a new will or codicil would have provided a simple method of doing it. We think the will as a whole, under the conditions existing at the time of the death of the testator, gives rise to a precatory trust in favor of the surviving brothers and sisters of the testator; and the plaintiff, being the sole survivor, the whole estate of the deceased vests in her.

It is contended that the order admitting the will to probate was void because of the disqualification of the acting county judge. It appears that the regularly elected

county judge disqualified himself. It is asserted that he was not in fact disqualified. No question is raised as to the regularity of the appointment and qualification of the acting county judge, other than the alleged qualification of the regularly elected county judge to act. Assuming that the elected county judge was qualified to act, no objection to the qualifications of the acting county judge was made in the probate proceeding and no appeal has been taken from the order of probate entered by him. The order is not subject to collateral attack by those who were parties to the probate proceeding. The acting county judge was clearly a de facto officer if the allegations of the appellants be true. As such, his acts are valid and binding upon the parties. Dredla v. Baache, 60 Neb. 655, 83 N. W. 916. There is no merit to the appellant's contention on this point.

It is also asserted that the elected county judge, who appears as the attorney for the appellee in the present case, is disqualified under the provisions of Article V, section 14, Constitution of Nebraska, providing: "No judge of the supreme or district courts shall act as attorney or counsellor at law in any manner whatsoever. No county judge shall practice law in any court in any matter arising in or growing out of any proceedings in his own court." This provision clearly means, as it applies to a county judge, that such judge may not appear as counsel in any matter in his own court or in any matter in which he would be disqualified if he had acted as county judge. By disqualifying as county judge he may not thereby remove himself from the prohibition of this constitutional provision in any matter in which he would otherwise be prohibited from engaging. It would be highly improper, we think, for a county judge to appear as counsel in the district court and argue for an interpretation of a will in accordance with an interpretation which he was required to make in his capacity as county judge, even though such latter interpretation is of limited effect. It is just as improper to disqualify

himself as county judge for any reason and participate in such a trial in the district court in view of the constitutional provision cited. When one seeks and is elected to the position of county judge, he is required to sever his relationship with all matters arising in or growing out of any proceedings in his own court. This being true, counsel for appellee was clearly disqualified from appearing as counsel for plaintiff in the district court and for such plaintiff as appellee in this court in the matter presently before us. The trial judge, however, took a different view of the matter and permitted the elected county judge to so act. While the trial court was in error in so doing, no prejudice to the rights of the defendants appears to have resulted. No basis therefore exists for depriving the plaintiff of the benefits of her judgment in the district court or in this court. If what is here said is not deemed an adequate correction of the violation, further inquiry in some other appropriate proceeding must afford the remedy.

AFFIRMED.

YEAGER, J., participating on briefs.

EILEEN BOECHE, PLAINTIFF IN ERROR, V. STATE OF NEBRASKA, DEFENDANT IN ERROR.
37 N. W. 2d 593

Filed May 19, 1949. No. 32566.

1. **Criminal Law: Trial.** An instruction in a criminal case that "you have no right to reject the testimony of any of the witnesses without good reason, and you should not do so until you find it irreconcilable with other testimony which you may find to be true," held to be erroneous and ordinarily prejudicial.
2. **Evidence.** The polygraph, commonly known as a lie detector, used for determining the truthfulness of testimony has not yet gained such standing and scientific recognition as to justify the admission of expert testimony deduced from tests made under such theory.

ERROR to the district court for Cass County: THOMAS E. DUNBAR, JUDGE. *Reversed and remanded.*

James F. Begley and *Lloyd E. Peterson,* for plaintiff in error.

James H. Anderson, Attorney General, and *William T. Gleeson,* for defendant in error.

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

MESSMORE, J.

Eileen Boeche, hereinafter referred to as defendant, was charged with the crime of uttering and publishing two bank checks as true and genuine when in fact they were false or forged instruments. She was convicted and sentenced to serve a term in the Nebraska Reformatory for Women. She prosecutes error to review the record of her conviction.

It appears from the record that the cashier and filing clerk of Soennichsen's Mercantile Store located at Plattsmouth, Nebraska, returned to her duties at 7:15 p. m., December 20, 1947. This witness testified that at that time a saleslady was present in the office who took care of the same in her absence. Between 7:30 and 8 p. m., a customer whom she later identified as the defendant was in the office and the saleslady had a check which was dated December 19, 1947, made payable to the order of Barbara Hale in the amount of $46.75, signed by Ann Mangel. A notation appears in the lower left-hand corner of the check, "Ann's Dress Shop, Nebr. City, Nebr." The saleslady presented the check to the cashier to be cashed. The cashier asked the defendant where she got the check, to which the defendant replied that it was a salary check for work done in Ann's Dress Shop at Nebraska City. The cashier then asked her if she knew a Dorothy Zimmerman at Nebraska City. She did not know such person. The check was then cashed. This witness was not positive that she saw the defend-

ant endorse the check. The check was taken to a bank the following Monday and was returned for the reason that it was a false and fraudulent check and no such party or place of business existed in Nebraska City as appeared thereon. The cashier then gave the bank the amount of the check, $46.75. This witness further testified that at the time of the transaction the defendant was wearing either a black or navy blue coat of soft wool material. She did not know what kind of a hat the defendant wore. The saleslady who received the check identified the defendant as the person who gave it to her, and corroborated the cashier's testimony.

The sheriff of Otoe County, who was also the chief of police of Nebraska City, testified that there is no such place of business in Nebraska City as Ann's Dress Shop; and that he has known and been acquainted with the defendant who has resided in Nebraska City for 10 or 12 years.

The cashier of the Otoe County National Bank, the bank upon which the checks in this case were drawn, testified that he was not acquainted with an Ann Mangel, a Barbara Hale, nor the defendant; that there was no such place of business in Nebraska City as Ann's Dress Shop; and that the bank had no account in the name of Ann Mangel.

The manager of the Ladies Toggery since 1919, a store in Plattsmouth, testified he saw a customer whom he later identified as the defendant in the store between 8:30 and 9 p. m., on December 20, 1947, at the time he was waiting on a customer and the defendant was standing in about the middle of the store. A saleslady gave him a check presented by the defendant in payment for some merchandise, for him to O. K. This check is identical in the handwriting and in the amount as the check previously described, with the same payee and the same maker. The only difference is in the number. This witness asked the defendant if this was her check and she said it was and that she received it for working

in Ann's Dress Shop. He then asked her for her social security number as identification. She said she was sorry, she had lost it the day previous. She had a pass book, opened it, and it showed deposits. The manager did not notice the name on the pass book. He told the defendant he did not know any dress shop in Nebraska City by that name, Ann's Dress Shop. She said it had been there for some time. He did not see the defendant endorse the check. The bank returned the check for the reason it was a false and fraudulent check, and the store returned the amount of $46.75 to the bank. The defendant had on a black coat and a small hat on the back of her head.

The saleslady who sold the merchandise to the customer who has been identified as the defendant, failed to identify her, but remembered the transaction with reference to the check and the conversation between the manager of the store and the customer as related by him, and corroborated his testimony in such respect.

The witness Louis Boeche testified that he was a mechanic junior grade in the Army Engineers and had been so employed for a period of two months prior to the time of the trial; before that time he was a sheet-metal worker with the Bell Gas Appliance Company located at Nebraska City; that he had known the defendant almost a year, and was married to her on December 24, 1947; that on the evening of December 20, 1947, he left his work at approximately 6:15 p. m., went home, took a bath, shaved, and sat down to lunch at 6:45 p. m., and that the defendant was with him. He was living at his mother's home. They were going to shop for shoes for him, and left his mother's house about 7:20 p. m. They walked up town in Nebraska City, going directly to Homeyer's Shoe Store, where he bought a pair of shoes and was waited on by one Jack Hall. The defendant was with him at the time. He told the defendant that he was going to pick out the shoes himself, and she was to say nothing about them, so while he and

Hall, the clerk, were talking, Hall asked the defendant why she did not say anything and if she had laryngitis because she was not talking. She informed him that she was to say nothing about the shoes. This witness and the defendant left the shoe store to go to a bakery and cafe a short distance from the shoe store where they had a cup of coffee and a sandwich, and here the defendant called her mother with reference to some ribbon for Christmas decorations for the front door. They were in the cafe at least 20 minutes. From the cafe they proceeded to the Dammast Clothing Store where about a week prior this witness had purchased a suit. The pants had been taken to the store to be shortened, and he was to pick them up before closing time on this evening. This was about 8:30 p. m., and the defendant was with him. He and the defendant then left the clothing store and went to the Arbor Theater, and she was carrying some packages. They sat in front of a Mr. and Mrs. Harvey Mead who resided at Sidney, Iowa. There was a serial playing, and Harvey Mead wanted to see it the second time. There was some conversation with reference to the matter. This witness and the defendant left the Arbor Theater at 11:15 p. m., and took a taxi. He went to his home and the defendant went to her home. The effect of the testimony of this witness was that the defendant was with him from 6:30 until 11:15 on the night of December 20, 1947.

Jack Hall, the shoe clerk, testified that he saw Louis Boeche and the defendant in the shoe store on the evening in question around 8 o'clock. On cross-examination he refused to say positively that on December 20, 1947, he sold a pair of Air-O-Magic shoes to Louis Boeche. Such a pair of shoes was sold that Saturday night, but he would not say they were sold to Louis Boeche.

Harvey Mead testified that on the evening in question he was in the Arbor Theater with his wife and saw Louis Boeche and the defendant come to the picture show between 8:30 and a quarter till nine, and that the

defendant had some packages which she was carrying.

The defendant's father testified that he was a civil engineer with the Army Engineers and had been so employed for 26 years; that on the evening in question he took the defendant to the Meredith residence, Mrs. Meredith being Louis Boeche's mother, at about 6 p. m., and that the defendant came home that evening at approximately 11:30 p. m. He fixed the date because he was preparing to decorate a Christmas tree the following day.

Mary Ann Meredith testified that she is the mother-in-law of the defendant, and that the defendant came to her house for dinner just after 6 p. m., on the evening in question. She left her home about 7 p. m., that evening, and the defendant was still at the house.

Betty Ruth Mead testified that she is acquainted with the defendant and saw her on the evening in question when she sat in front of the witness and her husband at the Arbor Theater, and that Louis Boeche and the defendant came into the theater about a quarter till nine.

Wilson Sigerson, Jr., testified that in December 1947, he was employed on Saturdays at the Dammast Clothing Store, and saw the defendant and her husband in the store between 8 and 9 o'clock that evening. It could not have been as late as 9:30 p. m., for the reason the store closes at 9 p. m. He was not positive as to the date.

Louis E. Harris testified that he is a resident of Lincoln; that for 15 years he has been a chemist and scientific criminologist with the degree of master of science and postgraduate work for the degree of doctor of philosophy. In the field of questioned documents, he had studied the texts, followed the work from a practical standpoint, examined many questioned documents, and testified in some cases in Nebraska. His evidence was admitted without objection by the State. There are several exhibits in evidence which were written by the defendant in the presence of the jury, and other

exhibits which constituted the handwriting of the defendant prior to her arrest, for the purpose of comparison of handwriting. The witness testified that in his opinion the endorsements appearing on the two checks in question were not made by the defendant.

The defendant's mother testified that she received a telephone call from the defendant at about 8 o'clock on the evening in question, when the defendant was down town in Nebraska City. She states the time by virtue of a radio program which she listened to.

The defendant testified that she was with Louis Boeche from 6 p. m. on, during the evening in question, and her testimony is in exactitude with that of the witness Louis Boeche.

Jack Knudtson testified that he is a criminal investigator for the Nebraska Safety Patrol, had worked in that capacity for a year prior to the time of the trial, and had been connected with the patrol for eight years; that he is known as a polygraph operator, and is engaged in the process of setting up a criminal laboratory for the state; that a polygraph machine, commonly referred to as a lie detector, is one that makes many recordings, such as the increase and decrease of blood pressure. It is also a galvanometer that records the increase and decrease of perspiration, and also a munograph that records respiration and inhalation and expiration of breath. He described the machine and the manner in which it makes the recordings, and testified that the defendant voluntarily submitted to certain tests. The defendant then offered the witness to testify to and prove the results of the tests so made which would show a normal reaction to all the questions propounded with reference to the commission of the offenses charged, and indicate that the defendant was not guilty of such offenses. Objection was made to the competency of such evidence and was sustained, we believe properly so for the reasons hereinafter given.

The trial court gave an instruction which contained

the following language: "Yet, you have no right to reject the testimony of any of the witnesses without good reason, and you should not do so until you find it irreconcilable with other testimony which you may find to be true."

The writer of this opinion joined in a concurrence in the case of Schluter v. State, *ante* p. 284, 37 N. W. 2d 396, that such language contained in an instruction is prejudicially erroneous in all civil and criminal cases and requires a reversal of any such case. The majority opinion in the afore-cited case announces the rule that an instruction containing such language is held to be erroneous and ordinarily prejudicial. We must conclude from the factual situation above detailed that an instruction containing the language as heretofore set out in this case is prejudicially erroneous and requires a reversal and remand of the cause for further proceedings.

The trial court gave instruction No. 13 as follows: "You are instructed that one of the defenses interposed by the defendant in this case is what is commonly known as an alibi; that is, that the defendant was at another place at the time of the alleged commission of the crimes. The Court instructs you, the jury, that such defense is as proper and legitimate, if proven, as any other, and all evidence bearing on that point should be carefully considered by the jury. If, in view of all the evidence, you, the jury, have a reasonable doubt as to whether the defendant was in some other place when the crime was committed, you should give the defendant the benefit of the doubt and find her not guilty. As regards the defense of an alibi, the jury are instructed that the defendant is not required to prove that defense beyond a reasonable doubt to entitle her to an acquittal on either or both of the counts of the amended information. It is sufficient if the evidence raises a reasonable doubt of her presence at the time and place of the commission of the crimes charged in the counts of the amended information filed herein."

The defendant contends that the district court erred in giving the foregoing instruction, for the reason that the instruction placed the burden of proof to establish an alibi on the defendant by the use of the words "if proven," and by the further language in the instruction, "the defendant is not required to prove that defense beyond a reasonable doubt to entitle her to an acquittal * * *."

An instruction on the defense of an alibi similar to the one given in the case at bar has been approved by this court in McLain v. State, 18 Neb. 154, 24 N. W. 720, and in Huckett v. State, 121 Neb. 364, 237 N. W. 159. In view of all the instructions given, and by analyzing the authorities with reference to the language "if proven" as appears in the instruction, the same was not prejudicially erroneous in the instant case. However, the phrase "if proven" is subject to criticism and we do not approve its use and believe that this phrase should be eliminated in the future in any instruction on an alibi, or any other language appearing in the instruction that might indicate the shifting of the burden of proof on the defense.

This brings us to the assignment of error where the trial court refused to admit evidence of the results of tests made on the defendant by the use of a polygraph, commonly known and referred to as a lie detector, to which the defendant voluntarily submitted.

We have heretofore set forth the qualifications and study made by the officer in charge of the giving of tests on the polygraph in behalf of the Nebraska Safety Patrol.

In the following reported cases the courts have generally rejected such tests on the ground that their reliability has not yet been fully established.

In People v. Forte, 279 N. Y. 204, 18 N. E. 2d 31, 119 A. L. R. 1198, in speaking of a polygraph or lie detector, the court said that the court may not take judicial notice that such an instrument is or is not ef-

fective for examining the truth, and, until the fact be demonstrated by qualified experts, it cannot be said, as a matter of law, that the trial court erred in denying the motion to reopen a case to have the defendant submit to an examination by the polygraph.

Cogent reasons in support of this attitude readily suggest themselves. In the first place, the vital function of cross-examination would be impaired. The operator, appearing as a witness to report and interpret the results of the test, might be questioned as to his qualifications, experience, his methods, and on similar matters, and that is about all. But the machine itself—conceding the comparatively high percentage record as to accuracy and reliability claimed for it—escapes all cross-examination. There is no persuasive analogy here with such tests as fingerprinting which have a strictly physical basis, clearly demonstrable. It is not contended that the lie detector measures or weighs the important psychological factors. Many innocent but highly sensitive persons would undoubtedly show unfavorable physical reactions, while many guilty persons, of hardened or less sensitive spirit, would register no physical indication of falsification. This the trained operators of course understand, and proceed upon the basis of a large percentage of error. But it seems quite too subtle a task of evaluation to impose upon an untrained jury. See State v. Lowry, 163 Kan. 622, 185 P. 2d 147. See, also, annotations in 139 A. L. R. 1174, 34 A. L. R. 147, 86 A. L. R. 616, 119 A. L. R. 1200; Frye v. United States, 54 App. D. C. 46, 293 F. 1013, 34 A. L. R. 145; State v. Bohner, 210 Wis. 651, 246 N. W. 314, 86 A. L. R. 611; State v. Cole, 354 Mo. 181, 188 S. W. 2d 43, 189 S. W. 2d 541.

It is apparent from the foregoing authorities that the scientific principle involved in the use of such polygraph has not yet gone beyond the experimental and reached the demonstrable stage, and that it has not yet received general scientific acceptance. The experimenting psy-

chologists themselves admit that a wholly accurate test is yet to be perfected.

We conclude the trial court did not err in rejecting this evidence.

Other assignments of error need not be discussed.

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

REVERSED AND REMANDED.

CHAPPELL, J., concurring.

I concur in the result. However, I do not agree with that part of the opinion holding that as a matter of law the so-called polygraph or lie detector, here involved, "used for determining the truthfulness of testimony has not yet gained such standing and scientific recognition as to justify the admission of expert testimony deduced from tests made under such theory."

The history of such physiological or psychological deception tests, its progressive development, scientific efficiency, and the question of the admissibility thereof, particularly in criminal cases, will be found in 34 A. L. R. 145, 86 A. L. R. 611, 119 A. L. R. 1198, 139 A. L. R. 1171, together with the respective annotations thereto, and supplemental decisions to date.

It will be noted that the first case, reported as Frye v. United States, 54 App. D. C. 46, 293 F. 1013, 34 A. L. R. 145, decided December 3, 1923, involved defendant's offer of an expert witness to testify concerning the result of a simple systolic blood pressure deception test made upon him prior to trial. The government's objection thereto was sustained, upon the basis that such a test "for determining the truthfulness of testimony has not yet gained such standing and scientific recognition as to justify the admission of expert testimony deduced from tests made under such theory."

Defendant therein was convicted, and upon appeal therefrom the court said: "Just when a scientific principle or discovery crosses the line between the experimental and demonstrable stages is difficult to define. Some-

where in this twilight zone the evidential force of the principle must be recognized, and while courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs.

"We think the systolic blood-pressure deception test has not yet gained such standing and scientific recognition among physiological and psychological authorities as would justify the courts in admitting expert testimony deduced from the discovery, development, and experiments thus far made."

State v. Bohner, 210 Wis. 651, 246 N. W. 314, 86 A. L. R. 611, decided January 10, 1933, involved the rejection of an offer by defendant of like evidence involving a like test, to prove an alibi for defendant. Therein, after citing and quoting from Frye v. United States, *supra*, it was said: "We are not satisfied that this instrument, during the ten years that have elapsed since the decision in the Frye Case, has progressed from the experimental to the demonstrable stage. * * * While it may have some utility at present and may ultimately be of great value in the administration of justice, it must not be overlooked that a too hasty acceptance of it during this stage of its development may bring complications and abuses that will overbalance whatever utility it may be assumed to have."

In People v. Forte, 279 N. Y. 204, 18 N. E. 2d 31, 119 A. L. R. 1198, decided November 29, 1938, after all the evidence was adduced, defendant's counsel moved to reopen the case and that he be permitted to take defendant to a laboratory in another county, there to be examined under the pathometer, commonly known as a lie detector. In reviewing denial of the motion, it was said: "We cannot take judicial notice that this instrument is or is not effective for the purpose of determining the truth. Can it be depended upon to operate with complete success on persons of varying emotional stability? The

record is devoid of evidence tending to show a general scientific recognition that the pathometer possesses efficacy. Evidence relating to handwriting, finger printing and ballistics is recognized by experts as possessing such value that reasonable certainty can follow from tests. Until such a fact, if it be a fact, is demonstrated by qualified experts in respect to the 'lie detector,' we cannot hold as matter of law that error was committed in refusing to allow defendant to experiment with it."

It will be noted that the court therein simply concluded that it could not, in the absence of competent foundation evidence, take judicial notice as a matter of law, that the lie detector did or did not possess such general scientific recognition as to justify the admission of expert testimony deduced from tests made under such theory.

In People v. Becker, 300 Mich. 562, 2 N. W. 2d 503, 139 A. L. R. 1171, decided February 11, 1942, defendant offered the result of a polygraph or lie detector test made upon him, which, upon objection by the state, was refused admission. However, in sustaining the exclusion, it was said: "We see no reason why, under the circumstances of this case, the result should have been admitted. There was no testimony offered which would indicate that there is at this time a general scientific recognition of such tests. Until it is established that reasonable certainty follows from such tests, it would be error to admit in evidence the result thereof."

In the annotation, 139 A. L. R. 1174, speaking of the foregoing case, it was said: "In this case, the test being offered by the defendant and objected to by the prosecuting attorney, the appellate court held that no error was committed in refusing to admit the results of the test in evidence. It should be observed that the court in this case, as is true of the court in People v. Forte (1938) 279 NY 204, 18 NE (2d) 31, 119 ALR 1198 (rehearing denied in (1939) 279 NY 788, 18 NE (2d) 870), merely held that such test was properly rejected in the absence of testi-

mony indicating a general scientific recognition of such a test. Had a proper foundation been laid for its introduction into evidence, it is conceivable that a different determination would have resulted."

In People v. Kenny, 3 N. Y. S. 2d 348, which People v. Forte, *supra,* did not overrule in principle, defendant prior to trial was subjected to a lie detector test at Fordham University under a modern triple-test machine similar to that at bar, designed for accurately testing human emotional reactions by graphically recording the increase or decrease of blood pressure, perspiration, and respiration of the subject while under examination.

In his defense, defendant offered the testimony as to the findings of the witness who asked the questions and operated the machine. Such witness was head of the Department of Psychology of the Graduate School of Fordham University, held a degree of doctor of physics from Georgetown University and one in philosophy from the Gregorian University. For seven years he was a professor of physiology at the Medical School of Georgetown University and had done extensive research work and private study in Europe, especially at the University of Vienna. His claim for scientific accuracy and reliability of the apparatus and tests resulting therefrom was based upon a study which covered more than 6,000 individual tests in which his findings were subsequently affirmed. He expressed the firm conviction, based upon evidence and investigations, that the tests, when properly employed upon those actually charged with crime, would prove 100 percent efficient and accurate in the detection of deception.

The state conceded the scientific value and practical utility of the apparatus and technique, but objected to evidence of its findings upon the grounds, among others, that the scientific principle involved in its use had not yet gone beyond the experimental and reached the demonstrable stage, and had not yet received general scientific acceptance. In doing so, the state relied upon

State v. Bohner, *supra,* and Frye v. United States, *supra,* both of which involved the results of simple systolic blood pressure tests as distinguished from the apparatus therein shown to have been perfected. The objection was overruled, and the court directed that the testimony should be received to be evaluated by the jury.

The opinion quoted from 2 Wigmore on Evidence (2d ed.), § 875, p. 237, App. 1, wherein it was said: " 'If there ever is devised a psychological test for the evaluation of witnesses, the law will run to meet it.' "

The opinion further said: "Objection to the use of scientific proof is not at all novel. At one time or another in their development testimony as to fingerprints, as to X-rays, as to handwriting, as to bullet markings and as to psychiatric examinations were all refused admission into evidence. * * * Their gradual admission into evidence came only after many rebuffs and rejections at the hands of various courts. Today their right to admission in evidence is firmly intrenched in our law. Yet the deductions of handwriting experts and of psychiatrists are not at all uniform, and we frequently have such experts testifying in our law courts and drawing conflicting inferences from their examinations. Despite the fact that such experts frequently differ in their conclusions, their testimony is received in evidence, and it is left to a jury to determine which, if either, expert or experts they are going to believe and accept. * * * Both upon legal principle and sound reasoning, it would seem that the courts, if willing to accept and receive handwriting testimony, psychiatric testimony and other such expert opinion, should also admit in evidence testimony of the pathometer test and the results disclosed thereby when a proper foundation has been laid therefor."

I agree that in the case at bar no sufficient foundation was laid to qualify the operator of the machine as an expert and that likewise no sufficient foundation was laid for admission of the exhibits demonstrating the recorded results of the tests to which defendant voluntarily

submitted upon request of county and state officials, who, as an inducement therefor, promised her a release if the tests showed, as they concededly did, that she was telling the truth when denying her guilt.

However, I am convinced that if such a foundation were laid, as was done in People v. Kenny, *supra,* then the testimony of the operator and the results obtained by the tests would be admissible in criminal cases, such as that at bar, wherein defendant had voluntarily submitted to the tests. That complicated and difficult questions may arise therefrom in the trial of cases should be no reason for the exclusion of such evidence. Modern court procedure must embrace recognized modern conditions of mechanics, psychology, sociology, medicine, or other sciences, philosophy, and history. The failure to do so will only serve to question the ability of courts to efficiently administer justice.

Be that as it may, in the case at bar, while the operator of the machine was on the stand, defendant offered in evidence the recordings which concededly demonstrated that defendant was not guilty. The State's objection thereto for lack of foundation was sustained. Thereupon, without objection, defendant was called to the stand for the purpose of adducing further foundation evidence.

The record discloses that the State, upon cross-examination of her at that time, doubtless intended to and did adduce a reasonable inference that the tests showed affirmatively that defendant was guilty. The operator was then recalled, whereupon defendant offered to prove that the results of the tests given defendant showed a negative reaction upon questions and answers propounded in connection with the offense charged. Upon objection thereto by the State, the offer was refused.

In such a situation, defendant was entitled to rebut that inference by showing the true result of the tests, which indicated her innocence. The court's refusal to permit the admission of such evidence, as I view it,

was prejudicially erroneous. See Burlingim v. State, 61 Neb. 276, 85 N. W. 76, wherein it was held: "It is error to exclude evidence the legitimate tendency of which is to put an innocent complexion upon inculpatory circumstances proven by the state; the weight of such evidence is for the jury."

Therefore, I agree that the judgment should be reversed as was done by the majority opinion, but do not believe that upon a retrial the results of the lie detector test made upon defendant, under the circumstances in this case, should be excluded if a proper foundation is laid whereby it would be established that the operator was an expert in that field, and that the apparatus used and the tests made thereunder have been given general scientific recognition as having efficacy.

WENKE, J., concurring.

Although I am in accord with the conclusion reached by the majority that the judgment should be reversed and the cause remanded, I am not in accord with the basis adopted by the majority for arriving at that conclusion.

Under a factual situation as set forth in the majority opinion I do not believe the instruction given by the trial court was prejudicially erroneous. My reasons for disagreeing are sufficiently set out in my dissent in Schluter v. State, *ante* p. 284, 37 N. W. 2d 396.

However, for the reasons stated in the concurring opinion of Judge Chappell, with which I am in full accord, the conclusion arrived at by the majority is, in my opinion, the proper one.

CARTER, J., joins herein.

LLOYD MORRIS PAULI, PLAINTIFF IN ERROR, V. STATE OF NEBRASKA, DEFENDANT IN ERROR.
37 N. W. 2d 717

Filed May 19, 1949. No. 32610.

1. **Indictments and Informations.** An information which apprises the defendant, with reasonable certainty, of the accusation against him so that he may prepare a defense and plead the judgment as a bar to subsequent prosecution for the same offense, meets fundamental purposes of information, as well as constitutional requirements.
2. **Trial: Appeal and Error.** Instructions are to be considered together, to the end that they may be properly understood, and, when so construed, if as a whole they fairly state the law applicable to the evidence, error cannot be predicated on the giving of the same.
3. **Criminal Law.** The sentence in the first instance lies with the trial judge even when leniency has been recommended, and will not be disturbed unless there is an abuse of sound judicial discretion in such respect.
4. ———. The proof of value and ownership of personal property destroyed in the instant case is sufficient in the absence of evidence contradictory thereto.
5. ———. Evidence examined and held sufficient to sustain a conviction of the destruction of personal property over and above the value of thirty-five dollars as charged in the information under the appropriate section of the statutes.

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

Straight Townsend, for plaintiff in error.

James H. Anderson, Attorney General, and *Walter E. Nolte,* for defendant in error.

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

MESSMORE, J.

The defendant, Lloyd Morris Pauli, was charged with the crime stated in section 28-572, R. S. 1943, of felonious, willful, and malicious destruction of personal property of a value of more than thirty-five dollars. He was

convicted of the offense and sentenced to the State Reformatory for Men at Lincoln, Nebraska, for a period of from 33 to 36 months. He brings the case here to review the record of his conviction by writ of error, and for convenience will hereinafter be referred to as the defendant.

There is little dispute in the evidence. It appears that during the night of June 18 and the early morning hours of June 19, 1948, the defendant broke out a window and entered Our Lady of Guadalupe Church located at 1110 South Twelfth Avenue in the city of Scottsbluff, Scotts Bluff County, Nebraska, and destroyed personal property situated therein such as religious articles used in the ritual of the church during services, totally demolishing the same. The defendant admits that he broke and entered the church and destroyed personal property located therein because he was against the form of worship conducted in the church. There is evidence that the defendant had been drinking intoxicating liquor. A police officer testified he believed the defendant was under the influence of intoxicating liquor and narcotics to some extent, but to what extent is not shown. The defendant, when arrested, had in his possession certain religious articles he obtained while in the church, and apparently did not hesitate to tell the police officers of the destruction he wrought while inside the church. No testimony was offered in behalf of the defendant.

The administrator of Our Lady of Guadalupe Church testified that the real estate was owned by the diocese of Grand Island; that the church was composed of a designated group of people who used the same for services and religious worship; that he was in full and complete charge of the mission or church and familiar with the personal property located therein; that the articles used in the ritual for the religious services were purchased by the people who used the church; that he had been associated with the church since October 1939, and was acquainted with and knew the general extent

of the articles which were injured and destroyed during the night of June 18 and early morning of June 19, 1948; that such articles, for the most part, could not be restored to their normal use and were injured and destroyed to the extent of the value of $1,900; and that he fixed the value of the articles so destroyed and demolished on the basis of his experience in purchasing such articles and on an attempt to replace them.

The defendant moved to strike the evidence of the administrator of the church for the reason there was complete lack of evidence that the property belonged to the church, and ownership thereof, as alleged in the information, was one of the essential elements of the offense.

From the record there is no question but that the administrator of the church had the full control and custody of the religious articles that were destroyed, and conducted the services in the church for and in behalf of those persons who worshipped there and who furnished and purchased such articles. It may be true, the administrator's testimony in such respect might have been more detailed or complete with reference to specific items, however, in the absence of contradictory testimony as to the value of such articles and the ownership thereof, we conclude the evidence of the value and ownership of such destroyed articles was ample and sufficient, and the trial court did not commit prejudicial error in overruling the defendant's motion to strike the testimony of the administrator of the church.

Defendant contends the information failed to allege a crime under section 28-572, R. S. 1943, for the reason that the alleged ownership of the property is not in either a person or persons, a corporation, or an association of persons, as provided in such section, and calls attention to the language in such statute as follows, with reference to property "of the value of thirty-five dollars or more, owned by any such person or persons, corporation, or association of persons," none of which

language appears in the information, but merely the language and description "Our Lady of Guadalupe Church."

The objection of the defendant to the information is very technical. Supertechnical rules in the drawing of complaints, informations, and indictments have been abandoned by this court in recent years where it appears that the defendant was not misled and understood the charge as filed against him. See Buckley v. State, 131 Neb. 752, 269 N. W. 892.

An information which, with reasonable certainty, apprises the defendant of the charge filed against him so that he may prepare a defense and plead the judgment as a bar to subsequent prosecution for the same offense, meets fundamental purposes of such information, as well as constitutional requirements. See, Sedlacek v. State, 147 Neb. 834, 25 N. W. 2d 533, 169 A. L. R. 868; Cowan v. State, 140 Neb. 837, 2 N. W. 2d 111; § 29-2308, R. S. 1943; Holmes v. United States, 134 F. 2d 125, certiorari denied, 319 U. S. 776, 87 L. Ed. 1722.

We conclude the information in the instant case fully and adequately informed the defendant of the crime charged. The defendant's contention is without merit, and is overruled.

The defendant predicates error in that the trial court overruled his motion objecting to the introduction of any evidence and submitting the cause to the jury when the information charged the defendant under section 28-572, R. S. 1943, rather than under the provisions of section 28-578, R. S. 1943. In this connection the defendant relies on the case of Wallace v. State, 91 Neb. 158, 135 N. W. 549.

In the cited case the defendant was charged under the Criminal Code (§ 7776a, Comp. St. 1909; § 2145a, Ann. St. 1909) with hog stealing, which provided a term in the penitentiary upon conviction. At that time section 119 of the Criminal Code (§ 7778, Comp. St. 1909; § 2193, Ann. St. 1909) provided punishment for

any person stealing goods or chattels of any kind or nature of the value of less than thirty-five dollars, while section 114 of the Criminal Code (§ 7772, Comp. St. 1909; § 2187, Ann. St. 1909) was of like purport except it provided for stealing of goods or chattels of any kind or nature of the value of thirty-five dollars or upward, and prescribed a penalty for such violation of the statute. The defendant was convicted of the crime of hog stealing. He appealed to this court contending he might have properly been charged under the sections of the statute hereinbefore summarized, and that the section of the statute under which he was prosecuted rendered the hog stealing statute, designated as section 117b, obnoxious, in that it destroyed the uniform operation of the law. This court said: "We cannot give our assent to this contention. By section 117b hog stealing is made a definite and substantive crime. The information on which the defendant was prosecuted charged him with a violation of that section, and in order to warrant a conviction the state was required to produce testimony establishing the commission of that offense." Therefore, the effect of section 117b was to eliminate the offense of hog stealing from the provisions of sections 114 and 119 of the Criminal Code, and compel the State to prosecute, if at all, under the provisions of that section.

The defendant contends the situation in the instant case is identical with that as stated and announced in Wallace v. State, *supra*. In the instant case the defendant was charged under section 28-572, R. S. 1943, which provides in part: "If any person shall willfully and maliciously destroy or injure personal property of any description whatever, or any building or structure of any kind whatsoever upon land, of the value of thirty-five dollars or more, owned by any person or persons, corporation, or association of persons, every person so offending shall be punished * * *" and prescribes the punishment. To like effect is section 28-573, R. S. 1943, except

as to the value of the property, that is, property under the value of thirty-five dollars, and the punishment is prescribed in such section. The section of the statute which the defendant contends if prosecuted at all he must be prosecuted under is section 28-578, R. S. 1943, which provides, in part: "Whoever shall willfully and maliciously injure or deface any church edifice, * * * buildings, its fixtures, books or appurtenances, or shall commit any nuisance therein, * * *" and prescribes the penalty.

We are not in accord with the defendant's contention in such respect. We have heretofore set out the essential elements of the offense as shown by section 28-572, R. S. 1943, under which the defendant was charged, and of section 28-578, R. S. 1943, under which the defendant contends he should have been charged. From the evidence appearing in the record in the instant case it is abundantly clear that the defendant was guilty of willfully and maliciously destroying personal property within the meaning and contemplation of section 28-572, R. S. 1943. The defendant's contention that the acts committed by him were a willful and malicious defacing or injury of a church, its fixtures, books, or appurtenances, as provided in such section, cannot be acquiesced in, and is untenable under the evidence as it appears in the record in this case. There is a substantial and material distinction and difference in the two crimes as defined in said sections, and the evidence adduced clearly placed the acts charged within the contemplation and purview of section 28-572, R. S. 1943.

The language contained in Wallace v. State, *supra*, is not conclusive in all events and especially under the circumstances of the instant case. There are cases too numerous to cite where prosecutions are brought under statutes involving different degrees of an offense.

The defendant predicates error on the part of the trial court in certain instructions given to the jury, among them instruction No. 8 to the effect that the evidence

offered in this case that the personal property injured and destroyed was purchased by a group of people who use Our Lady of Guadalupe Church and mission for services and religious worship, the contention being that this instruction assumed the corpus delicti was established. From an examination of the instructions, the following authority is applicable.

Instructions are to be considered together, to the end that they may be properly understood, and, when so construed, if as a whole they fairly state the law applicable to the evidence, error cannot be predicated on the giving of the same. See Herman v. Firestine, 146 Neb. 730, 21 N. W. 2d 444.

Instructions were tendered by the defendant with reference to the effect of intoxication. These instructions were rejected and instructions dealing with this subject were given by the trial court. The degree of intoxication of the defendant, or the fact that he might have been under the influence of intoxicating liquor and narcotics is not shown. From an examination of the instructions, we find the same to be without prejudice to the defendant.

"A judgment will not be set aside because a more accurate statement of the law might have been made than that contained in the instructions, when from a consideration of the instructions as a whole no prejudicial error appears." Wright v. Cameron, 148 Neb. 292, 27 N. W. 2d 226.

The defendant contends the sentence is excessive, and cites cases where this court has reduced the sentence when the court felt the same to be excessive, as provided for in section 29-2308, R. S. 1943.

The Supreme Court will not often reduce the sentence imposed by the trial court, particularly where the crime involved great moral turpitude and was one of violence. See Peterson v. State, 115 Neb. 302, 212 N. W. 610.

In Ayres v. State, 138 Neb. 604, 294 N. W. 392, this

court held that sentence lies with the judge, even when leniency has been recommended.

In the instant case the court imposed a sentence which in his sound judicial discretion met the requirements of the crime of which the defendant was found guilty. From an examination of the record we see no reason to disturb this sentence.

Other assignments of error are not necessary to be determined.

For the reasons given in this opinion the verdict of the jury and the judgment of the trial court thereon is affirmed.

AFFIRMED.

YEAGER, J., participating on briefs.

JOSEPH SKOLIL ET AL., APPELLEES, V. LYDIA KOKES, APPELLANT.
37 N. W. 2d 616

Filed May 19, 1949. No. 32575.

1. **Waters.** By virtue of section 31-201, R. S. 1943, an owner of land may, without liability in damages, drain the same in the general course of natural drainage by constructing and maintaining in a reasonable and proper manner, and wholly on his own land, an open ditch or tile drain, discharging a reasonable quantity of water therefrom into a natural watercourse upon his own land or into a natural drainway thereon, whereby such water may be carried into some natural watercourse.
2. ———. Where water is impounded upon land by natural conditions whereby a pond is formed, the owner of such land has no lawful right to remove an impediment to its flowage and thereby cause such water to flow upon the land of another to his damage.
3. **Injunction.** For such an injury injunction is the proper remedy, and equity looks to the nature of the injury inflicted, together with the fact of its constant repetition, or continuation, rather than to the magnitude of the damage inflicted, as the ground of affording relief.
4. **Waters.** A proprietor may defend himself against the encroachments of surface water by embankment or dike or otherwise and will not be liable in damages which may result from the deflec-

tion and repulsion defended against, provided that the proprietor in making defense on his own land himself exercised ordinary care and provided he so uses his own property as not to unnecessarily and negligently injure another.

5. ———. Where a substantial amount of water from another source or sources has been added to the water for which defendant is liable, and the combined waters have caused the damage, then it is incumbent upon the plaintiff to establish either that his damages would have occurred from the waters for which defendant is liable, or to establish the amount of his damage that had been caused by the waters for which defendant is liable.

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

Davis & Vogeltanz, for appellant.

William F. Manasil and *Harold A. Prince,* for appellees.

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

WENKE, J.

Joseph Skolil and Rose Skolil brought this action in the district court for Valley County against Lydia Kokes. The purpose of the action is to perpetually enjoin and restrain defendant from using drainage ditches on her land, to require defendant to fill said drainage ditches and restore her land to its former condition, and for the recovery of $500 as damages.

The trial court found generally for the plaintiff and entered its decree accordingly, awarding plaintiff, in addition to injunctive relief, the sum of $225 as damages.

Defendant filed a motion for new trial and from the overruling thereof she has appealed.

The record discloses that the appellees and appellant own adjoining farms just south of and bordering on the North Loup River in Valley County. The farms are in sections 35 and 36, Township 19 North, Range 13 West, in said county. Appellees' farm is east and downstream from that of appellant. The river at this

point flows east and south, although generally in an easterly direction.

South from the river there is a rise in these lands. However, the land seems to lie in flat areas or benches. The first bench, which borders on the river, is about 23 acres in area. About 21 acres of this is on appellees' farm and about 2 acres on that of the appellant. This area is meadowland, although partly used for pasture. After a slight rise there is a second flat area or bench of some 15 acres. This bench is mostly on appellant's farm as there are only about two acres thereof on that of appellees. After a slight rise there is a third bench. Apparently there is a fourth bench but with that we are not here concerned.

The extent of the third bench is not shown. On appellant's farm it seems to have an area of about 40 or 50 acres although estimated as high as 80. The surface drainage in this area is toward a low spot therein somewhat west of the division line between the two farms. The area of this low spot seems to be about 15 acres although estimated as high as 30. The water from this area collects in this basin and ponds there, subject only to seepage and evaporation. Before it will flow over the edge thereof the water therein must reach a depth of about 18 inches. This it has rarely, if ever, done. When it reaches that height the evidence is not too clear as to just what direction the overflow will take, although it would seem that it would be slightly east but generally north. Such overflow, if any, has established no well-defined channel or watercourse.

On June 19, 1947, appellant caused a ditch to be blasted from this low area on her farm to the second level or bench thereof and from there to the first level or bench. These ditches are on appellant's farm and about 12 to 15 feet west of the division fence. This caused the ponded waters on the third level to drain by flowing through these ditches onto appellant's two acres

on the first bench. From there it drained onto appellees' land located on this bench.

The natural drain on this first bench is toward the southeast. While there are low areas thereon it contains no natural waterway or watercourse with an outlet to the river or any other stream. As a result parts of this land became flooded and the evidence shows that at the time of the trial there was water on appellant's pasture deeper than the height of an ordinary boot. It is apparent that if the appellant is permitted to continue to drain this basin that the flooded condition will be permanent and the damage being caused thereby will continue.

We have examined the appellees' petition and find the allegations thereof sufficient to state a cause of action.

Appellant contends she had the right to do what she did. Section 31-201, R. S. 1943, provides: "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."

As stated in Halligan v. Elander, 147 Neb. 709, 25 N. W. 2d 13: "By virtue of section 31-201, R. S. 1943, an owner of land may, without liability in damages, drain the same in the general course of natural drainage by constructing and maintaining in a reasonable and proper manner, and wholly on his own land, an open ditch or tile drain, discharging a reasonable quantity of water therefrom into a natural watercourse upon his own land or into a natural drainway thereon, whereby such water may be carried into some natural watercourse."

In Aldritt v. Fleischauer, 74 Neb. 66, 103 N. W. 1084,

70 L. R. A. 301, we said: "* * * an owner of land has the right to drain ponds or basins thereon of a temporary character by discharging the waters thereof by means of artificial channels into a natural surface water drain on his own property, and through such drain over the land of another proprietor, even though the flow in such natural drain is thereby increased over the lower estate, provided he acts in a reasonable and careful manner and without negligence, * * *." See, also, Todd v. York County, 72 Neb. 207, 100 N. W. 299, 66 L. R. A. 561; Arthur v. Glover, 82 Neb. 528, 118 N. W. 111; Steiner v. Steiner, 97 Neb. 449, 150 N. W. 205.

Section 31-202, R. S. 1943, defines watercourse as follows: "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."

The difficulty with appellant's position in this regard is that the drainage of this pond on her land was not into a natural waterway or watercourse on her land but onto a piece of land the natural surface drainage of which was east and southeast onto that of appellees. It is true that part of appellees' land on this level had low areas where water sometimes collected and remained in small pools but it did not have a natural waterway or watercourse with an outlet to the river or any other stream. In fact, the evidence shows that water collecting on this land would have to be several feet deep before any of it would flow into the river. The evidence shows that at the time of the trial it lacked six inches of flowing into the river although at that time the water in appellees' pasture was so deep that appellant's witness could not wade it with ordinary boots. Prior to the construction of the ditches and draining of the water from the pond this bench had all been good meadow.

As stated in Todd v. York County, *supra*: "In Davis v. Londgreen, 8 Neb. 43, an early case in this court,

it is held that: 'The owner of a natural pond or reservoir wherein the surface water from the surrounding land accumulates, and from which it has no means of escape except by evaporation or percolation, cannot lawfully, by means of a ditch, discharge such water upon the land of his neighbor, to his injury.' It is apparent from a reading of the opinion in that case that what the court in fact decided was that the surface water on the upper estate could not be collected in an artificial channel and thrown on the land below there to remain, or to cut a channel for itself to some lower level. The principle enunciated may be considered as the accepted common law rule relating to the deflection of surface waters, and is and has been the doctrine obtaining in this state since its first announcement." The court therein went on to say: "Where there are two estates otherwise equally favorably situated by nature, and one is burdened by an accumulation of surface water in a pond or lake, it is difficult to conceive of any sound principle of justice which would permit the estate so burdened to be relieved by collecting in an artificial ditch such surplus waters, and casting them upon the land of the lower proprietor to his damage and detriment. Each proprietor takes the land as nature has formed it, and one ought not to improve his estate solely at the expense of his more fortunate neighbor."

Here applicable is the following from Yocum v. Labertew, 145 Neb. 120, 15 N. W. 2d 384: "When defendant cut the channel across the natural embankment and caused the water to flow into the basin he did not drain the water into any natural watercourse or into a natural depression or draw whereby it could be carried into a natural watercouse as provided by sections 31-301 and 31-302, Comp. St. 1929 (now sections 31-201 and 31-202, R. S. 1943). The evidence is that the water upon reaching plaintiffs' land is impounded in a natural basin from which the only means of escape is through evaporation or deep percolation, and there is no doubt that

digging the channel has been the cause of injury and damage to plaintiffs."

Appellant is draining the water from a pond on her land to a lower level on her farm. From there it flows, because of the natural surface drainage, onto her neighbor's land where it has no natural outlet or escape, except through evaporation or seepage, until it reaches a substantial depth, thus causing these lands to become and remain flooded. Under the following principles we think she had no right to do so.

What was said in Graham v. Pantel Realty Co., 114 Neb. 397, 207 N. W. 680, is, under the facts herein, controlling. Therein we said: "Certain it is that an upper proprietor cannot lawfully cut away the rim of the banks, which incloses a body of standing water on his land, and by the installation of a system of ditches, thereby discharge such water over and upon the lower lands of his neighbor to his injury. This constitutes a nuisance for which the trespasser may be enjoined. And, besides, he may be held in the same suit, to make good for such damages as he may have so unlawfully occasioned. * * * 'An owner of land upon which there is a natural accumulation of water into a swamp or lake, has no right to improve his land by draining such waters from one portion of his land through a natural barrier to another portion, whence it would escape over the lower lands of an adjoining proprietor; and the fact that the latter had the right to protect himself against such waters by diking or ditching would not cause the act to fall under the rule of damnum absque injuria.' Noyes v. Cosselman, 29 Wash. 635. See, also, Davis v. Fry, 14 Okla. 340, 69 L. R. A. 460."

And in Warner v. Berggren, 122 Neb. 86, 239 N. W. 473, where we said: "* * * the plaintiffs cannot be required, under the statute relied upon, to construct an artificial drain to care for the water discharged upon their land by such a ditch as the one constructed by the defendants."

Also, what we said in Yocum v. Labertew, *supra:* "Where water is impounded upon land by natural conditions whereby a lake is formed, the owner of such land has no lawful right to remove an impediment to its flowage and thereby cause such water to flow upon the land of another to his damage. * * * For such an injury injunction is the proper remedy, and equity looks to the nature of the injury inflicted, together with the fact of its constant repetition, or continuation, rather than to the magnitude of the damage inflicted, as a ground of affording relief."

While, as already stated, the evidence leaves a question of doubt as to whether the pond has ever been filled to overflowing and as to just where it would flow if it did so, however, if it can be said that it has and that appellees, by permitting debris to collect along their hog wire division fence, prevented the drain thereof toward the east and over his lands, such action, under the factual situation here where no natural drainway or watercourse had been formed, would be subject to the rule hereinafter set forth. It would not give appellant the right to drain her pond in the manner in which it was done.

"According to the common-law rule adopted by our court, no natural servitude exists in favor of the superior or higher land as to surface water, such as falls or accumulates by rain or the melting of snow. Therefore, the owner of the lower tenement may lawfully obstruct or hinder the flow of this water and in so doing hold it back or turn it off of his own land without liability therefor." Muhleisen v. Krueger, 120 Neb. 380, 232 N. W. 735.

"The rule in this jurisdiction is that a proprietor may defend himself against the encroachments of surface water by embankment or dike or otherwise and will not be liable in damages which may result from the deflection and repulsion defended against, provided that the proprietor in making defense on his own land himself exercised ordinary care and provided he so uses his own property as not to unnecessarily and negligently injure another."

Robinson v. Central Neb. Public Power & Irrigation District, 146 Neb. 534, 20 N. W. 2d 509. See, also, Churchill v. Beethe, 48 Neb. 87, 66 N. W. 992, 35 L. R. A. 442; Town v. Missouri P. Ry. Co., 50 Neb. 768, 70 N. W. 402; Todd v. York County, *supra;* Aldritt v. Fleischauer, *supra.*

As to the damages which appellees claimed they suffered because of this flooding of their land they alleged in their petition that this water, so diverted by appellant onto their hay ground, had covered 15 acres thereof and resulted in the killing of grasses thereon. The evidence establishes that the 21 acres of appellees' farm, which is on this first level, is meadow; that it has a good topsoil; that prior to being flooded it was good clean meadow; that 6 acres thereof was being used as pasture; that prior to the construction of these ditches on June 19, 1947, any seeped condition thereon never lasted over a few days; that since the construction of these ditches water stands on parts or all of 13 acres thereof; that this water has or is destroying the grasses growing thereon; and that the flooded lands have been damaged as a result thereof. We find the evidence supports the damages claimed and allowed.

Appellant further claims that the appellees did not segregate or allocate the damages to them resulting from the diverted waters and that from other causes. See Seibold v. Whipple, 143 Neb. 167, 9 N. W. 2d 154, and Faught v. Platte Valley Public Power & Irri. District, 147 Neb. 1032, 25 N. W. 2d 889. In this respect she refers to a flood on June 21, 1947, just two days after the ditches were dug; possible seepage from an irrigation ditch and laterals; and subsequent heavy rainfall. The evidence establishes that the damage resulted from the continuous flooding of these lands, which condition did not exist prior to the draining of the waters from this pond. The flood was only temporary, being of one day duration, and the silting therefrom is not the damage here complained of. The possible seepage from the irrigation ditch and

laterals is too speculative. We do not think the evidence establishes any extraordinary condition as to rainfall but, even if that were true, it would only add to the water coming out of the pond and onto the meadow. We think the appellees established that their damages occurred because of the waters for which the appellant is liable.

The rule is stated in Faught v. Dawson County Irrigation Co., 146 Neb. 274, 19 N. W. 2d 358: "Where a substantial amount of water from another source or sources has been added to the water for which defendant is liable, and the combined waters have caused the damage, then it is incumbent upon the plaintiff to establish either that his damages would have occurred from the waters for which defendant is liable, or to establish the amount of his damage that had been caused by the waters for which defendant is liable." See, also, Faught v. Platte Valley Public Power & Irrigation District, *supra*.

Appellant complains that the court's decree is not clear as to just what is required of her to comply therewith. We have clarified that in the first two paragraphs of this opinion. We do not hold that appellant cannot drain her lands, if done in a lawful manner, but only that she cannot lawfully do it in the manner in which it was done.

Having come to the conclusion that the trial court was correct in its holdings we therefore affirm its decree entered herein.

AFFIRMED.

YEAGER, J., participating on briefs.

MARY WHITNEY ET AL., APPELLANTS, V. OTTO COMBE ET AL., APPELLEES.
37 N. W. 2d 613

Filed May 19, 1949. No. 32602.

1. **Contracts.** Distinction exists between an ordinary commercial contract and a contract to personally care for another during

his lifetime. Contracts of the latter class are in a different classification and not subject to the ordinary rules applied by courts in other cases.

2. **Assignments: Contracts.** A promise to individually care for another is personal and not subject to assignment or to performance by another. While the death of the promisee does not constitute a willful violation of the promise it does, nevertheless, result in a failure to perform the promise and a failure of the consideration so far as the promisee is concerned for which an equity court will grant relief.
3. **Deeds: Cancellation of Instruments.** Where relief is given by setting aside or canceling a deed the consideration for which was an agreement by the grantee to individually care for the grantor, because full performance has been prevented by the death of the grantee, the court may impose such conditions as the equities of the case justify.

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

D. E. Owens, for appellants.

Ross D. Druliner, Jr., for appellees.

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

WENKE, J.

Mary Whitney, George Donaldson, and Dorothy Donaldson brought this action in the district court for Dundy County against Maria Combe, Otto Combe, Mabel Combe, George Combe, and Esther Combe. The purpose of the action is to have the court quiet in them the title to Lot 11 in Block 40 in the Second Addition to Benkelman, Nebraska. The trial court found generally for the defendants and dismissed the plaintiffs' petition. Their motion for new trial having been overruled, the plaintiffs appealed.

The record discloses the following factual situation: Maria Combe, a widow whose husband Charles had died about 1909, was, during the time here material, the owner of Lot 11 in Block 40 in the Second Addition to Benkelman and occupied it as her home. The property is a

small residence property and apparently of no great value, although no evidence was offered as to its actual worth. It appears that it was in a poor state of repair.

At the time of her husband's death the family lived on a farm near Benkelman. In addition to the parents the family consisted of three children. They were Johanna, a daughter, then the age of 20 or 21 years; Otto, a son, then the age of 16 years; and George, a son, then the age of 11 years.

About 1911 Johanna moved to Denver. She subsequently married and her name became Johanna Donaldson. To this marriage three children were born who are the appellants here. They constitute all her heirs as Johanna's husband had previously departed this life.

After the father's death the widow, with her two sons, stayed on the farm. She continued to operate it until 1929. In 1930 the mother moved to Benkelman. Thereafter each of the sons occupied a separate part of the farm and paid the mother rent for the use thereof. This continued until 1942. In that year the mother deeded to each of the sons the farm he was then occupying. This was done pursuant to an oral agreement she had with each of them and was their compensation for the services they had rendered her by staying home and helping farm the land. Subsequently the sons sold these farms and each received about $5,000 from the sale thereof.

Otto is married and the appellee Mabel Combe is his wife. George is also married and the appellee Esther Combe is his wife.

In 1945 Maria Combe, then being of advanced years and in poor health, induced her daughter to come to Benkelman from Denver to take care of her. The daughter had lived in Denver ever since going there in 1911. On August 2, 1945, the mother and daughter entered into an agreement with reference to the property herein involved. It is as follows:

"THIS AGREEMENT Made and entered into this 2nd day of August, A. D. 1945, by and between Maria Combe,

party of the first part and Johanna Donaldson, party of the second part:

"WITNESSETH That whereas party of the first part is not in good health, and is in need of someone to stay with her, and party of the second part has agreed to take care of and stay with said party of the first part, in consideration of the covenants and agreements of the party of the second part hereinafter set forth, party of the first part hereby agrees to and hereby does convey to party of the second part the dwelling and household goods located therein and all of Lot Numbered Eleven (11), in Block Numbered Forty (40), in the Second Addition to Benkelman, Dundy county, Nebraska, said deed of conveyance and bill of sale being delivered this date.

"IN CONSIDERATION of the covenants and agreements of the party of the first part hereinbefore set forth party of the second part agrees to give party of the first part physicial care and stay with her as long as she lives, and agrees not to sell or mortgage any of said property during the lifetime of said party of the first part.

"THIS AGREEMENT shall be binding upon the heirs, executors administrators and assigns of the parties hereto."

On the same day and as part of the same transaction the deed and bill of sale referred to in the agreement were made and executed. The bill of sale covered the household goods in the home. All these instruments were then placed in the safety deposit box of Maria Combe which was in the State Bank which is located in Benkelman. It should here be stated that Johanna Donaldson, by permission and direction of her mother, had, on various occasions while she lived with and was taking care of her mother, had access to and possession of this safety deposit box.

On the same day this agreement was made the daughter came into the home of her mother to stay and care for her. This she continued to do until in November 1946 when, due to illness, she was taken to a hospital in

Denver. She remained there until in January 1947. During her absence Dorothy Donaldson, one of the appellants and Johanna's daughter, took care of her grandmother and the home. Upon Johanna's return in January 1947, she again took up the care of her mother and continued to care for her until shortly before she, Johanna, died. Johanna died on July 17, 1947.

After her mother died Dorothy stayed in the home for a few weeks and offered to stay and take care of her grandmother. She was at that time employed by an implement company in Benkelman. Her offer was not accepted because it was thought an older person would be more desirable. As a consequence Alda Bennett was employed. She took care of Maria Combe and the home and was paid therefor by Maria Combe at the rate of $20 a week.

On September 4, 1947, the mother asked her two sons, Otto and George, to get the three papers, that is, the deed, the bill of sale, and the agreement, out of her safety deposit box in the bank and take them to her attorney, R. D. Druliner, to have them canceled. Otto and George got the papers out of the safety deposit box and took them to the office of Druliner, her attorney. Druliner wrote across these papers the following: "Cancelled on account of the death of Johanna Donaldson July 17th, 1947 Maria Combe by R. D. Druliner." At the same time and pursuant to the direction of their mother the sons had Druliner prepare a deed. This deed covered this property and was to the two sons. They, the two sons and Druliner, then went to the mother's home. There she executed the deed before Druliner, who appears to have been a notary, and gave the deed to her sons with directions that they have it recorded. This they did on the same day. There was an agreement between the sons and their mother relating to the consideration for this deed but evidence relating thereto was excluded.

In November 1947 the mother was taken to the hospital. She remained there until her death on April

25, 1948. In the meantime appellants had started this action on December 26, 1947. An amended petition, on which the case was heard, was filed on August 21, 1948.

In holding that Johanna Donaldson obtained no interest in the property by reason of the deed the trial court found: "* * * that the deed given to plaintiffs' ancestor, Johanna Donaldson was made simultaneously with a certain written agreement between Maria Combe and Johanna Donaldson, that said instruments constitute one agreement, that in said written agreement Johanna Donaldson agreed to take care of Marie Combe as long as she lives, that Johanna Donaldson died before Maria Combe and by reason of said death, there was a failure of consideration of the deed given by Maria Combe to Johanna Donaldson and Johanna Donaldson obtained no interest in the property involved herein by virtue of said deed."

There is no question but that the deed, bill of sale, and agreement are all part of the same transaction and that the consideration for the deed and bill of sale was that Johanna Donaldson would personally stay with and care for Maria Combe, her mother, as long as her mother should live. Unfortunately, due to Johanna's death, this was not possible.

The question presented is, what effect did the death of Johanna Donaldson before Maria Combe's have, that is, did it cause such a failure of consideration of the deed that the grantee named therein obtained no interest in the property by reason thereof?

With reference to the nature of such an agreement we have said: "Distinction exists as between an ordinary commercial contract and a contract of the kind here considered. Contracts of the latter class are in a different classification and not subject to the ordinary rules applied by courts in other cases. Anderson v. Reed, 20 N. M. 202, 148 Pac. 502, L. R. A. 1916B, 862." Copass v. Wilborn, 139 Neb. 124, 296 N. W. 565. Therein this court went on to say: "This and other courts have canceled

such contracts without stating any particular grounds for so doing. Tomsik v. Tomsik, 78 Neb. 103, 110 N. W. 674; Humbles v. Harris, 151 Ky. 685, 152 S. W. 797; Peck v. Hoyt, 39 Conn. 9."

What we held in Lewelling v. McElroy, 148 Neb. 309, 27 N. W. 2d 268, is here applicable. There we held: "The promise here was personal. While the death of the grantee would not constitute a willful violation of the promise, it nevertheless resulted in a failure to perform the promise and a failure of the consideration so far as the grantor was concerned, for which an equity court should grant relief."

And as stated in Bishop v. Aldrich, 48 Wis. 619, 4 N. W. 775: "The consideration for the conveyance has failed, and, under the circumstances peculiar to cases of this class, the conveyance ought to fail with it."

Where relief is given by setting aside or canceling a deed the consideration for which was an agreement by the grantee to individually care for the grantor, because full performance has been prevented by the death of the grantee, the court may impose such conditions as the equities of the case justify. See Tomsik v. Tomsik, 78 Neb. 103, 110 N. W. 674, and Lewelling v. McElroy, *supra*. Under the circumstances here should any conditions have been imposed?

The daughter was in the home from August 2, 1945, until July 17, 1947, or less than two years and, of this time, she spent about three months in the hospital. It appears she received $20 a month for these services besides her board and room. It also appears that Johanna's daughter stayed with her during this time. There is testimony that she spent these and other funds she had in fixing up the home, however, the testimony is not sufficiently definite to establish the amount so spent nor does it show anything in particular that any definite amount was spent for. In view thereof, we do not think the record sufficient nor the equities such as to require any

conditions to be imposed upon the appellees to entitle them to the relief granted.

For the reasons stated the decree of the trial court is affirmed.

AFFIRMED.

YEAGER, J., participating on briefs.

HENRY J. ALBERS, APPELLANT, V. GUY ZIEGLER, APPELLEE.
37 N. W. 2d 590

Filed May 19, 1949. No. 32606.

1. **Appeal and Error: Trial.** The findings of a court in a law action have the effect of a verdict of a jury and will not be interfered with unless they are clearly wrong.
2. ———: ———. The weight of evidence or credibility of witnesses is not a concern of this court in the review of such a case except to determine that the findings and judgment are supported by evidence and are not contrary to law.
3. **Brokers.** Whether a broker is the procuring cause of a sale is generally a question of fact for the jury, the decision in each case being dependent upon the particular facts and circumstances thereof.

APPEAL from the district court for Saunders County: HARRY D. LANDIS, JUDGE. *Affirmed.*

Carl F. Benjamin and *Howard V. Kanouff*, for appellant.

Ernest S. Schiefelbein and *Joseph L. Pallat*, for appellee.

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

WENKE, J.

Henry J. Albers brought this action in the district court for Saunders County against Guy Ziegler. The purpose of the action is to recover a real estate broker's commission in the sum of $1,250. The basis for recovery is the sale of a locker plant, ice, ice cream, and creamery

business located in Ashland, Nebraska, together with the real estate upon which the business is located. Upon trial a jury was waived. The trial court found for the defendant. The plaintiff appeals from the overruling of his motion for new trial.

With reference to the court's findings we most recently stated the applicable rule as follows: "The findings of a court in a law action have the effect of a verdict of a jury and will not be interfered with unless they are clearly wrong. The weight of evidence or credibility of witnesses is not a concern of this court in the review of such a case except to determine that the findings and judgment are supported by evidence and are not contrary to law. Barnhart v. Henderson, 147 Neb. 689, 24 N. W. 2d 854; State v. Neimer, 147 Neb. 284, 23 N. W. 2d 81." Foltz v. Brakhage, *ante* p. 216, 36 N. W. 2d 768. See, also, Gee v. City of Sutton, 149 Neb. 603, 31 N. W. 2d 747, and Bell v. Stedman, 88 Neb. 625, 130 N. W. 257.

The parties will be referred to as they appeared in the trial court.

The plaintiff was a licensed Nebraska real estate broker with his place of business located in Omaha, Nebraska. Defendant was the owner of a locker plant, ice, ice cream, and creamery business located in Ashland, Nebraska, together with the real estate upon which this business is located. This will be herein referred to as the business.

Defendant desired to sell this business. Commencing about the first of April 1945, he started to advertise that it was for sale. He advertised in many trade journals and numerous large daily newspapers. Most of these ads carried the name of the owner and location of the property. Although he had some prospects he did not find a satisfactory buyer and consequently did not make a sale of the property by the first of December of that year.

On December 1, 1945, defendant entered into an agency agreement with the plaintiff, listing this business for sale

on terms as therein stated. This agency agreement provided as follows: "The undersigned * * * in consideration of your agreement made with us to list and offer said property for sale, at your own expense, do hereby give and grant to you the sole and exclusive agency and right to sell and/or contract in our name to sell said property at the price and on the terms hereinafter stated, for the period of 60 (days) from the date hereof, * * * If during the contract period aforesaid we sell said premises directly, or through others, or if within twelve months after the expiration of this listing contract we make a sale of said premises to any one originating through your efforts or advertising done under this listing we agree to pay you the aforesaid commission."

On February 9, 1946, the defendant sold the business to Jack Fickler of Wayne, Nebraska, for the sum of $24,500. The purchaser took possession thereof on February 11, 1946.

As stated in 8 Am. Jur., Brokers, § 172, p. 1088: "When a broker is the procuring cause of a sale, is a question of considerable difficulty; in the main it is a question of fact for the jury, the decision in each case being dependent upon the particular facts and circumstances thereof."

We have said: "* * * where a broker is employed to sell real estate, it is not necessary that the whole contract should be completed alone by him, in order to entitle him to his commission. But if, through his instrumentality, the purchaser and owner are brought in contact, and a sale is made through the instrumentality of the agent, he is entitled to his compensation; and this without reference to whether the owner, at the time the sale was perfected, had knowledge of the fact that he was making the sale, through such instrumentality. Hartley v. Dorr, 15 Neb., 451. Anderson v. Cox, 16 Id., 10. Potvin v. Curran, 13 Id., 302." Butler v. Kennard, 23 Neb. 357, 36 N. W. 579.

"The broker, it is often said, must be the procuring cause of the sale, but it is not held that he must be

personally present when vendor and vendee meet, and introduce them, in the familiar sense of the word. It is enough if he be the cause of their coming together in the relation of vendor and vendee. They may meet by chance, and finally effect a sale, but if the broker be the means of putting the vendee's mind into the mood of purchasing, he certainly in that case procures the purchaser." Hambleton v. Fort, 58 Neb. 282, 78 N. W. 498.

"A real estate agent who has been instrumental in producing a purchaser for land listed with him for sale is entitled to his contract commission even though the owner of the property consummate the sale in ignorance of the services rendered by the agent." Craig v. Wead, 58 Neb. 782, 79 N. W. 718.

There is evidence in the record from which the court could have found that plaintiff ran a blind ad in the Omaha World Herald advertising this business for sale; that in the latter part of December 1945, Fickler, who was then living in Omaha, called the telephone number listed in the ad; that as a result of the call Fickler talked with plaintiff; that plaintiff informed Fickler of the location of the business; that Fickler had previously known of this business, its location, and that it was for sale; that he had not been interested therein prior to the call and did not become interested therein because of the call; that Fickler made the call while living in Omaha but subsequently moved back to Wayne; that after he returned to Wayne and not until after February 1, 1946, did Fickler become interested in this business; that on February 6, 1946, Fickler went to Ashland to investigate this business; that he took with him a Mr. McKibbon; that defendant did not know of Fickler or that he was interested in buying the business until he came to Ashland on that date; that Fickler returned to Ashland on February 7, 1946, and brought with him a Mr. Fuller, who was his financial backer; that on February 8, 1946, defendant went to Omaha to confer with Fickler and Fuller; that the deal was closed on February 9, 1946;

and that possession thereof was given on February 11, 1946.

Under these findings we do not think the plaintiff was the procuring cause of the sale for it does not appear that he started the negotiations which culminated in the sale of the business.

There is evidence in the record from which a contrary finding could be made but as already indicated this is a law action and not here for review de novo. The finding of the trial court finds support in the evidence and, not being clearly wrong, the judgment is affirmed.

AFFIRMED.

WALTER HARMER, APPELLANT, V. C. E. PETERSEN ET AL., APPELLEES.
37 N. W. 2d 511

Filed May 19, 1949. No. 32620.

1. **Officers.** A public officer is not liable to an action if he acts unwisely in a matter wherein it is his duty to exercise judgment and discretion, even though a private person may be damaged thereby. This rule is particularly applicable to officers in control of highways, for the reason that their operations touch the property of so many persons that, if not exempt, they might be constantly harassed.
2. **Counties: Officers.** County commissioners, being officers of the county and acting under its authority, stand in the shoes of the county and are not liable for negligence in the performance of their duties.

APPEAL from the district court for Otoe County: THOMAS E. DUNBAR, JUDGE. *Affirmed.*

John L. Mattox, for appellant.

Otto H. Wellensiek, for appellees.

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

WENKE, J.

Walter Harmer brought this action in the district court for Otoe County against Clarence E. Petersen, Adolph H. Weible, Levi A. Wilcox, and Forrest R. Johnston. The purpose of the action is to recover damages because of injury to plaintiff's lands. The basis for such recovery is the claim that defendants were negligent in moving a bridge and reconstructing the channel of a creek on a public road adjacent to plaintiff's lands, which change resulted in injury thereto.

Each of the defendants demurred separately and included in his demurrer the ground that the facts stated in plaintiff's petition, as amended, are not sufficient to constitute a cause of action against him. The trial court sustained these separate demurrers for that reason. From the order dismissing his action, his motion for new trial having been overruled, the plaintiff appeals to this court.

The parties will be herein referred to as they appeared in the trial court.

The petition, as amended, alleges as follows: That the defendants were, during the time herein material, qualified county commissioners of Otoe County; that as such county commissioners there was imposed upon them by law the duty to construct and maintain the public roads and bridges within Otoe County and the waterways appertaining thereto; that plaintiff is the owner of the south half of the northwest quarter and the north half of the southwest quarter of Section 5, Township 9, Range 11, in Otoe County, Nebraska; that running north and south along the west side of these lands there is a public road; that on said road there is a bridge over a creek; that this creek flows east across plaintiff's lands; that in the fall of 1945 the defendants Petersen, Johnston, and Weible, acting in their capacity as county commissioners, caused the bridge to be moved to and reconstructed at a location on the road further to the north; that they caused a new channel to be made thereunder for the flow

of the water, thereby diverting the waters from its former channel; that the water of the creek thereafter cut a new channel through plaintiff's lands approximately one-eighth of a mile long; that the new channel is now from one to three rods in width and from three to ten feet deep; that six acres of plaintiff's lands have been thereby rendered unfit for agricultural or any other purposes; that two acres lying between the old and new channel of the creek are inaccessible during most of the year; and that on about ten acres the topsoil has been washed thereby materially reducing its value.

Plaintiff alleges that the defendants' acts in causing the bridge to be moved and the channel thereunder to be reconstructed so as to cut a new channel across his lands were negligent and the proximate cause of the injury to his lands and that his lands were thereby damaged to the extent of $4,000. He asks judgment against each and all of the defendants for that amount.

The question raised by this record is, can county commissioners be held personally liable for any damages resulting from negligently performing the duties imposed upon them by virtue of their office?

"* * * a public officer is not liable to an action if he acts unwisely in a matter wherein it is his duty to exercise judgment and discretion, even though a private person may be damaged thereby. This rule is particularly applicable to officers in control of highways, for the reason that their operations touch the property of so many persons that, if not exempt, they might be constantly harassed. McConnell v. Dewey, 5 Neb. 385; Kendall v. Stokes, 44 U. S. *87, 11 L. ed. 506; Upham v. Marsh, 128 Mass. 546; Denniston v. Clark, 125 Mass. 216; Highway Commissioners v. Ely, 54 Mich. 173; Dean v. Millard, 151 Mich. 582; Packard v. Voltz, 94 Ia. 277. As was well said in Yealy v. Fink, 43 Pa. St. 212, 82 Am. Dec. 556: 'It is of the utmost importance that officers intrusted with such powers be protected in exercising them, without being terrified with the apprehension of personal

responsibility, if their acts should result in harm to any private property.' " Wilson v. Spencer, 91 Neb. 169, 135 N. W. 546.

As stated in Pester v. Holmes, 109 Neb. 603, 191 N. W. 709: "The road overseer, being an officer of the township and acting under its authority, stood in the shoes of the township and was not liable for negligence in the performance of the work. McConnell v. Dewey, 5 Neb. 385; Wilson v. Spencer, 91 Neb. 169; Gibson v. Sioux County, 183 Ia. 1006."

As stated in Wilbrecht v. Babcock, 179 Minn. 263, 228 N. W. 916: "The commissioner of highways is required by law to locate, construct and maintain the state highways, a duty requiring the exercise of judgment and discretion, and is not personally liable for acts done in performing that duty, unless done corruptly or maliciously."

Under these principles the facts pleaded do not state a cause of action against these defendants and their demurrers were therefore properly sustained. The action of the trial court is affirmed.

AFFIRMED.

ARTHUR SCHERZ ET AL., APPELLEES, V. PLATTE VALLEY PUBLIC POWER AND IRRIGATION DISTRICT, APPELLANT.
37 N. W. 2d 721

Filed May 26, 1949. No. 32532.

1. **Trial.** In determining whether or not a verdict should have been directed by the trial court, the evidence must be considered in the light most favorable to the party against whom the motion was made; that is, every controverted fact must be resolved in his favor and he should have the benefit of every inference that can reasonably be deduced therefrom.
2. ———. When the evidence is in conflict and such that reasonable minds can draw different conclusions therefrom, it presents a question of fact for a jury.
3. **Waters.** Under section 70-671, R. S. 1943, a public power dis-

trict is liable for seepage caused from waters escaping from its works when and if it accrues.

4. **Juries: Trial.** Matters inhering in the verdict of a jury cannot afterward be attacked by the affidavits or testimony of the jurors. Evidence of jurors on such matters should be excluded by the trial court.
5. ———: ———. A juror will not be permitted to state to his fellow jurors, while they are considering their verdict, facts within his personal knowledge and not given in evidence. If such facts relate to a matter in dispute and influence the jury in arriving at a verdict, it constitutes prejudicial error.
6. ———: ———. Such facts may properly be established by the affidavits or testimony of jurors for the reason that such misconduct on the part of a juror does not inhere in the verdict.
7. **New Trial.** A trial court may not grant a new trial for arbitrary, vague, or fanciful reasons.
8. ———. When the evidence adduced in support of a motion for a new trial is sufficient to sustain the finding of the court thereon, it cannot be said that the trial court abused its discretion in granting a new trial.

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

Crosby & Crosby and *Robert H. Beatty*, for appellant.

C. L. Baskins and *Carr & Hoagland*, for appellees.

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

CARTER, J.

Plaintiffs brought this action to recover damages to their lands and crops caused by seepage waters which were alleged to have escaped from the reservoir and canal of the Platte Valley Public Power and Irrigation District. The jury returned a verdict for the defendant. Plaintiffs filed a motion for a new trial which was sustained by the trial court. The defendant appeals from the order granting a new trial.

The district contends that the evidence was insufficient to sustain a judgment for plaintiffs and that its motion for a directed verdict should have been sustained. It urges that this being true, the errors assigned by the

plaintiffs could in no way prejudice the plaintiffs. It is the rule that when a successful litigant was entitled to a directed verdict, or when the proof is so clear and convincing that no other verdict could, within reason, have been returned, it becomes unnecessary to consider other claimed errors presented, for the reason that it is thereby shown that no substantial right of the unsuccessful litigant has been affected by such errors, if found to be such. Hardin Trust Co. v. Wollard, 119 Neb. 307, 228 N. W. 866. It is necessary therefore to determine if the defendant was entitled to a directed verdict.

In determining whether or not a verdict should have been directed, the evidence must be considered in the light most favorable to the party against whom the motion was made. Controverted facts must be resolved in his favor and he is entitled to the benefit of every inference that can be reasonably deduced therefrom.

The district is liable for seepage escaping from its works when and if it accrues. § 70-671, R. S. 1943. The district contends, however, that the evidence does not disclose that waters escaping from its works have damaged the lands of the plaintiffs, that a causal connection between escaped waters of the district and the seeped condition is not shown, and that the verdict therefore rests on speculation and conjecture. That proof establishing a causal connection between the waters of the district and the seeped condition of plaintiffs' lands is essential to a recovery of damages has been firmly established as the law of this state. Smith v. Platte Valley Public Power and Irrigation District, *ante* p. 49, 36 N. W. 2d 478.

The evidence on behalf of plaintiffs shows that when the defendant commenced its operations and filled its reservoir and canal, large amounts of water escaped and caused the level of the ground water under plaintiffs' lands to rise and thereby caused their lands to become seeped. The defendant's evidence is to the effect that the waters escaping from its reservoir and canal never did

reach the lands of these plaintiffs and that the seeped lands were the result of natural conditions brought about by abnormally high rainfall and low evaporation and transpiration. That plaintiffs' lands became seeped in 1942 and continued in that condition until the trial is established by the evidence and not disputed by the parties.

The parties offered the evidence of expert witnesses to show the cause of the seepage. The district contends that the testimony of plaintiffs' expert that he could not say whether or not waters from the district's reservoir or canal had found their way to plaintiffs' lands was sufficient to show that plaintiffs' case was grounded on speculation and conjecture, and therefore insufficient to support a judgment. Plaintiffs' expert testified, however, that although the proof tended to show that waters escaping from defendant's reservoir and canal may not have reached the lands of the plaintiffs, such waters had by hydrostatic pressure on existing ground waters raised the level thereof to such an extent as to cause the lands of plaintiffs to become seeped and waterlogged. It is true that the evidence of the experts was in conflict. It thus became a question for the jury to determine after considering the qualifications, opinions, and experience of the respective experts produced by the parties. We so held in a case very similar on its facts. Smith v. Platte Valley Public Power and Irrigation District, *supra*. The issues under the evidence adduced were for the jury and a directed verdict for the defendant was not in order.

The defendant contends that plaintiffs' cause of action as contained in the petition is based on an allegation that waters escaping from defendant's reservoir and canal found their way to and resulted in the waterlogging of said lands and that the evidence produced tended to prove that the escaped waters created a hydrostatic pressure which caused underground waters to rise and seep plaintiffs' lands. This is asserted as a fatal

variance between the pleading and the proof. There is no merit in defendant's position. The issue was whether waters escaping from defendant's reservoir and canal caused the damage or whether it was the result of abnormally high rainfall and other natural causes. The record does not show that the defendant was misled or otherwise prejudiced. We find no variance in the proof and pleadings that in any manner prejudiced the rights of the defendant. This very question was decided in Smith v. Platte Valley Public Power and Irrigation District, *supra*.

The record shows that the trial court found that a juror, during the jury's deliberations, discussed certain matters which were not expressions of opinion, but statements of fact claimed to have been personally known to him, and that such statements influenced the verdict arrived at by the jury. It was upon this finding that the trial court sustained plaintiffs' motion for a new trial. It is the general rule in this state that the affidavits or testimony of jurors are not admissible to impeach or avoid their verdict in respect to matters which inhere in the verdict itself. The plaintiffs offered the evidence of one or more jurors to the effect that a juror stated during the jury's deliberations that the defendant as a public corporation would probably drain the plaintiffs' lands; that if plaintiffs were permitted to recover damages, others would in all likelihood sue the public corporation; and that the defendant being a public corporation, all taxpayers would be affected thereby. These are matters of opinion, supposition, or argument which clearly inhere in a jury verdict. The evidence of jurors with respect thereto are not admissible and should not have been received in evidence by the trial court.

There is, however, the evidence of two jurors that a juror during the jury's deliberations made the statement that he formerly operated a road grader along this seeped land, that it had always been a regular frog pond all up and down there, and that it was no different now than

it was then. This is a statement of fact on a material issue which does not inhere in the verdict. It is evidence upon which a trial court may properly pass in determining if a new trial should be granted.

A verdict must be based upon the evidence introduced in the case. If a juror knows any fact which is relevant to the issues, he should be sworn and give his testimony the same as any other witness. Under our system, the trial court passes upon the competency, materiality, and relevancy of evidence before it is submitted to the jury. The testimony of a witness must be given under oath with the right of an opposing litigant to test it by cross-examination. An adverse party has a right to meet the evidence of any witness by counter proof, which he cannot do if he has no knowledge of its existence. These rights were all denied the plaintiffs in the present case because of the failure of the juror making the statements to be governed by the evidence introduced on the trial and the instructions given him by the court. Wood River Bank v. Dodge, 36 Neb. 708, 55 N. W. 234; Cook v. Patterson, 129 Neb. 16, 260 N. W. 696. When the misconduct of a juror relates to matters not inhering in the verdict, such misconduct may be shown by the affidavits or testimony of jurors familiar with the facts.

It is urged that the statements of the juror did not influence the result. It is necessary, of course, that the misconduct complained of influenced the jurors in arriving at a verdict. Chicago, B. & Q. R. R. Co. v. Oyster, 58 Neb. 1, 78 N. W. 359; Lambert v. State, 91 Neb. 520, 136 N. W. 720; Glick v. Poska, 122 Neb. 102, 239 N. W. 626. It is also the rule that such misconduct must relate to a matter in dispute. Carpenter v. Sun Indemnity Co., 138 Neb. 552, 293 N. W. 400. It is clear from the evidence in the present case that the misconduct related to the main issue to be determined.

The district contends, however, that the jury was not influenced by the improper statements made. It is true that the jurors called as witnesses maintained that they

tried the case on the evidence offered at the trial and the instructions of the court. But this raised an issue which the trial court could properly decide in passing upon the motion for a new trial. We have said that the right of a trial court to grant a new trial is based upon the exercise of a legal discretion. A new trial may not be granted for arbitrary, vague, or fanciful reasons. Greenberg v. Fireman's Fund Ins. Co., 150 Neb. 695, 35 N. W. 2d 772. But, when the granting of a new trial requires a consideration of conflicting evidence, the findings of the trial court thereon will not ordinarily be disturbed on appeal. And where, as here, there is evidence sufficient to sustain the finding of the trial court that prejudicial error was contained in the record, there is no basis for stating that the trial court abused its discretion in granting a new trial.

AFFIRMED.

CYRUS C. ROBY, APPELLEE, v. HOBART M. AUKER, APPELLANT.
37 N. W. 2d 799

Filed May 26, 1949. No. 32598.

1. **Trial.** When the evidence is in conflict and such that reasonable minds can draw different conclusions therefrom, it presents a question of fact for a jury.
2. **Negligence.** 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.
3. **Trial: Appeal and Error.** When a judgment is excessive and the items composing the excess can be ascertained, a remittitur may properly be required as a condition to its affirmance.

APPEAL from the district court for Dakota County: SIDNEY T. FRUM, JUDGE. *Affirmed on condition.*

H. E. Siman and *George W. Leamer,* for appellant.

Mark J. Ryan, for appellee.

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

CARTER, J.

Plaintiff sued to recover damages sustained in an automobile accident. The defendant counterclaimed for the damages sustained by him. The jury returned a verdict for the plaintiff in the amount of $1,977.98. The defendant appeals.

The evidence shows that on February 4, 1946, plaintiff was traveling west on U. S. Highway No. 20 at a point four miles west of South Sioux City, Nebraska. The defendant was traveling east, and at the scene of the accident came up behind another car traveling east at a speed in excess of 25 miles an hour. Defendant turned out to pass the car ahead of him, into the path of plaintiff's car, and an accident resulted. The collision occurred about 8 a. m. It was a foggy morning, which cut the visibility to approximately 400 feet. The pavement was straight, level, and icy. When defendant first saw plaintiff's car he applied his brakes and lost control of his car on the icy pavement. Plaintiff attempted to avoid the accident by turning his car onto the right shoulder of the highway. The cars collided on the north side of the highway and caused the injuries for which this action was brought. A more complete statement of the evidence can be found in the opinion written on a former appeal of this case to this court. Roby v. Auker, 149 Neb. 734, 32 N. W. 2d 491.

The defendant contends that plaintiff was not entitled to recover for the reason that plaintiff was guilty of negligence more than slight as a matter of law. The evidence in the present case is almost identical with that at the former trial. We held on the former appeal that the trial court did not err in refusing to sustain defendant's motion for a directed verdict. For the reasons stated in the former opinion, we hold that

defendant's motion for a directed verdict was properly overruled by the trial court in the second trial.

The defendant also contends that plaintiff was not entitled to recover as a matter of law under the doctrine of the last clear chance. The evidence on this subject contained in the record on this appeal is the same as on the former appeal. We there said that whether or not the defendant was entitled to the benefit of the last clear chance doctrine was a question for the jury. For the reasons stated and the authorities cited in the former opinion, we hold that the application of the last clear chance doctrine was a question for the jury to determine.

Defendant assigns as error the giving of instruction No. 13. The part of the instruction criticized is as follows: "Under this rule, if you find both parties were negligent, the plaintiff cannot recover in this case if you find from the evidence that his negligence when compared with that of the defendant was more than slight; * * *." It is the contention of defendant that before the comparative negligence statute can operate it must appear that the negligence of the plaintiff was slight without respect to the degree of negligence on the part of the defendant. If this be true, the quoted portion of the instruction would be technically erroneous.

The applicable portion of the pertinent statute provides: "In all actions brought to recover damages for injuries to a person or to his property caused by the negligence of another, the fact that the plaintiff may have been guilty of contributory negligence shall not bar a recovery when the contributory negligence of the plaintiff was slight and the negligence of the defendant was gross in comparison, * * *." § 25-1151, R. S. 1943.

We do not think there is merit in defendant's contention. The statute by the use of the words "when the contributory negligence of the plaintiff was slight and the negligence of the defendant was gross in comparison" clearly intended the words "in comparison" as qualifying both of the clauses immediately preceding.

The words "slight" and "gross" as used in the statute are comparative terms and the intent of the statute is that the negligence of the parties shall be compared one with the other in determining questions of slight and gross negligence.

We think the rule announced in Morrison v. Scotts Bluff County, 104 Neb. 254, 177 N. W. 158, supports this view. It was therein said: "The true rule is that, if plaintiff is guilty of negligence directly contributing to the injury, he cannot recover, even though the defendant was negligent, unless the contributory negligence of plaintiff was slight and the negligence of defendant was 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." It will be noted that the foregoing rule is predicated on a comparison of the negligence of the parties in determining the liability of both the plaintiff and the defendant, that is, the question of slight or gross negligence as used in the statute are both dependent upon a comparison of the negligence of the parties, one with the other.

The defendant urges that the verdict is excessive. The judgment rendered was for $1,977.98. According to the petition filed by plaintiff he suffered damage by virtue of the following items: Personal injuries sustained by the plaintiff, $1,000; damage to automobile, $900; loss of use of car, $300; towing of automobile from the scene of the accident, $10; and injuries sustained by plaintiff's wife, $100.

The cost of repairing plaintiff's car was conclusively fixed by the evidence at $410, and the cost of towing the automobile from the scene of the accident was similarly established at $5. There is no competent evidence that

plaintiff suffered any loss of the use of his car during the time it was being repaired. The claim for injuries to plaintiff's wife was properly withdrawn from the jury by the trial court. Consequently, the evidence sustains the verdict only to the extent of $1,415.

When a judgment is excessive and the items composing the excess can be ascertained, a remittitur may properly be required as a condition to its affirmance. McKay v. Hinman, 13 Neb. 33, 13 N. W. 15; Trester v. Pike, 60 Neb. 510, 83 N. W. 676; Ord Hardware Co. v. J. I. Case Threshing Machine Co., 83 Neb. 353, 119 N. W. 682; Braun, Ray Bros. & Finley Co. v. A. F. Roberts Construction Co., 122 Neb. 182, 239 N. W. 924.

If the plaintiff will file a remittitur within 20 days reducing this judgment to the principal sum of $1,415, and interest thereon, the judgment of the district court will be affirmed, as thus modified; otherwise the judgment will be reversed and the cause remanded for a new trial.

AFFIRMED ON CONDITION.

IN RE GUARDIANSHIP OF EDWARD CARSTENS, AN INCOMPETENT PERSON. WILLIAM H. LAMME, APPELLEE, V. RICKIE CARSTENS, APPELLANT.
37 N. W. 2d 581

Filed May 26, 1949. No. 32614.

1. **Guardian and Ward.** Where the grounds for removal of a guardian are enumerated by statute, removal cannot ordinarily be had on other grounds.
2. ———. By virtue of section 38-507, R. S. 1943, the county court has power to remove a guardian upon notice if he is insane or otherwise incapable of discharging his trust, or evidently unsuitable therefor.
3. ———. The word "unsuitable" in the statute has a broad general meaning and applies to every case where the guardian is for any reason shown to be incapable of or not in a situation to properly and suitably protect his ward's rights and interests.

4. ———. Corruption or malfeasance is not necessary to authorize the removal of a guardian, but competent evidence of a failure or inability to properly protect the ward's rights or interests is sufficient proof of unsuitability.
5. ———. A guardian may not be removed arbitrarily or at the mere caprice of the court or the complaining party, but since a guardian is an officer of the court and as such charged with duties fiduciary in character under its supervision, and section 38-507, R. S. 1943, is general in character, the trial court is, within the purview thereof, allowed a broad judicial discretion in the matter of removal or refusal to remove a guardian, and this court will not interfere with the exercise of such discretion unless it clearly appears that it has been abused.
6. New Trial. In order to make a sufficient showing for new trial upon the ground of newly discovered evidence, the proof in support thereof must show that such evidence was then available which neither the litigant nor his counsel could have discovered by the exercise of reasonable diligence, that it was not merely cumulative, but competent, relevant, and material with relation to a material issue, and of such character as to reasonably justify a belief that its admission would probably bring about a different result if a new trial were granted.

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

Sidner, Lee & Gunderson, for appellant.

Spear, Lamme & Flory, for appellee.

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

CHAPPELL, J.

On June 21, 1943, the county court of Dodge County appointed Rickie Carstens guardian of the person and estate of Edward Carstens, incompetent. On December 22, 1947, the ward, by his next friend and attorney, filed a petition in the county court praying for removal of the guardian and appointment of another upon the ground that she was evidently unsuitable to so act, and that the best interests and welfare of the ward required her removal. The guardian answered, denying generally and affirmatively alleging her financial accounting for the

ward's estate and her competency to act as guardian.

The county court, after hearing upon the merits, entered an order finding and adjudging that the guardian was evidently unsuitable to longer act as such, and removed her. Upon appeal to the district court, that judgment was affirmed. Motion for new trial was overruled, and the guardian appealed to this court, assigning as error substantially that: (1) The judgment was contrary to law in the light of a proper construction of section 38-507, R. S. 1943; and that (2) the court erred in its refusal to grant a new trial upon the ground of newly discovered evidence. We conclude that the assignments should not be sustained.

Generally speaking, the ward did not charge the guardian with any corruption or malfeasance in the administration of his estate. The primary issue presented to the county court and the district court was whether or not, within the purview of the statute, and under the circumstances appearing in the evidence, the guardian was "evidently unsuitable" as guardian to longer protect the ward's rights and interests by continuing to act as guardian of his person and estate.

The record discloses that, at time of trial, the ward was unmarried, and 66 years of age. He was the owner of a valuable farm in Dodge County, and approximately $7,000 in cash. He had two unmarried sisters, one of whom was the guardian. On May 4, 1943, upon request of his sisters, he was committed to the Norfolk State Hospital as an alcoholic. The guardian was subsequently appointed upon a petition filed by her.

On October 12, 1944, the ward was paroled from the institution to his guardian, and thereafter lived with his sisters at Scribner for almost a year. He was returned to the hospital on November 21, 1945, at his guardian's request. Upon return, he was suffering from acute alcoholism and early senile changes, which became of serious consequence only when he was under the influence of alcohol.

The ward had few complaints, caused no trouble, and made a satisfactory adjustment while in the hospital. While there, however, he repeatedly complained of long-standing indifference by the sisters concerning his welfare, and his serious differences with and ill-feelings toward them. He expressed a distrust of their handling of his property and money, insisting that they gave him but little, and used and wanted his property for their own purposes.

There is undisputed medical testimony of physicians at the hospital, who examined and cared for him while there, that he was eligible for parole and had been so eligible since prior to December 30, 1947, but that he had not been and should not be paroled again so long as the sister was guardian, because her indifference for his welfare, and his quarrels and differences with her would cause emotional reactions preventing any assurance of recovery. On the other hand, it was their opinion that upon her removal and the appointment of another guardian, not a relative but one in whom the ward had confidence, and that if he had a residence elsewhere than with his sisters, such prognosis would be good—that is, he could be then paroled, and under such circumstances would have a fifty-fifty chance for recovery.

The ward testified, intelligently recalling the date of his commitment and parole, his conduct and events during that period, and his return to the hospital. He testified concerning the indifference of his sisters and his long continued differences and incompatability with them, and expressed a desire that a stranger, a businessman, should be appointed his guardian.

The guardian testified, admitting that she had serious differences with the ward relating to his property, money, personal conduct, and affairs. She testified that he was harsh and untidy, and that she was afraid of him. She frankly admitted that she wanted to remain his guardian so that she could continue to have charge of his money and property and keep him in the hospital at

Norfolk, in spite of the physicians' testimony that it would without doubt be safe, proper, and fitting to release him on parole if she were removed as guardian. We find no competent evidence of threats or other conduct by the ward justifying her asserted fear of him.

Section 38-507, R. S. 1943, provides: "When any guardian, appointed either by the testator or county court, shall become insane, or otherwise incapable of discharging his trust, or evidently unsuitable therefor, the court, after notice to such guardian and all others interested, may remove him; * * *."

It is generally the rule that where the grounds for removal are enumerated by statute, removal cannot be had on other grounds. See, 39 C. J. S., Guardian and Ward, § 45, p. 65; 28 C. J., Guardian and Ward, § 140, p. 1101. It will be noted, however, that the foregoing statute does not attempt to specifically enumerate the causes for removal, but gives the judge of the county court a right generally to include any physical or mental condition or behavior of the guardian within the various cases that may arise where the exercise of such power of removal would be judicious in order to properly and suitably protect the rights and interests of the ward.

This court has never passed directly upon a factual situation identical with that presented at bar. However, in Crooker v. Smith, 47 Neb. 102, 66 N. W. 19, having a similarity in some respects, and relied upon by the guardian, this court held: "The county court has power to remove a guardian, upon notice, when he has become incapable of discharging his trust or evidently unsuited therefor. (Compiled Statutes, ch. 34, sec. 28). * * *

"The word 'unsuitable' in the statute applies to any case where the guardian is incapable or not in a situation to properly protect his ward's interests.

"Corruption or malfeasance is not necessary to authorize the removal of a guardian. Evidence of a failure to properly protect the ward's rights is sufficient proof of 'unsuitability.' "

In the opinion it was said: "It never could have been the intent of the legislature that a guardian once appointed should obtain an inalienable vested right to the office. He is an officer of the court charged with duties of a fiduciary character. It is the duty of the court to see that these duties are performed; * * *. We think the word 'unsuitable' in the statute is very broad in its meaning, and applies to every case where the guardian for any reason is shown not to be capable of or not in a situation to suitably protect his ward's interests."

The last sentence aforesaid was quoted with approval in In re Guardianship of Timperley, 141 Neb. 604, 4 N. W. 2d 603. See, also, 39 C. J. S., Guardian and Ward, § 45, p. 66, and cases cited in notes 13, 17, and 21.

In re Guardianship of Sherman, 42 Cal. App. 2d 251, 108 P. 2d 717, relied upon by the guardian, is distinguishable because based upon a statute setting forth many specific, as distinguished from general, grounds for removal, thereby having little similarity with our own.

A guardian may not be removed arbitrarily or at the mere caprice of the court or the complaining party, but since a guardian is an officer of the court, and as such charged with duties fiduciary in character under its supervision, and the statute is general in character, the trial court is, within the purview thereof, allowed a broad judicial discretion in the matter of removal or refusal to remove a guardian, and this court will not interfere with the exercise of such discretion unless it clearly appears that it has been abused. See, 28 C. J., Guardian and Ward, § 157, p. 1107; 25 Am. Jur., Guardian and Ward, § 56, p. 39, citing In re Guardianship of Nelson, 148 Iowa 118, 126 N. W. 973, Ann. Cas. 1912B 974.

In the light of the situation presented in the case at bar, we conclude that the trial court did not abuse its discretion, and that the first assignment of error has no merit.

In motion for new trial, the guardian assigned, among other reasons, newly discovered evidence as a ground

therefor. It was supported only by her own affidavit, which appears in the bill of exceptions. To set it forth at length would serve no purpose. It is sufficient for us to say that the showing made therein was insufficient.

It is generally the rule that to make a sufficient showing for new trial upon the ground of newly discovered evidence, the proof in support thereof must show that such evidence was then available which neither the litigant nor his counsel could have discovered by the exercise of reasonable diligence, that it was not merely cumulative, but competent, relevant, and material with relation to a material issue, and of such character as to reasonably justify a belief that its admission would probably bring about a different result if a new trial were granted. See, Wiegand v. Lincoln Traction Co., 123 Neb. 766, 244 N. W. 298; Erwin v. Watson Bros. Transfer Co., 129 Neb. 64, 260 N. W. 565; Jensen v. John Hancock Mutual Life Ins. Co., 145 Neb. 409, 16 N. W. 2d 847.

The foregoing rule has application to the second assignment, and based thereon we conclude that the trial court did not err in its refusal to grant a new trial.

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

AFFIRMED.

LOU ANN ARMER, A MINOR, BY IRWIN ARMER, HER FATHER AND NEXT FRIEND, APPELLANT, V. OMAHA AND COUNCIL BLUFFS STREET RAILWAY COMPANY, APPELLEE.

37 N. W. 2d 607

Filed May 26, 1949. No. 32613.

1. **Trial.** A motion to dismiss admits the truth of all material and relevant evidence, and the party against whom the motion was made is entitled to have it considered in the light most favorable to him and to have the benefit of all inferences reasonably deducible therefrom in testing the correctness of the action of a court in granting the motion.

2. **Infants.** The age when an infant during his minority 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 generally is a question of fact for the jury.
3. **Infants: Negligence.** Whether or not an infant between 11 and 12 years of age is of sufficient knowledge, discretion, and appreciation of danger that he may be subject to the defense of contributory negligence is generally a question of fact and not of law.
4. **Negligence: Automobiles.** In the absence of a prohibition by statute or ordinance a person may cross a street at any place and is not limited to crossings at intersections. The driver of a motor vehicle owes to one crossing a street at a point not a regular crossing the duty of reasonable and ordinary care under the circumstances, and a larger degree of care towards a child of tender years while making such a crossing of a street.
5. **Infants: Negligence.** The act of an infant between 11 and 12 years of age riding on a bicycle in making a left-hand turn, without a warning signal, at about the middle of a block, in an attempt to reach an opening of an alley on the opposite side of the street from that he was using before the turn, and not at a regular crossing of the street, was not of itself negligence.
6. **Negligence.** The violation of a safety regulation established by statute or ordinance is not negligence as a matter of law, but may be considered in connection with all of the other evidence in the case in deciding the issue of negligence.
7. **Negligence: Automobiles.** It is a general principle that it is negligence for a motorist to drive a motor vehicle on a public highway, at any time, at a speed or in such a manner that it cannot be stopped or its course changed in time to avoid a collision with an obstruction discernible within his range of vision ahead.
8. ———: ———. When a motor vehicle operated on a public highway collides with a person causing injury, liability arises when the peril of the injured person is discovered by the operator of the vehicle or by the exercise of ordinary care and caution could have been discovered in time to have avoided injury, if at the time of the collision no negligence of the injured person was active or a contributing factor to the accident.

APPEAL from the district court for Douglas County: WILLIS G. SEARS, JUDGE. *Reversed and remanded.*

Lyle Q. Hills, for appellant.

Kennedy, Holland, DeLacy & Svoboda, for appellee.

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

BOSLAUGH, J.

This controversy involves damages claimed to have resulted from injuries sustained by appellant in a collision of a bus of appellee with a bicycle of appellant while operated by her.

The basis of the action was alleged negligent operation of the bus resulting in injuries and damages to appellant. She charged negligence as follows: That appellee failed to keep a proper lookout; failed to warn appellant of the approach of the bus; failed to reduce the speed of, or stop, the bus and avoid the collision with appellant; drove the bus on the west, or wrong, side of the street; operated it at a high and unlawful speed contrary to the ordinance of the city of Omaha and statutes of the State of Nebraska, to wit, 40 miles an hour; that appellee saw, or should have seen, appellant in a position of imminent peril of being injured by the bus in time for it, by the exercise of ordinary care with means at hand and with safety to the bus, to have avoided injury to appellant by decreasing the speed thereof or stopping it, or operating it on the east, or right-hand, side of the street, or by giving a timely warning of its approach, but negligently failed to do so and thereby proximately caused injuries to appellant; and that an ordinance of the city requires speed at the location involved so as not to endanger any person, and in no event in excess of 25 miles an hour.

Appellee denied the claims of appellant and alleged the collision was the direct and proximate result of her negligence which was more than slight. Appellant replied with a denial, and alleged that she was a child of tender years, was incapable of being negligent, and was not negligent under the circumstances.

Motion of appellee to dismiss the action, made at the

close of the evidence of appellant, was sustained. Motion for new trial was denied.

The question in this case is whether or not the trial court was justified in discharging the jury and dismissing the case. The answer thereto depends on whether or not the evidence of appellant standing alone and accepted as true has probative force sufficient to make a prima facie case for her, and since judgment went against her, she is entitled to have all material and relevant evidence and all inferences fairly deducible therefrom viewed in the most favorable light in testing the correctness of the ruling of the court granting the motion of appellee and dismissing the case. Guyette v. Schmer, 150 Neb. 659, 35 N. W. 2d 689.

The evidence tends to establish that:

The place of the collision was at the first alley north of Lincoln Boulevard on the west side of Thirty-third Street in Omaha, Nebraska. Thirty-third Street is 35.4 feet wide, paved with brick, and extends from north to south. It is 174 feet from the north curb of Lincoln Boulevard to the north curb of the alley on the west side of Thirty-third Street, and 279 feet from the north curb of Lincoln Boulevard to the north curb of Cuming Street—the first street south of Lincoln Boulevard. Lincoln Boulevard and Cuming Street extend east and west and intersect Thirty-third Street. The entire distance from the north curb of Cuming Street to the north curb of the first alley north of Lincoln Boulevard on the west side of Thirty-third Street, the place of the accident, is 453 feet. The grade of Thirty-third Street from Cuming Street to Lincoln Boulevard declines 17.87 feet. From the intersection of Lincoln Boulevard with Thirty-third Street to the center of the alley on the west side of Thirty-third Street there is an incline of about 4 feet. There is a clear view from the alley south to Cuming Street, and anyone in the center of Thirty-third Street opposite the alley can easily see the center

of Thirty-third and Cuming Streets, a distance of 453 feet.

Lou Ann Armer was 11 years old on the 25th of February, 1947. The date and time of the accident was June 9, 1947, about 6:15 p. m. Appellant attended the public schools and was in the fifth grade. She received her bicycle from her mother as a birthday remembrance about two weeks before February 25, 1947. No instructions about safety matters were given her when she got it. She had ridden bicycles for about two years before the time of the accident, rode a good deal, and was good at riding. She did not ride to school. Her parents had not told her not to cross a street in the middle of a block. No one told her that when she was learning to ride, but she was told at school not to do so. She did not know at or before the time of the accident that she was supposed to make a signal for a left turn. Before the accident she was riding her bicycle west on Lincoln Boulevard. When she came to Thirty-third Street she turned and traveled north on that street, looked to see if there were any cars or traffic, and there were none. She traveled north on Thirty-third Street, closer to the center than the west curb, and continued north in the center of the street. She looked and saw no bus as she turned into Thirty-third Street. When she was near the alley on the west side of Thirty-third Street she turned west to go into the alley, and when she was about into it she looked south. "I turned my head and saw the bus was real close." The bus hit her, and the next thing she remembered was when she woke up in the hospital. She could not tell how far away the bus was when she saw it. "It was really close, I can not tell how far because I don't know." She heard no horn sounded. It was upgrade from Lincoln Boulevard to the alley. When she got pretty close to the alley, or right beside this west alley, she made a turn to the west, but did not look for anyone coming and did not put out her hand. She made a turn and "* * *

went a little bit and there was the bus right close * * *." That is the first time she saw the bus. It was almost on her; it was swinging towards the alley, towards the north and west, and that is the first time she saw it. "And then the collision occurred right then." The bus was traveling north on Thirty-third Street. The "squealing" of the brakes and the "screeching" of the tires of the bus were heard some distance before the collision. It traveled from a little east of the center of Thirty-third Street in a northwesterly direction across into the mouth of the alley, and stopped with the front wheels of the bus over the north curb of the alley in the parking, and the rear wheels of the bus against the north curb of the alley. A person about 75 feet from the accident heard no horn sounded by the bus, heard the "squeaking of the brakes," saw the right front of the bus hit appellant as she was entering the mouth of the alley. It was a clear day and the pavement was dry. Appellant was thrown from her bicycle and was lying in the gutter unconscious after being struck by the bus. There were skid marks back of the bus from the rear wheels a distance of 60 to 65 feet. The bus at the time of the accident was traveling in excess of 40 miles an hour. At a speed of 25 miles an hour a vehicle would travel 37½ feet per second, and at a speed of 40 miles an hour would travel 60 feet per second. The average reaction time of a professional driver, such as a bus driver, is approximately five-eighths of a second. At a speed of 40 miles an hour, the bus would travel about 37 feet in five-eighths of a second, or during the reaction time. A bus of the type involved in this accident traveling at 25 miles an hour could be stopped in 25 feet from the time the brakes were applied, and to this should be added the reaction time of 22 feet. An ordinance of the city of Omaha limited speed at the location involved so as not to endanger any person, and in no event in excess of 25 miles an hour.

Appellant received a fracture of the middle fossa of

the skull, a cervical fracture in the neck of the right humerus, concussion of the brain, injury to her right shoulder, cut in the ear, pavement burn, and bruises on her body.

The appellant was about three months past 11 years of age, and cannot be charged with the degree of caution required of an adult in guarding against possible accidents while traveling upon and crossing a street in a city. There is no arbitrary rule fixing the time at which a child during its minority may be declared wholly capable or incapable of understanding and avoiding dangers to be encountered while engaged in such an activity. It is generally considered that such a question is one of fact to be decided by a jury. Whether or not negligence may be attributed to a child of such tender years is usually a matter for a jury under the circumstances of each case. It is only in an extreme situation where the facts show plainly knowledge and appreciation of the danger to be incurred, if certain action is had, that a court may decide as a matter of law that a child of such an age was guilty of negligence, or that his act or omission was the proximate cause of the happening in question. It was a question for the jury whether or not the appellant, a child slightly more than 11 years of age, was or could be negligent, and whether or not any act or omission on her part was the proximate cause of the collision. Tews v. Bamrick, 148 Neb. 59, 26 N. W. 2d 499; Rule v. Claar Transfer & Storage Co., 102 Neb. 4, 165 N. W. 883; Chicago, B. & Q. R. R. Co. v. Russell, 72 Neb. 114, 100 N. W. 156; Kauffman v. Fundaburg, 123 Neb. 340, 242 N. W. 658; McKinney v. Wintersteen, 122 Neb. 679, 241 N. W. 112; Siedlik v. Schneider, 122 Neb. 763, 241 N. W. 535.

The conduct of appellant as shown by this record should not, her age considered, conclusively bar her right of recovery, conceding that she was a bright, intelligent girl; had lived in Omaha and had on occasions ridden bicycles on the streets for two years; and was as

familiar with the operations of vehicles and bicycles on the street as any girl of her age and discretion would usually be. She doubtless knew that there was danger of injury in traveling in the street and in turning to the left to cross the street. Nearly any child of her age would answer, if asked, that it knew if it fell in the river it might be drowned; if it fell in the fire it would be burned; or if it got in the way of a streetcar or a motor vehicle it would be injured and possibly killed; but mere childish knowledge of everyday things does not necessarily establish that they appreciate or understand the necessity for keeping away from, or not doing these things. They act on impulse, and often the greater the danger, the greater the challenge. They do dangerous things without thought of the consequences that may follow what they do, and to conclude as a matter of law that a child of such an age as the appellant should be held to the high standards demanded of adults in looking after their own and the safety of others is opposed to good judgment and sound law. The infant is favored by the law not so much on his lack of knowledge as because of indiscretion, imprudence, lack of judgment, and impulsiveness.

What is required of an infant is the exercise of that degree of care which an ordinary prudent child of the same capacity to appreciate and avoid danger would use in the same situation. Smith v. Smith-Peterson Co., 56 Nev. 79, 45 P. 2d 785, 100 A. L. R. 440; Sadlowski v. Meeron, 240 Mich. 306, 215 N. W. 422; Hackert v. Prescott, 165 Minn. 134, 205 N. W. 893; Annotation, 107 A. L. R. 4; Annotation, 174 A. L. R. 1174; Collins v. Weise, 110 Neb. 552, 194 N. W. 450; 45 C. J., Negligence, § 552, p. 998.

Appellee urges Johnston v. New Omaha Thomson-Houston Electric Light Co., 78 Neb. 24, 110 N. W. 711, on rehearing, 78 Neb. 27, 113 N. W. 526, 17 L. R. A. N. S. 435, in justification of the conclusion of the trial court that the negligence of appellant was more than slight.

That case concerned an extreme situation, and the facts considered have no similarity to those of this case. That case was decided more than 40 years ago, has not since been referred to or cited by this court as an authority, and in Rule v. Claar Transfer & Storage Co., *supra,* the writer of the opinion considers it an exception to the general rule, and that its doctrine should not be further extended.

Appellee contends that the proximate cause of the collision was the act of appellant in turning to her left without giving a signal of her intention in that regard, and that her conduct was negligence more than slight. If it had been established that the appellant was of full age and discretion, and that her conduct was a violation of an ordinance or a statute, it would not have amounted to negligence as a matter of law. It would have been only a fact or circumstance to have been considered by the jury with all the other evidence in the case. The violation of a safety regulation established by ordinance or statute is not negligence as a matter of law. Melcher v. Murphy, 149 Neb. 541, 31 N. W. 2d 411; Rule v. Claar Transfer & Storage Co., *supra;* Dickman v. Hackney, 149 Neb. 367, 31 N. W. 2d 232.

There is evidence tending to establish that appellant looked for traffic on Thirty-third Street when she entered thereon from Lincoln Boulevard, and there was none within the distance of her vision; that a user of Thirty-third Street traveling north had a clear vision of the street from the intersection of Cuming Street to the place of the collision on the west side of Thirty-third Street at the entrance of the alley north of Lincoln Boulevard, a distance of about 453 feet; that the only traffic on the street at the time of the collision was the bus and the bicycle; that each of the parties was traveling near the west side of the east lane of travel; that the speed of the bus was at least 40 miles an hour immediately before and at the time of the collision; that the maximum speed permitted on the street by an ordinance of

the city of Omaha was 25 miles an hour; that the bus traveled more than 100 feet after its driver knew that appellant was making a left-hand turn and was crossing to the west side of the street; that it was a clear, bright day and the pavement was dry; that it was upgrade north from Lincoln Boulevard; that the bus gave no warning as it approached appellant; and that the right front of the bus collided with appellant as she was entering the mouth of the alley on the west side of Thirty-third Street.

It is, with exceptions not applicable to this case, negligence for a motorist to drive a motor vehicle on a public highway, at any time, at a speed or in such manner that it cannot be stopped, its course changed or varied in time to avoid a collision with an obstruction discernible within the range of his vision ahead. Nothing will excuse his failure to see what is plainly in sight. If he does not see, then it must be concluded that he was not alert to the situation, and if he saw and did not avoid a collision, it must be held that he did not have required control, and in either event a finding of negligence is permissible. Most v. Cedar County, 126 Neb. 54, 252 N. W. 465; Buresh v. George, 149 Neb. 340, 31 N. W. 2d 106; Tews v. Bamrick, *supra;* Campbell v. Slater, 127 Neb. 231, 254 N. W. 897; Annotation, 87 A. L. R. 900.

Appellee refers to cases of this and other jurisdictions where the complainant suddenly and without means of notice to the motorist placed himself in a position of peril in the course of travel of a motor vehicle, and recovery was denied. These presented happenings where there was no opportunity for the operator of the vehicle to act and prevent a collision; and these were inevitable because of the suddenness of the appearance of the victim and the proximity to the moving machine. Unavoidable accident, at least so far as the driver was concerned, describe these happenings. In these cases speed, absence of signal of approach, failure of lookout, or lack of control was not the cause, proximate or remote, of the accident.

Appellee points to controversies in which courts have approved submission to a jury for determination of whether or not a motorist saw or should have seen the infant and avoided the collision by retarding speed, stopping, changing his course, having his vehicle under better control, or giving a warning of his approach, and the like. A detailed review of these cases is not justified or necessary. The distinction emanates from a determination of whether or not the time and space available was under the circumstances sufficient to permit the collision to be avoided by the exercise of reasonable care and action. If the situation is created so quickly that the motorist has no opportunity to avoid doing injury, there is no liability, but if he has time within which an ordinarily careful and prudent person could and would avoid inflicting damage, the problem of whether or not his acts or omissions were negligent, or the proximate cause of the damage, is for a jury.

Appellant was also entitled to have this case submitted to the jury under the humanitarian rule or the "last clear chance" doctrine which is, in this state, as applied to the situation here presented, that when a motor bus operated by a transportation company collides with a person causing her injury, liability arises when the peril is discovered by the operator of the bus, or, by the exercise of ordinary care and caution, could have been discovered in time to have avoided the injury, if at the time of the collision no negligence of the injured person was active or a contributing factor to the accident. Wilfong v. Omaha & C. B. St. Ry. Co., 129 Neb. 600, 262 N. W. 537; Whitehouse v. Thompson, 150 Neb. 370, 34 N. W. 2d 385.

The evidence is sufficient to support a finding that the acts of appellant were not the proximate cause of the collision, and that the appellee negligently injured the appellant. The trial court should not have dismissed the case.

REVERSED AND REMANDED.

NETA D. REDICK ET AL., APPELLEES, V. PEONY PARK, A CORPORATION, APPELLANT.
37 N. W. 2d 801

Filed June 3, 1949. No. 32609.

1. **Appeal and Error.** Rule 8 a 2 (4) of this court is designed to assist the parties and the court in determining the issues to be considered. It is not designed to prevent determination of issues by a technical construction of the rule.
2. **Declaratory Judgments.** Section 25-21,159, R. S. 1943, puts the duty upon the plaintiffs in the first instance of joining as parties all persons who have or claim any interest which would be affected by the declaration.
3. ———. The Uniform Declaratory Judgments Act is applicable only where there is a present actual controversy and all interested persons are made parties, and only where justiciable issues are presented.
4. ———. An action to secure a declaration of rights is designed to terminate a controversy so far as it relates to the parties and facts giving rise thereto, and courts should, under most circumstances, dismiss such an action without prejudice, whenever all parties, whose claims gave rise to the controversy and whose rights upon such claims would be adjudicated by the declaration sought, had they been a party to the action, have not been impleaded.
5. ———. There must be an actual and bona fide controversy as to which the judgment will be res adjudicata. Such a case requires that all the interested parties shall be before the court.
6. ———. The Uniform Declaratory Judgments Act does not contemplate the adjudication of interests of a party over which the court has no jurisdiction.
7. **Statutes.** Specific statutory provisions relating to a particular subject control over general provisions and other parts of the law which otherwise were broad enough to cover the subject and generally where there is a conflict between the two the special will prevail.
8. **Declaratory Judgments.** No matter what may be the wishes of the parties in court the courts will not ordinarily entertain and render decrees in declaratory judgment actions which, for want of necessary parties, cannot adjudicate the questions presented.

APPEAL from the district court for Douglas County: WILLIAM A. DAY, JUDGE. *Reversed and remanded with directions.*

James E. Bednar, for appellant.

Monsky, Grodinsky, Good & Cohen, for appellees.

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

SIMMONS, C. J.

Plaintiffs brought this action seeking a declaratory judgment as to their rights, status, and legal relations with the defendant with regard to a contract entered into by defendant with John and Dorothy Mach. Trial was had resulting in a decree that the contract involved was not a covenant running with the land and was not binding on the plaintiffs or any grantees of plaintiffs; that the contract being in restraint of trade was void as against public policy and for the purpose of suppressing competition in a lawful business; that the contract was void for want of and failure of consideration; and that the plaintiffs' property was free of any burdens of the contract and not encumbered in any manner by it. We reverse the judgment and remand the cause for failure of necessary parties.

So far as necessary for our determination here, there is no material dispute in the record.

In 1939, the defendant was the owner of some 34 acres of land generally in a rectangular tract, lengthwise to the east and west, in the city of Omaha. John and Dorothy Mach (hereinafter referred to as Mach) were the owners of 15 lots contiguous to and immediately south of the land of defendant. The larger rectangular piece of land formed by the two tracts was bisected by a highway running generally from the southeast corner of the Mach land in a northwest direction across the Mach land and the southwest part of the defendant's land, with the result that both Mach and defendant owned land on each side of the highway. The east part of the two tracts was lower and the land to the west part higher than the grade of the highway.

On March 25, 1939, the defendant and Mach entered into a writing, termed a "Restriction Agreement" which, among others, contained the following provisions: "IT IS THEREFORE understood and agreed by and between all the parties hereto that any buildings or improvements erected or constructed by them or by either of them on land belonging to them or to either of them within the area hereinabove last designated, for commercial or semi-commercial purposes or for business purposes, other than residences, shall be of fire proof or semi-fire proof construction (brick, brick veneer, stucco or stone) and shall be in keeping with and conformable to the class and character and kind of improvements and buildings now erected and maintained on land of The Tower Tourist Village, immediately East of said triangle, so far as construction is concerned. * * *

"All parties hereto agree not to use any land owned by them or by either of them within the area above described from Underwood Avenue to Dodge Street and from 82nd to 84th Street, for purposes of a tourist camp, tourist apartments or dance hall, nor for any unlawful purpose, nor in any way or manner which would injure or reflect on the credit or reputation of the neighborhood. This restriction does not prohibit dancing where it is incidental to another business, nor does it prohibit the sale of beer or liquor.

"The terms and convenants (sic) contained herein to extend and be binding on the parties hereto, their heirs, executors, administrators, agents, personal representatives, lessees, grantees, successors and assigns for a period of 15 years from date hereof, (sic) In the event of a sale or lease of any portion of the premises which are subject to these restrictions, an appropriate clause or provision shall be contained in such deed or lease, enbodying (sic) the substances of the restrictions and convenants (sic) herein contained, and in the event of failure or oversight to insert such provision in such deed or lease this instrument to operate in lieu thereof."

At the same time defendant and Mach entered into a contract with a contractor for the grading and leveling of the land. That work was done in 1939.

In January 1946, Mach began negotiations to sell his land lying south of the highway to the plaintiffs. Mach undertook to secure a release of the restriction agreement and defendant refused. Plaintiffs were advised of the restriction agreement.

On February 6, 1946, plaintiffs entered into a contract of purchase with Mach, who agreed to convey to plaintiffs, subject to building restrictions or easements then of record "and particularly subject to the restrictions stated and provided for in a certain agreement executed by and between the first parties (Mach) and Peony Park, a corporation, on March 25, 1939, * * *." Thereafter plaintiffs made tentative plans for the construction of improvements on the land and undertook to secure their approval by the defendant. Defendant did not approve.

By plat filed in April 1946, defendant subdivided its property into lots and blocks and on January 23, 1947, filed in connection therewith protective covenants "to run with the land" limiting the use to residential purposes. Defendant constructed a number of residences on the property and at the time this cause was tried had sold seven lots and residences. The evidence does not disclose the names of these purchasers nor when or under what conditions the sales were made.

The evidence also discloses that there is a corporation known as Tower Tourist Village which at all times mentioned herein owned and operated a business related primarily to tourist accommodations on land immediately to the east of defendant's land. There also is evidence that the control of Tower Tourist Village is vested in the same ownership that controls the defendant corporation.

There is evidence that Mach remains the owner of that part of his land to the north of the highway.

Plaintiffs brought this action against the defendant.

Plaintiffs alleged that they had an equitable title to that part of the Mach land lying south of the highway and set out the purported agreement between Mach and defendant. They further alleged that certain of defendant's stockholders were interested in Tower Tourist Village, a corporation; that the contract between Mach and defendant had for its purpose suppressing competition against Tower Tourist Village and giving it a monopoly in the business of renting furnished apartments; that Mach owned his land independent of defendant; that when the contract was entered into defendant did not sell anything of value to Mach, or Mach to defendant; that the provisions of the contract gave no benefit to any land described therein; that plaintiffs intended to build an apartment hotel on the premises and not a tourist camp or tourist apartments, although they did not expect to turn away tourists; that defendant objected to the construction thereof as in violation of the agreement, contending that it was a covenant running with the land; that plaintiffs contended that they were not bound by the agreement; that it was one in restraint of trade and void; that their proposed construction would not violate the agreement; and that defendant threatened injunction proceedings.

Plaintiffs prayed for a declaration of rights, for a declaration that their proposed plans did not violate the agreement; that the contract was not a covenant running with the land; that it was void; and that defendant had no right to interfere with the development.

Defendant answered, admitting plaintiffs' equitable title and the execution of the contract, and denying generally. Defendant further answered, alleging a good and valuable consideration for the contract which had been had and received by Mach; denying that the contract was one in restraint of trade or to give Tower Tourist Village a monopoly or suppress competition. Defendant alleged that plaintiffs' proposed construction would be violative of the contract; that the proposed construction would damage and hinder the development and sale of defend-

ant's land; and that plaintiffs purchased with full knowledge of and were bound by the contract, and prayed for a dismissal. Trial was had with the result above indicated.

At the beginning we are confronted with defendant's contention that the trial court erred in rendering a declaratory judgment because all interested persons were not made parties. Defendant relies upon section 25-21,159, R. S. 1943, which is in part as follows: "When declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceeding." Defendant also relies upon section 25-21,154, R. S. 1943, which is: "The court may refuse to render or enter a declaratory judgment or decree where such judgment or decree, if rendered or entered, would not terminate the uncertainty or controversy giving rise to the proceeding."

Plaintiffs counter with two contentions: First, that under rule 8 a 2 (4) of this court, the consideration of the cause is limited to errors assigned and discussed; second, that under sections 25-806 and 25-808, R. S. 1943, objections as to parties not raised by either demurrer or answer are deemed waived.

As to the first contention, plaintiffs overlook the concluding sentence of the rule: "However, the court may, at its option, notice a plain error not assigned."

Defendant assigns as error that the decree is contrary to law. Its first proposition of law is: "Declaratory judgments apply only to actions where there are justiciable issues, and all persons interested are made parties." Defendant begins its argument with "Appellant contends the court erred in rendering a declaratory judgment because the petition and evidence present no justiciable issues, and all interested persons are not made parties."

The rule upon which plaintiffs rely is one designed to assist the parties and the court in determining the issues

to be considered. It is not designed to prevent the determination of issues by a technical construction of the rule. We have the full right to consider the error argued under the rule.

This brings us to the contention of defendant as met by the second contention of plaintiffs.

Section 25-21,159, R. S. 1943, puts the duty upon the plaintiffs in the first instance of joining as parties all persons who have or claim any interest which would be affected by the declaration. To insure that joinder it provides no declaration shall prejudice the rights of persons not parties to the proceedings, and likewise section 25-21,154, R. S. 1943, provides that the court may refuse to render a declaratory judgment when to do so would not terminate the uncertainty or controversy giving rise to the proceeding.

It is the established rule that "The Declaratory Judgments Act is applicable only where there is a present actual controversy and all interested persons are made parties, and only where justiciable issues are presented." Miller v. Stolinski, 149 Neb. 679, 32 N. W. 2d 199. We have made application of this rule denying declaratory judgments in a number of decisions.

In Updike Investment Co. v. Employers Liability Assurance Corporation, 128 Neb. 295, 258 N. W. 470, we stated the rule as follows: "An action to secure a declaration of rights is designed to terminate a controversy so far as it relates to the parties and facts giving rise thereto, and courts should, under most circumstances, dismiss such an action without prejudice, whenever all parties, whose claims gave rise to the controversy and whose rights upon such claims would be adjudicated by the declaration sought, had they been a party to the action, have not been impleaded." In that action a declaratory judgment was entered to the effect that an insurance company was not obliged to defend an action brought by an employee of the plaintiff and would not be obligated to reimburse plaintiff for any sums that

might be recovered by plaintiff. We reversed that judgment because of the lack of a necessary party. The necessary party was the injured employee who was not a party to the contract, but who might have a cause of action under the provisions of the policy. We held that any declaration of rights would not be res adjudicata as to the employee, she not being a party to the action.

In Hall v. United States Nat. Bank, 128 Neb. 254, 258 N. W. 403, an original action in this court by the State Treasurer to determine his rights and status under his official bond, we sustained demurrers for the reason that the state and the surety on the plaintiff's bond were necessary parties to give the court jurisdiction to determine the questions presented as to the duty of deposit banks to pay checks drawn by the State Treasurer.

In Dobson v. Ocean Accident & Guarantee Corporation, 124 Neb. 652, 247 N. W. 789, the administratrix of an employee of plaintiffs secured judgment against the city of Gillespie, Illinois. Plaintiffs had a policy of insurance with defendant. Plaintiffs sought a declaratory judgment that if they were liable to the city, defendant was liable to protect the plaintiffs. The trial court denied the judgment and we affirmed, holding that "* * * the trial court in this case had no jurisdiction to determine any controversy between plaintiffs and the city of Gillespie, because the city is not a party to this action. No judgment rendered by this court would be binding upon the city, and if not binding upon the city, neither would it be binding upon the plaintiffs with respect to any liability claimed against them by the city. Hence, it follows that, had the trial court attempted to render a judgment in conformity with the prayer of plaintiffs' petition, it would not terminate the uncertainty or controversy." We cited with approval this statement: " 'There must be an actual and bona fide controversy as to which the judgment will be res adjudicata. Such a case requires that all the interested parties shall be before the court.' "

In Southern Nebraska Power Co. v. Village of Deshler, 130 Neb. 133, 264 N. W. 462, an action was brought seeking a declaratory judgment that an ordinance was void. Only one member of the village board was made a party. We held: "* * * the trial court in this case had no jurisdiction to determine any controversy between the plaintiff and the members of the village board of Deshler, because the members of the board are not parties to this action."

In Wood Realty Co. v. Wood, 132 Neb. 817, 273 N. W. 493, one of the parties sought a declaratory judgment as to its authority under certain contracts. Some of the interested parties to the contracts were not parties to the action. The trial court declined to rule and we affirmed, holding that "It is well-settled law that the statute authorizing a declaratory judgment is applicable only where all interested persons are made parties to the proceeding."

Our holdings are in accord with the general rule. See, 16 Am. Jur., Declaratory Judgments, § 55, p. 327, § 61, p. 330; 1 C. J. S., Actions, § 18, p. 1048.

We call attention to two recent cases in other jurisdictions. In Conley v. Union County Peoples' Utility Dist. (Or.), 187 P. 2d 150, the court declined to discuss the terms and conditions of a contract where one of the parties to the contract was not a party to the proceedings, and said: "Even the Declaratory Judgment Act has its limitations. The Act does not contemplate the adjudication of interests of a party over which the court has no jurisdiction."

In United Slate Workers Assn. v. United Brotherhood of Carpenters, 185 Md. 32, 42 A. 2d 913, a declaratory judgment was sought construing certain contracts involving the jurisdiction of the unions. Adversary parties were before the court as parties. Other parties to the contract were not parties to the action. The court denied a declaratory judgment on the ground that all the parties to the contract were not before the court.

Plaintiffs contend that defendant has waived that question under sections 25-806 and 25-808, R. S. 1943. Plaintiffs invoke the provisions of the Uniform Declaratory Judgments Act. Section 25-21,159, R. S. 1943, is a part of that act, which is complete within itself. It controls over the general provisions, the rule being that "Specific statutory provisions relating to a particular subject control over general provisions and other parts of the law which otherwise were broad enough to cover the subject and generally where there is a conflict between the two the special will prevail." Canada v. State, 148 Neb. 115, 26 N. W. 2d 509.

As above recited we have held that the presence of necessary parties was jurisdictional in this class of cases, and that is a matter which the parties cannot waive.

In Holland v. Flinn, 239 Ala. 390, 195 So. 265, the action involved the question as to whether or not a deed conveyed a fee simple title. The title of the grantor was brought in question and the construction of a will was presented. Both parties sought a declaratory judgment, one contending and the other denying that a fee simple title had been conveyed. The question of necessary parties was not raised either in the trial court or on appeal by either party. Remaindermen named in the will were not parties. The Supreme Court raised the question on its own motion. The court held that the remaindermen were necessary parties and their presence jurisdictional. The court said: "No matter what may be the wishes of the parties in court the courts will not entertain and render decrees, which, for want of necessary parties, cannot adjudicate the questions presented. This rule has been declared by many courts in cases under the Declaratory Judgment Law."

The question then is, are there parties, disclosed by this record, who have not been joined as parties to the action, whose absence prevents the granting of the

declaratory judgment under the rules and decisions here discussed?

The record is clear that Mach is a party to the contract which plaintiffs seek to have construed and declared void. Mach owns land involved in the contract. A declaratory judgment by this court such as plaintiffs seek would be a precedent applicable to his rights and liabilities under the contract contrary to the statutory provision that no declaration shall prejudice the rights of persons not parties to the proceeding. Such a declaration, however, would not be res adjudicata as to him and would not terminate any uncertainty or controversy that he might wish to assert against either plaintiffs or defendant, or they against him. The absence of Mach as a party renders necessary a reversal of the judgment of the trial court and a denial of the declaratory judgment sought.

The situation presented as to Tower Tourist Village presents a comparable situation. Plaintiffs alleged facts, the effect of which was to say that the contract involved was one made for the benefit and advantage of Tower Tourist Village. Plaintiffs offered evidence to sustain those allegations. Tower Tourist Village, therefore, on plaintiffs' own allegations and evidence had an interest which would be affected by the declaration, yet it is not made a party. Under these circumstances the failure to make Tower Tourist Village a party requires a reversal of the judgment of the trial court, and a denial of the declaratory judgment sought.

The situation as to the grantees of the defendant is different. Whether or not they have or claim any interest which would be affected by the declaration is not clear. The plaintiffs have the duty to determine that question initially. If they are not made parties and if, upon another trial of this action, it develops that they have or claim such an interest that they should be made parties, the court, consistent with the provisions of section 25-323, R. S. 1943, must order them brought

in and likewise refuse to enter a declaratory judgment until that has been done.

The judgment of the district court is reversed and the cause remanded with directions to dismiss the cause without prejudice in case Mach and Tower Tourist Village are not made parties to the action within a time to be fixed by the district court.

REVERSED AND REMANDED WITH DIRECTIONS.

RUTH ANN THOREN, APPELLEE, v. JOHANNA E. MYERS ET AL., APPELLANTS.
37 N. W. 2d 725

Filed June 3, 1949. No. 32627.

1. **Automobiles: Negligence.** The owner of an automobile which is kept for family purposes is liable for injuries inflicted upon a stranger resulting from the negligence of one member of the family who was using it for his individual pleasure or purpose with the owner's consent.
2. **Negligence.** The defendant, in a personal injury action, may show under a general denial that the injury was caused by the negligence of a third person for whose negligence he is not responsible.
3. **Evidence.** Admissions of a party against interest made in or out of court with reference to and pertinent to the issues being tried are admissible in evidence against such party.
4. **Appeal and Error.** Where the trial court admonishes the jury concerning the propriety of an oral argument, after objection by an adverse party, no error can be predicated thereon where the record discloses that the party claiming error acquiesced in the admonition given.
5. **Trial.** In determining whether or not a verdict should have been directed by the trial court, the evidence must be considered in the light most favorable to the party against whom the motion was made; that is, every controverted fact must be resolved in his favor and he should have the benefit of every inference that can reasonably be deduced therefrom.
6. **Damages.** In an action for damages, where the law furnishes no legal rule for measuring them, the amount to be awarded rests largely in the sound discretion of the jury, and the courts are reluctant to interfere with a verdict so rendered.

7. **Trial.** A verdict may be set aside as excessive only when it is so clearly exorbitant as to indicate that it was the result of passion, prejudice, or mistake, or that it is clear that the jury disregarded the evidence or controlling rules of law.
8. **Appeal and Error.** The ruling of the trial court, on matters involving the misconduct of counsel or jury, will not ordinarily be disturbed on appeal where there is evidence to support the findings of the trial court thereon.

APPEAL from the district court for Cass County: THOMAS E. DUNBAR, JUDGE. *Affirmed.*

W. H. Wright, Fraser, Connolly, Crofoot & Wenstrand, John R. Dudgeon, and *Chambers, Holland & Groth,* for appellants.

Stewart & Stewart and *Smith & Lebens,* for appellee.

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

CARTER, J.

Plaintiff commenced this action against the defendants to recover damages for injuries sustained in an automobile accident alleged to have resulted because of the negligence of the defendant David Myers. The jury returned a verdict for the plaintiff in the amount of $18,000. From the judgment entered on the verdict the defendants appeal.

The accident occurred on September 8, 1947, at about 8:15 p. m. The plaintiff was riding in the front seat of her husband's car, while he was driving east on U. S. Highway No. 34 about one mile north of Avoca, Nebraska. Plaintiff's husband, Francis Thoren, who will hereafter be referred to as Thoren, testified that he was proceeding at a speed estimated at 35 miles an hour. At the intersection where the accident occurred his car was struck by the automobile driven by the defendant David Myers, which entered the intersection from the south. The Thoren car was turned completely around by the impact, plaintiff was thrown from the car and

she was found under it in a bent-over position, severely injured.

The evidence shows that the car which struck the Thoren automobile was driven by the defendant David Myers, who was accompanied by his younger brother and three other teen-age boys. He admits that he went onto U. S. Highway No. 34 without stopping, and hit the car occupied by plaintiff. His evidence in general is that as he approached the highway his view was obstructed until he came over the crest of a knoll about 193 feet south of the intersection, that he did not know the highway was nearby, that he applied his brakes immediately, but because of the deep gravel on the road he could not stop, and skidded onto the highway and struck the Thoren car while traveling at a speed estimated at 15 miles an hour. He testified that the stop sign was poorly located so that he did not see it in time to stop. He testified that he did not drive over 40 miles an hour at any time and claims that the accident was unavoidable and the result of a sudden emergency.

The evidence shows that U. S. Highway No. 34 is a paved highway, the pavement being 22 feet in width. Thoren was driving on the south side of the pavement on his right-hand side. The headlights on his car were burning. His car was struck near the rear door and fender and it came to rest on the north shoulder of the highway, about 75 feet east of the point of impact. Thoren testified that he never saw the Myers car until just before the collision. The Myers car was traveling on a graveled road. The gravel was loose and heavy as one approached U. S. Highway No. 34 from the south. There was a knoll 193 feet south of the highway. The evidence shows that the crest of the knoll was 2 feet higher than the pavement on U. S. Highway No. 34. David Myers testified that he did not see the Thoren car, that he was unfamiliar with the location of the road at the time, that he applied his brakes immediately,

that he skidded onto the pavement, and that the resulting accident was unavoidable.

The foregoing constitutes a brief statement of the conditions existing and the actions of the parties at and immediately prior to the accident.

The defendant Johanna Myers, the owner of the automobile driven by David Myers, contends that she is not liable for any of the damages resulting from the accident under the family purpose doctrine, and that her motion for a directed verdict should have been sustained for that reason. In this respect the evidence shows that Johanna Myers was a widow. She lived in Weeping Water, Nebraska, with her two sons, David and Harold, ages 19 and 16, respectively. The automobile was owned by Mrs. Myers and it was licensed in her name. She had a driver's license and drove the car herself. The evidence is that she permitted David to drive the car when accompanied by her. There is evidence that both sons assisted with the driving when the three of them made a vacation trip to California in the summer of 1947. The evidence also shows that on a few occasions Mrs. Myers permitted David to drive the car for purposes of his own. She says that David took the car by himself two or three times, and only after obtaining her permission. David testified that he used the car alone four or five times. He drove the car mostly when his mother was with him.

We think the use of the car by David, under the circumstances here shown, brings it within the purview of the family purpose doctrine. The family consisted of Mrs. Myers and her two sons, David and Harold. The fact that Mrs. Myers exercised control of the car and required David to obtain her permission before he could use it is not a controlling factor. It is the usual practice for the owner as the head of the family to prescribe the conditions under which an automobile may be used. Clearly, when an automobile is used in accordance with such conditions with the express permis-

sion of the owner, as here, it is within the family purpose doctrine, even though the automobile is used for the purposes of the son.

The rule is: "The owner of an automobile kept for family purposes is liable for injuries inflicted upon a stranger as a result of the negligent driving of one of his children, where the car is occupied by members of the family and is being used for one of the purposes for which it is kept." Stevens v. Luther, 105 Neb. 184, 180 N. W. 87.

That the use of the automobile at the time of the accident, in the case before us, was for a family purpose is sustained by our holding in Linch v. Dobson, 108 Neb. 632, 188 N. W. 227, wherein we said: "Where the car is kept for the use and pleasure of the family, and one member of the family is using it for his individual pleasure, or for one of the family purposes for which it is kept, it comes strictly within the reason of the rule that, in such case, the member of the family is acting as the agent, in furthering the purposes of the owner, as truly as though other members of the family were in the car with him, and that the owner can be held responsible for damages resulting from the negligent operation of the car while so used." See, also, Hogg v. MacDonald, 128 Neb. 6, 257 N. W. 274.

In the instant case the controlling facts were not in dispute. They showed that, as a matter of law, the owner was liable for any negligence of her son David while he was using the car. Under such circumstances, the trial court properly instructed the jury that the family purpose doctrine applied as a matter of law.

The defendants assert that the trial court erred in refusing to permit the filing of an amendment to defendants' answer during the course of the trial. The petition charged that the accident was due to the negligence of David Myers. The answer was, in effect, a general denial. On the second day of the trial, after plaintiff had adduced evidence in support of the allega-

tions of her petition, but prior to the time she rested her case, defendants requested leave to amend their answer by adding a paragraph thereto alleging that the accident was proximately caused by the negligence of Francis Thoren, the husband of the plaintiff. The trial court denied the request. We find no error in this ruling. Nowhere is it charged that the plaintiff was guilty of any negligence, imputed or otherwise. It is the rule that a defendant may show, under a general denial, that the accident was proximately caused by a third person. In 41 Am. Jur., § 366, p. 541, it is said: "A general denial puts in issue every material allegation of the complaint, except those admitted. It goes to the root of the cause of action and permits the introduction of any proper evidence tending to controvert the facts which the plaintiff must establish to sustain his case. Any fact which goes to destroy, not to avoid, the plaintiff's cause of action is provable under the general denial, including facts independent of those averred in the complaint, of an affirmative character, but which have a negative effect upon the issues." In 45 C. J., § 730, p. 1141, the rule is stated as follows: "Defendant may also show under the general issue that the injury was caused by the negligence of a third person for whom he was not responsible, such as by an independent contractor; and this rule applies, although other reasons for the accident are set up in the answer, * * *." It is clear, therefore, that the proposed amendment could serve no useful purpose. The allegations therein contained could be properly proved under the general denial. Defendants assert that the proposed amendment was requested because of the testimony of plaintiff's husband. Consequently, the evidence was already admitted upon which the amendment was based. The jury had a full opportunity to consider it in determining whether or not the negligence of David Myers was the proximate cause of the accident. The amendment would have been surplusage under the issues as

made, and the trial court correctly denied the application to amend.

The defendants claim that the trial court erred in permitting plaintiff to read portions of the depositions of Johanna and David Myers in evidence when they were present in the courtroom and able to testify. The excerpts from the depositions were offered as admissions against interest. An examination of the portions of the depositions offered by the plaintiff shows them to be admissions against interest which were pertinent to the issues being tried. The rule is stated in Gentry v. Burge, 129 Neb. 493, 261 N. W. 854, and cases therein cited, as follows: "It is a well-settled rule that admissions of a party against interest made in court or out of court, with reference to and pertinent to the issues being tried, are admissible in evidence against such party." See, also, Tuttle v. Wyman, 146 Neb. 146, 18 N. W. 2d 744; Falkinburg v. Inter-State Business Men's Accident Co., 132 Neb. 670, 272 N. W. 924.

The record shows that objection was made to a statement of defendants' counsel during the course of his argument to the jury. The court ruled on the objection and admonished the jury with reference to the matter. Defendants' counsel stated immediately thereafter: "Yes, your Honor, that is right." It is evident that defendants' counsel acquiesced in rather than objected to this ruling. Counsel may not acquiesce in a ruling of the court and assert error in case of an unfavorable verdict. One may not be permitted to acquiesce in a ruling and gamble on a favorable verdict, and when the verdict is adverse, to obtain a new trial and a second chance before another jury. See Golder v. Lund, 50 Neb. 867, 70 N. W. 379.

It is contended that the evidence does not support the finding of the jury that the negligence of David Myers was the proximate cause of the accident. In considering this point, the evidence of the plaintiff will be considered in the light most favorable to her. Every

controverted fact must be resolved in her favor and she should have the benefit of every inference that can reasonably be deduced therefrom. Smith v. Platte Valley Public Power and Irrigation District, *ante* p. 49, 36 N. W. 2d 478.

The evidence shows that plaintiff, her husband, and two children were driving east at approximately 35 miles an hour on their right-hand side of the road. The road upon which they were driving was a favored arterial highway protected by stop signs. The driver of the car in which plaintiff was riding had a right to assume, until he was put upon notice, that the favored character of the highway would be respected. The defendant David Myers knew that U. S. Highway No. 34 was a favored highway protected by stop signs. He knew as he traveled north just before the accident that this highway was somewhere in the neighborhood, although he did not know exactly where it was. He approached the crest of the knoll at 40 miles an hour or less. He saw the highway and recognized it as U. S. Highway No. 34 as he came over the crest. He says he applied his brakes 180 feet from U. S. Highway No. 34. He did not see the stop sign located 60 feet south of U. S. Highway No. 34 until close to it, because of its claimed poor location. But he already knew that he was required to stop before entering upon U. S. Highway No. 34. The stop sign, under such circumstances, even if more effectively located, could have given him no information other than he already possessed. There is evidence of expert witnesses that the automobile could have been stopped in less than 180 feet. He failed to see the Thoren car, although its headlights were burning. He failed to drive at such a speed that he could stop within the range of his vision. Huston v. Robinson, 144 Neb. 553, 13 N. W. 2d 885. He failed to stop before entering the intersection. Ritter v. Hering, 135 Neb. 1, 280 N. W. 231. These facts, together with all the other circumstances surrounding the accident,

make a case for a jury to decide. It is clearly sufficient to sustain a finding that the negligence of David Myers was the proximate cause of the accident.

Defendants contend that the judgment was excessive. The evidence shows that plaintiff, after the accident, was under the automobile in a doubled-up position, the weight of the car pressing down upon her back. As a result thereof plaintiff suffered the fracture of three vertebrae. An operation was required to fuse the fractured vertebrae which, though successful, resulted in a 40 percent permanent disability to the back. Plaintiff was kept in a body cast for approximately five months and was required to use a body brace for an additional five months. She has a permanent deformity of the back which will predispose to strain at the lumbosacral region and at the site of the vertebral fractures. Plaintiff has suffered injury to her left leg which causes pain and swelling, due to injury to the spinal cord. The fractured vertebrae resulted in injury to the nerves controlling the bowels and bladder. She submitted to two operations to correct this condition, which were described as surgically successful, but functionally unsuccessful insofar as the bladder was concerned. She has an incontinence of urine that is permanent, accompanied by all the discomfort and embarrassment which naturally follows. Plaintiff is unable to perform the work she formerly performed, even her usual household duties. She was 21 years of age at the time of the accident and has a life expectancy in excess of 40 years.

"In an action sounding in damages merely where the law furnishes no legal rule for measuring them, the amount to be awarded rests largely in the discretion of the jury, and with their verdict the courts are reluctant to interfere." Rueger v. Hawks, 150 Neb. 834, 36 N. W. 2d 236.

"A verdict may be set aside as excessive by the trial court or on appeal only when it is so clearly exorbitant as to indicate that it was the result of passion, prejudice,

mistake, or some means not apparent in the record, or it is clear that the jury disregarded the evidence or rules of law." Horky v. Schroll, 148 Neb. 96, 26 N. W. 2d 396.

The plaintiff was a young woman in good health before the accident. She has a permanent disability of the back to the extent of 40 percent. She has suffered other injuries which will be a source of discomfort and embarrassment for the rest of her life. She has endured pain and suffering, including operations and the discomforts of casts and braces over a long period of time. No yardstick exists for determining an accurate measurement of her damage. The jury is assigned the duty of fixing the amount of damages in such cases under our system. Its judgment in such a case is to be sustained unless it is so exorbitant as to indicate passion, prejudice, mistake, or a complete disregard of the evidence and the law. We find no evidence in the present case which indicates that the jury did not fairly, honestly, and dispassionately assess the amount of the damages. The evidence is sufficient to sustain the amount found to be due and it is not within the province of this court, under such circumstances, to interfere therewith.

Complaint is made of the conduct of a juror in talking with plaintiff's husband in the main corridor of the courthouse. The evidence of both parties to the incident is to the effect that the conversation had was spontaneous and casual, and had no connection whatever with the case being tried. There was no abuse of discretion by the trial court in denying a new trial on the basis of this alleged misconduct.

Error is also predicated on an incident arising in the office of the clerk of the district court. It appears that a juror was seen in this office at a time when one of plaintiff's counsel was also present. The juror casually examined the top page of a sheaf of papers marked "PLAINTIFF'S REQUEST FOR INSTRUCTIONS." Plaintiff's counsel immediately took possession of them and left the office. There is no evidence that any preju-

dice resulted from this incident. No basis exists for interfering with the ruling of the trial court on this matter.

Other errors have been assigned. We have examined all of them and find no merit in any of them. The judgment is therefore affirmed.

AFFIRMED.

YEAGER, J., not participating.

FRANK PANEBIANCO, APPELLEE, V. THE CITY OF OMAHA, NEBRASKA, A MUNICIPAL CORPORATION, ET AL., APPELLANTS.
37 N. W. 2d 731

Filed June 3, 1949. No. 32617.

1. **Pleading.** A party who stands on a general demurrer to a pleading thereby admits the material facts averred, and must take all the consequences which result from such admission.
2. **Municipal Corporations.** Under police power a city may promulgate police regulations affecting and amounting to restrictions upon the use of property within certain areas of a city without such restrictions affecting all other areas if such regulations are reasonably in the interest of the public welfare.
3. ———. In the absence of anything appearing to the contrary a presumption obtains that such restrictions are reasonably in the interest of the public welfare.
4. **Pleading.** The presumption of reasonableness of a restriction in the interest of the public welfare does not obtain in the face of a factual declaration to the contrary and an admission of the declaration by demurrer.
5. **Constitutional Law.** A regulatory or restrictive ordinance subject to the objection that it is discriminatory as to classes of property and subject to the objection that it is not a reasonable exercise of the police power in the interest of the public welfare is violative of Article I, section 25, of the Constitution of the State of Nebraska.

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

Edward F. Fogarty, Edward Sklenicka, James M. Paxson, and *Herbert M. Fitle,* for appellants.

Fitzgerald & Smith, for appellee.

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

YEAGER, J.

This is a class action instituted by plaintiff in his own behalf and in behalf of all others in the city of Omaha, Nebraska, similarly situated, against the said city of Omaha, its mayor, its city councilmen, its chief of police, and its city clerk to have declared null and void and of no effect certain provisions of the city ordinances and for an injunction against the enforcement of the provisions in question.

To the petition which was filed by plaintiff the defendants filed a general demurrer. The demurrer was overruled. The defendants elected to stand on their demurrer whereupon default was entered against them and a decree was rendered permanently enjoining them from in any manner enforcing, or attempting to enforce, the provisions of the ordinance concerning which complaint was made. From the decree the defendants have appealed.

The provisions of the ordinance having pertinence to the inquiry here are the following:

"* * *, it shall be unlawful, on and after January 1, 1948, for any person or persons, firm, corporation, or association to * * * cut or bridge any curbing on or adjacent to any street, between Leavenworth Street and Cuming Street and 10th Street and 24th Street, all inclusive, for ingress or egress, * * * thereby rendering the street adjacent thereto unavailable for vehicular parking purpose, without first obtaining a permit in accordance with the terms and conditions hereinafter stated, * * *."

"No permit shall be issued except to * * * the leaseholders, tenants or record owners of the land adjacent to the space sought to be used. No permit shall be issued until the same has been authorized by resolution of the City Council. Once a permit has been authorized by the

City Council, same may be renewed, unless it has been revoked, or suspended, by paying the yearly permit fee."

"For the purpose of defraying the cost to the City of regulating, supervising, policing, marking and maintaining the use or privilege of * * * curb cuts, in, along, or upon the streets, there is hereby imposed an annual fee in the amount of $1.00 per front foot so used. * * * *Provided,* * * * however, that no fee shall be charged for the first fifteen (15) feet that may be needed for a driveway as a means of ingress or egress to any property."

"The City of Omaha reserves the right to refuse an application when, in the judgment of the City Council, such permit would create a traffic hazard or not be beneficial to the public welfare."

"The City of Omaha reserves the right to cancel any permit at any time."

"Any person or persons, firm, corporation, or association violating any provisions of this Article, upon conviction thereof, shall be fined in any amount not to exceed Two Hundred Dollars ($200.00) and each day of violation shall constitute a separate offense."

This ordinance purports to control within the area named also the use of space upon streets for loading and unloading but that subject is not embraced in the petition herein and the validity of the ordinance in that respect is not involved here.

The plaintiff has set forth in his petition that he is the owner of Lot 8, Block 2, Kountze and Ruth Addition to the city of Omaha, which property is located on the northwest corner of 17th and Jackson Streets in the city of Omaha, and within the area described in the ordinance; that on the property he operates a filling station, parking lot, and attendant and related activities and that in the conduct of his busines for ingress and egress of customers he requires at least 100 feet of lowered curb; that unless restrained the defendants will enforce this ordinance against him to his damage and to the damage of his business; and that a large number of other persons within

the described area are in a similar situation to that of the plaintiff.

He alleged that the ordinance is null, void, and invalid for the following reasons:

That the city council was without lawful power to require the plaintiff and the others similarly situated to do the things and make the payments required by the ordinance.

That the city council is without power to pass a valid ordinance levying a charge or tax upon persons or property within a part of the city of Omaha.

That the ordinance is violative of Article I, section 1, of the Constitution of Nebraska, in that it denies plaintiff the protection of his property.

That the ordinance is violative of Article I, section 3, of the Constitution of Nebraska, in that it deprives plaintiff of his property without due process of law.

That the ordinance is violative of Article I, section 21, of the Constitution of Nebraska, in that it takes plaintiff's property for a public use without just compensation.

That the ordinance is violative of Article I, section 25, of the Constitution of Nebraska, in that it discriminates against plaintiff in respect to ownership, possession, and enjoyment of his property.

That the ordinance is violative of Article VIII, section 1, of the Constitution of Nebraska, in that it does not purport to raise revenue as the Legislature directs and that it operates without uniformity and disproportionately upon property within the city.

That the ordinance is violative of the Fifth Amendment to the Constitution of the United States in that it deprives the plaintiff of property without due process of law and without just compensation.

That the ordinance is violative of the Fourteenth Amendment to the Constitution of the United States in that it abridges the privileges and immunities of plaintiff as a citizen of the United States and deprives him of his

property without due process of law and also denies him equal protection of the laws.

The declarations of the plaintiff as contained in his petition are that the exactions of the defendants pursuant to the ordinance were that as a condition of having ingress to and egress from his property he was required, on application, to be granted and receive a permit for such use; that use of more than 15 feet could not be had without payment of $1 a year for each additional foot; that the city is left free to grant or reject any such application; that the city is left free to cancel any such permit at any time; that the ordinance imposed a penalty in its nature criminal for a violation of the imposed regulation upon the right of plaintiff to ingress to and egress from his own property, all of which are illegal for the reasons stated.

It should be emphasized here, we think, that this case has come here on the petition of the plaintiff generally demurred to by the defendants which demurrer was overruled. There is no traverse of any fact alleged. Thus every fact well pleaded must be taken as true. In People v. Weston, 3 Neb. 312, it was said: "A party who stands upon his general demurrer to a pleading, thereby admits the material facts averred, and must take all the consequences which result from such admission." This pronouncement was approved in McArthur v. Clarke Drug Co., 48 Neb. 899, 67 N. W. 861, and in Central Nebraska Public Power and Irrigation District v. Walston, 140 Neb. 190, 299 N. W. 609.

This is a matter of much importance in an approach to the determination of the matters presented. This failure of traverse left the district court and leaves this court without adequate information upon which to make a safe determination of all of the legal questions tendered by the petition.

It is earnestly urged by the appellants that this ordinance was a proper exercise of that phase of the police power which permits the effect of an ordinance to be

limited to particular areas on account of peculiar conditions therein. The principle contended for is basicly sound.

However, because of the record presented, it can have no application here. The principle cannot be employed in the absence of presumption or pleaded facts sufficient to give it application.

It is observable that the ordinance fails to declare a reason for a limitation of its effect to the area described therein, and the petition in substance and effect declares that it is without valid reason, therefore for the purposes of this case, since there was no traverse, it must be taken as true that there was no valid reason for the limitation.

It follows therefore, on the record, that by this ordinance burdens were imposed upon plaintiff and others similarly situated which were not imposed on those outside the defined area without necessity therefor.

There is no doubt that under police power a city may promulgate police regulations affecting and amounting to restrictions upon the use of property within certain areas of a city without such restrictions affecting all other areas if such regulations are reasonably in the interest of the public welfare. Miller v. Board of Public Works, 195 Cal. 477, 234 P. 381, 38 A. L. R. 1479; Jardine v. Pasadena, 199 Cal. 64, 248 P. 225, 48 A. L. R. 509; Williams v. City of Chicago, 266 Ill. 267, 107 N. E. 599, Ann. Cas. 1916B 514; Goldman v. Crowther, 147 Md. 282, 128 A. 50, 38 A. L. R. 1455; Marrs v. City of Oxford, 32 F. 2d 134, 67 A. L. R. 1336; 37 Am. Jur., Municipal Corporations, § 286, p. 920; 58 Am. Jur., Zoning, § 1, p. 940.

It is also true that in the absence of anything appearing to the contrary a presumption obtains that such restrictions are reasonably in the interest of the public welfare. In Marrs v. City of Oxford, *supra,* speaking of the power to regulate, it was said: "Arbitrary and unreasonable regulations, clearly ineffective in accomplishment of the claimed public interest, will be stayed; but the presumption is in favor of a law or ordinance passed

in the exercise of the power, until the contrary is shown."

The presumption of reasonableness in the interest of the public welfare however does not obtain in the face of a factual declaration by a party affected that it is not and a legal admission of the truth of the factual declaration in the pleading of the enacting body as is the case here. In the words of the opinion in Marrs v. City of Oxford, *supra,* by the record presented here "the contrary is shown."

If a regulatory or restrictive ordinance is subject to the objection that it is discriminatory as to classes of property affected by it and is also subject to the objection that it is not a reasonable exercise of the police power in the interest of the public welfare, it is violative of Article I, section 25, of the Constitution of Nebraska. The rule is well stated in 38 Am. Jur., Municipal Corporations, § 343, p. 32, as follows:

"The general rule, so far as classification of business for the purpose of municipal license or occupation taxation is concerned, is that trades, occupations, professions, and privileges may be classified for the purposes of license or occupation taxation, and different licenses may be imposed upon the various classes, provided the classification is reasonable. Facts which justify classification for regulation may also justify classification for revenue purposes, in the imposition of a municipal occupation tax. It should be pointed out, however, that any such legislation by a municipality which has the effect of making an unreasonable classification not based on any essential distinction between the classes, is void." See, also, Speier's Laundry Co. v. City of Wilber, 131 Neb. 606, 269 N. W. 119.

It is true that the rule as stated makes no specific reference to classification of property but the rule as to property is the same. This is clearly pointed out by the following from 16 C. J. S., Constitutional Law, § 520, p. 1052: "A tax statute is void, however, which discriminates between persons or property in like situation,

or which contains classifications that are not based on any reason but on mere accident, whim, or caprice or that have no fair or substantial relation to the purpose for which made."

This statement deals with the power of the state in the situation under contemplation but it is axiomatic that the city derives its power from the state and can have no greater constitutional power in relation to classification than does the state itself. Article I, section 25, of the Constitution of Nebraska, as follows, inhibits against either the state or a city discriminating unreasonably with regard to the use and occupation of property: "There shall be no discrimination between citizens of the United States in respect to the acquisition, ownership, possession, enjoyment or descent of property."

We are therefore required to hold that the ordinance, on the record presented, is void for the reason that it imposes upon the plaintiff in the use of his property and upon all others similarly situated unreasonable and unequal restrictions within the meaning of law.

As is pointed out numerous other objections were made by plaintiff to the ordinance but since factually it has been made to appear that constitutional basis did not exist for the promulgation of the ordinance as a whole because, on the record, in application to the plaintiff and others similarly situated, it was not a proper exercise of the police power it is not deemed advisable or proper to consider the other objections. In other words the basis for the other objections having disappeared with the disappearance of the ordinance to the extent attacked nothing remains requiring consideration and determination.

For the reasons herein set forth the decree of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA EX REL. LEE HEIL, APPELLANT, V. RICHARD JAKUBOWSKI ET AL., SUPERVISORS OF SHERMAN COUNTY, NEBRASKA, APPELLEES.

38 N. W. 2d 26

Filed June 10, 1949. No. 32616.

1. **Mandamus: Appeal and Error.** Findings of fact in a mandamus proceeding, based on conflicting evidence, will not be disturbed on appeal unless clearly wrong.
2. **Mandamus.** A peremptory writ of mandamus should be issued only where the legal right to it is clearly shown.
3. ———. Mandamus, while classed as a law action, is an extraordinary remedy, which is not awarded as a matter of right, but rests in the sound discretion of the court governed by equitable principles, and will not issue when to do so would compel the doing of a substantial wrong.
4. ———. While the writ of mandamus may be issued to require an inferior tribunal or board to exercise its judgment, or proceed to the discharge of any of its functions, it cannot control its judicial discretion.
5. **Officers: Mandamus.** Mandamus may issue against a public officer to compel him to act, when (1) the duty is imposed on him by law, (2) the duty still exists at the time the writ is applied for, and (3) the duty to act is clear.
6. **Bridges.** Repairs of county bridges contemplated by sections 39-831 and 39-832, R. S. 1943, are such as may be made at once and without considerable cost.
7. ———. In determining the character of repairs to be made to bridges, and what bridges shall be repaired, when there are not sufficient funds for all, the court will not control the discretion of county commissioners, unless there is a clear abuse of such discretion.
8. ———. It is a general principle that 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.

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

H. G. Wellensiek and *Donald H. Weaver*, for appellant.

W. H. Line, for appellees.

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

SIMMONS, C. J.

This is a mandamus action in which the county supervisors of Sherman County are respondents. Relator sought a writ to compel respondents to repair a bridge across the Middle Loup River about midway between Loup City and Rockville in Sherman County. An alternative writ was issued. Answer was made and trial had. The trial court found generally for respondents and denied the writ. Relator appeals. We affirm the judgment of the trial court.

On March 12, 1948, the relator filed in the district court for Sherman County his application for an alternative writ of mandamus. In it he alleged that he was a resident, taxpayer, and elector of Sherman County; that the respondents were the supervisors of said county and had general supervision, charge, and control of the highways and bridges of the county and were required by law to keep and maintain the highways and bridges open and in proper repair for use and travel by the public; that the "Austin Bridge," describing its location, was a part of a public road in the county; that during the summer of 1947, it was wrecked by high waters and made impassable for travel; that respondents closed said road to the public; that on February 6, 1948, the relator and others served written notice on the respondents McFadden and Ogle, the two supervisors in whose district the bridge was located, to repair the bridge and put the same in safe condition for travel; that the respondents failed, neglected, and refused to repair the bridge and highway and restore the same to a safe condition for travel; that the bridge and road had been for 25 years on the star route of the United States mails, out of Rockville, and as a result of the bridge being impassable the patrons now receive triweekly instead of daily mail service; and that relator and the public are denied the use

of the road and put to great inconvenience. The notice pleaded is attached to the application and service is recited as having been made on February 6, 1948. It is directed to the two-named supervisors, gives notice that the bridge is out of repair and unsafe for travel, and demands that the board of supervisors "* * * proceed to repair said bridge and put the same in a safe condition for travel, as provided by Section 39-831, Revised Statutes of Nebraska, 1943."

The alternative writ was issued on March 20, 1948.

The respondents answered, admitting the allegations as to the relator's qualifications, the legal existence of Sherman County, respondents' position as supervisors, the wrecking of the bridge by high waters which made it impassable for travel, and the service of the notice of February 6, 1948, and denied other allegations. Answering further, the respondents alleged affirmatively facts which they contended justified their action and a denial of the writ. The facts as alleged will be covered in the recital of the evidence.

The trial court found generally for the respondents and against the relator and "from the evidence and pleadings" denied the writ.

The relator's case-in-chief was stipulated. The stipulation set forth facts admitted by the answer that during the summer of 1947 the bridge "was wrecked by high water and made impassable for travel"; that the road is on the star route rural free delivery from Rockville; that the road is impassable; that the bridge has not been repaired; and that respondents have taken no action to repair it. The service of the written notice of February 6, 1948, on the two supervisors was admitted, and a copy of the notice was offered and received in evidence.

The evidence as to the bridge is that in the year 1906 it was built of lumber on wooden piling driven into the sand from 15 to 20 feet and that there is no hardpan or rock foundation upon which piling can be made to rest. The bridge was 480 feet long. The piling in it was ex-

tensively replaced in 1916. Thereafter it was damaged by floods and ice and repaired from time to time. Several years before 1947 it was in a bad state of disrepair due to damage and deterioration, and traffic on it was limited to light loads. It was last extensively repaired by a "half sole" operation in 1945. On June 20, 1947, as a result of extreme high water 120 feet of the bridge were washed out and carried over 2 miles downstream. At the same time about 20 feet of the approach at the east end were washed away.

Some 200 yards to the west of this long bridge was a smaller 32-foot-long bridge over a channel of the river. This bridge was also washed away, together with its approaches. Apparently at the same time many other roads and bridges in the county were substantially damaged or destroyed.

Respondents' evidence is to the effect that the old bridge cannot be repaired; that there is no salvage of materials in it, save some of the piling and "half soling" lumber; and that to meet the carrying capacity required by section 39-803, R. S. 1943, it would require the building of two new bridges and approaches, and grading between the bridges at an estimated cost of $26,350, and to insure permanency ice breakers should be installed at an estimated added expense of $500 or $600.

Relator's evidence is that the bridge can be put back in the condition, as to carrying capacity, in which it had been before the June 1947 flood for $4,000. The evidence as to foundation for this estimate is not assuring as to accuracy. This estimate included use of salvage materials, and expenses on approaches, but did not include the cost of filling in the smaller channel which the witness proposed should be done. Relator offered an estimate of about $11,000 as the cost of a new bridge of reduced length at a new location on the section line north of the present location.

The evidence of the respondents is that there is little, if any, need for a bridge at the location involved, save

for the mail route and neighborhood use. The evidence of the relator is that the bridge was used somewhat more than respondents contend, and that if a 10-ton capacity bridge were built, it would be extensively used.

The evidence also is that before the bridge went out the star route proceeded daily from Rockville up one side of the river, across the bridge and returned on the other side. It now goes up and back one day on either side so that triweekly and not daily mail service is had. The patrons have made no effort to secure other or a rearranged service.

It further appears from the respondents' evidence that there are several bridges along well-used roads in the county that have not yet been repaired or replaced, and that a number of those are on mail routes.

The conflicts in the evidence must be here considered as having been established in respondents' favor in the light of the court's finding and the rule that "Finding of fact in a mandamus proceeding, based on conflicting evidence, will not be disturbed on appeal unless it is clearly wrong." State ex rel. Lackey v. Gering & Ft. Laramie Irrigation District, 129 Neb. 48, 260 N. W. 568. See State ex rel. McMillin v. Boyd County, 130 Neb. 898, 266 N. W. 764.

It was stipulated that for the fiscal year beginning July 1947, the legal limit was levied in the bridge and emergency bridge fund in the sum of $21,896.23; that there was a balance of $9,868.47 on June 30, 1947; and that the estimated receipts from the state from the gasoline tax, etc., were $5,505.30, or a total of $37,270 for the fiscal year if all levies were collected in full. It further was stipulated that on February 6, 1948, there had been spent from said bridge funds the sum of $19,714.19; that there were outstanding bills of $4,360.44 and bids of $3,088.87 allowed for lumber, or a total of $27,163.50, leaving a balance of $10,106.50 with which to construct and repair all bridges in the county during the remainder of the fiscal year. It later was stipulated that the amount

actually received during the fiscal year from the gasoline tax and other funds was $6,992.39 as against the estimated receipts of $5,505.30. It also was stipulated that on February 6, 1948, there was a balance in the road fund of $16,546.95 against which there was an outstanding contract for road machinery estimated to cost between $11,000 and $12,000, and that the average monthly amount expended from said fund for maintenance of equipment, labor, oil, gas, etc., on the public roads was $3,246.

The applicable rules are the following:

"A peremptory writ of mandamus should be issued only where the legal right to it is clearly shown." State ex rel. Strange v. School District, 150 Neb. 109, 33 N. W. 2d 358.

"Mandamus, while classed as a law action, is an extraordinary remedy, which is not awarded as a matter of right, but rests in the sound discretion of the court governed by equitable principles, and will not issue when to do so would compel the doing of a substantial wrong." State ex rel. Read v. Farmers Irrigation District, 116 Neb. 373, 217 N. W. 607.

"While the writ of mandamus may be issued to require an inferior tribunal or board to exercise its judgment, or proceed to the discharge of any of its functions, it cannot control its judicial discretion." State ex rel. Davis v. Hoctor, 98 Neb. 15, 151 N. W. 923. See State ex rel. Garton v. Fulton, 118 Neb. 400, 225 N. W. 28.

"Mandamus may issue against a public officer to compel him to act, when (1) the duty is imposed on him by law, (2) the duty still exists at the time the writ is applied for, and (3) the duty to act is clear." State ex rel. Herbert v. Anderson, 122 Neb. 738, 241 N. W. 545. See, also, State ex rel. Johnson v. Goble, 136 Neb. 242, 285 N. W. 569; State ex rel. Cashman v. Carmean, 138 Neb. 819, 295 N. W. 801.

Repairs of county bridges contemplated by sections 39-831 and 39-832, R. S. 1943, are such as may be made

at once and without considerable cost. State ex rel. Sumption v. Smith, 77 Neb. 1, 108 N. W. 173.

"In determining the character of repairs to be made to bridges, and what bridges shall be repaired, when there are not sufficient funds for all, the court will not control the discretion of county commissioners, unless there is a clear abuse of such discretion." State v. Switzer, 79 Neb. 78, 112 N. W. 297. See, also, State v. Kearney County, 12 Neb. 6, 10 N. W. 413; Brown v. Merrick County, 18 Neb. 355, 25 N. W. 356.

It is patent that relator rested his application for a writ upon sections 39-831 and 39-832, R. S. 1943. The notice pleaded and proved was served as provided in section 39-831, R. S. 1943, upon only two members of the board of the district within which the bridge is situated, and the notice specifically demanded that the board repair the bridge as provided in that section. The application for the writ rests upon that notice. Considering the total funds that the county had available for bridge work and the relator's evidence that the cost of repairs would be at least $4,000, it is obvious that the cost would be considerable and that the trial court properly denied the writ under the authority of State ex rel. Sumption v. Smith, *supra.*

It further appears that at the time the demand was made the county board had the duty of determining which of the many damaged and destroyed bridges should be repaired by the use of the limited available funds, and that that discretion was one within the determination of the board and under the authorities above cited was not for the court to exercise by a writ of mandamus.

As we said in State v. Switzer, *supra:* "The duty to repair involves the duty to determine and specify the character of the repairs within the limits of their reasonable discretion. It is a general principle that 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." The findings of the trial court, sustained by the evidence, determine that the respondents acted in good faith and did not abuse the discretion reposed in them.

Relator relies in part upon the following provision, which is a part of section 39-222, R. S. Supp., 1947: "It shall be the duty of every such county highway official in charge of road work to give the preference to rural mail route and star mail route roads in keeping the same in repair."

The evidence discloses that many bridges had been repaired and rebuilt on roads used as mail routes and that other bridges on such routes remained to be repaired and rebuilt from the available funds. The same section provides that consideration shall be given to "the importance of the highway to the traveling public." We need not now undertake to determine the exact limitations of the two provisions. They obviously place a discretion in the county officials. There is no showing here of an abuse of that discretion.

Relator relies here upon our decisions in McNair v. State, 26 Neb. 257, 41 N. W. 1099; State ex rel. Enerson v. County Commissioners, 102 Neb. 199, 166 N. W. 554; and State ex rel. Draper v. Freese, 147 Neb. 147, 22 N. W. 2d 556. The issues determined in those cases are not the issues presented here. We are not here concerned with whether mandamus is a proper remedy but whether a mandatory writ may be had under the issues, facts, and circumstances disclosed by this record.

Finally relator submits that if it be found that the respondents did not have sufficient funds to repair the bridge or build a new one on the section line, they should be here directed and ordered to levy sufficient funds to pay for the same, and requests a reversal with directions to issue an alternative writ. It is clear here that the respondents did not have available funds to rebuild this bridge even without giving any regard to their duty

to select and to repair and rebuild other bridges in the county. It also is clear that the duty to build a bridge on a new location was not an issue in the case. To sustain this last contention, relator at the bar here refers to section 39-847, R. S. 1943, and requests the alternative writ based on the provisions of that section.

The parties stipulated that Sherman County had levied the "legal limit" for the bridge and emergency bridge fund for the fiscal year beginning in July 1947. Whether or not that stipulation is inclusive or exclusive of the levy authorized in section 39-847, R. S. 1943, cannot be determined from this record and need not be. This record discloses no demand upon the respondents that they proceed under the provisions of section 39-847, R. S. 1943; no such demand was pleaded; no issues were made with reference to the duty of the respondents under that section; no evidence was introduced thereon; and the trial court made no determination of that question. Obviously the matter is not here for consideration.

The judgment of the trial court is affirmed.

AFFIRMED.

GREEN FINANCE COMPANY, A CORPORATION, APPELLEE, V. ARNOLD BECKER, APPELLANT.

37 N. W. 2d 794

Filed June 10, 1949. No. 32597.

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.
2. **Replevin.** When a defendant in replevin denies plaintiff's title and right of possession of the property, and pleads a right of possession thereof in himself, and prays the return of the property, proof of the demand before the bringing of action is unnecessary.
3. **Chattel Mortgages.** The mortgagee's burden of proving that the mortgage was properly recorded, or the burden of proving,

by one who asserts it, that the recordation was invalid, may be sustained by any competent evidence sufficient to establish the necessary facts.

4. **Courts.** Comity is neither a matter of absolute obligation or mere courtesy or good will, but is the doctrine under which contracts made, rights acquired, and obligations incurred in one state are enforced by the courts of another state unless there is some definite public policy preventing recognition of such right or title.
5. **Chattel Mortgages.** A chattel mortgage, properly executed and recorded according to the law of the state where the mortgage is executed and the property is located, will, if valid in such state, be held valid as against existing creditors and subsequent purchasers in another state to which the property may be removed without the mortgagee's consent, unless the mortgage or transaction is of a character to contravene some statute or the settled law or policy of the forum; the matter being one resting upon the principle of comity between states.
6. ———. A buyer of personalty subject to a mortgage of which he has constructive notice takes whatever title he may acquire in hostility to mortgagee, and does not become purchaser in good faith for value as against such mortgage.

APPEAL from the district court for Cedar County: SIDNEY T. FRUM, JUDGE. *Affirmed.*

Clarence E. Haley, for appellant.

Lon S. Haymes and *Philip H. Robinson,* for appellee.

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

MESSMORE, J.

This is an action in replevin. The plaintiff's petition sets forth that the plaintiff is a duly organized corporation doing business in Springfield, Missouri; further alleges it has a special property in one Frazer Manhattan sedan, and sets forth facts by which it claims the right of replevin. The affidavit in replevin is in accordance with the petition. The defendant, by answer, denies generally the allegations contained therein, and by way of answer and cross-petition, asserts that the defendant purchased the automobile in question and is the owner

thereof, an innocent purchaser for value, and prays dismissal of the plaintiff's action.

At the close of all the evidence the plaintiff moved for a directed verdict on the ground that there was no material question of fact for submission to the jury on which there was any substantial controversy or upon which there was any evidence to sustain a judgment for the defendant. Damages were not involved. The court sustained the motion for directed verdict. Judgment was entered on the verdict that the plaintiff's right of possession in and to said property at the commencement of this action be affirmed. Upon the overruling of the motion for new trial, the defendant appeals.

For convenience, the parties will be referred to as originally designated in the district court.

It appears from the record that on or about February 18, 1948, Marvin L. Bard and Mary E. Bard, his wife, then being the owners of a 1948 model Frazer Manhattan four-door sedan which they had purchased from the Green Motor Company of Springfield, Missouri, which has some connection with the plaintiff, drove the automobile, accompanied by one Irby Donelson, to the plaintiff's place of business where they contacted Robert R. Green, president of the corporation, the purpose being to sell the automobile in question to Irby Donelson. Papers were drawn in the presence of Robert R. Green transferring the automobile from the Bards to Irby Donelson. At the same time, and as a part of the transaction, Irby Donelson executed and delivered to Marvin L. Bard and Mary E. Bard a promissory note in the amount of $2,244.60, dated February 18, 1948, stating certain payments to be made within a period of 13 months after date of the instrument, and executed a chattel mortgage on the automobile to secure the promissory note. This promissory note and the chattel mortgage were immediately sold and assigned by the Bards to the plaintiff. On February 27, 1948, the plaintiff filed the chattel mortgage with the recorder of deeds in Greene County, Missouri, where the mortgage

has been of record since that date, in accordance with the provisions of section 3486, Revised Statutes of Missouri, 1939.

This statute is too long to set out in the opinion, however the substance of the section is that a chattel mortgage, or a true copy thereof, may be filed in the office of the recorder of deeds of the county where the mortgagor resides; that the recorder of deeds shall endorse on the instrument, or copy, the time of receiving the same; and that such chattel mortgage so filed shall henceforth be notice of the contents thereof to all the world.

At the time of the transaction, the certificate of title of the Bards was assigned to Irby Donelson. This assignment showed a mortgage to the plaintiff as a lien on the automobile. On March 15, 1948, Irby Donelson made application to the Department of Revenue, Motor Vehicle Registration of the State of Missouri, for a new certificate of title. This application also discloses the mortgage to the plaintiff. On the same date the DeLuxe Auto Upholstery & Polish Shop, by Irby Donelson, made application through the same department for a certificate of title covering this automobile. This application and the certificate of title issued thereon showed the amount of plaintiff's mortgage. The sum of $144.37 was paid on the promissory note as before described, on March 25, 1948. No further payments were made thereon. Subsequently, the time not known, Irby Donelson left Springfield, Missouri, and had not been heard from at the date of trial. The plaintiff, because of default in payments, attempted by letter to locate the automobile in question, and on or about May 5, 1948, was advised by the Motor Vehicle Division of the State of Nebraska that the automobile involved herein had been registered in Cedar County, Nebraska, by the defendant. The removal of the automobile from Greene County, Missouri, and its subsequent sales to various parties and finally to the defendant, were all without the consent or knowledge of the plaintiff. The plaintiff, upon learning of the location of

the automobile, made a demand therefor through the sheriff of Cedar County, Nebraska. The defendant refused to give the sheriff possession of the car upon such demand.

The testimony in behalf of the defendant was, in substance, as follows: He had for a number of years, and was at the time of trial, engaged in the pursuit of farming, and was a resident of Cedar County, Nebraska. On or about April 19, 1948, one Joe Loecker, a salesman of automobiles for the Bell Motor Company of Kansas City, Missouri, who had formerly been a salesman of automobiles in Cedar County, Nebraska, and was known by the defendant, brought the automobile in question to the defendant's farm. The defendant purchased the automobile and gave his check to Loecker in the amount of $2,350. The check in due course was paid. The defendant received from the Bell Motor Company a Missouri certificate of title showing on its face that the car was free of liens. On April 26, 1948, the defendant made application to the county clerk of Cedar County, Nebraska, for a Nebraska title to said car, and surrendered to the county clerk the certificate of title given to him by the Bell Motor Company. The county clerk retained the Missouri certificate of title for his records, and there was issued to the defendant a Nebraska title to the automobile. Subsequently the defendant secured from the county treasurer of Cedar County a certificate of registration of the car in his own name, and was issued license plates therefor.

There is nothing in the record to disclose that the defendant made any inquiry of Mr. Loecker, or was advised by him that the car was free of all encumbrances, and that he would furnish a clear title.

The defendant contends that the court erred in directing a verdict against him, and that the evidence was insufficient to sustain the judgment entered.

The law is well established in this jurisdiction: "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." Gutoski v. Herman, 147 Neb. 1001, 25 N. W. 2d 902; McIntosh v. Union P. R. R. Co., 146 Neb. 844, 22 N. W. 2d 179. We take cognizance of this rule in determining this appeal.

The defendant contends that there was not a proper demand made upon him prior to the institution of the replevin suit. The record shows that the sheriff of Cedar County, pursuant to the request of the plaintiff, asked the defendant to deliver to him the automobile in question. The defendant, in his answer and cross-petition, denied the plaintiff's title and right of possession; pleaded the right of possession of the automobile in himself; and prayed that he be adjudged to be entitled to the possession of the same as a bona fide and innocent purchaser in good faith, and that judgment be rendered accordingly.

"When a defendant in replevin denies plaintiff's title and right of possession of the property, and pleads a right of possession thereof in himself, and prays a return of the property, proof of demand before the bringing of the action is unnecessary." Herman v. Kneipp, 59 Neb. 208, 80 N. W. 816. See, also, Wilcox v. Beitel, 43 Neb. 457, 61 N. W. 722.

The defendant contends that the record is void of proof that the chattel mortgage involved in this action was filed with the recorder of deeds in Greene County, Missouri, and the general denial contained in the defendant's answer required the plaintiff to establish by competent evidence the filing of the chattel mortgage.

The record shows that the witness Green testified positively that after the execution of the mortgage it was filed with the recorder of deeds in Greene County, Missouri, on February 27, 1948. There was no objection made by the defendant to this evidence. There is no testimony in behalf of the defendant that denied the mortgage was owned by the plaintiff and not properly

filed of record, and such facts are not controverted in any manner.

The general rule is: "The mortgagee's burden of proving that the mortgage was properly recorded, or the burden of proving, by one who asserts it, that the recordation was invalid, may be sustained by any competent evidence sufficient to establish the necessary facts." 14 C. J. S., Chattel Mortgages, § 166, p. 775.

The cases of Noll v. Kenneally, 37 Neb. 879, 56 N. W. 722; Fuller v. Brownell, 48 Neb. 145, 67 N. W. 6; and Drexel v. Murphy, 59 Neb. 210, 80 N. W. 813, relied upon by the defendant, are not applicable in the instant case. The evidence in the instant case was sufficient to prove the filing of the mortgage with the recorder of deeds of Greene County, Missouri. The defendant's contention is without merit and is overruled.

The plaintiff was without knowledge and did not give its consent to the removal of this automobile from the State of Missouri, and had no knowledge of the subsequent transfers of title, or that the automobile had been taken out of the State of Missouri and brought into the State of Nebraska until it ascertained such fact from the Motor Vehicle Division of Nebraska.

By weight of authority, a mortgage, if valid and properly executed and recorded according to the law of the state where the mortgage is executed and the property at the time is located, will be held valid even as against bona fide creditors and purchasers in another state to which the property is removed by the mortgagor or those who hold title through him, unless it contravenes the statute or settled law or policy of the forum. Under this rule, the due execution and recordation of the mortgage, in the state where made and where the property is located, operates as at least constructive notice of the mortgage lien to all persons dealing with the property in the state to which it is removed, and, in the absence of a statute to the contrary, the mortgage is enforceable in the state to which the property has been removed.

See, 14 C. J. S., Chattel Mortgages, § 15, p. 607; 5 R. C. L., Chattel Mortgages, § 21, p. 399.

The following authorities from the State of Nebraska and the State of Missouri disclose that each of said states gives recognition to the rule heretofore set out under the doctrine of comity, and are pertinent to the instant case.

In the case of Farmers & Merchants State Bank v. Sutherlin, 93 Neb. 707, 141 N. W. 827, 46 L. R. A. N. S. 95, Ann. Cas. 1914B 1250, the court said: "The most important point is whether the mortgage is valid in this state against an innocent purchaser of the property from the mortgagor, the mortgage not having been filed in the office of the county clerk in any county in this state. This seems to be a new question in this court. The general rule, as stated in Jones, Chattel Mortgages (5th ed.) sec. 299, is as follows: 'The law of the place of contract, when this is also the place where the property is, governs as to the nature, validity, construction, and effect of a mortgage, which will be enforced in another state as a matter of comity, although not executed or recorded according to the requirement of the law of the latter state.' " In support of this general principle the court refers to several states which have adopted the afore-cited rule. The court held: "Where a mortgagor removes property from another state into this state, without the consent of the mortgagee, which has been incumbered by a mortgage duly recorded and valid under the laws of the former state, such removal does not invalidate the recording of such mortgage, nor necessitate the recording of it again in the county in this state to which the mortgagor has removed with the property."

In the case of Yellow Manufacturing Acceptance Corp. v. Rogers and Schooler, 235 Mo. App. 96, 142 S. W. 2d 888, the court said: " 'Comity' is neither a matter of absolute obligation or mere courtesy or good will, but is the doctrine under which contracts made, rights ac-

quired, and obligations incurred in one State are enforced by the courts of another State unless there is some definite public policy preventing the recognition of such right or title."

In the case of Wisdom v. Keithley, 237 Mo. App. 76, 167 S. W. 2d 450, the court held: "A chattel mortgage, properly executed and recorded according to the law of the state where the mortgage is executed and the property is located, will, if valid in such state, be held valid as against existing creditors and subsequent purchasers in another state to which the property may be removed by the mortgagor without the mortgagee's consent, unless the mortgage or transaction is of a character to contravene some statute or settled law or policy of the forum; the matter being one resting upon the principle of comity between states. * * * Insofar as the State of Missouri may be said to have a policy with respect to chattel mortgages validly executed in another state upon property located in such state, it is, upon the principle of comity, to enforce such mortgages according to their terms, and this notwithstanding the fact that upon the removal of the property to Missouri without the mortgagee's consent citizens of Missouri may become innocently involved to their loss and prejudice in their subsequent dealings with the property." See, also, 10 Am. Jur., Chattel Mortgages, § 21, p. 729; 5 R. C. L., Chattel Mortgages, § 21, p. 399.

"A buyer of personalty subject to a mortgage of which he has constructive notice takes whatever title he may acquire in hostility to mortgagee, and does not become 'purchaser in good faith for value' as against such mortgage." 14 C. J. S., Chattel Mortgages, § 163, p. 768.

The evidence is insufficient to warrant the submission to the jury of the question as to whether or not the defendant was an innocent purchaser for value, and the trial court did not err in failing to submit such defense.

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

AFFIRMED.

THOMAS UMBERGER ET AL., PARTNERS DOING BUSINESS AS THE UNION AIR SERVICE, APPELLEES, V. ROY A. SANKEY, APPELLANT.

38 N. W. 2d 21

Filed June 10, 1949. No. 32544.

1. **Appeal and Error.** Errors assigned but not discussed will not ordinarily be considered by this court.
2. **Trial.** A motion for a directed verdict or for judgment notwithstanding the verdict must, for the purpose of decision thereon, be treated as an admission of the truth of all material and relevant evidence submitted on behalf of the party against whom the motion is directed. Such party is entitled to have every controverted fact resolved in his favor, and to have the benefit of every inference that can reasonably be deduced from the evidence.
3. **Negligence: Trial.** In negligence cases the trial court should sustain a motion for directed verdict, or for judgment notwithstanding the verdict, only when the evidence, viewed in the light most favorable to the party against whom the motion is directed, fails to establish actionable negligence.
4. **Trial.** In a law action, it is error for the trial court to direct a verdict for either of the parties on an issue of fact on which the evidence is conflicting. Such issue should be submitted to the jury for its determination.
5. **Appeal and Error.** A judgment will not ordinarily be reversed for refusing to give tendered instructions, where other instructions given by the court fairly and correctly covered the issues involved in the tendered instructions.
6. **Negligence.** When separate and independent acts of negligence by different persons combine to produce a single injury, each participant is liable for the resulting damages, though one of them alone would not have caused the result.
7. **Pleading: Negligence.** In the absence of an issue of negligence by plaintiff or by a third person imputable to plaintiff, allegations in an answer denying that defendant was negligent and alleging that the accident and resulting damages were solely and proximately caused by the negligence of such third person

is not an affirmative plea in avoidance of plaintiff's cause of action and imposes no burden of proof upon defendant with relation thereto, but rather is one entirely consistent with and provable under the general issue.

8. **Appeal and Error: Trial.** It is error to give the jury instructions which contain inconsistent and conflicting paragraphs relating to the burden of proof.

9. ———: ———. The giving of an instruction which places the burden of proof on the wrong party to establish some of the facts put in issue by the pleadings is reversible error.

APPEAL from the district court for Lancaster County: RALPH P. WILSON, JUDGE. *Reversed and remanded.*

T. R. P. Stocker, for appellant.

Hammond & Parker, and *Sam Zimmerman,* for appellees.

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

CHAPPELL, J.

Two airplanes collided while landing. Plaintiffs, as owners of one, operated solo by a licensed pilot, hereinafter designated as the pilot, brought this action against defendant, owner and licensed pilot of the other, alleging that negligence of defendant proximately caused the accident and resulting damages to plaintiffs' plane. The pilot was not made a party. Defendant filed answer and cross-petition, alleging that the accident and resulting damages to both planes were solely and proximately caused by negligence of plaintiffs and the pilot, whose negligence was imputed to plaintiffs. Plaintiffs' reply and answer was a general denial.

Upon trial to a jury, at the conclusion of all the evidence, the trial court overruled defendant's motion for a directed verdict, or in the alternative to dismiss plaintiffs' petition, but sustained plaintiffs' motion to dismiss defendant's cross-petition, and submitted to the jury only such remaining issues as were then supported by the evidence and presented by the pleadings.

Plaintiffs were awarded a verdict and judgment. Defendant's motion for judgment notwithstanding the verdict, or, in the alternative, for new trial, was overruled, and he appealed, substantially assigning as error: (1) Disposition of the motions aforesaid; (2) giving of instructions Nos. 2, 3, 5, and 6; (3) the refusal to give defendant's requested instructions Nos. 1, 2, 3, and 5; and (4) that the verdict and judgment were not sustained by the evidence but contrary thereto, and contrary to law. We conclude that instruction No. 3, given by the trial court, was prejudicially erroneous, but that the other assignments should not be sustained.

Plaintiffs were partners, doing business as Union Air Service, at the Union Airport, and there engaged generally in the sale and operation of airplanes, and approved, licensed flight and pilot instruction. There was a collision at the airport on October 22, 1946, about 5:30 p. m., between a plane owned by plaintiffs, but operated solo by the pilot engaged in taking flight training from plaintiffs, and a plane owned and operated by defendant for his own pleasure. The accident occurred at a point where a diagonal northwest-southeast hard-surfaced runway and an east-west grass runway crossed each other, and occurred at a time when defendant was landing from northwest to southeast on the former, and the pilot was spot-landing from west to east on the latter. Air traffic at the airport was not directed, supervised, or controlled by a control tower or radio equipment. The extent of the injuries to each plane and the amount of damages resulting therefrom was not questioned. The foregoing was without dispute, but generally speaking the evidence adduced by the parties upon other material issues ultimately submitted, was conflicting.

Plaintiffs alleged substantially that the accident and damages to their plane were proximately caused by defendant's negligence, in that he failed to conform to the flow of traffic which was taking off, preparing to

land, and landing on the east-west runway; that he landed on the diagonal northwest-southeast runway at a time when it was not in use or authorized for use, and in violation of local field rules then in effect and known to defendant, which provided that all landings and take-offs must be on the runway designated by a wind tee, which at the time designated only the east-west runway for use; that he attempted to so land at an excessive and unsafe landing speed of approximately 80 miles an hour; that he failed to look or see other airplane traffic then in the approaching traffic pattern, and attempted to land his plane with disregard for the safety of other persons and planes; and that he failed and refused to yield the right-of-way to plaintiffs' plane, which was overtaken by defendant's plane prior to and at the time of collision.

The trial court in its instructions submitted those issues for determination by the jury, and an examination of the record discloses sufficient competent evidence to sustain an affirmative finding with relation thereto.

Defendant, for answer and cross-petition, denied generally that he was negligent as claimed by plaintiffs; alleged that plaintiffs expressly authorized him to use the diagonal runway; that the wind was in the right direction to do so; and that the use of the runways was controlled by wind socks and not a wind tee. He alleged that the accident and resulting damages were solely and proximately caused by negligence of plaintiffs and the pilot operating their plane under plaintiffs' direction, supervision, and control, which pilot, although having a clear view, failed to look and avoid striking defendant's plane as he made his final approach after defendant's plane had landed on the ground; failed to yield the right-of-way to defendant's lower-landing plane; did not have a proper pattern to land, and attempted to make a spot-landing on the hard-surfaced runway in use by defendant; and that without having his plane under reasonable control, made a premature landing directly

over and upon defendant's plane, which had previously landed.

The trial court in its instructions submitted the issues, thus traversing plaintiffs' allegations and those relating to the pilot's alleged negligence, and an examination of the record discloses sufficient competent evidence to have sustained an affirmative finding with relation thereto, but the jury found otherwise.

It will be observed that although defendant traversed generally the material allegations of plaintiffs' petition, he did not factually allege that plaintiffs were directly negligent, and there was no competent evidence in any event which could sustain a finding that plaintiffs, acting in any capacity, were themselves negligent in any manner proximately causing the accident.

On the other hand, the record now before us discloses no competent evidence of a relation of partnership, or principal and agent, or master and servant, or the like, or the existence of a joint enterprise with control or equal rights of the pilot and plaintiffs to control the movements of their plane, from which the pilot's negligence, if any, could be imputed to plaintiffs.

In the light of the foregoing, we do not deem it necessary to discuss or decide plaintiffs' contention that defendant could not recover upon his cross-petition in any event because he was guilty of contributory negligence more than slight as a matter of law within the purview of Fuelberth v. Splittgerber, 150 Neb. 309, 34 N. W. 2d 380.

It follows by analogy from the foregoing that instruction No. 2, given by the trial court, which informed the jury that defendant's cross-petition had been dismissed and that the only question they should consider was plaintiffs' right, if any, to recover from defendant upon their petition under the evidence and instructions given, was not prejudicially erroneous.

Likewise, instruction No. 5, given by the trial court, which told the jury that there was no evidence from

which they could find that plaintiffs themselves were guilty of negligence proximately contributing to the accident, and that there was no competent evidence that plaintiffs' pilot was at the time of the accident acting as either employee or agent of plaintiffs, or that they had or exercised any control over the operation of plaintiffs' plane at the time of the accident, thus no negligence, if any, of the pilot could be imputed or charged to plaintiffs, was also not prejudicially erroneous.

It is well established that: "A motion for a directed verdict must for the purpose of decision thereon be treated as an admission of the truth of all material and relevant evidence submitted on behalf of the party against whom the motion is directed. Such party is entitled to have every controverted fact resolved in his favor, and to have the benefit of every inference that can reasonably be deduced from the evidence." Dickman v. Hackney, 149 Neb. 367, 31 N. W. 2d 232; Kipf v. Bitner, 150 Neb. 155, 33 N. W. 2d 518. By analogy, the same rule applies to a motion for judgment notwithstanding the verdict. Remmenga v. Selk, 150 Neb. 401, 34 N. W. 2d 757.

It is also the rule that in negligence cases the trial court should sustain a motion for directed verdict, or for judgment notwithstanding the verdict, only when the evidence, viewed in the light most favorable to the party against whom the motion is directed, fails to establish actionable negligence. Hughes v. Coniglio, 147 Neb. 829, 25 N. W. 2d 405.

Likewise, "In a law action it is error for the trial court to direct a verdict for either of the parties on an issue of fact on which the evidence is conflicting. Such issue should be submitted to the jury for their determination." Spaulding v. Howard, 148 Neb. 496, 27 N. W. 2d 832.

In the light of those rules and previous discussion, we conclude that the evidence was sufficient to sustain the verdict and judgment, and that the trial court did not

err in respectively disposing of the motions aforesaid or in giving instructions Nos. 2 and 5.

The court's refusal to give instructions Nos. 1 and 2, requested by defendant, was not prejudicially erroneous. The substance thereof was in all material respects, although by use of different phraseology, included within instruction No. 11 given by the trial court on its own motion. The applicable rule is that: "A judgment will not ordinarily be reversed for refusing to give tendered instructions where other instructions given by the court fairly and correctly covered the issues involved in the tendered instructions." Blanchard v. Lawson, 148 Neb. 299, 27 N. W. 2d 217.

The court's refusal to give defendant's requested instructions Nos. 3 and 5 was assigned as error, but not otherwise discussed in the brief. The rule applicable thereto is: "Errors assigned but not discussed will not be considered by this court." Little v. Loup River Public Power District, 150 Neb. 864, 36 N. W. 2d 261.

Instruction No. 3, given by the trial court, which purported to impose the burden of proof upon both plaintiffs and defendant, was prejudicially erroneous. In that connection, it will be noted that the issue of plaintiffs' contributory negligence, direct and imputed, had been theretofore eliminated from the case, thus defendant had no burden of proof remaining with relation thereto.

In that situation, the burden was entirely upon plaintiffs, before they would be entitled to recover, to prove by a preponderance of the evidence that defendant was negligent in one or more of the particulars, as alleged in plaintiffs' petition, that such negligence was a proximate cause of the accident from which plaintiff suffered damages to their plane, and the extent of such damages. Without such proof, plaintiffs would thereby affirmatively fail to sustain the necessary elements of their alleged cause of action, and defendant would be entitled to a directed verdict and judgment, or judgment notwithstanding the verdict.

It is generally the rule that: "When separate and independent acts of negligence by different persons combine to produce a single injury, each participant is liable for the resulting damages, though one of them alone might not have caused the injury." Bergendahl v. Rabeler, 133 Neb. 699, 276 N. W. 673.

Therefore, if the pilot and defendant were both concurrently negligent, and the negligence of both combined to proximately cause the accident and damages to plaintiffs' plane, then plaintiffs could still recover from defendant, since the issue of contributory negligence, direct and imputed, was no longer available as an affirmative defense.

As a matter of course, if defendant were not negligent, or his negligence were not a proximate cause of the accident, i. e., if negligence of the pilot were the sole and proximate cause, as alleged by defendant, then plaintiffs could not recover. Instruction No. 6, given by the trial court, correctly stated the applicable rules with regard to concurrent negligence and proximate cause with relation thereto.

We conclude that the allegations in defendant's answer that the pilot was negligent, and that his negligence was the sole and proximate cause of the accident and resulting damages, was not an affirmative plea in avoidance of plaintiffs' cause of action, but rather one entirely consistent with and provable under the general issue to deny, negative, controvert, or destroy the plaintiffs' affirmative allegations of negligence by defendant.

In City of McCook v. McAdams, 76 Neb. 11, 114 N. W. 596, relied upon by plaintiffs, the defendant's answer contained an affirmative factual avoidance of plaintiffs' cause of action, the effect of which was to allege that defendant was not negligent, but if it were, the damages would have occurred in any event because of an act of God. Thereby the case is distinguishable from that at bar, wherein, if defendant were negligent and such negligence proximately caused the accident, as affirma-

tively alleged by plaintiffs, his liability would be established beyond peradventure of a doubt.

As stated in 45 C. J., Negligence, § 730, p. 1141, citing cases too numerous to set forth herein: "Defendant may also show under the general issue that the injury was caused by the negligence of a third person for whom he was not responsible, such as by an independent contractor; and this rule applies, although other reasons for the accident are set up in the answer, * * *." See, also, 41 Am. Jur., Pleading, § 366, p. 541. Viewed in that light, the burden of proof was not affirmatively imposed upon defendant to establish such a defense and thus prove that he was not negligent. Rather, under the circumstances presented here, the burden was affirmatively imposed upon plaintiffs to prove all the necessary material elements aforesaid, and thus establish defendant's liability, as the jury were correctly informed in the first paragraph of instruction No. 3 given by the trial court.

However, in the second paragraph of the same instruction, the trial court, evidently overlooking the fact that the issue of contributory negligence, direct and imputed, had been removed from its consideration, inconsistently and erroneously instructed the jury that: "The burden of proof is upon the defendant to prove every material affirmative allegation in his answer by a preponderance of the evidence except as the same may have been established by the allegations of plaintiffs in their petition or by agreement of the parties during the progress of the trial. The defendant alleges that the accident and collision of the airplanes, in this case, occurred by reason of negligence on the part of the pilot of plaintiffs' airplane, and the burden is therefore upon the defendant, to prove the same by a preponderance of the evidence."

The rules applicable to such a situation will be found in Omaha Street Ry. Co. v. Boesen, 68 Neb. 437, 94 N. W. 619, wherein it was held: "The giving of an instruction which places the burden of proof to establish some

of the facts put in issue by the pleadings on the wrong party, is reversible error.

"It is error to give the jury instructions which contain inconsistent and conflicting paragraphs relating to the burden of proof. Farmers' Bank v. Harshman, 33 Neb. 445, approved and followed." See, also, Mercer v. Omaha & C. B. St. Ry. Co., 108 Neb. 532, 188 N. W. 296, and Myers v. Willmeroth, 150 Neb. 416, 34 N. W. 2d 756.

For the reasons heretofore stated, the judgment of the trial court should be and hereby is reversed, and the cause is remanded for new trial.

REVERSED AND REMANDED.

CLYDE C. MCKAIN, APPELLEE, V. PLATTE VALLEY PUBLIC POWER AND IRRIGATION DISTRICT, A PUBLIC CORPORATION, APPELLANT.

37 N. W. 2d 923

Filed June 10, 1949. No. 32531.

1. **Pleading.** There is no variance between an allegation of a petition in an action for damages resulting from seepage of land that the use of power and irrigation works caused water to seep therefrom and damage the land, and an allegation in the reply that the damage to the land was caused by it becoming saturated with water pushed in and under the topsoil by leakage of water from the works.
2. **Trial.** In deciding the correctness of the action of the trial court in submitting a case to the jury, the evidence will be viewed in the light most favorable to the successful party, controverted facts will be resolved in his favor, and he will be given the advantage of any inferences reasonably deducible from the evidence.
3. **Interest.** Recovery of interest on an unliquidated claim, the subject of reasonable controversy, and incapable of being fixed by computation, may be had only from the date of the determination of the right of recovery and the ascertainment of the amount.
4. **Trial.** It is the duty of the trial court, without request, to instruct the jury on each issue presented by the pleadings and supported by evidence.

5. ———. A litigant is entitled to have the jury instructed as to his theory of the case as shown by pleading and evidence, and a failure to do so is prejudicial error.
6. Waters. Where water from another source has been added to water for which defendant is liable, and the combined waters have caused the damage, then it is incumbent upon plaintiff to establish either that his damages would have occurred from the water alone for which defendant is liable, or to establish the amount of his damage caused by the waters for which defendant is liable.

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

Crosby & Crosby, and *Robert H. Beatty*, for appellant.

Edward E. Carr and *C. L. Baskins*, for appellee.

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

BOSLAUGH, J.

Appellee brought this case to recover damages to his lands and crops claimed to have been caused by water which was alleged to have escaped from the reservoirs and canal of appellant. The verdict was for the appellee. Motion of appellant for a new trial was denied, and it has appealed.

The cause of action of appellee as stated in the petition is based on the allegation that the use by appellant of its power and irrigation works caused water to seep from its canal and reservoirs and damage the lands of the appellee, and that waters from the works have seeped from the canal and reservoirs and traveled through the subsoil and alkali deposits to his lands, and have seeped in and through the soil. Appellant made no effort to secure a more specific statement in this regard. Appellee by his reply states that the damages were caused by the lands becoming saturated with water pushed in and under the topsoils by leakage of water from the works of appellant and from waters seeped from its canal and reservoirs. Prejudicial variance is claimed between the petition, the

new matter in the reply, and the evidence. These each relate to water escaping from the works of the district and resulting in seepage of the land of appellee. The issue was, did water from the works of the district cause the damage, or did the damage claimed result from rainfall and other natural causes. The conclusion that there was not a material variance is required by a prior decision of this court. Smith v. Platte Valley Public Power & Irrigation District, *ante* p. 49, 36 N. W. 2d 478.

Appellant makes the contention that there is a failure of evidence to sustain a finding that water from its works escaped and reached, affected or damaged the lands of appellee, that causal connection between water lost from the canal or reservoirs of appellant and the waterlogged condition of land of appellee is not shown, and the only support of the award in his favor is speculation. Proof thereof is indispensable to recovery herein. Smith v. Platte Valley Public Power & Irrigation District, *supra*. That the lands of appellee were seeped as early as 1943 and continued to the time of the trial in 1948, except as to the year 1947, is not a subject of dispute herein. The issue was what was the cause and source of it.

In deciding the correctness of the action of the trial court in submitting the case to the jury, the evidence will be viewed in the light most favorable to the party for whom the verdict was returned, controverted facts will be decided in his favor, and he will be given the advantage of any inferences reasonably deducible therefrom. Remmenga v. Selk, 150 Neb. 401, 34 N. W. 2d 757.

Appellee produced evidence tending to show that after appellant diverted water in its canal and reservoirs a very considerable amount thereof was lost by seepage, that the seepage augmented and put pressure upon the then existing ground water, and caused the ground water to rise under the land of appellee. This resulted in his lands becoming badly seeped. The evidence of appellant is that any water lost from its works did not reach the lands of appellee, and the condition complained of by

him was caused by natural conditions resulting from unusual precipitation, evaporation, and transpiration. There is conflicting evidence of experts as to the source and cause of the seepage affecting the lands. The contention here made was recently held without merit in a case referred to by the appellee as a companion case, and described by appellant as almost identical as to record and witnesses, including the experts. Smith v. Platte Valley Public Power & Irrigation District, *supra*. This issue was one of fact, and it was proper to submit it to the jury for determination.

The trial court allowed interest at legal rate on the amount of the verdict from October 1, 1945 to June 15, 1948. The judgment was entered on the latter date. The damages claimed were a matter of reasonable controversy, unliquidated, incapable of being fixed by computation, and could only be ascertained by agreement of the parties or by suit. Recovery of interest on such a claim may be had only from the date of the determination of the right of recovery and the ascertainment of the amount. Smith v. Platte Valley Public Power & Irrigation District, *supra*.

This case involved the questions: Did the conditions of the lands and crops of the appellee, of which he complained, result wholly from waters from the works of appellant; or were they caused wholly by precipitation and other conditions natural to that area; or were they the result of both waters from the reservoirs and canal of appellant and rainfall and other natural causes?

There is evidence tending to show that:

The lands of appellee are first bottom valley lands, very near the South Platte River. A part of it is accretion land. The river as it proceeds east approaches the land, and at the northeast corner is adjacent thereto. Beer Slough is between the river and the north part of the land. Fremont Slough meanders across nearly the entire length of the south part. Two draws cross this land as indicated by the map. Low marshy condition of

lands along Fremont Slough are indicated as early as 1899 by topographic map. Borrow pit, without outlet, on the north side of the east and west county road south of hay meadow of appellee, holds stagnant water, shown with growth of moss thereon. Water coming from canal of appellant to south of land of appellee would not cross to his land north of Fremont Slough, but would go east down the slough. If it was obstructed so the water could not flow therefrom, it would fill up and the water table under the land would rise. There are obstructions therein. On occasion the land dried out, and if affected by artificial seepage, it would tend to be steady or constant in its flow, and the land would remain wet. During the period of rise shown by test wells, there had been materially increased rainfall, and because thereof, evaporation had been decreased. The average annual rainfall had been for the period from 1931 to 1935, 15.54 inches; from 1936 to 1940, 13.67 inches; from 1941 to 1945, 20.65 inches; in 1946, 20.74 inches; and in 1947, 18.47 inches. Appellee in 1937 cut the larger portion of his hay meadow, except along the slough. Water was first stored in the Sutherland Reservoir in 1936. Rainfall as shown by well 242 near the State Farm, caused the water table to rise three feet in a period before and during the year 1935. The cause of this was wholly natural, no artificial contribution. Water showing up around Fremont Slough and surrounding land is partly seepage water from canal. The water table has raised from ample rainfall. It has not been determined how much is due to rainfall and how much to seepage. Alkali comes to the surface in the lowlands along the river where the water table becomes high and there is evaporation, and that happens whether the water causing the rise in the water table comes from natural or artificial sources.

Appellee bought the west half of the southwest quarter of the section in which his other lands are in June of 1947 for $4,100, after this case was commenced. This land is traversed by the slough, and the same type as his

other land. The larger part of the meadow was usually cut, but there was always a strip along the slough that was not worth cutting. There was no difference in the condition of the slough at the time of the trial and in 1910 and 1911. In the wet year of 1915 it was difficult to cut the grass, and the hay was not good on land like this. The three-cornered grass will grow in waterlogged land, but it is found through all the grass up and down the valley. In some places three-cornered grass will predominate, and in some places sedge will predominate. The round grass, three-cornered grass, sedge, and salt grass are common to the meadows up and down the Platte Valley, and predominate in waterlogged conditions. They appear and predominate when the water level rises, whether from rainfall or other conditions. There are alkali beds in the lowlands up and down the valley, and the kinds of grasses along the slough on the McKain land are found on the low meadow lands throughout the valley.

In years past persons trapped in the wintertime and fished along in the slough on the McKain land. The slough then had a gravel and sand bottom. People walked up and down it barefoot without difficulty, and there was then no mud or obstructions. There were springs along the slough in the early years, and some of them are about the same as they were in 1890. The water in Fremont Slough varied in wet and dry years. In wet years the land would become waterlogged and the lowland produced coarser grass, and in dry years there was less grass on the highland and finer and better grass on the lowland. The slough has filled up and become obstructed. The channel can hardly be identified, and after heavy rains it goes out of its banks, spreads over the meadows, and it takes from several days to several weeks before the water moves out. About 1900, a part of what is now the McKain land was broken and cultivated, but that section was so wet the party in possession gave it up and moved to higher land.

The grasses offered in evidence in this case from the McKain land are respresentative grasses growing in the entire Platte Valley. These grasses result from natural conditions in the valley.

The relative position of the underground water is primarily determined by rainfall, evaporation, and transpiration. The fluctuation shown by test wells in 1946 and 1947 was such as to show that the source or cause of any damage to appellee was not water from the south, the direction of the works of appellant. The source of the water in the ditches along the road south of the McKain land was rainfall that could not get away. The water was higher in Fremont Slough than the water table of the surrounding lands. The water in the slough was feeding the land on either side of it instead of the ground water going into the slough. The same situation is true as to Beer Slough. No water lost out of the reservoir or canal of appellant has reached or affected the McKain lands. Any seeped or waterlogged condition of these lands was the result of high rainfall, low evaporation, the clogged condition of Fremont Slough, and inadequate drainage.

The evidence would have sustained a finding that any damage sustained by appellee because of the seeped condition of his land: (1) Was wholly the result of waters from the works of appellant; or (2) was wholly caused by rainfall and other things natural to that area; or (3) was the result of both the waters from the canal and reservoirs of the appellant and natural conditions including high precipitation.

An issue as to the extent natural conditions had contributed to the waterlogging of lands of appellee, and any damage resulting therefrom, was made in the trial court, and its failure and refusal to instruct the jury in reference thereto is assigned and discussed in this court. The attention of the court was directed to this issue by a proper instruction tendered by appellant. It is the mandatory duty of the trial court, without request,

to instruct the jury on each issue presented by pleadings and evidence. Fimple v. Archer Ballroom Co., 150 Neb. 681, 35 N. W. 2d 680; Hackbart v. Rohrig, 136 Neb. 825, 287 N. W. 665. A litigant is entitled to have the jury instructed as to his theory of the case shown by pleading and evidence, and it is prejudicial error to fail to instruct the jury on such theory. Landrum v. Roddy, 143 Neb. 934, 12 N. W. 2d 82; 149 A. L. R. 1041; Swengil v. Martin, 125 Neb. 745, 252 N. W. 207; Hansen v. Lawrence, 149 Neb. 26, 30 N. W. 2d 63.

Appellant was liable for seepage damage to the land of appellee caused by water from its works. No recovery could be had from it for seepage damage caused by water from another source. If water from the works of appellant combined with water from another source, and the combined water caused damage to the land of appellee, before he could recover any amount he must prove either that the damage would have been done by the water from the works of appellant without the water from the other source, or he must establish the amount of the damage done by the water of the appellant. Smith v. Platte Valley Public Power & Irrigation District, *supra*. Whether the damage was caused by the combined sources of water and would not have occurred from the water of appellant's canal and reservoirs alone was a question for the jury. If they so found, then, in the condition of the record in this case, they would have been required to deny appellee any recovery herein, because he failed to offer any proof in separation or allocation of damages from natural causes and from artificial causes attributable to appellant. Smith v. Platte Valley Public Power & Irrigation District, *supra*. The failure of the trial court to instruct the jury as to this issue is reversible error.

The judgment is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

CARTER, J., concurring.

I concur with the result reached by the majority. I submit that the rule announced with reference to the damages for which the district is liable is neither clear nor understandable.

The district is liable for seepage damage to the lands of appellee caused by water escaping from its works. No recovery can be had from the district for seepage damage caused by water from other sources. If waters escaping from the works of appellant combined with waters from natural causes or conditions to damage the lands of appellee, and the damage would not have occurred but for such escaping waters, the district is liable for all of such damage. Damages caused by natural conditions, such as rainfall, diffused surface waters, or any other waters with which the land is burdened, must be borne by the owner of the land. But, if damage results only by the addition of waters escaping from the district's works, the district is liable for all the damages thus resulting. "As stated by the decisions and authorities, if by any act of man in conjunction with the act of nature an injury is inflicted, he will be held to respond for the injury suffered." Amend v. Lincoln & N. W. R. R. Co., 91 Neb. 1, 135 N. W. 235. See, also, Davis v. Union Pacific R. R. Co., 99 Neb. 769, 157 N. W. 964.

"It is universally agreed that, if the damage is caused by the concurring force of the defendant's negligence and some other cause for which he is not responsible, including the 'act of God' or superior human force directly intervening, the defendant is nevertheless responsible, if his negligence is one of the proximate causes of the damage, within the definition already given. * * * But if the superior force would have produced the same damage, whether the defendant had been negligent or not, his negligence is not deemed the cause of the injury." 1 Shearman & Redfield, Negligence (6th ed.), § 39, p. 76.

A purchaser of land takes it subject to natural conditions such as excessive rainfall, diffused surface waters,

and other waters, surface or subterranean, with which he is burdened by law. But if such waters do not damage the land, and damages do occur only when the waters escaping from the district's works find their way to his lands, then the district is liable for all the damage caused. If some land is damaged as a result of natural conditions, and waters escaping from the district's works find their way to the land and thereby cause additional damages, the district is liable for such additional damages.

No question of apportionment or allocation is involved. The district, stating it simply, is liable for all the damage proximately caused by its escaping waters.

I am authorized to say that Judge Chappell joins in this concurrence.

ALBERTINA M. KOCH, APPELLEE, V. THE COUNTY OF DAKOTA ET AL., APPELLEES, HAROLD KRUMWIEDE ET AL., INTERVENERS AND APPELLANTS.
38 N. W. 2d 397

Filed June 29, 1949. No. 32623.

1. **Adverse Possession.** Where possession of real estate is entered upon under an agreement with the owner with reference to the occupancy and not as owner, the occupant cannot assert ownership by adverse possession unless he first surrenders his possession, or by some unequivocal act notifies the landlord that he no longer holds under the agreement made.
2. **Landlord and Tenant.** When the relation of landlord and tenant has been created, the possession of the tenant is consistent with the title of the landlord.
3. ———. The mere nondemand and nonpayment of rent are not sufficient to bar the landlord's title.
4. ———. The tenant is precluded from relying on his possession to bar his landlord as are also all persons who come in under or derive possession from the tenant in any manner.
5. ———. In such cases possession is presumed to be in accordance with the title. This presumption holds until some unequivocal act of exclusion shall have occurred.
6. **Highways.** Petitioners who have signed a petition as provided

for in section 39-105, R. S. 1943, have the right to withdraw their names from the petition before the same is presented to the county board.

7. ———. The statutory provision that a petition for the establishment or vacation of a public road shall be signed by at least ten electors residing within five miles of the road is jurisdictional.
8. ———. The facts essential to the jurisdiction of a county board to establish or vacate a road must affirmatively appear on the record of the proceedings.
9. **Judgments.** A judgment rendered without jurisdiction of the subject matter may not be used as the basis for the application of the doctrine of res adjudicata.

APPEAL from the district court for Dakota County: SIDNEY T. FRUM, JUDGE. *Affirmed.*

Mark J. Ryan, for appellants.

Warner & Warner, Free, Berry & Free, and *Malcolm R. Smith,* for appellees.

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

SIMMONS, C. J.

This is an action in equity brought by the plaintiff against Dakota County and its board of commissioners to secure the cancellation of a lease granting a right-of-way for a road, to enjoin the defendants from asserting any right to or interest in the land involved, and for equitable relief. Certain parties intervened and alleged rights adverse to the contentions of plaintiff. Trial was had resulting in a general finding and decree for plaintiff. Interveners appeal. We affirm the judgment of the trial court.

Plaintiff's predecessor in title was one John Mulhall. On December 1, 1919, he, as lessor, entered into a contract with the county commissioners of Dakota County, as lessees, whereby in consideration of $80 a year, payable in advance, he leased for the purpose of a public highway an L-shaped strip of land across property then owned by Mulhall. The lease was to run as long as the lessees

desired, with the proviso that if the rent was not paid when due the lessor might cancel the lease and the land would revert to the lessor. Plaintiff is successor in title to the interests of Mulhall in the land and assignee of his interests under the lease.

The county entered upon the premises and constructed a roadway thereon, and it has since been maintained and used as a public highway. The county has at all times taxed the land, including the leased roadway.

There is some evidence in the record that in 1927 the county commissioners refused to pay the stipulated rent for that year, the county clerk stating that as of June 1, 1927, the board decided it would pay the rent if Mulhall paid taxes three years past due.

It is stipulated that the county has not paid rentals accruing under the lease since December 1, 1934. In March 1937, Mulhall filed a claim for rent for the years 1935, 1936, and 1937. The board rejected the claim on September 24, 1937. There is evidence that one of the commissioners stated the county would not pay rent while there were back taxes on the land. No appeal was taken. No further claims for rent were filed. The public continued to use the road and the county to maintain it.

It appears that at some recent date, not definitely disclosed, plaintiff contracted to sell the land and desired to close the road. At about that time plaintiff's agent discussed with the commissioners the matter of the obligation of the county to pay rent and was advised that if some $12,000 in taxes due on the land was paid, the amount due on the rental would be paid.

On May 19, 1948, plaintiff served notice to quit upon the defendants. They took no action thereon. A petition to vacate was filed in April 1948, and rejected on June 3, 1948. This proceeding will be referred to later herein. Thereafter this action was instituted on June 19, 1948.

Interveners concede the rule to be that "Where possession of real estate is entered upon under an agreement with the owner with reference to the occupancy and not

as owner, the occupant cannot assert ownership by adverse possession unless he first surrenders his possession, or by some unequivocal act notifies the landlord that he no longer holds under the agreement made." Garner v. McCrea, 147 Neb. 541, 23 N. W. 2d 731.

Interveners argue that the refusal to pay the rent in 1937 constitutes the unequivocal act; that thereafter plaintiff or her predecessor in title could either have appealed the denial of the claim, taken action to terminate the lease, or abandoned all rights under the lease; that the failure to take action for more than ten years amounts to a dedication of the road to the public use; and that it indicates an abandonment and the establishment of a highway by adverse use for ten years and more.

It has been held as well settled that "* * * when the relation of landlord and tenant has been created, the possession of the tenant is consistent with the title of the landlord, and the mere non-demand and non-payment of rent, are not sufficient to bar the landlord's title, whatever effect they may have, if long continued, upon his right to recover the rent; and not only is the tenant precluded from relying on his possession to bar his landlord, but also all persons who come in under or derive possession from the tenant in any manner however remotely. In such cases, possession is presumed to be in accordance with the title, and this presumption will hold until some notorious and unequivocal act of exclusion shall have occurred." Ehrman v. Mayer, 57 Md. 612. See Barada-Ghio Real Estate Co. v. Keleher (Mo.), 214 S. W. 961.

Whatever rights the public and the interveners have here rest upon the rights and obligations by which the county received the use of this land for the public use. There has been no unequivocal act here that enables the county or the public to assert a right contrary to the provisions of the lease by which the county holds. Clearly plaintiff's relationship with the county began as and remains that of landlord and tenant.

Plaintiff is accordingly entitled to prevail in this action unless there is merit in interveners' contention that this action is barred by the adjudication of the petition to vacate.

It appears that plaintiff's agent discussed this situation with the county officers in 1948, and it was suggested that a road vacation proceeding be filed. A petition was prepared, directed to the county board of Dakota County, petitioning them to vacate "a Private road" which is that described in the lease here, and also "the road" along the east boundary of plaintiff's land. This was signed by ten persons, apparently at the agent's request, and it was certified that the petitioners resided "within five miles of the within proposed road and are legal petitioners for the same." Plaintiff was not one of the petitioners and we find no evidence to indicate that she was a qualified petitioner. This petition was filed April 17, 1948, and on that day was referred to the county surveyor for report. On April 21, 1948, he reported, recommending the vacation of the road. Beginning April 22, notice of the report was published, in which it was recited that objections must be filed on or before noon of May 17, 1948. On May 17, at 9:30 a. m., six of the ten petitioners filed a written request that their names be withdrawn from the petition for the reason that the matter had been misrepresented to them. Objections also were filed, the date not being shown, and one of the grounds being that there was an insufficient number of electors signing the petition. On June 3, 1948, the board met and the petition came on for hearing. An attorney appeared "for Mrs. Koch and the petitioners" and an attorney appeared for the objectors. Hearing was had. There is here no record of the evidence taken. No findings are shown. The petition was "rejected." The county clerk testified that the reasons discussed for the rejection were that if it was a private road, the board had no right to allow the petition, and if it was a public road, there were too many objectors. Interveners pleaded and here contend that

this proceeding was an adjudication which bars the present action.

The proceedings to vacate the road were had, as interveners contend, under the provisions of section 39-102, R. S. Supp., 1947, and sections 39-103 to 39-142, R. S. 1943. Section 39-105, R. S. 1943, requires a petition signed by at least ten electors residing within five miles of the road proposed to be vacated.

Assuming, but not deciding, that the rules as to res adjudicata are applicable to a proceeding such as involved here, we are at the outset confronted with this situation. Before the final time set for filing objections and well before the time the petition was presented to the board for action, six of the ten petitioners filed a request that their names be withdrawn from the petition and gave reasons therefor. The record shows that the withdrawal was called to the attention of the board.

The petitioners had the right to withdraw their names from the petition before the same was presented to the board. State v. Nemaha County, 10 Neb. 32, 4 N. W. 373; Hoffman v. Nelson, 1 Neb. (Unoff.) 215, 95 N. W. 347; Buckley v. Major, 97 Neb. 417, 150 N. W. 257; Wilkinson v. City of Lincoln, 105 Neb. 752, 181 N. W. 861; State ex rel. Tanner v. Warrick, 106 Neb. 750, 184 N. W. 896; Burrows v. Keebaugh, 120 Neb. 136, 231 N. W. 751. This statement is not intended to limit or define petitioners' rights after the petition is presented.

It follows then that at the time the petition was presented to and acted upon by the board it was the petition of but four electors.

"The statutory provision that a petition for the establishment or vacation of a public road shall be signed by at least ten electors residing within five miles of the road is jurisdictional. * * * The facts essential to the jurisdiction of a county board to establish or vacate a road must affirmatively appear on the record of the proceedings." Letherman v. Hauser, 77 Neb. 731, 110 N. W. 745. See McNair v. State, 26 Neb. 257, 41 N. W. 1099.

It follows that the board was without jurisdiction to enter any order in the matter save to dismiss for want of jurisdiction.

A judgment rendered without jurisdiction of the subject matter may not be used as the basis for the application of the doctrine of res adjudicata. Colby v. Parker, 34 Neb. 510, 52 N. W. 693; Sackett v. Montgomery, 57 Neb. 424, 77 N. W. 1083, 73 Am. S. R. 522; 50 C. J. S., Judgments, § 617, p. 38; 30 Am. Jur., Judgments, § 198, p. 939.

The judgment of the district court is affirmed.

AFFIRMED.

EDWIN B. FISCHER, NEXT FRIEND OF GOTTHARDT S. FISCHER, APPELLANT, V. BEULAH ADAMS, APPELLEE.
38 N. W. 2d 337

Filed June 29, 1949. No. 32632.

1. **Marriage.** A marriage contract will not be declared void for mental incapacity to enter into it unless there existed at the time of the marriage such a want of understanding as to render the party incapable of assenting thereto.
2. ———. Mere weakness or imbecility of mind, eccentricity, or partial dementia, are not sufficient to void a contract of marriage unless there be such a mental defect as to prevent the party from comprehending the nature of the contract and from giving to it his free and intelligent consent.
3. **Appeal and Error.** Where 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 therefore must have accepted one version of the facts rather than the opposite.

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

Reller, McArthur & Davis, and *Thomas H. Adams,* for appellant.

Frederick J. Patz and *Ralph H. Gillan*, for appellee.

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

CARTER, J.

This is an action commenced by Edwin B. Fischer, as the next friend of Gotthardt S. Fischer, to annul a marriage between the latter and the defendant, Beulah Adams. The trial court found for the defendant and the plaintiff appeals.

It is the contention of Edwin B. Fischer in his capacity as next friend to his father, Gotthardt S. Fischer, that his father was insane at the time the marriage contract was made and that he was therefore mentally incapable of assenting to the marriage. Allegations that the marriage contract was the result of fraud and undue influence are also contained in the petition.

The evidence shows that Fischer was more than 80 years of age. He had lived at Kenesaw for many years where he had operated a blacksmith shop. He had accumulated property worth approximately $17,000. He had three children, Dr. George Fischer, Edwin B. Fischer, and Alma Groff. The record shows that Fischer, during the period he lived in Kenesaw, had served on the school board, the village board, and in other civic capacities. The record shows that the family had always gotten along well together, a situation which still continues except for the occurrences stated herein.

In 1938 Fischer's wife passed away. From that time forward his condition began to change. Evidences of senile dementia manifested themselves. He became very eccentric and somewhat quarrelsome. He insisted on living in the squalid quarters of his blacksmith shop. He became dirty and slovenly in his habits and appearance. He would stay with his children for short periods only, although the record shows they did all they could to make him comfortable and contented. He became progressively more feeble and reached the point

where he could no longer control his bodily functions. He was easily confused, could not remember the names of members of his own family and could not travel from one place to another unattended. He developed a propensity to build small benches which were of no value to anyone. This was his general condition in January 1948, when he suffered a stroke which partially paralyzed him. The son Edwin B. Fischer placed him in a Lincoln hospital in the care of a competent physician. He was found to be suffering from cerebral hemorrhage, diabetes mellitus, and a decompensating heart. That he was wholly incompetent during his stay in the hospital is established by the record.

In February 1948, Fischer began to show signs of improvement and on the recommendation of his attending physician he was removed from the hospital to a private home where nursing facilities were available. The defendant, Beulah Adams, aged 55, was employed by the family to care for Fischer, and he was removed to her home in an ambulance. The record shows that Fischer continued to improve under the care of Mrs. Adams. He was soon able to get up and around. He was contented and made improvement in his mental condition. On June 6, 1948, Fischer and Mrs. Adams were married at Papillion, Nebraska, without the knowledge of Fischer's family.

The evidence shows that Fischer was able to testify concerning the marriage ceremony and the events immediately following. There was evidence by laymen of acts by Fischer from which they gave an opinion that he was insane. Dr. George Fischer, son of Gotthardt Fischer and a qualified medical expert, gave his opinion that his father was insane on the day of the marriage. The defendant produced Dr. Robert J. Stein, a physician specializing in psychiatry, who examined Fischer before and after the marriage was entered into. He found no evidence of delusions or hallucinations. It

was his opinion, after a consideration of the facts submitted and the tests he himself made, that Fischer was sane at the time the marriage agreement was made.

It is the general rule in this state that a marriage contract will not be voided on the grounds of mental incapacity unless there existed at the time of the marriage such a want of understanding as to render the party incapable of assenting to the contract. Whatever may have been the mental condition at other times, the condition at the time of the marriage itself must govern the question of capacity. If the afflicted person is cognizant of the nature and obligations of the marriage contract, a decree avoiding the contract is not authorized.

In Aldrich v. Steen, 71 Neb. 33, 98 N. W. 445, we said: "Thus this state seems clearly to have adopted the prevailing rule that, while absolute inability to contract, insanity or idiocy, will avoid a marriage, mere weakness will not, unless it extend so far as to produce the derangement that avoids all contracts, by doing away with the power to consent."

In Svanda v. Svanda, 93 Neb. 404, 140 N. W. 777, 47 L. R. A. N. S. 666, we said: " 'Imbecility of mind is not a sufficient ground of divorce, unless it amounts to idiocy or insanity. * * *.' " See, also, Adams v. Scott, 93 Neb. 537, 141 N. W. 148.

Every variation from a normal mental condition is not sufficient to avoid a marriage contract. The mental derangement relied upon must have a direct bearing upon the contract. If the party has sufficient capacity to understand the nature of the contract and the obligations and responsibilities it creates, the marriage is valid. Mere weakness or imbecility of mind is not sufficient, nor eccentricity or partial dementia, but it must be such a derangement as prevents the party from comprehending the nature of the contract and from giving to it his free and intelligent consent in order to warrant a decree nullifying the purported marriage. See Elfont v. Elfont, 161 Md. 458, 157 A. 741.

The evidence in the present case is in irreconcilable conflict. In such a situation this court has said: "By statute, on the consideration of this case, it being in equity, it became the duty of this court to retry the issues of fact upon the evidence contained in the bill of exceptions and upon trial de novo of such questions of fact, to reach an independent conclusion as to what findings are required upon the pleadings and all the evidence, without reference to the conclusion reached in the district court. Comp. St. 1929, sec. 20-1925. In such cases when the evidence on material questions of fact is in irreconcilable conflict, this court will, in determining the weight of 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." Nitzel and Co. v. Nelson, 144 Neb. 662, 14 N. W. 2d 197. See, also, Dier v. Dier, 141 Neb. 685, 4 N. W. 2d 731.

In the present case the trial court heard the evidence, expert and otherwise. It also heard the evidence of Gotthardt Fischer, the person alleged to be insane. The evidence being in irreconcilable conflict, we will consider the weight accorded it by the trial court because of the more advantageous position occupied by it in determining the weight to be given thereto. Giving effect to this rule, we find that Gotthardt Fischer was sane on June 6, 1948, the date the marriage contract was made.

The record will not sustain a finding of fraud or duress in the procurement of the marriage contract. There is some evidence that Fischer was deprived of his mail by the defendant and that she concealed their approaching marriage from his children. There is some evidence that she attempted unsuccessfully to obtain control of his property after her marriage to Fischer, which was thwarted by the action of the children and the appointment of a guardian. A decree appointing a guardian for an incompetent person is not necessarily inconsistent

with a finding that such person is sane. The issues are not the same, although insanity constitutes an adequate ground for the appointment of a guardian. These matters are not sufficient, however, to void a marriage contract for fraud or undue influence.

Plaintiff assigns as error the rulings of the trial court in limiting the cross-examination of the defendant to matters testified to by her on direct. The extent of the cross-examination of a witness on matters outside of those testified to on direct is largely discretionary with the trial court. No prejudice being shown, we cannot say that the trial court abused its discretion.

Complaint is made of the refusal of the trial court to permit Gotthardt Fischer to talk with his family during the progress of the trial. We do not see how this could bear upon the mental capacity of Fischer on June 6, 1948, and consequently no error prejudicial to the rights of plaintiff resulted therefrom.

AFFIRMED.

ELIZABETH TREVETT, APPELLANT, V. LOUIS TREVETT, APPELLEE.
38 N. W. 2d 332

Filed June 29, 1949. No. 32593.

1. **Divorce.** Where an action for divorce on the ground of extreme cruelty has been abandoned and reconciliation effected on the promise that there would be no repetition, repetition of cruelties revives the right of the complaining party to reassert the cruelties alleged in the first action as grounds for divorce.
2. ———. One party to the marriage may condone the cruelty of the other but one claiming condonation must establish it by clear and satisfactory proof.
3. **Appeal and Error.** In an action for divorce if the evidence is principally oral and is in irreconcilable conflict, and the determination of the issues depends upon the reliability of the respective witnesses, the conclusion of the trial court as to such reliability will be carefully regarded by this court on a review.

APPEAL from the district court for Dixon County: SIDNEY T. FRUM, JUDGE. *Affirmed.*

Mark J. Ryan, for appellant.

L. W. Crumbaugh and *John E. Newton,* for appellee.

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

YEAGER, J.

This is an action for divorce by Elizabeth Trevett, plaintiff, appellant here, against Louis Trevett, defendant, appellee here. Divorce was denied by the decree of the district court. From this decree and an order overruling a motion for new trial plaintiff has appealed.

The ground alleged for divorce was that the defendant had been guilty of extreme cruelty upon and toward the plaintiff. For answer the defendant denied generally the acts of cruelty charged against him and further answering pleaded that the acts of cruelty, if any, which he had committed against plaintiff had been condoned and that because thereof she was not entitled to a divorce. The prayer was for dismissal of the petition.

These parties were married in Dakota County, Nebraska, March 30, 1942. They went to live at the farm home of defendant in Dixon County, Nebraska, which was, at all times referred to herein, the residence of the defendant. They separated in August 1944 and in September 1945 the plaintiff filed a petition for divorce from defendant on the ground of cruelty. There is little question that the acts of cruelty charged therein constituted a part of the acts charged in the petition herein. On February 22, 1946, a reconciliation took place and that action was abandoned. On July 3, 1947, this action was commenced.

The case was presented to the district court by plaintiff on the theory that the defendant on the reconciliation promised not to repeat the cruelties which had theretofore been practiced and that he would desist from any

such practice, but that he had failed to keep his promise and did commit further cruelties therefore she was entitled to reassert her charges and obtain a divorce on account thereof.

The theory is a correct one and on it she is entitled to the relief she seeks provided the evidence sustains her position and provided further that she is not barred by acts of condonation on her part. Even without such an express promise he was obliged to pursue a line of conduct in keeping with the terms of such a promise, and for failure so to do an action for divorce embodying the earlier cruelty was available to her. McConnell v. McConnell, 37 Neb. 57, 55 N. W. 292.

The evidence as to incidents and details of the alleged cruelty is meagre and in most incidents not corroborated. All of it is denied by the defendant. We think however that had the cause been decided favorably to the plaintiff on that issue the evidence would have been sufficient to sustain it.

The cause was not however decided on that issue but on the issue of condonation. Plaintiff was denied a divorce on the ground that she had condoned any act or acts of cruelty committed upon or against her by the defendant.

The condonation which was found to have taken place did not relate in any wise to the reconciliation which took place in February 1946, but to cohabitation which the defendant says occurred thereafter and continued up to a few days before the trial.

The defendant testified that cohabitation started when plaintiff came back to Dakota County, Nebraska, and continued periodically about every two weeks until May 26, 1947. Just when she came to Dakota County is not made clear but from the allegations of the petition it would appear to have been as much as a year prior to July 3, 1947. He testified that she came to his home and spent the night with him in March 1947 and that she lived with him at his home in the relation of husband and wife

for a period of about five weeks beginning May 26, 1947. He further testified that he cohabited with her thereafter about every two weeks until just a few days before the trial.

Cohabitation is denied by plaintiff. She admits that she was at the home of defendant for at least three weeks but says that she was practically a prisoner. She says that she was there only for the purpose of protecting her right of supervision of the small child of the parties.

Some of the incidents, according to the testimony of defendant, occurred under the observation of relatives and presumably friends of the plaintiff. None of these was called to refute the claims of defendant or to support the denials of plaintiff.

It is said in McConnell v. McConnell, *supra:* "A wife may condone the cruelty of her husband, but the husband, to avail himself of such condonation, must establish the same by clear and satisfactory proofs."

The evidence of defendant was clear and sufficient if believed to sustain the defense of condonation. We think, in the sense and in the relationship used, satisfactory means a quality, in addition to the clarity required, which is sufficient by preponderance to convince and to outweigh the evidence, if any, to the opposite effect.

The evidence was evidently considered clear and satisfactory by the trial court. Bearing in mind the rule that in actions for divorce if the evidence is principally oral and is in irreconcilable conflict, and the determination of the issues depends upon the reliability of the respective witnesses, the conclusion of the trial court as to such reliability will be carefully regarded by this court on review of the evidence, we conclude that the evidence of defendant clearly and satisfactorily established the defense of condonation. Peyton v. Peyton, 97 Neb. 663, 151 N. W. 150.

The decree of the district court is affirmed.

AFFIRMED.