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REPORTS OF CASES

DECIDED BETWEEN
JULY 1, 1950 AND MARCH 2, 1951

IN THE

Supreme Court of Nebraska

JANUARY AND SEPTEMBER TERMS 1950, AND
JANUARY TERM 1951

VOLUME CLIII

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By WALTER D. JAMES, REPORTER OF THE SUPREME COURT

For the benefit of the State of Nebraska

SUPREME COURT

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TABLE OF CASES REPORTED

Adams; Paloucek v. 744
Adams; Tempero v. 331
Andersen v. City of Omaha 147
Anderson v. Nincehelser 329
Archer-Daniels-Midland Co. v. Board of Equalization 776
Armer v. Omaha & Council Bluffs St. Ry. Co. 352
Armstrong v. Board of Supervisors 858
Armstrong v. State Farm Mutual Automobile Ins. Co. 144
Atwood v. Sharp 73
Ayres Auto Supply; Peek v. 239

Ballou; Beetison v. 360
Baskins v. Krepcik 36
Bee Line Motor Freight v. Petersen & Petersen, Inc. 517
Beetison v. Ballou 360
Beltner v. Carlson 797
Benson, In re Estate of 824
Bisson; Trowbridge v. 389
Blake v. Pathfinder Hotel Co. 231
Board of Equalization; Archer-Daniels-Midland Co. v. 776
Board of Supervisors; Armstrong v. 858
Borah v. Lincoln Hospital Assn. 846
Bridgeport, City of; Inslee v. 559
Brown v. Hyslop 669
Brudevold v. Brudevold 545
Bruno, In re Application of 445
Bruno v. Fischer 445
Bryant v. State 490
Busteed v. Sheffield 253

Caldwell, State ex rel. v. Peterson 402
Carlson; Beltner v. 797
Carroll; State v. 16
Chicago, B. & Q. R. R. Co. v. County of Gosper 805
City of Bridgeport; Inslee v. 559
City of Lincoln; Noble v. 79
City of Omaha; Andersen v. 147
City of Omaha; Davis v. 460
City of Omaha; Lewis v. 11
City of Omaha; Lynch v. 147

City of Omaha; Lynn v. 193
City of Ravenna; Davidson v. 652
City of Wahoo; Manners v. 437
Clear Creek Drainage District; Ohm v. 428
Clute v. Mach 772
Conley v. Hays 733
Corbitt v. Hafer 824
County of Gage; Ramsey v. 24
County of Gosper; Chicago, B. & Q. R. R. Co. v. 805
County of Lancaster v. Schwarz 472
County of Richardson; Wittwer v. 200
Cunningham v. State 912

Darlington v. State 274
Davidson v. City of Ravenna 652
Davis v. City of Omaha 460
Dennis v. Omaha National Bank 865
Department of Roads and Irrigation; Lackaff v. 217

Evertson; National Fire Ins. Co. v. 854

Feight v. Mathers 839
Ficke v. Gibson 478
Fischer; Bruno v. 445
Fisher v. State 226
Fitzsimons v. Frey 124, 550
Francil v. Francil 243
Fremont Cake & Meal Co.; Wilson & Co., Inc. v. 160
Frey; Fitzsimons v. 124, 550

Gage, County of; Ramsey v. 24
Gibson; Ficke v. 478
Gosper, County of; Chicago, B. & Q. R. R. Co. v. 805

Hafer; Corbitt v. 824
Haffke; Parkening v. 678
Hall v. Modern Woodmen of America 600
Hays; Conley v. 733
Hendrix v. Vana 531
Herman v. M. & S. Transport Co. 260
Herrin v. Johnson Cashway Lumber Co. 693
Hill; Snyder v. 721
Holbrook; Lund v. 706
Hyslop; Brown v. 669

In re Application of Bruno 445
In re Application of M. & S. Transport Co. 260

In re Application of Moritz 206
In re Application of Petersen & Petersen, Inc. 517
In re Application of Silberman 338
In re Estate of Benson 824
In re Estate of Thompson 375
Inslee v. City of Bridgeport 559
Interstate Transit Lines; Krepcik v. 98

Jessen; Pospisil v. 346
Johnson Cashway Lumber Co.; Herrin v. 693
Junge; Stratbucker v. 885

Keiserman v. Lydon 279
Kitts v. State 784
Krepcik v. Interstate Transit Lines 98
Krepcik; Baskins v. 36
Kroger v. Kroger 265
Kuther; Schomberg v. 413

Lackaff v. Department of Roads and Irrigation 217
Lancaster, County of v. Schwarz 472
Lewis v. City of Omaha 11
Lincoln, City of; Noble v. 79
Lincoln; Snyder v. 611
Lincoln Hospital Assn.; Borah v. 846
Loyal's Auto Exchange, Inc. v. Munch 628
Lund v. Holbrook 706
Lydon; Keiserman v. 279
Lynch v. City of Omaha 147
Lynn v. City of Omaha 193

M. & S. Transport Co.; Herman v. 260
M. & S. Transport Co., In re Application of 260
Mach; Clute v. 772
Mangiameli v. Mangiameli 753
Manners v. City of Wahoo 437
Mathers; Feight v. 839
May v. State 369
Meier v. Meyer 222
Meyer; Meier v. 222
Miller v. Miller 890
Miller; Phifer v. 748
Modern Woodmen of America; Hall v. 600
Moritz, In re Application of 206
Moritz v. Transcontinental Bus Lines, Inc. 206
Munch; Loyal's Auto Exchange, Inc. v. 628

National Fire Ins. Co. v. Evertson 854
Nebraska Beer Wholesalers Assn., State ex rel. v. Young 395
Nebraska State Bar Assn., State ex rel. v. Wiebusch 583
Nestor; Weisenmiller v. 153
Newquist v. State 917
Nincehelser; Anderson v. 329
Noble v. City of Lincoln 79
Noetzelmann v. Noetzelmann 133
Novak; State v. 596

Ohm v. Clear Creek Drainage District 428
Olson Construction Co.; School District v. 451
Omaha & Council Bluffs St. Ry. Co.; Armer v. 352
Omaha, City of; Andersen v. 147
Omaha, City of; Davis v. 460
Omaha, City of; Lewis v. 11
Omaha, City of; Lynch v. 147
Omaha, City of; Lynn v. 193
Omaha National Bank; Dennis v. 865

Paloucek v. Adams 744
Parkening v. Haffke 678
Pasko v. Trela 759
Pathfinder Hotel Co.; Blake v. 231
Paxton & Gallagher Co.; Tucker v. 1
Peek v. Ayres Auto Supply 239
Petersen & Petersen, Inc., In re Application of 517
Petersen & Petersen, Inc.; Bee Line Motor Freight v. 517
Petersen v. Schneider 815
Peterson; State ex rel. Caldwell v. 402
Peterson v. Peterson 727
Phifer v. Miller 748
Pindell; Securities Credit Corp. v. 298
Pospisil v. Jessen 346

Ramsey v. County of Gage 24
Ravenna, City of; Davidson v. 652
Rhoades v. State Real Estate Commission 625
Richardson, County of; Wittwer v. 200
Roads and Irrigation, Department of; Lackaff v. 217
Ross; Wabel v. 236

Sarraillon v. Stevenson 182
Schluter v. State 317
Schneider; Petersen v. 815
Schomberg v. Kuther 413
School District v. Olson Construction Co. 451

Schroeder v. Sharp 73
Schwarz; County of Lancaster v. 472
Scott v. Scott 906
Scriven v. Scriven 655
Securities Credit Corp. v. Pindell 298
Shamburg v. Shamburg 495
Sharp; Atwood v. 73
Sharp; Schroeder v. 73
Sheffield; Busteed v. 253
Silberman, In re Application of 338
Silberman; Transit, Inc. v. 338
Smith v. State 308
Snyder v. Hill 721
Snyder v. Lincoln 611
Sopcich v. Tangeman 506
Spencer v. Village of Wallace 536
State Farm Mutual Automobile Ins. Co.; Armstrong v. 144
State Real Estate Commission; Rhoades v. 625
State v. Carroll 16
State v. Novak 596
State; Bryant v. 490
State; Cunningham v. 912
State; Darlington v. 274
State; Fisher v. 226
State; Kitts v. 784
State; May v. 369
State; Newquist v. 917
State; Schluter v. 317
State; Smith v. 308
State; Truman v. 247
State ex rel. Caldwell v. Peterson 402
State ex rel. Nebraska Beer Wholesalers Assn. v. Young 395
State ex rel. Nebraska State Bar Assn. v. Wiebusch 583
Stevenson; Sarraillon v. 182
Strasser v. Strasser 288
Stratbucker v. Junge 885

Tangeman; Sopcich v. 506
Tempero v. Adams 331
Thompson, In re Estate of 375
Thompson v. Thompson 375
Transcontinental Bus Lines, Inc.; Moritz v. 206
Transit, Inc. v. Silberman 338
Trela; Pasko v. 759
Trowbridge v. Bisson 389
Truman v. State 247
Tucker v. Paxton & Gallagher Co. 1

Vana; Hendrix v. 531
Village of Wallace; Spencer v. 536

Wabel v. Ross 236
Wahoo, City of; Manners v. 437
Wallace, Village of; Spencer v. 536
Weisenmiller v. Nestor 153
Wiebusch; State ex rel. Nebraska State Bar Assn. v. 583
Wilson & Co., Inc. v. Fremont Cake & Meal Co. 160
Wittwer v. County of Richardson 200
Wright v. Wright 18

Young; State ex rel. Nebraska Beer Wholesalers Assn. v. 395

Zoppelli v. Zoppelli 577

CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

JANUARY TERM, 1950

KELLEY W. TUCKER, APPELLEE, v. PAXTON & GALLAGHER COMPANY, A CORPORATION, APPELLANT.

43 N. W. 2d 522

Filed July 6, 1950. No. 32754.

1. **Workmen's Compensation: Appeal and Error.** The function of this court in a workmen's compensation case is to consider the case de novo unless from the record it appears that the findings are conclusively supported by the evidence.
2. **Workmen's Compensation.** The word "accident" within the meaning of the Workmen's Compensation Act as applied to the facts of this case means an unexpected or unforeseen event happening suddenly and violently, with or without human fault, and producing objective symptoms of an injury.
3. **Evidence.** In a lawsuit based on personal injuries, wherein the character of the injuries can only be ascertained by scientific examination and analysis, the testimony of a party who has no scientific knowledge on the subject, which testimony is in conflict with testimony based on the scientific examination and analysis, will not bind such party.
4. **Workmen's Compensation.** The burden is upon the plaintiff in a workmen's compensation action to prove by a preponderance of the evidence that personal injury was caused by an accident arising out of and in the course of his employment.
5. ———. A plaintiff in a workmen's compensation action is entitled to recover an award if he has shown by a preponderance of the evidence that he has sustained injury resulting from an

accident arising out of and in the course of his employment even if preexisting disability combined to produce his disability.

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

Kennedy, Holland, DeLacy & Svoboda and *Edwin Cassem,* for appellant.

Charles A. Nye, William Comstock, and *Schall, Robinson, Hruska & Garvey,* for appellee.

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

YEAGER, J.

This case was previously considered by this court in 152 Neb. 622, 41 N. W. 2d 911, and on the record as at that time presented it was held that the merits of the case could not be determined since the defendant and appellant had consented to the overruling of the motion for new trial. The ruling on the motion for new trial presented the only question for review, if any was presented.

By leave of this court the appellant was permitted to present to this court a supplemental transcript. This supplemental transcript discloses a nunc pro tunc order of the district court which shows that the defendant did not consent to the overruling of the motion for new trial but that it was regularly ruled on adversely to the defendant.

Under the circumstances the decision contained in the former opinion is hereby withdrawn and the case will now be considered on its merits.

This is an action by Kelley W. Tucker, plaintiff and appellee, against Paxton & Gallagher Company, a corporation, defendant and appellant, to recover under the Workmen's Compensation Act for alleged accidental injuries sustained by plaintiff on May 17, 1948, while he was engaged as an employee of the defendant. A judge of the workmen's compensation court, on hearing, dis-

missed the action. From the dismissal an appeal was taken to the district court where a trial was had. In the district court an award was rendered in favor of plaintiff for $18 a week for 55 weeks for temporary total disability and for $201.20 for medical and hospital expense. From this award the defendant has appealed.

The only question presented by the appeal is that of whether or not the plaintiff sustained an accident which produced the disabilities of which he has complained. The propriety of the amount of the award in the event that it is found that the plaintiff sustained a compensable injury is not brought into question.

In approaching a determination of the questions involved in this appeal it is to be borne in mind that the function of this court is to consider the case de novo unless it be concluded that the findings of fact are conclusively supported by the evidence as disclosed by the record. § 48-185, R. S. 1943; Werner v. Nebraska Power Co., 149 Neb. 408, 31 N. W. 2d 315; Solheim v. Hastings Housing Co., 151 Neb. 264, 37 N. W. 2d 212.

An examination discloses that the findings of fact may not be said to be conclusively supported by the evidence. In substantial particulars competent and material evidence is sharply conflicting. It has therefore become necessary to consider the case de novo on the record.

The evidence discloses that the plaintiff was first employed by the defendant on August 6, 1947. He was continuously employed from that date until May 17, 1948, except for periods when he was away on account of illness. He had no regular type of employment but his work over the entire period was in the coffee warehouse. On March 29, 1948, he entered a hospital on account of a kidney infection. He remained there until April 12, 1948, when he went home. He stayed at home for a week and then on April 19, 1948, returned to work. On May 10, 1948, he got sick and went home. He returned to

work on May 14, 1948. As to this phase of the evidence there is no dispute.

The plaintiff testified that at about 8:30 a. m. on May 17, 1948, he was engaged in dumping paper sacks of empty coffee cans into a conveyor. A sack such as he was handling at the time contains 140 cans and weighs from 50 to 60 pounds. The bag which he was lifting broke or tore. He grabbed the bag to keep it from falling apart and at that time he had a terrible pain. At different points in the record it is indicated that the pain was in his hip, back, and legs. He dropped to his knees and was unable to arise. He went or was taken to another floor of the building. From there he was taken in an ambulance to the hospital. This evidence is not directly disputed or by reasonable inference counteracted. It must therefore be accepted as true.

The plaintiff contends that this evidence constitutes proof of an accident within the definition of the term by the Workmen's Compensation Act as follows: "The word 'accident' as used in this act shall, unless a different meaning is clearly indicated by the context, be construed to mean an unexpected or unforeseen event happening suddenly and violently, with or without human fault, and producing at the time objective symptoms of an injury." § 48-151, R. S. Supp., 1949.

It must be said that this evidence of the plaintiff satisfies the statutory requirements of the definition of an accident.

As pointed out the evidence of the defendant does not in anywise dispute or counteract the evidence of accident. Its substantial contention, when analyzed, is not that there was no accident but that the finding of compensatory injury is not sustained by the evidence. It relies for support of its position upon its own evidence, claimed inconsistency in the evidence of plaintiff, and claimed contradictory statements made before the trial which statements were adduced in evidence at the trial.

As to the question of whether or not plaintiff sustained

the injury complained of in consequence of the accident he testified, in addition to what has already been summarized, that he remained in the hospital for about 12 days under the care of Dr. Dendinger and that he was examined by a specialist; that he received heat treatments and shots for pain; that after 12 days he went home and to bed for about a month; that at home he received treatments on his back; that after about a month he went to see his doctor and the specialist who saw him at the hospital; that he started wearing a brace in September which he was still wearing at the time of the trial; that treatments were continued at the office of the doctor; that he had continuous severe pain in his legs and back from May 17, 1948, until about January 1949 when he went to the Creighton University Medical Clinic where he became a patient in charge of an orthopedic surgeon; that after examination and X-rays this surgeon on January 31, 1949, performed a surgical operation on his back; that he left the hospital and went home about February 15, 1949; that since the operation he has numbness in the left leg from the knee down and the left foot; that he does not have a lot of pain but has some across his hip; and that at the time of the trial he was still unable to work. In his testimony he gave a history of having been hospitalized on March 29, 1948, for prostate trouble and a kidney infection and that he returned to work April 19. He was home sick on May 10, 1948, and away from work until May 14. He had poliomyelitis in 1939, but appears to have satisfactorily recovered from that disease. Other incidents relating to the health of plaintiff were testified to by him but the relation of them is not deemed important.

The orthopedic surgeon referred to testified that the plaintiff came under his charge on January 15, 1949; that plaintiff exhibited symptoms of severe pain in his back radiating down his left leg; that he made a thorough examination of and applied certain tests to plaintiff; that he obtained a history of his condition from plaintiff and

had detailed to him the accident which has been described; and that in the light of these things he found a deformity in the spinal cord and diagnosed the condition as a herniated disc.

This surgeon testified that on January 31, 1949, he operated on plaintiff and that in the space between the fourth and fifth lumbar vertebrae he found and removed a small disc. In the space below this point he found bone protuberances which were curetted.

The doctor gave it as his opinion that the condition which he found was the result of injury sustained in the accident in which plaintiff was involved on May 17, 1948.

On cross-examination the surgeon gave testimony that between the fourth and fifth lumbar vertebrae he found adhesions around the fifth lumbar nerve root probably caused by an old inflammatory condition. The effect of his testimony was to say that the condition was surgically relieved.

A general surgeon was called to testify on behalf of the defendant. He examined plaintiff on June 8, 1948, November 2, 1948, and April 4, 1949. The first two examinations were made before the operation. On June 8 he obtained a history from plaintiff and made an examination. The history and findings were not materially different than the history given to the operating surgeon and the findings made by him prior to the operation.

Based on the history given to this general surgeon by the plaintiff, additional history related at the trial, his examinations, information as to the findings made when the operation was performed, and the results flowing therefrom, he gave it as his opinion that plaintiff's condition did not flow from the accident of May 17, 1948. He did not dispute the existence and removal of the disc but concluded that this was not the cause of the disability. Inferentially at least it was his position the disc had no causal connection with what occurred

on May 17. Again inferentially at least it was his conclusion that the occurrence of May 17, 1948, flowed from a general debilitated condition and faulty nerve functioning caused by the adhesions testified to by the operating surgeon.

The witness gave no opinion as to the cause of the collapse on May 17. The reasonable inference to be drawn from his testimony is that what happened was that on account of a weakened and a diseased body endurance gave way.

Substantially the defendant says that this evidence of its witness together with the findings of the operating surgeon of adhesions as described and claimed contradictory statements made before the trial hereinbefore mentioned defeat a claim of accidental injury.

The statements which it is contended contradict the evidence given at the trial are contained in a written instrument prepared by one Donald T. Fox from information given by plaintiff. It was signed by plaintiff.

The instrument among other things gives a history of plaintiff's condition before and at the time of the accident. It described the kind of work engaged in by plaintiff and relates what occurred on May 17, 1948.

The statement consists of 15 paragraphs. The first important point of claimed contradiction appears in the fifth paragraph. It is substantially contended that the following contradicts a claim that the plaintiff sustained an accidental injury:

"I worked along on this job. Nothing happened in particular that I can remember. I did not slip or fall or have an accident but about Wednesday May 5 I noticed for the first time a pain in my left hip. It didn't seem to (sic) bad. It hurt me worse when I was stooping over to pick something up or walking up the stairs. When I picked up something where I didn't have to stoop it wasn't so bad. The rest of that week went along that way. * * *."

Obviously from the tenor of this and its position in

the statement this quoted portion has no relation to the date of the accident. The pain thus described was before the date of the accident. The evidence of severe pain appearing in the testimony relates to the time following the accident and not to this portion of the statement. It may be said that there was some contradiction between this statement and the testimony given at the trial but it cannot be said that it was sufficient to destroy its weight and probative value.

Evidence of pain before May 17 has a bearing on the question of whether or not this was an accidental injury or simply the end result of preexisting degenerating conditions.

The ninth and tenth paragraphs of the statement refer specifically to what occurred on May 17. These do not conflict in any material particular with the testimony given on the trial in this respect. They are in part as follows:

"About 8:30 this Monday morning while I was picking up one of these sacks or bags of cans from the floor to empty into the chute I got a terrible pain in my left hip. It was so severe I had to drop on one knee to the floor and I was unable to straighten up.

"I had to quit right away. I was in such terrible pain I was half crazy with it. * * *."

The next claimed contradiction appears in the fourteenth paragraph. It is as follows: "I did not slip or fall while on the job at Paxton-Gallagher. This day Monday May 17 when I got this terrible pain in my left hip while stooping over to pick up this bag of cans I did not slip or jar myself in any way. I just figure that I was in too weakened condition after my kidney trouble to do any work of that kind."

What is contained here is not exactly what was stated in this respect in plaintiff's testimony but viewed practically it may not be said that it is a material departure. The substance of what he said on all occasions with regard to the pain was that while he was attempting

to lift the bag of cans the seizure came upon him.

It is substantially urged that the statement: "I just figure that I was in too weakened condition after my kidney trouble to do any work of that kind," defeats his right to assert an injury as the result of the accident.

That contention is without legal basis. Whether or not he received an injury as a result of the accident could be determined only through scientific investigation and examination, and he as an ordinary layman may not be charged with such obscure knowledge. Any statement therefore of his with regard to whether or not he sustained the injury complained of as the result of the accident in question may not be considered binding upon him and may not have the effect of defeating the scientific evidence in relation thereto. Flesch v. Phillips Petroleum Co., 124 Neb. 1, 244 N. W. 925; Keenan v. Consumers Public Power District, 152 Neb. 54, 40 N. W. 2d 261.

The defendant urges that the plaintiff has not supported his claim by a preponderance of the evidence. It contends that to the contrary it is equivocal and leaves the relation between the disability and the alleged injury in uncertainty and the realm of speculation.

The burden as contended by the defendant is upon the plaintiff to prove by a preponderance of the evidence that personal injury was caused to the employee by an accident arising out of and in the course of his employment. Bartlett v. Eaton, 123 Neb. 599, 243 N. W. 772; Kuhtnick v. Carey, 124 Neb. 762, 248 N. W. 89; Huffman v. Great Western Sugar Co., 125 Neb. 302, 250 N. W. 70; Hudson v. City of Lincoln, 128 Neb. 202, 258 N. W. 398.

As has been pointed out the accident has been proved beyond peradventure. As to injury the surgeon called by the defendant did speculate as to the cause of plaintiff's condition on and after May 17, 1948. He gave it as his opinion that the disc did not result from the accident. He gave it as his further opinion that plaintiff's pain and disability resulted from nerves involved by the

adhesions found by the operating surgeon. At no point however did he go so far as to say that the happening of May 17, 1948, had no influence upon the condition on that day or thereafter.

On the other hand the evidence of the operating surgeon was definite and positive as to findings and his opinion with regard to causation was positive and unequivocal.

It is true that the evidence shows plaintiff was not a strong and robust person. In truth it shows that he had physical afflictions from which it is easy to say that he was a person readily susceptible to disease and injury but this condition constitutes no bar to a right of recovery for accidental injury under the Workmen's Compensation Act. He has the right to have his award sustained if he has shown by a preponderance of the evidence that he sustained an injury, resulting from an accident arising out of and in the course of his employment even if preexisting disability combined to produce his disability. Gilcrest Lumber Co. v. Rengler, 109 Neb. 246, 190 N. W. 578, 28 A. L. R. 200; Yakal v. Henkle & Joyce Hardware Co., 145 Neb. 365, 16 N. W. 2d 531; Sporcic v. Swift & Co., 149 Neb. 246, 30 N. W. 2d 891.

The conclusion of this court is that the plaintiff has sustained the burden of proving an accident and compensable injury within the meaning of the Workmen's Compensation Act.

The decree of the district court is affirmed and an attorney's fee in the amount of $250 is allowed for services in this court.

AFFIRMED.

HERMAN LEWIS, APPELLANT, V. CITY OF OMAHA ET AL., APPELLEES.

43 N. W. 2d 419

Filed July 6, 1950. No. 32757.

1. **Courts: Administrative Law and Procedure.** Where an administrative tribunal is authorized to ascertain and declare the existence or nonexistence of certain facts, and no provision is made for an appeal to the courts, the courts are limited to a determination of two questions; whether the tribunal had jurisdiction of the subject matter and whether the findings and order based thereon are arbitrary or capricious.
2. **Officers.** The dismissal of an employee of the fire department is "necessary for the proper management or discipline, or for the more effective working or service of the fire department" within the meaning of section 14-704, R. S. 1943, when it is established that the employee lacks the qualifications for the position, has failed in the performance of his duties, or has been shown to be an unfit or improper person to hold the position.
3. **Courts: Administrative Law and Procedure.** In such a case if all the jurisdictional facts are established and there is evidence to support the order made by the administrative tribunal, no basis exists for interference by the courts.
4. ———: ———. Whether a cause of removal is a sufficient ground for removal as a matter of law is for the courts. If the ground for removal be sufficient, whether removal is justified is for the administrative tribunal subject to the limitation that it must not be arbitrary or capricious.

APPEAL from the district court for Douglas County: FRANK M. DINEEN, JUDGE. *Affirmed.*

Alfred A. Fiedler, Herbert S. Dolgoff, and *Clarence E. Walsh,* for appellant.

Edward F. Fogarty, Edward Sklenicka, James M. Paxson, and *Herbert M. Fitle,* for appellees.

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

CARTER, J.

This is an appeal from an order of the district court for Douglas County dismissing the petition of plaintiff

in error praying that the findings and order of the city council of Omaha discharging him from the fire department of the city of Omaha be reversed and vacated, and that he be restored to his position in the fire department.

The complaint alleges in substance that on May 27, 1941, Herman Lewis, the plaintiff in error, violated section 3, chapter 7, Rules and Regulations of the Fire Department of the city of Omaha, which regulation provides: "In matters of general conduct, not within the scope of Department rules, members will be governed by the ordinary rules of good behavior observed by law-abiding citizens."

The evidence offered to sustain the complaint is substantially as follows: On May 27, 1941, police officers Vondrasek, McKay, and Trotter, who were assigned to the vice detail, were searching for an Indian girl, Tillie Monroe, who had been reported as a prostitute infected with a social disease. The purpose of the search was to induce a medical examination and treatment. The girl was found at the home of Herman Lewis, who will hereafter be referred to as Lewis. She was there employed as a housekeeper and as a governess for the minor children of Lewis.

The evidence shows that the officers came to the door, explained their mission, and were admitted to the home by Lewis. The officers talked to Tillie Monroe and obtained her consent to go with them for medical examination and treatment. The officers had no warrant and did not attempt to arrest the girl. The officers testify that while the girl was out of the room, preparing to leave with the officers, an altercation between Lewis and the officers took place. The officers testify that Lewis struck officer McKay, ordered them out of the house, pushed the officers about, and commenced a fight which required the officers to arrest Lewis and take him with them. The evidence of Lewis and his witness is in direct conflict with the evidence of the officers. We will not undertake to state it here. It was sufficient, how-

ever, if believed, to sustain a finding of innocence on the part of Lewis.

The findings and order of the city council dismissing Lewis from the fire department are reviewable on petition in error to the district court and on appeal to this court from the district court. State ex rel. Sutton v. Towl, 127 Neb. 848, 257 N. W. 263. It is urged, however, that the charge in the complaint was outside the scope of the controlling statute which provides in part: "All members or appointees of the fire department shall be subject to removal by the city council under such rules and regulations as may be adopted, and whenever the council shall consider and declare such removal necessary for the proper management or discipline, or for the more effective working or service of the fire department." § 14-704, R. S. 1943. It is contended that a fireman's conduct while off duty is of no concern to the city and that authority is lacking to suspend or discharge a fireman for conduct, while off duty, necessary for "the proper management or discipline, or for the more effective working or service of the fire department." We think a city under the quoted section of the statute is authorized not only to inquire into the private character and conduct of an applicant for a position on the fire department to determine whether they meet the standards required by the city of those seeking such employment, but to make such inquiries after employment at any and all times. A city is not required to keep persons in its employ whose conduct is embarrassing or inimical to the interests of the city. Kennett v. Barber, 159 Fla. 81, 31 S. 2d 44; Arehart v. School District, 137 Neb. 369, 289 N. W. 540.

In Herbert v. Atlantic City, 87 N. J. Law 98, 93 A. 80, it was said: "It is argued for the prosecutor that because he was not on duty at the time as a police officer when the episode related occurred, therefore, the quoted section of the statute is not applicable to him. In other words, the contention practically is that a police officer

when off duty may misbehave and misconduct himself as much as he pleases, namely, he may be engaged openly in conduct tending to reflect upon the morale and discipline of the police force and department, without being held to account for such misbehavior or misconduct. If this were so, then the discipline and morale of the police force, which the legislature evidently intended to secure by the provision of the statute referred to, is seriously threatened, and its efficacious object of requiring good behavior and denouncing misconduct of a police officer will be signally defeated."

We conclude that the regulation here involved was within the power of the city council to make and the council was authorized to hear, consider, and determine the charge made in the present case.

The action of the city council in finding against Lewis and dismissing him from service in the fire department is an administrative act, though quasi-judicial in character. The limit of judicial interference in such cases is to protect the member of the fire department in his right to a hearing on specific charges. If the order made by the council after hearing is not arbitrary or capricious, it will be sustained by the courts. The action of the council in the present case is supported by evidence. The fact that the evidence is very conflicting does not change the rule. There being evidence, if believed, to sustain the charge, we cannot say that the order of the council was arbitrary or capricious. In State ex rel. Sorensen v. Lake, 121 Neb. 331, 236 N. W. 762, this court quoted the following with approval: " 'The judgment should be affirmed if all of the jurisdictional facts were established by any competent evidence, even though opposed by other and weighty evidence. In referring to the evidence as "competent" we mean evidence competent for that character of proceedings.' "

Ayers v. Hatch, 175 Mass. 489, 56 N. E. 612, states the controlling principle as follows: "The fact, however, that removals are to be for cause, repels the idea of removal

at pleasure, even though the sufficiency of the cause is for him to decide. The question then arises, what jurisdiction has this court in regard to removals? The answer it seems to us, is this. Cause implies, we think, a reasonable ground of removal, and not a frivolous or wholly unsatisfactory or incompetent ground of removal. If the cause assigned is a reasonable one, then, whether under the circumstances it is sufficient to justify a removal, is for the mayor to decide and his decision is final. But whether the cause assigned constitutes, of itself, as matter of law, ground for removal, is a question for this court to determine. In the present case the cause assigned was 'the good of the service,' and manifestly it seems to us, that was good ground for removal." See, also, Sullivan v. Martin, 81 Conn. 585, 71 A. 783; McNiff v. City of Waterbury, 82 Conn. 43, 72 A. 572, 135 Am. S. R. 247.

It is urged that Lewis had a personal right to do everything he did. While this statement is grounded on very conflicting evidence, it is not always a defense in cases of this kind, even if it be assumed to be true. A governmental subdivision has a right to select its own employees and it may, in proper cases, dismiss them for conduct which but for the employment the employees would have a perfect right to do. The holding of a position of fireman is not a matter of right. It is merely a privilege. The city council may, especially when authorized by law as here, make reasonable regulations governing the conduct of city firemen that may infringe upon personal rights which they might otherwise assert. The principle is summarized in the statement of Mr. Justice Holmes in McAuliffe v. Mayor and Board of Aldermen of New Bedford, 155 Mass. 216, 29 N. E. 517, wherein he said: "The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman." Appellant has had no personal rights infringed upon by the order of the city council of which he can here complain.

It appears that the city council had jurisdiction of the subject matter of the complaint, and the evidence was sufficient, if believed, to sustain the findings and order of the council. This being so, the order of dismissal was not arbitrary or capricious. The order was therefore valid and beyond the power of the courts to change or modify on appeal. The trial court so held and it was correct in so doing. The judgment of the trial court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLANT, V. FRANK D. CARROLL, APPELLEE.

43 N. W. 2d 422

Filed July 6, 1950. No. 32784.

Public Lands: Mortgages. The judgment of the district court is affirmed on the authority of State ex rel. Johnson v. Commercial State Bank, 142 Neb. 752, 7 N. W. 2d 654.

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

Clarence S. Beck, Attorney General, *Walter E. Nolte, Robert A. Nelson,* and *W. Keith Peterson,* for appellant.

Richard Steele, for appellee.

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

SIMMONS, C. J.

The plaintiff brought this action to recover payments and interest due by the terms of a school land lease. The trial court found for defendant. Plaintiff appeals. We affirm the judgment of the trial court.

The facts are either admitted or not in dispute. On January 1, 1924, the land involved was leased to Edward Beckley and the lease was recorded in the office of the Board of Educational Lands and Funds. On November

15, 1924, Beckley assigned his interest to E. P. Van Kirk. On October 1, 1930, Van Kirk assigned his interest to N. Chris Nelsen. On April 29, 1931, Nelsen assigned his interest to F. D. Carroll. These various assignments were recorded in the office of the Board of Educational Lands and Funds. On July 12, 1933, the Board of Educational Lands and Funds declared the lease forfeited for failure to pay rent and interest. At the time of the forfeiture there was due on the lease $386.40. Improvements were sold, leaving a balance due of $381.40, for which the plaintiff sought judgment.

Defendant's evidence is that prior to April 29, 1931, he was the owner of a tract of land in Knox County, and negotiated the sale of it to N. Chris Nelsen for $2,500, $1,500 of which was to be paid by a purchase money mortgage. Fred Neilsen desired to purchase the school land lease for $1,000. Neilsen did not have the money to buy the lease, and defendant agreed to furnish the money needed to complete the purchase of the school land lease. By this arrangement Nelsen was to have a conveyance of the defendant's land, Neilsen was to have an assignment of the school land lease, and defendant was to receive a $1,500 secured debt on the land to be conveyed to Nelsen, and the $1,000 from Neilsen. On April 29, 1931, Neilsen, Nelsen and wife, and Carroll and wife appeared before a real estate agent. There defendant and wife conveyed the land owned by defendant to Nelsen, taking back a mortgage for $1,500. Neilsen paid defendant $500, and gave him a note for $500, to be secured by an assignment of the school land lease. The scrivener drew the assignment of the lease direct from Nelsen to defendant. Neilsen went into possession of the school land and later made a compromise settlement of the note "in the summer of 1931" and then secured an assignment of the lease from defendant which he, Neilsen, did not file. Also while in possession of the land, Neilsen paid rental to the plaintiff for the period ending December 31, 1931. Neilsen thereafter defaulted, the lease was forfeited, and

thereafter he obtained a new lease in his own name. Neilsen was in possession of the land during the period involved and defendant never had possession.

The fact situation here involved is substantially that appearing in State ex rel. Johnson v. Commercial State Bank, 142 Neb. 752, 7 N. W. 2d 654, with these exceptions. There the leaseholder who assigned as security for a loan remained in possession. Here the purchaser of the lease entered possession at the time of the purchase. There the lease assignment ran from a previous holder, to a borrower, to a lender. Here it ran direct from a previous holder to the lender. In both instances the lender held the school land lease as security for a loan and not as owner. The above distinctions are of no materiality. Under the above decision, as to possession, the controlling question is, did defendant enter possession? The evidence shows that he did not. As to title, the question is not how defendant received the title he had, but under what conditions did he hold it. The evidence is that he held it as security for a loan.

The issues presented here were presented and answered in and are controlled by our decision in State ex rel. Johnson v. Commercial State Bank, *supra*.

The judgment of the trial court is affirmed.

AFFIRMED.

LOIS M. WRIGHT, APPELLEE, V. CLARENCE K. WRIGHT, APPELLANT.

43 N. W. 2d 424

Filed July 6, 1950. No. 32793.

1. **Divorce.** Condonation is forgiveness, express or implied, for a breach of marital duty, with the implied condition that the offense shall not be repeated. Forgiveness sufficient for condonation is complete if there is a voluntary resumption of the marital relations.
2. ———. Where condonation is relied upon as a defense, it should

be pleaded. Where a repetition of the wrong condoned is relied upon, it should be pleaded.

3. ———. The absence of a plea of condonation does not prevent the court from considering that question.
4. ———. While a divorce proceeding is pending, the parties must live separate and apart from each other.
5. ———. There is a rebuttable presumption that a husband and wife living in the same house live on terms of matrimonial cohabitation.
6. ———. Sexual intercourse is not an indispensable element of condonation.

APPEAL from the district court for Antelope County: LYLE E. JACKSON, JUDGE. *Reversed and petition and cross-petition dismissed.*

Harold Rice and *Julius D. Cronin,* for appellant.

Elven A. Butterfield and *Lynn D. Hutton,* for appellee.

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

SIMMONS, C. J.

In this action plaintiff sought a divorce from the defendant on the ground of extreme cruelty. Defendant resisted, and sought a divorce from the plaintiff on the ground of adultery and extreme cruelty. The trial court granted plaintiff a divorce, awarded the custody of the children to her, and made distribution affecting the property of the parties. Defendant appeals. We reverse the judgment of the trial court, and dismiss plaintiff's petition and defendant's cross-petition.

The parties were married in 1937. In 1938, a son, and, in 1940, a daughter were born to the parties. They had little of material goods when they were married. They lived and worked together, raised two good children, and accumulated substantial property holdings.

There is evidence of discord over absences of the defendant from home and business, inattention to family affairs and duties, and labors expected of and performed by the wife. There were acrimonious discussions and

controversies. Plaintiff testified that in August 1948, a dispute arose resulting in a battery of her by the defendant. The testimony is without corroboration except as to one detail. The plaintiff testified that the defendant left home, and that three days later she wrote him and asked him to return, which he did, and the family life and routine were restored and continued.

There is evidence on the part of the defendant that in June 1949, he returned home unexpectedly. He testified to facts which he contends established adultery on the part of the wife on the night of and immediately prior to the time of his return. The evidence is without corroboration. It appears that the events described did not in anywise affect the normal routine of the home and that the relationship of husband and wife thereafter continued between the parties. Defendant, to support his charge of cruelty, testified to other acts of his wife and one Beach which he claims occurred in his presence. It taxes credulity to believe that a husband would stand by silent and inactive under the circumstances related. The testimony is not corroborated.

The latter part of July 1949, plaintiff was ill with an infected tooth. She testified that defendant failed to help care for the children. On August 8, 1949, she filed petition for divorce. She alleged cruelty generally as above outlined, and specifically as to assault and battery in August 1948. On the same day the defendant filed a voluntary appearance reserving the right to plead. His signature was witnessed by plaintiff's attorney. Defendant left the home after the action was started and returned on August 26, 1949.

Sometime prior to August 20, 1949, defendant and plaintiff's father went on a fishing or hunting trip together. On that night the corroborated evidence establishes indiscreet conduct on the part of the plaintiff. The evidence as to adultery on that occasion is circumstantial and, if believed, would be sufficient to establish it under the rule last stated in Cook v. Cook, 141 Neb.

294, 3 N. W. 2d 450. The trial court, having heard this testimony and observed the witnesses, made no finding favorable to it. There also are in defendant's evidence circumstances shown which cast serious doubt upon such a conclusion. For reasons stated hereinafter we make no conclusion on that matter.

Defendant was fully advised within four or five days of what the circumstances were on August 20, 1949. On August 26, 1949, during the temporary absence of the plaintiff from the home, defendant and plaintiff's brother took the children from the home to the home of plaintiff's parents. Plaintiff went there. The situation was discussed. A reconciliation followed. Plaintiff, defendant, and the two children returned to their home that day and resumed family life. They slept in the same house and ate at the same table. Defendant continued to furnish the necessaries of life. On August 27, 1949, the parties and the children went to a circus and returned home that night, for aught that appears, a happy family. Plaintiff testified that that amicable situation continued for several weeks. Defendant testified that it continued for two days.

Plaintiff testified that they had sexual intercourse on August 26, 1949, the next night, and on occasion thereafter until September 19, 1949. Defendant was unable to testify when the last act of intercourse occurred, but fixed it as sometime prior to August 20, 1949. The parties continued to live in the same house down to and including the days of the trial. Plaintiff testified that she did the defendant's washing and ironing the week of the trial.

Plaintiff testified that in November 1949 at a hearing in the courtroom before trial, defendant became angry; that she read his lips as he whispered; and that he threatened to kill her. Others were present but there is no corroboration.

It does not appear when defendant filed his answer and cross-petition. It does appear that on September

24, 1949, plaintiff filed a motion to make more definite and certain the allegations of defendant's answer and cross-petition as to adultery. On September 27, 1949, defendant filed his amended answer and cross-petition in which he alleged adultery in June 1949, and on August 20, 1949, and alleged extreme cruelty based "on an affair" of the plaintiff and one Beach. Plaintiff filed a reply denying generally on October 7, 1949. The matter went to trial beginning on November 21, 1949. At the close of the trial plaintiff amended her reply, with the consent of the court, and pleaded cohabitation on and after August 26, 1949, and condonation.

Defendant did not plead condonation so far as the alleged acts of cruelty on his part are concerned.

The trial court found defendant guilty of extreme cruelty, granted plaintiff a divorce, awarded her the custody of the children and child support, and made an order as to the real and personal property of the parties.

The defendant appeals presenting the questions as to which party is entitled to the divorce and the custody of the children, and as to the correctness of the order as to the property.

The rules are:

"Condonation is forgiveness, express or implied, for a breach of marital duty, with the implied condition that the offense shall not be repeated. Forgiveness sufficient for condonation is complete if there is a voluntary resumption of the marital relations." This rule applies, of course, to known offenses. Wetenkamp v. Wetenkamp, 140 Neb. 392, 299 N. W. 491.

"Where condonation is relied upon as a defense, it should be pleaded. Where a repetition of the wrong condoned is relied upon, it should be pleaded." Eicher v. Eicher, 148 Neb. 173, 26 N. W. 2d 808. The absence of a plea of condonation does not prevent the court from considering that question. Griffith v. Griffith, 77 Neb. 180, 108 N. W. 981.

The only issue of fact here presented is whether or not

there was a resumption of sexual relations following the reconciliation of August 26, 1949. Plaintiff states there was. Defendant states there was not.

We have held that while a divorce proceeding is pending, the parties must live separate and apart from each other. Ellis v. Ellis, 115 Neb. 685, 214 N. W. 300. We have held that "From cohabitation sexual intercourse, and from sexual intercourse forgiveness, is implied." Dunn v. Dunn, 26 Neb. 136, 42 N. W. 279. It is not necessary that there be direct proof of the sexual act. There is a rebuttable presumption that a husband and wife living in the same house live on terms of matrimonial cohabitation. 27 C. J. S., Divorce, § 61, p. 615; 2 Bishop, Marriage, Divorce and Separation, § 281, p. 138; Marsh v. Marsh, 13 N. J. Eq. 281; Toulson v. Toulson, 93 Md. 754, 50 A. 401; Nixon v. Nixon, 127 Pa. Super. 407, 193 A. 132, reversed on other grounds, 329 Pa. 256, 198 A. 154; Karger v. Karger, 19 Misc. 236, 44 N. Y. S. 219; Burns v. Burns, 60 Ind. 259; Phinizy v. Phinizy, 154 Ga. 199, 114 S. E. 185. There is no evidence here to rebut that presumption.

In Huffine v. Huffine, 36 Ohio O. 56, 74 N. E. 2d 764, under a similar factual situation, the court held that where defendant pleaded condonation and testified to marital relations, her testimony was sufficiently corroborated by the fact that the parties were living in the same house, whether or not plaintiff denied the acts.

Sexual intercourse is not an indispensable element of condonation. If that were not so, then an impotent husband could never condone the wife's offenses. Phinizy v. Phinizy, *supra.*

Here the record shows that with full knowledge of all the events related, the parties were reconciled, and were determined to and did reestablish the family relationship with all its normal procedures, and that the condonation was intentional, voluntary, and complete.

We recognize the rule is that the repetition of the offense revives the wrong condoned. Eicher v. Eicher,

supra. Plaintiff relies upon the uncorroborated evidence of what happened in the courtroom in November 1949, to revive the offense of cruelty. It is not sufficient for that purpose.

We conclude that plaintiff has condoned the acts of the defendant about which she complains, and that defendant has condoned the acts of the plaintiff about which he complains. It follows that the trial court erred in granting the plaintiff a divorce and did not err in not granting the defendant a divorce.

The remaining assignments need not be considered.

The judgment of the trial court is reversed. The plaintiff's petition and the defendant's cross-petition are dismissed.

REVERSED AND PETITION AND CROSS-PETITION DISMISSED.

FRANK RAMSEY, APPELLANT, V. COUNTY OF GAGE IN THE STATE OF NEBRASKA, APPELLEE.

43 N. W. 2d 593

Filed July 6, 1950. No. 32801.

1. **Constitutional Law.** The words and terms of a constitutional provision are to be interpreted and understood in their most natural and obvious meaning, unless the subject indicates or the text suggests that they have been used in a technical sense, and while the Constitution, as amended, must be construed as a whole, still where the words employed in a constitutional provision are plain, direct, and unambiguous, no interpretation is necessary to ascertain their meaning, for courts may not supply what they deem unwise omissions, or add words which substantially add to or take from the Constitution as framed.
2. **Courts: Constitutional Law.** The courts should accord to the language of the Constitution the meaning which obviously would be accepted by a layman.
3. ———: ———. In construing a constitutional amendment for the purpose of ascertaining the intent of the people in adopting it, the courts must find such intent in the language of the amendment itself and they are not to hold that the people

intended anything different from what the language employed imports.

4. **Constitutional Law: Officers.** By Article III, section 19, of the Constitution of this state, the Legislature is prohibited from increasing or diminishing the salary of any public officer during his term of office, where such salary is fixed by the Legislature subsequent to the adoption thereof.
5. **Statutes.** Section 33-128.01, R. S. Supp., 1949, constitutes a saving clause to the effect that if it be held that the increase in salary could not be paid during the existing term of office, then section 33-128, R. S. Supp., 1949, would not be declared void but would become operative upon the beginning of the first future term of office of the officer affected by said section.

APPEAL from the district court for Gage County: CLOYDE B. ELLIS, JUDGE. *Affirmed.*

Shrout, Brown & Thurmond, and *Chambers, Holland & Groth,* for appellant.

Clarence S. Beck, Attorney General, *William T. Gleeson,* and *William B. Rist,* for appellee.

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

MESSMORE, J.

This is an appeal from a judgment of the district court for Gage County denying the plaintiff's claim for salary and per diem as a county supervisor filed in accordance with section 33-128, R. S. Supp., 1949, and allowing the claim for salary and per diem as a county supervisor as provided for in section 33-128, R. S. Supp., 1947.

Where reference is made to the Constitution of 1920 in this opinion, it refers to amendments adopted in 1920 to the Constitution of Nebraska of 1875.

The pleadings show the following facts admitted: The plaintiff, a duly elected and qualified member of the board of supervisors of Gage County, Nebraska, on August 31, 1949, filed with the supervisors of the county his claim for salary and per diem in the amount of $15.36. The claim was rejected. Appeal was perfected by the plaintiff to the district court.

Legislative Bill No. 461, enacted by the Sixty-first Session of the Legislature of the state and now appearing as section 33-128, R. S. Supp., 1949, was approved May 5, 1949, and became law August 27, 1949. The amended statute provides that: "Members of county boards shall each be allowed for the time they shall be necessarily employed in the performance of all the duties of that office the sum of seven dollars and fifty cents per day and six cents per mile to be paid out of the general fund of the county; * * *. The total maximum amount of per diem compensation, to be paid or drawn by any member of the board shall not exceed the following amounts per annum: (1) In counties under township organization having twenty-two thousand or more inhabitants and less than sixty thousand inhabitants, fourteen hundred twenty-five dollars; * * *."

Gage County comes within the purview of section 33-128, R. S. Supp., 1949.

The defendant's answer alleged that the plaintiff was entitled to compensation for his services in the sum of $5.00 a day, or the sum of $10.36 for services and mileage, performed by the plaintiff on the 30th and 31st days of August, 1949, as provided for by section 33-128, R. S. Supp., 1947, and specifically denied that the plaintiff was entitled to any additional compensation under section 33-128, R. S. Supp., 1949.

The plaintiff moved for a judgment on the pleadings. The trial court held that the following language appearing in Article III, section 19, of the 1920 Constitution of the State of Nebraska: "* * * nor shall the compensation of any public officer, including any officer whose compensation is fixed by the Legislature subsequent to the adoption hereof be increased or diminished during his term of office," barred the plaintiff from receiving the increased compensation provided for in section 33-128, R. S. Supp., 1949.

Upon the overruling of the plaintiff's motion for new trial the plaintiff appeals.

The appellant assigns as error the judgment of the trial court holding that Article III, section 19, of the Constitution of Nebraska, barred the appellant from receiving the increased compensation provided for in section 33-128, R. S. Supp., 1949, and that the judgment so entered was contrary to law. In support of this contention the appellant sets forth Article III, section 16, of the Constitution of Nebraska, 1875, as follows: "The Legislature shall never grant any extra compensation to any public officer, agent, servant, or contractor after the services shall have been rendered or the contract entered into. Nor shall the compensation of any public officer be increased or diminished during his term of office."

The appellant relies on the case of County of Douglas v. Timme, 32 Neb. 272, 49 N. W. 266. In the cited case the defendant in error was elected county commissioner of Douglas County. His salary was fixed by statute. Before his term of office expired the Legislature passed an act providing in counties having a population of over 70,000, that county commissioners would receive a salary of $1,800 a year. The defendant in error filed a claim before the county board for the increase in compensation. The claim was rejected. Appeal was had to the district court, and the district court rendered judgment in favor of the claimant. Douglas County, plaintiff in error, appealed. In the Supreme Court the plaintiff in error contended that the Legislature had no power to increase the salary of the defendant in error during his term in office, and based the contention on Article III, section 16, of the Constitution. In interpreting the cited section and article of the Constitution the court said: "That provision, in our view, applies alone to those officers whose offices were created by the constitution. As to all such officers, the salary or compensation fixed by law when the officer is elected and enters upon the duties of his office, can neither be increased in any form, nor diminished, during his term."

State ex rel. Gordon v. Moores, 61 Neb. 9, 84 N. W.

399, is cited. In this case a police judge of an incorporated city, a constitutional officer, brought an action in mandamus to compel the payment of the difference in salary under a charter passed by the Legislature reducing the salary while the incumbent was holding over his term pending the election of a successor. The court, in interpreting Article III, section 16, of the Constitution of 1875, said: "This provision of the fundamental law has been construed to apply alone to officers created by that instrument, and as to such officers their compensation or salary, as the same existed when the official term began, could be neither increased nor diminished during such term." County of Douglas v. Timme, *supra*, is cited in support thereof.

It is the contention of the appellant that the foregoing cited authorities disclose that this court, by judicial construction, has interpreted the words "any public officer" as the same appear in Article III, section 16, of the Constitution of 1875, as meaning any public constitutional officer; that the word "public" used in said section and article of the Constitution was of no particular significance for the reason that the Constitution was speaking about public officers. The appellant argues further that when the Constitutional Convention convened in 1920, it had before it the interpretation by this court of the words "any public officer" or "any officer."

In this connection, the appellant relies on the following rule: "It is an established rule of construction that, where a constitutional provision has received a settled judicial construction, and is afterward incorporated into a new or revised constitution, or amendment, it will be presumed to have been retained with a knowledge of the previous construction, and courts will feel bound to adhere to it." 16 C. J. S., Constitutional Law, § 35, p. 76. See, also, Bodie v. Pollock, 110 Neb. 844, 195 N. W. 457.

The Constitutional Convention which assembled in 1920 amended Article III, section 16, of the Constitution

of 1875. As amended the provision appears as Article III, section 19, of the Constitution of 1920, and reads as follows: "The Legislature shall never grant any extra compensation to any public officer, agent or servant after the services have been rendered nor to any contractor after the contract has been entered into, nor shall the compensation of any public officer, including any officer whose compensation is fixed by the Legislature subsequent to the adoption hereof be increased or diminished during his term of office." The words added by the amendment are: "including any officer whose compensation is fixed by the Legislature subsequent to the adoption hereof."

Appellant contends further that the added words by amendment, as the same appear in Article III, section 19, of the Constitution of 1920, do not extend the constitutional prohibition to public officers such as the appellant, but the prohibition extends, as previously determined by this court, to constitutional officers.

The rule of construction heretofore set out, contended for by the appellant, is not applicable when the Constitutional Convention of 1920 and the people, by the adoption of the revised amendment, now Article III, section 19, Constitution of 1920, not only changed the language but also the construction of the constitutional provision, as will hereinafter be pointed out.

It will be observed that the amendment to Article III, section 16, of the Constitution of 1875, now Article III, section 19, of the Constitution of 1920, was not a reenactment, but went further than simply reenacting Article III, section 16, of the Constitution of 1875.

A constitutional amendment becomes an integral part of the instrument and must be so construed. While the amendment to a section of a Constitution is an integral part of the Constitution, the original provision actually remains a part of the Constitution for purposes of construction. It is therefore possible to consider the original section as well as the amendment to determine the intent

of the people in adopting the amendment. See Swanson v. State, 132 Neb. 82, 271 N. W. 264.

Article III, section 19, together with all other amendments proposed by the Constitutional Convention of 1920, was submitted to the electors of our state on September 21, 1920, and legally adopted. It now stands as a part of the Constitution of our state and is as binding upon all sessions of the Legislature as upon the Governor of our state and on its courts. See State ex rel. Randall v. Hall, 125 Neb. 236, 249 N. W. 756.

A state Constitution is the supreme written will of the people of the state who have adopted it as a framework or basis of their government, subject only to the limitations to be found in the federal Constitution. See 16 C. J. S., Constitutional Law, § 70, p. 131.

"The purpose of section 19, art. III of the Constitution, was to establish and maintain the independence of the three branches of the government.

"Our system of government distributes the powers between three coordinate departments, the legislative, the executive, and the judicial. Each of these three independent departments derives its power directly from the people, and is responsible to them." State ex rel. Randall v. Hall, *supra.*

Such a provision is one of the oldest of the checks and balances provided in the federal Constitution and in the Constitutions of most, if not all, of the states. See State ex rel. Johnson v. Marsh, 149 Neb. 1, 29 N. W. 2d 799.

It is a maxim that the object of construction as applied to a written Constitution is to ultimately ascertain and give effect to the intent of the people. On the attitude or approach to interpretation, there is precedent. The words and terms of a constitutional provision are to be interpreted and understood in their most natural and obvious meaning, unless the subject indicates or the text suggests, that they have been used in a technical sense. The courts should accord to the language of the

Constitution the meaning which obviously would be accepted by a layman. No sentence, clause, or word should be rejected as meaningless or superfluous. See, Elmen v. Board of Equalization and Assessment, 120 Neb. 141, 231 N. W. 772; Mekota v. State Board of Equalization and Assessment, 146 Neb. 370, 19 N. W. 2d 633.

In discussing the question presented by this appeal, it is true the Constitutions of some states, by their very terms, specify explicitly the office to which the inhibition shall apply, by extending the scope to all public officers, thus negativing any contention that the inhibition does not extend beyond offices specifically created by the Constitution. The Constitutions of other states are less explicit in that, in providing for the inhibitions applicable to public officers, they fail to specify whether, within the designation of that phrase, officers whose authority does not spring from the terms of the Constitution itself may be included.

The courts which have specifically considered the question have reached the conclusion that constitutional provisions prohibiting change in the compensation of public officers are not confined in their application to offices directly created under the Constitution, but are applicable to all public offices, whether of legislative or of constitutional origin. See, Calvert County v. Monnett, 164 Md. 101, 164 A. 155, 86 A. L. R. 1258; Crawford v. Hunt, 41 Ariz. 229, 17 P. 2d 802.

It has been held in many cases decided by the Supreme Court of Pennsylvania that such an inhibition applies to officers holding offices created by the Legislature, as well as those created by the Constitution, and that no distinction should be made in applying the rule as between the two classes. Lancaster County v. Fulton, 128 Pa. 48, 18 A. 384, 5 L. R. A. 436; Richie v. Philadelphia, 225 Pa. 511, 74 A. 430, 26 L. R. A. N. S. 289; Tucker's Appeal, 271 Pa. 462, 114 A. 626; Com. ex rel. Wolfe v. Moffitt, 238 Pa. 255, 86 A. 75, Ann. Cas. 1914C 211.

We are impressed with the soundness of the authorities aforecited. The constitutional provision in question is plain and emphatic. The words used are apt and direct, constitute a material and significant change in the section, and construe themselves. It positively forbids increasing or diminishing the compensation of all officers, state and county, whose salaries are fixed by the Legislature. It was designed to protect the individual officer against legislative oppression and, further, to curb the activities of public officers in lobbying to induce the Legislature to increase salaries. By the amendment the people simply said that the Legislature shall not increase or diminish the compensation of any public officer during his term of office, and that this inhibition should include any, and therefore all, public officers whose compensation is fixed by the Legislature. It necessarily follows that the change made by amendment, Article III, section 19, of the Constitution of 1920, destroys the validity of such decisions as County of Douglas v. Timme, *supra*, as binding precedents, or as useful guides in the problem before the court.

In State ex rel. Johnson v. Marsh, *supra*, and Elmen v. State Board of Equalization and Assessment, *supra*, it is held that this court will take judicial notice of the proceedings of the Constitutional Convention. A resort to those proceedings is now had, not as an aid to interpretation, but to demonstrate and confirm that the people did broaden the coverage by amending Article III, section 16, of the Constitution of 1875, now Article III, section 19, Constitution of 1920, as stated in State ex rel. Randall v. Hall, *supra*.

The reports of committees, debates, and colloquies between members relative to the phraseology of the provisions of the Constitution are too voluminous to quote to any extent here. The proceedings of the Constitutional Convention of 1920 demonstrate beyond question that the intention of that assembly was to accomplish exactly what we have said the language does accomplish.

A careful reading and analysis of the constitutional debates, in connection with this change in the language of the Constitution and other related matters, clearly indicate that it was the intention of the convention to extend the constitutional prohibition against increasing or diminishing compensation during the terms of officers to include in the prohibition not only constitutional officers but all other officers whose salaries should thereafter be fixed by the Legislature. A few quotations from the proceedings of the convention will illustrate that such was the intention of the assembly.

In the first discussion of the proposed amendment, the delegate who introduced the proposal to amend Article III, section 16, of the Constitution of 1875, said: "In drawing this proposal it is proposed to make that same provision extend a little further than our courts have decided it extended and I see in that and this provision the same provision that is in the Constitution now, 'the same provision shall apply to all public officers including an officer whose compensation is fixed by the legislature.' In other words, it applies it to the county officers * * *." Proceedings of the Constitutional Convention, 1919-1920, p. 971.

Another delegate, a member of the Legislative Department Committee, stated: "The reason why this was added (which could only mean the new language appearing in the amendment, Article III, section 19, of the Constitution of 1920) was because the Supreme Court of our state had construed that provision of the Constitution as it now exists to apply only to those officers whose offices were created by the Constitution itself, and they also held that it did not apply to the officers created by the legislature. It was thought by the proposer of the bill that this constitutional provision should be extended to include all officers created by the legislature, * * *." Proceedings of the Constitutional Convention, 1919-1920, p. 974. This delegate said further: "Speaking for myself, at least, I consider that the Supreme Court of the

State having construed what was meant by 'public officers' in that provision as it existed, would adhere to that as applying to a Constitutional office, and we then thought it was advisable to extend the provision to include, as the language here is, 'all public officers including those whose compensation is fixed by the legislature.' And the 'all public officer' clause, referring to the Constitutional officers, as heretofore construed by the Supreme Court, then we add another clause, those whose compensation is fixed by the legislature. That was the idea I, as a member of the committee, had in mind, and the reason we had for that was to prevent lobbying of county officers in particular, and other officers, * * *." The same delegate later said: "It was intended when we passed Proposal No. 71 to reach constitutional officers and officers created by the legislature, as you will probably remember, * * *." Proceedings of the Constitutional Convention, 1919-1920, pp. 975, 1482.

The delegate who introduced the proposal in the first instance reiterated his former statements. Many statements of similar import may be found in the published report of the proceedings of the convention. They all tend to demonstrate that the entire convention understood the purpose of the amendment would be as we have herein indicated.

Another delegate stated to the convention as follows: "There is a very material change, and the latter part of it applies to an officer whose office is created by law or by the Legislature, whereas the old provision simply applied to offices contained within the Constitution." Proceedings of the Constitutional Convention, 1919-1920, p. 2198.

So much of the "Address to the People" as relates to this amendment reads as follows: "Amended Section 16, submitted as No. 10 on the ballot, extends the provision of the old section so that the Legislature shall never grant any extra compensation to any public officer, agent or servant after the services have been rendered,

nor to any contractor after the contract has been entered into, including any officer whose compensation is fixed by the Legislature. The purpose of this amendment is to prevent increase of the salary of a public official during his term of office and to prevent or discourage lobbying in favor of increase of salary." Proceedings of the Constitutional Convention, 1919-1920, p. 2842.

It is quite apparent from an examination of the Proceedings of the Constitutional Convention with reference to the subject matter here involved that the people did not only change the language of the provision of the Constitution in question but the construction as well.

The trial court was correct in the rendition of the judgment heretofore set out.

The appellant inquires, from what date shall the members of the county boards of supervisors or commissioners begin to receive the increase in salary provided by section 33-128, R. S. Supp., 1949?

Section 33-128.01, R. S. Supp., 1949, provides: "That section 33-128 shall be so interpreted as to effectuate its general purpose, in the public interest, to provide adequate compensation as therein provided for members of the county boards of county commissioners and supervisors, and to permit a change in such compensation as soon as same may become operative under the Constitution of Nebraska."

Section 33-128.01 may be logically interpreted as a saving clause to the effect that if it be held that the increase in salary could not be paid during the existing term of office, then section 33-128, R. S. Supp., 1949, would not be declared void but would become operative upon the beginning of the first future term of office of the officer affected by said section. See State ex rel. Johnson v. Marsh, *supra.*

Section 33-128.01, R. S. Supp., 1949, does not in any manner benefit appellant in his attempt to recover increase in compensation during his present term of office.

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

AFFIRMED.

C. L. BASKINS, APPELLANT, V. JOSEPH F. KREPCIK ET AL., APPELLEES.

43 N. W. 2d 624

Filed July 13, 1950. No. 32785.

1. **Partition: Homestead.** A surviving spouse who elects to partition the homestead premises thereby forfeits all homestead rights therein.
2. **Partition: Estates.** At common law an estate in remainder subject to an existing particular estate in the whole of the real estate could not be the subject of involuntary or compulsory partition.
3. **Common Law.** The adoption of the common law by this state was strictly qualified and limited and any part thereof may be abrogated by statute or modified or disregarded by this court as not applicable.
4. **Partition: Estates.** The rights of an owner of a life estate in the whole of the premises, of which partition is sought by the owner of an estate in remainder therein, cannot over the objection of the life tenant be in any way or to any extent changed or disturbed.
5. ———: ———. A remainderman in fee of an undivided interest in real estate may maintain a suit for partition against the owner of the remaining undivided interest in remainder, the whole of the premises being subject to a life estate.
6. ———: ———. The mere existence of a life estate in the whole of the premises does not prevent partition among the remaindermen prior to the death of the life tenant. If the life tenant consents or does not object, the whole of the real estate may be sold.
7. **Partition.** A legal right of partition of property is absolute and not a matter of grace.
8. **Cases distinguished.** Weddingfeld v. Weddingfeld, 109 Neb. 729, 192 N. W. 227, and Bartels v. Seefus, 132 Neb. 641, 273 N. W. 485, are discussed and distinguished.

APPEAL from the district court for Lincoln County:

ISAAC J. NISLEY, JUDGE. *Reversed and remanded with directions.*

Baskins & Baskins, for appellant.

Beatty, Clarke, Murphy and *Morgan,* and *William S. Padley,* for appellees.

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

BOSLAUGH, J.

This is a suit to partition land in Lincoln County. Demurrers to the petition were sustained on the ground that a cause of action for involuntary or compulsory partition was not shown because of the existence of a life estate in the whole of the land. Appellant elected not to plead further, and the case was dismissed. The appeal is from the judgment of dismissal.

Emil F. Krepcik is the owner of a life estate in the land. Appellant is the owner of a part of the land subject to the life estate. Appellees Joseph F. Krepcik, Anna M. Bloomenkamp, Emil E. Krepcik, Edward R. Krepcik, Louis W. Krepcik, Louisa C. Pavelka, Grace Ringenberg, and Violet Krepcik, are the owners of the balance of the land subject to the life estate.

Grace M. Krepcik was the owner of the land, and it was occupied by her and her husband, Emil F. Krepcik, as their homestead at the time of her death. The appellees, except Violet Krepcik, are their children. Calvin L. Krepcik was their son. He died after the death of his mother and left surviving him Violet Krepcik, his widow, and Emil F. Krepcik, his father, as his only heirs. Emil F. Krepcik conveyed to appellant all his interest in the land except his life estate.

The owner of the life estate has not objected to partition. He defaulted on October 18, 1949. The effect of this is he disregards the lawsuit and, so far as he is concerned, the allegations of the petition may be accepted as true, including the statement that he has a

life estate in all the land. Danbom v. Danbom, 132 Neb. 858, 273 N. W. 502. It is not claimed that there has been a waiver, release, or extinguishment of the life estate, or that the owner thereof has elected to have or permit partition of the land. If he had, the life estate or "homestead right of the survivor" would have terminated. § 40-117, R. S. Supp., 1949; Metzger v. Metzger, 108 Neb. 613, 188 N. W. 229.

Appellant and appellees are common owners in fee of a vested remainder in the land. Their estate is subject to the life estate of Emil F. Krepcik, an estate in possession in the whole of the land. The problem of this appeal may thus be stated: Can a remainderman in fee of an undivided interest in real property maintain a suit for partition thereof against the owners of the remaining undivided interest in remainder, the whole premises being subject to a life estate in another? Independently of statute, a suit in partition may not be maintained by one whose undivided estate is in remainder only. 40 Am. Jur., Partition, § 111, p. 95; 47 C. J., Partition, § 49, p. 289, § 175, p. 341; Freeman, Cotenancy & Partition, § 440, p. 534; 2 Tiffany, Real Property (3d ed.), § 475, p. 312. The case of appellant therefore must prevail, if at all, upon statutory authorization.

The legislation on the subject of partition is significant. The territorial laws provided that: "When the object of the action is to effect a partition of real property among several joint owners, the petition must describe the property and the respective interests of the several owners thereof, if known." Title 26, p. 538, R. S. 1866 (§ 802, Code of Civil Procedure). Nebraska became a state March 1, 1867, and the territorial laws became the laws of the state. Title 26, p. 538, R. S. 1866. The Legislature of Nebraska of 1871 amended this section as follows: "When the object of the action is to effect the partition of real property among several joint owners, the petition must describe the property, and

the respective interests and estates of the several owners thereof, if known. All tenants in common, or joint tenants of any estate in land, may be compelled to make or suffer partition of such estate or estates in the manner hereinafter prescribed." Laws 1871, § 1, p. 112. Section 802 of the original code has become section 25-2170, R. R. S. 1943, and it is the identical language of the amendment of 1871 except the words "several interests" have been substituted for "respective interests" in the first sentence, and the words "several joint owners" are used in place of "several owners" where they last appear in the first sentence.

The statute before the amendment of 1871 did not provide who was qualified to maintain an action for partition of real estate. The common law conferred this remedy upon joint tenants, tenants in common, owners of estates for life or years, and owners of estates in which some of the cotenants held for term of life or years and others held estates of inheritance. A prerequisite was an estate in possession, and none but parties having such estates were bound by the judgment, but the partition did not affect estates in remainder or contingency. Tenants of estates in remainder were not permitted to interfere with tenants in possession, but tenants in possession had power to compel partition confined to their particular estates but could do nothing towards effecting a severance of estates in remainder or reversion. It was the rule at common law and under the English statutes that estates of remainder or reversion could not be divided by proceedings for compulsory partition. Freeman, Cotenancy & Partition, § 439, p. 532, § 440, p. 534; 2 Tiffany, Real Property (3d ed.), § 476, p. 315. The common law applies in this state except as abrogated by statute or modified by decision of court. C. VII, § 1, p. 31, R. S. 1866; § 49-101, R. S. 1943; In re Estate of Lewis, 148 Neb. 592, 28 N. W. 2d 427.

It is presumed that the Legislature of 1871 knew the

limitations and conditions of partition as imposed by the common law, including the requirement of possession or right of possession, when it by the exercise of its powers changed the law by an amendment thereof. In this situation it provided in simple clear language that all tenants in common or joint tenants of any estate in land may be compelled to make or suffer partition of such estate. It did not resort to any words of technical meaning indicating quality or kind of an estate owned by tenants in common or joint tenants, such as an estate in land *held* by them or all tenants in common or joint tenants who *hold* any estate in land. The words "held" or "hold" when used in reference to interest entitling an owner to partition imply a tenant of a freehold and have been construed as denoting an estate of present possession. Smith v. Gaines, 39 N. J. Eq. 545; Allnatt on Partition, p. 53. The Legislature used only the words any estate in land. It has not been decided during the more than three quarters of a century since the amendment of this statute that ownership of a freehold estate was indispensable to a resort to the remedy of partition of real estate. This is conceded by counsel for the contending parties. It has been determined that "when there is an outstanding estate for life, vested in a third person, in the whole of the premises of which partition is sought, a remainderman cannot maintain an action in partition over the objection of the holder of the life estate." Weddingfeld v. Weddingfeld, 109 Neb. 729, 192 N. W. 227. See, also, Bartels v. Seefus, 132 Neb. 841, 273 N. W. 485. These cases presented an attempt to force partition of the whole of the real estate involved, including the life estate, against the objection and desire of the life tenant. Plaintiff in either case did not seek partition of a vested remainder owned in common by the plaintiff and others without disturbing the life estate. The court did not decide that the owner of a vested remainder cannot in a proper case maintain partition with the consent of the life

tenant or where the life tenant is a party to the case and makes no objection. The limitation in those cases is that a remainderman cannot partition the whole property when the owner of a life estate objects to his estate being disturbed. An important fact in this case is that the life tenant does not make objection to the remedy or any relief asked by appellant, and the record shows no reason for denying his right to resort to the remedy of partition or for denying the relief.

The partition statute requires that the petition allege the several interests and estates of the several owners of the property and if it is supposed there are any interests unknown, contingent, or doubtful, the facts in reference thereto shall be set out. All persons having any interest contingent or otherwise must be parties and the proceeds of the property so situated are subject to the order of the court until the right becomes vested. When the shares and interests are settled, judgment shall be rendered confirming them and making partition accordingly either in kind or by sale to prevent prejudice to the owners, and when jurisdiction of the parties in interest exists, the proceedings are conclusive upon all of them. § 25-2170 et seq., R. R. S. 1943. This is indicative of great change in the law of partition from what it was at common law. It is well discussed in Scoville v. Hilliard, 48 Ill. 453, in this language: "The petition in this case conforms to the statute, and the question very naturally arises, why should tenants for life be made parties to the petition, if their rights were not to be adjudicated by the court? We can perceive no reason for it, and the statute no where intimates that the petitioner claiming an interest in the premises, shall be entitled to the possession thereof, at the time he presents his petition for partition. It is sufficient if he discloses he has such an interest as specified in the statute—that he is a tenant in common, or joint tenant, or a coparcener, and what interest the defendant is supposed to have in the same, and it would seem,

though that interest may be a life estate, as in this case, the same is to be subject to the action of the court in the proceeding. * * * It is insisted by appellees, that inasmuch as the appellants do not show they were entitled to the possession of the premises, the proceeding cannot be sustained. Now, there is not a word in the statute requiring this should be shown."

Sections 9238, 9258, and 9261, Comp. St. 1922, are now respectively sections 25-2170, 25-2190, 25-2193, R. R. S. 1943. The court considered these in Weddingfeld v. Weddingfeld, *supra,* and said: "When these sections (§§ 9258 and 9261, C. S. 1922) are read in connection with 9238 they cannot be construed to confer upon the remainderman the right to force partition upon the holder of the life estate. Section 9261, upon which chief reliance is placed, does not authorize the court to ascertain the value of the life estate and pay it over to the holder of the life estate, but, on the other hand, it directs the court to have the entire fund created by the sale invested, 'and the proceeds to be paid to the incumbrancer during the existence of the incumbrance.' It is clear, we think, that the provisions of the last two mentioned sections are meant only to apply, first, to cases where there is an ordinary incumbrance, such as a mortgage; and, second, where there is an estate for life or for years and the holder of such estate voluntarily submits to the partition, but, having gone thus far, fails to agree with the other parties in interest upon the value of the life estate. In that event the court orders the investment of the entire amount realized from the sale."

It is argued that it would be unjust and injurious to the appellees to have a partition while the life estate exists. This is not convincing or controlling. It is conceivable that a present sale of the remainder might be more advantageous than a sale after the termination of the particular estate. A denial of partition might on the other hand be injurious and unjust to appellant. In Scoville v. Hilliard, *supra,* the court said: "It may be

very important to one holding such an estate with another holding the same kind of an estate, that their particular interests should be set off and allotted to them, or if not capable of being so done without prejudice, that such interests should be sold. An undivided interest in property is not so secure as a separate one, and every such proprietor desires to know certainly what he does own, and so long as the owner of the life estate is not affected by the proceeding, we see no reason why that interest should be an obstacle in the way of a partition between those owning the fee as reversioners." See, also, Heintz v. Wilhelm, 151 Minn. 195, 186 N. W. 305. A right of partition given by law is imperative and absolute and is not a matter of grace. Whether the result is injurious or beneficial is not a legal consideration. Windle v. Kelly, 135 Neb. 143, 280 N. W. 445.

It has been said, as it is contended in this case, that an important, if not the primary, purpose of partition was to avoid or relieve against the dissatisfaction and inconveniences of possession by more than one person of the identical thing. This is a disputed subject. 2 Tiffany, Real Property (3d ed.), § 476, p. 317, discusses it as follows: "In asserting the inability of one having undivided interest in remainder upon a life estate to demand a partition, it is occasionally said that one who has not an estate in possession cannot maintain the proceeding, for the reason that the purpose of the proceeding is to sever the possession. This, however, appears to be questionable. It has been decided in several cases that the existence of an outstanding estate for years, whether this is by reason of a lease by one cotenant to the other, or by reason of a lease to a stranger, does not affect the right to demand partition, and this accords with the common-law authorities. The purpose of the proceeding at common law appears to have been to obtain a division of the freehold, that is, of the seisin, for which reason an estate less than freehold was entirely disregarded, and the above decisions would suggest that such is still

the purpose of the proceedings, rather than the severance of the possession."

A discussion of partition of future interests in property in the Restatement of the Law makes reference to three classes of statutes, as follows: "Class 1 consists of those statutes under which the power to compel partition exists only in persons who own 'present interests,' and this phrase, for historical reasons, includes persons who have estates of freehold * * * subject to outstanding estates for years. * * * Class 2 consists * * * of statutes which empower a joint tenant or tenant in common in an unconditional and indefeasible future interest to compel partition of the future interest thus held in co-ownership, under some one or more of four defined and restricted sets of circumstances. * * * Class 3 consists of those statutes which, in general, empower any joint tenant or tenant in common in an unconditional and indefeasible future interest to compel partition of the future interest thus held in co-ownership. Under this variety of statute the power is much less qualified and restricted than under the varieties of statute grouped as Class 2." Restatement, Property, c. 11, pp. 656, 657. It is also said therein: "(1) When a future interest in land is owned in a joint tenancy or in a tenancy in common, then a concurrent owner in such future interest has power to compel partition thereof when the requirements of all the Clauses of Subsection (2) are satisfied. (2) The prerequisites for the existence of the power stated in Subsection (1) are the following: (a) the state wherein the affected land is located has a statute which, in specific words, confers the power to compel partition on a joint tenant or tenant in common in a 'reversion or remainder,' or in a 'vested remainder or reversion,' or in 'an interest or estate in land,' or which employs other language of like import; and (b) the joint tenant or tenant in common, in exercising such power, complies with all requirements specified by such statute as to matters other than the prerequisite variety of future interest; and (c)

the creator of the concurrently owned future interest has not manifested effectively an intent that no such power to compel partition be present * * *; and (d) the future interest of such joint tenant or tenant in common is a future estate in fee simple absolute not subject to a condition precedent." Restatement, Property, § 175, pp. 676, 677.

A statute of Illinois provides: "* * * when land, tenements or hereditaments are held in joint tenancy, tenancy in common or co-parcenary, * * * any one or more of the persons interested therein may compel a partition thereof * * *." Ill. Ann. St., § 1, c. 106, p. 610; Laws 1935, § 1, p. 1054. This statute is no more comprehensive than the Nebraska statute. There could hardly be less qualified or less restrictive language than that used in the statute of this state, "any estate in land." The Illinois statute has been construed to permit the owner of an undivided interest in a vested remainder, subject to a life estate in the whole of the premises, to demand partition. A case to this effect, often referred to, is Scoville v. Hilliard, *supra.* The petition in that case showed that appellants and appellees were the owners in fee by undivided interest in the premises and the whole thereof was subject to a life estate therein. A demurrer to the petition was sustained and the suit dismissed. The contention was that a remainderman in fee of an undivided interest in real estate could not maintain a suit for partition thereof against the owners of the remaining undivided interest in remainder, the whole premises being subject to a life estate in another. The court observed that there was not a word in the statute requiring a person demanding partition to show that he was entitled to the possession of the premises. It is said in that case: "A remainder-man, or reversioner in fee, of an undivided interest in property, may maintain a suit for partition, against the owner of the remaining undivided interest in remainder, the whole premises being subject to a life estate unexpired. * * * In order to maintain a suit for partition, our statute

does not require that the petitioner claiming an interest in the premises should be entitled to the possession thereof. It is enough, if he discloses such an interest as the statute specifies—that he is a tenant in common, or joint tenant, or a coparcener, and what interest the defendant is supposed to have in the same."

In Cummins v. Drake, 265 Ill. 111, 106 N. E. 456, the court said: "Appellant being the remainder-man of an undivided interest in this property is entitled to maintain a suit for partition against the owners of the remaining undivided interests in remainder, and this is true although the whole premises are subject to a life estate which is unexpired. (Scoville v. Hilliard, 48 Ill. 453; Drake v. Merkle, 153 Ill. 318.) Partition among remainder-men does not necessarily affect the estate of a life tenant, as the remainder, if not divisible, may be sold without the life estate and the proceeds divided, or, if the life tenant consents, the whole estate may be sold. (Drake v. Merkle, supra.)" See, also, Voellinger v. Kirchner, 314 Ill. 398, 145 N. E. 638; Wells v. Dalies, 318 Ill. 301, 149 N. E. 279; Thomas v. Stoakes, 328 Ill. 115, 159 N. E. 269; Gahan v. Golden, 330 Ill. 624, 162 N. E. 164; Tilton v. Tilton, 382 Ill. 426, 47 N. E. 2d 454.

The Minnesota statute provides: "When two or more persons are interested, as joint tenants or as tenants in common, in real property in which one or more of them have an estate of inheritance or for life or for years, an action may be brought by one or more of such persons against the others for a partition thereof according to the respective rights and interests of the parties interested therein, * * *." Minn. S. A., § 558.01, p. 124. In Heintz v. Wilhelm, *supra,* it was by the court concluded that: "Under our statute a cotenant in the remainder may compel partition, although the life tenant is in possession of the property. * * * Where there is an estate in severalty for life or years in the property to be partitioned, the partition, whether in kind or by sale, should be made subject to such estate, unless it be clearly shown that a

due regard for the interest of all parties requires that the precedent estate be included therein." It is further said therein: "At common law a cotenant could not compel a partition of the land, unless he was entitled to the present possession of it as a cotenant, and hence he could not enforce a partition where his estate was subject to a life estate, as the life tenant was entitled to possession. Our statute has changed this rule, * * *. If, in making a partition, the land is to be sold and the proceeds divided, and there is an estate for life or for years in the whole or any part of it, the sale may be made subject to such estate, 'but if, in the judgment of the court, a due regard for the interest of all parties requires that such estate be sold, the sale may be so ordered.' G. S. 1913, § 8052. * * * Estates for life or years in severalty may be included in the sale under our statutes when a due regard for the interest of all parties requires it." See, also, Rekovsky v. Glisczinski, 170 Minn. 303, 212 N. W. 595.

This court in Oliver v. Lansing, 50 Neb. 828, 70 N. W. 369, said concerning the Illinois statute above referred to that it was held by the Illinois court that as the statute contained nothing requiring that the applicant should have an estate entitling him to be in possession, and as it clearly contemplated bringing before the court the owner of the life estate, it must be construed as authorizing a reversioner or remainderman to maintain a suit for partition against the owner of the remaining undivided interest in reversion or remainder, although the whole premises were subject to a life estate. The court made reference to Scoville v. Hilliard, *supra,* and Hilliard v. Scoville, 52 Ill. 449. It was also said therein that a like construction was given a similar statute in Minnesota. Cook v. Webb, 19 Minn. 167. This court then significantly observed that the conclusion reached by the courts of Illinois and Minnesota was "in each instance influenced by a statute much resembling our own * * *."

The statute of Missouri on this subject is to the effect that "where lands, tenements or hereditaments are held

in joint tenancy, tenancy in common or coparcenary, * * * any one or more of the parties interested therein, * * * to file a petition in the circuit court of the proper county asking for * * * partition * * *." § 7132, R. S. 1889.

In Hayes v. McReynolds, 144 Mo. 348, 46 S. W. 161, the court referred to this statute and said: "The statute quoted authorizes any one owning an interest in real property, though subject to a life estate, dower or curtesy, to prosecute an action to have his interest partitioned subject to such estate." See, also, Flournoy v. Kirkman, 270 Mo. 1, 192 S. W. 462; Reinders v. Kopplemann, 68 Mo. 482, 30 Am. R. 802.

The owner of a life estate in the whole of real estate sought to be partitioned may object to the partition of his estate and in that event the suit may not be maintained; or the owner of the particular estate may consent to the partition of the whole real estate; or if he does nothing in the case, the court may partition the real estate and the life tenant may claim a life estate in the proceeds, and if the interested parties cannot agree on the present value of the life estate, the court may order all of the proceeds of the sale invested and the income paid to the life tenant during his life.

The judgment is reversed and the cause remanded, with directions to the district court to overrule the demurrers to the petition.

REVERSED AND REMANDED WITH DIRECTIONS.

SIMMONS, C. J., dissenting.

I respectfully dissent.

I accept the statement of the majority that the parties here are common owners of a vested remainder in the land involved.

The majority hold that independent of statute a suit in partition may not be maintained by one whose undivided estate is in remainder only. It is also held that it was the rule at common law and under the English statutes that estates of remainder could not be divided

by proceedings for compulsory partition. I accept those two holdings. The reason is obvious. A remainderman does not have a right of possession.

The majority hold that when the Legislature in 1871 provided that all tenants in common, or joint tenants of any estate in land, may be compelled to make or suffer partition, it thereby eliminated the requirement that ownership of an estate in possession was a prerequisite to partition; that a remainderman may maintain a suit for partition against his co-owners in remainder; and that the plaintiff is not required to be in possession or have the right of possession in order to maintain partition. There we disagree.

The majority stress the use of the words "any estate in land," but give no particular attention to the preceding words *"all tenants in common, or joint tenants* of any estate in land." The words "any estate in land" are limited by the preceding words.

Possession is an essential element of tenancy in common or a joint tenancy. 2 Tiffany, Real Property (3d ed.), § 418, p. 196, § 426, p. 212; 62 C. J., Tenancy in Common, § 5, p. 410; 48 C. J. S., Joint Tenancy, § 1, p. 910. Unity of possession does not exist in the case of co-owners in remainder. 2 Tiffany, Real Property (3d ed.), § 418, note 5, p. 196. A majority of this court committed this jurisdiction to the principle of possession as an essential element in the creation of joint tenancies in Stuehm v. Mikulski, 139 Neb. 374, 297 N. W. 595, 137 A. L. R. 327. See, also, Anson v. Murphy, 149 Neb. 716, 32 N. W. 2d 271. A vested remainder is an estate which is deprived of the right of immediate possession. 2 Tiffany, Real Property (3d ed.), § 317, p. 15, § 319, p. 20; 33 Am. Jur., Life Estates, Remainders, etc., § 177, p. 643, § 219, p. 703; 31 C. J. S., Estates, § 85, p. 97. A joint tenant or a tenant in common has the right of immediate possession. It follows that when the Legislature gave the right of partition against tenants in

common or joint tenants, it did not include those holding vested remainders.

We need not speculate as to the intent and purpose of the Legislature in adopting the 1871 amendment. Reasonable explanations of the intent and purpose are to be found in the books. To determine that intent and purpose we must pursue two inquiries. The one involves an understanding of the rights of joint tenants and tenants in common in the dissolution of such an estate. The other involves an investigation of our constitutional and statutory history of partition and power of courts.

Section 49-101, R. S. 1943, provides: "So much of the common law of England as is applicable and not inconsistent with the Constitution of the United States, with the organic law of this state, or with any law passed or to be passed by the Legislature of this state, is adopted and declared to be law within the State of Nebraska."

This act has been on our statutes since territorial days. C. VII, § 1, R. S. 1866. In adopting this statute, Nebraska, so far as applicable, adopted the common law of England and not the statutory law of England. Farmers & Merchants Ins. Co. v. Jensen, 58 Neb. 522, 78 N. W. 1054, 44 L. R. A. 861; Brooks v. Kimball County, 127 Neb. 645, 256 N. W. 501.

At common law all joint tenants might agree to make partition of the lands, but one of them could not compel the others so to do. 1 Cooley's Blackstone (4th ed.), p. 585 (Book II, c. 12, p. 185). Likewise tenants in common were not compelled to make partition of their lands at common law. 1 Cooley's Blackstone (4th ed.), p. 591 (Book II, c. 12, p. 194).

By statute 31 Henry VIII, c. 1, enacted in 1539, and statute 32 Henry VIII, c. 32, enacted in 1540, joint tenants and tenants in common were compellable to make partition.

The language of statute 31 Henry VIII is: "* * * all joint tenants and tenants in common, that now be, or

hereafter shall be, of any estate or estates of inheritance in their own rights, or in the right of their wives, of any manors, lands, tenements or hereditaments * * * shall and may be *coacted* and *compelled,* by virtue of this present act, to make partition between them of all such manors, lands, tenements and hereditaments, as they now hold, or hereafter shall hold as joint tenants or tenants in common * * *." (Emphasis supplied.) 31 Henry VIII, c. 1.

The above statute applied to estates of inheritance.

By statute 32 Henry VIII, enacted in 1540, it was provided: "That all joint tenants and tenants in common, and every of them, which now hold, or hereafter shall hold, jointly or in common for term of life, year or years, or joint tenants or tenants in common, where one or some of them have or shall have estate or estates for term of life or years, with the other that have or shall have estate or estates of inheritance or freehold in any manors, lands, tenements or hereditaments, shall and may be *compellable* from henceforth, by writ of partition * * * to make severance and partition * * *." (Emphasis supplied.) 32 Henry VIII, c. 32. By this later act, joint tenants and tenants in common for life or years were compellable to make partition.

Our statute, section 25-2170, R. R. S. 1943, in simpler language, used the "compelled" of the English acts. The Legislature obviously intended to supplement the common law, as did the Parliament, and make partition compellable between tenants in common and joint tenants. Such was the purpose and effect of the amendment in England.

Lewis in his Blackstone, volume 1, page 655, states in the notes that joint tenants and tenants in common could never sue for partition till the right was conferred on them by statutes 31 and 32 Henry VIII, and these statutes restrict the right to such as are seised. Therefore, a remainderman cannot sue in partition until the

death of the life tenant, citing Stevens v. Enders, 13 N. J. Law Reports (1 Green) 271, 279.

But the majority say that the Legislature did not use the word "held" or any similar word denoting an estate of present possession. My answer to that is twofold. That condition is inherent in the language used. Likewise in all our decisions, hereinafter cited, we have recognized that present possession was an essential requirement to the right to maintain compulsory partition.

We have construed our statute in accord with the English acts.

In Oliver v. Lansing, 50 Neb. 828, 70 N. W. 369, we held: "Where a cause is fairly within the law authorizing a partition, the right to partition is imperative and absolutely binding upon courts of equity. In such a case the right of partition is a matter of right and not of mere grace." We followed that decision in Arthur v. Arthur, 115 Neb. 781, 215 N. W. 117, and Wilcox v. Halligan, 141 Neb. 643, 4 N. W. 2d 750. In Windle v. Kelly, 135 Neb. 143, 280 N. W. 445, dealing with the right of a guardian to maintain partition, we cited first the statutory provision, then Oliver v. Lansing, *supra.* The statute and our decisions are in accord.

I now turn to the statutory and constitutional situation that existed when the 1871 amendment was passed.

The organic law of the Territory provided for the vesting of the judicial power in a supreme court, district courts, probate courts, and in justices of the peace. It provided that the jurisdiction of probate courts and of justices of the peace "* * * shall be as limited by law: *Provided,* That justices of the peace shall not have jurisdiction of any matter in controversy when the title or boundaries of land may be in dispute * * *." Organic Law, § 9, p. 4, approved May 30, 1854.

The Legislature in 1855 provided that a judge of probate had jurisdiction of the probate of wills, the administration of the estates of deceased persons, and of

the guardianship of minors and insane persons. Laws 1855, Part II, § 37, p. 174. This was in effect continued in 1857. Laws 1857, Part 1, c. XXXV, § 3, p. 118. The same two Legislatures enacted the partition provision which is set out in the majority opinion. Laws 1855, Part 1, § 608, p. 114; Laws 1857, Part 1, c. XXXVI, § 1, p. 120.

The Territorial Legislature in 1858 adopted an act providing that in an action for the recovery of real property it shall be sufficient if plaintiff states that he has a real estate therein and is entitled to the possession thereof and that the defendant keeps him out of possession, and that in an action by a tenant in common of real property against a cotenant, the plaintiff must state, in addition to the above, that the defendant either denies the plaintiff's right or did some act amounting to such denial. Laws 1858, Title XVIII, c. I, §§ 566, 568, p. 205. Possession was thereby recognized as an essential element in the estates of tenancy in common. These provisions are now section 25-2124 and 25-2126, R. R. S. 1943. In the same act (c. III, § 585, p. 207), it was provided that partition under existing statutes might be made until the Legislature otherwise provided.

The Territorial Legislature of 1860 enacted a provision for the partition and distribution of estates. Laws 1860, c. II, p. 101. The first four sections appear to be the lineal ancestors of our present sections 30-1301 to 30-1304, R. R. S. 1943. Section 5 and following of the 1860 act provided that when an estate assigned to two or more heirs, devisees, or legatees "shall be in common and undivided," partition may be made by commissioners appointed "by the probate court" and there follows detailed procedural provisions. So that in 1860, the partition of such estates "in common and undivided" was placed in the jurisdiction of the "probate court." This act became a part of the statutes of Nebraska, chapter XIV, section 288, and following. R. S. 1866, p. 117.

The 1866 Constitution provided for a Supreme Court,

district courts, probate courts, justices of the peace, and other courts. Judiciary, § 1. It provided in section 4 that probate courts, justices of the peace, and other inferior courts shall not have the power to order or decree the sale or partition of real estate.

In 1870, the Legislature provided that probate courts should not have jurisdiction to order or decree the sale or partition of real estate. Laws 1870-1871, § 1, p. 7. This act was approved February 28, 1870, and was enacted at a session of the Legislature that began February 17, 1870. One year later, at a session of the Legislature that began January 5, 1871, in an act approved March 3, 1871, the Legislature amended section 802 of the then code to provide that "All tenants in common, or joint tenants of any estate in land, may be compelled to make or suffer partition of such estate or estates in the manner hereinafter prescribed." Laws 1870-1871, p. 112.

By this somewhat involved process the Legislature changed the jurisdiction to partition estates held in common or as joint tenants from the probate courts to the district courts. It thereby complied with the constitutional limitation on the jurisdiction of probate courts. It made partition between tenants in common and joint tenants a compellable right.

This is further illustrated by the later history of the act of 1860.

The Legislature amended it in 1873 to provide for the appointment of the partition commissioners "by the district court" and by the use of the words "district court" in several places instead of "probate court" apparently attempted to make the act conform to the constitutional requirement. C. 17, G. S. 1873, p. 334 et seq. So at that time we had a general and a special act dealing with partition. The 1881 Legislature solved that difficulty by repealing the special provisions and providing that "When such estate shall consist in part of real estate, and shall descend to two or more heirs, dev-

isees or legatees, and the respective shares shall not be separate and distinguished, partition thereof may be made as provided by law." Laws 1881, c. 50, § 1, p. 234. This provision is now section 30-1305, R. R. S. 1943.

The Legislature then, in 1873, completed the transfer of partition jurisdiction in some cases from the probate courts to the district court. In 1881, it removed the special procedure provision. We then had, as we have now, one partition proceeding of general application.

This history brings the statutory changes down to within five years of our first decision construing and applying this statute. Hurste v. Hotaling, 20 Neb. 178, 29 N. W. 299, decided in 1886. It then was current history. If the Legislature of 1871 had intended to make a change in the basic requirements of the law as to possession, it may be assumed that the lawyers of that time would have had knowledge of it. Yet, no indication of such a knowledge appears in the briefs or in the decision. The writer of the opinion became a member of this court in 1873. The attorneys involved are shown to have been members of this bar in 1883. 14 Neb. iii. The date of their admission is not shown. However, Mr. Davidson is shown to have begun the practice in this state in 1872. History of Nebraska 1882, p. 1012. Judge Appelget began the practice at Tecumseh in 1870. History of Johnson and Pawnee Counties, 1889, p. 164.

We had this statute before us in the Hurste case. Our opinion was rendered 15 years after the 1871 act was passed. We there discussed this statute and said: "The controlling principle in partition, therefore, without regard to the extent or quantity of the interest, is that the parties shall be joint tenants or tenants in common of an estate in the land. Subsequent sections of the statute permit, if they do not require, other persons having particular, qualified, or reversionary interests, such as a tenant for years, in dower, or persons having liens on the land, to be brought in, in order that

their rights may be determined in the action. *Only joint tenants or tenants in common of an estate in the land, however, can institute the proceedings.*

"In Woods v. Clute, 1 Sandf. Ch., 201, the court, in speaking of tenants for years, by the courtesy or in dower, persons entitled in reversion *or remainder,* and creditors having liens, says: 'These may be made parties to the partition, *but there appears to be no authority for their instituting it, unless they are also tenants in common in possession.*' " (Emphasis supplied.) We approved this holding in Barr v. Lamaster, 48 Neb. 114, 66 N. W. 1110, 32 L. R. A. 451.

In Seymour v. Ricketts, 21 Neb. 240, 31 N. W. 781, in an opinion by the judge who wrote Hurste v. Hotaling, *supra,* we held: "A party out of possession of real estate, whose title is denied, cannot maintain an action of partition against one in possession claiming the title to said land. He must first establish his estate in the land." We followed this decision in McMurtry v. Keifner, 36 Neb. 522, 54 N. W. 844. We construed that opinion in Bell v. Dingwell, 91 Neb. 699, 136 N. W. 1128, and said "we held" there that partition could not be had until petitioners "had first obtained possession."

In Oliver v. Lansing, *supra,* we held: "Where real property leased for a term of years is owned by several persons as tenants in common, *both of the rents and the reversion,* partition upon the petition of one of the tenants in common may be had, and, in case of a sale being thereby rendered necessary, the lessee will become a tenant of the purchaser of the rents and reversion." (Emphasis supplied.)

The majority cite this case for a reference made therein to an analysis made by the Supreme Court of Illinois as to the statute of that state and get comfort from the fact that we said the statutes of Minnesota and Illinois much resembled our own. An analysis of the facts and issues of that case and the decision reached on the cited

authorities negatives the conclusion reached by the majority in this case.

In Oliver v. Lansing, *supra,* the briefs reveal it was contended by the appellants that "A tenant in common of a reversion in land expectant on a lease for years cannot maintain a suit for partition." It was contended by the appellee that "A joint tenant of leased lands, *both of the rents and of the reversion,* may maintain partition." (Emphasis supplied.) The lawyers involved in that case were not novices at the bar, but rather were then and had been leaders of the bar in this state. It is significant that the appellants did not cite section 802 of the code, now section 25-2170, R. R. S. 1943. Appellee quotes the code but makes no further reference to it. The reason is plain.

The appellee contended that "* * * Lansing and Oliver are tenants at the present time not only of the fee or reversion, but of all the present rents and incomes." It was the appellee's contention that Oliver and Lansing had a present possession through the rents and income, and that where that situation existed, partition could be compelled under the statute. We sustained that contention. We did not hold that a present possession was not necessary.

We cited Woodworth v. Campbell, 5 Paige Ch. (N. Y.) 518, wherein it was held that as the parties had a present interest in the rents as tenants in common and also were the owners of the reversion, they had a present partable interest in the premises and partition could be had. This case appears to be the basic case relied on in the other decisions cited by appellee. We also quoted from Freeman, Cotenancy & Partition, § 446, p. 544, that "* * * no person has the right to demand any Court to enforce a compulsory partition unless he has an estate in possession —one by virtue of which he is entitled to enjoy the present rents or the possession of the property as one of the cotenants thereof." The next three sentences in Freeman (following our quote in the Oliver case) are:

"Therefore, the grantee of a deed in which the grantor reserves the right to remain in possession during his natural life, cannot maintain a suit for a compulsory partition. So it was held that a tenant in common of lands whose moiety was held by a tenant under a lease had no right to demand partition, although the applicant was tenant in common of the rents as well as of the reversion. But probably the weight of the authorities is the other way, and in favor of the rule that, notwithstanding a lease for years, a cotenant *both of the rents and of the reversion* may call for a partition." (Emphasis supplied.) We followed the majority rule that a cotenant of both the rents and reversion could compel partition. We did not hold that a cotenant of a remainder could do so. In fact we negatived that holding. The authority relied upon (Freeman) in the sentence preceding our quote in the Oliver case states: "Thus a remainderman might be brought before the Court, in certain cases, and compelled to execute a conveyance for the purpose of carrying out a decree of partition; *but in no case could he institute proceedings to enforce compulsory partition.*" (Emphasis supplied.) Freeman, Cotenancy & Partition, § 446, p. 544.

Oliver v. Lansing, *supra,* is cited in the annotation, 151 A. L. R. 389, as authority for the proposition that "The requirement that those to whom partition is made shall have possession, or the right to possession, is satisfied by holding that the possession of the lessee inures to their benefit." So the Oliver case, when analyzed, does not sustain the position of the majority and is in harmony with our decisions that possession or the right to present possession is required. It is significant that in the briefs in the Oliver case our Nebraska decisions herein quoted are not even mentioned. The cause was submitted and decided upon the rule stated in the syllabus quoted herein, which of itself recognized the requirement of possession. It is likewise significant that neither in the briefs nor in the opinion is there any indication

that we were modifying or overruling our own prior decisions, or that we were adopting constructions of other statutes by the courts of other states contrary to the construction we had theretofore put upon our own statute.

We held in Phillips v. Dorris, 56 Neb. 293, 76 N. W. 555, that only a joint tenant or a tenant in common of real estate can maintain an action for its partition. This was followed in Heiser v. Brehm, 117 Neb. 472, 221 N. W. 97. An examination of the brief of appellee in Phillips v. Dorris, *supra,* reveals that the appellee urged upon this court that the statute here involved did "not provide that the party seeking partition shall be in possession" and that "the issue of possession cannot be used to defeat the right to partition." In the opinion we said: "The object of a partition suit is to assign property, the fee simple title to which is held by two or more persons as tenants, or joint tenants in common, to them in severalty." This was followed in Hoover v. Haller, 146 Neb. 697, 21 N. W. 2d 450, and Trowbridge v. Donner, 152 Neb. 206, 40 N. W. 2d 655.

In Wicker v. Moore, 79 Neb. 755, 113 N. W. 148, we pointed out that it was the general rule that one must be entitled to the present possession of his share in severalty, and that the rule was different in New York and Illinois, and had been changed by statute in New Jersey. In the body of the opinion in Mathews v. Glockel, 82 Neb. 207, 117 N. W. 404, 18 L. R. A. N. S. 1208, we cited this case as authority for "It is the general rule that the present right of possession is a prerequisite to the right to maintain partition." We accordingly there refused to follow the Illinois rule which the majority now adopt. The Mathews decision came 11 years after Oliver v. Lansing, *supra,* was decided which contains the reference to the Illinois statute upon which the majority rely.

In Mathews v. Glockel, *supra,* the syllabus is: "An action by a tenant in common to have his undivided share set apart to him is in effect an action in partition,

and may not be maintained unless the tenant in common *is entitled to the present possession of such share.*" (Emphasis supplied.)

In Riley v. Whittier, 100 Neb. 107, 158 N. W. 446, we had a case involving personal property where the relationship was "one of a common ownership * * * each party having a right of possession of the whole." We there held: "A court of equity has jurisdiction to decree partition or, if necessary, a sale of personal property owned in unequal shares by two parties each of whom *has a right of possession.*" (Emphasis supplied.)

In Nitz v. Widman, 106 Neb. 736, 184 N. W. 172, we said: "The general rule now is that every cotenant may demand partition as a matter of right, however inconvenient or injurious it may be to make it, or whether the title of the parties be legal or equitable, *if there is a present right of possession.*" (Emphasis supplied.) We there held that the plaintiff, as a tenant in common with the defendant and having a right to immediate possession, had a right to maintain the action.

The majority distinguish Weddingfeld v. Weddingfeld, 109 Neb. 729, 192 N. W. 227. Accordingly, I discuss it more in detail. We there quoted: " 'The general rule which prevails with few exceptions unless it has been changed by statute is that a joint tenant or tenant in common will not be permitted to maintain a suit for partition *unless he has an estate in possession,* namely, such an estate as entitles him to enjoy the present possession of the property and receive the rents and profits thereof as one of the joint tenants or cotenants thereof.' " We said: "It will be seen that an essential element requisite to the maintenance of the action is the possession, actual or constructive, or the immediate right to such possession of the lands sought to be partitioned. The proceeding operates upon the possession and enables each of the owners to take and enjoy his share of the common or joint estate." We cited the statute here involved and held: "Counsel point out that, in this

section, 'nothing whatever is said about possession or the right of possession.' And they argue that because of the absence of a reference to possession or the right of possession the legislature intended to say that partition might be had although the parties seeking the relief had neither the possession nor the right thereto. *A reading of the statute, however, discloses that it provides for partition only among 'tenants in common or joint tenants.'*" (Emphasis supplied.)

In Weddingfeld v. Weddingfeld, *supra,* the briefs show that the attorneys for appellant urged with reference to this statute that "The court will observe from a reading of this statute that all tenants in common or joint tenants of any estate in land may be compelled to suffer partition thereof. Nothing whatever is said about possession or the right of possession." "However, if the court would not want to go so far as to disturb the life tenant in his possession, we can conceive of no reason why the fee title could not be partitioned among the owners without disturbing the previous estate * * *" and urged that the petition stated a cause of action in partition as between the plaintiff and two of the defendants as joint owners of the remainder, and that the court erred in dismissing the petition as to the two remainderman defendants.

The appellee urged that "nothing is said in this statute about 'possession,' because the very description of the parties entitled to bring, or compelled to suffer, partition necessarily contemplates possession, or the right to present possession, and forecloses the idea of possession in another; and if possession, by virtue of a vested freehold estate, be found to be in another, then they are not joint owners with such other, and are not entitled to maintain the suit."

With reference to the power of a court to award partition between remaindermen, without disturbing the previous particular estate and in answer to appellant's contention, the appellee cited the specific rule quoted

in the second paragraph of our opinion, which requires an estate in possession. We adopted the rule. However, we did not specifically base the decision as to this matter on that rule but rather on the failure to show service on or an appearance of the defendant remaindermen. I do not discuss Bartels v. Seefus, 132 Neb. 841, 273 N. W. 485, for it merely follows the Weddingfeld decision.

As I see it, we have a legislative and constitutional history that negatives the conclusion of the majority as to the intent and purpose of the Legislature in adopting the 1871 amendment.

We have the above-quoted decisions. The precise question here presented does not seem to have been directly decided. No matter whether these quotes are called statements, dicta, or holdings, the fact remains that there entered into all the above decisions the premise that an essential element to the right of maintenance of the action of partition under our statute is possession or the immediate right to possession of the lands sought to be partitioned. Almost 80 years have passed since the statute was adopted. We began construing it as above indicated 65 years ago. We have repeatedly and consistently followed that construction since. At least on two occasions we have been urged to accept the construction now made. We heretofore have not done so. On at least one occasion (Wicker v. Moore, *supra*) we refused to follow the Illinois and New York decisions.

I point out but do not speculate on the effect that this opinion may have in making it possible for one co-owner in remainder to force the termination of a remainder estate held in common by two or more. If that result is to be had it should follow from a clear legislative act.

I would follow the law as we have stated it to be. I would let this question stand decided. I would follow the practice long followed by this court and sustain the construction of the statute that we have heretofore repeatedly made until changed prospectively by the

Legislature if that law-making body sees fit to do so. See Mosher v. Huwaldt, 86 Neb. 686, 126 N. W. 143. We have approved this statement: " 'The doctrine of stare decisis applies with full force to decisions construing statutes, especially where they have been long acquiesced in.' " Patterson v. Kerr, 127 Neb. 73, 254 N. W. 704.

The majority place great reliance upon section 25-2193, R. R. S. 1943. That statute presents no difficulty when properly analyzed. It deals not with the right to maintain partition, but with the distribution of the proceeds after the action has proceeded to a sale of the property.

Freeman, Cotenancy & Partition, section 549, page 662, states: "The parties before the Court whose title has been divested by the sale may have a vast variety of interests. Some of them may be in possession of estates for life or for years; others may have estates in reversion or remainder; and still others may have mere contingent interests. Upon each of these interests, other claims and liens may have attached." It is the court's problem then to protect all those rights in its decree of distribution.

That such a situation can exist in this state is certain. We have held that "The owner of a life estate in a portion of a larger tract of land may maintain partition proceedings against a cotenant holding a fee-simple title." Nitz v. Widman, *supra*. See Annotations, 12 A. L. R. 644, 134 A. L. R. 662. Under those circumstances the court in its decree of distribution would be compelled to protect the rights, in the proceeds, of the owner of the life estate, the owner of the remainder, and the cotenant in fee.

The statute applies to situations of the character above described by Freeman and illustrated by Nitz v. Widman. The statute is: "If an estate for life or years be found to exist as an *encumbrance* upon *any part* of said property, and if the parties cannot agree upon the sum in gross which they will consider an equivalent for such estate, the court shall direct the avails of the *encumbered*

property to be invested, and the proceeds to be paid to the encumbrancer during the existence of the *encumbrance.*" (Emphasis supplied.) § 25-2193, R. R. S. 1943. The statute makes it possible for the cotenant in fee to get his share in cash presently, for the cotenant for life or years to get his share which is the value of the use, and for the remainderman to be protected and to get his share after the termination of the "existence of the encumbrance."

This matter is discussed in Restatement, Property, section 126e, page 401: "When the owner of an estate for life secures partition in accordance with the rule stated in this Section, and the partition is effected by a judicially ordered sale of the whole, or of a part, of the interests in the land which is concurrently owned (see § 125, Comment d), such owner is entitled to the use for his life of that portion of the proceeds which represents the undivided share in which the estate for life existed. To whatever extent a state, by statute, has conferred upon the owner of the estate for life a power to obtain a lump sum, as the commuted value of such use for his life, to that extent the power described in this Section has been amplified. To whatever extent a state, by statute, has conferred upon the owner of the future interest limited to take effect in possession after the estate for life, a power to compel the owner of the estate for life to accept a lump sum, as the commuted value of such use for his life, to that extent the power described in this Section has been modified. In the absence of statute making some other provision the 'use for his life' of that portion of the proceeds which represents the undivided share in which the estate for life existed consists in the receipt by the owner of the estate for life of the interest earned by such proceeds, periodically during the continuance of the life which measured such estate." See, also, 47 C. J., Partition, § 851, p. 583; 40 Am. Jur., Partition, § 91, p. 81.

The majority quote from Weddingfeld v. Weddingfeld,

supra, that where the parties fail to agree upon the value of the life estate "* * * the court orders the investment of the entire amount realized from the sale," and from that it is argued that it was a life estate in the whole of the property that was within the legislative intent.

To that there are two answers. The statute does not direct the investment of the entire amount received from the sale. The statute directs the investment of the "avails of the encumbered property." And what is the "encumbered property"? It is that "part" of the property upon which there exists "an encumbrance" of an estate for life or years. When read in the light of the statute and the preceding language in the Weddingfeld opinion, it is clear that there, in using the term "entire amount realized from the sale," we referred only to the amount received from the sale of the encumbered part, not all the property.

If the Legislature used this language to mean a direction to invest "the entire amount received from the sale" and not the amount received from the sale of the "encumbered" part and intended to provide for a situation where there was a life estate in the whole of the property, then the language of the act must be construed so as to make "any part" of the property mean "all" the property, and the word "encumbered" be stricken from the act. We do not have the power to so amend and delete the legislative act. Not only that, but that construction leaves the court without legislative direction as to what to do in the event of a sale where the owner of a life estate in a portion of a larger tract partitions against or is partitioned against by a cotenant holding a fee simple title. In that event, must the proceeds of that part of the land held in fee be invested and the owner denied the right, that follows from his fee title, to possession of the entire share that represents his fee title? The majority so construe the statute and the legislative act. If the statute means that, then must the "proceeds" of the investment be paid to the life estate owner even though he admit-

tedly has an interest in only a part of the investment and proceeds? Such would seem to be the result of the conclusion of the majority flowing from the effort to make a statute of distribution into a grant of power to maintain an action.

The majority rely upon the discussion of this subject in Restatement, and rely upon class 3 and the statement in the notes that Nebraska is one of five states whose statutes "probably" come within class 3. The weight to be given the "probably" is illustrated by the statutes of two of the states cited. Section 27-1301, Arizona Code 1939, provides in general language that "The owner or claimant of any real property or of any interest therein, may compel a partition thereof between him and other owners, * * *." The New Mexico act, section 25-1201, New Mexico Ann. Stat., 1941, contains the specific words, "whether they be in possession or not." No further comment seems necessary.

One further matter requires attention. This matter comes here on appeal from an order of the trial court sustaining special demurrers to plaintiff's petition for the reasons that it appears on the face of the petition that the plaintiff is not in possession or entitled to the possession of the real estate; that plaintiff's interest is subject to a life estate; and that partition may not be maintained. The transcript shows personal service of summons on the life tenant. No appearance is shown nor is a default shown to have been entered.

Implicit in the majority decision is the fact that material consideration is given to the failure of the life tenant to object and that because thereof a right arises in the plaintiff to maintain partition subsequent to the filing of the petition and independent of any facts alleged in the petition.

We have held that " 'As a general rule, only the pleading demurred to may be considered in passing on the demurrer. The court must assume that the facts are as alleged, and cannot assume the existence of any facts not

alleged, nor find facts in aid of the pleading, nor hear evidence on the questions involved, nor consider what evidence may be introduced at the trial.' * * * Courts cannot consider extrinsic facts admitted by the parties or counsel, nor an agreed statement of facts, nor can matters within the personal knowledge of the court be considered." Griffin v. Gass, 133 Neb. 56, 274 N. W. 193.

We have also held that on demurrer other records in the proceedings which are not a part of the petition or demurrer are not before the court until some issue of fact or law is properly raised requiring an investigation thereof. In re Estate of Statz, 144 Neb. 154, 12 N. W. 2d 829.

We have also held that "The rule that a demurrer searches the entire record applies only when a demurrer is filed to a pleading subsequent to the petition." "We think the rule is clear that the court will not ordinarily go beyond the pleading questioned in determining whether a cause of action is stated. If the transcript on appeal, or previously filed petitions, contains statements tending to support defendant's position, they may be introduced as evidence on the trial, but they may not be considered in determining whether a cause of action has been stated in the amended petition on which the plaintiff elected to stand." In re Estate of McCleneghan, 145 Neb. 707, 17 N. W. 2d 923.

Here the majority decision goes not to any pleading but to a failure of a defendant to plead to find a fact reason on which to hold that a petition states a cause of action. In my judgment they err in so doing.

I am authorized to say that CHAPPELL and WENKE, JJ., concur in this dissent.

CARTER, J., concurring.

I submit that the dissent is not tenable. The question for decision in this case, concisely stated, is: Can the owner of a vested estate in remainder maintain a suit in partition against his remaining co-owners, where there is an outstanding estate for life vested in a third

person in the whole of the premises for which partition is sought and the life tenant does not object to the partition and defaults when suit is brought for that purpose?

Under the common law the answer would be simple for the reason that possession or the right to possession was a necessary element of the right to partition. The Legislature of this state, however, has enacted statutes in derogation of the common law dealing with the partition of real property of joint owners. Consequently we must look to the statutes of this state as they have been construed by the courts in solving the question before us.

The precise question before us has not been previously decided by this court. The closest approach to it will be found in Weddingfeld v. Weddingfeld, 109 Neb. 729, 192 N. W. 227, and Bartels v. Seefus, 132 Neb. 841, 273 N. W. 485. In each of those cases it was held that where there is an estate for life vested in a third person in the whole of the premises of which partition is sought, a remainderman cannot maintain an action in partition "over the objection of the holder of the life estate." The fact that the court deemed it necessary to insert the limitation "over the objection of the holder of the life estate" makes it clear that where the life tenant did not object the court was of the opinion that a partition action could be maintained. Unless this conclusion is valid I can see no reason for incorporating the limitation in the stated rule.

The proper solution of the problem must rest upon the correct interpretation of sections 25-2170, 25-2190, and 25-2193, R. R. S. 1943. The effect of these three sections was considered in Weddingfeld v. Weddingfeld, *supra,* which opinion, in my judgment, points out the result at which we should arrive in the case before us. In that opinion it was said, unqualifiedly, as follows: "It will be seen that an essential element requisite to the maintenance of the action is the possession, actual

or constructive, or the immediate right to such possession of the lands sought to be partitioned." After making the foregoing statement, the court went on to say: "However, it is argued by plaintiff's attorneys that this action may be maintained by virtue of the provision of section 9238, Comp. St. 1922, which provides:

" 'When the object of the action is to effect the partition of real property among several joint owners, the petition must describe the property, and the several interests and estates of the several joint owners thereof, if known. All tenants in common, or joint tenants of any estate in land may be compelled to make or suffer partition of such estate or estates in the manner hereinafter prescribed.'

"Counsel point out that, in this section, 'nothing whatever is said about possession or the right of possession.' And they argue that because of the absence of a reference to possession or the right of possession the legislature intended to say that partition might be had although the parties seeking the relief had neither the possession nor the right thereto. A reading of the statute, however, discloses that it provides for partition only among 'tenants in common or joint tenants.' Before it can be invoked to compel the holder of the life estate to submit to partition, a court must first hold that the holder of the life estate and the remaindermen are 'tenants in common or joint tenants.' It is plain that plaintiff and her two minor children whom she has made defendants are tenants in common or joint tenants in remainder, but they are not tenants in common or joint tenants with the holder of the life estate. She holds her interest in severalty. As to her it is not necessary that the statute make reference to possession, or the lack of possession, because she does not fall within its terms."

It will be observed that the court uses the expression "tenants in common or joint tenants in remainder" and indicates that partition would be proper between them, but points out and bases its decision upon the fact that

the life tenant was not a joint tenant or tenant in common with the remaindermen. If this were not true, the court could have disposed of the matter by simply stating that possession or the right to possession was an essential element of a joint tenancy or tenancy in common and that the action could not be maintained for that reason.

The court in the Weddingfeld case then said: "But counsel point to two succeeding sections of the statute, namely, 9258, Comp. St. 1922, which provides for the payment of incumbrances, if any are found to exist, and section 9261, which provides:

" 'If an estate for life or years be found to exist as an incumbrance upon any part of said property, and if the parties cannot agree upon the sum in gross which they will consider an equivalent for such estate, the court shall direct the avails of the incumbered property to be invested, and the proceeds to be paid to the incumbrancer during the existence of the incumbrance.'

"When these sections are read in connection with 9238 they cannot be construed to confer upon the remainderman the right to force partition upon the holder of the life estate. Section 9261, upon which chief reliance is placed, does not authorize the court to ascertain the value of the life estate and pay it over to the holder of the life estate, but, on the other hand, it directs the court to have the entire fund created by the sale invested, 'and the proceeds to be paid to the incumbrancer during the existence of the incumbrance.' It is clear, we think, that the provisions of the last two mentioned sections are meant only to apply, first, to cases where there is an ordinary incumbrance, such as a mortgage; and, second, where there is an estate for life or for years and the holder of such estate voluntarily submits to the partition, but, having gone thus far, fails to agree with the other parties in interest upon the value of the life estate. In that event the court orders the

investment of the entire amount realized from the sale." The sections referred to are now sections 25-2190 and 25-2193, R. R. S. 1943. If partition cannot be maintained at all where there is an outstanding life estate in a third person in the whole of the premises, the very basis of the dissenting opinion, no reason exists for any reference to a life estate in section 25-2193. It might be argued that it applies only where there is a life estate in a part of the property. The same reasoning that would deny partition to all of the property would certainly apply to a part and the absence of the right of possession of the part would bar a partition proceeding as to it. Even more significant is the statement in the Weddingfeld case as to what happens where the holder of a life estate voluntarily submits to the partition but fails to agree with the other parties in interest upon the value of the life estate. It there states: "In that event the court orders the investment of the entire amount realized from the sale." This refers to something more than a life estate in a part of the property. The direction that the court shall invest the whole amount derived from the sale clearly indicates that it was a life estate in the whole of the property that was within the legislative intent. During the life of the life tenant the income from the investment is paid to the life tenant, and at the death of the life tenant the proceeds of the sale are divided among the remaindermen.

This poses the question as to how the two statements in the Weddingfeld case can be reconciled—the one that possession is an essential requisite to the maintenance of the partition suit and the other that the property can be sold and the entire amount realized from the sale invested. There can be only one answer. Possession is an essential element to the maintenance of a partition action. If the life tenant does not object to the maintenance of the proceedings, or if he defaults after service of process in such proceedings, the "tenants in common or joint tenants in remainder," to use the words of the

Weddingfeld case, become entitled to the possession for the purposes of the partition action.

It is true as pointed out in the dissenting opinion that possession is generally deemed to be an essential element to the existence of a joint tenancy or a tenancy in common. The language contained in section 25-2170, R. R. S. 1943, in relation thereto is followed and qualified by the words "of any estate in land" and comprehends what the Weddingfeld case called "tenants in common or joint tenants in remainder."

In further support of this position I point out that Restatement, Property, c. 11, pp. 656, 657, classifies the various state statutes on partition into three classes. The third class includes those statutes which authorize "any joint tenant or tenant in common in an unconditional and indefeasible future interest" to compel partition of a future interest thus held in co-ownership. In the 1948 Supplement to Restatement, p. 427, the Nebraska statute is cited as one probably falling within class 3, as the majority opinion holds.

In summarizing, it is my view that possession or the right to possession is necessary to the maintenance but not to the commencement of a partition action. Where a "tenant in common or joint tenant in remainder" commences a partition suit without having the possession or right to possession of the property, and the life tenant defaults or fails to object, the "tenants in common or joint tenants in remainder" thereupon are constructively in possession for the purposes of the action. The possession thus attained becomes as effective for the purposes of the action as if it had existed when the action was commenced.

This construction is amply supported by our statutes on the subject and is consistent with the previous decisions of this court. It makes unnecessary a more specific discussion of the meaning of the words "all tenants in common, or joint tenants of any estate in land" contained in section 25-2170, R. R. S. 1943.

In the case at bar the life tenant did not object to the partition. He defaulted in the action. For the purposes of the suit the "tenants in common or joint tenants in remainder" thereupon became constructively entitled to the possession. But, unless agreement is reached as to the value of the life estate, the entire proceeds of the sale must be invested and the income from the investment paid to the life tenant. The intent of the statute must be followed.

I therefore concur with the majority opinion and agree that the judgment should be reversed with directions to overrule the demurrers to the petition.

IN RE CLAIM FOR COMPENSATION ON ACCOUNT OF THE DEATH OF LEE W. SCHROEDER. MAYE S. SCHROEDER, WIDOW, APPELLEE, V. L. M. SHARP, FIRST, REAL AND TRUE NAME UNKNOWN, APPELLANT.
No. 32822.

LOUISE ATWOOD, FOR HERSELF AND MINOR CHILD, LOIS JEAN ATWOOD, APPELLEE, V. L. M. SHARP, DOING BUSINESS AS SHARP CONSTRUCTION COMPANY, ET AL., APPELLANTS.
No. 32823.
43 N. W. 2d 572

Filed July 13, 1950.

1. **Workmen's Compensation.** In the workmen's compensation law the word "willful," in its relation to negligence of an employee while in the performance of duty, means deliberate act; conduct evidencing reckless indifference to safety; more than want of ordinary care but not necessarily amounting to wantonness but approximating it in degree.
2. ———. The burden of proof to establish willful negligence of the injured employee is on the employer.
3. **Negligence.** Negligence is not presumed; the mere happening of an accident does not prove negligence.
4. ———. The burden of proving a cause of action is not sustained by evidence from which negligence can only be surmised or conjectured.

5. ———. Where there is no eyewitness, no direct evidence of the accident causing the injury, the facts and circumstances may be proved by circumstantial evidence, and the presumption is raised by the instinct of self-preservation on behalf of the deceased that he was not guilty of negligence, but was in the exercise of due care and caution for his own safety, unless the contrary is shown.
6. ———. It is essential to the existence of negligence that there be some fault on the part of the person sought to be held liable.

APPEAL from the district court for Deuel County: JOHN H. KUNS, JUDGE. *Affirmed and attorneys' fees allowed.*

Kepler & Knicely, for appellants.

P. J. Heaton, Harold E. Connors, and *William P. Mullen,* for appellees.

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

SIMMONS, C. J.

These are companion cases for death benefits under the Workmen's Compensation Act. The issues and the facts involved here are the same. The compensation court and the district court awarded compensation. We affirm the judgment of the trial court.

The evidence shows that the defendant was engaged in drilling an irrigation well for one Paul Nass. The well-digging machinery consisted of a motor-driven truck, some 10 or 12 feet in length, with motor and cab on the front end. Mounted on the rear of the truck was the motor-driven well-digging machinery. Among other things, this machinery consisted of a boom hinged at the top of the truck, and when it was erected it was 47 feet high. It was secured, when erected, by pins at the bottom and by cables from the top of the boom and attached to the front bumper of the truck. It was raised and lowered by the motor of the well equipment and lowered forward.

The well was located 13 feet south of a high voltage electric power line.

The equipment was so placed that the front end of the truck was toward the power line and the entire truck was between the power line and the well. The well-digging operations consumed at least two days. The defendant's crew of employees consisted of a foreman and two men. These men knew of the dangers of the high voltage line and the danger involved should the boom come in contact with the electric line.

When the well was completed, a pump head standing above the ground was temporarily placed on it and the well tested by means of a belt from the pump to a separate tractor engine. In order to remove the well-digging equipment and lower the boom without allowing it to touch the wire, it was necessary to move the truck backward and that necessitated the pulling or removal of the pump head as it interfered with that movement.

After the well was tested for some hours the foreman decided to go and get Mr. Nass. Mr. Nass' son was at the well at the time. The truck and equipment were in place, the boom erect, and the cables attached. The motors were not running. The pump was operating by means of the tractor engine and belt.

There is a conflict in the evidence as to the instructions given the two employees before the foreman and the son left to get Mr. Nass. Mr. Nass' son stated that the foreman told the men, " '* * * I don't want you boys to touch anything until I get back from down there.' * * * 'Don't move the truck or do a thing with it until I get back' "; "* * * 'Leave the pump running until we get back' "; "* * * 'Before this truck can be moved, * * * we will have to pull the pump head off and back the truck over the casing.' " He testified that the foreman told the boys not to touch anything because they would get electrocuted and " 'If you boys move that truck and that boom hits that power line, you will be pushing up daisies.' " His testimony was that when he and the foreman left to

get Mr. Nass, the two men were standing on the west side of the truck under the shade of the trees.

The foreman testified on direct examination as defendant's witness, that he told them, "* * * we couldn't possibly let that boom down before we could move the machine and disconnect the pump." Asked as to what he told them they should or should not do while he was gone, he replied, "* * * about the only thing I told them —they weren't to let that boom down until we had pulled the pump out so we could move the rig back," and that when he and young Nass left to get Mr. Nass, the two employees were not "doing anything except pulling up the pump."

The foreman and young Nass were absent 15 minutes. When they returned the belt from the tractor to the pump had been removed and the tractor engine was running free; the motor for the truck was running; the motor for the well-digging equipment was running; the truck had been moved backward, according to the Nasses about six inches, and according to the foreman not "over four feet"; the lever that controlled the lowering of the boom had been used; the cables were loose and resting on the front bumper; and the boom was on an incline and its top touched and extended over the electric line about two or three inches. The two employees were lying in front of the truck, one body across the other and not in touch with any electric contact. Both had been electrocuted.

The widow of one employee brought the action for herself; the other for herself and minor child.

The defense is willful negligence of the deceased employees and that the death of the employees did not arise out of the employment.

The statutes provide:

"If the employee is injured by reason of his intentional willful negligence, or by reason of being in a state of intoxication, neither he nor his beneficiaries shall receive

any compensation under the provisions of this act." § 48-127, R. S. 1943.

"(7) For the purpose of this act, willful negligence shall consist of (a) deliberate act, (b) such conduct as evidences reckless indifference to safety, or (c) intoxication at the time of the injury, such intoxication being without the consent, knowledge or acquiescence of the employer or the employer's agent." § 48-151, R. S. Supp., 1949.

"In the workmen's compensation law the word 'wilful,' in its relation to negligence of an employee while in the performance of duty, means deliberate act; conduct evidencing reckless indifference to safety; more than want of ordinary care but not necessarily amounting to wantonness but approximating it in degree." Moise v. Fruit Dispatch Co., 135 Neb. 684, 283 N. W. 495. See, also, Clark v. Village of Hemingford, 147 Neb. 1044, 26 N. W. 2d 15.

The burden of proof to establish willful negligence of the injured employee is on the employer. Hoff v. Edgar, 133 Neb. 403, 275 N. W. 602; Rexroat v. State, 142 Neb. 596, 7 N. W. 2d 163; 58 Am. Jur., Workmen's Compensation, § 439, p. 859; 71 C. J., Workmen's Compensation Acts, § 878, p. 1069.

" 'Negligence is not presumed; the mere happening of an accident does not prove negligence.' * * * 'The burden of proving a cause of action is not sustained by evidence from which negligence can only be surmised or conjectured.' " Bowerman v. Greenberg, 142 Neb. 721, 7 N. W. 2d 711.

"Where there is no eyewitness, no direct evidence of the accident causing the injury, the facts and circumstances may be proved by circumstantial evidence, and the presumption is raised by the instinct of self-preservation on behalf of the deceased that he was not guilty of contributory negligence, but was in the exercise of due care and caution for his own safety, unless the contrary is shown." Engel v. Chicago, B. & Q. R. R. Co., 111 Neb. 21, 195 N. W. 523. The presumption here stated applies

to charges of negligence as well as of contributory negligence.

In reviewing the evidence in the light of these rules we accept the testimony of the foreman, as the trial court evidently did. The testimony of young Nass is not in entire conflict with that testimony. The foreman outlined what had to be done before the boom could be lowered. His instructions fairly construed were not that nothing should be done, but rather that "they" were not to let the boom down until the pump was pulled out, so that the truck could be moved back. The statement of young Nass that "if you boys move that truck and that boom hits that power line" implies permission to move the truck, but to avoid hitting the power line in lowering the boom. When the foreman left the job the two employees were "pulling up the pump." That was the first thing that was to be done before removing the truck, and the foreman knew that the two employees were doing it. The evidence also shows that the truck had been moved; that the cables had been loosened; and that there was a miscalculation of distance of a few inches in whether or not the boom would clear the wires when being lowered.

But that is not all. There is no evidence here as to which of the two employees, if either, did the acts that were done after the foreman left the job. As we said in Meyers v. Neeld, 137 Neb. 428, 289 N. W. 797, the evidence fails to disclose which party, if either, was at fault, and it is essential to the existence of negligence that there be some fault on the part of the person sought to be held liable. Was Mr. Atwood negligent? Was Mr. Schroeder negligent? The answer to those questions on this record is in the field of speculation and conjecture. The presumption is that each one was not negligent. The contention of the defendant is based on the assumption that each of the two men severally did one or more of the acts charged. The evidence only is that someone did. It

necessarily follows that the defense of willful negligence fails.

The defendant further contends that the employer has the right to prohibit an employee from working in a dangerous place and that these employees were prohibited from working in the place where they were killed, and, hence, that the injury did not arise out of or in the course of the employment. As above pointed out, the evidence does not sustain the fact contention upon which this argument is based.

The judgment of the trial court is affirmed.

The trial court allowed to the plaintiff's attorneys in each case an attorneys' fee of $325, to be taxed as costs. Under the provisions of section 48-125, R. S. 1943, there is allowed a fee of $175 to the plaintiff in each case for services in this appeal, to be taxed as costs.

AFFIRMED AND ATTORNEYS' FEES ALLOWED.

MYRON D. NOBLE ET AL., APPELLANTS, V. THE CITY OF LINCOLN, A MUNICIPAL CORPORATION, ET AL., APPELLEES.
43 N. W. 2d 578

Filed July 13, 1950. No. 32827.

1. **Municipal Corporations.** In a city operating under a home rule charter the charter is the fundamental law for the government of the city.
2. ———. The charter of a city operating under a home rule charter may contain by amendment anything relating to its government which is not violative or in conflict with the United States Constitution or the Constitution or laws of the state.
3. ———. The people of a city in the adoption or amendment of a home rule charter act legislatively.
4. ———. The power of a city to adopt or amend a home rule charter is a constitutional power but the exercise of the power is legislative.
5. **Municipal Corporations: Constitutional Law.** As a general rule the courts will not in advance of passage or adoption of legislation by a city enjoin such legislation or inquire into the validity or constitutionality thereof.

6. **Elections: Constitutional Law.** As a general rule the courts will not inquire into the validity or constitutionality of an election or enjoin it at the suit of a taxpayer unless it be made to appear that the passage or enactment thereof would immediately destroy or irreparably damage special property rights or interests peculiar to the taxpayer and not enjoyed by the public at large.
7. **Municipal Corporations: Constitutional Law.** An exception to the general rules is where the passage of the legislative act would be followed by some irreparable loss or injury beyond the power of redress by subsequent judicial proceedings.
8. ———: ———. Another exception is when the passage of the act would cause a multiplicity of suits.
9. ———: ———. Another exception is where the conduct of a political subdivision has been such as to estop it to assert the right to insistence upon the general rule.
10. ———: ———. Another exception is where by amendment to a home rule charter bonds for a project have been voted and directions given to the city council to acquire a site and to construct a project thereon without a further vote of the people, an election thereafter, the purpose whereof is to select a site the effect of which would be to defeat the prompt and successful completion of the project as directed by the previous vote of the people, may be enjoined.
11. **Estoppel: Municipal Corporations.** Under the theory of estoppel action may be had to test the validity of a proposed amendment before adoption thereof when a municipality acting under its municipal capacity has gained a clear and decided advantage by the act or acts relied upon.
12. **Declaratory Judgments.** A justiciable issue is presented when a petition is tendered setting forth a cause of action proper for determination between proper parties in a court having jurisdiction.
13. **Injunction.** A resident taxpayer without showing any other interest may maintain an action to enjoin the improper disposition of public funds raised by taxation to prevent the creation of an invalid obligation.
14. **Declaratory Judgments: Municipal Corporations.** Where there is an actual controversy, recognizable as such under law, between the officials of a municipality and its taxpayers concerning the rights over the disposition of public funds and of property belonging to the municipality declaratory judgment proceedings are proper for the determination of the legal rights involved.

APPEAL from the district court for Lancaster County:

JOHN L. POLK, JUDGE. *Reversed and remanded with directions.*

Davis, Stubbs & Healey, and *Richard D. Wilson,* for appellants.

John Jacobson and *C. Russell Mattson,* for appellees.

Leonard A. Flansburg and *Charles Flansburg,* amicus curiae.

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

YEAGER, J.

This is an action by Myron D. Noble, Charles H. Arnold, Arthur A. Dobson, Chas. S. Elce, James R. Reed, and John K. Selleck as citizens, voters, residents, and taxpayers of the city of Lincoln, Nebraska, plaintiffs, against the City of Lincoln, Nebraska, as a municipal corporation, Clarence G. Miles, mayor, and Thomas Pansing, Rees Wilkinson, Ferne Orme, Arthur J. Weaver, John Comstock, and Roy A. Sheaff, members of the city council of the city of Lincoln and Theo Berg, city clerk of the city of Lincoln, defendants, the purpose of which is, under the Uniform Declaratory Judgments Act, to have declared the rights, duties, and obligations of the mayor and city council under existing charter amendments, which amendments will be specifically designated herein; to have declared a duty and obligation on the part of the defendants to proceed with construction of a city auditorium pursuant to plans made and steps taken under the terms of these charter amendments; to enjoin the defendants from holding an election the purpose of which will be to ascertain whether or not the amendments referred to shall be changed so as to nullify certain of the provisions thereof under which large expenditures of money have been made and require the location of the auditorium on a site other and different from the one acquired pursuant to the existing charter

amendments; and for a mandatory injunction requiring the defendants to proceed with the construction of the auditorium on the site which has been acquired.

The cause was submitted to the district court on petition of the plaintiffs and a general demurrer joined in by all of the defendants. The demurrer was sustained. The plaintiffs elected to stand upon their petition whereupon a judgment was entered dismissing the action. From this judgment the plaintiffs have appealed.

The question for determination here therefore is as to whether or not the petition states a cause of action. In making the determination this court must assume that all pertinent facts well pleaded are true and accordingly adjudicate. Hallstead v. Perrigo, 87 Neb. 128, 126 N. W. 1078; Panebianco v. City of Omaha, 151 Neb. 463, 37 N. W. 2d 731.

The petition in this case is of great length and it will not be quoted herein. An effort however will be made to set forth sufficient of its salient features to enable a comprehensive consideration of questions involved.

By the petition it is declared that the city of Lincoln is a municipal corporation operating under a home rule charter adopted pursuant to the Constitution of Nebraska.

It is interpolated here that the home rule charter was and is subject to amendment and that no question is raised by plaintiffs as to the constitutional procedure employed in the effort proposed to amend the charter of which complaint is made in this action.

Reverting again to the petition, it is therein declared that on May 2, 1939, an election was held at which by a sufficient vote an amendment to the charter of the city of Lincoln was adopted granting the city council power and authority to purchase and acquire real estate abutting on 15th Street between K and R Streets as a site for a public building for a city auditorium and for other public purposes and to erect thereon such building. It authorized the levy of a tax of not exceeding $75,000

annually for a period of ten years for the purpose of opening and widening 15th Street between K and R Streets and for the purpose of acquiring or purchasing a site and erecting a building thereon. Following a canvass of the vote the city council declared the amendment adopted. Thereafter by ordinance the city council caused to be spread a tax levy of .761 mills upon all taxable property within the city including that of the plaintiffs.

In May 1941 a similar proposal to amend the charter was submitted to and adopted by the voters of the city. The only significant change was that this one extended authority to equip and furnish the building whereas the earlier one did not. Pursuant to the adoption of the amendment the city council caused to be spread a tax levy of .793 mills upon all taxable property within the city again including that of plaintiffs.

Under authority vested by the amendment of 1941 the city council pursuant to an ordinance dated August 14, 1941, proceeded to issue general obligation bonds for which the city received the contract price of $1,100,000. At the time of the commencement of the action bonds of the issue were outstanding in the amount of $715,000. The bonds were issued, by recital therein contained, pursuant to, among other things not necessary to be mentioned here, the charter amendment in question and for the purpose of purchasing and acquiring real estate abutting on 15th Street between K and R Streets as a site for the erection of a public building to be used as a city auditorium and for other public purposes and for the purpose of opening, widening, and improving 15th Street between K and R Streets.

Pursuant to the authority of the amendments in question, in 1941 title to a certain block of real estate between 15th and 16th Streets and between M and N Streets was acquired by the city of Lincoln at a cost to the city of $46,750 for the purpose of erecting thereon the auditorium contemplated by the charter amend-

ment. Also pursuant to the amendments street improvements were made on 15th Street between K and R Streets at a cost of $270,250; for architect's study, plans, and specifications there has been expended the total amount of $22,943.50; and there has been expended on a contract for the installation of an ice rink in the contemplated auditorium the amount of $2,000. These amounts were paid out of the tax levies authorized and the proceeds of the sale of the general obligation bonds.

Tax levies have been made in varying amounts over the years from 1940 to 1949 inclusive and additional levies will be required to redeem the outstanding bonds.

Because of conditions attending the late World War and the unavailability of essential materials and shortage of labor nothing has been done in furtherance of the erection and construction of the auditorium except what has been hereinbefore described.

In May 1949 with the purpose of providing additional funds so that progress could be had in the construction of the auditorium a proposal for a new bond issue was submitted to and adopted and approved by the voters of the city. The proposal was insofar as pertinent here as follows:

"In addition to the power and authority elsewhere in this Charter provided, and in addition to the bonds heretofore authorized for such purpose, the City Council for the purpose of erecting a public building to be used as a city auditorium and equipping the same, is hereby authorized to borrow money and pledge the credit and property of the city upon its negotiable bonds in an amount not to exceed $1,500,000.00 without further consent of the voters * * *."

On these facts the plaintiffs allege substantially that it is the duty of the defendants to proceed with the construction of the auditorium on the site selected and purchased for that purpose.

Nevertheless they say that the defendant officials have failed to do so, that they contemplate action con-

trary thereto, and that unless otherwise directed by an adjudication they will submit a proposed amendment to the city charter which has been duly filed which in terms if adopted by a vote of the people and if declared to be legal, valid, and binding would nullify the provision of the present charter as amended making provision for the location of the auditorium, and would render for naught the outlay of expense for purchase of site, improvement of 15th Street, architect's fees, and the contract for the ice rink, contrary to law and equity and the rights of plaintiffs as taxpayers of the city of Lincoln.

The proposed amendment does not designate a location for the auditorium. It merely empowers the city council to select a location which shall not abut on 15th Street between K and R Streets. It simply excludes the area designated in the present amendments and the location already acquired by purchase.

The plaintiffs contend substantially that such an amendment would be void, a nullity, and illegal, and that under the facts and circumstances the defendants are estopped from holding or permitting an election the purport of which would be to repudiate the charter amendments and actions of the city council with reference to the location of the city auditorium. The facts and circumstances pleaded in this connection are: The authorization of the auditorium in 1939 was to build on 15th Street; the authorization in 1941 was to build on 15th Street and to improve 15th Street; the authorization to improve 15th Street was an integral part of and an adjunct to the construction of appropriate environs for the building of the 15th Street site; the city has levied taxes under the terms of the authorization requiring the building to be on 15th Street; the city has issued bonds and borrowed money containing covenants and representations that the said auditorium would be on 15th Street; the city has purchased property relying upon the authorization of the charter amendments

for the building of an auditorium and the improving of 15th Street; the city has brought condemnation suits against numerous property owners and has acquired and taken from them their property under the authorization to build an auditorium and improve 15th Street in conjunction therewith; from the levies and the bonds the city has spent $46,750 in acquiring a site for the said building; it has spent $270,250 in improving 15th Street as a part of the said general plan; it has spent $22,943.50 for architectural fees for plans for the construction of a building on the proposed site, which plans are totally useless in the event of a transfer of the building to any other site; and it has spent $2,000 as part payment for an ice rink. All of the foregoing was done prior to the submission of the charter amendment of 1949 which charter amendment provides that $1,500,000 of bonds shall be authorized in addition to the authorization previously made.

The foregoing is we think a fair reflection of the essential facts set forth by plaintiffs in their petition and of course it is these essential facts that the defendants by their demurrer say do not amount to a cause of action.

The substance of the grounds for demurrer to the petition are:

That the right of a city operating under a home rule charter to amend its charter is a constitutional right and when a petition sufficient for submission of an amendment is filed the courts have no jurisdiction to interfere with or prevent the holding of an election upon the proposed amendment.

That a city operating under a home rule charter with regard to the matter of voting on amendments of its charter is a legislative body and operates legislatively and the courts will not in advance of adoption of amendment pass upon the validity or constitutionality of a proposed amendment.

That a taxpayer may not enjoin an illegal election to save expense unless it be shown that he has a special

interest not enjoyed by the public at large which would be destroyed or irreparably damaged.

That no justiciable controversy is presented by the petition which would support a declaratory judgment.

That the people of a city operating under a home rule charter may not be estopped from changing, amending, or altering their charter.

Other objections are set forth but they either inhere in these or are refinements upon them, hence they will not be set forth separately.

In an approach to a consideration of the questions involved it appears well to point out that in a city operating under a home rule charter the charter is the fundamental law for the government of the city. It may contain or be made to contain by amendment anything relating to its government which is not violative or in conflict with the United States Constitution or the Constitution or laws of this state. Schroeder v. Zehrung, 108 Neb. 573, 188 N. W. 237; Consumers Coal Co. v. City of Lincoln, 109 Neb. 51, 189 N. W. 643; Standard Oil Co. v. City of Lincoln, 114 Neb. 243, 207 N. W. 172; State ex rel. City of Lincoln v. Johnson, 117 Neb. 301, 220 N. W. 273. It may not validly contain provisions in conflict with statutory provisions or questions of general or state-wide public interest or concern. Consumers Coal Co. v. City of Lincoln, *supra.*

The people of a city in the adoption or amendment of a home rule charter act legislatively. Consumers Coal Co. v. City of Lincoln, *supra.*

The significant difference between a city operating under a charter prescribed by the Legislature and one operating under a home rule charter is that while the two charters are legislative, in the former instance the legislative body is the state Legislature whereas in the latter it is the voters of the organized community itself. The power to act in each instance is constitutional but the action taken under the power is legislative. Consumers Coal Co. v. City of Lincoln, *supra.*

It is a general rule that the courts will not in advance of passage or adoption of legislation enjoin such legislation or inquire into the validity or constitutionality thereof. Lee v. City of McCook, 82 Neb. 26, 116 N. W. 955; Chicago, R. I. & P. Ry. Co. v. City of Lincoln, 85 Neb. 733, 124 N. W. 142; Leeman v. Vocelka, 149 Neb. 702, 32 N. W. 2d 274; Annotation, 140 A. L. R. 439.

It is also a general rule that the courts will not inquire into the validity or constitutionality of an election in advance or enjoin it at the suit of a taxpayer unless it be made to appear that the passage or enactment thereof would immediately destroy or irreparably damage special property rights or interests peculiar to the taxpayer and not enjoyed by the public at large. Lee v. City of McCook, *supra;* Davis v. County Commissioners, 153 Mass. 218, 26 N. E. 848, 11 L. R. A. 750; Dunn v. Board of Commissioners, 162 Kan. 254, 449, 177 P. 2d 207; Mann v. County Court, 58 W. Va. 651, 52 S. E. 776; Richardson v. Mayes (Tex. Civ. App.), 223 S. W. 546; 28 Am. Jur., Injunctions, § 163, p. 353.

To these general rules there are recognized exceptions. An exception is where the passage of the legislative act would be followed by some irreparable loss or injury beyond the power of redress by subsequent judicial proceedings. Solomon v. Fleming, 34 Neb. 40, 51 N. W. 304; Wabaska Electric Co. v. City of Wymore, 60 Neb. 199, 82 N. W. 626; Poppleton v. Moores, 62 Neb. 851, 88 N. W. 128, 67 Neb. 388, 93 N. W. 747; Chicago, R. I. & P. Ry. Co. v. City of Lincoln, *supra;* Munch v. Tusa, 140 Neb. 457, 300 N. W. 385.

Another is when it would cause a multiplicity of suits. Cases cited in support of the next preceding proposition apply to this one.

Another is when the acts and conduct of the corporation have been such as to estop it to assert the right to insistence upon the general rule. The authorities relative to this proposition are cited and discussed later herein.

Still another under the law of this jurisdiction is where by amendment to a home rule charter bonds for a project have been voted and directions given to the city council to acquire a site and to construct the project thereon without a further vote of the people, an election thereafter, the purpose whereof is to select a site the effect of which would be to defeat the prompt and successful completion of the project as directed by the previous vote of the people, may be enjoined. State ex rel. Ballantyne v. Leeman, 149 Neb. 847, 32 N. W. 2d 918.

It is not questioned that the petition which has been submitted to the city clerk is on its face sufficient for submission of the proposed amendment to a vote of the people of the city of Lincoln. Also it is not contended that the plaintiffs have interests which would be affected any differently than those of the public at large.

It follows then that the questions for primary determination are: Assuming that the proposed amendment, if adopted, would be an invalid exercise of power under the home rule charter, are the general rules with reference to such attacks or the exceptions thereto to be applied? Does the petition present a justiciable controversy? Is the controversy properly presentable under the Uniform Declaratory Judgments Act by these plaintiffs? Would the proposed amendment, if adopted, be an invalid exercise of power under the home rule charter and the facts as set forth in the petition?

There being no question about the general rules it appears only necessary to consider the exceptions. The first one to be considered is that of whether or not the adoption of the amendment would cause irreparable loss or injury beyond the powers of redress by subsequent judicial proceedings.

That this would be true according to the allegations of the petition there can be little doubt. The only tangible thing that the city would have left of value would be the real estate purchased, and this would

have no value for the purposes for which it was purchased. It would have the street improvement, but this improvement would have no relation to the purpose for which the money was expended in the absence of an auditorium on 15th Street. The funds expended for architect's fees would be a total loss. The funds expended on the ice rink contract would be a total loss. None of the funds could be recovered in subsequent legal proceedings, and none could be recovered otherwise except such as might be realized from the sale of the site acquired. The total of all funds expended would be irretrievably lost for the purposes for which they were raised and expended except possibly the amount invested in the site.

Whether or not a multiplicity of suits would flow from the adoption of the amendment is of course conjectural. The possibility does however confront. The possibility of an action to test the validity of such an amendment on the grounds on which plaintiffs herein seek to test it is not remote. Also it is not difficult to anticipate that the courts would be appealed to by taxpayers to determine whether or not the funds raised pursuant to the amendments of 1939, 1941, and 1949 could be expended for the acquisition of a site other than the one acquired and the construction of an auditorium thereon. Further it is not difficult to anticipate that if taxpayers did not bring such action the city itself might be under the necessity of instituting action to clarify this question in order to obtain a contract or contracts for construction dependent for payment out of funds raised pursuant to these amendments.

While it cannot be said with any degree of certainty that the failure to adjudicate the questions before the court would cause a multiplicity of suits, it can be said that an adjudication would avoid the possibility.

Under the theory of estoppel action may be had to test the validity of a proposed amendment before adoption thereof when a municipality acting under its

municipal capacity has gained a clear and decided advantage by the act or acts relied upon. In such case equity will prevent it from retaining the advantage and at the same time denying its binding force and effect. Philadelphia Mortgage & Trust Co. v. City of Omaha, 63 Neb. 280, 88 N. W. 523, 93 Am. S. R. 442, 57 L. R. A. 150; State ex rel. Cox v. McIlravy, 105 Neb. 651, 181 N. W. 554; City of Grand Island v. Willis, 142 Neb. 686, 7 N. W. 2d 457; May v. City of Kearney, 145 Neb. 475, 17 N. W. 2d 448; Mitchell v. Brown, 18 N. H. 315; Sawyer v. Manchester & Keene R. R. & Tr., 62 N. H. 135, 13 Am. S. R. 541; Benjamin v. District Township of Malaka, 50 Iowa 648; Kirchner v. Board of Directors, 141 Iowa 43, 118 N. W. 51; People ex rel. Osborn v. Board of Trustees, 119 Misc. 357, 196 N. Y. S. 459; City of Hudson v. Board of Education, 158 Misc. 583, 287 N. Y. S. 620; Independent School District No. 68 v. Rosenow, 185 Minn. 261, 240 N. W. 649, 79 A. L. R. 434; Consolidated School District No. 2 v. Cooper (Mo. App.), 28 S. W. 2d 384; Marks v. Richmond County, 165 Ga. 316, 140 S. E. 880.

None of the cases cited bear directly upon the question of the amendment to the home rule charter of a city. They do however point out very definitely that, where a political subdivision has by vote of the people given to the governing body a power and a mandate, and has implemented the power and mandate by authorization of bond issues and collection of taxes, and pursuant to such authorization and mandate steps have been taken to effect the purposes contemplated, the question of whether or not a subsequent election may be held, the purpose of which is to effect a change in the authorization and mandate, is a matter for judicial inquiry and interpretation.

The fourth exception to the general rule noted herein contains something more than an exception. It contains also a declaration of substantive right and legislative power. It declares that once power has been ex-

tended as it has been in instances such as this one and the power has been exercised to the extent of directing the city to issue bonds and to select a site the matter of selection of a site is no longer a subject of referendum and that a referendum election may be enjoined. State ex rel. Ballantyne v. Leeman, *supra.*

It is true that the action there was directed at a proposed referendum upon a city ordinance and not an election upon a proposed charter amendment, but in view of the expression of the court in that opinion this does not appear to be of controlling importance. The ground of the determination was that after the power of selection was conferred on the city council the matter of selection became an executive function and not legislative and could not be interfered with by a further vote of the people of the city. In the opinion it was said:

"It is now contended that this first act of the council in starting to acquire a site therefor must be submitted to a referendum vote as a legislative act. Could not the same argument be used later and another referendum demanded on the letting of the contract for the erection of the building?

"To permit a referendum on each of the various steps in carrying out a definite mandate of the voters to secure a site and build a city auditorium would delay executive conduct of the council and defeat the prompt and successful completion of the city auditorium as directed by vote of the people at the special election held for that purpose."

Again assuming that this amendment would be invalid if adopted we conclude that under the exceptions to the general rule the questions presented by the petition are proper for consideration at this time, that is, before submission of the proposed amendment to a vote of the people.

This determination disposes of the question of whether or not a justiciable issue is presented by the petition.

Whether or not this justiciable issue will support a declaratory judgment will be considered later herein.

To this point we have considered the question as to whether or not the petition presents questions proper for determination in a judicial proceeding at this time and having decided that it does attention is now directed to the question of whether or not the facts pleaded entitle the plaintiffs to the relief sought or some of it. The proper determination in this respect we conclude flows from the pronouncements made in the decisions already cited herein.

The case of State ex rel. Ballantyne v. Leeman, *supra,* was one wherein by amendment to the home rule charter of the city of Omaha the city council was authorized to issue bonds for the construction of a city auditorium and to select a site therefor. The council proceeded by proposed ordinance to select a site. A referendum was sought upon the ordinance. The right to injunction against the election was sustained. The right was sustained, as has been pointed out, on the ground that an election would be an interference with executive power and authority and not the exercise, under the facts, of a legislative right.

In the case at bar the authority to issue bonds and to levy taxes has been given as was also authority to select a site. In addition, pursuant to that authority, large expenditures of money were made and a site selected and purchased.

As has already been pointed out if the auditorium is not to be built on the site there will be an irreparable loss for which redress cannot be had in judicial proceedings or otherwise and this loss will fall in proportion to their assessable property on all of the taxpayers of the city of Lincoln.

Again as already pointed out there can be no certainty as to whether or not there would be a multiplicity of suits if this proposed amendment were adopted. The

potential and the possibility thereof certainly would with good reason threaten.

As to estoppel numerous decisions point to principles the effect of which is to say that situations such as this will give rise to an estoppel to hold such an election under circumstances such as are disclosed here.

In Philadelphia Mortgage & Trust Co. v. City of Omaha, *supra,* it was said:

"The correct rule, therefore, is, and should be, that the doctrine can be appealed to effectively, as against a municipal corporation, only when it is acting in its private as contradistinguished from its public or governmental capacity. There may be and probably are exceptions to the rule stated, as when a municipality has gained a clear and decided advantage by the act relied on to operate as an estoppel, then equity will prevent it from retaining the advantage, and at the same time deny its binding force."

The case of Mitchell v. Brown, *supra,* was one where the right of a school district to reconsider by vote action which had previously been taken to raise funds by taxation was brought into question. In the opinion it was said in part: "The selectmen were, therefore, bound to assess the tax. It was legally assessed, committed to the collector, with a warrant for its collection, and he had actually commenced the collection of it before the district, at a subsequent meeting, undertook to reconsider its previous action.

"It is clear, that, after all this had been done, it was not in the power of the district, by a reconsideration, to render nugatory the previous vote."

In Sawyer v. Railroad, *supra,* it was said: "At any time before the rights of third persons have attached, a town may rescind its votes, or the record thereof, if erroneous, may be amended in accordance with the facts; but votes cannot be rescinded to the prejudice of rights which have accrued under them."

In Benjamin v. District Township of Malaka, *supra,* a

school district case, it was said: "After the tax had been collected and this action commenced, the electors, at the annual meeting in 1878, rescinded their previous action in relation to the erection and appropriation for the house in question. By the payment of the taxes levied and collected for the purpose of erecting the house, the plaintiff's right thereto became vested, and no subsequent action of the electors, without his consent, could have the effect of depriving him of such right."

To the same effect is Kirchner v. Board of Directors, *supra.*

In Barclay v. School Township, 157 Iowa 181, 138 N. W. 395, the two earlier cases are criticised in certain respects. The holding with reference to estoppel was not criticised. The effect of the criticism was to say that the court in those cases erred in holding that the rights considered were vested as distinguished from mere rights.

In People ex rel. Osborn v. Board of Trustees, *supra,* which was a case wherein there had been an election for the purpose of raising funds for the construction of a road, it was said: "In addition to the reasons specified above, it would seem that the appropriation of the moneys for a purpose other than that for which it was raised would be an illegal and improper diversion of said fund."

In City of Hudson v. Board of Education, *supra,* a case not similar in point of fact but involving principles pertinent to this inquiry, it was said: "It is well settled 'that where substantial expenditures have been made on the strength of an ordinance or franchise, the municipality may be estopped to deny its validity, if not clearly ultra vires.' "

In Independent School District No. 68 v. Rosenow, *supra,* a school district case, it was said: "We hold therefore that the voters of a school district may, in properly called meeting, rescind the action taken at an earlier election authorizing a bond issue; provided of course that the bonds have not been issued in such fashion as to

bind the district contractually and beyond its power to withdraw. Had the proposed bond issue now under consideration gone that far, doubtless an injunction against the holding of an election to rescind the authority therefor would have been inescapable."

In Consoldiated School District No. 2 v. Cooper, *supra,* it was said: "As a usual thing, the doctrine of equitable estoppel cannot be invoked against a municipal or public corporation as to the exercise of governmental functions, but yet exceptions are to be made, and where right and justice demand it, the doctrine will be held to apply, * * *."

In Marks v. Richmond County, *supra,* a case involving the vote of a bond issue for paving and construction of specified highways, it was said: "Funds raised by a bond issue for a specific purpose by popular vote can not be diverted to any other purpose whatsoever. They constitute trust funds to be used only for the purpose for which the bonds were voted. * * * The voters might not have voted for this large issue of bonds, if the roads on which the proceeds of the bond issue were to be spent were not then in existence, and if such roads were in the future to be established and located by the county authorities or the State Highway Board. Good faith with the voters requires that these funds should be used in paving State-aid roads which had been designated at the time of the passage of this resolution and which were in existence at the date of the election."

The conclusion arrived at, therefore, on the facts as set forth in the petition and under the noted exceptions to the rules that the courts will not in advance of passage or adoption of legislation enjoin or inquire into the validity or constitutionality thereof, is that a situation has been presented which calls for a judicial declaration that the holding of the contemplated election would be invalid, and that an injunction to restrain the holding of such election is proper. On the same basis it is concluded that the city council should be declared to be under a

duty and obligation to proceed with the construction of an auditorium pursuant to the named amendments to the city charter now in existence and on the site which has been procured for that purpose.

Whether or not the facts will support a judgment under the Uniform Declaratory Judgments Act is dependent upon two considerations. The first is as to whether or not the parties plaintiff may bring the action, and the second is as to whether or not there is an actual controversy between the plaintiffs and the defendants.

As to the former there can be little doubt. A resident taxpayer without showing any other interest may maintain an action to enjoin the improper disposition of public funds raised by taxation to prevent the creation of an invalid obligation. Tukey v. City of Omaha, 54 Neb. 370, 74 N. W. 613, 69 Am. S. R. 711; Woodruff v. Welton, 70 Neb. 665, 97 N. W. 1037; Fischer v. Marsh, 113 Neb. 153, 202 N. W. 422; Neumann v. Knox, 115 Neb. 679, 214 N. W. 290; May v. City of Kearney, *supra.*

As to the latter where there is an actual controversy, recognizable as such under law, between the officials of a municipality and its taxpayers concerning the rights over the disposition of public funds and of property belonging to the municipality declaratory judgment proceedings are proper for the determination of the legal rights involved. § 25-21,150, R. R. S. 1943; City of Lincoln v. First Nat. Bank, 146 Neb. 221, 19 N. W. 2d 156; Reid v. City of Omaha, 150 Neb. 286, 34 N. W. 2d 375.

It is concluded under this authority and the conclusions arrived at herein with reference to the subject matter of the action that the issues presented are sufficient to support a declaratory judgment.

For the reasons herein set forth the decree of the district court denominated journal entry is reversed and the cause remanded with directions to enter a decree in accordance herewith.

REVERSED AND REMANDED WITH DIRECTIONS.

VIOLET KREPCIK, ADMINISTRATRIX OF THE ESTATE OF CALVIN L. KREPCIK, DECEASED, APPELLANT, V. INTERSTATE TRANSIT LINES, A CORPORATION, APPELLEE.

43 N. W. 2d 609

Filed July 19, 1950. No. 32594.

1. **Statutes.** In construing remedial statutes, there are three elements to be considered: (1) The old law, (2) the mischief, and (3) the remedy; and, unless restrained by constitutional authority, it is the duty of courts to so construe such acts as to suppress the mischief and advance the remedy.
2. ———. Remedial statutes are to be liberally construed with a view to effectuate the purposes of the Legislature; and if there be any doubt or ambiguity, that construction should be adopted which will best advance the remedy provided and help to suppress the mischief against which it was aimed.
3. ———. It is an old and unshaken rule in the construction of statutes that the intention of a remedial statute will always prevail over the literal sense of its terms, and therefore when the expression is special or particular, but the reason is general, the expression shall be deemed general.
4. **New Trial.** As to new trials, the law, prior to the adoption of section 25-1315.03, R. R. S. 1943, was: An order of a district court setting aside the verdict of a jury and granting a new trial is not a final order from which a direct appeal may be taken to this court.
5. ———. The remedy adopted by the Legislature by section 25-1315.03, R. R. S. 1943, was to provide that an order granting or denying a new trial is an appealable order.
6. **Courts: New Trial.** Federal Rule 50 (b) and our section 25-1315.02, R. R. S. 1943, deal with the power of a trial court.
7. **Courts: Appeal and Error.** Section 25-1315.03, R. R. S. 1943, deals with the power of this court on appeal.
8. **Trial: Appeal and Error.** Section 25-1315.03, R. R. S. 1943, vests the power here on appeal to review the action taken by the trial court in any action taken under section 25-1315.02, R. R. S. 1943, and to enter here the judgment in favor of the party who was entitled to the judgment in the trial court.
9. **Appeal and Error.** 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 further action. In such a case, the order is interlocutory. 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.

10. **New Trial: Trial.** Where a party litigant has taken the necessary steps under section 25-1315.02, R. R. S. 1943, and pursuant thereto has filed a motion for judgment notwithstanding the verdict and in the alternative for a new trial, the denial of the motion for a new trial is implicit in the action of the trial court in granting the motion for judgment notwithstanding the verdict and dismissing the action, and operates as a denial of the motion for a new trial.
11. **Appeal and Error.** Upon appeal from such a judgment, the action of the trial court is here within the appellate jurisdiction and not within the original jurisdiction of this court.
12. **Trial.** Where two conflicting instructions are given on a question, one containing an incorrect, and the other a correct, statement of the law, the latter will not cure the former.
13. **Trial: Negligence.** It is the duty of the trial court, without request, to submit to and properly instruct the jury upon all the material issues presented by the pleadings and the evidence. This rule applies to the affirmative defense of contributory negligence.
14. ———: ———. Where specific charges of contributory negligence are pleaded and supported by proof the instructions should submit those specific charges to the jury for its determination.
15. **Trial.** An instruction to a jury concerning the credibility of witnesses 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" is erroneous and should not be given in any case.
16. **Opinion disapproved in part.** Our opinion in Thurow v. Schaeffer, 151 Neb. 651, 38 N. W. 2d 732, is disapproved in part.
17. **Opinion modified.** Our decision in Krepcik v. Interstate Transit Lines, 152 Neb. 39, 40 N. W. 2d 252, is modified on rehearing to the extent indicated in the opinion.

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

Beatty, Clarke, Murphy & Morgan, and *William S. Padley,* for appellant.

C. B. Matthai, G. C. Holdrege, R. B. Hamer, and *James G. McIntosh,* for appellee.

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

SIMMONS, C. J.

This is an action for damages for the death of plaintiff's decedent. The cause was tried to a jury, resulting in a verdict for the plaintiff. The defendant filed a motion for judgment and, in the alternative, for a new trial. The motion for judgment was sustained and judgment rendered in favor of defendant. The trial court reserved a ruling on the motion for a new trial. On appeal here, by our opinion in 152 Neb. 39, 40 N. W. 2d 252, we reversed the judgment and remanded the cause with directions to reinstate the verdict and judgment thereon, and with the further direction that the motion of the defendant for a new trial be considered and a determination made thereon in the trial court. We granted rehearing, the argument to be limited to a consideration of section 25-1315.03, R. R. S. 1943, and the effect to be given to that section with respect to the duty and authority of this court to consider the merits of defendant's motion for a new trial filed in the district court, and the merits of defendant's motion for a new trial. The matter has been extensively briefed and reargued. On reconsideration we modify our former opinion and hold that the merits of the motion for a new trial are for determination here, and, on the merits, grant a new trial.

At the close of the trial and after both parties had rested, the defendant moved to dismiss the jury and enter judgment for the defendant, or, in the alternative, to instruct the jury to return a verdict for the defendant for four reasons: (1) The insufficiency of the evidence as to the negligence of the defendant; (2) the evidence established that the sole and proximate cause of the accident was the negligence of the decedent; (3) decedent was guilty of more than slight negligence; and (4) under all the evidence the jury would not be justified in returning a verdict in favor of plaintiff.

The court overruled the motion, and submitted the matter to the jury with the result of a verdict for the plaintiff.

Thereupon the defendant moved the court to set aside its order on defendant's motion made at the close of all the evidence, to set aside the verdict and the judgment, to enter an order sustaining the motion made at the close of the evidence, and to enter judgment in favor of defendant on the motion. In the same instrument the defendant moved that, in the event the above outlined motion was denied, the verdict be set aside and a new trial be granted upon 36 specific grounds. The matter was heard by the court upon both phases of the motion. The court sustained the motion as to the motion made at the close of all the evidence and dismissed plaintiff's causes with prejudice. The court then ordered that, defendant's motion for a new trial having been made in the event that judgment on its earlier motion was denied, "* * * it is not now necessary for the Court to rule upon said motion for a new trial, and decision and ruling thereon is therefore expressly reserved."

The matter came here on appeal and was first considered on a motion of the defendant to affirm the judgment. That motion was denied in Krepcik v. Interstate Transit Lines, 151 Neb. 663, 38 N. W. 2d 533. The matter was again before us in our decision that is now being considered on rehearing.

The first question is whether the disposition made in remanding the cause to the trial court for a ruling on the motion for a new trial was correct. The merits of the motion are for determination in the event we find our previous order to be incorrect.

We are now of the opinion that we erred, and that we did not give full consideration to the remedial nature of this statute and to the difference in the powers of trial courts in granting new trials in the federal system and in this state, and particularly we erred in not giving

consideration to the provisions of section 25-1315.03, R. R. S. 1943.

The statutes here involved provide: "Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Within ten days after the reception of a verdict, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict; or if a verdict was not returned such party, within ten days after the jury has been discharged, may move for judgment in accordance with his motion for a directed verdict. A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. If a verdict was returned the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. If no verdict was returned the court may direct the entry of judgment as if the requested verdict had been directed or may order a new trial." § 25-1315.02, R. R. S. 1943.

"An order entering judgment as provided in section 25-1315.02, or granting or denying a new trial, is an appealable order, and the time for taking appeal shall commence to run from the date of entry of such order. The Supreme Court on appeal from an order granting a new trial, or upon a review of an order denying a new trial in the action in which such motion was made, or on appeal from the judgment, may order and direct judgment to be entered in favor of the party who was entitled to such judgment." § 25-1315.03, R. R. S. 1943.

"In construing remedial statutes, there are three elements to be considered: (1) The old law, (2) the mischief, and (3) the remedy; and, unless restrained by constitutional authority, it is the duty of courts to so construe

such acts as to suppress the mischief and advance the remedy." Placek v. Edstrom, 148 Neb. 79, 26 N. W. 2d 489, 174 A. L. R. 856.

In Securities Investment Corporation v. Indiana Truck Corporation, 129 Neb. 31, 260 N. W. 691, we quoted with approval this language: "Black, Interpretation of Laws (2d ed.) 487, sec. 140, in discussing remedial statutes, says: 'Remedial statutes are to be liberally construed with a view to effectuate the purposes of the legislature; and if there be any doubt or ambiguity, that construction should be adopted which will best advance the remedy provided and help to suppress the mischief against which it was aimed. It is "an old and unshaken rule in the construction of statutes that the intention of a remedial statute will always prevail over the literal sense of its terms, and therefore when the expression is special or particular, but the reason is general, the expression shall be deemed general," ' quoting from Brown v. Pendergast, 7 Allen (Mass.) 427."

In our decision in Krepcik v. Interstate Transit Lines, 151 Neb. 663, 38 N. W. 2d 533, we stated the old law, the mischief, and the remedy, insofar as it related to the question of a motion for a directed verdict, in this language: "A district court was not, prior to an act of the Legislature of 1947 (Laws 1947, c. 85, p. 262), authorized to render a judgment notwithstanding the verdict except where, upon the statements in the pleadings, one party was entitled by law to a judgment in his favor. Where the pleadings did not show a right to a judgment, the court could not disregard a verdict and enter such a judgment as the evidence justified. If the verdict was not sustained by the evidence or was contrary to law, the remedy was, on motion therefor, to award a new trial. If the trial court was convinced it erred in submitting the case to the jury and should have directed a verdict, the remedy was a new trial, not a judgment of dismissal. § 25-1315, R. S. 1943; Winterson v. Pantel Realty Co., 135 Neb. 472, 282 N. W. 393. The limitation of this pro-

cedure was thought to be unjust because it sometimes coerced the losing party to compromise or abandon legal rights involved in the case or to suffer the delay, expense, and effort of another trial upon what frequently proved to be substantially the same evidence. It was believed that if material error occurred in the case during the trial and this was discovered or determined upon further consideration after the trial when there was better opportunity for further study, the court should be authorized to grant a new trial, or without another trial, to render judgment for the party entitled thereto as a matter of law, upon the evidence which had been produced. It was because of this that the Legislature of 1947 changed the rule and prescribed a new procedure in this regard. * * * At the time the act of the Legislature of 1947 above referred to became effective, it was a part of the procedure of this state that if a motion for a directed verdict was made during the trial of the cause, the ruling of the court thereon could not be reviewed by this court unless it was, by the party aggrieved by it, assigned as error in a motion for a new trial, and a ruling thereon secured in the trial court. Albright v. Peters, 58 Neb. 534, 78 N. W. 1063; Link v. Reeves, 3 Neb. (Unoff.) 383, 91 N. W. 506. See, also, Waxham v. Fink, 86 Neb. 180, 125 N. W. 145, 28 L. R. A. N. S. 367. A failure to observe this requirement, if the motion for an instructed verdict was sustained, limited the review in this court to a determination that the pleadings did or did not support the judgment rendered on the verdict in accordance with the direction of the court."

As to new trials, the law, prior to the adoption of section 25-1315.03, R. R. S. 1943, was: "An order of a district court setting aside the verdict of a jury and granting a new trial is not a final order from which a direct appeal may be taken to this court." Egan v. Standard Oil Co., 132 Neb. 518, 272 N. W. 327.

The mischief of this rule is well illustrated in Greenberg v. Fireman's Fund Ins. Co., 150 Neb. 695, 35 N. W.

2d 772. There a party was compelled to wait until a final order was made in the second trial in order that he could present here the question of whether or not the trial court erred in granting a new trial. We there held: "Where a party has sustained the burden and expense of a trial and has succeeded in securing the judgment of a jury on the facts in issue, he has a right to keep the benefit of that verdict unless there is prejudicial error in the proceedings by which it was secured." There the party who was successful in the first trial was delayed in securing a determination here of whether or not there was prejudicial error in the proceedings of the first trial until after he had undergone the cost and effort of a second trial. To that extent justice was denied.

The remedy adopted by the Legislature by section 25-1315.03, R. R. S. 1943, was to provide that an order granting or denying a new trial is an appealable order. As we said in Krepcik v. Interstate Transit Lines, 151 Neb. 663, 38 N. W. 2d 533, the purpose of this was to eliminate needless costs and effort, and to simplify and expedite the final disposition of litigation. If the terms of the act will reasonably permit, it should be construed to accomplish that purpose.

In our decision in this case (Krepcik v. Interstate Transit Lines, 152 Neb. 39, 40 N. W. 2d 252), we relied upon and followed Montgomery Ward & Co. v. Duncan, 311 U. S. 243, 61 S. Ct. 189, 85 L. Ed. 147, and United States Circuit Court decisions cited therein. In doing so we did not recognize the distinction between the broad unreviewable discretion of a federal trial judge to grant motions for a new trial as set out in those opinions, and the explicitly limited reviewable power of a trial court in this state. Here the rules, recently stated in Greenberg v. Fireman's Fund Ins. Co., *supra,* are:

"The district court has an inherent power as a matter of judicial grace to consider assignments of error and to grant a new trial even though the motion was not made within the time required by statute. The inherent power

of the court to grant a new trial is limited to those situations where prejudicial error appears in the record of the proceedings. It expires with the term of court at which the judgment was rendered."

"The district court has the power and is required to consider and determine motions for a new trial by the exercise of its judicial discretion."

"As used in this connection judicial discretion means the application of statutes and legal principles to all of the facts of a case."

"The power of judicial discretion authorizes and requires the court to determine the question as to whether or not a legal reason exists for the granting of a new trial. If a legal reason exists and the complaining party makes his application in writing within the time fixed by statute, the court has no discretion in the matter and the motion must be sustained. If a legal reason does not exist, the court has no discretion in the matter and the motion must be denied."

"That rule does not authorize the district court to invade the province of the jury and to set aside the verdict and grant a new trial because the court arrived at a different conclusion than the jury on the evidence that went to the jury."

In the Montgomery Ward case the court was construing and applying Rule 50 (b) of the Federal Rules of Civil Procedure. As we stated in our opinion, this rule is identical with our section 25-1315.02, R. R. S. 1943.

More important than the distinction above made is the fact that Federal Rule 50 (b) and our section 25-1315.02, R. R. S. 1943, deal with the power of a trial court. The question here presented deals with the power of this court on appeal. The Montgomery Ward case was decided December 9, 1940. Over six years later, our Legislature enacted what is now section 25-1315.03, R. R. S. 1943, dealing with the power of this court on appeal. In that act it provided: "The Supreme Court on appeal from an order granting a new trial, or upon

a review of an order denying a new trial in the action in which such motion was made, or on appeal from the judgment, may order and direct judgment to be entered in favor of the party who was entitled to such judgment." Laws 1947, c. 85, § 1 (2), p. 263. The question then is, what is our power of review under this act?

No such a rule was involved in the Montgomery Ward case. The absence of a rule making clear the power of the appellate court was commented on in Binder v. Commercial Travelers Mut. Acc. Assn., 165 F. 2d 896.

Section 25-1315.03, R. R. S. 1943, was patterned after the South Dakota statute. § 33.1705, 2 S. D. Code, 1939. However, the Judicial Council, apparently as the result of their study, caused a significant change to be made therein when the bill was proposed for introduction in our Legislature. (Legislative Journal 1947, p. 168.) It is not our province to construe the statutes of other states in this action. It appears, however, that the South Dakota statute and others cited limit the Supreme Court to a determination of the merits of the motion for a directed verdict, for it is provided that the court may "* * * direct judgment to be entered in favor of the party who was entitled to have such verdict directed in his or its favor, whenever it shall appear from the testimony that the party was entitled to have such motion granted." § 33.1705, 2 S. D. Code, 1939. Our statute is not so limited. While our statute was copied in part from the South Dakota act, it is obvious that the Judicial Council and the Legislature intentionally omitted the limiting language quoted, and instead used the much broader language, "* * * may order and direct judgment to be entered in favor of the party who was entitled to such judgment." § 25-1315.03, R. R. S. 1943. For these reasons we do not deem it necessary to review the decisions of those states here. Neither do we deem it necessary to review our own decisions dealing with comparable situations prior to the adoption of this act. It is patent that in adopting a procedural statute such

as ours, the Legislature cuts a new path through existing rules in so doing. Our task is to construe and apply the new procedure.

Clearly section 25-1315.03, R. R. S. 1943, vests the power here on appeal to review the action taken by the trial court in any action taken under section 25-1315.02, R. R. S. 1943, and to enter here the judgment in favor of the party who was entitled to the judgment in the trial court. Such a decision is consistent with the purpose to eliminate needless costs and effort and to simplify the final disposition of litigation.

But here the trial court, while ruling on the motion for a directed verdict, expressly did not rule upon the motion for a new trial, although that motion was presented. The effect of the judgment entered was to dispose of the case, including the motion for a new trial. It was a final judgment.

It is the rule that "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 further action. In such a case, the order is interlocutory. 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." Lincoln Joint Stock Land Bank v. Barnes, 143 Neb. 58, 8 N. W. 2d 545.

The order of the court here dismissing the action was a final order and an appealable one. That appeal brings here for determination all matters which were considered by the trial court and which were in effect determined by the trial court. Any other decision would nullify in part the purpose and intent of the Legislature in enacting section 25-1315.03, R. R. S. 1943.

We are mindful of the rule stated in Underwriters Acceptance Corporation v. Dunkin, 152 Neb. 550, 41 N. W. 2d 855, that "A question not presented and ruled on by the trial court will not be considered on appeal. Neither does a motion, which was never presented and

ruled on below, present anything for review."

The reason for this rule as stated in Waxham v. Fink, 86 Neb. 180, 125 N. W. 145, 28 L. R. A. N. S. 367, is to give the trial court an opportunity to correct all errors complained of, and no alleged error can be considered as ground for reversal that is not so brought to the attention of the trial court.

Here that opportunity and call-to-attention were given but not acted on.

We must recognize the practical situation here, however, that the motion for a new trial was presented and considered by the trial court and in effect denied, and the like result that when the trial court sustained defendant's motion to dismiss, there was then no need or occasion to press for a further decision on the merits of the motion for a new trial. Defendant had accomplished its ultimate desire in the cause.

Under these circumstances there was a denial of the motion for a new trial by operation of law. The denial was implicit in the trial court's decision dismissing the action. Georgia Casualty Co. v. Boyd, 34 F. 2d 116; Larson v. Long, 73 Colo. 241, 214 P. 539; Motor Finance Co. v. Universal Motors (La. App.), 182 So. 143; Carmichael v. Estate of Glenn Bailey, 163 Kan. 741, 186 P. 2d 99; 4 C. J. S., Appeal and Error, § 363, p. 791.

This brings us to the contention that for us to pass upon the merits of the motion for a new trial here would be to exercise original jurisdiction in violation of the provisions of Article V, section 2, of the Constitution. As we view this record, we are called upon to exercise appellate and not original jurisdiction. In Wallace v. Clements, 125 Neb. 358, 250 N. W. 235, relied upon by defendant, an original application was made here for a moratorium on a case brought here on appeal. We held that it was not within the original jurisdiction of this court, and to grant it would require the reversal of a valid judgment on a question not presented to or considered by the trial court or raised here by the record,

and that such a course was at variance with proper appellate procedure. That situation does not exist here.

Accordingly we hold that the merits of the motion for a new trial are properly before us for determination, and that we erred in remanding the cause to the trial court to make that determination.

The defendant's first assignments of error as to the motion for a new trial argued here go to the charges that the verdict is contrary to the evidence and is not sustained or supported by sufficient evidence. We adhere to our conclusions in the previous opinion as to those matters.

The next assignment is that the court erred in giving instruction No. 6 to the jury. It is as follows: "Contributory negligence on the part of said Calvin L. Krepcik does not bar the plaintiff's recovery, if such contributory negligence was slight, and if also the negligence of the said Donald E. Quinn, driver of said bus, proximately causing the death of said Krepcik, if any such existed, was less than gross in comparison to the contributory negligence of said decedent. But if any contributory negligence existed on the part of said Krepcik, and the negligence on the part of said Quinn contributing to the proximate cause of the death of said Krepcik, if any such existed, was in any degree less than gross in comparison to such contributory negligence of said Krepcik, then such contributory negligence on the part of said Krepcik does bar the plaintiff's recovery. Likewise, if contributory negligence on the part of said decedent Krepcik existed and if the same was in any degree more than slight in comparison to the negligence of said Quinn that contributed to the proximate cause of said death, if any such existed, then also such contributory negligence on the part of said decedent Krepcik does bar the plaintiff's recovery. In case you find that any contributory negligence existed on the part of said decedent Krepcik, but that the same was not sufficient in extent to bar the plaintiff's recovery under the rules

above stated, then you will consider such contributory negligence on the part of said decedent Krepcik in diminution of the amount of plaintiff's recovery in proportion to the amount of contributory negligence attributable to said decedent Krepcik.

"You will note from the rules above given that the amount that you may deduct from the plaintiff's recovery, in case you should find for the plaintiff, must necessarily not be any large per cent of the total damages, for the reason that otherwise the contributory negligence of said decedent Krepcik would be sufficient in extent to bar recovery entirely."

The complaint here goes to the first and last sentences of the instruction.

As to the first sentence, the charge is that by the use of the words "less than" in the instruction, a positive misstatement of the law was made, and that it was not corrected by the correct statement in the second sentence. That the first sentence is erroneous is conceded.

The statute is: "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, but the contributory negligence of the plaintiff shall be considered by the jury in the mitigation of damages in proportion to the amount of contributory negligence attributable to the plaintiff; and all questions of negligence and contributory negligence shall be for the jury." § 25-1151, R. R. S. 1943.

In Morrison v. Scotts Bluff County, 104 Neb. 254, 177 N. W. 158, we said: "The true rule is that, if plaintiff is guilty of negligence directly contributing to the injury, he cannot recover, even though defendant was negligent, unless the contributory negligence of plain-

tiff 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."

This rule has been repeatedly followed down to and including Roby v. Auker, 151 Neb. 421, 37 N. W. 2d 799, where we said: "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."

By instruction No. 4, the court called attention to the "rules relating to contributory negligence" to be later given. By instruction No. 10, the court told the jury that it could not properly decide the issue without a consideration of the meaning of the words "negligence," "gross negligence," and "slight negligence."

That the first sentence of the instruction was prejudicial to the defendant is patent. In Missouri P. Ry. Co. v. Fox, 56 Neb. 746, 77 N. W. 130, we said: "An inaccuracy or incomplete statement in a charge may be cured by further correct and supplementary statements; but an absolute misstatement of the law cannot be cured by a subsequent correct statement conflicting therewith. The doctrine is familiar."

In Koehn v. City of Hastings, 114 Neb. 106, 206 N. W. 19, we said: "Where conflicting instructions are given, it leaves the jury in doubt as to which should be followed" and held: "Where two conflicting instructions are given on a question, one containing an incorrect, and the other a correct, statement of the law, the latter

will not cure the former." This was followed in Toliver v. Rostin, 120 Neb. 363, 232 N. W. 616; Brooks v. Thayer County, 126 Neb. 610, 254 N. W. 413; and Robison v. Union Transfer Co., 141 Neb. 574, 4 N. W. 2d 558. Under this situation it is impossible to tell which rule the jury attempted to follow. The jury could not intelligently follow both; it might have followed neither. This error in the instruction requires reversal of the judgment and remanding of the cause for a new trial.

We think, also, that there was prejudicial error in the concluding sentence of the instruction. The statute defines the basis for the jury's consideration of the contributory negligence of the plaintiff. The instruction told the jury in effect that if it determined that the verdict should be for the plaintiff and the amount, the jury then should determine the amount that the damages should be diminished in mitigation, and it should make certain that the amount in diminution was not any large percentage of the total, lest it show that the contributory negligence of the plaintiff's decedent was sufficient to bar recovery entirely. The suggestion is that the jury was to check the amount of diminution against the total damage, and, if the one was too great, to reduce it lest it prove the jury's conclusion that plaintiff should recover to be erroneous. The jury was not instructed to reexamine its conclusion as to liability under the comparative negligence rule, but rather to make the figures prove the correctness of its conclusion. The instruction obviously is prejudicial and should not have been given.

In this action plaintiff pleaded specific acts of negligence of the defendant. The defendant by answer pleaded that the accident was due to the negligence of the deceased in some eight particulars. The trial court by its instructions submitted to the jury the "material elements" of plaintiff's cause of action as to negligence upon which there was conflict in the evidence. The trial court instructed the jury as to the burden of proof as to negligence and contributory negligence, and that if plaintiff

was prevented from recovery on account of contributory negligence on the part of decedent, then it should so find for defendant. At no point in the instructions did the trial court set out or fully advise the jury as to the specific acts of negligence alleged by the defendant as a defense.

Defendant contends that those allegations were sustained by evidence, and that it was error for the trial court to fail to submit issues as to contributory negligence. Defendant also contends that it was error to stress the plaintiff's charges of negligence and impress them on the jury and at the same time fail to similarly stress and impress defendant's charges of negligence. Plaintiff answers that she was held to her specific allegations of negligence; that the defendant was not so limited; that under the instructions the jury could have found for the defendant upon any theory of contributory negligence, whether pleaded or not; and that had the defendant wanted more specific instructions, it should have requested them.

We discuss these contentions only insofar as is necessary to guide the court on a retrial of this case. Whether or not the evidence hereafter may require the submission of the specific allegations of negligence in whole or in part cannot now be determined.

The error of this method of instruction is well illustrated by the Supreme Court of Missouri in Schide v. Gottschick, 329 Mo. 64, 43 S. W. 2d 777, where, in reference to an instruction there considered, that court said: "It is too general to constitute a direct guide for the jury and amounts to what is commonly termed a roving commission. It fails to advise the jury, or point out in any way, what acts or omissions on the part of plaintiff, if any, found by them from the evidence, would constitute contributory negligence. It permitted them to base a finding for defendant 'on any theory of negligence which they could construct or evolve out of their own minds and was therefore erroneous.' "

The applicable rules are:

"It is the duty of the trial court, without request, to submit to and properly instruct the jury upon all the material issues presented by the pleadings and the evidence." Dunlap v. Welch, 152 Neb. 459, 41 N. W. 2d 384. This rule applies to the affirmative defense of contributory negligence. Johnson v. Griepenstroh, 150 Neb. 126, 33 N. W. 2d 549.

It is the uniform and proper practice in this state that where specific acts of negligence are charged and supported by the evidence, the trial court instructs as to the specific acts so alleged and supported. It necessarily follows that where specific charges of contributory negligence are pleaded and supported by proof the instructions should submit those specific charges to the jury for its determination. Reece v. Jefferson Transp. Co. (Mo. App.), 160 S. W. 2d 789. To fail to do so, whether or not requested to do so, is error.

It is recognized that it may be argued that the rules here stated are in conflict in part with our conclusions stated in Thurow v. Schaeffer, 151 Neb. 651, 38 N. W. 2d 732. To the extent of the conflict, our application of the rules in that case is disapproved.

The trial court, as a part of its instruction on the credibility of witnesses, gave this instruction: "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." Defendant assigns it as prejudicial error.

This instruction was before us in Moore v. Pacific Mutual Life Ins. Co., 128 Neb. 605, 259 N. W. 916, and there was held free from prejudicial error. It again was before us in Asbra v. State, 144 Neb. 146, 12 N. W. 2d 845, where we held that the instruction was not prejudicial to the defendant. It was here in Wilson v. State, 150 Neb. 436, 34 N. W. 2d 880, where we held that the giving of the instruction was prejudicial error, and in doing so

held: "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 abridgment of that right by the trial court in instructions to a jury amounts to the deprivation of the benefits of this substantial right." This was followed in Frank v. State, 150 Neb. 745, 35 N. W. 2d 816, where it was stated in the syllabus that it was ordinarily prejudicial error to give such an instruction in a criminal case. It was followed in 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 instruction to be prejudicial, and did so again in Jennings v. State, 150 Neb. 828, 36 N. W. 2d 268. In Schluter v. State, 151 Neb. 284, 37 N. W. 2d 396, we held that the giving of the instruction was prejudicial error. The dissenting judges held that the giving of the instruction was error, but not prejudicial. In Kitts v. State, 151 Neb. 679, 39 N. W. 2d 283, we held that the giving of the instruction was prejudicial error. See, also, Latham v. State, 152 Neb. 113, 40 N. W. 2d 522.

It will be noted that we have not held in any of these opinions that the instruction was free from error. In the two cited cases we have held that it was free from prejudicial error.

Because reversal here is necessary for other errors we need not determine whether or not the error is prejudicial here. The instruction is erroneous and should not be given again.

For the reasons given herein, our opinion in Krepcik v. Interstate Transit Lines, 152 Neb. 39, 40 N. W. 2d 252, is set aside insofar as it directs the trial court to consider and determine the motion for a new trial. Our judgment of reversal therein is adhered to. The judgment of the trial court is reversed and the cause is remanded for a new trial.

REVERSED AND REMANDED.

YEAGER, J., dissenting.

I respectfully dissent from the latest opinion adopted in this case in its entirety. I do not dissent from that portion which concludes that on its merits the motion for new trial should be sustained on the ground that this conclusion is incorrect but on the ground that the merits of the motion are not, under the law as it is rather than as the opinion declares it to be, at this time before this court.

I insist that the opinion in 152 Neb. 39, 40 N. W. 2d 252, is a proper and correct present disposition of the case. The insistence here is based on all of the reasons set forth in that opinion together with other pertinent statutes, legal principles, and section 25-1315.03, R. R. S. 1943, which the latest opinion erroneously says was not given consideration. It is true that section 25-1315.03 is not referred to in the opinion but it does not follow that it was not duly and carefully considered. It was not mentioned but it is obvious that it was carefully considered since the determination is in strict conformity with the mandate of that section.

This latest opinion in 36 paragraphs dealing with the statement of the case and that subject comes to the conclusion that after reversing the judgment notwithstanding the verdict we were in error in remanding the cause for a ruling on the motion for new trial. The basis of the conclusion is, as stated in the opinion, that we failed to give consideration to section 25-1315.03.

In this connection I submit that in all of this there is no analysis of the section on which to base such a conclusion. An examination of the statute furnishes the reason for this failure. A faithful analysis of the provision finds it devoid of any language or reasonable inference to support the conclusions of the majority.

One conclusion drawn in the opinion is directly contrary to the specific language of the statute. In the opinion it is said: "Clearly section 25-1315.03, R. R. S. 1943, vests the power here on appeal to review the action taken

by the trial court * * * and to enter here the judgment in favor of the party who was entitled to the judgment in the trial court."

The statute provides: "The Supreme Court on appeal * * * may order and direct judgment to be entered in favor of the party who was entitled to such judgment."

While this may not be of grave importance in the light of other considerations it thus early herein demonstrates that the majority opinion fails to comprehend the true nature and quality of the statutory provision.

Before passing on to any analysis of the statutory provisions in the light of their context it is deemed apropos and not impertinent to call attention to a strange and revolutionary and withal dangerous approach to and arriving at an ascertainment of legislative intent. In the opinion it is said: "However, the Judicial Council, apparently as the result of their study, caused a significant change to be made therein when the bill was proposed for introduction in our Legislature." And again: "While our statute was copied in part from the South Dakota act, it is obvious that the Judicial Council and the Legislature intentionally omitted the limiting language quoted, and instead used the much broader language, * * *."

Viewed from any point this is to say that in statutory interpretation for the purpose of arriving at intent resort at least in part is to be had to the intention of a proponent of legislation, though the proponent is not a part of the legislative machinery. I submit that the voice of the lobbyist has no proper place in the deliberations of this court when it engages in the solemn function of the ascertainment of legislative intent.

One of the conclusions of the majority opinion is that in instances such as is confronting here the Legislature intended to and did abrogate rules reannounced as late as Underwriters Acceptance Corporation v. Dunkin, 152 Neb. 550, 41 N. W. 2d 855, as follows: "A question not presented and ruled on by the trial court will not be considered on appeal. Neither does a motion, which was

never presented and ruled on below, present anything for review."

Also a conclusion is that the Legislature intended and did abrogate, again in such instances as this, that body of statutory law and the decisions of this court which make indispensable as a basis for review in this court the filing of a motion for new trial and a ruling thereon by the trial court in cases where the errors complained of depend upon errors of law occurring at the trial and rulings made during the trial. Krepcik v. Interstate Transit Lines, 151 Neb. 663, 38 N. W. 2d 533.

Neither of these conclusions finds even the remotest basis in these statutory provisions. Clearly inferentially if not indeed specifically the provisions preserve and protect all of the preexisting rights of parties litigant under preexisting statutes and decisions with regard to motions for new trial and motions generally, the foremost of which was to file them and to have them ruled upon first by the trial court.

It is freely conceded that the Legislature could with perfect propriety dispense with the necessity for a motion for new trial and a ruling thereon as a condition precedent to consideration here on review. It however did not do so. This legislation is not and does not purport to be, if its text is to be given reasonable regard, any restriction, limitation, or extension of the manner in which motions for new trial as such were to be regarded and treated under preexisting statutes and decisions.

Just what are the contents of these statutory provisions anyway? What functions do they perform? What evils were they designed to correct? The answers to these questions must flow fundamentally from what the Legislature said in coordination with related law on the subject, and not from extraneous discovery of the intent of the Judicial Council.

As is well known and as is pointed out in the majority opinion in Krepcik v. Interstate Transit Lines, 151 Neb. 663, 38 N. W. 2d 533, prior to this legislation a district

court was not authorized to render a judgment notwithstanding the verdict except where, upon the statements in the pleadings, one party was entitled by law to a judgment in his favor. If a district court submitted a case to a jury and a verdict was returned sustaining a cause of action, even though there was no evidence to sustain a cause of action and even though a motion for a directed verdict had been made at the close of the trial it could do no more than to sustain a motion for new trial. It could not go back and review the motion for directed verdict and render such judgment as would have been proper before the verdict was returned. Winterson v. Pantel Realty Co., 135 Neb. 472, 282 N. W. 393.

Also prior to this legislation the action of the district court in granting a motion for new trial was not reviewable on appeal unless and until there was a new trial and a verdict adverse to the party against whom the motion for new trial had been sustained. Greenberg v. Fireman's Fund Ins. Co., 150 Neb. 695, 35 N. W. 2d 722.

The purpose of the legislation as is disclosed by its context was to permit the trial court after verdict or if none was returned to review its prior action and to render such judgment as would have been proper on the motion for directed verdict at the time made, and to permit this court to review the ruling or rulings of the district court in this connection, and further to permit this court to review without a retrial the action of the district court in sustaining a motion for new trial. The provision also makes an order overruling a motion for a new trial an appealable order but this is not new at least when it is coupled with a judgment in conformity therewith.

In other words all that the legislation does in these connections is to extend the powers of the district court and, within the measure outlined, to extend the power of review on appeal. It does not directly or by any quality of inference confer upon this court any power of original action not found in previous legislation.

I submit that analysis confirms without peradventure the contentions set forth herein. By section 25-1315.02, if a motion is made for a directed verdict at the close of the evidence in a case and denied, the following, and nothing else, is provided for and from it nothing else may flow: (1) It is to be deemed that the court submitted the action to the jury subject to a later determination of the legal questions involved in the motion; (2) within ten days after the verdict the moving party may move for judgment notwithstanding the verdict; (3) if there is no verdict such party may move for a judgment in accordance with the motion for directed verdict; (4) a motion for new trial may be filed with this motion; (5) a motion for new trial may be prayed for in the alternative; (6) if a verdict was returned the court is empowered (a) to allow the judgment to stand, (b) to reopen the judgment and order a new trial, or (c) to direct the entry of judgment as if the requested verdict had been directed; and (7) if no verdict was returned the court may direct the entry of judgment as if the requested verdict had been directed or may order a new trial.

Section 25-1315.03 contains just two sentences. The first provides only and in simple language that the entry of judgment pursuant to section 25-1315.02 is an appealable order; that the granting of a new trial is an appealable order; and that the denial of a new trial is an appealable order.

The second sentence defines and prescribes the limitation upon the power and function of this court when subjects come here on *appeal*. The terms of this second sentence are likewise simple. Without any confusion or opportunity or occasion for misunderstanding or misinterpretation it says that *on review on appeal* of a judgment entered, or in an action where no verdict was returned, or from an order granting a new trial, or from an order denying a new trial, this court may direct judgment to be entered in favor of the party who was entitled to such judgment.

In re-emphasis of this point already made it is to be observed that at no point in any part of this legislation is the Supreme Court empowered either directly or by reasonable implication to exercise any original jurisdiction with regard to the subjects therein considered. It grants only power to consider specific matters under appellate jurisdiction and to make *direction* solely in the light of appellate consideration.

Applied to this case when it came here on appeal this court was empowered only to consider the attack upon the judgment notwithstanding the verdict since that was all that ever was or is before this court. Having found that the judgment was erroneous and could not be sustained this court had power only to reverse the judgment, remand the cause, and give directions to the district court to adjudicate (direct judgment to be entered) upon the record as it stood in the district court after the judgment was reversed, that is to proceed and determine judicially the matters which stood, in the light of the determination of this court, without decision. The thing which stood without adjudication was the motion for new trial.

That motion stood without decision and moreover under no cited or known rule of law or reason could it have been ruled upon with finality in the absence of an ultimate determination upon the motion for judgment notwithstanding the verdict favorably to the plaintiff. The most that could ever have been done was for the district court to have anticipated a possibility that the judgment would be reversed and in that light to have academically and tentatively ruled upon the merits of the motion for new trial. There is nothing in the statute which points to any such procedure.

Attention has been directed to what these statutory provisions do contain. Attention is now directed to fallacious assumptions of their content contained in the majority opinion and some of the reasons why those assumptions ought not to be indulged.

The majority opinion assumes that the effect of the sustaining of the motion for judgment notwithstanding the verdict and rendition of judgment accordingly was a judgment of dismissal. Not desiring to be technical I shall not voice any disagreement in that respect. However the related assumption that this became in effect a judicial determination upon the motion for new trial adversely to the appellee I cannot so mildly dismiss. The implications of such an assumption are much too startling.

In this case the defendant won completely its lawsuit and by the judgment on its motion for judgment notwithstanding the verdict. Upon it no burden remained. The judgment had finality subject only to reversal on review in this court on appeal by the plaintiff. Contrary however to this necessary implication the assumptions of the majority opinion impose the burden upon this defendant of becoming an appellant with the duty to seek a reversal of an adjudication which was never made, an adjudication which was expressly and properly reserved, and moreover one which could not have been made properly and with valid and binding force and effect except in the event of reversal of the judgment notwithstanding the verdict by this court.

An inevitable inference from the assumptions of the majority opinion and the manner in which the subject is treated is that if the trial court had ruled upon the merits of the motion for new trial the adjudication would have been adverse to the defendant. If this inference is not correct then why did this court require the defendant to appear before this court as appellant on the motion rather than to require the plaintiff to come as appellant to overcome the assignments contained in the motion?

I submit no such inference may properly flow from the record and the statutory provisions under consideration, and no other statutes and no decision of this court supply a basis for the indulgence of any such inference.

The motion for new trial contained 36 assignments of error and only one was the same as any assignment contained in the motion for directed verdict. The two motions as this discloses were basically different. Who in this light can validly infer what the adjudication would have been had one been made?

And yet by the majority opinion in this case the decision is not only inferred but also that it would have been necessarily wrong.

This is the confusion which the majority opinion says that the Legislature sought to impose upon litigants and the legal profession of the state of Nebraska. I am not convinced that any intention to so confuse flows from this legislative expression.

I submit that the original opinion in this case correctly determines the issues involved and that its disposition of the case should not be disturbed.

BOSLAUGH, J., concurs in this dissent.

MYRTLE FITZSIMONS, APPELLEE, V. VIRGINIA R. FREY, APPELLANT, WYONA FREY, APPELLEE.

43 N. W. 2d 531

Filed July 19, 1950. No. 32769.

1. **Furniture.** The word "furniture" has been defined to include movable articles including articles of ornamentation such as a pair of branch candlesticks or candelabra.
2. **Contracts.** Language used in an agreement prepared by one of the parties thereto, which is susceptible of more than one construction, should receive such a construction as the party preparing the same at the time supposed the other party would give to it, or such a construction as the other party would be fairly justified in giving to it.
3. **Evidence.** Parol evidence is generally admissible when it is offered for the purpose of explaining and showing the true nature of the transaction between the parties. Such evidence is not offered for the purpose of varying the terms of a written instrument between the parties.

4. **Trial.** The "burden of proof" means the duty resting on one party or the other, usually the party having the affirmative, to establish by preponderance of evidence a proposition essential to the maintenance of the action. In this sense the burden of proof never shifts or changes, but remains from the first to last where it is placed by the pleadings or the substantive law of the case.
5. ———. An instruction on the burden of proof which fails to inform the jury as to what their verdict should be in the event the evidence is equally balanced or preponderates in favor of the defendant is prejudicially erroneous.
6. ———. Evidence examined and held sufficient to warrant submission to the jury.

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

Max Kier and *Charles Bocken,* for appellant.

William L. Walker, Earl Ludlam, and *Leonard Dunker,* for appellee Fitzsimons.

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

MESSMORE, J.

This is a replevin action instituted by the plaintiff against the defendant to recover certain personal property, for the purposes of this appeal, described as a pair of candelabra or branch candlesticks. The plaintiff's amended petition alleges that she is the owner of one pair of large, tall grape candelabra, is entitled to the immediate possession of the same, and that said property is wrongfully and unlawfully detained by the defendant. The defendant's answer is a general denial.

The cause was tried to a jury resulting in a verdict finding that at the commencement of the action the right of possession of the personal property in controversy, to wit: One pair of large grape candelabra, was in the plaintiff, and assessing damages against the defendant in the amount of one cent. The defendant Wyona Frey was dismissed out of the action, the evidence being insuf-

ficient to show that she was involved in the controversy.

Upon the overruling of the defendant's motion for new trial, defendant appeals.

For convenience we will refer to the parties as originally designated in the district court.

The defendant predicates error on the trial court's part in not instructing a verdict for the defendant as requested by defendant's tendered instruction No. 2. We examine the record to determine whether or not the trial court erred in such respect.

The record shows that on December 3, 1947, through a real estate agency, an appointment was made for the plaintiff to meet the defendant and her daughter Wyona at the defendant's home with a view to exchanging real estate properties. While the plaintiff was inspecting the interior of the defendant's home she saw and inspected a pair of grape candelabra which were sitting on the dining room table. The plaintiff testified that the defendant, talking with reference to the exchange of properties, stated that she wanted $85,000 for her property just as it stood. From that date until April 4, 1948, the plaintiff was in the defendant's home a number of times, and each time the candelabra were on the dining room table.

On the evening of April 3, 1948, the defendant called the plaintiff, saying in effect that she and the plaintiff could make their own agreement about the furnishings the way they wanted it, as they understood each other. Pursuant to arrangements made at that time, the plaintiff went to the defendant's home the following day, April 4, 1948. The plaintiff and defendant were alone, and while they were going through the house the defendant said she did not want anything, that there was no sentiment about it and she would be better off out of the big house, and told the plaintiff: " 'Everything is yours, lock, stock and barrel.' " The plaintiff saw the pair of candelabra that day. The defendant told her: " 'They belong on this table; they are yours. They belong in this house.'

* * * 'I couldn't use them in a small house.' " The parties then discussed the exchange of properties and household furnishings. An agreement was written out by the plaintiff. The plaintiff testified that the defendant dictated the agreement, but this is denied by the defendant.

The agreement, exhibit No. 1, is as follows: "Between Vergina Frye and Myrtle Fitzsimons agreement on furniture Party 2. Fitzsimons agrees To Leave ~~refrigerator~~ and Stove on 2nd floor Electric range In Kitchen also deep freeze White Handles. Mrs. Frey takes 2 bedroom sets the furniture known as In Wyona's apt also her refrigerator. Also her desk and Duano. rose. this is our personal agreement between we two." Signed "Virginia R. Frey. Myrtle Fitzsimons."

On April 6, 1948, the plaintiff, her friend Roy Young, and the defendant met in the office of the defendant's counsel. Plaintiff's counsel was also present. A discussion was had between the parties as to the contents of a contract to be prepared for the exchange of real estate between the parties. The witness Roy Young testified that at that time the plaintiff handed the defendant's counsel the agreement, exhibit No. 1, and asked him to look it over and have the defendant verify her signature. Counsel handed it to the defendant. She acknowledged her signature, and discussion ensued between the defendant's counsel and the defendant with reference to the rights of the defendant under the agreement. The plaintiff testified that the defendant said she knew what it meant, she had no sentiment about it, and she was trading and getting what she wanted. The defendant denied that she had the agreement, exhibit No. 1, on that day, or that anything was said about it by the plaintiff or any other person, and stated that her counsel did not see exhibit No. 1 until after the instant case was started.

On that date counsel for the respective parties suggested that a contract be drawn in connection with any personal property that was to be exchanged. To such

suggestion both the plaintiff and defendant said they would handle that matter between themselves. With reference to this agreement, the testimony of the parties is to the effect that the purpose for drawing the agreement themselves was to save attorney fees and cut down on revenue stamps, and that there was no reason to include such agreement in the real estate contract.

On April 20, 1948, the contract with reference to the exchange of real estate was effected by the parties. The next day the parties started moving, and the moving was completed either on April 28 or 29. During the moving process there was argument between the plaintiff and defendant with reference to moving certain articles which included the candelabra. Three or four days after the moving was completed plaintiff discovered that the candelabra were missing.

On May 5, 1948, the deeds were signed and delivered by the respective parties. Both their counsel were present. This completed the real estate transaction. In concluding the settlement, the plaintiff gave the defendant a check which, after deducting a tax claim, amounted to $324.97, and leases were assigned.

The defendant testified that when the agreement of April 4 was entered into she told the plaintiff that she would keep all personal belongings such as all bric-a-brac, mirrors, silver, and anything like that; that she had owned the candelabra, which is of grape design and part of a set, for a period of 20 years; that she never had any conversation at any time with the plaintiff wherein the plaintiff claimed the candelabra; that at the time of the exchange of deeds on May 5, 1948, she and the plaintiff, in response to her counsel's question, stated that everything had been completed; and that the plaintiff stated that she had everything she was supposed to get, and the defendant made a like statement. She further testified that the plaintiff had no complaint and made no protest when she signed and delivered the deeds, and at that time everything was amicable and friendly.

Plaintiff's counsel testified that at the time the exchange of the real estate was consummated there was no discussion about personal property which should be left in the defendant's home.

An official of the storage and transfer company that moved the parties testified he never heard any conversation during the progress of the moving between the plaintiff and defendant relative to the candelabra. After the move was completed and while he was collecting his bill he had a conversation with the plaintiff and Roy Young, wherein the plaintiff said she was satisfied with the move, and made no complaint about not receiving the candelabra. She paid her bill and acknowledged on the ticket that the work was satisfactory and all goods received in good condition.

Roy Young further testified that he saw the candelabra in the dining room of the defendant's home, and that he understood she was to keep the silverware, that is, the knives and forks. He did not recall a conversation about the candelabra.

The candelabra were taken under the writ of replevin and placed in possession of the plaintiff.

It is apparent from the evidence that there is a conflict therein with reference to the ownership and right of possession of the candelabra. We conclude the trial court did not err in submitting the case to the jury.

The defendant contends that the word "furniture" used in the agreement, exhibit No. 1, does not include silverware or candelabra, and tendered an instruction to such effect, which was refused.

The word "furniture" has been defined to include movable articles, including articles of ornamentation. See, Webster's New International Dictionary; 37 C. J. S., Furniture, pp. 1412, 1413, and 1414.

Furniture means all personal chattels which may contribute to the use or convenience of the householder or the ornament of the house. See, Marquam v. Sengfelder,

24 Or. 2, 32 P. 676; Bell's Administratrix v. Golding, 27 Ind. 173.

We conclude that the word "furniture" included the candelabra in question, and the trial court did not err in refusing defendant's tendered instruction contra thereto.

The defendant contends the trial court erred in permitting oral testimony to be received with reference to the agreement. It will be noted that the agreement is ambiguous and difficult to construe. In such a situation the following authorities are applicable: "Language used in a contract prepared by one of the parties thereto, which is susceptible to more than one construction, should receive such a construction as the party preparing the same at the time supposed the other party would give to it, or such a construction as the other party would be fairly justified in giving to it." Flory v. Supreme Tribe of Ben Hur, 98 Neb. 160, 152 N. W. 295. See, also, Blum v. Poppenhagen, 142 Neb. 5, 5 N. W. 2d 99; Bradway v. Higgins, 152 Neb. 724, 42 N. W. 2d 627.

"Parol evidence is generally admissible when it is offered for the purpose of explaining and showing the true nature of the transaction between the parties. Such evidence is not offered for the purpose of varying the terms of a written instrument between the parties." Brock v. Lueth, 141 Neb. 545, 4 N. W. 2d 285. See, also, Davis v. Sterns, 85 Neb. 121, 122 N. W. 672; Spangenberg v. Losey, 116 Neb. 112, 216 N. W. 191; Bradway v. Higgins, *supra.*

No error was committed by the trial court in permitting the testimony objected to to be received.

The defendant predicates error on instruction No. 4 given by the trial court as follows: "You are instructed that before the plaintiff can recover in this action, she must prove, by a preponderance of the evidence, all of the material allegations of her amended petition. Therefore, the burden is on the plaintiff to prove, by a preponderance of the evidence (1) That at the time of the

commencement of this action, she was the owner and entitled to the immediate possession of the property described therein, to-wit: One pair of large tall grape candelabra, and (2) That the same were at that time wrongfully detained from her by the defendant. If the plaintiff has established both of said propositions, by a preponderance of the evidence, then your verdict should be for the plaintiff. On the other hand, if you believe, from a preponderance of the evidence, that the plaintiff has failed to establish said propositions, your verdict should be for the defendant."

The defendant contends that the language "if you believe, from a preponderance of the evidence, that the plaintiff has failed to establish said propositions, your verdict should be for the defendant" is prejudicially erroneous. The following authorities are cited to disclose the legal importance of the burden of proof.

The burden of proof means the duty resting on one party or the other, usually the party having the affirmative, to establish by preponderance of evidence a proposition essential to the maintenance of the action. In this sense the burden of proof never shifts or changes, but remains from first to last where it is placed by the pleadings or the substantive law of the case. This rule is founded upon the obvious purpose of facilitating justice by serving the convenience of the court; and as the rule as to burden of proof is a fixed rule of law, the burden never shifts from the party having the affirmative of the issue. The rule as to the burden of proof is important and indispensable in the administration of justice, and constitutes a substantial right of the party upon whose adversary the burden rests. It should therefore be jealously guarded and rigidly enforced by the courts. The test for determining which party has the affirmative, and therefore the burden of establishing a case, is found in the result of an inquiry as to which party would be successful if no evidence at all were given, the burden being of course on the adverse party.

See Shiman Bros. & Co. v. Nebraska Nat. Hotel Co., 146 Neb. 47, 18 N. W. 2d 551. See, also, Kucaba v. Kucaba, 146 Neb. 116, 18 N. W. 2d 645; 20 Am. Jur., Evidence, § 135, p. 138; In re Estate of Hagan, 143 Neb. 459, 9 N. W. 2d 794, 154 A. L. R. 573; 46 Am. Jur., Replevin, § 113, p. 62.

The plaintiff in an action of replevin has the burden of proving his case by a preponderance or greater weight of the evidence. Thus, the burden is upon him to show that at the time of the commencement of the action he was the owner of the property sought to be replevied, that he is entitled to immediate possession of the property, and that the defendant wrongfully detains it.

The instruction on the burden of proof heretofore set out, especially the language "if you believe, from a preponderance of the evidence, that the plaintiff has failed to establish said proposition, your verdict should be for the defendant" used therein, does not show what rule of law the jury is required to believe from a preponderance of the evidence that the plaintiff has failed to prove his case, before the defendant can recover. There is no language in the instruction that informs the jury to whom the verdict should go in the event the evidence was equally balanced, or in the event the evidence preponderates in favor of the defendant. In view of the authorities cited upon the burden of proof and an analysis of the instruction on the burden of proof heretofore stated, we conclude that the giving of the instruction in the form in which it was given constituted prejudicial error.

Other assignments of error need not be discussed.

For the reasons given in this opinion we reverse the judgment and remand the cause for new trial.

REVERSED AND REMANDED.

HENRY NOETZELMANN, APPELLANT, V. RUDOLPH O. NOETZELMANN ET AL., APPELLEES.
43 N. W. 2d 515

Filed July 19, 1950. No. 32778.

1. **Specific Performance: Frauds, Statute of.** One seeking specific performance of an oral contract for the conveyance of real estate has the burden to prove by a preponderance of the evidence a contract which is clear, satisfactory, and unequivocal in its terms; that he has performed the obligations imposed upon him by the contract capable of performance to the time of the commencement of the litigation; that he is able to and will perform any other obligation thereof when it becomes capable of satisfaction by him; and that his acts 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 contract.
2. ———: ———. In determining whether or not acts of one seeking specific performance of an oral contract are referable solely to the contract alleged, the acts must be considered as a whole, and proper consideration must be given to all other relevant facts and circumstances shown by the evidence.
3. ———: ———. When the acts performed by the one seeking specific performance of an oral contract for the conveyance of real estate tend to show, not only that there was an agreement, but also throw some light on the nature of the agreement, the evidence cannot be said to rest wholly in parol, the parol evidence being auxiliary to the proof afforded by the case itself.
4. **Property: Vendor and Purchaser.** Possession of land is notice to the world of the rights of the person in possession and of all his interests of which inquiry of him would elicit knowledge.

APPEAL from the district court for Garden County: CLAIBOURNE G. PERRY, JUDGE. *Reversed and remanded with directions.*

Blackledge & Sidner, for appellant.

L. D. Hurley and *V. H. Halligan,* for appellees.

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

BOSLAUGH, J.

This is essentially an action in equity for specific performance of an alleged oral contract the subject

of which is land in Garden County. The district court denied the relief asked by Henry Noetzelmann, appellant, sustained the claims of Rudolph O. Noetzelmann, one of the appellees, and quieted title to the land in him. A motion for a new trial by appellant was denied and he prosecutes this appeal.

The appellant alleged: Before and during 1924 he was part owner and actively engaged in the operation of an automobile and garage business in Alliance; that in the fall of that year appellee and Anna Noetzelmann, parents of appellant, sought to induce him to dispose of his interests therein and to return to the home community near Lewellen; that to accomplish this they orally offered appellant if he would do so, marry a woman who would live on a farm, and if they would reside on the land, the subject of this suit, operate and improve it, pay the parents during their lives an amount equal to a reasonable rental for the land, that the parents would construct a house thereon and at their death appellant should be the owner of the land and all improvements made thereon; that he accepted the offer, disposed of his business and property in Alliance, complied with all the terms thereof capable of performance, and he and his wife early in 1926 took and have since continued possession, occupancy, and use of the land; that appellant has in every respect promptly and fully performed all of the terms and conditions of the oral agreement obligatory upon him in reliance on and in performance thereof, and he is ready, able, and offers to continue during the life of appellee performance in accordance with the terms of the agreement; that Rudolph O. Noetzelmann, in violation of the agreement with appellant, has entered into a contract with Harry Nelson and Pearl Nelson for the sale and conveyance of the land to them; and that they had actual notice and knowledge of the possession and occupancy of the land by appellant. He asks that the existence of the oral agreement as alleged be adjudicated and enforced, sub-

ject to his continued performance of the terms thereof during the life of Rudolph O. Noetzelmann, and that the contract between him and his vendees be found and decreed to be of no force or effect.

Rudolph O. Noetzelmann denied the claims of appellant and alleged that the agreement as stated in his petition, if it existed, was abandoned by appellant, and that he entered upon the land in controversy as a tenant and had failed to farm the land in a proper manner or to pay the rental therefor. Appellee asks that the title to the land be quieted in him.

Henry Noetzelmann and Rudolph O. Noetzelmann are the contesting parties, and they are designated herein as appellant and appellee respectively.

Appellant asserts that the findings and decree are not sustained by the evidence and are contrary to law.

Appellee and Anna Noetzelmann, his wife, the parents of appellant, established their home on land in Garden County north of Lewellen in 1909 and continued there until they separated and were later divorced in 1937, except they spent a part of the time in Kearney since 1919. They had nine children. A son Ed was the oldest, and appellant is their second child. They were industrious, thrifty, and acquired extensive and valuable real estate consisting of about 3,000 acres of land and two residence properties in Kearney. All of it, except a farm near Lisco and the properties in Kearney, were near Lewellen. That was the home community. The land involved in this case is 240 acres near the family homestead, and after appellant and his wife moved on it in 1926 it was known and spoken of by members of the family and others as "Henry's place." Anna Noetzelmann conducted the negotiations for and made the purchase of this land in 1914. It was conveyed to her and she had the title, subject to any rights of appellant, until December 1937, when it was assigned to appellee in the division of property made in the divorce case between him and Anna Noetzelmann. The land was unimproved native

grassland and was purchased for $18 an acre.

Appellant spent his early life on the home place and worked with his parents and brothers and sisters. Sometime before he was 20 years of age he and his older brother Ed were conducting all of the operations upon all of the land owned by their parents near Lewellen. Appellant suddenly left the home and community, and his whereabouts was not known for a considerable time. The reason is not definitely shown. It is referred to in general terms—"some trouble or difficulty in the family" "what it was I (appellee) don't know * * *." It was then that appellee ordered Henry to, and he did leave home. There is no claim or showing that appellant was not dutiful, industrious, and obedient or that his conduct was not regular and proper. His relationship with his father was satisfactory. They "were always good friends." Appellant went to Alliance, worked in a garage, and became a partner with his employer. The situation was satisfactory to him. He was there until the fall of 1924. He had not seen or had any communication with or from his parents since he was driven from the home. The parents were concerned and distressed about the circumstances of his estrangement and absence. They attended church at Kearney. The subject of the sermon was the "Prodigal son." They were affected by the sermon. The mother became very emotional and stricken with grief. They left the service at the conclusion of the sermon and "we talked things over." The father wanted his wife to make an effort to get their son home again and "things would be all right." They discussed what they would offer him to return and agreed if he would do so that they would build a house on the land affected by this case so that he could get married, go on the place, improve it and farm it, pay the parents for the use of the land as long as they needed it, and "otherwise it was his home." She went to Alliance, found Henry engaged in the garage business, pleaded with him to return home, told him of the ar-

rangement discussed by her and his father, and ultimately Henry agreed to do so. He sold his property and business in Alliance and returned home with his mother.

Anna Noetzelmann, the mother, at that time owned the land involved in this case. She conducted and managed the family business and financial affairs so completely that checks written by her husband were dishonored by the bank. The bank account was in her name. She wrote the checks and paid the bills.

The day after her arrival in Alliance when she and Henry returned home appellee told appellant that if he would go on this land, remain there and build it up, it should be his home. It was said in another conversation with appellant in which both of his parents participated that if he remained on the land and built it up they would give him a deed for it. On another occasion in the presence of several members of the family appellee agreed that if Henry and his wife would live on the place the parents would build a house on it and put down a well, and if Henry would put other improvements on the land that it should belong to Henry when the parents died. After appellant occupied and improved the land, in a conversation had with appellee in which appellant mentioned that he had nothing to show the arrangement under which he had moved onto the land, appellee said to appellant in the presence of his wife that the place was his home and no one could ever take it from him—that appellee would see to that. Similar statements were made by appellee many times and as late as 1948. He told a neighbor of long acquaintance with the family that he had given Henry a home. There is testimony of a conversation in which appellant said to another acquaintance of the family in the presence of his father that when his parents were through with the place where he lived that it would be his, and appellee said that was true, "'* * * the place is going to be Henry's.'" When the right of appellant to remain on the land was challenged in 1937 he promptly, in an action in equity, as-

serted the oral agreement relied upon in this case and his performance thereof, and asked a decree of specific performance of the contract against his parents, who were the defendants in that case. That was sufficient to cause a discontinuance of any effort to dispossess him. His acts since he took possession of the land have been consistent with the agreement he claims was made in reference to it.

After appellant had occupied, improved, and operated the place for more than ten years in a manner wholly consistent with the oral agreement he claims, while a case was pending in the court where this case was tried, to which appellee was a party and in which the appellant alleged the existence of substantially the same agreement asserted by him in this case and sought specific performance thereof, the appellee in a case in the district court for Buffalo County, Nebraska, testified and offered to prove that he and his wife did have a talk in the presence of Henry about the kind of a deal that would be made with him if he went onto this place. That matter was discussed "'* * * sometimes on the inside of the house and sometimes in the yard.'" The offer of proof of appellee in that case was that at the time Henry came back from Alliance and went onto the place involved in this case there was an agreement verbally made between appellee and his wife and Henry that he should move on that place, improve it, make it his home, and pay to his father and mother during their lifetime one-third of the crops grown on the place, and, if he did, the parents would deed him the property, and acting and relying thereon appellant did move on the place and had stayed there for about ten years and had made improvements.

There were no improvements on this place until the spring of 1926, except a partial temporary fence, and about 60 acres had been broken and were tilled. It was leased when appellant returned in the fall of 1924. His parents agreed to build a house thereon at their expense

and he was to make all other improvements he desired at his expense. He married on December 5, 1925. The house and a temporary barn were built and a well put down in the spring of 1926, and he and his wife moved on the place and have continued to occupy it. He broke about an additional 100 acres. The balance is used for pasture, location of improvements, and garden. He has at his expense since he has occupied the land, as his time and finances would permit, made improvements thereon consisting generally of a new barn, chicken house, garage, bunkhouse, hog house and shed, brooder house, corncrib, granary, hog lots, fence and cross fences partly of barbed wire and partly woven wire with cedar posts, well and windmill, large cistern, a system for running water into the house, feed lots, garden, and about the homestead generally, wired the house for electricity, and installed a wind charger. He has planted and grown a grove of about a thousand trees, has planted fruit trees, berry bushes, shrubs, and flowers, and he has located and graveled driveways on and into the farm. He has used the land in a proper manner to the best of his judgment and knowledge since 1926. "Henry was considered by his father and the neighbors the best farmer in the neighborhood, and he is. He is a good farmer." Appellant since 1926 made all decisions of management, operation, and improvement of the land. There were no suggestions, directions, or instructions to him from appellee or any other person in reference thereto, and no one but Henry spent anything on the place. Appellee testified that the place was improved nicely, everything looked neat, and appellant has kept the land nice and clean.

Appellant paid the agreed amount to his mother each year until the land was assigned in the divorce proceedings in 1937 to appellee, except the payment for 1936 which was made to his father. Appellee and his wife had disagreed, separated, and were engaged in divorce litigation, and he persuaded appellant to make

the payment to him for 1936, and because of this the mother served notice on appellant to surrender possession of the land and commenced a case to recover possession from him, which was dismissed without trial.

Appellant paid appellee each year, after the land was awarded to him in 1937, the amount he was obligated to pay by the contract upon which he relies, except the year 1949. The crop for that year has not been divided or disposed of, except possibly one load of wheat, because of the contract for the sale of the land, but it is available for division when any conflicting claims to it are resolved. Appellant has acknowledged his obligation and willingness to continue to promptly and fully perform the terms of the contract during the life of appellee.

The value of the land in question in 1949 was $15,000, or about $63 an acre. Unimproved adjacent comparable land sold for $29 an acre. The difference in the two tracts of land was the manner in which the Noetzelmann land was improved, the fact that it had been cared for, the good farming methods used, and the fact that the place was clean.

The law is that one seeking specific performance of an oral contract for the conveyance of land has the burden of proving by a preponderance of the evidence a contract which is clear, satisfactory, and unequivocal in its terms; that he has performed the obligations imposed upon him by the contract to the extent they are capable of performance at the time of the commencement of the litigation; and that he is able and willing to, and will fully perform any remaining obligations as they become capable of satisfaction by him. Riley v. Riley, 150 Neb. 176, 33 N. W. 2d 525; Lunkwitz v. Guffey, 150 Neb. 247, 34 N. W. 2d 256; Anderson v. Anderson, 150 Neb. 879, 36 N. W. 2d 287; Jenkins v. Jenkins, 151 Neb. 113, 36 N. W. 2d 637. The evidence justifies application of the doctrine of Harrison v. Harrison, 80 Neb. 103, 113 N. W. 1042, as follows: "Where the acts performed by the plaintiff tend to show, not only that there was an agree-

ment, but also throw some light on the nature of that agreement, the evidence cannot be said to rest wholly in parol, the parol evidence being auxiliary to the proof afforded by the case itself." See, also, Peters v. Wilks, 151 Neb. 861, 39 N. W. 2d 793. The appellant has sustained the burden imposed upon him by the rules referred to and has shown by the greater weight of the evidence an oral contract in reference to the land involved of the character the law requires. He has performed all of the obligations of the contract now capable of satisfaction, and tenders prompt and full performance of the terms of the contract during the remainder of the life of appellee.

Appellee emphasizes the fact that he and his wife on January 2, 1931, gave a mortgage on the land to secure their note for $4,000 due one year thereafter. The mortgage was subsequently released. This under some circumstances might weigh heavily against a claim of a prior existing oral contract by the mortgagors to convey the land. It is, however, unimportant here. Appellant was not a party to the transaction, it was not for his benefit, and he realized nothing from it. It is not shown that he was consulted about it or that he knew of it at the time of the giving of the mortgage or when, if at all, he learned that the land had been encumbered by his parents.

A further requirement in a case of this character is that one seeking specific performance of such a contract has the burden of showing by a preponderance of the evidence that his acts relied upon to constitute performance were such as were referable solely to the contract sought to be enforced and not such as might be referable to some other contract. Proof must be made of something that the claimant would not have done except because of the agreement and with the direct purpose of its performance so that a failure of the other party to perform his obligations would be a fraud upon the parties seeking to enforce performance. Anderson v.

Anderson, *supra;* Winkelmann v. Luebbe, 151 Neb. 543, 38 N. W. 2d 334; Peters v. Wilks, *supra.*

Appellant and his brother were performing the operations on all the land owned by their parents in Garden County. Appellant was suddenly, for some cause no one has been able or willing to detail, driven from his home, so far as the record shows, without compensation or resource. He became estranged and remained away without communication to or from home or his parents. He was able to care for himself, and established himself in a business. His situation was satisfactory. He did not need or seek aid from, nor did he request the privilege to return home. He had severed all ties of home and relations. The parents sought to overcome the estrangement and bring their son back to the home community—possibly it may be speculated to make amends in some measure for his wrongful expulsion from home. This purpose was accomplished. It is improbable, with knowledge of the manner in which he was summarily driven from home and the long attendant estrangement, that he would have severed his satisfactory business association, sold his business and property, and returned to farming without a definite agreement for present income and future security. Likewise it is very doubtful that as a mere tenant appellant would have taken this land in its barren natural state, made substantial and costly improvements thereon, taken advantage of every opportunity to build it up by good farming methods, made and kept it clean and desirable, conducted all the operations, and made the improvements thereon for nearly a quarter of a century without suggestion, request, direction, or outlay on the place by the appellee or any other person. These acts and accomplishments are not characteristics of a tenancy relationship from year to year inherent in which is the hazard of a final termination at the end of any tenancy period. They are referable to a contract for an interest in and ultimate ownership of the subject of the improve-

ment and enhancement in value. In deciding if the acts of appellant were referable solely to the contract he seeks to enforce, they must be considered in their light and in proper respect of all the other relevant facts and circumstances shown by the evidence. Riley v. Riley, *supra;* Harrison v. Harrison, *supra.*

The acts of appellant claimed to have been performance of the oral agreement were such as were referable solely to the contract he seeks to establish and enforce. They were of the character of things he would not have done except because of the agreement and with the direct purpose of satisfaction of its obligations.

This is a suit in equity. There is controversy as to the facts. Appellee denies there was any agreement with appellant by virtue of which he should receive title to the real estate involved herein, and that he was a mere tenant with no permanency of occupation or use of the land. This court is required to consider and decide this case on the evidence without regard to the conclusions of the district court, but to the extent that there is an irreconcilable conflict of proof on any question of fact, it may give due consideration to the fact that the district court saw the witnesses and their manner of testifying and that it accepted one version of the facts. Kuenzli v. Kuenzli, 150 Neb. 855, 36 N. W. 2d 247. This rule has been regarded in the examination and consideration of this case and in the conclusion that the finding and decree of the district court are contrary to the evidence and law; that appellant has satisfied the burden imposed upon him; has proved the existence of the oral agreement alleged by him; and has shown his performance of the terms and obligations thereof now capable of performance.

Harry Nelson and Pearl Nelson, appellees, by pleading and evidence show they knew appellant was in possession of the land since 1928. They lived on land which joined the real estate in this case on the south. They made no inquiry as to any interest of appellant in the

land before they contracted with appellee for its purchase. It has long been the rule that possession of real estate is notice to the world of the rights of the person in possession thereof and all his interests of which inquiry of him would elicit knowledge. Blum v. Poppenhagen, 142 Neb. 5, 5 N. W. 2d 99; Blum v. Voss, 139 Neb. 233, 297 N. W. 84. The contract of the Nelsons with Rudolph Noetzelmann for the purchase of the land is ineffective and invalid because of the prior existing agreement with appellant for title to the land upon his performance of the obligations thereof. It should be set aside.

Specific performance of the contract of appellant for title to the land as claimed and alleged by him herein should be enforced by a decree of the district court subject to and upon payment by him to appellee each year commencing with the year 1949 of one-third of what is produced on the land until the death of appellee.

The decree of the district court should be, and it is, reversed and remanded, with directions to the district court to enter a decree in this case in accordance with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

BARTON S. ARMSTRONG, APPELLEE, V. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, APPELLANT.
43 N. W. 2d 501

Filed July 19, 1950. No. 32808.

1. **Negligence: Trial.** A party who alleges and charges negligence has the burden of proving it by a preponderance of the evidence.
2. ———: ———. Where a party alleges negligence as the basis of his cause of action and fails to produce evidence of any act of negligence, the trial court, on motion, should direct a verdict for the defendant.

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

Heaton & Connors, for appellant.

E. O. Richards, for appellee.

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

CARTER, J.

This is an action at law commenced in the district court for Deuel County by Barton S. Armstrong, plaintiff, against the State Farm Mutual Automobile Insurance Company, defendant, to recover damages for the destruction of plaintiff's automobile by fire. The trial court directed a verdict for the plaintiff and defendant appeals.

On October 20, 1947, plaintiff was traveling east on U. S. Highway No. 30, and at a point approximately one and one-half miles northwest of Rock River, Wyoming, he became involved in an accident with another automobile. Plaintiff contacted one R. N. Harison at Laramie, Wyoming, who purported to be the agent of the defendant company with whom plaintiff was insured. After informing him of the accident and explaining the circumstances, Harison sent a tow car from Laramie to bring plaintiff's automobile to that point. The next day plaintiff went to the office of Harison where a report of the accident was made to the defendant company on blanks provided by Harison. Plaintiff testified that he talked with Harison about an adjustment of the damages, that Harison informed him that if a cash settlement could not be agreed upon the automobile would be repaired in first-class condition, and that plaintiff would have an opportunity to accept or reject the automobile after it was repaired. On October 21, 1947, the automobile was placed in the Chrysler-Plymouth garage in Laramie for the purpose of having it repaired.

On January 16, 1948, one S. H. Aden of Chappell, Nebraska, who was also reputed to be an agent of the defendant, wrote plaintiff that the defendant insurance

company had placed a value of $1,775 on plaintiff's automobile and asked him to write Harison at Laramie whether he would accept this amount or whether the car should be repaired. Plaintiff thereupon wrote Harison that the value placed on the car was not acceptable and to have the car repaired. On January 21, 1948, Harison wrote plaintiff that he had communicated with the garage at Laramie and that the automobile would be satisfactorily repaired. On May 10, 1948, Aden wrote plaintiff that he had heard from Harison that plaintiff's car had been destroyed by fire.

At the time of the automobile accident the plaintiff was protected by a comprehensive policy of insurance issued by the defendant company. At the time of the destruction of the automobile by fire there was no insurance coverage on the car. This is a suit against the insurance company for damages for the destruction of the car because of the negligent acts of the defendant and its agents.

The petition pleads that the automobile was destroyed by fire through the negligent acts of the agents of defendant company. No specific acts of negligence are pleaded. The case appears to have been tried on the assumption that the defendant company through its agent was negligent. The rule is, however, that one who pleads negligence has the burden of proof to establish it. There is no evidence in the record as to the manner of the destruction of this automobile, the nature or cause of the fire which allegedly destroyed it, or of any act by the defendant or its agents which could be construed as an act of negligence contributing to its destruction. In fact, there is no competent evidence in the record that the automobile was ever destroyed by fire. Appellee argues that the fact that the automobile was placed in the garage on October 21, 1947, and was not repaired until April 13, 1948, constitutes negligence. In the first place, the plaintiff did not elect to have the car repaired until January 19, 1948, and in the second

place, there is no evidence that the delay was due to any act of the defendant or its agent. In any event, the delay in having the automobile repaired, even if chargeable to the defendant, is not a proximate cause of the destruction of the automobile by fire, assuming that it was so destroyed. There is no causal connection between the two. The appellee has failed to establish an act of negligence by the defendant or its agents which was a proximate cause of the loss. Olson v. Omaha & C. B. St. Ry. Co., 137 Neb. 216, 289 N. W. 356; Bohmont v. Moore, 138 Neb. 784, 295 N. W. 419, 133 A. L. R. 270; Shiman Bros. & Co. v. Nebraska Nat. Hotel Co., 146 Neb. 47, 18 N. W. 2d 551. Under such circumstances the trial court should have sustained defendant's motion for a directed verdict.

The failure of plaintiff to establish any act of negligence on the part of the defendant company, which was a proximate cause of the loss, requires that the judgment of the district court be reversed and the action dismissed. This makes it unnecessary to discuss other questions raised by the appeal.

REVERSED AND DISMISSED.

GEORGE B. LYNCH, APPELLEE, V. CITY OF OMAHA ET AL., APPELLANTS.
No. 32739.

LEON D. ANDERSEN, APPELLEE, V. CITY OF OMAHA ET AL., APPELLANTS.
No. 32740.
43 N. W. 2d 589

Filed July 24, 1950.

1. **Parties.** A defect of parties who are not indispensable is ordinarily waived unless appropriate objection thereto is made before the cause is finally submitted upon the merits.
2. **Administrative Law and Procedure.** Findings and orders of an official administrative agency or body acting in a quasi-judicial

capacity will ordinarily be upheld in error proceedings to the district court and on appeal to this court, if it appears that such agency or body has acted within its jurisdiction and that all of the jurisdictional facts essential to uphold its findings and orders are sustained by some competent evidence.

3. **Municipal Corporations.** As provided in section 14-810, R. S. 1943, if the city refuses or neglects to defend any suit at law or in equity brought against it, any resident taxpayer may defend said suit on its behalf at cost of the city, not including attorney's fees.
4. **Trial: Appeal and Error.** The striking of a motion for new trial, timely filed in the district court, is the equivalent of overruling the same and finally disposing of the cause upon the merits, from which appeal may be taken to this court, where upon review such judgment may be entered or directed as should have been rendered by the trial court.

APPEAL from the district court for Douglas County: WILLIAM A. DAY, JUDGE. *Reversed and remanded with directions.*

G. H. Seig, for appellants.

Eugene D. O'Sullivan, Arthur J. Whalen, Eugene D. O'Sullivan, Jr., Warren C. Schrempp, and *Ernest S. Priesman,* for appellees.

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

CHAPPELL, J.

Appellees, police officers of the city of Omaha, were each formally charged with neglect of duty, conduct unbecoming an officer, not being fit to perform the duties of an officer, and selling intoxicating liquor without a license and while on duty. They were each at all times here involved represented by counsel of their own choosing. Herein they will be generally designated as plaintiffs, the City of Omaha, et al., as defendants, and Adolph W. Larsen as the taxpayer.

Pursuant to Omaha city ordinances, a hearing was had on such charges before the chief of police, who thereafter entered his findings and orders respectively find-

ing plaintiffs guilty as charged, and ordering them suspended and dismissed from the service.

Therefrom they appealed to the Omaha police civil service commission, where, after a hearing, the findings and orders of the chief of police were affirmed and sustained.

They then appealed to the city council, where, after hearing upon a transcript of the evidence adduced by the parties before the chief of police and the police civil service commission, the findings and orders of the chief of police and the police civil service commission were again affirmed and sustained.

Therefrom they prosecuted error to the district court, attaching a transcript of all the evidence theretofore taken as a settled bill of exceptions. After a hearing, the trial court entered an order finding that there was error in the record, and retaining the causes for hearing upon the merits. Later, the cases were so heard, whereat the only evidence adduced was that contained in the transcript thereof heretofore described. Thereafter the trial court entered orders and judgments, finding and adjudging in effect that the findings and orders of the chief of police, the police civil service commission, and the city council, were, as a matter of law, not sustained by the evidence; that the suspension and dismissal of the officers was null and void; and ordering them reinstated to their former positions. Thereafter, the city of Omaha refused and neglected to further defend the action. Thereupon, Adolph W. Larsen, a resident taxpayer, as provided in section 14-810, R. S. 1943, a part of Omaha's home rule charter, timely filed motions for new trial.

Plaintiffs then filed motions respectively to strike such motions for new trial, which the trial court sustained for the reason, insofar as important here, that the resident taxpayer's attempted intervention was contrary to law and not within the purview of section 14-810, R. S. 1943. The taxpayer's timely motions filed there-

after, to set aside and vacate such orders striking his motions for new trial, were likewise stricken for the same reason, and he appealed to this court.

The two cases were separately appealed to this court, and separate transcripts were filed. However, it was stipulated by the parties that because the issues in each case were identical and arose out of the same facts, the separate appeals should be consolidated with but one bill of exceptions and one set of briefs applicable to both cases. Thus they will both be disposed of in this opinion.

The taxpayer's assignments of error were substantially that the trial court erred: (1) In assuming jurisdiction when neither the police civil service commission nor its members were made parties to the error proceedings; (2) that the trial court erred in holding that the findings and orders of the chief of police, the police civil service commission, and the city council, were not sustained by the evidence; and (3) erred in striking the motions for new trial. We conclude that the first assignment has no merit, but that the second and third should be sustained.

The first assignment was not supported by any cited applicable authority, and we have found none. The police civil service commission and its members were doubtless proper, but in no sense indispensable parties. In such a situation the general rule is that a defect of parties is waived unless appropriate objection thereto is made before the cause is finally submitted upon the merits. Bianki v. Greater American Exposition, 3 Neb. (Unoff.) 656, 92 N. W. 615; Goble v. Swobe, 64 Neb. 838, 90 N. W. 919; Edney v. Baum, 70 Neb. 159, 97 N. W. 252. The defendants made no such objections, and thus waived the defect, if any. We thus conclude that the trial court did not erroneously assume jurisdiction of the proceedings in error.

In error proceedings taken from findings and orders of an administrative agency or body acting in a quasi-

judicial capacity, as in the case at bar, only two questions are ordinarily presented for decision. The general rule is that if it appears in such cases that such agency or body has acted within its jurisdiction and that all of the jurisdictional facts essential to uphold its findings and orders are sustained by some competent evidence, such findings and orders will be upheld in error proceedings to the district court and on appeal to this court. Munk v. Frink, 81 Neb. 631, 116 N. W. 525; Matthews v. Hedlund, 82 Neb. 825, 119 N. W. 17; In re Commercial State Bank, 105 Neb. 248, 179 N. W. 1021. The case at bar comes squarely within the rule. Competent evidence appearing in the record before us was amply sufficient to sustain the findings and orders of the chief of police, the police civil service commission, and the city council who respectively acted within their jurisdiction. To repeat such evidence here would serve no purpose.

It is sufficient to say that we find no error in the proceedings before such bodies. Consequently, the petitions in error filed in the district court were without merit and the trial court should have so held. Therefore, the judgments entered therein must be reversed and the causes remanded with directions if Adolph W. Larsen, the resident taxpayer, had authority to defend the city under section 14-810, R. S. 1943, which provided: "If the city shall refuse or neglect to defend any suit at law or in equity brought against it, any resident taxpayer may defend said suit on its behalf at the cost of the city, not including 'attorney's fees.' "

In that connection we conclude that the taxpayer here involved did have such authority. The city was in fact a defendant in a suit at law brought against it when error proceedings were filed in the district court, although theretofore the proceedings had been only administrative in character.

In the district court proceedings brought against it, the city did have rights which it should have continued to defend. When the city failed and refused to do so,

any resident taxpayer had a right to defend the suit on its behalf. In that situation, the taxpayer stood in the shoes of the city and was in fact and in law the city itself. Thus he had a right to and did lawfully attempt to defend it and every other resident taxpayer's rights.

The purpose of section 14-810, R. S. 1943, was to make sure that the rights of the city and its resident taxpayers would be protected as required by law, when city officials, as here, refused or neglected to do so. Any other conclusion would make the provision of no force or effect. We therefore conclude that appellant as a resident taxpayer had full power and authority to act as he did. Intervention in the technical sense had no application with relation to the city's rights, which he as a taxpayer had the statutory right to defend on its behalf. The fact that others may have urged him to take the action which he took or may have agreed to pay the attorney's fees incurred thereby is not in any manner controlling. To hold otherwise would judicially impose legislative qualifications and restrictions upon a clear and unambiguous statute, which this court has no right or authority to do.

Therefore, we conclude that the striking of the taxpayer's motions for new trial was not only erroneous but also was the equivalent of overruling his motions for new trial and finally but erroneously disposing of the cases upon the merits.

For the reasons heretofore stated the judgments entered by the district court should be and hereby are reversed and the causes are remanded with directions to dismiss the petitions in error.

REVERSED AND REMANDED WITH DIRECTIONS.

YEAGER and BOSLAUGH, JJ., concur in the result.

VICTOR A. WEISENMILLER, APPELLANT, V. GUNNAR A. NESTOR, APPELLEE.

43 N. W. 2d 568

Filed July 24, 1950. No. 32741.

1. **Trial.** A motion to dismiss or for directed verdict admits the truth of all material and relevant evidence adduced by the party against whom the motion is made, and such party is entitled to have such evidence considered in the light most favorable to him and to have the benefit of all inferences reasonably deducible therefrom in testing validity of the court's action in disposing of the motion.
2. **Negligence: Automobiles.** In those cases where reasonable minds may differ on the question of whether or not the operator of an automobile exercised the ordinary care required of him under the circumstances of the particular situation, the issue of negligence on the part of the operator is one of fact to be determined by a jury.
3. **Negligence.** A plaintiff is required to establish by a preponderance of the evidence that the injury occurred in the manner alleged, but when facts and circumstances are adduced from which the manner of sustaining injuries and damages may be logically inferred, an issue thereon is for the jury to determine.
4. ———. Where under the evidence adduced it appears that negligence of defendant alleged to have proximately caused injuries and damages to plaintiff was not joint or concurrent with others in such manner as to impose liability upon defendant as a joint tort-feasor, then he is liable for only such injuries and damages as a preponderance of the evidence establishes that plaintiff sustained as the proximate result of defendant's negligence as distinguished from those, if any, caused by others.

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

Max Kier and *Charles Bocken,* for appellant.

Towle, Young & Mattson, for appellee.

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

CHAPPELL, J.

Plaintiff brought this action to recover damages for

personal injuries alleged to have been proximately caused when he was run over on a highway at night by an automobile owned and negligently operated by defendant. After plaintiff had rested, defendant moved for a directed verdict for insufficiency of the evidence. At that time the motion was overruled, but upon renewal thereof at conclusion of all the evidence the trial court sustained such motion and instructed the jury accordingly, whereupon it returned a verdict for defendant and a judgment was entered in conformity therewith. Plaintiff's motion for new trial was subsequently overruled and he appealed, assigning substantially that the trial court erred: (1) In sustaining defendant's motion for directed verdict; (2) in failing to submit the cause to the jury for its determination; and (3) in overruling plaintiff's motion for new trial. We sustain the assignments.

Plaintiff argued that there was sufficient competent evidence adduced by him from which it could have been reasonably concluded that defendant was negligent in one or more of the particulars alleged, which proximately caused personal injuries and damages to plaintiff. We sustain that contention.

In that connection, plaintiff's petition alleged substantially that defendant negligently drove his car at an excessive rate of speed without proper regard for the condition of the highway and the traffic thereon; without having his car under proper control; without maintaining a proper lookout to observe plaintiff's position on the highway or taking precautions to avoid running over him; and drove his car at such a rate of speed as to be unable to stop within the range of his vision.

Plaintiff also pleaded the last clear chance. However, as stated in Parsons v. Berry, 130 Neb. 264, 264 N. W. 742: "The doctrine of last clear chance applies in those cases where there is negligence of the defendant subsequent to the negligence of the plaintiff and the defendant's negligence is the proximate cause of the in-

jury." In the record before us, we find no competent evidence from which it could be reasonably concluded that plaintiff was placed in a position of peril by his own negligence. Therefore the only question presented is whether or not defendant was negligent in some manner alleged which proximately caused the accident and resulting injuries and damages to plaintiff. True, plaintiff was in a position of peril, but how he got there is not shown. We conclude that under the circumstances presented, the last clear chance doctrine had no application.

At the outset it should be observed that a motion to dismiss or for directed verdict admits the truth of all material and relevant evidence adduced by the party against whom the motion is made, and such party is entitled to have such evidence considered in the light most favorable to him and to have the benefit of all inferences reasonably deducible therefrom in testing validity of the court's action in disposing of the motion. Moncrief v. Interstate Transit Lines, 129 Neb. 168, 261 N. W. 163; Shiman Bros. & Co. v. Nebraska Nat. Hotel Co., 143 Neb. 404, 9 N. W. 2d 807; Armer v. Omaha & C. B. St. Ry. Co., 151 Neb. 431, 37 N. W. 2d 607; Pahl v. Sprague, 152 Neb. 681, 42 N. W. 2d 367. In the light thereof and other applicable rules hereinafter discussed, we have examined the record.

Competent and relevant evidence adduced by plaintiff was substantially as follows:

During the evening of May 26, 1948, plaintiff, with his mother and brother, went for a ride in the brother's car. They drove from Lincoln south to Princeton, and about 11 p. m. started back to Lincoln over U. S. Highway No. 77. A short distance south of the Turnpike, they had a flat tire. The filling station nearby was closed, and farm houses were dark. Having no tools with which to make repair, the brother and mother, by pre-arrangement, started walking south and plaintiff started walking north to obtain assistance. The brother

and mother did obtain assistance and thereafter drove on into Lincoln without seeing or hearing of plaintiff again until early the next morning when they were informed that he was in a hospital.

In the meantime, plaintiff had walked north on the east side of the highway. He was wearing new shoes which hurt his feet, so he removed his shoes and sox and placed the sox in his shoes which he tied together and carried in his hands or about his neck. He tried unsuccessfully to thumb a ride from passing motorists as he walked north on the pavement in his bare feet.

He did not recall being struck by anything, but the next thing he did remember was that he was in quite a deep ditch on the east side of the highway. There was then something wrong with his right foot or leg, because he could not walk on it. However his arms were all right, and using his hands and arms he crawled out of the ditch up to the edge of the road, where everything blacked out and he remembered nothing again until he was in a car being taken to a hospital.

Theretofore at about 2 a. m. a car occupied by the driver, his wife, their two children and two other adults came from the south traveling on the east side of U. S. Highway No. 77 at 40 to 50 miles an hour. At a point opposite Lincoln Memorial Cemetery the driver saw something like a body prone in the west lane of the highway. His wife also saw the object which looked like a bundle of clothes. They drove on north for a couple of blocks then turned around and drove back to investigate. They drove slowly past and there saw that it was the body of a man dressed in dark clothes lying head to the south, feet stretched out together, and arms folded with a shoe on his chest. They honked their horn and flashed their spotlight upon him, but he did not move. He did not then look like he was injured, but they had no opportunity to examine him and could not tell. They then drove on south about a half block or more and turned into the driveway of the cemetery

on the east side of the highway, intending to turn around and stop. As they did so, defendant's car was seen coming from the north quite some distance away at about 40 miles or more an hour.

Thereupon when defendant's car was a half block to a block from the body, they flashed and continued to flash their spotlight across and on the body, which could be seen "very clearly," "very plain," "bright as day," "lit him up like a Neon sign." However, defendant's car did not turn out or slow down but kept on coming and ran right on over the body, later identified as plaintiff, then swerved back and forth across the whole road and went on down the highway without stopping. After he was run over, plaintiff was seen trying to sit up or raise up, and the driver of the car who attempted to warn defendant turned around, overtook defendant, told him that he had run over a man, and urged him to come back, but defendant declared that he "never hit anything" and drove on without returning to the scene of the accident. The number of his Nash automobile was taken, however, and its ownership was traced to defendant, who a few days later admitted that he was driving his Nash car allegedly involved at the particular time and place; that the driver of another car ran him down, told him that someone had been run over, and requested him to return, but feeling that he was not involved, he did not do so.

After stopping defendant, the driver returned to the scene of the accident, where plaintiff was placed in another car, which had appeared in the meantime, and taken to a hospital. When placed in the car, it was observed that plaintiff limped and that his right arm was broken. Whether they first then observed that his head was cut and bleeding or that was later seen at the hospital is not clear. Nevertheless, at the hospital the driver of the car and another adult, as well as plaintiff's physician, did observe that plaintiff's head and face were bleeding from a cut on his chin, a large Y-shaped cut

over his forehead, and partially back toward the back of his head; that his right arm was badly broken; that he had a deep gash or puncture wound in his right thigh; his right heel was practically torn off; and that there were numerous bruises and scratches around his head and upon the rest of his body. Upon admission to the hospital, plaintiff was generally rational, although having been theretofore in a coma he was unable to remember any details of the accident and was suffering from shock and loss of blood. The fracture of his arm was compound and comminuted so badly as to require reductions, subsequent operations, bone grafting, and hospitalization extending over a period of several months.

Whether or not plaintiff had his sox on or off at the time of the accident is of little consequence. The torn, dirty, and bloody clothing worn by plaintiff at the time of the accident and removed at the hospital, was offered in evidence. However, contrary to defendant's contention, the condition of such clothing could be of little if any assistance in determining how the accident happened or how plaintiff received the injuries sustained. We do call attention to the fact, however, that there were marks up plaintiff's right pant leg having the appearance of tire marks.

To the foregoing evidence there are applicable rules of law supporting plaintiff's contentions. 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 headlights. Roth v. Blomquist, 117 Neb. 444, 220 N. W. 572, 58 A. L. R. 1473. Also, the failure of a motorist to see what was plainly in sight if he had maintained a proper lookout cannot ordinarily be excused. Buresh v. George, 149 Neb. 340, 31 N. W. 2d 106.

However, there are exceptions to such general rules when the object is the same color as the roadway, and

for that reason or for other sufficient reasons the object cannot ordinarily be observed by the exercise of ordinary care in time to avoid collision therewith. See Adamek v. Tilford, 125 Neb. 139, 249 N. W. 300, wherein it was held that plaintiff's own evidence established as a matter of law that the accident was unavoidable. However, such a situation is not presented here.

This court has held in cases similar to that at bar that where reasonable minds may differ upon 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, then the issue of negligence on the part of the operator is one of fact to be determined by a jury. Miers v. McMaken, 147 Neb. 133, 22 N. W. 2d 422; Buresh v. George, *supra;* Pierson v. Jensen, 150 Neb. 86, 33 N. W. 2d 462; Floyd v. Edwards, 150 Neb. 41, 33 N. W. 2d 555; Anderson v. Nincehelser, 152 Neb. 857, 43 N. W. 2d 182.

Upon the question of whether or not there was competent evidence adduced sufficient to sustain a finding that the alleged negligence of defendant proximately caused personal injuries and damages to plaintiff, the applicable rule is that a party is required to establish by a preponderance of the evidence that an injury occurred in the manner alleged, but when facts and circumstances are adduced, as in the case at bar, from which the manner of sustaining injuries and damages may be logically inferred, an issue thereon is for the jury. Fonda v. Northwestern Public Service Co., 138 Neb. 262, 292 N. W. 712; Markussen v. Mengedoht, 132 Neb. 472, 272 N. W. 241. We conclude that there was sufficient evidence to sustain a finding that defendant was negligent in one or more of the particulars alleged, and that such negligence proximately caused injuries and damages to plaintiff.

In that connection, this is not a case involving joint or concurring negligence of two or more persons thus imposing liability upon defendant as a joint tort-feasor.

If defendant is liable to plaintiff for injuries and damages, he is liable for only such as a preponderance of the evidence shows that plaintiff sustained as a proximate result of defendant's negligence, as distinguished from those, if any, caused by others. In other words, if defendant negligently operated his car and thereby proximately caused injuries to plaintiff, then defendant is liable to respond in damages for the injuries inflicted by his car. Under the circumstances presented here, that was a question for the jury to determine. Kleiner v. Johnson, 249 Wis. 148, 23 N. W. 2d 467; DeWitt v. Gerard, 274 Mich. 299, 264 N. W. 379.

For the reasons heretofore stated, the judgment should be, and hereby is, reversed and the cause is remanded for new trial.

REVERSED AND REMANDED.

WILSON & COMPANY, INC., A CORPORATION, APPELLEE, V. FREMONT CAKE & MEAL COMPANY, A CORPORATION, APPELLANT.

43 N. W. 2d 657

Filed July 24, 1950. No. 32745.

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. **Arbitration and Award: Courts.** Where arbitration constitutes a part of the contract between parties to it and an attempt is made to enforce arbitration by invoking the Federal Arbitration Act, in the courts of this state the issue is one of procedure and not of substantive right, and the laws of this state are controlling.
3. **Arbitration and Award: Contracts.** In this jurisdiction a provision in a contract requiring arbitration, whether of disputes arising under the contract generally or only of the amount of any loss or damages sustained by the parties thereto, will not be enforced; nor will refusal to arbitrate be available in an action growing out of the contract.

4. **Sales.** Where a certain date is fixed as the time limit for delivery of six tank cars of soybean oil by the seller to the purchaser, and by subsequent agreement between the parties in the form of correspondence the time limit date for delivery is postponed, such agreement does not discharge the original contract, but the same remains in full force, changed only to the extent that delivery is postponed.
5. **Contracts.** If a party by his contract creates a duty or imposes a charge upon himself, he must under any and all conditions substantially comply with the undertaking.
6. ———. Inconvenience or the cost of compliance, though they might make compliance a hardship, cannot excuse a party from the performance of an absolute and unqualified undertaking to do a thing that is possible and lawful.
7. ———. A contract is not invalid, nor is the obligor therein in any manner discharged from its binding effect, because it turns out to be difficult or burdensome to perform.
8. **Contracts: Sales.** An abnormal rise in the price of soybean products due to war or unusual trade conditions, so that the processor thereof cannot perform a contract to process and deliver the same to a contractee without greater expense than anticipated, is not an impossibility excusing performance.
9. **Sales: Damages.** The measure of damages is the difference in the contract price of the merchandise and the market value of the same at the time to which delivery is postponed. If delivery is postponed by agreement of the parties, the market value at the time to which delivery is postponed is taken as the criterion.

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

Beghtol & Rankin, Sidner, Lee & Gunderson, Kenneth E. Anderson, Nate C. Holman, George E. Svoboda, and *John C. Mason,* for appellant.

Kennedy, Holland, DeLacy & Svoboda, Louis R. Simpson, and *Spear, Lamme & Flory,* for appellee.

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

MESSMORE, J.

This is an action at law brought by the plaintiff, Wilson & Company, a corporation, against the Fremont Cake

& Meal Company, a corporation, to recover damages for the alleged breach of contract for the sale and delivery of soybean oil to the plaintiff. At the close of all the evidence the plaintiff moved for a directed verdict. This motion was sustained. From the overruling of defendant's motion for a new trial and entry of judgment on the verdict in the amount of $41,175 and costs, the defendant perfected appeal to this court.

For convenience we will refer to the appellant, Fremont Cake & Meal Company, a corporation, as the Fremont company, and to the appellee, Wilson & Company, corporation, as Wilson & Company. The Commodity Credit Corporation, Washington, D. C., a corporate agency of the United States government, will be referred to as the CCC, and the Office of Price Administration, an agency of the United States government, as the OPA.

We review the record with the following rule in mind: "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." Thoren v. Myers, 151 Neb. 453, 37 N. W. 2d 725.

The following facts are not in substantial dispute: On August 10, 1945, Wilson & Company entered into a contract identified as No. 3447-W, negotiated by B. E. Forssell, the manager of the refinery department of Wilson & Company, through the Marwood Company, Incorporated, a brokerage concern. The contract was confirmed by B. E. Forssell, and is as follows:

"August 10, 1945 No. 3447-W

Seller MARR SOYBEAN PROCESSING COMPANY, 130 North Broad Street, Fremont, Nebraska.

Buyer	WILSON AND COMPANY, Refinery Department, 4100 South Ashland Avenue, Chicago 9, Illinois.

Gentlemen: We confirm transaction today for your account as follows:

Commodity	SOYBEAN OIL.
Quality	Crude.
Quantity	Thirty six (36) Buyer furnishing tankcars of approximately 61,000 pounds capacity each.
Weight	Certified.
Price	Eleven and three-quarters cents (11-¾¢) per pound (or O.P.A. ceiling price in effect at time of shipment) f.o.b. Fremont, Nebraska.
Terms	Sight Draft/Bill of Lading attached for amount of invoice, free of exchange to buyer. Weights & quality guaranteed at destination.
Shipment Time	Three (3) tankcars each month October, 1945, through September, 1946.
Shipment From	Fremont, Nebraska.
Other Conditions	Seller warrants that crude soybean oil covered by this contract will be produced from beans acquired in accordance with his processor contract with the CCC, or any other government agency controlling the marketing and crushing of oilseeds during season 1945-46. This contract is subject to any government regulation controlling the movement and allocation of crude soybean oil. Subject to tankcar regulations by ODT.
Rules	National Soybean Processors Association.
Brokerage	

This confirmation is made in triplicate, one copy being sent to the buyer, one to the seller, and one retained on file in this office.

MARWOOD COMPANY, INC.
As Brokers Only
By Marvin Wood

Buyer to have privilege of unloading shipments immediately on receipt, seller to be notified by mail of details as to quality and weight adjustment."

On or about September 1, 1945, the Fremont company succeeded to the business of the Marr Soybean Processing Company. The Fremont company, with the consent of Wilson & Company and the Marr Soybean Processing Company, adopted and agreed to carry out the terms of the contract set out, and which will hereinafter be referred to as the contract. The Fremont company, under the terms of the contract, delivered to Wilson & Company 30 tank cars of soybean oil at the price provided for in the contract. When the Fremont company assumed the contract it was obligated to take over contracts to furnish Armour & Company 36 cars of oil, the Interstate Cottonseed Oil Refining Company a minimum of 33 cars, in addition to the 36 cars for Wilson & Company, making the total commitment of 105 cars of oil.

On September 10, 1945, Harry E. Wiysel, manager of the Fremont company, signed for the company the CCC contract. The CCC contract provided: "1. Purchase of Soybeans. The processor shall purchase for his own account, upon the terms and conditions hereinafter specified, soybeans of the 1945 crop, either directly from producers or from others who have paid producers not less than the support prices specified * * * in a total quantity not in excess of the quantity he can process on or before October 10, 1946 (to be

determined by multiplying the total daily capacity of the Plant * * *)."

The last delivery was made by the Fremont company on September 24, 1946, leaving six tank cars of soybean oil to be delivered to Wilson & Company, which were never delivered and which constitute the subject matter of the instant case.

The plaintiff's petition alleged that six tank cars of soybean oil remained undelivered under the contract; that by mutual consent the time for delivery of the same was extended so that there could be delivered during the latter part of October 1946, three of the tank cars of soybean oil, and the last three during the latter part of November 1946. Due to the failure of delivery as pleaded, the plaintiff prayed damages in the amount of $43,005, based upon the failure of the Fremont company to perform the contract.

The defendant's answer, insofar as the same need be considered, alleged in substance that delivery under the contract was to be made from October 1945, through September 1946; the soybean oil to be furnished under the contract was required to be produced according to the Fremont company's contract with the CCC or any other government agency controlling the marketing and crushing of soybeans into oil during the 1946 season which ran from September 10, 1945, to October 10, 1946; that the defendant used all soybeans allowed it under the CCC contract and allocated the oil processed therefrom between the three contracts to which it was committed when it assumed the contract from the Marr company; and that defendant notified plaintiff it would be required under a prior contract, before proceeding with new contracts, to furnish two tank cars of soybean oil. Defendant also alleged that Wilson & Company was advised early in October 1946, that the contract could not be fulfilled because of government regulations controlling the movement and allocation of soybean oil, and its processor's contract; that any default that occurred

was on or before October 1, 1946; and further, that Wilson & Company gave no notice of default as required by rule 116 of the Soybean Processors Trading Rules. Defendant also alleged that the terms "Eleven and three-quarters cents (11-¾¢) per pound (or O.P.A. ceiling in effect at time of shipment) f.o.b. Fremont, Nebraska," were intended and understood by the parties and the industry and interpreted in practice to mean ceiling price now in effect, or ceiling price in effect at the time of delivery, or if no ceiling price, then market price at the time of delivery; and that the Fremont company never at any time after October 1, 1946, offered to ship any soybean oil to Wilson & Company except at the market price at time of delivery.

Wilson & Company is engaged in the packing business, and also refines crude soybean oil into margarine or cooking oil.

We make reference to the documentary evidence only insofar as the same relates to the six tank cars of soybean oil not delivered.

B. E. Forssell testified in behalf of Wilson & Company that on or about the 10th of September 1946, he was in Fremont and contacted Mr. Wiysel, manager of the Fremont company. His purpose was to endeavor to purchase soybean oil for his company. He talked to Wiysel about the scarcity of oil and this contract. Wiysel told him: " 'We owe you six tanks more than we are shipping this month, but I think by next month we will be Okeh and ship again.' " Forssell said that would be all right, "we have a contract on it and I suppose you will live up to your contract." There was nothing more said by Wiysel.

On October 11, 1946, Wilson & Company wired the Fremont company: "ACCORDING OUR RECORDS WE HAVE SIX TANKS SOYBEAN OIL STILL DUE US MARWOOD CONTRACT 3447-W STOP PLEASE WIRE WHEN YOU PLAN LOAD THESE REMAINING SIX TANKS DUE GIVE US LOADING DATES AS

YOU SEE THEM." On October 14, 1946, the Fremont company wired Wilson & Company: "EXPECT TO LOAD THREE TANKS LAST HALF OCTOBER THREE TANKS LAST HALF NOVEMBER WILL ADVISE LOADING DATES LATER."

This witness testified that he kept familiar with the OPA ceiling prices, and on October 1, 1946, the ceiling price was 11¾ cents per pound for soybean oil, the price when the contract was entered into. There was a very short period during the summer when the ceiling prices were off, but during the interim the price stayed at 11¾ cents per pound. The OPA was put back on with the same ceiling price. On October 1, 1946, an order of the OPA made the ceiling price 13½ cents per pound for soybean oil. One delivery on this contract was made between October 1 and October 16, 1946. It was shipped in September. The ceiling price on the day of the last shipment was 11¾ cents per pound. The latter part of October and November 1946, when the Fremont company, by its telegram of October 14, 1946, stated it expected to load three tanks the last part of October and three tanks the last half of November, the ceiling price at that time was 13½ cents per pound. On October 16, 1946, the ceiling price was withdrawn.

On November 1, 1946, Wilson & Company wired the Fremont company, "YOUR WIRE OCT. 14TH ADVISING EXPECT TO LOAD THREE TANKS SOYBEAN OIL LAST HALF OCTOBER THREE TANKS NOVEMBER WHEN WILL YOU WANT THESE EMPTY TANKS FOR LOADING WIRE REPLY." On November 2, 1946, the Fremont company wired Wilson & Company: "RETEL WILL NOT HAVE OIL TO SHIP UNTIL LATE NOVEMBER WILL CONTACT YOU WHEN CAN SHIP AND SET PRICE ON OIL." This last telegram received from the Fremont company by Wilson & Company was the first indication that there would be any other price than the contract price charged for the soybean oil.

On November 5, 1946, this witness received a long distance telephone call from Wiysel wherein Wiysel wanted to make an adjustment as to prices on the six cars that had not been delivered. He was informed that there was no adjustment, as the price was on the contract, 11¾ cents per pound.

On November 15, 1946, this witness wrote the Fremont company referring to the telephone conversation with Wiysel, and stated that this oil, on the basis of the contract, was due and coming to Wilson & Company at 11¾ cents per pound, f.o.b. Fremont, inasmuch as this was the last OPA ceiling price in effect.

On November 16, 1946, the Fremont company wired Forssell in Chicago: "OFFER TO SHIP SIX CARS SOYBEAN OIL DECEMBER JANUARY IF ACCEPTED IN FULL SATISFACTION OF HARWOOD CONTRACT NO. 3447W." On November 16, 1946, Forssell wired the Fremont company in reply to this offer to ship six cars of soybean oil December 1946, and January 1947, and that it was satisfactory to ship same on dates mentioned at 13½ cents per pound in full satisfaction of the contract.

On November 18, 1946, the Fremont company wired Forssell: "OUR WIRE 16TH OFFER TO SHIP SIX CARS PREDICATED ON AGREEMENT AT CURRENT OIL MARKET WHICH WE BELIEVE IS 23 CENTS." This marked the first time that the Fremont company set a definite figure for the price of the six cars in controversy, which was the current price on that date. There was a fluctuation of prices after the ceiling was removed, from 20 to 23 cents, and then from 24 to 25 cents the latter part of November 1946. The last day of October the market price was 22 cents.

On November 18, 1946, Forssell wrote the Fremont company making reference to its telegram of November 16th wherein it offered to ship six cars of soybean oil in December and January in full satisfaction of the contract, to which Wilson & Company replied that it

would accept the six tanks at 13½ cents per pound, and that they received a telegram from Fremont company offering the six cars at 23 cents per pound. Not to have any misunderstanding, Wilson & Company reiterated the position as outlined in its letter of November 15th, "that on the basis of our contract with you this oil is due and coming to us at 11-3/4¢ per lb., but without waiving any of our rights we would accept these six tanks you offer us for December-January shipment at 13-1/2¢ per lb. in full satisfaction of this contract." There was no reply received to this letter.

On December 2, 1946, Forssell wired the Fremont company: "NO REPLY OUR LETTER NOVEMBER 18TH WHAT CAN WE EXPECT SIX TANKS SOYBEAN OIL DUE ON MARWOOD CONTRACT NO. 3447-W." December 3, 1946, the Fremont company wired Forssell: "RETEL OFFER SHIP CAR SOYBEAN OIL CURRENT MARKET 25 CENTS." On December 3, 1946, the market price of soybean oil was 25 cents per pound.

Harry E. Wiysel, manager for the Fremont company, testified that its factory was located at Fremont, Nebraska, and that it engaged in the processing of soybean oil; that he was familiar with the CCC contract with his company, and the same was referred to in the contract between the Fremont company and Wilson & Company under the language contained therein, "Other Conditions"; and that the CCC contract was the only contract under which the Fremont company operated in the processing of soybeans into crude oil during the season of 1945-1946. In accordance with the CCC contract, the Fremont company went into the market and purchased soybeans at $2.04 per bushel, paid to the grower. The Fremont company sold the soybeans to the CCC for $2.04 per bushel, and repurchased them from the CCC at 37 cents less a bushel, which constituted the margin of profit to the Fremont company.

The CCC contract provided that the Fremont company

(the processor) was privileged to purchase soybeans of the 1945 crop "in a total quantity not in excess of the quantity he (the processor) can process on or before October 10, 1946 (to be determined by multiplying the total daily capacity of the Plant * * *," which is in this instance 2,300 bushels daily, which would entitle the Fremont company to purchase 759,000 bushels. Wiysel further testified that a bushel of soybeans would produce 8½ pounds of oil, or, 6,451,500 pounds of soybeans would be equivalent to 105⅔ tank cars. At the time the CCC contract was entered into the Fremont company had commitments of 105 tank cars. The Fremont company purchased 691,338 bushels of soybeans under the CCC contract between October 1, 1945, and October 10, 1946, the production was based on 80 percent of the plant's capacity. Assuming that there were 8½ pounds of oil to the bushel, 96 tank cars of oil could be produced. Thirty cars were delivered to Armour & Company, 27 cars to the Interstate Cottonseed Oil Refining Company, and 30 cars to Wilson & Company, or a total of 87 cars. Wiysel further testified that the total production of soybean oil from the 1945 bean crop was 5,588,120 pounds. This would be equivalent to 91½ cars.

The Fremont company's plant was shut down in September, the greater part of October, and in November, 1945, due to inability to procure adequate machinery, steel, and other items necessary to keep the plant in full production.

Wiysel further testified that Wilson & Company never at any time informed the Fremont company it would waive the requirements that any soybean oil sold to it under this contract be produced from beans acquired in accordance with its contract with the CCC or any other government agency controlling the marketing or crushing of oilseeds during the season 1945-1946, and nothing was said to the Fremont company about waiving the defaults and the delivery of soybean oil in October 1945, and April and May 1946. He testified that he kept ad-

vised of the OPA ceiling prices in effect from time to time, and that after October 16, 1946, the ceiling was unlimited; it was the market price. He related his conversation with Forssell in September 1946, where matters were discussed about the contract, and wherein he related to Forssell the difficulties he had during the past year, previous to September 1946, to the effect that one large expeller was on order, that delivery was promised in time to commence operation on the 1945-1946 crop, that delivery was not made until October 1, and the plant was not in operation until the end of October. He also explained to Forssell the difficulties in obtaining repairs for the other expellers. One expeller was down for six weeks and another a like period of time in December and January, and they were unable to obtain repairs due to war conditions. He further explained to Forssell that the Fremont company had other contracts that were to be filled, and that the Fremont company carried the contracts making delivery on a pro rata basis, month by month. Forssell said nothing with reference to that matter, and indicated he would accept the oil at a later date. Wiysel testified that the Fremont company was agreeable to shipping the remaining six cars of oil at a later date at the maximum permitted under the OPA.

The Fremont company asserts the contract is subject to the rules of the National Soybean Processors Association which appear in the Year Book and Trading Rules of the National Soybean Processors Association. Rule 115 contained therein deals with arbitration. Rule 116 deals with contingencies, and specifically refers to war. We will discuss this rule later in the opinion. In addition, rules for arbitration of the American Arbitration Association are also pertinent to the contract, and the Fremont company asserts that the refusal of the trial court to admit into evidence all of such rules relating to arbitration constitutes prejudicial error. Further, the United States Arbitration Act, Title 9, U. S. C. A., sections 2, 3, and 4, are applicable and should be enforced

in the state courts, and the failure of the trial court to so do constitutes prejudicial error.

In this act it is provided that a written provision in any contract involving commerce to settle by arbitration an existing controversy arising out of such contract shall be valid and enforceable. By section 3 it is provided that if any suit or proceeeding be brought in any court of the United States upon any issue referable to arbitration, the court in which the suit is pending, shall, on application of one of the parties stay the trial until such arbitration has been had, provided the applicant for the stay is not in default in proceedings in such arbitration.

Section 4 provides in part as follows: "A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any court of the United States which, save for such agreement, would have jurisdiction under the judicial code at law, in equity, or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement."

The proper legal steps were taken by the Fremont company to present to the district court for Dodge County the question as to whether or not arbitration should be invoked by the trial court in the instant case. The trial court ruled against the Fremont company on its contention in such respect.

A brief history of this litigation is appropriate to relate in connection with this assignment of error. On July 11, 1947, Wilson & Company filed suit in the United States District Court for the District of Nebraska, Omaha Division, to recover damages against the Fremont company for alleged breach of contract (the contract involved in the instant case). On August 2, 1947, the Fremont company filed a motion to stay proceedings until arbitration had been had in accordance with Title

9, U. S. C. A., section 3. This motion was sustained. Subsequent proceedings in the federal court hereinafter referred to disclose no order upon the ruling of the court was signed by the parties or presented to the court for approval. See Wilson & Co., Inc. v. Fremont Cake & Meal Co., 77 F. Supp. 364.

On July 19, 1948, Wilson & Company filed a motion to dismiss its action in the United States District Court. This was before the service or filing of an answer by the Fremont company. This motion was sustained. In sustaining the plaintiff's motion the court said the plaintiff had, perhaps still has, the absolute choice of forums for the recovery of the damages it claims, beyond the possible intervention of the defendant. By plaintiff is meant Wilson & Company, by defendant is meant the Fremont company. That reflection does not enter into the ruling upon the point; but it obviates the suggestion that the procedure that is made mandatory in the federal court is being imposed upon a litigant brought there against its will and thereby deprived of the supposed advantages to it of the state court's traditional usages unaffected by Title 9, U. S. C. A., section 3. See Wilson & Co., Inc. v. Fremont Cake & Meal Co., *supra.*

The instant case was filed by Wilson & Company in the district court for Dodge County on October 29, 1948. The case proceeded to trial in the latter part of September 1949, and judgment was entered on the verdict on September 24, 1949.

On April 8, 1949, the Fremont company filed an original action in the United States District Court for the District of Nebraska, Omaha Division, seeking an affirmative order to require Wilson & Company to submit this controversy to arbitration, as provided for in U. S. C. A., Title 9, section 4. This original action was filed while the instant action was pending and undetermined in the district court for Dodge County, Nebraska. The United States District Court dismissed the Fremont company's original action filed therein on October 8, 1949, holding

that the Fremont company not only had taken none of the explicitly defined steps to institute arbitration, but that its course in the entire controversy had been dilatory and obstructive only. Despite the early threats of Wilson & Company in two letters to invoke the arbitration clause of the contract, it remained silent on the question touching arbitration and did not itself initiate the process or even assent to Wilson & Company's suggestion of its liability. See Wilson & Co., Inc. v. Fremont Cake & Meal Co., 83 F. Supp. 900.

This case was appealed to the United States Court of Appeals, 8th Circuit, and on June 27, 1950, an opinion was rendered by that court wherein the United States District Court was affirmed. There is no occasion to quote from the opinion, except to say that the Circuit Court stated the state court obtained jurisdiction of the controversy between Wilson & Company and the Fremont company long prior to the commencement of the present proceeding. "A conflict of jurisdiction is always to be avoided if possible and it is a general rule that the right of a plaintiff to prosecute his suit in a court having once attached, will not be taken away by proceedings in another court. The decision in this case does not purport to interfere in any respect with the jurisdiction of the State Court but unless it could have such an effect it can not be said to determine any actual substantive controversy between the parties." Fremont Cake & Meal Co. v. Wilson & Co., Inc., 183 F. 2d 57.

In connection with this assignment of error the following authorities of this jurisdiction are applicable.

Whatever distinction may be made elsewhere between arbitration generally and arbitration as to damages only, it is well settled in this state that a provision in a contract requiring arbitration, whether of all disputes arising under contract, or only the amount of loss or damages sustained by the parties thereto, will not be enforced, and that refusal to arbitrate is not available to the parties in an action growing out of the contract. See,

Schrandt v. Young, 62 Neb. 254, 86 N. W. 1085; National Masonic Accident Assn. v. Burr, 44 Neb. 256, 62 N. W. 466; German-American Ins. Co. v. Etherton, 25 Neb. 505, 41 N. W. 406; Rentschler v. Missouri P. R. R. Co., 126 Neb. 493, 253 N. W. 694, 95 A. L. R. 1.

We conclude that the Fremont company's assignment of error here discussed cannot be sustained.

The Fremont company contends a question for the jury was presented by the conflict in the testimony of Forssell and Wiysel regarding the telegrams and correspondence between them as to whether or not a new contract was made between the parties requiring delivery at an agreed price after September 1946.

The evidence shows that on October 11, 1946, a telegram from Wilson & Company to the Fremont company stated: "ACCORDING OUR RECORDS WE HAVE SIX TANKS SOYBEAN OIL STILL DUE US MARWOOD CONTRACT 3447-W STOP PLEASE WIRE WHEN YOU PLAN LOAD THESE REMAINING SIX TANKS DUE GIVE US LOADING DATES AS YOU SEE THEM." The Fremont company's answer dated October 14, 1946, said: "EXPECT TO LOAD THREE TANKS LAST HALF OCTOBER THREE TANKS LAST HALF NOVEMBER WILL ADVISE LOADING DATES LATER." We believe this exchange of telegrams constituted the terms of an extension agreement. It may be noted also that on November 16, 1946, the Fremont company offered to ship six cars of soybean oil in December and January, if accepted in full satisfaction of the Marwood contract, which was accepted by Wilson & Company.

There is an exchange of telegrams between Wilson & Company and the Fremont company with reference to the acceptance of the six tank cars of oil in December 1946, and January 1947, at 13½ cents per pound, which occurred after the Fremont company refused to deliver at the contract price. These telegrams show that in order to get the oil, Wilson & Company not only agreed to a future delivery, but to an increase in price to meet

the OPA ceiling price in effect October 16, 1946.

Where a certain date is fixed as the time limit for delivery of merchandise by the seller to the purchaser, and by subsequent agreement between the parties in the form of correspondence the time limit date for delivery is postponed, such agreement does not discharge the original contract, but the same remains in full force, changed only to the extent that delivery is postponed. See Sussman, Wormser & Co. v. Sea Food Co., 127 Miss. 420, 90 So. 116. See, also, Gruner Lumber Co. v. Algonquin Lumber Co., 123 Miss. 157, 85 So. 191; Roberts v. Benjamin, 124 U. S. 64, 8 S. Ct. 393, 31 L. Ed. 334.

There was no new contract made between the parties; there was merely an extension of time for delivery of the soybean oil.

The Fremont company contends that the trial court erred in denying it a right at the close of the evidence to amend its answer to further develop the defense that it was precluded from performing the contract because of war and conditions resulting therefrom.

This assignment of error is based on the evidence adduced that the Fremont company was unable to procure, due to priorities, the necessary machinery, supplies, and repairs to carry on maximum production of its plant; that the plant was shut down at intervals during the period of the contract so that delivery was impossible to be made under the terms of the contract; and that this condition made so by war developed unforeseen difficulties, and in addition, by soybean shortages and the CCC contractual limitations in procurement of the same. The evidence does not show that the Fremont company was hindered, delayed, or prevented by any act of war from processing and delivering the six tanks of soybean oil in question. The evidence does show that Wilson & Company consented to and acquiesced in each delay of delivery without waiving any of its rights under the contract to delivery of the six tank cars of oil in question. No facts existed when the contract in the instant case was made

and assumed by the Fremont company, which made it impossible of performance.

"Inconvenience or the cost of compliance, though they might make compliance a hardship, cannot excuse a party from the performance of an absolute and unqualified undertaking to do a thing that is possible and lawful. Parties sui juris bind themselves by their lawful contracts, and courts cannot alter them because they work a hardship. The rights of the parties must be measured by the contract which they themselves made. A contract is not invalid, nor is the obligor therein in any manner discharged from its binding effect, because it turns out to be difficult or burdensome to perform. It has been said that difficulties, even if unforeseen and however great, are no excuse, and that the fact that a contract has become more burdensome in its operation than was anticipated is not ground for its rescission." 12 Am. Jur., Contracts, § 362, p. 928.

"Contract obligations are not generally within the rule that a person will be absolved from nonperformance of an obligation or a duty imposed on him by law if performance is rendered impossible without his fault by an act of God or an unavoidable accident. * * * A more general rule which is well settled, though subject to exceptions, is that supervening impossibility is not an excuse for nonperformance of an act promised. A contract which is possible of performance when made does not become invalid or unenforceable because conditions afterwards arise which render performance impossible. * * * If a party by his own contract creates a duty or imposes a charge on himself, he must under any and all conditions substantially comply with the undertaking." 12 Am. Jur., Contracts, § 363, p. 930. See, also, Columbus Ry. P. & L. Co. v. Columbus, 249 U. S. 399, 39 S. Ct. 349, 63 L. Ed. 699, 6 A. L. R. 1648; Cameron-Hawn Realty Co. v. Albany, 207 N. Y. 377, 101 N. E. 162, 49 L. R. A. N. S. 922.

In the absence of a statute to the contrary, conditions

arising from a state of war in which this country is engaged will not ordinarily constitute an excuse for nonperformance of contract. See 17 C. J. S., Contracts, § 463, p. 953. See, also, J. C. Lysle Milling Co. v. Sharp (Mo. App.), 207 S. W. 72; Ingram Day Lumber Co. v. Kola Lumber Co., 122 Miss. 632, 84 So. 693.

As stated in Porto Rico Sugar Co. v. Lorenzo, 222 U. S. 481, 32 S. Ct. 133, 56 L. Ed. 277: "A part of the delay seems to have been caused by the repeated breaking down of the machinery, but nothing appears to take the case out of the ordinary rule that performance of an absolute undertaking is not excused by facts of that sort." See, also, Sunseri v. Garcia & Maggini Co., 298 Pa. 249, 148 A. 81, 67 A. L. R. 1428.

Some contention is made by the Fremont company that rule 116 of the Trading Rules 1945-1946, National Soybean Processors Association, which constitutes a part of the contract, governs. This rule deals with contingencies and does mention: "If in consequence of any act of God, fire, flood, wind, explosion, war, * * * an act of government, * * * the Seller may be unable to ship or the Buyer unable to receive, * * *," then provides a course of procedure to invoke the rule. The contention is that Wilson & Company failed to abide by or avail itself of this rule. The rule was not admitted into evidence. The trial court rejected rule 116 on the ground that it was tied into the arbitration feature of the contract. The rule also provided that on failure of the parties to agree that the contingency "has or will delay the execution of the contract, then the matter shall be arbitrated in accordance with Rule 115 of these Trading Rules * * *."

We have heretofore expressed the inapplicability of the rules with reference to arbitration in the instant case.

We conclude that the trial court did not abuse its discretion in denying the Fremont company the right to amend its answer, as contended for by it.

The Fremont company further contends that the trial

court erred in not admitting all of the correspondence between the parties, citing section 25-1215, R. R. S. 1943, as follows: "When part of an act, declaration, conversation or writing is given in evidence by one party, the whole on the same subject may be inquired into by the other. When a letter is read, all other letters on the same subject between the same parties may be given. When a detached act, declaration, conversation or writing is given in evidence, any other act, declaration or writing which is necessary to make it fully understood, or to explain the same, may also be given in evidence." It cites also, Jensen v. Romigh, 133 Neb. 71, 274 N. W. 199; Culver v. Union P. R. R. Co., 112 Neb. 441, 199 N. W. 794; Roeder v. State, 119 Neb. 116, 227 N. W. 446.

This assignment of error involves certain correspondence between Wilson & Company and one Mr. Eighmy, connected with a firm processing soybean oil which had no connection with the Fremont company. This correspondence was to the effect that Wilson & Company desired Eighmy to use his best offices to persuade the Fremont company to abide by the terms of its contract with Wilson & Company. Eighmy's reply was to the effect that Wilson & Company should not be favored in such respect, and should pay the market price for soybean oil. We are unable to discern in what manner this correspondence could affect any issue in this case. No prejudicial error resulted to the Fremont company by the rejection of this evidence.

The balance of the evidence upon which the Fremont company predicates error by the trial court not admitting the same, relates to correspondence by Wilson & Company through its counsel and representatives, relating to invoking arbitration against the Fremont company, also the refusal of the trial court in not admitting in evidence the entire complaint filed by the Fremont company in the federal court, after Wilson & Company introduced a part thereof as admissions against interest. The part of the complaint the Fremont company desired in evi-

dence dealt with arbitration. Suffice it is to say, the arbitration feature of the contract is not here involved. The trial court did not commit prejudicial error in rejecting this evidence.

The Fremont company contends the jury should have been permitted to decide whether or not, under the peculiar conditions existing at the time the contract was made, the parties intended the price to be 11¾ cents in any event unless the OPA fixed a different price, or whether it was the intention to recite the OPA price then in effect and prescribe a third person, to wit the OPA, to fix the price. If the latter was the case, then the failure of the OPA to fix any price after October 16, 1946, would discharge both parties from any liability under the contract. The Fremont company cites section 69-410, R. S. 1943. The contract is plain. It provided for 11¾ cents per pound unless the OPA raised the ceiling above that figure, and then it would be the ceiling price fixed by the OPA. In the absence of a ceiling price fixed by the OPA, the contract price is just what the contract provided, 11¾ cents per pound.

Forssell testified that the OPA ceiling was removed October 16, 1946. The evidence is that the OPA eliminated all control of soybeans. There was no ceiling price thereafter. The seller could sell at the market price, above the market price, or below the market price. There were no restrictions, and no reason why a jury should pass upon the question as contended for by the Fremont company. The Fremont company was obligated and required to fulfill its contractual obligation to Wilson & Company separate and apart from any contract with the CCC which it voluntarily entered into. In this connection there is no doubt that the Wilson & Company contract could have been fulfilled by the Fremont company. They were permitted to purchase enough soybeans under the CCC contract to fulfill this contract. There was no reason for Wilson & Company to be required to prorate with any other commitments held by

the Fremont company when they took over the Marr company obligations.

The measure of damages, where the delivery date within which delivery must be made has been postponed by the parties, is the difference between the contract price of the goods and their market value at such postponed date of delivery. See Sussman, Wormser & Co. v. Sea Food Co., *supra.*

The measure of damages in this case is the difference in the contract price of the six tank cars of soybean oil in question and the market value of the same at the time to which delivery is postponed. If delivery is postponed by agreement of the parties, the market value at the time to which delivery is postponed is taken as the criterion. See, Summers v. Hibbard, 153 Ill. 102, 38 N. E. 899, 46 Am. S. R. 872; Crescent City Mfg. Co. v. Slattery, 132 La. 917, 61 So. 870; Covington Mfg. Co. v. Ferguson, 204 Ala. 192, 85 So. 726; Loy v. Storz Electric Refrigeration Co., 122 Neb. 357, 240 N. W. 423.

An abnormal rise in the price of goods due to unusual trade conditions, such that a producer cannot perform his contract to fill his order without greater expense than anticipated, is not within the provisions of the contract relieving him from liability in case of unavoidable accidents, wars, strikes, fires, labor trouble, or other delays. See Farmers Fertilizer Co. v. Lillie, 18 F. 2d 197, 52 A. L. R. 552. See, also, Wickham & B. Coal Co. v. Minnesota Coal Co., 7 F. 2d 873.

The evidence discloses that there was no dispute between the parties as to what the market price was on any given date after the ceiling was eliminated.

Where the defendant had defaulted on its contract to deliver equal monthly installments of merchandise and such requirement had been waived by plaintiff's acquiescence, the defendant had no right to insist that plaintiff's damages for breach should be measured by the market price in the months preceding the final breach of the contract, the market price of such merchandise having

increased after the final breach. See Brevard Tannin Co. v. J. F. Mosser Co., 288 F. 725.

Other assignments of error need not be discussed.

For the reasons herein given, the judgment entered by the trial court on the verdict is sustained.

AFFIRMED.

CHAPPELL, J., dissents.

WILLIAM SARRAILLON ET AL., APPELLEES, v. W. L. STEVENSON ET AL., APPELLANTS.
43 N. W. 2d 509

Filed July 24, 1950. No. 32766.

1. **Property.** The selection of the place of business is not in all cases left to the owner alone. It is often a matter of private and public concern.
2. **Nuisances.** A legitimate business is generally not a nuisance, but it may become a nuisance in fact by reason of the manner of its operation, and because of conditions implicit in and that unavoidably result from its operation, especially in a residential or other closely occupied area.
3. ———. A legitimate business conducted in a residential neighborhood that pollutes or contaminates the air through noisome and noxious odors created by it, that by noises emanating from it disturbs the peace, quiet, and comfort of the residents thereof, and injuriously affects property rights of adjoining and nearby property owners, is a nuisance in fact.
4. **Injunction: Nuisances.** In granting an injunction against a nuisance, a court of equity will not go beyond the necessities of the particular case before it.
5. ———: ———. The exercise of due care by the owner of a business in its operation does not constitute a defense to an action to enjoin its operation as a nuisance where notwithstanding such care the business as conducted materially and injuriously affects the comfort, enjoyment, and property rights of those in its vicinity.
6. **Appeal and Error.** In the absence of an express finding by the district court on an issue adverse to the appellee, a cross-appeal in reference to such issue may not be had in this court.

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

Paul P. Chaney, and *Moran & James,* for appellants.

Lloyd E. Peterson and *Betty Peterson Sharp,* for appellees.

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

BOSLAUGH, J.

This is an action by appellees for an injunction against W. L. Stevenson, Julien R. Stevenson, and Stevenson Packing Company, appellants, to prevent them from slaughtering hogs and cattle, maintaining and using stockyards, and operating a cold storage or locker plant on property owned by them in Nebraska City.

The basis of the case of appellees is the claim that the operations of appellants are contrary to and a violation of ordinances of the city prohibiting them at the location where conducted, and that they, as conducted, constitute a nuisance. The substance of the defense of appellants is that they have properly and legally conducted their business, a denial of violation of any ordinance of the city, or that they have caused or that there exists a nuisance because of their business or any condition resulting therefrom.

The trial resulted in findings by the district court that appellants should not be enjoined from operating the cold storage plant, the smoking of meats, or the rendering of edible animal fats incidental thereto; that the slaughtering of animals and the yard in which stock is temporarily kept was a violation of ordinances of the city; that the property of appellants was in the "business district" and not in the "industrial district" under (zoning) ordinance No. 643 of the city; and that appellants should be enjoined from using any part of their premises for the purpose of slaughtering animals or for a stockyard. The decree rendered was consistent with

the findings and enjoined appellants or anyone acting in their behalf from using any part of their real estate for slaughtering any animals or as a stockyards for the retention of any animals. Appellants made a motion for a new trial. It was denied, and they have appealed.

Appellants W. L. Stevenson and Julien R. Stevenson have at all the times important to this case owned the part of Block 81 in Nebraska City upon which the operations are had which are sought to be enjoined. They own and conduct thereon in the name of Stevenson Packing Company a cold storage plant, the slaughtering and processing of meat for food, the rendering of edible animal fats, the curing of meats by smoking, and have and use an enclosure for yarding cattle and hogs.

Eight of the appellees own and occupy residences as their homes on other parts of the same block. A majority of the other appellees own and occupy homes near the property of appellants. This area is, and for many years before any of the acts of appellants complained of herein, was a residential area and is classified as such in the last zoning ordinance of the city.

The building of appellants was a mill, but has not been used as such since about 1925. Part of it was used for dead storage for about ten years. In the fall of 1935 a part of the building was first used for cold storage or as a locker plant, and its operation has been continued to the present. In the spring of 1936 other parts of the building to the rear of the locker plant were put in use for slaughtering and processing hogs and cattle, and this has been also continued. An enclosure near the alley of Block 81 referred to in the record as "stockyards" or "holding pen" was constructed at the rear of and attached to the building. It has been used to yard hogs and cattle, sometimes for a few hours, sometimes for a longer period—7 a. m. to 5 p. m., and on occasions cattle were kept there the balance of the day of delivery, the following night, and part of the second day. The yards are constructed of posts, boards, and gates. There

is no shed or covering. Water or feed is not furnished to the stock while detained there. There were five to fifteen hogs—"maybe a few more" and four to eight cattle—"somewhere in there" received, yarded, and killed each day when there was slaughtering at the plant, on an average of three to four days each week.

A chain was fastened to a hind leg of each hog killed and it was elevated head down by a power hoist. It was killed by sticking a knife in the throat. The cattle were killed by the blow of a hammer on the head. In dressing the animals their contents, except the heart and liver, were deposited on the floor. The contents of the stomach were removed therefrom and left on the floor. Later the offal, except the contents of the stomach, was removed from the building by carrying it in the open and placing it in barrels outside under a lean-to with the south side entirely exposed to the open. There was no outside wall to the south and no screen. The barrels were, much of the time, at least, not covered. Later they were loaded or the contents dumped into a truck or other containers in a truck at or near the alley and taken away by a rendering company. The length of time the barrels and their contents remained at the packing plant was uncertain and irregular. The contents of the stomachs were scooped from the building to the pen attached thereto and later scooped in open and uncovered trucks backed in from the alley and hauled through it and the residential area and deposited outside the city. Drippings from the trucks were seen as they moved away from the plant through the alley.

It is undisputed that frequently when the barrels were removed bones, parts of the heads, hoofs, and organs of the animals and other contents thereof were thrown to or left for dogs that gathered in considerable numbers, and this material was carried by them to the homes and lawns of appellees and others, gnawed and eaten by the dogs, and the remnants thereof left on the

yards and lawns about the homes to be cleaned up, removed, and disposed of by the occupants.

The retaining of animals at the yard of the plant under the conditions recited without feed or water, the fact that they were strange to each other and in an environment which afforded the smell of blood, the dragging and lifting hogs by a chain fastened to one leg, and the sudden sticking of a sharp knife in their flesh caused frequent and for some periods continuous unusual bellowing, squealing, and hideous cries of anguish by the animals which were disturbing, annoying, and to some of the more sensitive persons in the area, harmful.

The commencement of the operations of the slaughterhouse at this location was the advent of an invasion of flies in this area. There had been no unusual experience in this area of the city with such insects before, and many of appellees had lived there many years, and one of them for more than 60 years. There were small flies and big flies, houseflies, and blowflies of the most annoying and revolting kind that appeared and gathered at the plant and traveled to and around and in many instances got into the homes. They were seen coming from the location of this plant, and there is no reasonable doubt but that that was their source and principal place of assembly. Rats invaded the neighborhood, and there has been a continual war between the residents and the rats.

The operation of the packing plant and the conditions caused by it has created noisome, offensive, disturbing, and in some instances nauseating and sickening odors that taint and fill the atmosphere around and in the homes of appellees and in the area generally—"* * * it just smells so bad it is sickening." This is especially true in the summer. They cause much discomfiture, annoyance, and distress. Persons lose their appetites, do not care to eat, and are driven from their meals. The odors disturb their sleep and rest. They awake at night

with a feeling of sickness and a longing for fresh unpolluted air. When the wind blows from the direction of the plant the odors are bad enough to cause persons to close the openings in their homes. If they did not they couldn't stay there. They are deprived from sitting on and enjoying the porches of their homes as they formerly did. They are prevented from having friends and entertaining in their homes. Some have left their homes and driven in the country to get away from these. These smells are "like South Omaha." They are regular packing house odors and are offensive. An employee of the garbage firm loaded and hauled away the garbage for about a month in 1948. It was a soft mass and gave off awful sickening odors which continued for the entire trip of about three miles to the city dump. It made him sick. He was unable to continue and refused to work. He was transferred to another route. Another garbage truck operator said the packing plant was the last stop on the route because "That is the worst thing. Q. In all Nebraska City it is the worst? A. That is right."

These conditions have depreciated greatly the value of the property of appellees and no residence has been constructed in the vicinity of this plant since it commenced the packing house business.

There is no fixed or arbitrary rule governing cases of this class. Each case must be determined by the facts and circumstances developed therein. Beisel v. Crosby, 104 Neb. 643, 178 N. W. 272. The facts shown by the evidence have been stated. There is no reasonable doubt but that appellants have used their property for purposes and in a manner which deprives appellees and other residents of normal and ordinary sensibilities living in the area around it of the reasonable and comfortable use of their property, and so that the accepted law of decency is violated and the value of their property because thereof has been substantially depreciated. Complete freedom and full use and enjoyment of home life in the neighbor-

hood has been limited if not destroyed. A court of equity has jurisdiction to enjoin such a use of private property when its continuance would occasion a constantly occurring grievance. Lowe v. Prospect Hill Cemetery Assn., 58 Neb. 94, 78 N. W. 488, 46 L. R. A. 237.

Appellants argue that the business in which they are engaged is legitimate and legal, that it cannot be conducted without the conditions complained of in some degree, and that if this is sufficient reason for abating the business as a nuisance it must necessarily be abandoned. They assert that the injunction granted herein violates provisions of the state and federal constitutions. It has not heretofore been considered that a property owner had a vested right in or a constitutional privilege to maintain or continue a nuisance. The evidence of appellants is that every slaughterhouse or packing plant has its own characteristic odors; that the animals brought to the plant, yarded there, and killed make noises different from those made by them in other circumstances; and experience, knowledge, or ingenuity has not discovered or devised any method or manner of eliminating either the odors or the noises. Appellants claim that the plant involved here is kept and operated in as good a manner and condition as it can be and as other similar plants. An answer of the contention of appellants in this regard is not difficult. They may lawfully conduct their operations anywhere if they acquire a sufficient area so that the objectionable features and conditions thereof are confined to their property, or they may conduct them at such places where businesses of like kind are carried on —where the result thereof is not to deprive people of the comfort and enjoyment of their homes or to depreciate or destroy the value of their property. An industry of this sort may not be conducted at any place or at all places merely because it is legitimate and lawful. The selection of the place of business is not necessarily left to the owner alone. That subject is often a matter of both private and public concern. Beisel v. Crosby, *supra*.

No amount of skill, effort, or attention can, according to the evidence in this case, wholly eliminate the distressing conditions or results of the operation of a packing plant in close proximity to residences. Appellants would not assert that they could with legal immunity physically invade their neighbors' property and thus render it less useful to them. There is no difference in effect between a physical invasion which limits the use of or destroys the property and an invasion by permeating or by noise and insects that results in the same kind of a limitation of use or depreciation of property. A legitimate industry is generally not a nuisance, but it may become a nuisance in fact by reason of the manner of its operation and conditions implicit in and that unavoidably result from its operation, especially in a residential or other closely occupied area. Beisel v. Crosby, *supra;* Village of Kenesaw v. Chicago, B. & Q. R. R. Co., 91 Neb. 619, 136 N. W. 990; Annotation, 27 A. L. R. 329; 48 Am. Jur., Slaughterhouses, § 5, p. 463; Rhoades v. Cook, 122 Iowa 336, 98 N. W. 122; Robinson v. Westman, 224 Minn. 105, 29 N. W. 2d 1, 174 A. L. R. 746. See, also, Saier v. Joy, 198 Mich. 295, 164 N. W. 507, L. R. A. 1918A 825; Brede v. Minnesota Crushed Stone Co., 143 Minn. 374, 173 N. W. 805, 6 A. L. R. 1092.

A court of equity will not usually enjoin the operation of a legitimate business conducted at a proper place solely because of the manner of its operation, without regard to how serious may be the grievance caused thereby. In the first instance, at least, it will require the cause of the grievance to be corrected and will enjoin conduct of the enterprise perpetually after it has been proven that no application of endeavor, science, or skill can effect a remedy or that the owner cannot be induced to conduct it properly. Mathews v. Mozer, 111 Neb. 71, 195 N. W. 943; State ex rel. Towle v. Eyen, 130 Neb. 416, 264 N. W. 901.

In Stuhr v. City of Grand Island, 120 Neb. 491, 233 N. W. 886, it is said: "In granting an injunction against a

nuisance, a court of equity will not go beyond the necessities of the particular case before it." The situation here is different. The evidence of appellants establishes that the objections to the operations complained of are substantially matters inherent in the nature of the business and that no application of effort, science, or ingenuity will afford a remedy in that location. There is a class of business, of which slaughterhouses and fertilizing plants are examples, which, from their very nature, cannot generally be conducted except in more or less isolated places. No matter how scientifically the plants are constructed or how hygienically they are operated, they emit noxious, noisome, and offensive, and to many persons, nauseating odors. They produce disturbing noises and often cause an invasion of insects and rodents. Few people can or will reside or stay within the reach of them except under the compulsion of necessity. The courts will not, where these conditions exist, permit such operations to continue in districts where people have their homes or where they are compelled to congregate in pursuit of their ordinary avocations, nor on such a restricted area that their operation must of necessity render materially less valuable to their owners abutting and adjacent property. A proprietor cannot be permitted to convert his property into a nuisance to the detriment of other nearby proprietors. The area where the plant here in question is located is essentially residential. The grievances shown by the evidence are an invasion of the property of appellees to which they ought not to be compelled to submit. In other words, the plant is at a place where it has necessarily caused injury to the adjoining and nearby property owners, and it is thus a nuisance and should be abated in the respects and to the extent hereinafter stated.

Appellants offered evidence tending to show that they have properly conducted their business. If this is accepted as the fact it is not sufficient to defeat the granting of appropriate relief to appellees. The exercise of

due care by the owner of a business in its operation does not constitute a defense to an action to enjoin its operation as a nuisance where notwithstanding such care the business as conducted seriously disturbs persons of normal and ordinary sensibilities in the comfort, use, and enjoyment of their homes and interferes with their property rights. In Village of Kenesaw v. Chicago, B. & Q. R. R. Co., *supra,* a nuisance was abated by injunction although the court found that: "* * * while the railroad company seems to have exerted reasonable efforts to remedy the conditions, it has been unable to prevent the existence of a nuisance, at least to an extent very annoying to the residents living near by." Lead v. Inch, 116 Minn. 467, 134 N. W. 218, 39 L. R. A. N. S. 234, Ann. Cas. 1913B 891, states the rule as follows: "If the manner in which it is conducted results in noxious odors, disagreeable noises, to the discomfort and annoyance of adjoining property owners, it is a nuisance within the meaning of the law, regardless of the question whether defendant exercised due care to so manage the property as to avoid results of that nature. Joyce, Nuisances, 202; Berger v. Minneapolis Gaslight Co. 60 Minn. 296, 62 N. W. 336. In other words, where the business casts off noxious and unwholesome odors, in fact annoying to and impairing the comfort of adjoining property owners, it is no defense to say that it was conducted in a reasonable and proper manner, and that the odors emanating therefrom were such as are ordinarily incident to the business when properly conducted."

Appellants argue that the district court did not find that any of their operations were a nuisance. They contend that the court found for them on this issue, and in any event that it cannot be considered because appellees did not cross-appeal. The trial court did not by the use of the word "nuisance" find that one existed. The court did make a separate, distinct, and general finding that "* * * defendants should be enjoined from using any part of their said premises * * * for * * * slaughtering

animals thereon, * * * and from using any part of their said premises * * * for a stockyards * * *." It is not inherently impossible that this included a conclusion that the specified uses of the premises constituted a nuisance. This is more probable than that the finding quoted related only to a violation of a zoning ordinance of the city. The view that the district court wholly disregarded or found against the claim of appellees that there was a nuisance is on this record a strained one. If that had been the view of the court, the judge thereof would not have been interested in a view of the property of any of the parties. If appellants were located and operating in violation of a zoning ordinance these facts would have resolved the case. The manner, result, or conditions caused by the operations would not have been important or interesting. But the court did extensively view and examine the property of all of the parties to the case. This points to his interest and concern in the existence or nonexistence of a nuisance. It should not be assumed that he did an unimportant or frivolous thing. The claim that a cross-appeal by appellees was a prerequisite to a consideration in this court of the issue of nuisance is obviously without merit. There is no record that the district court found that appellants were not maintaining a nuisance. The absence thereof prevented appellees from stating in a cross-appeal how the issue was decided in the trial court—one of the indispensable requirements of a resort to the remedy of cross-appeal. Any attempt by them to present a cross-appeal in this case as to the finding of the trial court on this issue would have been frivolous and futile.

The district court saw and heard the witnesses testify. The very extensive record in this case consists largely of testimony orally given at the trial on the issue of the existence or absence of a nuisance. It is in many respects in irreconcilable conflict. The trial judge viewed the premises under circumstances favorable to ascertaining the true conditions. Appellants have significantly

avoided consideration, analysis, or discussion of the evidence on this issue, and have failed to point out any defects or insufficiency therein. This case has been, as the law provides, examined and considered de novo. The conclusion is that the existence and operation of the cold storage or locker plant of appellants, the rendering of edible animal fats, and the curing of bacon and hams by smoking incidental to the cold storage business, is not objectionable and should not be interfered with in this case, and the relief sought by appellees in reference thereto should be denied; that the slaughtering of animals on any part of Block 81 of Nebraska City, Nebraska, owned by appellants, or the use of any part thereof as a stockyards for enclosing and detaining animals constitutes and is a nuisance; and that appellants and each of them, and any and all persons acting for or on their behalf, should be permanently enjoined from using any part of said premises for the slaughtering of any animals or for a stockyards.

The judgment of the district court should be, and the same is hereby, affirmed.

AFFIRMED.

VYO LYNN, APPELLEE, V. THE CITY OF OMAHA, A MUNICIPAL CORPORATION, APPELLANT.
43 N. W. 2d 527

Filed July 24, 1950. No. 32771.

1. **Eminent Domain.** In condemnation proceedings, where the market value of real estate is in issue evidence of prices paid by a condemner therefor is inadmissible in like proceedings involving other land for the reason the same does not furnish a criterion for market or going value of land being condemned.
2. ———. The market value of property taken in condemnation is not measured by the benefits to, or needs of, condemner. The question is, What has the owner lost? not, What has the taker gained?
3. **Trial.** The purpose of instructions is to furnish guidance to

the jury in their deliberations, and to aid them in arriving at a proper verdict; and, with this end in view, they should state clearly and concisely the issues of fact and the principles of law which are necessary to enable them to accomplish the purpose desired.

APPEAL from the district court for Douglas County: FRANK M. DINEEN, JUDGE. *Reversed and remanded.*

Edward F. Fogarty, Edward Sklenicka, James M. Paxson, and *Herbert M. Fitle,* for appellant.

G. H. Seig, for appellee.

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

WENKE, J.

This appeal arises out of the city of Omaha appropriating certain lands by condemnation for its use as an addition to its municipal airport. The lands so taken included a tract belonging to Vyo Lynn. Lynn appealed to the district court for Douglas County from the award of the board of appraisers which had fixed the value of his property taken at $6,750. Upon trial in the district court the jury fixed the value thereof at $11,625. From the overruling of its motion for new trial and the entry of judgment on the verdict, the City of Omaha appeals.

For the purpose of this opinion we shall refer to appellant as the city and to appellee as Lynn.

Admittedly the city took an improved tract of land belonging to Lynn. It was located north of Fort Street and south of the Missouri River levee and contained somewhere between 16.06 and 19 acres. It was north of and immediately adjacent to the city's airport.

In the trial to determine the amount which Lynn was entitled to receive because of the taking the city contends the court erred when, over proper objection as to foundation, it admitted the testimony of Charles Bahm as to what the city had paid him for his property in 1941 when it purchased it for municipal airport pur-

poses and its subsequent refusal to give the city's requested instruction No. 4 to the effect that the jury should not consider this evidence in determining the fair market value of the property taken.

The land which the city purchased from Bahm in 1941 for airport purposes is just south of the Lynn land and of a sufficiently similar character that if it could be said that it was a sale in the open market it was admissible under the rule as announced in Langdon v. Loup River Public Power District, 142 Neb. 859, 8 N. W. 2d 201. Therein we said: "It seems that there could be no better evidence of the true market or going value of land than the price paid for other, similar and similarly situated land sold at about the same time when, by evidence, it is shown that the price so paid for the other lands depended upon market or going value rather than other considerations."

Bahm was asked: "* * * what price did the City of Omaha pay you for your 5 acres of land when they bought it in 1941?" Over proper objection he was permitted to answer and testified: "$1000 an acre."

We held in State v. Wright, 105 Neb. 617, 181 N. W. 539: "* * * it is the universal rule that sales of similar lands cannot be shown where such sales had not been entirely voluntary. Sales made to the state as a part of a tract, which is sought to be acquired by condemnation in case purchases cannot be made, are not considered of such a voluntary character as will truly reflect the reasonable or market value of the land sold and, therefore, cannot, upon any theory, be shown in evidence as having a bearing upon the value of the land under condemnation. Oregon R. & N. Co. v. Eastlack, 54 Or. 196; United States v. Beaty, 198 Fed. 284; Spring Valley Water Works, v. Drinkhouse, 92 Cal. 528; City of San Luis Obispo v. Brizzolara, 100 Cal. 434; South Park Commissioners v. Ayer, 237 Ill. 211; State v. Superior Court, 55 Wash. 64; Coate v. Memphis R. T. Co., 120 Tenn. 525; note, 43 L. R. A. n.s. 985. Individual sales throw no

light on market values if in any sense compulsory, or when the vendor is not given opportunity to indefinitely hold his property and invite competition among all who should desire to become purchasers.

"Mr. Lewis, in his treatise on Eminent Domain (3d ed.) sec. 667, says: 'What the party condemning has paid for other property is incompetent. Such sales are not a fair criterion of value, for the reason that they are in the nature of a compromise. They are affected by an element which does not enter into similar transactions made in the ordinary course of business. The one party may force a sale at such a price as may be fixed by the tribunal appointed by law. In most cases the same party must have the particular property, even if it cost more than its true value. The fear of one party or the other to take the risk of legal proceedings ordinarily results in the one party paying more or the other taking less than is considered to be the fair market value of the property. For these reasons such sales would not seem to be competent evidence of value in any case, whether in a proceeding by the same condemning party or otherwise.' "

As stated in Papke v. City of Omaha, 152 Neb. 491, 41 N. W. 2d 751: "In condemnation proceedings where the market value of real estate is in issue, evidence of prices paid by a condemner therefor is inadmissible in like proceedings involving other land, for the reason the same do not furnish a criterion for market or going value of land being condemned."

The evidence received was not admissible and it was error to admit it.

The city further contends that the utility or availability of the property for the special purpose of the condemner cannot be considered in determining market value if the taker is the only person who can use the property for that purpose and that the court erred when it refused to give its requested instruction No. 3.

This requested instruction is as follows: "You are

further instructed that in this proceeding plaintiff is entitled to the market value of property taken for the use to which it may be most advantageously put and for which it would sell for the highest price in the market, but you are not entitled to base your award of damages upon your estimate of the value of this real estate for enlargement of the airport."

As stated in Minneapolis-St. Paul Sanitary District v. Fitzpatrick, 201 Minn. 442, 277 N. W. 394, 124 A. L. R. 897: "The market value of property taken in condemnation is not measured by the benefits to, or needs of, condemnor. The question is, What has the owner lost? not, What has the taker gained?" Therein the court, by quoting from Stinson v. Chicago, St. P. & M. Ry. Co., 27 Minn. 284, 6 N. W. 784, goes on to say: " 'No reason can be given why property taken under the eminent domain by a railroad company, or for any public purpose, should be paid for at a rate exceeding its general value—that is to say, its value for any purpose. Any use for which it is available, or to which it is adapted, is an element to be taken into account in estimating its general value. But where a condemnation is sought for the purposes of a railroad, to single out from the elements of general value the value for the special purposes of such railroad, is in effect to put to a jury the question, what is the land worth to the particular railroad company, rather than what is it worth in general? The practical result would be to make the company's necessity the landowner's opportunity to get more than the real value of his land.' " See, also, State v. Platte Valley Public Power and Irrigation District, 147 Neb. 289, 23 N. W. 2d 300, 166 A. L. R. 1196.

As stated in Olson v. United States, 292 U. S. 246, 54 S. Ct. 704, 78 L. Ed. 1236: "Value to the taker of a piece of land combined with other parcels for public use is not the measure of or a guide to the compensation to which the owner is entitled."

And in United States v. Chandler-Dunbar Water

Power Co., 229 U. S. 53, 33 S. Ct. 667, 57 L. Ed. 1063: "But in a condemnation proceeding, the value of the property to the Government for its particular use is not a criterion. The owner must be compensated for what is taken from him, but that is done when he is paid its fair market value for all available uses and purposes."

This rule should not be confused with the rule as stated in Langdon v. Loup River Public Power District, 144 Neb. 325, 13 N. W. 2d 168, as follows: "The market value of property includes its value for any reasonable use to which it may be put. If, by reason of its surroundings, or its natural advantages, or its artificial improvements, or its intrinsic character, it is peculiarly adapted to some particular use, all the circumstances which made up this adaptability may be shown, and the fact of such adaptation may be taken into consideration in estimating compensation. The proper inquiry is, what is its fair market value in view of any reasonable use to which it may be applied and all the reasonable uses to which it is adapted? The correct rule is as stated in Alloway v. Nashville, 88 Tenn. 510, 13 S. W. 123: '"* * * witnesses should not be allowed to give their opinions as to the value of property for a particular purpose, but should state its market value in view of any purpose to which it is adapted. The condition of the property and all its surroundings may be shown, and its availability for any particular use. If it has a peculiar adaptation for certain uses, this may be shown, and if such peculiar adaptation adds to its value the owner is entitled to the benefit of it. But when all the facts and circumstances have been shown, the question at last is, What is it worth in the market?" Lewis, Eminent Domain, sec. 479.' "

While it is true that the court sustained the city's objections to questions as to value based upon its use by the city as an airport, however, in view of the form of the questions asked, the fact that Bahm was permitted to testify as to what the city paid him for his land which the city acquired for airport purposes and the fact that

the jury was permitted to view the premises, we find the court should have given an instruction properly cautioning the jury in regard thereto.

The city also contends that the trial court should submit to the jury only a plain statement of the facts as to the issues that are to be determined. This contention relates itself to the issue raised by the pleadings that the proceedings were null and void because the city council of the city of Omaha appointed as the chairman of the board of freeholders to appraise the property being taken by the city one George T. Morton who, at that time, was a member of the city planning commission of the city of Omaha and because of that fact not a disinterested freeholder as provided for in such cases by the charter provisions of the city. This issue was contained in instructions Nos. 1, 2, and 3 given by the court.

As stated in Langdon v. Loup River Public Power District, 144 Neb. 325, 13 N. W. 2d 168: "The purpose of an instruction is to furnish guidance to the jury in their deliberations, and to aid them in arriving at a proper verdict; and, with this end in view, it should state clearly and concisely the issues of fact and the principles of law which are necessary to enable them to accomplish the purpose desired."

The issue so raised did not present a question for the jury but one of law for the court. It should not have been included in the instructions as it was wholly immaterial to the issue which the jury was to determine. It should not be included when the matter is again presented to the jury.

The city makes two other contentions: First, that the verdict is excessive, and second, that interest should not be allowed on an award when, after the award is made, the owner retains possession. Neither of these questions may again arise on the retrial which we find is necessary. In view thereof it would not be proper for us to answer them now.

For the reasons hereinbefore stated there must be a

retrial. The judgment and verdict are therefore vacated and set aside and the judgment reversed and the cause remanded for a retrial.

REVERSED AND REMANDED.

SIMMONS, C. J., participating on briefs.

GRACE WITTWER, ADMINISTRATRIX OF THE ESTATE OF JAMES WITTWER, DECEASED, APPELLEE, V. THE COUNTY OF RICHARDSON, NEBRASKA, APPELLANT.

43 N. W. 2d 505

Filed July 24, 1950. No. 32776.

1. **Counties.** In an action to recover damages from a county under sections 30-809 and 30-810, R. R. S. 1943, and section 39-834, R. S. 1943, the burden is on the plaintiff to establish negligence on the part of the county.
2. **Counties: Bridges.** A county is not an insurer of the safety of the bridges it constructs and maintains upon highways for the use of the public.
3. ———: ———. In an action to recover damages from a county on account of injury or death caused by a defective bridge on a public highway the plaintiff must prove by a preponderance of the evidence that the defect was known or that it existed for such a length of time that with reasonable diligence it could or should have been discovered by the county.
4. ———: ———. A county is not liable for negligence on account of latent defects in a bridge on a public highway but only for such as are patent and may be ascertained by reasonable inspection.
5. **Counties.** A county is not liable for negligence for injury or death on account of defects caused by climatic conditions beyond its control.

APPEAL from the district court for Richardson County: VIRGIL FALLOON, JUDGE. *Reversed and dismissed.*

Bayard T. Clark, Jean B. Cain, and *F. A. Hebenstreit,* for appellant.

Paul P. Chaney and *John H. Wiltse,* for appellee.

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

YEAGER, J.

This is an action by Grace Wittwer, administratrix of the estate of James Wittwer, deceased, plaintiff and appellee, against the County of Richardson, Nebraska, defendant and appellant, to recover damages on account of the death of James Wittwer, which the plaintiff says was caused by the negligence of the defendant. The case was tried to a jury and a verdict was returned in favor of plaintiff for $19,570.72. Judgment was entered on the verdict. A motion for new trial was duly filed and overruled. From the judgment and the order overruling the motion for new trial the defendant has appealed.

Numerous alleged errors were assigned as grounds for reversal. Such of them as require consideration in a proper determination of the case will be discussed at the proper point herein.

James Wittwer of the age of 49 years came to his death on March 21, 1949, at a point on a public county highway in Richardson County, Nebraska, about one and one-half miles west of Falls City. He came to his death as the direct result of a fire in a Ford automobile truck which he had operated west to the point of the incidents involved on the highway.

At the place where death occurred there was a bridge across the highway and over a regular drainway or creek. Its width was about 19 feet and its span about 13 feet. Authentically it appears that the bridge was constructed not later than 1922. At the east side of the creek was a reinforced concrete abutment extending north and south. The thickness of the abutment does not appear in the evidence. Its height including the base was about 16 feet. The base or footing was 30 inches wide by two feet in depth. Attached to each end of the abutment and extending backward from the channel

of the creek and obliquely outward for a distance of about 10 to 11 feet there was a reinforced concrete wing. The thickness was 11 inches at the top and greater at the bottom. Whether or not the wings rested on a base similar to that supporting the abutment is not made clear. There was an abutment with wings on the west side the same as on the east. The wings were doubtless placed there for the purpose of aiding to support the abutments and to prevent earth from escaping from behind the abutments. The span of the bridge was attached to and rested on top of the abutments in a manner not necessary to be described here.

The lowest point of the channel of the stream was about three feet below the bottom or base of the abutments but this low point did not extend outward to the base of the abutments. There had been no washing out under the abutments. There is no evidence of a lack of firmness at the base of the abutments.

In the early morning while it was yet dark the deceased driving a Ford automobile truck at about the speed of 30 or 35 miles an hour approached the bridge and from behind the truck was seen to apparently drop. Almost immediately thereafter it was found that the west abutment had fallen forward and downward and that the span of the bridge had fallen upon it and the truck spanned the gap which had been covered by the span of the bridge. The front end extended west beyond where the west abutment had been and the rear to the east beyond the location of the east abutment. The deceased and another man were pinned in the truck in such manner that they could not at the time be extricated. A fire started and the two men died in consequence thereof before they could be extricated.

Whether or not the bridge collasped before or after the deceased arrived at this point is, on the record, only a matter of surmise.

The plaintiff, the widow of the deceased and administratrix of his estate, brings the action under authority

of sections 30-809 and 30-810, R. R. S. 1943, and she charges the defendant county with liability under section 39-834, R. S. 1943. No question is raised as to her right to maintain the action or as to her right to recover if negligence of the county was shown to be the proximate cause of the death of her husband. It follows therefore that the provisions of statute referred to require no discussion.

The grounds of action are:

"That the defendant disregarding its duties to said James Wittwer and the public generally carelessly and negligently permitted said bridge to become out of repair and dangerous for public travel in the following particulars, towit:—

"(a) In failing to maintain said bridge so that it was fit for public traffic across the same.

"(b) In permitting said bridge to become out of repair.

"(c) In that the defendant, its officers and agents, knew or should have known that said bridge was not in repair and taken the necessary steps to make said bridge safe for public travel across the same.

"(d) In maintaining said bridge so that the West perpendicular wall became out of place and fell inward or toward the east so that there was no support for the top or roadway surface of said bridge."

As a ground for reversal the defendant says that the court erred in not sustaining defendant's motion for a directed verdict at the close of plaintiff's testimony. The basis of the assignment is that the evidence wholly failed to establish any negligence on the part of the defendant.

In an action to recover damages from a county under the sections of the statute named herein the burden is on the plaintiff to establish negligence on the part of the county. Miller v. Abel Construction Co., 140 Neb. 482, 300 N. W. 405.

A county is not an insurer of the safety of the bridges

it constructs and maintains upon highways for the use of the public. Johnson County v. Carmen, 71 Neb. 682, 99 N. W. 502; Brooks v. Thayer County, 126 Neb. 610, 254 N. W. 413; Freedom Oil Works Co. v. Beaver County, 298 Pa. 174, 148 A. 67, 68 A. L. R. 600; Sumey v. Fayette County, 298 Pa. 93, 147 A. 851, 68 A. L. R. 596.

In an action to recover damages from a county on account of injury or death caused by a defective bridge on a public highway the plaintiff must prove by a preponderance of the evidence that the defect was known or that it existed for such a length of time that with reasonable diligence it could or should have been discovered by the county. Johnson County v. Carmen, *supra;* Clingan v. Dixon County, 74 Neb. 807, 105 N. W. 710; City of Central City v. Marquis, 75 Neb. 233, 106 N. W. 221; O'Chander v. Dakota County, 90 Neb. 3, 132 N. W. 722; Bethel v. Pawnee County, 95 Neb. 203, 145 N. W. 363; Higgins v. Garfield County, 107 Neb. 482, 186 N. W. 347.

A county is not liable for negligence on account of latent defects in a bridge on a public highway but only for such as are patent and may be ascertained by reasonable inspection. Johnson County v. Carmen, *supra;* Sumey v. Fayette County, *supra;* Clingan v. Dixon County, *supra;* Peitzmieier v. Colfax County, 94 Neb. 675, 144 N. W. 248; Bethel v. Pawnee County, *supra.*

A county is not liable for negligence for injury or death on account of defects in a bridge caused by climatic condition beyond its control. Johnson County v. Carmen, *supra;* Sumey v. Fayette County, *supra.*

The question of whether or not the plaintiff has sustained a cause of action must be ascertained by application of these rules to the evidence adduced on the trial by the plaintiff.

The evidence of plaintiff as already pointed out did show that the bridge collapsed and its position and condition after collapse. It also showed that there was a hole the size of a bushel basket at some place under the south wing to the west abutment and a hole the size of a bucket

under the north wing of the same abutment. It also showed that the bed of the stream under the bridge was about three feet below the base of the abutments. Nothing else in the nature or quality of defects was shown or attempted to be shown by the plaintiff.

No effort was made by plaintiff in her evidence either directly or circumstantially to show that either the holes or the depth of the channel caused or contributed to the cause of the collapse of the bridge. There is no evidence that either the depth of the stream or the holes under the wings weakened the support of the abutment. Also no reasonable inference flows from the described conditions that they caused or contributed to the causing of the collapse of the bridge.

The unavoidable conclusion is that there is nothing in the evidence of plaintiff which justified the submission of the issue of negligence of the defendant to a jury.

It may well be said also that nothing appeared in the evidence of the defendant to sustain any of the charges of negligence made in the petition.

The witnesses for defendant were positive that neither the depth of the channel nor the holes under the wings caused or contributed to the collapse of the bridge. It is true that a witness said on cross-examination that a channel below the base of abutments to a bridge was not good construction but there was no departure from the conclusion and opinion that this had no relation to the collapse of this bridge.

Two witnesses for the defendant, as engineers and experts, gave their opinions as to the cause of the collapse. They gave it as their opinion that it was caused by softening and partial liquefaction of earth and moisture back of the abutment due to extremely warm weather for the time of year which produced sufficient pressure to cause the abutment to rotate on its base to the east.

It could not be reasonably inferred that this was a condition which was known or could have been anticipated or discovered by reasonable inspection.

On the entire record it is concluded that actionable negligence on the part of the defendant has not been shown. This conclusion renders unnecessary a consideration of the other assignments of error.

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

REVERSED AND DISMISSED.

IN RE APPLICATION OF MORITZ. ELMER A. MORITZ, APPELLEE, V. TRANSCONTINENTAL BUS LINES, INC., APPELLANT.

43 N. W. 2d 603

Filed July 24, 1950. No. 32777.

1. **Public Service Commissions.** When an application is made to the Nebraska State Railway Commission under section 75-230, R. R. S. 1943, for a certificate of public convenience and necessity authorizing the operation covered by the application the burden of proof at the hearing thereon is upon the applicant to show that the conditions therein required for the granting of the application exist, that is, that the applicant is fit, willing, and able to perform the service proposed and to conform to the provisions of sections 75-222 to 75-250, R. R. S. 1943, and the requirements, rules, and regulations of the Nebraska State Railway Commission thereunder and that the proposed service is or will be required by the present or future public convenience and necessity.
2. ———. In determining the issue of public convenience and necessity, controlling questions are whether the operation will serve a useful purpose responsive to a public demand or need; whether this purpose can or will be served as well by existing carriers; and whether it can be served by applicant in a specified operation without endangering or impairing the operations of existing carriers contrary to the public interest.
3. **Appeal and Error.** On appeal to the Supreme Court from an order of the Nebraska State Railway Commission, while acting within its jurisdiction, the question for determination is the sufficiency of the evidence to prove that the order is not unreasonable or arbitrary.
4. **Public Service Commissions.** The prime object and real pur-

pose of Nebraska State Railway Commission control is to secure adequate sustained service for the public at minimum cost and to protect and conserve investments already made for that purpose, and in doing so primary consideration must be given to the public rather than to individuals.

5. **Public Service Commissions: Motor Carriers.** Duplicate lines of transportation by competing common carriers are ordinarily incompatible with the public interest. Such a competing line will be authorized only for compelling reasons.

6. ———: ———. The method of regulating public utilities in Nebraska is based upon the theory of regulated monopoly rather than competition and, before one carrier is permitted to take the business of another already in the field, it must be shown that the existing carrier is rendering unsatisfactory service and is unable or unwilling to provide adequate transportation facilities and that the operation proposed by the new carrier will better serve the public convenience and necessity.

APPEAL from the Nebraska State Railway Commission. *Reversed and remanded with directions.*

John W. Blood and *R. E. Powell,* for appellant.

George A. Skultety, Hubka & Hubka, and *Albert Detmer,* for appellee.

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

WENKE, J.

Elmer A. Moritz, doing business as Fairbury-Lincoln Stage Lines, on November 18, 1948, filed his application with the Nebraska State Railway Commission for a certificate of public convenience and necessity authorizing him to extend his operations as a common carrier by motor vehicle of passengers, baggage of passengers, mail, express, and newspapers over a regular route between Beatrice and Lincoln via U. S. Highway No. 77, serving all intermediate points.

A hearing was had on the application before two examiners. At this hearing Transcontinental Bus Lines, Inc., successor to Santa Fe Trail Transportation Company, appeared and offered evidence in opposition to the

application. After the hearing was completed the examiners made their report to the commission recommending that it authorize the service as to passengers, baggage of passengers, express, and newspapers "as an *ALTERNATE ROUTE* (to a combination of presently authorized regular routes in Applications B-152, Division B, and B-152, Division C), between Beatrice and Lincoln, Nebraska, via US-77," but recommended that the alternate route be restricted as follows: "Applicant shall not transport passengers, baggage of passengers, express and newspapers solely between Beatrice and Lincoln, or solely between points both of which are intermediate thereto, or solely between Beatrice or Lincoln, on the one hand, and, on the other hand, points intermediate between Beatrice and Lincoln." This, in effect, recommended that the authority requested be granted but as a "closed door" operation.

Applicant filed exceptions to the report and on September 6, 1949, the commission sustained his exceptions and granted him a certificate of public convenience and necessity which authorized him to transport passengers, baggage of passengers, mail, express, and newspapers by motor bus over an "Alternate regular route (as an alternate route to presently authorized regular route operations between Superior and Lincoln via Fairbury and Crete and operated in combination with authorized regular route operations under certificates issued in Application No. B-152, Division B and Division C) via US No. 77 between Beatrice and the junction of US No. 77 and Nebr. No. 33, serving all intermediate points."

Transcontinental Bus Lines, Inc., thereupon filed a motion for rehearing and, from the overruling thereof, has appealed. For the purpose of this opinion we shall refer to the appellee as the applicant and to the appellant as the objector.

The over-all effect of the objector's contention is that the evidence adduced at the hearing does not warrant the commission's issuance of a certificate of public conven-

ience and necessity to the applicant which permits him to directly compete with it for local business between Beatrice and Lincoln and points intermediate. That is, if the authority asked for by applicant to operate between Beatrice and Lincoln is granted that it should be limited to a "closed door" operation.

Section 75-230, R. R. S. 1943, so far as here material, provides: "* * * a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operations covered by the application, if it is found * * * that the proposed service, to the extent to be authorized by the certificate, is or will be required by the present or future public convenience and necessity; * * *."

We have held: "It is elementary that the grant or refusal of a certificate of convenience and necessity in such cases is within the constitutional and legislative authority of the Nebraska State Railway Commission. In Effenberger v. Marconnit, 135 Neb. 558, 283 N. W. 223, it was said: 'We necessarily conclude that a certificate of convenience and necessity is in the nature of a permit or license and that it is not property in any legal or constitutional sense. It is a mere license that can be amended or revoked by the power authorized to issue it. Such being the case, it is personal in its character, is not transferable, and does not pass by succession. It is purely a regulatory measure that can vest no property right in the holder. This being true, the railway commission has the sole power to grant, amend, deny, revoke or transfer a certificate of convenience and necessity.'" Moritz v. State Railway Commission, 147 Neb. 400, 23 N. W. 2d 545.

When an application is made to the commission under section 75-230, R. R. S. 1943, for a certificate authorizing the operation covered by the application the burden of proof at the hearing thereon is upon the applicant to show that the conditions therein required for the granting of the application exist, that is, that the applicant is

fit, willing, and able to perform the service proposed and to conform to the provisions of sections 75-222 to 75-250, R. R. S. 1943, and the requirements, rules, and regulations of the Nebraska State Railway Commission thereunder and that the proposed service is or will be required by the present or future public convenience and necessity.

"In determining the issue of public convenience and necessity, the controlling questions are whether an operation will serve a useful purpose responsive to a public demand or need; whether this purpose can or will be served as well by existing carriers; and whether it can be served by applicant in a specified operation without endangering or impairing the operations of existing carriers contrary to the public interest." Chief Refrigerator Truck Lines, Inc., 34 M. C. C. 492. See Kenosha Auto Transport Corporation, 7 F. C. C., No. 66.

And as stated in People's Telephone Exchange v. Public Service Commission, 239 Mo. App. 166, 186 S. W. 2d 531, by quoting from the majority report of the commission: " 'Public convenience and necessity requires the availability of service and when that exists and is complete and reasonable and pursuant to law, the regulatory body has a duty to preserve it for public use.' "

We have often held: "On appeal to the supreme court from an order of the Nebraska state railway commission, while acting within its jurisdiction, the question for determination is the sufficiency of the evidence to prove that the order is not unreasonable or arbitrary." In re Application of Chicago, B. & Q. R. R. Co., 138 Neb. 767, 295 N. W. 389. See, also, Publix Cars, Inc. v. Yellow Cab & Baggage Co., 130 Neb. 401, 265 N. W. 234; Furstenberg v. Omaha & C. B. St. Ry. Co., 132 Neb. 562, 272 N. W. 756; Thomson v. State Railway Commission, 143 Neb. 52, 8 N. W. 2d 552; Moritz v. State Railway Commission, *supra*; In re Application of Chicago, B. & Q. R. R. Co., 152 Neb. 367, 41 N. W. 2d 165.

To determine that question there are certain principles

which this court has approved and which must be considered in connection therewith.

"The prime object and real purpose of Nebraska State Railway Commission control is to secure adequate sustained service for the public at minimum cost and to protect and conserve investments already made for that purpose, and in doing so primary consideration must be given to the public rather than to individuals." In re Application of Union P. R. R. Co., 149 Neb. 575, 31 N. W. 2d 552.

In Publix Cars, Inc. v. Yellow Cab & Baggage Co., *supra*, we approved the following from 3 Pond, Public Utilities (4th ed.), § 775, p. 1552: "The policy of regulation upon which our present public utilities commission plan is based and which tends to do away with competition among public utilities, as they are natural monopolies, is at once the reason and the justification for the holding of our courts that the regulation of an existing system of transportation, which is properly serving a given field or may be required to do so, is to be preferred to competition among several independent systems. In requiring a proper service from a single system for a city or territory, in consideration for protecting it as a monopoly for all the service required and in conserving its resources, no economic waste results and service may be furnished at the minimum cost. The prime object and real purpose of commission control is to secure adequate sustained service for the public at the least possible cost, and to protect and conserve investments already made for this purpose. Experience has demonstrated beyond any question that competition among natural monopolies is wasteful economically and results finally in insufficient and unsatisfactory service and extravagant rates. Neither the number of the individuals demanding other service nor the question of fares constitutes the entire question, but rather what the proper agency should be to furnish the best service to the public generally and continuously at the least cost. Anything which tends to

cripple seriously or destroy an established system of transportation that is necessary to a community is not a convenience and necessity for the public and its introduction would be a handicap rather than a help ultimately in such a field."

As stated in Furstenberg v. Omaha & C. B. St. Ry. Co., *supra*: "Resolution No. 137 of the Nebraska railway commission, the legislative instrument under and by which this appellant makes application for certificate of convenience and necessity, provides: 'While the old adage "Competition is the life of trade" may still be acceptable as applied in private industry, still today it is the general concensus of opinion of both the courts and regulatory bodies that unbridled competition between such public utilities is not only harmful to the industries themselves but also in the end generally inures to the detriment of the general public as well.' "

As stated in In re Application of Effenberger, 150 Neb. 13, 33 N. W. 2d 296:

"Duplicate lines of transportation by competing common carriers are ordinarily incompatible with the public interest. Such a competing line will be authorized only for compelling reasons.

"Where an established common carrier is ready, willing, and able to comply with any reasonable order of the railway commission in providing adequate service to the public in its field, an order denying a certificate of convenience and necessity to a new, competing carrier is not arbitrary. * * *

"The evidence indicates that adequate service can be provided by the established carrier. Clearly, it has the first right to so do in the manner and by the means which the railway commission might prescribe. If the established carrier failed in its duty or refused to comply with the orders of the commission with respect thereto, the railway commission might then be obliged to favorably consider applications of others to perform the service. The whole theory of commission control is to eliminate

unbridled competition between common carriers when it will result in higher costs to the public. Competitive routes will ordinarily be authorized only where the existing carrier refuses or has failed to provide adequate service upon the order of the railway commission. Where the evidence does not show that such a situation exists, the established carrier may properly resist invasion of its field before the commission." See, also, Moritz v. State Railway Commission, *supra;* and In re Application of Chicago, B. & Q. R. R. Co., 138 Neb. 767, 295 N. W. 389.

The history of the original granting of the authority to operate passenger bus service in the territory and over the routes herein involved is fully set out in Moritz v. State Railway Commission, *supra,* released on June 21, 1946, and will not be restated herein. Subsequent thereto, and effective as of November 1, 1946, applicant acquired the authority of Cowsky to operate from Superior and Nelson to Beatrice via Fairbury. Applicant immediately extended his route, which had been from Deshler to Fairbury to Lincoln via Western, Wilber, and Crete, to one from Superior and Nelson to Fairbury and then to Lincoln via Western, Wilber, and Crete. He operates this run on a schedule leaving Superior at 7 a. m., arriving at Fairbury at 9:10 a. m., and then via Western, Wilber, and Crete to Lincoln, arriving there at 11:30 a. m. His return trip leaves Lincoln at 5:30 p. m., arrives at Fairbury at 7:45 p. m., leaves there at 7:55 p. m., and arrives at Superior at 10:10 p. m. He also discontinued the Cowsky run from Superior and Nelson to Beatrice via Fairbury and in place thereof operated a local service twice daily from Fairbury to Beatrice and return. With reference to his schedule from Superior and Nelson to Fairbury and Lincoln via Western, Wilber, and Crete his local bus to Beatrice leaves Fairbury at 10:20 a. m., thus causing any passengers coming from west of Fairbury to wait one hour and ten minutes at Fairbury to take the bus from there to Beatrice. He also

canceled the interline tariff arrangement of Cowsky with the Santa Fe, predecessor of objector, for passengers exchanged at Beatrice for Lincoln and sold only combination fares. This resulted in passengers going to Lincoln via Beatrice paying a higher fare than if they went over applicant's Lincoln bus line through Western, Wilber, and Crete. These changes resulted in the practical elimination of passengers from Fairbury and points west on applicant's schedule going to Lincoln via Beatrice and over objector's bus line.

At the time of the hearing the objector, whose predecessors were the original passenger bus operators in the field over the route from Lincoln to Beatrice and south to the state line via U. S. Highway No. 77, was the only one operating in that field. It was operating five schedules from Lincoln to Beatrice in each direction. Three of these were in through service and two in local service. While there is some evidence that these busses were at times overloaded, thus causing passengers to stand, it appears that such overloading occurred generally on certain schedules over the weekends and on the days immediately before and after holidays. Objector met this situation by using additional busses and, on the whole, the service rendered appears to have been adequate and sufficient to meet the needs of the traveling public and no complaints were made to the objector in regard thereto. In fact, the over-all load factor, especially of the local schedules, hardly seems to be sufficient to successfully meet the cost of the operation thereof as weekday travel is not very heavy. There is also some evidence that the objector's local bus which is scheduled to leave Beatrice at 11:30 a. m. and arrive in Lincoln at 12:35 p. m. is not conveniently scheduled as it does not permit reaching Lincoln in time for lunch. If it should be desirable to have this bus leave earlier in order to meet the needs of the public it can be easily changed by the commission.

But even if such were not true and additional or differ-

ent service was necessary to meet the needs of the traveling public it would, under our holdings, be incumbent upon the commission to give those in the field the first opportunity to supply it.

The method of regulating public utilities in Nebraska is based upon the theory of regulated monopoly rather than competition and, before one carrier is permitted to take the business of another already in the field, it must be shown that the existing carrier is rendering unsatisfactory service and is unable or unwilling to provide adequate transportation facilities and that the operation proposed by the new carrier will better serve the public convenience and necessity.

The objector states it has been and is ready, willing, and able to put on such additional service as the demands of the public require whenever the commission finds it necessary and so directs. We find the commission, under the facts as disclosed by the record, was not justified in granting to applicant the authority to operate a passenger bus service between Beatrice and Lincoln and all points intermediate in direct competition with the objector who was already in the field and that its action in doing so was arbitrary and unreasonable.

The evidence shows that the passenger bus of applicant scheduled from Superior and Nelson to Fairbury and then to Lincoln via Western, Wilber, and Crete is the only bus service east out of Superior and Nelson to Lincoln; that it travels over 37 miles of graveled highway between Fairbury and Wilber; that this graveled highway has steep hills, narrow bridges, and sharp turns and curves; that it does not receive primary attention when blocked by snow, thus causing it to remain impassable for a longer time than the road from Fairbury to Lincoln via Beatrice; that it is dusty when dry, slippery when wet, and when muddy it usually causes delay. As a whole it presents an unsatisfactory route for bus service as it causes many inconveniences and some danger to the traveling public. On the other hand the route from

Fairbury to Lincoln via Beatrice is all hard surfaced and five miles shorter.

The evidence also shows that while there is a bus depot at Beatrice the transfer of passengers takes place outdoors on the street. In bad weather this presents many inconveniences to those traveling. There is no porter service provided and consequently the passengers are required to transfer their own baggage. Also, at times, there are not sufficient seats available on the bus to Lincoln so that passengers who had seats are required to stand. These conditions present serious difficulties to certain types of travelers, such as elderly people, parents with young children, passengers that are in any way physically incapacitated, and those having considerable baggage.

As a general proposition a through service on a comparatively short run is the best and most convenient service. Transfer of passengers and their baggage from one bus to another, particularly where there is no porter service and it is required to be made outdoors, should be eliminated whenever possible, having due regard to proper economy of operation and the rights of existing certificate holders.

We could go into further detail as to reasons why, for the convenience and need of the traveling public from Fairbury and points west on applicant's route, they should be permitted to travel in a through bus from Fairbury to Lincoln via Beatrice over a hard-surfaced road which would not require them to travel over the 37 miles of gravel road from Fairbury to Wilber with its many inconveniences and some danger. But this does not require that such authority be of the nature as authorized by the commission. It is true that applicant would undoubtedly enjoy additional business if he were allowed to operate between Beatrice and Lincoln and intermediate points with open doors, as authorized by the commission, and it would undoubtedly add to the profits of his business. But this would be in direct

competition with and at the expense of the objector who is already in the field over that route.

We find that the evidence justifies the authorization of the alternate route to Lincoln via Beatrice but that it should be a closed door operation between Beatrice and Lincoln and all points intermediate. The order of the commission is reversed and the cause remanded to the commission with directions to modify its authorization of the certificate of public convenience and necessity accordingly.

REVERSED AND REMANDED WITH DIRECTIONS.

IN RE APPLICATION NO. 4477 FILED WITH THE DEPARTMENT OF ROADS AND IRRIGATION FOR THE STATE OF NEBRASKA FOR A PERMIT TO LOWER THE WATERS OF FRAZIER LAKE LOCATED IN SECTIONS 25 AND 26-28-17, ROCK COUNTY, NEBRASKA. MAUDE LACKAFF ET AL., APPELLANTS, V. DEPARTMENT OF ROADS AND IRRIGATION OF THE STATE OF NEBRASKA, APPELLEE.

43 N. W. 2d 576

Filed July 24, 1950. No. 32819.

1. **Statutes.** Specific statutory provisions, relating to a particular subject, control over general provisions and leave the latter to operate only outside the former.
2. **Appeal and Error.** The appeal to the district court provided for in section 81-706, R. R. S. 1943, is a trial de novo as in equity. On appeal to this court the review is by trial de novo as in equity.
3. **Waters.** Where the evidence shows that a drainage ditch to be constructed for the purpose of draining a natural lake coming within the provisions of section 81-702, R. R. S. 1943, will result in damage to another person, the Department of Roads and Irrigation is required to deny an application for a permit to construct such ditch under the provisions of section 81-705, R. R. S. 1943.
4. **Constitutional Law.** A party invoking the provisions of a statute is not in a position to raise the question of its constitutionality.

APPEAL from the district court for Rock County: DAYTON R. MOUNTS, JUDGE. *Affirmed.*

Edgar M. Morsman III, Morsman, Maxwell, Fike & Sawtell, for appellants.

Clarence S. Beck, Attorney General, and *William T. Gleeson,* for appellee.

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

CARTER, J.

This is an appeal from a judgment of the district court for Rock County sustaining the action of the Department of Roads and Irrigation in refusing to issue a permit for a proposed work of drainage.

The evidence shows that Frazier Lake lies within Sections 25 and 26, Township 28, Range 17, in Rock County. It covers approximately 160 acres. The lake watershed is small in area, the source of the waters of the lake in addition to surface waters being springs and flowing wells. The plaintiffs own about three-fourths of the lake bed, the balance being the property of one Brown. The evidence shows that Holt Creek crosses the south end of Section 26, cuts across the northeast corner of Section 35, and crosses Section 36 in a southeasterly direction. Holt Creek is not a live stream but is a natural watercourse. The record shows that in 1926 a ditch was constructed to carry the waters from plaintiffs' lands into Holt Creek. This ditch has been abandoned. The waters damaging plaintiffs' lands in Section 26 are described as seepage waters which rise in plaintiffs' meadows when the lake is high and recede as the lake level declines in height. No attempt has been made in the past to lower the level of the lake by draining waters directly from it. The evidence shows further that the lake level became high in 1949 and has maintained a high level to the date of the trial in the district court. The waters from the lake have percolated laterally into

plaintiffs' lands and created a seepage condition on approximately 60 acres of plaintiffs' meadow lands. This was the general situation existing when plaintiffs on June 3, 1949, applied to the Department of Roads and Irrigation for a permit to lower the waters of Frazier Lake by constructing a ditch on plaintiffs' lands from Frazier Lake to Holt Creek, a distance of 3,000 feet. The plaintiffs have appealed from the order of the district court sustaining the action of the Department of Roads and Irrigation in refusing the permit.

It is the contention of plaintiffs that they are entitled to construct the drainage ditch under the provisions of section 31-201, R. S. 1943, which 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."

The Department of Roads and Irrigation contends that the controlling statutes are sections 81-702 and 81-705, R. R. S. 1943, which respectively provide: "No person shall drain, lower, or in any manner reduce or divert, the water supply of any natural or perennial lake, if the area exceeds twenty acres at low water stage, or if the lake is of such depth and character as to have more economic importance for fish culture, hunting or other purpose, than the bed of said lake would have for agricultural purposes. Any person, intending to drain, lower, divert, or in any way reduce the waters or water supply of any natural or perennial lake, shall, before commencing the construction of any such work for drainage or diversion, make application to the Department of Roads and Irrigation for a permit to do so."

"If it appears to the Department of Roads and Irrigation that the proposed works of drainage or diversion

will result in injury or damage to any person, or will be detrimental to the public welfare and not result in economic benefit to the state, the department shall refuse to approve the application, and the party making such application shall not prosecute such work so long as such refusal shall continue in force."

It is apparent that section 31-201 is a general law dealing generally with drainage by landowners. Sections 81-702 and 81-705 deal with a specific subject, the drainage of natural lakes covering an area in excess of 20 acres at low water stage. Specific statutory provisions relating to a particular subject control over general provisions. Canada v. State, 148 Neb. 115, 26 N. W. 2d 509. Plaintiffs appear to have so considered it, for if section 31-201 alone controlled, no necessity would have existed for obtaining the permit required by section 81-702. The question is one which must be decided under sections 81-702 to 81-708 inclusive.

The case will be heard de novo as in equity in this court. In re Application of Iverson, 151 Neb. 802, 39 N. W. 2d 797. The statute authorizing an appeal states that the appeal shall be heard and determined upon proofs by the applicant and the department. § 81-706, R. R. S. 1943. This brings it within the rule announced in the Iverson case.

It is claimed by the Department of Roads and Irrigation that the proposed works of drainage will result in injury or damage to another person. Such a contention, if sustained by the evidence, constitutes a bar to the approval of the application for a permit under the express provisions of section 81-705.

The record shows that when the waters of Frazier Lake are high it subirrigates the adjoining lands to such an extent that they are more productive than when the lake is at normal or low stage. There is evidence also that the construction of the proposed drain will result in damage to the lands of Brown in Section 36. The evidence is that Holt Creek, as it enters the lands owned

by Brown, is flat and level, although it constitutes a natural drain. The dumping of the water from Frazier Lake into Holt Creek, although the ditch is wholly on plaintiffs' land, will spread out over Brown's hay and pasture lands, deposit silt thereon, and materially reduce the productivity of such lands. It is estimated that 70 acres of Brown's lands in Section 36 would be thus damaged. We think this evidence warrants a finding that the construction of the ditch described in the application would seriously damage the Brown lands in Section 36 and require a disapproval of the application and a denial of the permit as provided by section 81-705. The evidence clearly sustains the position of the Department of Roads and Irrigation in refusing to grant the permit. Beem v. Davis, 111 Neb. 96, 195 N. W. 948; Davis v. Beem, 115 Neb. 697, 214 N. W. 633.

The plaintiffs contend that if sections 81-702 to 81-706 are interpreted as urged by the Department of Roads and Irrigation, it purports to authorize the department to determine private rights between adjacent landowners in violation of Article I, sections 3, 6, and 13, and Article V, section 1, of the Nebraska Constitution. The plaintiffs, having sought relief under the provisions of sections 81-702 to 81-706, are not in position to question its constitutionality. It is fundamental that a person may not seek the benefit of a statute and at the same time question its constitutionality. Plaintiffs may pursue such a course only when the statute is invoked against them. La Borde v. Farmers State Bank, 116 Neb. 33, 215 N. W. 559; Sommerville v. Board of Commissioners of Douglas County, 116 Neb. 282, 216 N. W. 815; Federal Farm Mortgage Corporation v. Hughes, 137 Neb. 454, 289 N. W. 866.

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

AFFIRMED.

AUGUSTA MEIER ET AL., APPELLANTS, V. HAROLD R. MEYER, APPELLEE.

43 N. W. 2d 503

Filed July 24, 1950. No. 32838.

1. **Trusts.** Where property has been acquired by fraud equity at the suit of injured parties will impress a constructive trust upon such property in their favor, and in the event of a prior transfer by the wrongdoer will trace the property, if possible, through whatever mutations and impress a trust thereon in the hands of a third person, unless such third person is in the position of a bona fide purchaser for value without notice, or has changed his position thereby so as to give rise to an equitable defense in his favor and against the plaintiff.
2. ———. An antecedent debt is not such a consideration as will have the effect of cutting off a trust against funds applied to the satisfaction thereof even though the creditor acts in good faith and without notice where he has not changed his position in relation to the person from whom the fund was received.

APPEAL from the district court for Douglas County: WILLIAM A. DAY, JUDGE. *Reversed and remanded with directions.*

Cranny & Moore, for appellants.

Pilcher & Haney, for appellee.

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

YEAGER, J.

This is an action by Augusta Meier and Beulah Meier, plaintiffs and appellants, against Harold R. Meyer, defendant and appellee, the purpose of which is to cause the defendant to be adjudged a trusteee for the benefit of plaintiffs of certain funds received by him and that he be required to account therefor to the plaintiffs. The cause was tried to the court and a decree entered dismissing the action of plaintiffs. A motion for new trial was filed which was overruled. From the decree and the order overruling the motion for new trial plaintiffs have appealed.

This is a companion case to Meier v. Trosper, 152 Neb. 184, 40 N. W. 2d 811, and the facts in the two cases are very much alike. The background of the two cases is identical. The record discloses that one John H. Owens, known also as J. H. Owens and Jack Owens, induced plaintiffs to make a loan of $12,000. The loan was made on July 18, 1945. It consisted of checks amounting to $11,888.37 and an interest coupon of $111.63. In consideration of the loan Owens delivered to plaintiffs what purported to be a mortgage note of $12,000 with interest coupons attached, together with a real estate mortgage securing the same on a quarter section of land in Dodge County, Nebraska. The note and mortgage purportedly bore the signature of one James T. Maxwell. The signatures to all the instruments were forgeries.

On or about July 18, 1945, Owens had on deposit in the Omaha National Bank $275.84. On that day he deposited in this account the $11,888.37 he received from plaintiffs.

On or about August 6, 1945, Owens caused the account to be made a joint account with right of survivorship with his wife. She was known as A. C. Owens and also as Nan C. Owens and Anna C. Owens. Owens died on or about August 10, 1945.

On or about August 31, 1945, the said A. C. Owens drew a check against this account in favor of the defendant for $506.25. The check was deposited to the account of the defendant and paid by the Omaha National Bank out of funds which the record discloses Owens received from the plaintiffs.

The check was for refund of $500 together with interest of $6.25 on a contract which the defendant had with the Western Land Cattle & Loan Co., Inc., a corporation, for the purchase of land which was never consummated and which defendant was entitled to have refunded on demand.

The record clearly discloses that the transaction between Owens and the plaintiffs was fraudulent and that the $12,000 was obtained by fraud. The record also

discloses that of the amount received by Owens there is still due and owing much more than the amount of $506.25.

It is this amount which plaintiffs seek to recover in this action against the defendant. The theory of plaintiffs is that since the defendant received this payment out of the particular funds received by Owens from plaintiffs by fraud practiced upon them by him they are entitled in equity to have impressed upon the fund a constructive trust in their favor and to have judgment therefor against the defendant.

There can be little question about the fact that this case presents a situation calling for the application of the principle for which plaintiffs contend unless the defendant may be said to be in the position of a bona fide purchaser for value without notice or unless he by reason of the transaction involving the receipt of the $506.25 has in consequence changed his position with reference to Owens or his representative in relation to the claimed antecedent obligation.

"Where property, as here, has been acquired by fraud, equity, at the suit of the injured parties, will impress a constructive trust upon such property in their favor and, in the event of a prior transfer by the wrongdoer, will trace the property, if possible, through whatever mutations and impress a trust thereon in the hands of a third person, unless he be a bona fide purchaser for value and without notice. Cady v. South Omaha Nat. Bank, 46 Neb. 756, 65 N. W. 906; Allen Dudley & Co. v. First Nat. Bank, 122 Neb. 443, 240 N. W. 522." Meier v. Geldis, 148 Neb. 561, 28 N. W. 2d 140. See, also, Meier v. Geldis, 148 Neb. 304, 27 N. W. 2d 215; Meier v. Trosper, *supra*.

"An antecedent debt is not such consideration as to have the effect of cutting off the trust against funds applied to the satisfaction thereof even though the creditor acts in good faith and without notice where he has not changed his position in relation to the person from whom the fund was received." Meier v. Geldis, 148 Neb. 561,

28 N. W. 2d 140. See, also, Meier v. Geldis, 148 Neb. 304, 27 N. W. 2d 215; Meier v. Trosper, *supra.*

There is nothing in the record to disclose that the defendant with reference to this fund came into the situation of a bona fide purchaser for value without notice. This was simply the payment of an antecedent debt not even legally owing to him by Owens but by the Western Land Cattle & Loan Co.

The record does not show that the defendant in any way changed his situation so as to give rise to any equitable defense against the plaintiffs. No previous right that he had was in anywise impaired or destroyed. The liability in his favor still remained. The mere fact that on receipt of payment by check of the $506.25 he surrendered his contract could not operate to change his rights. Moreover the record in this case shows that this evidence was readily available. It is a part of the bill of exceptions herein.

The defendant asserts that the plaintiffs by reason of laches should not be allowed to succeed in this action. In this connection he says that they delayed until it was too late to file a claim against the estate of Owens. A sufficient answer to this is that there is nothing in this record to indicate that under any circumstance he would have been entitled to make a claim against the estate. The antecedent debt here was one of the Western Land Cattle & Loan Co. and not of Owens. The contention is without merit.

The remaining proposition to be considered is one which is novel and unusual to say the least. After the defendant received the check for the $506.25 he deposited it in his account and used the money for his own purposes or at least all except $26.78. He urges that if the plaintiffs may recover from him at all the recovery must be limited to that portion of the fund which was not used by him and which remained in his bank account after he was notified of the claim of plaintiffs.

The effect of the contention is to say that funds may

come into the hands of a constructive trustee and he may escape liability either to return the funds or to account therefor by dissipating them before notice of a call for an accounting.

He cited in support of the proposition the controlling authorities wherein the purpose is to trace and recover an identifiable fund. Neither the authorities cited nor any others sustain the contention.

The decree of the district court is reversed and the cause remanded with directions to enter judgment for the plaintiffs as prayed.

REVERSED AND REMANDED WITH DIRECTIONS.

GERTRUDE IRENE FISHER, PLAINTIFF IN ERROR, V. STATE OF NEBRASKA, DEFENDANT IN ERROR.

43 N. W. 2d 600

Filed July 24, 1950. No. 32875.

1. **Appeal and Error.** In error proceedings under section 25-1931, R. S. Supp., 1949, the one-calendar-month period begins to run from the time the court's ruling on a motion for a new trial has been entered on the journal of the court.
2. **Criminal Law.** Under section 24-342, R. S. Supp., 1949, where an affidavit has been filed, after conviction, by the defendant in a criminal case that he is unable by reason of his poverty to pay for a bill of exceptions, the court is required to direct the reporter to prepare and deliver a bill of exceptions to the defendant to be paid for by the county, unless, on objections and hearing, it is disclosed that defendant's claim of poverty is untrue, or that his inability to pay is occasioned by his own willful act for the purpose of avoiding payment.

ERROR to the district court for Lincoln County: ISAAC J. NISLEY, JUDGE. *Motion to dismiss denied; application sustained in part.*

Edward E. Carr, for plaintiff in error.

Clarence S. Beck, Attorney General, for defendant in error.

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

SIMMONS, C. J.

This cause is before us on two matters.

The defendant in error moves to dismiss for the reason that the transcript was not filed here within the time provided by law.

The verdict of the jury in this case was returned on April 2, 1950. From a journal entry "filed" April 18, 1950, it appears that the court pronounced sentence on April 4, 1950. A motion for a new trial was filed on April 8, 1950. By a journal entry "filed" May 27, 1950, it appears that the motion for a new trial was overruled April 8, 1950. It also appears that no journal entry was made on this order until May 27, 1950, nor does it, or any reference to the overruling of the motion, appear in the transcript prior to that date.

Plaintiff in error filed her petition in error and transcript here on May 29, 1950.

The controlling statute provides in part: "No proceedings for reversing, vacating, or modifying judgments or final orders shall be commenced unless within one calendar month after the rendition of the judgment or making of the final order complained of; * * *." § 25-1931, R. S. Supp., 1949.

Unless such proceeding is taken within the time the Legislature has prescribed, this court does not have jurisdiction to entertain it. Iron Bear v. State, 149 Neb. 634, 32 N. W. 2d 130.

The question then is, does the one-month period begin to run from April 8, 1950, or May 27, 1950.

In Union Central Life Ins. Co. v. Saathoff, 115 Neb. 385, 213 N. W. 342, we were confronted with a similar problem and construed a "three months from the rendition of such judgment" proviso in connection with what is now section 25-1318, R. R. S. 1943, which provides: "All judgments and orders must be entered on the

journal of the court, and specify clearly the relief granted or order made in the action." We held that the three-month provision did not begin to run until the judgment or decree was entered on the journal of the trial court. Section 25-1931, R. S. Supp., 1949, prior to 1949, provided "within three calendar months." That provision was amended to provide "within one calendar month" for the purpose, as expressed in the title, "to reduce the time for institution of such proceedings to correspond with the time for taking of an appeal to the Supreme Court." Laws 1949, c. 57, § 1, p. 168.

In Goodman v. State, 131 Neb. 662, 269 N. W. 383, the trial court overruled the motion for a new trial on May 4, 1936, and on May 7, 1936, the journal entry overruling the motion for a new trial was filed and entered on the court journal in the office of the clerk of the court. We held: "There can be no question therefore that the time for perfecting error proceedings commenced to run on May 7, 1936."

Section 29-2306, R. S. Supp., 1949, provides in part: "In all criminal cases, writs of error shall be issued by the Clerk of the Supreme Court upon the filing of a petition in error and transcript of the record of the proceedings of the district court and payment of a docket fee of twenty dollars to the Clerk of the Supreme Court; * * *."

We have held that "Motion for a new trial not preserved and authenticated as a part of the transcript on appeal cannot be considered in this court." Lee v. State, 124 Neb. 165, 245 N. W. 445.

We have also held that " 'In order to review alleged errors occurring during the trial of a criminal case, such errors must be pointed out to the trial court in the motion for a new trial and a ruling obtained thereon.' " Luster v. State, 142 Neb. 253, 5 N. W. 2d 705.

It necessarily follows that in order to file here a transcript of the record of the proceedings of the district court adequate to present alleged errors occurring during the

trial, the transcript must show not only the filing of a motion for a new trial, but also the ruling of the court thereon. Such a transcript cannot be prepared and filed here unless and until the ruling of the trial court on the motion for a new trial is entered on the journal.

Accordingly we hold that in error proceedings under section 25-1931, R. S. Supp., 1949, the one-calendar-month period begins to run from the time the court's ruling on a motion for a new trial has been entered on the journal of the court. It follows that the transcript in the instant case was filed within the time provided by law. The motion of the defendant in error to dismiss accordingly is denied.

The next matter is one presented by plaintiff in error. It arises from the following situation. On April 18, 1950, she filed her affidavit in the district court that she was without money and that her husband was without money to pay the cost of a transcript and bill of exceptions. She prayed for an order requiring the clerk to furnish a transcript and that the court reporter be ordered to deliver to her a bill of exceptions, to be charged to the county. A hearing was had on the application, although it does not appear that it was resisted by the filing of objections. At the hearing it was stipulated that the husband of plaintiff in error was employed and earning $50 a week. No other evidence was introduced. The trial court denied the application on the ground that the plaintiff in error "has money." On May 1, 1950, plaintiff in error filed a motion for a rehearing on the application. That was denied on May 27, 1950. On May 29, 1950, plaintiff in error filed application here for an order reversing the district court and directing that the transcript and bill of exceptions be furnished by and at the expense of Lincoln County.

Section 24-342, R. S. Supp., 1949, provides that it shall be the duty of the reporter to furnish on the application of the county attorney, or any party to a suit in which stenographic report of the proceedings has been made,

a transcribed copy of the proceedings so recorded, or any part thereof. It makes provision for payment, and provides: "* * * (2) where the defendant in a criminal case, after conviction, shall make an affidavit that he is unable by reason of his poverty to pay for such copy, the court or judge thereof may, by order endorsed on such affidavit, direct the reporter to deliver such transcribed copy to such defendant, and his fees therefor shall be paid by the county in the same manner as other claims are allowed and paid." § 24-342, R. S. Supp., 1949.

In Altis v. State, 109 Neb. 776, 192 N. W. 327, construing this statute as it was then, we held that "* * * on application by defendant for an order to require reporter to furnish bill of exceptions at the expense of the county, where objection is made thereto, the court or judge has authority to hear testimony for and against such application, and if the testimony discloses that defendant's claim of poverty is untrue, or that the inability to pay the fee is occasioned by his own wilful act for the purpose of avoiding payment, the court or judge should refuse the order."

Assuming that objection was made to the allowance, there is no showing of any kind here that the claim of poverty of plaintiff in error is untrue, nor is there any showing of a willful act done to avoid payment. The affidavit of poverty stands uncontradicted. The trial court erred in denying the application for the order.

The application of plaintiff in error accordingly is sustained insofar as it relates to a bill of exceptions, and the trial court is ordered to direct the reporter to prepare the bill of exceptions and deliver it to the plaintiff in error, same to be paid for by Lincoln County in the manner provided.

The motion to dismiss of defendant in error is denied.

The application of plaintiff in error is sustained as to the bill of exceptions.

MOTION TO DISMISS DENIED;
APPLICATION SUSTAINED IN PART.

CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

SEPTEMBER TERM, 1950

MARGARET R. BLAKE, BY LEONARD L. LARSEN, HER GUARDIAN, APPELLANT, V. PATHFINDER HOTEL COMPANY, A CORPORATION, ET AL., APPELLEES.
44 N. W. 2d 310

Filed October 18, 1950. No. 32789.

Appeal and Error. The only question that can be presented to the Supreme Court on appeal, in the absence of a bill of exceptions, is the sufficiency of the pleadings to support the judgment.

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

Richards & Schafersman, for appellant.

Cook & Cook, and *Sidner, Lee & Gunderson,* for appellees.

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

MESSMORE, J.

This is an action at law brought in the district court for Dodge County by the duly appointed guardian of Margaret R. Blake, an incompetent, to recover damages for personal injuries alleged to have been sustained by his ward due to the negligence of the defendants. A jury was impaneled, and at the conclusion of the plain-

tiff's evidence, defendants moved for directed verdict. This motion was sustained. The plaintiff filed a motion for new trial which was overruled. Thereafter the plaintiff appealed to this court.

There is no bill of exceptions before this court. The sole question presented to this court on this appeal is whether or not the pleadings are sufficient to sustain the judgment of the trial court.

The pleadings are in accord that the defendant Pathfinder Hotel Company is a corporation duly organized and existing under and by virtue of the laws of the State of Nebraska, authorized to do and doing business in the city of Fremont, Dodge County, Nebraska; that the defendants Francis R. Orshek and Paul Christensen are the owners of a six-story hotel structure located and situated at the intersection of Broad and Sixth Streets, Fremont, Nebraska, and were the owners of such property on July 4, 1948; that the Pathfinder Hotel Company was the tenant of the owners, and in conjunction with the hotel operated and maintained a coffee shop and cafe on July 4, 1948; and that Leonard L. Larsen is the duly appointed, qualified, and acting guardian of the person and estate of Margaret R. Blake, an incompetent.

The petition alleges in substance that at all times mentioned the owners and tenant solicited and invited the public to patronize the coffee shop and cafe on said premises; that on or about July 4, 1948, the plaintiff, Margaret R. Blake, went to the coffee shop owned by the owners of the hotel property and conducted by the tenant Pathfinder Hotel Company, a corporation, at the solicitation and invitation of the tenant, for the purpose of making a purchase of her breakfast at the counter in the coffee shop; that while at the counter the plaintiff sat upon a stool built upon a platform which was 6¼ inches above the floor level, which was provided by the owners and the tenant for the comfort and convenience of the tenant's patrons; that by reason of the negligent and careless manner in which the stool, plat-

form, and floor of the coffee shop were constructed and maintained at the time and place by the owners and the tenant, Margaret R. Blake, upon attempting to get off the stool and leave the premises, was caused to fall upon the floor, as a result of which she sustained injuries and damages; that at all times herein alleged the owners knew their premises to be a public place and a place where large numbers of people would congregate and frequent; that the owners and tenant knew or should have known that the counter, stool, platform, and floor, and the material thereof were so arranged and constructed as to create a trap and pitfall and a dangerous condition, and that it rendered the coffee shop unsafe for the public use intended; that the plaintiff, prior to the accident, was in good mental and physical condition and competent to handle and manage her own affairs, and did walk and travel extensively; and that the plaintiff was without negligence in the premises, but that her injuries and damages were caused solely by reason of the negligence of the owners and tenant and each of them.

The petition alleged that the negligence of the tenant Pathfinder Hotel Company consisted of the following: (1) By maintaining the platform above the floor level with the identical material of terrazzo on both, and with such an arrangement which produced the appearance of a common level of the platform and floor, and which produced the effect of confusing and deceiving an ordinary person, including the plaintiff, into the belief that she was on the same level; (2) in failing to warn or notify the plaintiff of the existence of a dangerous condition; and (3) in maintaining on the premises said counter, stool, platform, and floor in such condition and arrangement as to render them unsafe for the public use intended, and in inviting the public to use the same in said dangerous condition.

The petition further alleged that the negligence of the owners, the defendants Francis R. Orshek and Paul

Christensen, consisted of the following: (1) In permitting the dangerous condition described aforesaid to exist on their premises and on the premises leased to the defendant Pathfinder Hotel Company, when they knew that said premises were being used and would be used as a public place where large numbers of people would gather; and (2) in allowing and permitting the conditions described aforesaid, which constituted a trap and pitfall, to be maintained on their premises, and when they knew, or with reasonable diligence should have known, said trap and pitfall would be injurious to persons rightfully in said coffee shop.

The petition further alleged that as a direct and proximate result of the carelessness and negligence of the defendants as aforesaid, the plaintiff sustained injuries. The injuries are thereafter described in the petition, and a prayer for judgment follows.

The answer of the defendants Pathfinder Hotel Company, a corporation, and Francis R. Orshek and Paul Christensen, the owners of the hotel property, are identical. After the admissions of the allegations of the plaintiff's petition which have previously been set forth, the answers are in substance as follows: There is a general denial of each and every allegation not admitted in the answers. Further answering each defendant alleged that at the time alleged in the petition there were ten booths and six tables in the coffee shop; that on several occasions prior to the time of the alleged injuries to Margaret R. Blake and during the time that she was a guest of the hotel, she had always used the booths or tables provided by the hotel for the use of their patrons; and that at the time of the alleged injuries there were tables and booths available for the use of Margaret R. Blake, but she, knowing that the stools were located upon a platform, elected to use the stools sitting upon the platform and stepped upon the same. The defendants further alleged that the coffee shop was well lighted. The defendants denied the al-

legations of the petition that it maintained a platform above the floor level with the identical material of terrazzo on both and with such an arrangement that produced the appearance of a common level of the platform and floor, and which produced the effect of confusing the plaintiff into the belief that she was on the same level. Defendants further alleged that Margaret R. Blake voluntarily and without any invitation of the defendants, at the time alleged in the petition, sat upon the stool at the counter instead of using the booths or one of the tables. The defendants further alleged that if the plaintiff sustained any injuries or damages, as alleged in her petition, said injuries and damages were the result of the negligence and contributory negligence of the plaintiff, which were more than slight and which would preclude her from recovery in this action, and that the negligence of the plaintiff as alleged therein, consisted of the following: (1) That the plaintiff, prior to her alleged injuries, had eaten her meals in said coffee shop and prior to alleged injuries had full knowledge of the equipment in the coffee shop, including the booths, tables, counter, and stools, and the design, construction, and location of the same; and (2) that the plaintiff, just prior to the time of her alleged injuries, stepped upon the platform and sat on the stool, and that she was well aware that said stools were located on the platform. Defendants prayed that plaintiff's petition be dismissed and they might recover the costs of the action.

The reply was a general denial of the affirmative allegations of the defendants' answers.

The answers of the defendants, it will be observed, constitute a denial of the allegations of negligence charged against them appearing in the plaintiff's petition. The answers further set forth certain facts with reference to contributory negligence on the part of Margaret R. Blake, and allege that if any damages were sustained by Margaret R. Blake, they were the direct and proximate result of her own negligence and contributory negli-

gence. In addition to the denials of negligence on the part of defendants, valid affirmative defenses are pleaded. We hold that the pleadings are sufficient to sustain the judgment of the trial court.

The applicable authority is: "The only question that can be presented to the Supreme Court on appeal, in the absence of a bill of exceptions, is the sufficiency of the pleadings to support the judgment." Cozad v. McKeone, 149 Neb. 833, 32 N. W. 2d 760. See, also, Doon v. Adcock, 127 Neb. 335, 255 N. W. 548.

The judgment of the district court is affirmed.

AFFIRMED.

RAYMOND G. WABEL, APPELLEE, V. JOHN ROSS, APPELLANT.
44 N. W. 2d 312

Filed October 18, 1950. No. 32812.

1. **Appeal and Error.** A bill of exceptions in a case tried in district court must be authenticated by certificate of the clerk thereof to be considered in the Supreme Court.
2. ———. This court will, on its own motion, refuse to consider a document appearing in the record and purporting to be a bill of exceptions when not authenticated as such by certificate of the clerk of the district court.
3. ———. In the absence of a bill of exceptions, no question will be considered, a determination of which requires an examination of evidence produced at the trial.
4. ———. In the absence of a bill of exceptions, it is presumed that an issue of fact raised by the pleadings was sustained by the evidence, that it was correctly determined, and if the pleadings are sufficient to support the judgment of the district court, it will be affirmed.

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

H. G. Wellensiek and *Donald H. Weaver,* for appellant.

Lloyd W. Kelly and *W. G. Blackburn,* for appellee.

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

BOSLAUGH, J.

This suit was to recover the amount of the balance, claimed by appellee to be due and unpaid, of the purchase price of a motor vehicle service station sold by him to appellant.

The claim of appellee was that the equipment was sold by him to appellant for $1,350.00, and the stock or merchandise was sold for its wholesale cost; that an inventory thereof was made on that basis and the purchase price thereby fixed at $2,115.21; and that the amount of the purchase price unpaid was $1,524.11. The appellant admitted that he bought the service station from appellee for the consideration of $1,350.00 for the equipment, but he asserted the stock or merchandise was sold to him for the sum of $700.00 and that the whole of the purchase price had been paid by him to appellee. The dispute is whether the stock or merchandise of the service station was sold for the wholesale cost to be determined by an inventory thereof, or whether the stock or merchandise was sold by appellee to appellant for the fixed sum of $700.00, the whole of which had been paid.

The trial resulted in a finding and judgment against appellant. His motion for a new trial was denied and he has appealed.

The assignments of error that the findings and judgment are contrary to law and that the district court erred in admitting the inventory in evidence, or either of them, were not referred to in the motion of the appellant for a new trial, and they cannot be considered in this court on appeal. Alleged errors of the district court in an action at law not referred to in the motion for new trial will not be considered by this court. Schwank v. County of Platte, 152 Neb. 273, 40 N. W. 2d 863; Shipley v. McNeel, 149 Neb. 790, 32 N. W. 2d

639; Hickman-Williams Agency v. Haney, 152 Neb. 219, 40 N. W. 2d 813.

The assignments of error that the findings and judgment are not sustained by the evidence and that the district court erred in denying the motion of appellant for a new trial, or either of them, cannot be reviewed in this court except by an examination and consideration of the evidence received on the trial of the case.

There is no bill of exceptions. A transcript of the proceedings at the trial to constitute a bill of exceptions must be settled as provided by statute and "filed with the papers in the case" in the office of the clerk of the district court where the case was brought and prosecuted. § 25-1140.06, R. R. S. 1943. If it is desired to use the original bill of exceptions in this court, it is indispensable that it be authenticated by a certificate of the clerk of the district court. § 25-1922, R. R. S. 1943. It was many years ago determined, has since been frequently repeated, and quite recently reiterated that a bill of exceptions in a case tried in the district court must be authenticated by the certificate of the clerk of such court to entitle it to be considered in the Supreme Court. If a purported bill of exceptions has not been so authenticated, its contents will not be examined or considered by this court for any purpose. Martin v. Fillmore County, 44 Neb. 719, 62 N. W. 863; Romberg v. Fokken, 47 Neb. 198, 66 N. W. 282; Bednar v. Bednar, 146 Neb. 726, 21 N. W. 2d 438; Ratay v. Wylie, 147 Neb. 201, 22 N. W. 2d 622. The practice is firmly established and has been consistently adhered to that this court will on its own motion refuse to consider a document appearing in the record and purporting to be a bill of exceptions when not authenticated as such by the certificate of the clerk of the district court. Ratay v. Wylie, *supra;* Bednar v. Bednar, *supra.* In the absence of a bill of exceptions, no question will be considered, a determination of which requires an examination of the evidence produced in the trial court. It follows that any assign-

ment of error that requires an examination of evidence cannot prevail on appeal in the absence of a bill of exceptions. In re Estate of Abts, 122 Neb. 714, 241 N. W. 270; Bednar v. Bednar, *supra*.

A separate document purporting to be, and referred to in the briefs as a bill of exceptions, accompanies the transcript and briefs in this case. It has not been filed in this court, and there is no evidence that it has been filed in the district court or that the clerk of that court has certified that it is the original, settled, and allowed bill of exceptions in the case, or a copy thereof, as required by law. This pretended bill of exceptions must be wholly disregarded in the consideration and determination of this case.

In the absence of a bill of exceptions it is presumed that an issue of fact raised by the pleadings was sustained by the evidence and that it was correctly determined, and if the pleadings are sufficient to support the judgment of the district court it will be affirmed. State ex rel. Wright v. Barney, 133 Neb. 676, 276 N. W. 676; Bednar v. Bednar, *supra*. The pleadings in this case are sufficient to support the judgment.

The judgment of the district court should be, and is, affirmed.

AFFIRMED.

IRA O. PEEK, APPELLANT, V. AYRES AUTO SUPPLY, APPELLEE.
44 N. W. 2d 321

Filed October 18, 1950. No. 32824.

1. **Workmen's Compensation: Appeal and Error.** The filing of the statement of errors in an appeal from an award of a single judge of the compensation court, as required by sections 48-179 and 48-181, R. S. 1943, is not a jurisdictional requirement.
2. ———: ———. In an appeal from the district court in a compensation case a trial de novo in the Supreme Court is not authorized by section 48-185, R. S. 1943, where findings of fact

do not appear from the record to have been made by the tribunal required to make the same.

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

Armstrong & McKnight, and *Paul P. Chaney,* for appellant.

Fraser, Connolly, Crofoot & Wenstrand, for appellee.

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

CARTER, J.

This is an appeal from an order of the district court dismissing an appeal from the compensation court because of an alleged failure to comply with section 48-181, R. S. 1943.

The record shows that appellant was injured in an automobile accident arising out of and in the course of his employment. The questions at issue on the merits are the extent of the injuries and the amount of compensation to which the appellant is entitled.

On July 9, 1948, the compensation court entered an award after a hearing before a single member of that tribunal. Appellant filed a waiver of a rehearing before the three members of the court on July 14, 1948. On July 21, 1948, appellant filed his petition on appeal in the district court. The appellee filed a waiver of the issuance and service of summons, and entered a voluntary appearance. On August 7, 1948, the appellee filed its answer, praying for the dismissal of the appeal for the reason that the notice and petition on appeal did not plainly state any error upon which appellant relied for a reversal or modification of the award of the compensation court. The appellee insists that such failure is jurisdictional and therefore fatal to the appeal under the provisions of section 48-181, R. S. 1943, which provides in part as follows: "Such appeal to the district court shall be taken and perfected in the same manner

as provided for appeals to the compensation court, and in such cases the trial in the district court shall be a trial de novo." An appeal from a single judge to the compensation court is provided by section 48-179, R. S. 1943. The applicable portion of that section provides: "Either party at interest who refuses to accept findings, order, award or judgment of the judge may, within fourteen days after the date thereof, file with the Nebraska Workmen's Compensation Court an application for a rehearing, plainly stating the errors on which such party relies for reversal or modification."

The petition filed in the district court on appeal does not plainly state the errors relied upon. It merely states the nature of the accident, the injuries incurred, the earning capacity of the appellant, and an allegation that the appellant was totally disabled. The prayer is for such relief as the appellant may be entitled to under the Workmen's Compensation Act. The record shows that an amended petition was filed on November 1, 1949, which set forth plainly the errors relied upon. The trial court permitted the filing of this amended petition, subject to a final ruling thereon at the close of the trial. The final ruling was to the effect that the assignment of errors was essential to the jurisdiction of the court, and that an amendment at a time more than fourteen days subsequent to the entry of the award in the compensation court could not lodge jurisdiction in the district court. It was for this reason that the trial court dismissed the appeal.

It will be noted that section 48-181, which provides for a waiver of a rehearing before the compensation court and for an appeal direct to the district court, specifically provides that the trial on such appeal shall be de novo. An assignment of errors is not essential to a trial de novo. Neither does it have the effect of limiting the scope of the inquiry to be made. We so held in Hansen v. Paxton & Vierling Iron Works, 135 Neb. 867, 284 N. W. 352, wherein we said: "Since the proceedings before

both the compensation court and the district court are trials de novo, the statement of errors does not limit the scope of the hearing in the district court, but merely serves to point out the questions or issues which should be given particular attention on the retrial. * * * In any event, the district court, of course, has the right to require that the issues be clarified in any necessary way, not as a matter of jurisdiction, but for purposes of orderly disposition."

It is clear, therefore, that under the holding of the Hansen case the filing of the statement of errors in an appeal from an award of a single judge of the compensation court, under sections 48-179 and 48-181, R. S. 1943, is not a jurisdictional requirement. See, also, Bell v. Denton, 136 Neb. 23, 284 N. W. 751. The foregoing holding is also consistent with the policy of liberal construction which we have long adhered to in construing the Workmen's Compensation Act. Solheim v. Hastings Housing Co., 151 Neb. 264, 37 N. W. 2d 212; Ludwickson v. Central States Electric Co., 135 Neb. 371, 281 N. W. 603.

We hold, therefore, that a failure to assign errors in the case before us is not a jurisdictional defect. It is merely a deficiency in pleading which may be waived or supplied upon demand. The trial court was in error in dismissing the appeal after the assignment of errors had been supplied by the filing of an amended petition.

The question arises whether this court should proceed to hear the case de novo or to remand it to the district court for further proceedings. The record discloses that a complete trial on the merits was had in the district court before the trial court sustained appellee's motion to dismiss. No findings of fact were made, however, and no award other than the dismissal of the appeal was entered.

An appeal from the district court to the Supreme Court in a compensation case is provided by section 48-185, R. S. 1943. This section in part states: "A judgment,

order or award of the district court may be modified or set aside only upon the grounds that (1) the court acted without or in excess of its powers, (2) the judgment, order or award was procured by fraud, (3) the findings of fact are not conclusively supported by the evidence as disclosed by the record, and if so found, the cause shall be considered de novo upon the record, or (4) the findings of fact by the court do not support the order or award."

It will be observed that a trial de novo in the Supreme Court is authorized only under the third ground set forth in the quoted statute. It is only where the findings of fact by the tribunal authorized to make their determination are not conclusively supported by evidence that this court is authorized to try the case de novo. In the case before us the district court is required to hear the case on appeal de novo, and consequently the trial court having dismissed the appeal on jurisdictional grounds, no findings of fact were made. Under such circumstances the language of the statute does not authorize a trial de novo in this court and requires that the cause be remanded to the district court for a trial de novo upon the merits.

REVERSED AND REMANDED.

LOUIS A. FRANCIL, APPELLEE, V. CLARA FRANCIL, APPELLANT.
44 N. W. 2d 315

Filed October 18, 1950. No. 32837.

1. **Divorce.** In a divorce suit, where the court has jurisdiction of the parties, it has the power and authority to adjust all of their respective property interests and rights.
2. ———. The division of property and allowance of alimony in divorce actions are always to be determined by the facts in each case.
3. ———. In the division of property and allowance of alimony in a divorce action, the court, in the exercise of judicial discretion, should consider the estate of the parties, if any, at the

time of the marriage and their contributions since; the duration of the marriage; the wife's loss of interest in the husband's property by virtue of the divorce; the social standing, comforts, and luxuries of life which the wife would probably have enjoyed; the conduct of the parties leading up to the divorce; to which party the divorce was granted; the age, condition of health, and earning ability of the parties; and all other relevant facts and circumstances; and make such an award as appears to be fair and equitable.

APPEAL from the district court for Keith County: JOHN H. KUNS, JUDGE. *Affirmed as modified.*

Firmin Q. Feltz and *G. B. Hastings,* for appellant.

Baskins & Baskins, for appellee.

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

CHAPPELL, J.

In this case, defendant wife was granted a decree of absolute divorce upon her cross-petition, charging extreme cruelty. In lieu of alimony, she was awarded certain described real property valued at approximately one-third of the estate accumulated by the parties during the marriage. Defendant's motion for new trial was overruled, and she appealed, assigning substantially that division of the property was inequitable and unjust. That is the sole issue presented, and we sustain the assignment.

It is now elementary that in a divorce suit, where the court has jurisdiction of the parties, it has power to adjust all of their respective property interests and rights. Lippincott v. Lippincott, 144 Neb. 486, 13 N. W. 2d 721.

This court has consistently held that the division of property and allowance of alimony in a divorce action are always to be determined by the facts in each case. In arriving at decision thereof, the court, in the exercise of judicial discretion, should consider the estate of the parties, if any, at the time of the marriage and their

contributions since; the duration of the marriage; the wife's loss of interest in the husband's property by virtue of the divorce; the social standing, comforts, and luxuries of life which the wife would probably have enjoyed; the conduct of the parties leading up to the divorce; to which party the divorce was granted; the age, condition of health, and earning ability of the parties; and all other relevant facts and circumstances; and make such award as appears to be fair and equitable. Peterson v. Peterson, 152 Neb. 571, 41 N. W. 2d 847; Holmes v. Holmes, 152 Neb. 556, 41 N. W. 2d 919; Ristow v. Ristow, 152 Neb. 615, 41 N. W. 2d 924; Specht v. Specht, 148 Neb. 325, 27 N. W. 2d 390.

In the light of the foregoing, we have examined the record. Concededly, defendant was entitled to a divorce. The facts relating to the cause of the divorce attributable to plaintiff need not be related here. The parties were married June 26, 1916. During most of the 34 years of their marriage, they lived on a farm in Keith County. The defendant was always a faithful, frugal, and industrious wife. Their five children had all reached maturity at the time of trial. Defendant was then 54 years of age. She was in poor health and needed major surgery, but was without sufficient funds to obtain it. She had been cooking and washing dishes part time in a cafe to earn a livelihood. Because of plaintiff's conduct and neglect, defendant had left the farm in 1944 and purchased a home in Ogallala in her own name, where she lived thereafter with some of her children, while plaintiff remained a great part of that time in hospitals and under guardianship, necessitated by alcoholic liquor which he drank to excess. Concededly, there was an equity of $2,000 in that home, which the decree properly awarded to defendant.

During the marriage, plaintiff had inherited about $4,000 and defendant about $2,000, which sums were respectively contributed to the estate. The trial court found that each of the parties had personal property of

fairly equal value, and respectively quieted title thereto in each. The evidence upon the question of value of such personal property is meager, but in the light thereof and debts owing by plaintiff, together with sums received by defendant since the divorce was entered, we sustain that part of the decree so dividing the personal property.

During the marriage the parties purchased and paid for the southwest quarter of Section 11, the southeast quarter of Section 24, the southwest quarter of the northeast quarter of Section 24, and the northeast quarter of Section 25, all in Township 14 North, Range 40, consisting of 520 acres, free and clear of all encumbrances. Concededly, such land was worth approximately $100 an acre. Plaintiff lived upon and farmed the southeast quarter of Section 24 and the southwest quarter of the northeast quarter of Section 24, 200 acres all in one tract. Adjoining therewith on the south was the northeast quarter of Section 25, which was farmed by two of their sons. The southwest quarter of Section 11, given to defendant by the decree, although disconnected from the other land, was also farmed by the two sons.

Under the circumstances of this case, we conclude that, so far as possible, there should be an equal division of the property, making due allowance for the estate of each respectively brought to the marriage by the parties. Viewed in that light, defendant should be awarded the home in Ogallala, subject to the encumbrances thereon. The equity in such property was concededly about $2,000, the amount she brought into the estate. Defendant should also, however, be awarded not only the southwest quarter of Section 11, but also the south half of the northeast quarter of Section 25, or a total of 240 acres free and clear of all encumbrances.

On the other hand, title to the southeast quarter of Section 24, the southwest quarter of the northeast quarter of Section 24, and the north half of the northeast quarter of Section 25, or a total of 280 acres, should be quieted in plaintiff. The difference of 40 acres, valued

at about $4,000, represents the amount put into the estate by plaintiff.

We have not overlooked the fact that defendant received sums of money out of the income from the estate for the support of herself and their minor children during the periods while plaintiff was under guardianship. Contrary to plaintiff's contention, however, he is not entitled to credit for such sums in this action. Defendant was entitled to the payment of such sums as support money, and further, they were created by defendant's own industry from which plaintiff ultimately profited very substantially.

Costs are taxed to plaintiff, and since there was reasonable justification for her appeal, defendant's attorney is allowed an attorney's fee of $500, taxed as a part of the costs.

For the reasons heretofore stated, the decree, when modified as directed in this opinion, is affirmed.

AFFIRMED AS MODIFIED.

EMMERT A. TRUMAN, PLAINTIFF IN ERROR, V. STATE OF NEBRASKA, DEFENDANT IN ERROR.

44 N. W. 2d 317

Filed October 18, 1950. No. 32867.

1. **Criminal Law.** When the State introduces a written statement of the defendant it is not bound by exculpatory statements contained therein but such statements are to be considered by the jury in the light of the surrounding facts and circumstances.
2. ———. Where the punishment of an offense created by statute is left to the discretion of a court, to be exercised within certain prescribed limits, a sentence imposed within such limits will not be disturbed unless there appears to be an abuse of such discretion.

ERROR to the district court for Lancaster County: JEFFERSON H. BROADY, JUDGE. *Affirmed.*

Emmert A. Truman, pro se, and *Herbert W. Baird,* for plaintiff in error.

Clarence S. Beck, Attorney General, and *Homer L. Kyle,* for defendant in error.

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

WENKE, J.

Emmert A. Truman was found guilty by a jury in the district court for Lancaster County of the statutory crime of rape and after his motion for new trial had been overruled he was sentenced to serve six years in the penitentiary. He brings this error proceeding to review his conviction and sentence.

For the purpose of this opinion we shall refer to the plaintiff in error, defendant below, as the defendant and to the defendant in error, the State of Nebraska, as the State.

The defendant raises a question as to the sufficiency of the evidence to sustain his conviction because, as he contends, the State failed to prove beyond a reasonable doubt that the prosecutrix was chaste before she had sexual intercourse with him on December 6, 1949.

Admittedly the parties had sexual relations on that date for the first time and it was voluntarily entered into by them. At that time prosecutrix was 15 years of age and the defendant 34.

That under these circumstances such fact is an essential element of the crime with which the defendant was charged, and which the State was bound to so prove, is evidenced by the following language of section 28-408, R. R. S. 1943, under which the defendant was prosecuted: "* * * if any male person, of the age of eighteen years or upwards, shall carnally know or abuse any female child under the age of eighteen years, with her consent, unless such female child so known and abused is over fifteen years of age and previously unchaste, shall be

deemed guilty of rape, and shall be imprisoned in the penitentiary not more than twenty nor less than three years."

In the course of the trial the State introduced a statement made by the defendant admitting his relations with the prosecutrix. This statement contains the following: "It was my opinion the first time I had sexual relations with Rosemary, N. E. of Havelock, that it was not the first time. I do not know for sure, but that was my opinion. Rosemary never said that she had had sexual relations before, but she had hinted that she had gone with another boy earlier in the summer of 1949, and I surmised that she may have had relations with this boy. However she says not. At the time that I had sexual relations with her, I did not believe she was a virgin, because she had no hymen, and I asked her at that time why she didn't have and she said she didn't know."

It is the defendant's contention that if the prosecution introduces an exculpatory statement made by the accused that such statement is regarded as true and binding on the prosecution and, in order to secure a conviction, it must show by other testimony, beyond a reasonable doubt, that the statement is false. That is, if the State introduces an admission or confession of the accused which contains an exculpatory statement, that unless it shows by other evidence that the facts are otherwise, it is bound by such statement.

There are jurisdictions which apply the foregoing rule, however, they make certain exceptions thereto which, under the facts disclosed by the record, would be applicable here. See, Banks v. State, 85 Tex. Cr. 165, 211 S. W. 217, 5 A. L. R. 600; McKinley v. State, 104 Tex. Cr. 65, 282 S. W. 600; Tate v. State, 116 Tex. Cr. 340, 31 S. W. 2d 453; Yarbrough v. State, 125 Tex. Cr. 304, 67 S. W. 2d 612; Lindsey v. State, 146 Tex. Cr. 459, 176 S. W. 2d 192. But we need not discuss these exceptions because we do not think the foregoing is either the correct rule or the one generally accepted in most jurisdictions.

As stated in State v. Ball, 220 Iowa 595, 262 N. W. 115:

"While it is true that the state introduced this confession in evidence, the contention of the defendant cannot be sustained that the state is bound by the exculpatory statements contained therein. These statements must be considered in the light of the surrounding facts and circumstances, and other statements made by the defendant in such written statement, and when so considered are, of necessity, a question for the jury. * * *

"While the exculpatory statements made in said written confession must be considered by the jury in reaching a verdict, it cannot be said that because of the same they are final. The rule governing these matters is quite tersely stated in 16 C. J., p. 738, § 1517, as follows:

" 'The rule that a confession is to be considered in its entirety does not compel the jury to give the same belief to every part of it. The jury may attach such credit to any part of it as they deem it worthy of, and may reject any portion of it which they do not believe. All of it must be weighed carefully by the jury, and upon all the circumstances surrounding the case they must determine how much of it they will receive and how much they will reject.'

"We think, therefore, under this rule, which seems to be quite universal, that the exculpatory statements contained in this confession, and the weight to be given to them made a question of fact for the jury."

And in Mitsunaga v. People, 54 Colo. 102, 129 P. 241: "Counsel for defendant contend the people were bound by his statements which the prosecution introduced in evidence in chief, unless they were shown to be untrue. It was for the jury to determine from all the evidence in the case, how much, if any of the statements they would believe.—State v. Merkle, 189 Mo. 315-321."

In State v. Patchen, 36 Nev. 510, 137 P. 406, the court held: "Statements or explanations made by the accused at the time of the arrest may be introduced as part of the state's case in chief, but the improbability of the

statements or explanations may be so apparent that the jury will not believe them even though they be not contradicted. Their reasonableness is a matter entirely for the jury."

And in State v. Harris, 324 Mo. 223, 22 S. W. 2d 802: "The general rule is that, while the jury may believe any statement made by a defendant which is against his interest, it is not obliged to believe statements in his own interest merely because such statements appear in a statement shown by the State to have been made by said defendant."

While the jury may or may not believe any part or all of a statement made by a defendant, it is not obligated to believe statements in his interest merely because they appear in a statement proved by the State.

When the State introduces a written statement of the defendant it is not bound by exculpatory statements contained therein but such statements are to be considered by the jury in the light of the surrounding facts and circumstances.

Assuming that the statement hereinbefore set forth can be said to be evidence of the prosecutrix's physical condition on December 6, 1949, from which it could be said that she was unchaste at the time the act took place of which complaint is here made, that evidence would not necessarily be controlling because there is other evidence offered by the State which, if believed by the jury, is sufficient to establish beyond a reasonable doubt that she was chaste. The prosecutrix testified that she had never, prior to December 6, 1949, had relations with anyone. She testified as to the immediate effect upon her of the act and her subsequent physical condition. From this evidence the jury could properly find that defendant was wrong in what he believed about her condition. It is probably true that medical testimony could have been offered by the State as to this fact but it was not absolutely bound to do so under the circumstances. There is sufficient evidence in the

record from which the jury could properly find that prior to the relations had by defendant with the prosecutrix on December 6, 1949, that she was chaste.

Defendant raises the question of the sentence being excessive. Under section 28-408, R. R. S. 1943, the defendant, upon conviction, was subject to being sentenced to the penitentiary for not more than twenty nor less than three years. He was sentenced to six years. It is true that under section 29-2308, R. R. S. 1943, we have the authority to reduce a sentence when, in our opinion, it is excessive. But, as stated in Bright v. State, 125 Neb. 817, 252 N. W. 386: "Where the punishment of an offense created by statute is left to the discretion of a court, to be exercised within certain prescribed limits, a sentence imposed within such limits will not be disturbed unless there appears to be an abuse of such discretion."

The record shows that at the time the act was committed defendant was 34 years of age and the prosecutrix 15. He was married and had a family of four children ranging between the ages of 2 and 8 years. He became acquainted with the prosecutrix and her family in August 1949. He promoted this acquaintanceship with her and conducted a course of attention toward her that resulted in their becoming infatuated with each other. For this purpose he kept her out of school during most of the latter part of November and the forepart of December 1949 under the pretext of teaching her to drive a car. On the date involved he promised to get a divorce and marry her. As a result she consented to the act. What happened subsequent thereto is immaterial except as it reflects the defendant's conduct in his association with the prosecutrix. In January 1950 he took the prosecutrix to Oklahoma, leaving his wife and two of their children in Kansas, and there lived with prosecutrix as man and wife until apprehended by the authorities. The record also shows that when he was 18 years of age that defendant was committed to a

reformatory. Under these circumstances we do not think the sentence excessive.

Finding no merit in the contentions of the defendant, and the record fully sustaining the finding of his guilt, we affirm the verdict and sentence of the court below.

AFFIRMED.

ALICE BUSTEED, APPELLEE, V. WALTER W. SHEFFIELD ET AL., APPELLANTS, IMPLEADED WITH HELEN M. FORD ET AL., APPELLEES.

44 N. W. 2d 471

Filed October 31, 1950. No. 32768.

1. **Deeds.** The possession of a duly executed deed is prima facie proof of delivery thereof and the burden is on one contesting to overcome the presumption of delivery.
2. **Trial.** When a defendant at the close of the evidence of the plaintiff moves for dismissal of the action for want of evidence to support a judgment or decree the defendant admits the truth of the evidence and every reasonable conclusion which may be drawn therefrom.
3. ———. When a motion is made at the close of plaintiff's evidence to dismiss for want of evidence to sustain a cause of action it is the duty of the court to determine the question as a matter of law.
4. **Specific Performance.** One seeking specific performance of an oral contract for the conveyance of real estate has the burden of proving by a preponderance of evidence a contract which is clear, satisfactory, and unequivocal in its terms; that he has performed the burdens imposed upon him by the contract; and that his acts 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 Keith County: JOHN H. KUNS, JUDGE. *Affirmed.*

V. H. Halligan, for appellants.

Baskins & Baskins, for appellee.

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

YEAGER, J.

This action as originally instituted was by Alice Busteed, plaintiff, against Walter W. Sheffield, Ida Sheffield, Helen M. Gile, Robert Busteed, Allen Stimson, Gordon Stimson, and Ruby Stimson, defendants. Helen M. Gile became Helen M. Ford by marriage after the commencement of the action and before the trial. The object and purpose of the action was to have vacated and set aside a deed to a half section of land in Keith County, Nebraska, from Mansfield Sheffield and Ellen D. Sheffield to Walter W. Sheffield and to have title to the said land quieted in plaintiff, Walter W. Sheffield, Helen M. Gile, Allen Stimson, and Gordon Stimson, all being heirs at law of Mansfield Sheffield and Ellen D. Sheffield both of whom were deceased. Other relief was sought under the pleadings but determination thereon was reserved until after final decision upon the validity of the deed.

Alice Busteed, Walter W. Sheffield, and Helen M. Ford are children of Mansfield Sheffield and Ellen D. Sheffield and Allen Stimson and Gordon Stimson are the children of their deceased daughter. Ida Sheffield is the wife of Walter W. Sheffield and Ruby Stimson is the wife of Gordon Stimson. Robert Busteed is the husband of the plaintiff.

The district court by its decree declared void the deed and quieted title to the land in Alice Busteed, Walter W. Sheffield, Helen M. Ford, Allen Stimson, and Gordon Stimson. From the decree the defendants Walter W. Sheffield and Ida Sheffield have appealed.

A large number of assignments of error appear in the brief but because of their interrelationship they are not subject to separate designation and treatment herein.

The record discloses that Mansfield Sheffield obtained title to a portion of the land in question in 1900 and the

remainder in 1902 and that on December 30, 1929, he and Ellen D. Sheffield executed a deed to all of it in favor of Walter W. Sheffield. Walter W. Sheffield went into possession of the land as a tenant in about January 1920. By his pleadings he contends that his tenancy was coupled with an oral agreement whereby he was to receive full title to the land on the death of his parents. His mother died in February 1940. A short time thereafter Walter W. Sheffield came into possession of the deed. The deed was filed for record in December 1940. Mansfield Sheffield died on April 10, 1945.

The plaintiff offered no direct evidence as to where the deed reposed from the date of its execution until December 1940 when it was filed for record by Walter W. Sheffield. Also no evidence was offered as to knowledge of its existence or how it might have come into possession of Walter W. Sheffield except that his father had a box in which he kept papers which box at some uncertain time was turned over to him by one of the sisters.

As a part of her case the plaintiff adduced evidence that Walter W. Sheffield stated after recording the deed that he neither had nor made any claim to title to the land in the lifetime of his father. Walter W. Sheffield pleaded affirmatively in his answer that he claimed no title to the land in the lifetime of his parents.

This was the state of the record in this case at the close of plaintiff's evidence at which time the defendants Sheffield moved for dismissal on the ground that the evidence did not sustain a cause of action. The point of the motion is that in this state of the record Walter W. Sheffield was the grantee in possession of a deed which had been duly executed and was entitled to a presumption that the deed had been duly delivered. He contends that the burden was upon the plaintiff to prove that there was no valid delivery of the deed.

It is well settled that possession of a duly executed deed is prima facie proof of delivery and the burden

is on one contesting it to overcome the presumption of delivery. Roberts v. Swearingen, 8 Neb. 363, 1 N. W. 305; Wilson v. Wilson, 85 Neb. 167, 122 N. W. 856; Clark v. Holmes, 109 Neb. 213, 190 N. W. 493; Ladman v. Ladman, 130 Neb. 913, 267 N. W. 188.

If failure of delivery was the sole essence of plaintiff's right of recovery and if she has sustained the burden contemplated by this legal rule then of course the district court did not commit error in overruling the motion to dismiss. If she did not it was the duty of the court to sustain the motion.

As we view the record it seems apparent that these defendants were entitled at the conclusion of plaintiff's evidence to the benefit of the presumption of delivery of the deed in question. It does not follow however that because thereof they were entitled to have their motion to dismiss sustained. That was not the only determinable factor in the case and not the only basis of the cause of action at that time.

The plaintiff sufficiently pleaded that the deed was not operative as an instrument of conveyance of the real estate described therein. In support of the pleading as hereinbefore indicated evidence was adduced and received that Walter W. Sheffield stated and admitted that he had and claimed no right or estate in the lands as against the father in his lifetime.

If this was true, and at the time the motion was made the court was required to regard it as true, the deed did not have the effect that it purported to have on the date of execution, on the date of delivery, or at the time of recording, and the burden of proving a cause of action had been sustained without regard to whether or not Walter W. Sheffield was entitled to the presumption attending the unexplained possession of a deed.

When a defendant at the close of the evidence of plaintiff moves for a dismissal of the action for want of evidence to support a judgment or decree the defendant

admits the truth of the evidence and every reasonable conclusion which may be drawn therefrom. Schroeder v. Bartlett, 129 Neb. 645, 262 N. W. 447; Meyer v. Platt, 137 Neb. 714, 291 N. W. 86; Lucas v. Lucas, 138 Neb. 252, 292 N. W. 729; Caspers v. Frerichs, 146 Neb. 740, 21 N. W. 2d 513; Casper v. Frey, 152 Neb. 441, 41 N. W. 2d 363.

Coupled with this rule is another rule which requires the court, when a motion is made at the close of plaintiff's evidence to dismiss for want of evidence to sustain a cause of action, to determine the question as a matter of law. Schroeder v. Bartlett, *supra;* Lucas v. Lucas, *supra;* Caspers v. Frerichs, *supra;* Casper v. Frey, *supra.*

On his own behalf with regard to the cause of action pleaded by plaintiff, the defendant Walter W. Sheffield offered evidence which without peradventure refutes his contention that there was an actual or presumptive delivery of this deed by his father to him. He got the deed from an attorney in Ogallala, Nebraska, in February 1940, shortly after the death of his mother. This attorney probably drew it since he took the acknowledgment of the grantors thereto in 1929. If the deed was ever out of the possession of the attorney prior to February 1940 there is no evidence of that fact. There is no evidence that the attorney was agent, attorney, or attorney in fact for any party at the time of delivery and no evidence that the father directed or even knew of the delivery.

The incidents pertaining to receipt of the deed to the extent necessary to set them forth here are as follows: After the death of Ellen D. Sheffield, Mansfield Sheffield, Walter W. Sheffield, and the two sisters of Walter went to the office of the lawyer and there the deed and the will of Ellen D. Sheffield were passed separately to Walter. He passed the will along to the others to be read and put the deed in his pocket. The testimony of Walter W. Sheffield, which is the only pertinent testimony relating to the subject, is the following: "Q After

Mr. DeVoe called up, what did you do? A I come to town and picked up Pop and the girls. Q And where did you go to? A Mr. DeVoe's office. Q And now when you went in there, did Mr. DeVoe give you some papers? A He did. Q And what papers did he give you? A My deed and the will. Q What will is that? A Mother's. Q And what did you do with the will at that time? A I handed it to Pop. Q And what did he say? A He said, 'I know what's in that,' and he handed it back and I handed it to Helen. Q Were these papers in a separate envelope, or just folded up? A They were separate, not together. The deed and will weren't together. Q What I mean: Were they in an envelope, or just loose? A They were loose. Q And you handed the will, then, to—A My sister, Helen. Q And she read the will, then, did she? A She did. Q And what was then done with the will? A She handed it to Alice. Q Was there any discussion in Mr. DeVoe's office in reference to the deed? A No. Q And what did you do with the deed? A Just put it in my pocket. Q And where did you all four go after you got the deed? A Come back up home."

As a circumstance bearing on the question of whether or not there was a delivery of the deed, a short time after it was recorded Mansfield Sheffield filed of record a statement in which he repudiated any knowledge of delivery or intention to deliver the deed to Walter W. Sheffield. As a further circumstance to be considered Walter W. Sheffield thereafter took no known steps in the lifetime of his father to have his status with regard to the real estate clarified.

Coming now to the defense as pleaded by the defendants Sheffield in their answer it is observed again that they do not in fact claim any title by virtue of the delivery of the deed in question. They claim only that Walter W. Sheffield became entitled to the land on the death of Mansfield Sheffield and Ellen D. Sheffield. Their claim is based on an alleged oral contract which they say they performed by the terms of which they were to

go upon the land in 1920, farm it, improve it, and pay rent therefor until the death of Mansfield Sheffield and Ellen D. Sheffield, whereupon it would become the land of Walter W. Sheffield. Their substantial contention is that the deed became effective on the death of Mansfield Sheffield for the purpose of carrying into effect the alleged oral contract.

The defendants Sheffield sought by their pleadings to have title quieted in them pursuant to the terms of the alleged oral contract.

It is well settled that one seeking specific performance of an oral contract for the conveyance of real estate has the burden of proving by a preponderance of evidence a contract which is clear, satisfactory, and unequivocal in its terms; that he has performed the burdens imposed upon him by the contract; and that his acts 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. Riley v. Riley, 150 Neb. 176, 33 N. W. 2d 525; Lunkwitz v. Guffey, 150 Neb. 247, 34 N. W. 2d 256; Anderson v. Anderson, 150 Neb. 879, 36 N. W. 2d 287; Jenkins v. Jenkins, 151 Neb. 113, 36 N. W. 2d 637; Noetzelmann v. Noetzelmann, *ante* p. 133, 43 N. W. 2d 515.

There was no competent evidence adduced of the oral contract alleged. Walter W. Sheffield offered to prove by his own testimony such a contract but the offer was rejected. No error is predicated upon the rejection. The propriety of the rejection therefore does not require consideration herein. The only other evidence bearing on the subject was testimony by the daughters that there was a general understanding that Walter W. Sheffield would receive this land in the distribution of the estate of his parents, and some very indefinite purported statements of Mansfield Sheffield that this land was or would become the property of Walter W. Sheffield.

In this light necessity for a consideration of the question of performance does not arise.

The district court correctly decreed that the deed in question was invalid and further correctly quieted title in Alice Busteed, Walter W. Sheffield, Helen M. Ford, Allen Stimson, and Gordon Stimson, which decree is affirmed.

AFFIRMED.

IN RE APPLICATION OF M. & S. TRANSPORT COMPANY. MABEL C. HERMAN, DOING BUSINESS AS HERMAN OIL TRANSPORT COMPANY ET AL., APPELLANTS, V. M. & S. TRANSPORT COMPANY ET AL., APPELLEES.

44 N. W. 2d 585

Filed October 31, 1950. No. 32799.

1. **Motor Carriers.** When a certificate of public convenience and necessity has already been issued and an application is made by another to acquire the operating rights thereunder, such application comes within the provisions of sections 75-229 and 75-230, R. R. S. 1943.
2. **Public Service Commissions: Motor Carriers.** An order of the Nebraska State Railway Commission, the effect of which is to revoke the old and issue a new certificate of public convenience and necessity to an applicant in conformity with such statutes, is valid, effective, and not subject to collateral attack except that such certificate may be suspended, changed, or revoked upon statutory grounds.

APPEAL from the Nebraska State Railway Commission: *Affirmed.*

Rosewater, Mecham, Stoehr, Moore & Mecham, for appellants.

Jack W. Marer and *Loyal G. Kaplan,* for appellees.

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

CHAPPELL, J.

On August 20, 1948, a joint form application was filed with the Nebraska State Railway Commission, hereinafter called the commission, seeking authority by M. &

S. Transport Company as purchaser of its operating equipment, to acquire the intrastate operating rights of Ervin C. Lacina, doing business as Lacina Transport Company, and obtain authority as its successor in interest to operate as an intrastate motor carrier for hire, of "Petroleum products * * * From all producing, refining and distributing points in Nebraska, as points of origin to all points and places within a 100-mile radius of Lincoln, Nebraska, over irregular routes."

On August 26, 1948, Mabel C. Herman, doing business as Herman Oil Transport Company, filed a letter of protest with the commission, alleging that the granting of such aforesaid application would: "(1) * * * not be consistent with the public interest; (2) * * * unduly restrict competition; and (3) that in a statutory sense applicant is not fit and able properly to perform the service proposed and to conform to other relevant provisions of law." Such letter also requested a formal hearing on some date after September 28, 1948.

On October 20, 1948, as shown in the transcript, a hearing was held upon the application "pursuant to notice duly given all interested parties," whereat, although kept open for one hour, protestant did not appear.

On October 29, 1948, a report and recommendation of the examiner was filed with the commission. That instrument, after reciting at length the evidence adduced, found that appellant, M. & S. Transport Company, was "fit, willing and able properly to perform the proposed service and to conform to the provisions of Section 75-222 to 75-250 R. S. Nebr., 1943 and the requirements, rules and regulations of the Commission promulgated thereunder," and "That the proposed transaction will be consistent with the public interest and does not unduly restrict competition." It then found and recommended that "applicant should be granted a certificate of public convenience and necessity authorizing operations as" sought in the application.

No exceptions were filed to such report or recommen-

dations, and on November 10, 1948, the commission entered its findings and order specifically affirming the findings of the examiner, approving his report and recommendation that "applicant should be issued a certificate of public convenience and necessity authorizing operations as" sought by it, and specifically "granted" and "issued" such a "certificate."

On November 18, 1949, one year and eight days after entry of the commission's final order of November 10, 1948, and after the mandate was issued in In re Application of Neylon, 151 Neb. 587, 38 N. W. 2d 552, Mabel C. Herman, doing business as Herman Oil Transport Company, filed a motion with the commission asking leave to file a petition for reconsideration, reopening, and vacation of the order of November 10, 1948, upon the ground that it was void primarily because no notice of hearing upon the application or copy of the examiner's report or such order had ever been received by either protestant or her attorney, and that the commission was without jurisdiction to authorize the transfer of a certificate of public convenience and necessity from one holder to another. Also, on November 18, 1949, Transit, Inc., as an alleged interested party, filed a petition with the commission, praying for leave to intervene and likewise seek to have the commission's order of November 10, 1948, reconsidered, reopened, and vacated on similar grounds.

On December 7, 1949, M. & S. Transport Company and Ervin C. Lacina, doing business as Lacina Transfer Company, filed with the commission a joint motion to dismiss or overrule the motion for leave to file a petition for reconsideration and to dismiss or deny the petition for leave to intervene, and answered not only specifically traversing all the allegations of such motion and petition but also pleading facts supported by affidavits and copies of official commission records attached thereto, showing precedent notice and knowledge by both protestant and intervener of the application, the details

of the entire transaction, the hearing, and final action of the commission thereon.

On December 10, 1949, the commission sat en banc, whereat evidence was adduced, including by stipulation all pleadings filed by the parties in the original proceeding, together with all attachments thereto, upon the issues so presented. Thereafter, the commission, upon consideration of such pleadings and evidence, entered its official findings and order wherein, after reciting substantially the findings and order of November 10, 1948, granting and issuing a certificate of public convenience and necessity to M. & S. Transport Company, it overruled the motion of Mabel C. Herman, doing business as Herman Oil Transport Company, for leave to file a petition for reconsideration, and denied the petition of Transit, Inc., for leave to intervene.

The petition of protestant and intervener for rehearing was denied by the commission on December 30, 1949, and they appealed, assigning substantially that the order of November 10, 1948, was void ab initio, and that the orders of December 10, 1949, and December 30, 1949, were arbitrary, unreasonable, and contrary to the evidence and the law. We conclude that the assignments have no merit.

By their pleadings and evidence appellants have concededly not brought themselves within the procedure or provisions of section 75-238, R. R. S. 1943, relating to the suspension, change, or revocation of certificates of public convenience and necessity. Since this is a collateral attack upon the order of November 10, 1948, from which no appeal was ever taken, the basic issue for decision is the validity of such order.

It is apparent from the record that upon the filing of the joint application here involved, the commission proceeded to act under and in compliance with the authority granted to it by section 75-240, R. R. S. 1943, relating to the commission's authority to approve and authorize the purchase of the operating property of a

motor carrier, and sections 75-229 and 75-230, R. R. S. 1943, relating to the application for and authority of the commission to issue certificates of public convenience and necessity.

Contrary to appellants' contentions, the record and evidence herein disclose beyond peradventure of a doubt that a hearing was had upon the application pursuant to notice thereof by mail served upon all interested parties, including appellants, as required by the afore-cited statutes. Also, contrary to appellants' contention, this is not a case wherein there was a transfer of a certificate already issued from one holder to another, as in In re Application of Neylon, *supra*. Rather, in this case, after a notice and hearing according to law whereat ample competent evidence was adduced, the commission approved the purchase, and not only effectually revoked the old but also granted and issued a new certificate of public convenience and necessity to M. & S. Transport Company in conformity with sections 75-229 and 75-230, R. R. S. 1943. In other words, in the case at bar, as found by the commission, and affirmed by this opinion, there was proper notice, hearing, findings, and conformity with such sections, which were lacking in In re Application of Neylon, *supra*, relied upon by appellants.

We are convinced that the order of the commission, entered November 10, 1948, was valid and enforceable in every respect. No appeal was ever taken therefrom, and it was not subject to collateral attack. Therefore, the orders of the commission entered December 10, 1949, and December 30, 1949, were not arbitrary and unreasonable but amply supported by the evidence and the law.

Other matters were presented by briefs and argument, but we deem it unnecessary to discuss them.

For the reasons heretofore stated, such orders should be and hereby are affirmed.

AFFIRMED.

RUTH H. KROGER, APPELLANT, V. ERNEST G. KROGER, APPELLEE.

44 N. W. 2d 475

Filed October 31, 1950. No. 32829.

1. **Divorce.** No decree of divorce can be lawfully entered unless the allegations of the petition for divorce are supported by satisfactory evidence other than the admissions of the parties.
2. ———. It is impossible to lay down a general rule as to the degree of corroboration required in a divorce action as each case must be decided on its own facts and circumstances.
3. ———. There may be extreme cruelty justifying a decree of divorce without physical injury or violence. Unjustifiable conduct on the part of husband or wife, which utterly destroys the legitimate ends and objects of matrimony, may constitute extreme cruelty.
4. ———. In a divorce suit, where the court has jurisdiction of the parties, it has power to adjust all their respective property interests.
5. ———. In determining the question of alimony or division of property as between the parties the court, in exercising its sound discretion, will consider the respective ages of the parties to the marriage; their earning ability; the duration of and the conduct of each during the marriage; their station in life, including the social standing, comforts, and luxuries of life which the wife would probably have enjoyed; the circumstances and necessities of each; their health and physical condition; their financial circumstances as shown by the property they owned at the time of the divorce, its value at that time, its income-producing capacity, if any, whether accumulated or acquired before or after the marriage, the manner in which it was acquired, and the contributions each has made thereto; and, from all the relevant facts and circumstances relating thereto, determine the rights of the parties and make an award that is equitable and just.

APPEAL from the district court for Hall County: H. EMERSON KOKJER, JUDGE. *Reversed and remanded with directions to modify.*

Sterling F. Mutz, for appellant.

Mayer & Mayer, Harold A. Prince, and *W. P. Lauritsen,* for appellee.

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

WENKE, J.

This is a divorce action appealed from the district court for Hall County by Ruth H. Kroger, plaintiff below. She complains of that part of the decree awarding a divorce to Ernest G. Kroger on his cross-petition and awarding her alimony in the sum of $10,000. He cross-appeals from the allowance of the alimony.

We shall herein refer to Ruth H. Kroger as appellant and Ernest G. Kroger as appellee.

The questions involved by the appeal and cross-appeal relate themselves to the issue of who is entitled to the divorce, if either, and the amount of alimony that should be allowed. Since the matter is here for our consideration de novo we shall discuss these issues generally.

Appellant and appellee were married on June 21, 1944, at Osborne, Kansas. They did not immediately hold themselves out in Grand Island, Nebraska, their home city, as man and wife. They did not do so until after they were remarried at Staplehurst, Nebraska, on April 3, 1945. It was the second marriage for both. Their respective first spouses were deceased and the family of each had already grown to maturity. At the time of the trial he was 61 years of age and she was 51. She had two sons by her first marriage of which the elder was killed in action during World War II. This occurred shortly before the remarriage of the parties on April 3, 1945. He had a family of four children consisting of three sons and a daughter.

Appellee, without disclosing in particular just what it was he complained of, alleged in his cross-petition that appellant had in divers ways been guilty of conduct toward him that constituted extreme cruelty and that such conduct had the effect of destroying the legitimate objects of their marriage. The trial court found generally that appellant had been guilty of conduct toward appellee

which constituted extreme cruelty and awarded him a decree of divorce on that basis. However, in his testimony, appellee limited his complaints as to her conduct as follows: "* * * that one weakness (her use of intoxicating liquors) that was causing our trouble."

The evidence shows that on several occasions during their married life that both appellee and appellant indulged in the use of intoxicating liquors. Usually the appellee purchased the liquor or furnished the money to buy it with. On such occasions the appellee's use thereof was always very moderate and never to excess. However, on a few of these occasions it would appear appellant indulged therein to such an extent that she either became intoxicated, sick, or both.

The evidence falls far short of establishing that the appellant had become "an habitual drunkard" within the meaning of subdivision 5 of section 42-301, R. S. Supp., 1949. Neither do we find her conduct in this respect, insofar as it is shown by the record, to be of such a character that it would support a finding that it constituted "extreme cruelty" within the intent and meaning of section 42-302, R. S. 1943.

However, we are not called upon to base our decision solely on such finding. Section 42-335, R. S. 1943, provides: "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."

While we have said in Green v. Green, 148 Neb. 19, 26 N. W. 2d 299: "It is impossible to lay down a general rule as to the degree of corroboration required in a divorce action as each case must be decided on its own facts and circumstances."

However, as held in O'Reilly v. O'Reilly, 120 Neb. 720, 234 N. W. 916: "No decree for annulment of a marriage can be lawfully entered unless the allegations of the petition for annulment are supported by satisfactory evi-

dence other than the admissions of the parties." Therein we stated: "* * * even had this conversation occurred and had she made such admission, under the provisions of the statute above quoted, such evidence was insufficient to entitle plaintiff to the annulment of the marriage contract." The foregoing applies to a decree of divorce.

Appellee testified to instances when he claims appellant was intoxicated in the presence of others and of her conduct at such times. However, he did not attempt to have any of the parties present on such occasions testify as to her condition or conduct at the times of which he makes complaint. Outside of his testimony, and such admissions as she made, we find no other evidence in the record sufficient to corroborate his contention that her condition and conduct on such occasions were of such a character that it had the effect of destroying the objects and purposes of their marriage.

There is also evidence in the record, adduced on the cross-examination of the appellant, that she made two trips while appellee and his son were in Canada. This occurred in 1945. The first of these trips was to Omaha, Nebraska. Appellant drove her car and took with her a lady friend from Grand Island. While in Omaha they visited a night club and then stayed overnight in Omaha at the home of some married friends of the Krogers. It is true that the character of this lady friend was apparently not of the best but there is nothing in the record to show that the appellant did anything on this trip to cast any reflection on herself. Neither does the evidence show that she continued to associate with this person. Appellee had not been aware of the fact that she had made this trip until she testified thereto at the trial.

The second trip was to North Platte, Nebraska. This trip was made by train. There she visited a lady friend and stayed overnight in her apartment. Apparently this friend was also not of the highest character. However, there is nothing in the record to show appellant

did anything on this trip to cast any reflection on herself. While she was in touch with this person at a later date, however, the record does not show that she again associated with her socially. Apparently appellee was also unaware of these facts until the time of the trial.

What has already been said with reference to the evidence as it relates to the appellant's use of intoxicating liquors is applicable here. There is nothing in these facts to justify a decree of divorce in favor of the appellee.

We find that the appellee was not entitled to a decree of divorce on his cross-petition and that the trial court was in error in granting him a divorce thereon.

Appellant likewise sought a divorce on the grounds of extreme cruelty without specifically setting forth the acts of which she complained as a basis therefor. In this respect she testified as to appellee's conduct toward her during their entire married life. These acts related to neglect, pouting, outbursts of temper, and refusal to talk with her over long periods of time. They also related to his conduct as being rude, sarcastic, and indifferent.

Appellee admits that, among other things, he scolded her, shamed her, and tried to keep from talking with her. He says he did this in an endeavor to correct her of the one habit he says was causing their trouble. That he was guilty of the things of which appellant complains finds support in the testimony of her son, Kenneth Walker, and that of Louis McKenzie.

Appellant also testified to one occasion when appellee used physical force on her in an attempt to make her do as he wanted. Whether, under the circumstances as appellee described them, his conduct was justified we need not decide for standing alone it does not find sufficient corroboration within the meaning and intent of our statute. However, such fact is not here absolutely controlling for as stated in Green v. Green, *supra,* we said: " 'There may be extreme cruelty justifying a decree of divorce without physical injury or violence. Un-

justifiable conduct on the part of husband or wife, which utterly destroys the legitimate ends and objects of matrimony, may constitute extreme cruelty.' Myers v. Myers, 88 Neb. 656, 130 N. W. 254. See, also, Faris v. Faris, 107 Neb. 214, 185 N. W. 347."

The evidence establishes conduct on the part of the appellee, during most of their married life, which cannot be justified under the facts and circumstances out of which it arose. This conduct sometimes continued over long periods of time and it had the effect of destroying the objects and purposes of the marriage. As such it constituted extreme cruelty within the intent and meaning of our statute. In view thereof the appellant was and is entitled to a decree granting her a divorce from the appellee.

Having had difficulties in the spring of 1949 the parties attempted a reconciliation thereof in June of the same year. This lasted until September. Appellant contends that because of the attempted reconciliation there was a condonation by appellee of her previous conduct which now defeats his right to base any action thereon. This, because there is no evidence in the record that she has used intoxicating liquors since April 1949 except on a doctor's order. In view of our holding it will not be necessary to discuss this question and the legal principles cited as applicable thereto.

Appellant complains because the court refused to specifically enforce the antenuptial agreement entered into by the parties on June 15, 1944, and because the court canceled and annulled it. This agreement contemplated marriage and was fairly entered into by the parties. It provides, among other things, that appellant thereby relinquished all her right of control of and inheritance in appellee's property. However, it provides that she is "entitled to her support from first party (appellee) during his lifetime, and need use no part of the income of her property for that purpose." It also makes certain provisions for her during the balance of

her life in case appellee dies first. This agreement gave her certain rights as long as she did not breach the contract by her conduct, that is, if she so conducted herself that she did not destroy the objects and purposes of the marriage which were contemplated by the agreement.

As stated in Maxwell v. Maxwell, 106 Neb. 689, 184 N. W. 227: "It is too firmly established in the jurisprudence of this state to be questioned that in a divorce suit, where the court has jurisdiction of the parties, it has power to adjust all their respective property interests." See, also, Bigelow v. Bigelow, 131 Neb. 201, 267 N. W. 409; Resnick v. Resnick, 137 Neb. 256, 288 N. W. 816; Lippincott v. Lippincott, 144 Neb. 486, 13 N. W. 2d 721.

Under this principle, with reference to antenuptial contracts, we said in White v. White, 112 Neb. 850, 201 N. W. 662: "But the ultimate answer, conceding that the contract was fairly obtained, is that the matter of divorce was not contemplated by the parties and not anticipated in the contract; and the law provides that in every divorce for any cause excepting that of adultery committed by the wife the court may 'decree to her such part of the personal estate of the husband and such alimony out of his estate as it shall deem just and reasonable, having regard to the ability of the husband, the character and situation of the parties, and all other circumstances of the case.' Comp. St. 1922, sec. 1533 (now section 42-318, R. S. Supp., 1949). The statute has made no exceptions in the case of an antenuptial contract, and the power is vested in the trial court to make fair and fitting award not limited by the provisions of such contract. The contract may be in evidence, among other evidence, as to the amount to be awarded, but no more."

The provisions of this antenuptial agreement, and all the rights of the appellant thereunder, will be taken into consideration and settled in determining the amount she should receive as it is part of their property rights and

interests which the court has power to adjust.

We have often stated the factors that should be considered in determining the question of alimony or division of property between the parties in case a divorce is granted.

As stated in Peterson v. Peterson, 152 Neb. 571, 41 N. W. 2d 847: "In the division of property and allowance of alimony in a divorce action, the court, in the exercise of judicial discretion, should consider the estate of the parties, if any, at the time of the marriage and their contributions since; the duration of the marriage; the wife's loss of interest in the husband's property by virtue of the divorce; the social standing, comforts, and luxuries of life which the wife would probably have enjoyed; the conduct of the parties leading up to the divorce; to which party the divorce was granted; the age, condition of health, and earning ability of the parties; and all other relevant facts and circumstances; and make such an award as appears to be fair and equitable."

Also in Nickerson v. Nickerson, 152 Neb. 799, 42 N. W. 2d 861: "In determining the question of alimony or division of property as between the parties the court, in exercising its sound discretion, will consider the respective ages of the parties to the marriage; their earning ability; the duration of and the conduct of each during the marriage; their station in life, including the social standing, comforts, and luxuries of life which the wife would probably have enjoyed; the circumstances and necessities of each; their health and physical condition; and their financial circumstances as shown by the property they owned at the time of the divorce, its value at that time, its income-producing capacity, if any, whether accumulated or acquired before or after the marriage, the manner in which it was acquired, and the contributions each has made thereto and, from all the relevant facts and circumstances relating thereto, determine the rights of the parties and make an award that is equitable and just."

The evidence shows that at the time of the marriage in June 1944 appellant was successfully operating a beauty parlor in Grand Island. She also owned two houses located there. These she had liquidated by March 1946 and received therefrom a net of $6,125. At the time of the trial in January 1950 appellant was again operating the beauty parlor but not very successfully. This was partly due to lack of business but also to the fact that she was no longer able to regularly perform the duties of an operator. In addition to the beauty parlor, which is probably worth $1,500, appellant has the possibility of recovering from her son Kenneth the sum of $3,800. This amount she had advanced to him for the purpose of purchasing the equipment in his office. Her son is an optometrist, having graduated as such in June 1948. He thereafter opened an office in Grand Island in October of that year.

Appellee was at the time of the marriage and still is a district judge. During the period of their marriage, which covers the years 1944-1949, inclusive, he had an annual over-all income of about $10,000. After paying income taxes, this was reduced to about $8,100. When the parties were married he had real and personal property of the reasonable net value of about $61,000. At the time of the divorce, because of increased values and the savings that had been made from his income, this had increased to about $104,000. During this same period he had given his children a total of about $10,500.

Taking into consideration all the facts, as disclosed by the record, we find the amount of alimony awarded appellant to be too small. It should be increased to $20,000, payable $3,500 in cash within 30 days from the entry of a decree by the district court in accordance herewith and the balance at the rate of $125 a month commencing with the first of the month following the entry of such decree and continuing until it is fully paid.

There are certain findings by the trial court with

reference to specific personal property which are decreed accordingly. The decree also restored to appellant her name of Ruth H. Walker and taxes the costs to appellee. None of these are questioned by this appeal and insofar as they are concerned the decree of the trial court is affirmed.

We therefore remand the cause to the district court with directions to modify its decree in accordance herewith, that is, that the divorce be granted to appellant on the grounds of extreme cruelty and that the alimony be increased to $20,000 payable as herein provided. However, in all other respects the decree is to stand as originally entered. Costs of this appeal are taxed to the appellee.

REVERSED AND REMANDED
WITH DIRECTIONS TO MODIFY.

DAVID DARLINGTON, PLAINTIFF IN ERROR, V. STATE OF NEBRASKA, DEFENDANT IN ERROR.
44 N. W. 2d 468

Filed October 31, 1950. No. 32881.

1. **Indictments and Informations: Criminal Law.** There is no specified time that must elapse between filing of an information or indictment and the commencement of trial thereon, except defendant may not without his consent be arraigned or required to answer it until at least one day after he has received a copy thereof.
2. **Criminal Law.** The law requires that a person accused of crime be afforded reasonable opportunity to secure available evidence and appropriate time to prepare for trial.
3. ———. An application for postponement of time of trial of a criminal case is addressed to the sound discretion of the trial court, and in the absence of abuse of discretion disclosed by the record, a denial thereof is not error.
4. **Trial: Appeal and Error.** Affidavits used as evidence on the hearing of an issue of fact must be offered in evidence in the trial court and embodied in a bill of exceptions to be available to plaintiff in error in this court.

5. **Judgments.** All presumptions exist in favor of regularity and correctness of orders and judgments of courts of general jurisdiction, and he who asserts the contrary is required to establish a claimed defect or error by an exhibition of the record.

ERROR to the district court for Lancaster County: JEFFERSON H. BROADY, JUDGE. *Affirmed.*

Carl E. Sanden, for plaintiff in error.

Clarence S. Beck, Attorney General, and *Walter E. Nolte,* for defendant in error.

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

BOSLAUGH, J.

David Darlington, defendant and plaintiff in error, was convicted of the crime of assault with intent to commit rape, and was adjudged to be confined in the Nebraska State Reformatory. By these proceedings he seeks to have the conviction and sentence vacated.

It was charged by the State that on March 18, 1950, defendant, more than 18 years of age, in Lancaster County, Nebraska, made an assault on a female child 16 years of age, previously chaste and not related to him, with intent to feloniously and forcibly rape her.

Complaint was made against him in the municipal court on March 22, 1950. He waived hearing, was bound over for trial, and an information was filed in district court on March 31, 1950. He was on April 4, 1950, arraigned, pleaded not guilty, and April 10, 1950, was by the court fixed as the time of the commencement of the trial of the charge against him. On that date, before the jury was impaneled, defendant by motion supported by affidavits requested that time of trial be postponed for a period from 30 to 60 days for the reason that he or his counsel had not had sufficient or reasonable time to prepare for the trial of the case, and that additional time was required to procure material evidence essential to a proper defense of defendant. The court denied the

motion for a continuance and proceeded with the trial forthwith at the time previously designated. Defendant was admitted to bail on March 22, 1950, and has since been at liberty.

The only assignment of error made is that the district court erred in denying the motion of defendant for a postponement of the time of the trial.

Defendant insists that the prosecution was pressed forward to a conclusion with unauthorized and prejudicial haste. The area requested by him to be explored by the court in this case is defined by his declarations that the review in this court is not directly concerned with his guilt or innocence of the crime charged against him "* * * but is concerned with the unjustified speed with which the defendant was forced into trial," and that he "is not basing his plea on the merits of his defense, but on the deprivation of his right to properly prepare his defense * * *."

The law does not specify any length of time that must elapse between the filing of an information or indictment and the commencement of the trial of a defendant in the district court for the crime charged therein against him, except that a defendant may not without his consent be arraigned or required to answer an information or indictment until at least one day shall have elapsed after he has received a copy thereof. §§ 29-1604 and 29-1802, R. R. S. 1943; Barker v. State, 54 Neb. 53, 74 N. W. 427; Hoctor v. State, 141 Neb. 329, 3 N. W. 2d 558; Duggan v. Olson, 146 Neb. 248, 19 N. W. 2d 353, certiorari denied 327 U. S. 790, 90 L. Ed. 1016, 66 S. Ct. 803. See, also, Maher v. State, 144 Neb. 463, 13 N. W. 2d 641, certiorari denied 323 U. S. 757, 89 L. Ed. 606, 65 S. Ct. 91. It is the requirement of law that every person accused of crime should be afforded reasonable opportunity to secure witnesses and evidence and appropriate time to prepare for trial. This is a substantial and valuable right and should be respected. Hubbard v. State, 65 Neb. 805, 91 N. W. 869; Dolen v. State, 148

Neb. 317, 27 N. W. 2d 264; Powell v. Alabama, 287 U. S. 45, 77 L. Ed. 158, 53 S. Ct. 55, 84 A. L. R. 527; 14 Am. Jur., Criminal Law, § 172, p. 886.

An application for a continuance is necessarily, from what has been said, addressed to the discretion of the trial court, and, in the absence of abuse of discretion disclosed by the record, a denial of the application does not constitute error. Absence of the exercise of a proper discretion or of prejudice to the party complaining of the denial of the request for postponement of time of trial will not be presumed but must be shown by him. Maher v. State, *supra*. The mere fact that a criminal case is disposed of in the district court with great promptness and unusual dispatch, over the objection of a defendant, who is displeased with the result of the trial, does not in itself establish abuse of discretion by the court or prejudice to the rights of the defendant. Hubbard v. State, *supra*.

The evidence intended to sustain the allegations of fact in the motion for continuance made by defendant was not preserved, authenticated, and lodged in this court as required by the rule of practice so that the court is permitted or authorized to consider it. The affidavits attached to and filed with the motion, intended as evidence to support statements made therein, are included in the transcript of which they are not legally or legitimately a part, but they are not included in the bill of exceptions, and the record does not disclose that they were offered or received in evidence in the district court on the hearing of the motion therein. It has long been a mandatory requirement in this jurisdiction, recently again stated by this court, that affidavits used as evidence on the hearing or trial of any issue of fact must have been, as a prerequisite to examination of them in this court, identified and offered in evidence in the trial court and embodied in a bill of exceptions. Wright v. State, 45 Neb. 44, 63 N. W. 147; Connolly v. State, 74 Neb. 340, 104 N. W. 754; Parker

v. State, 76 Neb. 765, 108 N. W. 121; Mulder v. State, 152 Neb. 795, 42 N. W. 2d 858. In the last case it is said: "On the other hand, as shown by the transcript, both such matters of alleged misconduct were factually urged by affidavit filed in support of defendant's motion for new trial. However, such affidavit was never offered in evidence and does not appear in the bill of exceptions. * * * it is of no avail to attach the affidavits to a motion for a new trial made a part of the transcript. They must be offered and received in evidence to support the contention, and as such made a part of the bill of exceptions." Applicable and conclusive of the contention of defendant is Kerr v. State, 63 Neb. 115, 88 N. W. 240: "Affidavits in support of an application for a continuance * * * not made a part of the bill of exceptions and found only in the transcript of the record certified by the clerk of the trial court, are not properly presented to a reviewing court for consideration in determining whether the lower court correctly ruled on such application." The condition of the record deprives this court of the right or power to review any evidence considered by the trial court on the hearing of the motion of the defendant for a continuance. The order of the district court disposing of the motion is in this situation conclusively presumed to be correct. Kerr v. State, *supra*. All presumptions exist in favor of the regularity and correctness of the orders and judgments of courts of general jurisdiction, and he who asserts the contrary is required to establish the alleged defect or error by an exhibition of the record. Salisteam v. State, 115 Neb. 838, 215 N. W. 107, 53 A. L. R. 1057; Wright v. State, *supra*.

The judgment of the district court should be, and it is, affirmed.

AFFIRMED.

LEAH KEISERMAN, APPELLEE, V. EDWIN M. LYDON, APPELLANT, IMPLEADED WITH LESLIE G. TANNER, APPELLEE.

44 N. W. 2d 513

Filed November 3, 1950. No. 32787.

1. **New Trial.** A new trial may be granted only for a legal cause and where it appears that a legal right has been prejudicially invaded or denied.
2. ———. Where a litigant has sustained the burden of a trial, and secured the verdict of a jury on the facts in issue, he is entitled to retain the benefit of the verdict if the proceedings are free from prejudicial error.
3. **Negligence: Trial.** It is not error for the trial court to refuse to instruct that defendant was guilty of negligence as a matter of law where the evidence is in conflict as to the proximate cause of the injury.
4. **Trial.** An instruction concerning the credibility of witnesses 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" is erroneous.
5. **Appeal and Error: Trial.** Whether the giving of such an in-instruction in a civil case constitutes prejudicial error is dependent upon the situation existing in each particular case. If the instruction under the facts shown is prejudicial to the rights of a party to a fair trial it is reversible error, but otherwise not.

APPEAL from the district court for Lincoln County: J. LEONARD TEWELL and JOHN H. KUNS, JUDGES. *Reversed and remanded with directions.*

Hollman & McCarthy, and *V. H. Halligan,* for appellant.

Beatty, Clarke, Murphy & Morgan, for appellee.

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

CARTER, J.

This is an appeal from an order of the district court for Lincoln County setting aside a verdict of the jury in favor of the defendant and granting the plaintiff a new trial.

The procedure to be followed in a case such as we have before us is controlled by our decision in Greenberg v. Fireman's Fund Insurance Co., 150 Neb. 695, 35 N. W. 2d 772, wherein we said: "If, as in the instant case, the trial court gave no reasons for its decision, then the appellant meets the duty placed upon him when he brings the record here with his assignments of error and submits the record to critical examination with the contention that there was no prejudicial error. Under these circumstances the appellant is not required to establish a negative. The duty then rests upon the appellee to point out the prejudicial error that he contends exists in the record and which he contends justifies the decision of the trial court. The appellant then in reply has the right, if he desires, of meeting those contentions." The parties have complied with the procedure therein announced. The plaintiff urges that the trial court properly awarded a new trial to the plaintiff because the trial court erred (1) in failing to instruct the jury that the defendant was guilty of negligence as a matter of law in running into the rear of the car in which plaintiff was riding, and (2) in giving instruction No. 11.

A review of the facts is necessary to a proper determination of the questions thus raised. The record discloses that on March 13, 1948, about 12:30 p. m., Leslie G. Tanner was driving a light truck, with a two-wheel house trailer attached, east on U. S. Highway No. 30 about four miles west of Sutherland, Nebraska. Under the belief that he had a low tire he pulled over to the south edge of the pavement and stopped with the right wheels on the very edge of the pavement. Behind Tanner's truck and trailer was an automobile driven by Naomi Spurgin, which was driven within 30 or 40 feet of the trailer immediately prior to the accident. Following the Spurgin car was one driven by Lawrence Keiserman. Leah Keiserman, plaintiff and wife of Lawrence Keiserman, was riding in the front seat of this

car. Following the Keiserman car came another car owned and driven by the defendant Edwin M. Lydon. Mary Ellen Lydon, defendant's sister, occupied the front seat with him, and Walter Carl, a neighbor, was riding in the rear seat.

The evidence of the plaintiff is that she was riding with her husband, Lawrence Keiserman, immediately before the accident. As the Keiserman car approached the scene of the accident it was following the Spurgin car at a safe and reasonable distance and at a safe rate of speed. As the Keiserman and Spurgin cars were thus proceeding, the Tanner truck and trailer stopped in the east-bound lane of traffic. An approaching automobile prevented the Keiserman and Spurgin cars from passing the Tanner vehicles. As the Spurgin car slowed down, plaintiff's evidence is that the Keiserman car was slowed down by the application of its brakes, which was indicated by the flashing of the brake lights on the rear of the car. It is the contention of plaintiff that the defendant was driving his automobile in an easterly direction behind the Keiserman car at a reckless and excessive rate of speed and ran into the rear of the Keiserman car, causing the injuries to plaintiff of which complaint is made. The evidence of plaintiff and her husband is to the effect that their car had been stopped or almost stopped three to ten feet behind the Spurgin car when they were struck from the rear by defendant's car. Both testify that the Keiserman car did not strike the Spurgin car before the former was struck by defendant's car.

Defendant was driving in an easterly direction and came up behind the Keiserman car. He states that he was driving 50 or 55 miles an hour just before the accident. When he saw the other cars slowing down ahead of him he turned to the left to pass, but seeing that the north lane was occupied he returned to the right lane. At that time he applied his brakes and threw his sister into the windshield. He thereupon released the brakes temporarily and then applied them again. In a few

seconds he bumped into the back of the Keiserman car. A tire mark was made on the pavement for a distance of 94 feet by defendant's car. Defendant testifies that the Keiserman car stopped or slowed down very suddenly. He did not know whether his car struck the Keiserman car before or after the Keiserman car struck the Spurgin car. The witness Carl, the occupant of the back seat of defendant's car, says that the Keiserman car struck the Spurgin car before defendant hit the Keiserman car.

The medical testimony shows that plaintiff suffered a compression fracture of the twelfth dorsal vertebra. There is evidence also of a small ossicle between the fifth and sixth cervical vertebrae. Plaintiff's medical experts testify that these injuries could be sustained by the force resulting only from the striking of the Keiserman car from the rear. The medical experts called by the defendant state that the injuries could have resulted from the striking of the Keiserman car by the defendant, the striking of the Spurgin car by the Keiserman car, or from being thrown against another part of the car wherever the force may have been applied.

It is the contention of the plaintiff under the facts here shown that defendant was guilty of such negligence in driving his car into that of Keiserman that the trial court should have instructed the jury to return a verdict for the plaintiff, leaving to the jury only the question of the amount of damages to be awarded. We cannot agree with the plaintiff. It is true that defendant saw the three cars ahead of him. He was obliged to see that which was in plain sight. The cars ahead of him were moving east as he came up behind them. There is some evidence that the Keiserman car stopped suddenly and unexpectedly. There is evidence, very conflicting, as to the sequence of two collisions between the Spurgin, Keiserman, and Lydon cars. There is a difference of opinion among the experts as to whether the first or second collision was the proximate cause of plaintiff's

injuries. The conflicting questions of fact necessary to a determination of the issues are for the jury and not the court.

The case appears to be quite similar to the case of O'Brien v. J. I. Case Co., 140 Neb. 847, 2 N. W. 2d 107, wherein we said: "The two automobiles, in the instant case, were proceeding along an almost level, dry highway, with good visibility, with nothing to interrupt their driving or make it difficult. The Waite car had been proceeding at 50 miles an hour; the O'Brien car at 40 to 45 miles. Obviously, as long as the cars retained their respective speeds, there would be no collision, but if the car ahead stopped suddenly or abruptly or slowed down instantly, without the driver thereof giving any signals, as required by law, the driver of the car following would be confronted with an emergency. We believe O'Brien acted as an ordinary, prudent person would act under like or similar circumstances. He immediately applied his brakes in an endeavor to stop his car and tried to turn to the left and avoid the Waite car. He could not turn to the right; the girls were in that vicinity.

"In consideration of the entire record, we conclude that the negligence of the defendant driver and the negligence of the driver of the car in which the plaintiff was riding presented a jury question under proper instructions."

We call attention to the fact that many more conflicts in the evidence exist in the case at bar than in the O'Brien case. There is evidence that defendant's sister was thrown into the windshield of his car when he first applied his brakes, an occurrence which had a distracting effect. There is evidence that the Keiserman car stopped suddenly and unexpectedly, causing an emergent situation. The evidence conflicts as to the sequence of the two collisions and as to which was the proximate cause of the injuries sustained by the plaintiff. The medical testimony is in conflict as to the manner in which the described injuries were or might have been sustained.

We think these conflicts in the evidence require that the case be submitted to the jury, and that it would have been error to instruct that the evidence showed conclusively the wrong was with the defendant. The failure or refusal of the trial court to so instruct does not support the action of the trial court in granting a new trial.

Plaintiff contends that instruction No. 11 given by the court was prejudicially erroneous. This was an instruction on the credibility of witnesses and the weight to be given to their testimony. It included this sentence: "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 plaintiff relies upon Wilson v. State, 150 Neb. 436, 34 N. W. 2d 880, and Schluter v. State, 151 Neb. 284, 37 N. W. 2d 396, to support his claim of prejudicial error.

It will be noted at the outset that the cases cited, as well as the others in this jurisdiction which support the rule therein announced, are criminal cases. There has never been a plain and definite statement in any of the pronouncements of this court that such an instruction is prejudicially erroneous whenever given in a criminal case. The nearest approaches to it will be found in Wilson v. State, *supra,* and Jennings v. State, 150 Neb. 828, 36 N. W. 2d 268. In Frank v. State, 150 Neb. 745, 35 N. W. 2d 816; Knihal v. State, 150 Neb. 771, 36 N. W. 2d 109, 9 A. L. R. 2d 891; Schluter v. State, *supra;* Kitts v. State, 151 Neb. 679, 39 N. W. 2d 283; and Latham v. State, 152 Neb. 113, 40 N. W. 2d 522, the giving of such an instruction is held to be erroneous and ordinarily prejudicial. In making these distinctions it is not the purpose of the court to determine in this case the rule to be applied in criminal cases. They are pointed out merely to show their inconclusiveness as authority for the plaintiff's position in the case at bar. We have held such an instruction to be erroneous when given in a civil case, but we have never held it to be prejudicially

erroneous in such a case. Krepcik v. Interstate Transit Lines, *ante* p. 98, 43 N. W. 2d 609. Whether its use constitutes reversible error is dependent upon the situation existing in each particular case. If the language under the facts shown is prejudicial to the rights of a party to a fair trial it is reversible error, but otherwise not.

In considering the application of the rule in civil cases we desire to point out that sound reason exists for a different application of the rule in such cases. In criminal cases the State is required to prove the guilt of the defendant beyond a reasonable doubt. The plea of not guilty by the defendant is evidence in his behalf and clothes him with a presumption of innocence until it is overcome by evidence beyond a reasonable doubt. In a criminal case the burden of proof is always upon the State. The defendant may submit his case to the jury on the theory that the State has not maintained the required burden of proof, or that the State has not affirmatively eliminated a reasonable doubt. The inherent nature of a criminal trial makes the instruction much more susceptible to a charge that it was prejudicial to the rights of the accused than to a party in a civil action. In civil cases the jury is required to determine the facts by a preponderance of the evidence. The parties to a civil suit are not clothed with a protective legal mantle as in a criminal case, nor is the burden of proof of a degree designed to protect from the political intemperances of the past, as in the latter. The jury is usually told, as in the case at bar, that "you are the sole judges of the credibility of witnesses. 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 unreliable or untrue." The evidence in the present case was very conflicting. To find for either party the jury from necessity must disbelieve the other. They could not believe both. Consequently, under the facts in this

case the jury did from necessity what the court erroneously instructed they should do. The result would have been identical if the erroneous instruction had not been given. The burden of proof was on the plaintiff and the instruction did not have the effect of changing that burden to her detriment. In this it is much different than in a criminal case when, under some circumstances, such an instruction can have the effect of placing a greater burden upon the accused than the law permits. The jury was not required to accept as true the evidence of witnesses which was uncontradicted and reconcilable, for the very good reason that the evidence was contradicted and irreconcilable. The instruction under such circumstances could not be prejudicial to plaintiff's right to a fair trial.

We do not think that the instruction as given had the effect upon the jury that the plaintiff contends. While the language used was inaccurate and ought to be corrected in the interest of exactness, we cannot say that it misled the jury. The break-down of the language used in order to arrive at its exact meaning requires such technical refinements of definition and expression that it can hardly be supposed that they were observed by the jury.

The identical language given in a similar instruction was before this court in Moore v. Pacific Mutual Life Ins. Co., 128 Neb. 605, 259 N. W. 916. We there said: "Instruction No. 8 was the conventional instruction given for a generation by judges all over the state. 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."

That the instruction in question is a stock instruction which has been followed by trial courts in this state for a great many years cannot be denied. It was never questioned until the Moore case came to this court in 1935. Except in the Krepcik case, heard during the current year, it has not been questioned since in a civil case until the present appeal was taken to this court. During all these years trial judges have been giving this instruction without any objection on the part of a bar which carefully scrutinizes their actions in search of error. How can it be said that technical refinements in exactness of expression which have escaped the bench and bar for so many years could mislead a jury in a function so fundamental? For all practical purposes the jury was not misled by the instruction and the plaintiff was not therefore denied a fair trial. There certainly is nothing in the instruction which requires the jury to accept and believe false testimony, or that requires it to refuse and disregard evidence which it believes to be true. It would not lead a jury to believe that it was obliged to accept false testimony merely because they were unable to find it irreconcilable with true testimony. The common sense of the jury would not permit such an absurd meaning to be placed upon the language in question. The instruction is not prejudicially erroneous under the facts and circumstances of this case.

We find no error in the record which will sustain the action of the trial court in granting a new trial. This being so, the defendant is entitled to the benefit of his

verdict. The judgment of the district court is reversed with instructions to reinstate the verdict of the jury and to enter judgment thereon.

REVERSED AND REMANDED WITH DIRECTIONS.

MESSMORE, YEAGER, and BOSLAUGH, JJ., dissent.

ELIZABETH STRASSER, APPELLANT AND CROSS-APPELLEE, V. HAROLD G. STRASSER, APPELLEE AND CROSS-APPELLANT.

44 N. W. 2d 508

Filed November 3, 1950. Nos. 32795 and 32803.

1. **Appeal and Error.** This court in determining an appeal in an equity action involving questions of fact is required to reach an independent conclusion, but in determining the weight of evidence, where there is an irreconcilable conflict on a material issue, it may properly consider the fact that the trial court observed the witnesses and their manner of testifying.
2. **Divorce.** Under the law of this state no decree of divorce shall be awarded 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.
3. ———. No particular form or type of corroboration is necessary to satisfy the statute but each case must rest upon its own facts.
4. ———. In determining the question of alimony or division of property as between the parties the court will consider the respective ages of the parties to the marriage; their earning ability; the duration of the marriage; the conduct of each party during the marriage; their station in life, including the social standing, comforts, and luxuries of life which the wife would probably have enjoyed; the circumstances and necessities of each; their health and physical condition; and their financial circumstances as shown by the property they owned at the time of divorce, its value at that time, its income-producing capacity, if any, whether accumulated or acquired before or after the marriage, the manner in which it was acquired, and the contributions each has made thereto. From these elements and all other relavant facts and circumstances, the court will determine the rights of the parties and make an award that is equitable and just.
5. **Attorney and Client.** A reasonable attorney fee in any proceed-

ing is to be determined by the nature of the case, the amount involved in the controversy, the results obtained, and the services actually performed therein, including the length of time necessarily spent in the case, the care and diligence exhibited, and the character and standing of the attorneys concerned.

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

Gross, Welch, Vinardi & Kauffman, and *B. J. Cunningham,* for appellant.

Suhr, Pierce & Cronin, 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 Strasser, plaintiff, against Harold G. Strasser, defendant. In the action Harold G. Strasser filed an answer and cross-petition wherein he asked for a divorce from the plaintiff. After trial a decree was entered in favor of plaintiff. The parties separately appealed from the decree. The two appeals were consolidated for hearing here and in the briefs have been treated as an appeal and cross-appeal in the same action.

The basis of the appeal of the plaintiff is that the decree awarded her an insufficient amount of property and money as alimony and an insufficient amount as attorneys' fees for her attorneys.

The basis of the cross-appeal, as it shall be termed herein, is a claim that plaintiff's evidence did not sustain a right to a divorce in her favor, that the evidence sustained the right of defendant to a divorce from plaintiff, and in case it should be found that plaintiff is entitled to a divorce from the defendant that the amount of property and money awarded to her as alimony is excessive.

The parties at the time of the marriage lived in the State of California. They were originally married in

Yuma, Arizona, in 1936. On account of a thought that the marriage was invalid because of the shortness of time after a divorce of plaintiff obtained in California the parties were again married in Reno, Nevada. The second marriage took place in 1941. No children were born of the marriage. At the time of the separation plaintiff was about 44 years of age and the defendant 47. The parties lived in California until 1941 when they came to Grand Island, Nebraska, to live. Grand Island has since that time been their residence. Until they came to Nebraska neither of the parties had any consequential amount of money or property. At the time of the marriage the parents of the defendant were both living. Their home was in Grand Island. The father of defendant died intestate in 1940. He left an estate of very considerable value. After the death of the father, defendant succeeded to a one-half interest in the estate. Later, apparently in 1942, his mother died intestate and on her death he succeeded to the entire estate of his mother which included what then remained of one-half of the father's estate to which she had succeeded on his death.

On coming to Grand Island in 1941 it inferentially appears that the defendant took over with his mother the management of the estate left by the father. The evidence indicates that plaintiff participated in considerable degree in the management of the estate until July 1947 when the parties finally separated. On the death of his mother the defendant took over the entire management of the estate.

In her petition the plaintiff made numerous charges of misconduct against the defendant which she contends entitle her to a divorce. In his answer the defendant denied the charges and in his cross-petition he made numerous charges of misconduct against the plaintiff which he contends entitle him to a divorce from plaintiff.

No good purpose could be served by enumerating all of these charges and counter-charges herein. Only such

incidents as require consideration herein will be pointed out.

Each of the parties has attempted substantially to show that the use of intoxicating liquors by the other was an incident which with other incidents constituted grounds for divorce. As to this there is justification for a statement that there is some evidence of excessive use of intoxicating liquor but there is no indication that this in any way disturbed the marital relations of the parties.

There is evidence of assault by each upon the other. As to these instances the evidence is in irreconcilable conflict. Each charges the other with responsibility for the several encounters. No safe or satisfactory disposition of this subject may be made on a trial de novo here unless it be by resort to what was apparently the finding of the trial court and the rule of law which requires this court, in determining an appeal in an equity action involving questions of fact, to reach an independent conclusion but which permits the court in determining the weight of the evidence, where there is an irreconcilable conflict on a material issue, to consider the fact that the trial court observed the witnesses and their manner of testifying. Fisher v. Standard Investment Co., 145 Neb. 80, 15 N. W. 2d 355; W. L. Phillips Sons v. Northwest Realty Co., 152 Neb. 808, 43 N. W. 2d 6.

Whether the trial court found in favor of plaintiff with reference to this phase of evidence does not appear. The court did apparently however find generally in favor of plaintiff on her charges against the defendant.

There is evidence that each of the parties on occasions vulgarly addressed the other but there is nothing to indicate that these outbursts seriously disturbed the marital relationship. There is no indication that they had a causal connection with the ultimate separation.

The plaintiff charged the defendant with an unnatural and abnormal sex attitude toward her. This phase of

her complaint has been testified to by her but the testimony stands without corroboration within the meaning of law. Section 42-335, R. S. 1943, provides as follows: "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." See, Christensen v. Christensen, 144 Neb. 763, 14 N. W. 2d 613; Brown v. Brown, 146 Neb. 908, 22 N. W. 2d 148; Green v. Green, 148 Neb. 19, 26 N. W. 2d 299; Nuss v. Nuss, 148 Neb. 417, 27 N. W. 2d 624.

It is pointed out in these cited cases that no particular form or type of corroboration is necessary to satisfy the statute but that each case must rest upon its own facts in this respect.

Presumably within the allowable latitude indicated by the decisions cited the plaintiff insists that the record discloses sufficient corroboration. The corroboration insisted upon is a claimed indecent advance of defendant toward a witness who testified, an alleged indecent conversation with another witness at a time and place far removed from plaintiff, and the possession of indecent literature and pictures by the defendant. These things we cannot regard as sufficiently connected with the testimony of plaintiff as to amount to corroboration.

Further as bearing on the credibility of the testimony of plaintiff in this connection it appears proper to direct attention to the fact that she testified that the claimed attitude of the defendant manifested itself soon after the marriage in 1936 and persisted thenceforth. It does not appear that this was regarded by her as a cause for separation or divorce until the petition was filed herein.

It is apparent that from the viewpoint of plaintiff the cause of the separation and the occasion for the filing of the petition for divorce was alleged absences from home of the defendant and his association with another woman.

There is ample evidence, if it is to be believed, to sustain this charge. In the light of the evidence in this regard on its face, the surrounding circumstances, the character of the denials, and the lack of evidence to sustain them it appears that this evidence is worthy of belief. It seems apparent that as to this irreconcilable evidence the trial court accepted the version of the plaintiff rather than that of the defendant.

The defendant charged that plaintiff was also guilty of association with other men and to such an extent and degree as to entitle him to a divorce from plaintiff.

There is no evidence of any such association which appears to have come to the attention of defendant before the separation. As to incidents occurring before the separation there is evidence from a witness who at the time of the trial was friendly to the defendant and unfriendly to the plaintiff that the plaintiff had made improper proposals to him. This witness said that he refused to respond to the proposals. Of course this is denied by plaintiff.

There is evidence which establishes that after the separation there were occasions when the plaintiff was found in the company of men and some evidence that on occasions she engaged in conduct which would not meet polite approval. The evidence however does not indicate or justify a reasonable inference that on these occasions she went beyond mere indiscretion. Had there been anything more, a reasonable inference to be drawn from this record is that the defendant would have had evidence of that fact.

It factually appears that the defendant through paid informers had advance information of the three outstanding incidents complained of. One of the informers was a participant on one of the occasions and he gave evidence only of drinking of intoxicating liquor and of improper proposal by plaintiff to which he did not respond. On another occasion she doubtless was followed. Nothing tangible appears except that it is suggested

that she was improperly attired and that she became intoxicated. Her attire was what was referred to by her as a play suit. The third of these three occasions was a date made for a call upon her by a man in the evening after she had returned in the morning from a hospital. As to this instance there is no evidence whatever of any wrongdoing. There is no authentic evidence that the proposed call was made.

We conclude therefore that the defendant has failed to sustain a cause of action for divorce against the plaintiff. On the other hand we conclude that plaintiff by her evidence has sustained her right to a divorce from the defendant.

The plaintiff contends that she was allowed by the decree an insufficient amount of money and property as permanent alimony and a further insufficient amount as fees for her attorneys. She was awarded the property which had been occupied by the parties as a residence of the value of from $10,000 to $12,000; the furniture and household goods therein with certain exceptions; all policies of life insurance on her life free of encumbrances thereon; articles of jewelry some of which were designated; a Chrysler New Yorker automobile subject to encumbrances thereon; the equipment of a beauty shop which had been operated by her in the Mayfair Hotel which is one of the properties belonging to the defendant; and $26,000, payable in annual installments, the first being $6,000 on February 1, 1950, the others $5,000 each until the total sum is paid. The value of the total of the allowances to plaintiff is not capable of exact determination but it is probably of about $50,000. The defendant was charged with the costs of the action and attorneys' fees of $1,600 which was to be in addition to $400 already paid.

The defendant was decreed to be entitled to all other property including title to about 2,240 acres of ranch land title to which stood in the name of plaintiff.

Plaintiff insists that the alimony award departs un-

favorably to her from the following pronouncement of of this court which she contends contains proper controlling criteria in the fixing of alimony in actions for divorce:

"In determining the question of alimony or division of property as between the parties the court, in exercising its sound discretion, will consider the respective ages of the parties to the marriage; their earning ability; the duration of and the conduct of each during the marriage; their station in life, including the social standing, comforts, and luxuries of life which the wife would probably have enjoyed; the circumstances and necessities of each; their health and physical condition; their financial circumstances as shown by the property they owned at the time of the divorce, its value at that time, its income-producing capacity, if any, whether accumulated or acquired before or after the marriage, the manner in which it was acquired, and the contributions each has made thereto and, from all the relevant facts and circumstances relating thereto, determine the rights of the parties and make an award that is equitable and just." Nickerson v. Nickerson, 152 Neb. 799, 42 N. W. 2d 861. See, also, Ristow v. Ristow, 152 Neb. 615, 41 N. W. 2d 924.

Taking into consideration these criteria we find, as already observed, that in the first instance neither of the parties brought much property to the marriage. Between 1940 and the date of the separation defendant came into possession by inheritance of a large estate. As to the value of the inheritance at the times received the record presents no reliable information. The estate did however consist of a considerable amount of ranch and farm lands, business and residence properties, and doubtless some personal property. Most if not all ranch land was in Nebraska. The farm lands were in Nebraska and other states of the Union and in Canada. After the defendant acquired control of the estate portions of it were sold and other property acquired. On

the ranch land, operations in cattle were carried on. One of the properties acquired was a hotel in Grand Island, Nebraska, known as the Mayfair. This was renovated, refurnished, and operated. This operation appears to have been highly profitable. It may well be said that it is reasonably inferable that all of the operations with regard to the entire estate were profitable. It is also reasonably inferable that the estate was of considerably greater value at the time this case was tried than at the time of original acquisition. Of course some of the increased value is attributable to general appreciation of values over the period.

There is little doubt that the plaintiff made a substantial contribution to the profitable handling of the estate, especially the hotel, the ranching operations, and the disposition of certain properties.

While as has been pointed out there has been a marked appreciation of the value of the estate of the defendant since 1941 when he took charge not even a fair approximation of the increase may be ascertained from the record. No books or comprehensive records were kept of the transactions or operations, not even of the hotel. The record discloses that a certified public accountant was engaged for more than a year without success in an effort to bring a semblance of order out of this confusion.

While it has not been possible to ascertain anything approaching an approximation of the value of the estate at the time of acquisition or its increase thereafter it was possible to arrive at some estimates of its value at the time of trial. It appears that all personal property was reasonably of the value of $153,186.65; that the estimated value of the real estate and personal property was $499,906.65 to $554,006.65; and that the liabilities were $156,413.92. The estimated net value of the estate therefore was from $343,492.73 to $397,592.73.

Taking into consideration the facts as reflected by the record and the foregoing quoted portion of the opin-

ion in Nickerson v. Nickerson, *supra,* it is the conclusion of this court that the award made by the decree to plaintiff as permanent alimony is insufficient.

We conclude that all provisions of the decree with regard to alimony and disposition of property should be affirmed except the amount of $26,000 payable to plaintiff which shall be increased to $75,000 and that instead of the amount being payable in installments that she have judgment therefor. The decree is modified accordingly.

We conclude also that the amount allowed as fees for plaintiff's attorneys is insufficient.

In Hemmer v. Metropolitan Life Ins. Co., 133 Neb. 470, 276 N. W. 153, it was said: "A reasonable attorney fee in any proceeding is to be determined by the nature of the case, the amount involved in the controversy, the results obtained, and the services actually performed therein, including the length of time necessarily spent in the case, the care and diligence exhibited and the character and standing of the attorneys concerned." See, also, Darnell v. City of Broken Bow, 139 Neb. 844, 299 N. W. 274, 136 A. L. R. 101.

In the light of this pronouncement and the pertinent application of information contained in the record it is concluded that the defendant should pay a fee for plaintiff's attorneys for their services in the district court and this court in the amount of $9,600 which is in addition to the $400 already paid. The decree is modified accordingly.

The decree of the district court as modified is affirmed.

AFFIRMED AS MODIFIED.

SECURITIES CREDIT CORPORATION, A CORPORATION, APPELLANT, V. I. L. PINDELL, APPELLEE.
44 N. W. 2d 501

Filed November 3, 1950. No. 32804.

1. **Automobiles.** The Certificate of Title Act was enacted for the protection of owners of motor vehicles, those holding liens thereon, and the public.
2. ———. The Certificate of Title Act eliminates the practice of filing and recording chattel mortgages on motor vehicles in the chattel mortgage records, and substitutes the recording of such upon the certificate of title itself.
3. ———. One holding a lien upon a motor vehicle must, insofar as he can reasonably do so, protect himself and others thereafter dealing in good faith, by complying and requiring compliance with applicable laws concerning certificates of title to motor vehicles.
4. ———. Under the act relating to certificates of title to motor vehicles, no valid lien can be asserted against a motor vehicle unless it is disclosed by a valid certificate of title regularly issued by the county clerk of the county in which the applicant resides.
5. ———. A motor vehicle mortgage lien, not shown in title certificate, is not valid against a subsequent holder of a mortgage lien shown in the certificate of title.
6. **Records.** A public record is a written memorial made by a public officer authorized by law to make it. It is required by law to be kept, or necessary to be kept, in the discharge of a duty imposed by law, or directed by law to serve as a memorial and evidence of something written, said, or done.

APPEAL from the district court for Cheyenne County: JOHN H. KUNS, JUDGE. *Affirmed.*

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

Martin & Davis, for appellee.

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

MESSMORE, J.

The Securities Credit Corporation brought this action at law in the district court for Cheyenne County against I. L. Pindell, the county clerk of said county, to recover

damages, charging negligence on the part of the defendant in failing to perform the duties of his office by not noting the lien of the plaintiff upon the certificate of title of a motor vehicle. The parties, by stipulation, waived trial to a jury and agreed that the case be submitted to the court. The trial court found generally in favor of the defendant and against the plaintiff; specifically found that the defendant was not guilty of malfeasance either in the issuance of the certificate of title to the purchaser of the automobile or in the recording and noting of the mortgage lien held by the Platte Valley Finance Company without first recording and noting the mortgage lien of the plaintiff upon the certificate of title; further found that the evidence did not sustain the allegations of the plaintiff's petition; and adjudged and decreed that the plaintiff's petition be dismissed with prejudice. Upon the overruling of the plaintiff's motion for a new trial, the plaintiff perfected its appeal to this court.

The parties stipulated to most of the material evidence in the record. The rest of it is not in much dispute.

For convenience the parties will be referred to as originally designated in the district court.

It appears from the record that on August 5, 1948, one Ray E. Walker, hereinafter referred to as Walker, purchased a Plymouth club coupe from the Paul Long Motors Company, Sterling, Colorado. On the same day Walker executed a note and chattel mortgage to the Paul Long Motors Company in the amount of $1,958.16, which constituted a lien upon the automobile purchased from it. On the same day this note and mortgage were assigned by the Paul Long Motors Company to the plaintiff, Securities Credit Corporation. The dealer issued a bill of sale to Walker. This bill of sale does not show the existence of any lien on the automobile. On August 11, 1948, the plaintiff mailed a letter to the defendant enclosing the note and mortgage and a check in the amount of sixty-five cents to cover the filing

fees, and requesting that the defendant note the lien on the certificate of title when Walker came into the county clerk's office for his new title. On Saturday evening, August 14, 1948, Walker contacted the defendant at his apartment with reference to procuring a certificate of title to the automobile. Walker presented to the defendant the bill of sale upon which no liens were noted. The clerk then filled out an application for a certificate of title which was signed and sworn to by Walker. This instrument did not show that there was a lien on the automobile. Thereafter Walker accompanied the defendant to the county clerk's office where a certificate of title to the motor vehicle was issued by the defendant to him. The lien of the plaintiff was not noted on the certificate of title.

The defendant testified that Walker presented to him a clear bill of sale, and in the application for the certificate of title he took the affidavit of Walker that the motor vehicle was clear of all mortgages. The defendant gave further testimony to the effect that prior to the time the Certificate of Title Act became the law chattel mortgages on automobiles were filed with other chattel mortgages and a record of all chattel mortgages was kept. When a transfer of an automobile was made the chattel mortgage records were searched to ascertain the encumbrance against such automobile, if any. After the act became effective and the county clerks were required by law to issue certificates of title to automobiles, it was required that the mortgage be presented with the application for a certificate of title, and it was noted on the certificate of title. There were no other records of the chattel mortgages on automobiles kept. The previous practice had been superseded.

The parties stipulated that Sterling, Colorado, is approximately 50 miles distant from Sidney, Nebraska, and that there is overnight mail service between the two cities.

The defendant did not know whether he had the

plaintiff's mortgage in his possession at the time he issued the certificate of title to Walker, or whether it had ever been in the office prior to the issuing of the certificate of title. He made no search for it. He did not know whether or not the plaintiff requested him to issue the certificate of title to Walker prior to the time it was issued.

A deputy county clerk testified that it was her duty to make deposits, and that the sixty-five-cent check for filing fees which accompanied the mortgage and note sent by the plaintiff to the defendant was deposited by her. It appears that this check was paid by the bank in Sterling, Colorado, on August 18, 1948, so it must have been deposited prior to that date. She testified further that in her official capacity she noted mortgage liens upon the certificates of title to automobiles.

On September 7, 1948, Walker executed another mortgage on this automobile to the Platte Valley Finance Company of Sidney. This mortgage lien appears as a first lien upon the certificate of title to the automobile.

There is evidence of the deputy clerk to the effect that representatives of the plaintiff, having previously obtained the certificate of title issued to Walker from the Platte Valley Finance Company, presented the mortgage together with the certificate of title, and she recorded the plaintiff's mortgage on the certificate of title as a second lien, on February 17, 1949. She recalled that the original mortgage of the plaintiff was in the county clerk's office at one time. She did not know how long it remained there. When the files were cleaned out, it was mailed back to the plaintiff.

On November 5, 1948, the plaintiff sent a letter to the defendant, calling his attention to the fact that on August 11, 1948, the plaintiff mailed him the original mortgage which was executed by Walker on the date the automobile was purchased, and that plaintiff requested that the lien be recorded and the mortgage returned; that plaintiff had not received the title and mortgage;

and wondered if Walker had ever brought the certificate of title to the clerk's office; and if not, to let the plaintiff know by return mail so it would have an opportunity to contact Walker and have the papers properly recorded. The reply of the defendant appeared on the same letterhead, to the effect that his office was holding the mortgage in the name of Walker, and he had not yet brought in his title so that the mortgage could be recorded on the certificate of title.

A witness for the plaintiff testified that as a representative of it he procured the title from the Platte Valley Finance Company, made an investigation of the matter, and found that the Platte Valley Finance Company had a mortgage on the automobile; that Walker had taken the automobile to Orosi, California, and there it was found in about three weeks. Walker was not located. The automobile was sold by proper legal proceedings, and the plaintiff paid the amount due the Platte Valley Finance Company on its mortgage. The damage the plaintiff claimed was the amount the plaintiff had to pay the Platte Valley Finance Company to get a release of its mortgage.

The plaintiff contends that the judgment rendered by the trial court is contrary to law, and is not sustained by sufficient evidence.

The parties are in agreement that the following questions are presented under the assignment of errors: (1) Is a county clerk liable to the owner of a chattel mortgage lien for failure to note such lien upon the title to a motor vehicle, when such lien is in his possession at the time he issues a new certificate of title? (2) Is a county clerk liable to the owner of a chattel mortgage lien on a motor vehicle for failure to make a diligent search of his records to ascertain whether or not he has in his possession such lien and a request for it to be noted upon a certificate of title of a motor vehicle at the time he accepted the application for a new certificate of title? (3) Is a county clerk liable for damages sustained by reason of his failure

to note a lien upon the certificate of title to a motor vehicle in the absence of malfeasance or fraudulent practice?

The Certificate of Title Act was enacted by the Legislature in 1939. We will refer to it as the act. This court has not directly passed upon the purpose of the act or the intendment of the Legislature in enacting it. We believe the following authorities exemplify the purpose of the act and intendment of the Legislature in such respect.

The act as a whole indicates conclusively that the Legislature believed the chattel mortgage registration laws theretofore existing, insofar as they affected motor vehicles, were inadequate for the protection of lienholders and innocent purchasers for value. This, for the reason if, under the registration act, a mortgagee filed his mortgage in the office of the county clerk of the county where the property is situated, and in some cases where the mortgagor resided, it became constructive notice to every person. It may be assumed that the Legislature was cognizant of the fact that mortgagors of automobiles frequently changed the county of their residence and that under existing laws the mortgage may not be registered at a given time in the county of the new residence. A purchaser would as well accept the word of the seller of a car that there was no lien on it, as to accept his word as to the county of his residence, under the circumstances related. It would perhaps be unpracticable to require a prospective purchaser to make a search of the records in numerous counties to ascertain if the car was encumbered. To remedy the shortcomings of the previous law on the subject, the new law under consideration was passed.

We construe the act to definitely declare that no valid lien can be asserted against a motor vehicle unless it is disclosed by a valid certificate of title regularly issued by the Department of Roads and Irrigation, even though an asserted lien has been previously filed in the office

of the county clerk as provided by the registration statutes. See Commercial Credit Co. v. American Mfg. Co. (Tex. Civ. App.), 155 S. W. 2d 834.

In Nichols v. Bogda Motors, Inc., 118 Ind. App. 156, 77 N. E. 2d 905, it was held that the statute relating to certificates of title to motor vehicles was enacted for the protection of owners of such vehicles, those holding liens thereon, and the public; and that one holding a lien upon a motor vehicle must, insofar as he can reasonably do so, protect himself and others thereafter dealing in good faith, by complying and requiring compliance with applicable laws concerning certificates of title to motor vehicles.

This court said in Snyder v. Lincoln, 150 Neb. 580, 35 N. W. 2d 483, that the very purpose of the law is to protect ownership against fraud, quoting from Mock v. Kaffits, 75 Ohio App. 305, 62 N. E. 2d 172. The Certificate of Title Act in Ohio is very similar to the act in this state.

We now make reference to certain parts of sections of the act involved in this appeal.

Section 60-110, R. S. 1943, provides in part that sections 36-207, 36-208, 36-301, 36-302, and 36-303 shall never be construed to apply to or to permit or require the deposit, filing or other record whatsoever of a chattel mortgage, conveyance intended to operate as a mortgage, trust receipt, conditional sales contract or similar instrument, or any copy of the same covering a motor vehicle.

It will be observed that the foregoing language indicates that the Legislature intended to eliminate the previous practice of filing chattel mortgages on motor vehicles in the chattel mortgage records in the offices of county clerks in the several counties.

As stated in Higgins v. Robertson (Tex. Civ. App.), 210 S. W. 2d 250, the Certificate of Title Act repealed and superseded portions of previous chattel mortgage

registration statutes affecting registration of mortgage liens on automobiles.

Section 60-106, R. S. 1943, provides in part: "Application for a certificate of title shall be made upon a form prescribed by section 60-114, * * *." The form prescribed by section 60-114, R. S. 1943, provides headings and space for the notation of liens thereon.

Section 60-106, R. S. 1943, also provides that the application for certificate of title shall be filed with the clerk of the county in which the applicant resides if the applicant is a resident of this state. It further provides if a certificate of title has not previously been issued for such motor vehicle in this state, the application, unless otherwise provided for in the act, shall be accompanied by a manufacturer's or importer's certificate as provided for in the act, or by a proper bill of sale or other evidence of ownership required by the law of another state from which such motor vehicle was brought into this state.

In the instant case the automobile in question was purchased in the State of Colorado, and the purchaser was given a bill of sale by the dealer which met the legal requirements of that jurisdiction. As the evidence shows, the chattel mortgage executed by the purchaser to the dealer was not noted on the bill of sale.

Section 60-110, R. S. 1943, provides in part: "The holder of a chattel mortgage, trust receipt, conditional sales contract or similar instrument, upon presentation of such instrument to the clerk of the county where such certificate of title was issued together with the certificate of title and the fee prescribed by this act, may have a notation of such lien made on the face of such certificate of title."

It will be observed by the foregoing language that the dealer, who is generally the person acquiring a lien upon sale of motor vehicles when a new certificate is required, as was the case here, is enabled to obtain a certificate of title himself in the name of the purchaser. Thus the dealer personally is able to determine that the

lien is noted on the certificate of title. This was not the manner in which this transaction was handled.

A holder of a mortgage lien on an automobile owes a duty to see that the mortgagor has complied with the Certificate of Title Act in order to protect such lien, as well as innocent purchasers of automobiles. A chattel mortgage lien cannot be asserted against an automobile unless disclosed by a valid title certificate regularly issued by the county clerk, though previously filed in the county clerk's office as provided by other chattel mortgage registration statutes. An automobile mortgage lien, not shown in the title certificate, is not valid against a subsequent innocent purchaser of an automobile or holder of a mortgage lien shown in the certificate nor enforceable against the automobile in such purchaser's possession. An automobile mortgage lien, not shown in the chain of title to the automobile, does not prevail over the title to and lien on an automobile claimed by a subsequent purchaser and mortgagee without knowledge of the previous lien. See Higgins v. Robertson, *supra*. See, also, Ball Bros. Trucking Co. v. Sorenson (Tex. Civ. App.), 191 S. W. 2d 908.

The plaintiff was in a position so that it could reasonably protect its lien and others dealing in good faith by complying with the Certificate of Title Act. The foregoing parts of the act disclose the manner and form of obtaining title to automobiles and the noting of liens on the certificate of title.

The plaintiff contends that the language appearing in section 60-106, R. S. 1943, as follows, discloses negligence on the part of the defendant for which liability attaches against him. The section provides in part: "The county clerk shall use reasonable diligence in ascertaining whether or not the facts in such application (meaning the application for certificate of title) are true by checking the application and documents accompanying the same with the records of motor vehicles in his office; and if satisfied that the applicant is the owner of

such motor vehicle and that the application is in the proper form, the county clerk shall issue a certificate of title over his signature and sealed with his seal, but not otherwise."

The evidence relied upon by the plaintiff is that the chattel mortgage with the proper filing fee was sent by mail by the plaintiff, directed to the county clerk on August 11, 1948, and received by the defendant prior to the time Walker made application for the certificate of title. Therefore, the plaintiff contends, that the chattel mortgage accompanied the application and constituted a record in the county clerk's office which he was obligated by the duties of his office and as an administrative officer to check, which he failed, neglected, and refused to do.

The word "record" used in connection with instruments to be filed evidencing indebtedness against motor vehicles, must by necessity mean a public record, defined as follows: A public record is a written memorial made by a public officer authorized by law to make it. It is required by law to be kept, or necessary to be kept, in the discharge of a duty imposed by law, or directed by law to serve as a memorial and evidence of something written, said, or done. See Amos v. Gunn, 84 Fla. 285, 94 So. 615. See, also, People v. Purcell, 22 Cal. App. 2d 126, 70 P. 2d 706.

In that part of section 60-106, R. S. 1943, requiring the clerk to use reasonable diligence in ascertaining whether or not the facts in such application are true by checking the application and documents accompanying the same with records of motor vehicles in his office, the word "accompanying" means to go along with, or to accompany each other, and should, as nearly as possible, be simultaneous. See 1 Stroud's Judicial Dictionary (2d ed.), p. 17. The word "simultaneous" means taking place or operating at the same time. See Webster's New International Dictionary (2d ed.), p. 2342.

The words "together with," as used in section 60-110,

R. S. 1943, heretofore set out, mean conjointly; by combined effort; along with; in union with. See, 41 Words and Phrases (Perm. ed.), p. 716; Webster's New International Dictionary (2d ed.), p. 2660. This phrase does not mean "and also," but "at the same time as"; therefore, a bill of sale and its affidavit must be registered simultaneously. See 3 Stroud's Judicial Dictionary (2d ed.), p. 2068.

In view of the evidence, the parts of the act set forth, and the authorities cited, we conclude that by the mailing of the chattel mortgage held by the plaintiff to the defendant, and which was apparently in his office at the time the certificate of title was issued, the chattel mortgage did not "accompany" the application for the certificate of title, nor was it "together with" the application for the certificate of title as required by the act, but was separate therefrom; was not such a "public record" which the defendant in the course of his official duties was obligated to check before issuing the certificate of title, and no negligence exists on his part by his failure to do so; and he is not liable for damages suffered by the plaintiff.

The defendant was not guilty of malfeasance in office as provided for in section 76-218, R. R. S. 1943, and we deem discussion of this finding by the trial court unnecessary in the light of our conclusion.

For the reasons given in this opinion, the judgment of the trial court is affirmed.

AFFIRMED.

MILO SMITH, PLAINTIFF IN ERROR, V. STATE OF NEBRASKA, DEFENDANT IN ERROR.

44 N. W. 2d 497

Filed November 3, 1950. No. 32836.

1. **Trial: Criminal Law.** An instruction to a jury in the trial of a criminal case defining the expression "beyond a reasonable

doubt" and an instruction on the subject of circumstantial evidence of the character indicated in the opinion are proper.

2. **Indictments and Informations: Criminal Law.** The same rule as to the information, conduct of the case, and punishment applicable to a principal in fact governs his aider, abettor, or procurer, and no additional facts are required to be set out in the information against the latter than are necessary against the principal.
3. **Appeal and Error.** Errors assigned by a plaintiff in error but not discussed by him will be considered waived and will not be examined by this court.
4. **Trial.** It is not error to refuse requested instructions when the substance of them is given by the court in its instructions to the jury.

ERROR to the district court for Adams County: EDMUND P. NUSS, JUDGE. *Affirmed.*

J. E. Willits, for plaintiff in error.

Clarence S. Beck, Attorney General, and *Robert A. Nelson,* for defendant in error.

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

BOSLAUGH, J.

In a prosecution in the district court for Adams County, Milo Smith, defendant, plaintiff in error here, was convicted of grand larceny under an information that charged he unlawfully and feloniously on or about the 16th day of January 1950, stole and took away money of the value of more than $35.00 from the Home Oil Company of Hastings, Nebraska, being its property, with intent to convert it to his use, and he was sentenced to serve two years in the State Penitentiary. He presents for review the record of his conviction.

Insufficiency of the evidence to prove guilt of defendant beyond a reasonable doubt was timely and appropriately challenged during the trial, and is urged in this court as a basis for reversing the conviction.

Circumstantial evidence was relied upon by the State.

Many of the facts are admitted or are conclusively shown, but in some vital matters the evidence is in sharp conflict. Home Oil Company was, at the time important to this case, engaged in conducting a motor vehicle service station at 102 East Second Street in Hastings, Nebraska, and it was from there that the money was taken. Its location was south of the street. North of and near its building were the pumps by which gasoline was served its customers. The building had four rooms—the northwest room was identified in the evidence as No. 1; east of it was room No. 2; south of it was room No. 3; and east of rooms Nos. 2 and 3 was room No. 4, a large room with grease pit and car hoist where vehicles are serviced. There was a doorway fitted with a metal door about midway in the north wall of room No. 1 usually used by persons who visited the station. The cash register was on a stand against the south wall a short distance from the southwest corner of the room. It had one divided drawer and was equipped with a bell which sounded automatically when the drawer was opened. It could be heard by a person in room No. 3 under some circumstances. There was an opening not equipped with a door in the middle of the east wall for passage to and from room No. 2, and a similar opening about the middle of the south wall of room No. 2 for passage to and from it to room No. 3. A telephone was installed against the west side of this opening. A desk where the book and paper work of the station was done was in the southwest corner of room No. 3. Anyone at the desk could see only the southeast part of room No. 2, and no part of or anyone in room No. 1. A door in the southeast corner of room No. 3 permitted passage to and from room No. 4, and there was a large door in its north wall and a driveway from there to East Second Street.

Merritt Reichstein was in charge of the station on the 16th day of January 1950. His hours were 9 a. m. until 9 p. m. and he had sole charge of the money of

the station while on duty. It was checked each time he took over the station—in the morning, at 4 p. m., the end of the business day of the company, and when he closed the station at night. He checked the cash register at 4 p. m. on that day, but he was away from the station for 40 minutes from about five o'clock until about ten minutes of six. During that time another was in charge. Reichstein checked the contents of the register at 6:15 p. m. after he returned, and found that all items therein amounted to $872.97, including $250.00 in currency he had put in the register for change at 4 p. m. He then delivered gasoline to a customer from one of the pumps, put what he received from him in the register, and saw the currency was then in it. He went to the back office, room No. 3, to do book work and was there a few minutes when about 6:30 Milo Smith, his brother Duane Smith, and Earl May entered the station from the north into room No. 1. Reichstein heard the door open and heard them enter. They asked to use the telephone and he consented. Duane made a call to a taxi company, and then came into room No. 3 and talked to Reichstein. The defendant and Earl May were in room No. 1 all of the time they were in the station—ten minutes or more—except about a minute before they left they came to room No. 3 and were also talking to and with Reichstein. They all went to room No. 1 for a few seconds before the taxi came. When it arrived the three men left in it and went to the home of the defendant several blocks west and south of the station. When the four of them were in room No. 1 Reichstein observed the cash register and did not notice anything unusual about it, but did not examine it and it is not shown how far he was from it. He did not hear the bell on the cash register sound or ring while the defendant and his companions were there, but during much of this period Duane Smith was in room No. 3 carrying on a conversation with Reichstein while he was trying

to do book work at the desk "* * * and there was quite a bit of noise going on."

Dave Elliott, an employee of Home Oil Company who worked at its station at the intersection of Burlington Avenue and J Street, came into room No. 1 of the station on East Second Street immediately after defendant and his associates left in the taxi, and while Reichstein was still in that room. They talked briefly; a customer stopped for gasoline; Reichstein waited on him; received cash for the purchase; went to the register to put it in the drawer; and found it open and the currency gone. A check showed the register was $170.00 short. Elliott had not been to or near the register. He was in view of Reichstein all the time and stood near the opening between rooms Nos. 1 and 2. There was some evidence the register had been operated by someone not authorized because the tape showed a charge sale of $44.47 had been rung up. There was no such transaction, and any sale on credit would not have been entered on the cash register tape but would have been entered on a day sheet for the day on which the sale was made and credit extended. There was no such entry on the day sheet.

The taxi took the three men from the station to the home of the defendant. He there changed his clothes, and they then went to the cafe operated at the station of the company at Burlington Avenue and J Street. Defendant while there had "quite a few bills" folded and protruding from his vest pocket. They were there drinking intoxicating liquor until about 8 p. m. when they were arrested and taken to the police station. They were examined to ascertain what they had on them. The first search of defendant produced an empty pocketbook and "* * * two nickels and just odds and ends is all." Later when he was disrobed, fifteen $1 bills fell and were shaken from the sock he had on his left foot. Part of them were crumpled and fell out of the sock when it was removed and part of them "Looked

like they had been flattened down or stepped on" and they came out of the sock when it was shaken. Duane Smith had a billfold but no money in it except a few small coins. He had twenty-four $1 bills fastened with a paper clip and seven $5 bills with a clip on them loose in his shirt pocket. Earl May had twenty-seven $1 bills and six $5 bills in his billfold.

Defendant did not know how much money he had when he was searched, what the officers took from him, or why the money was all dollar bills. "Q. And what did they take off of you? A. * * * I don't know, but it was around $15.00. I hadn't counted it." He carried money loose in his left pants pocket until arrested and placed in a cell when he put it in a sock because "Ordinarily when they arrest you charged with drunkeness (sic) and you go in there you automatically try to keep out some money for when you post a bond. They don't make that bond more than you have in your possession, so I held it for that reason." He knew that from personal experience. He was married, and maintained and supported a home for himself and his wife. She was not employed. He had not been employed since November 17, 1949, but had casual work of not to exceed seven or eight days during the month immediately preceding his arrest, and he earned only $56.00 and received $20.00 a week unemployment compensation. He had no money on Friday before January 16, 1950, until he received his weekly check of $20.00 that day. The following day he was paid $5.00 by check for work he had performed. From the proceeds of these two checks $7.50 had been paid for rent, and he claims the $15.00 taken from his sock in the cell of the police station was what he had left of the $25.00. He cashed the checks at a grocery store, but did not claim he received only twenty-five $1 bills for them.

Duane Smith claims he had "Around about $60.00" when he went to the first service station. He was discharged from the State Penitentiary on January 15,

1950, and then received $25.00 or $30.00 and "When I came out of the penitentiary * * * she (his sister) said, 'Here is some money I owe you'" and she gave him some money.

Earl May said that when he went to the first service station he had "Approximately around $65.00"—six $5 bills and twenty-seven to twenty-nine $1 bills in a billfold. He had worked "off and on from" the middle of December driving cars bought by his employer to Hastings. He had made four trips and received $20.00 for each. He had spent only $15.00 in about a month.

Defendant was previously convicted of a felony. His brother, Duane Smith, 25 years of age, was an inmate of the State Industrial School at Kearney before 1944, and had served more than two years of a sentence in the State Penitentiary at Lincoln before January 15, 1950. Earl May was 24 years old, was committed to the State Industrial School at Kearney in 1936, was there four years, was in the Army from 1944 to 1946, and was then sentenced to the State Reformatory.

There was evidence on behalf of the defendant that when he and his companions came to the door of the first service station two boys came hurriedly out of room No. 1. The evidence of the State positively disputes this. The defendant and his associates vigorously and in detail deny that any of them were near, touched, came in contact with, or had anything to do with the cash register of the oil company; that they or any of them took or received any of its money; that the bell on the register sounded; or that the drawer thereof was opened or operated while they were in the station.

The determination of the trial court that the evidence required a submission of the case to the jury to decide the guilt or innocence of defendant of the charge against him was correct, and the contention of defendant that the evidence is insufficient to authorize or sustain a verdict of guilty must be denied. The credibility of the witnesses and the weight of their testimony was

for the jury to determine and the decision of the jury cannot be disturbed unless it is clearly wrong. Morrow v. State, 146 Neb. 601, 20 N. W. 2d 602. The evidence in this case prevents a conclusion that the verdict of the jury is clearly wrong and without adequate proof to justify it. The verdict is supported by consistent and related circumstances to which the jury was entitled to attach great weight.

Prejudicial error is claimed because the district court in the instructions given to the jury attempted to define what "beyond a reasonable doubt" is or is not. The instructions in these particulars are in all material respects identical with those quoted and approved in a very recent case in this court. Owens v. State, 152 Neb. 841, 43 N. W. 2d 168. Similar instructions on the subject of reasonable doubt have the sanction of many prior decisions of this court. Carr v. State, 23 Neb. 749, 37 N. W. 630; Carleton v. State, 43 Neb. 373, 61 N. W. 699; Reno v. State, 69 Neb. 391, 95 N. W. 1042; Goemann v. State, 100 Neb. 772, 161 N. W. 421.

The correctness of the instruction on the subject of circumstantial evidence is questioned. It is said that it assumes the money was taken from the oil company; that no one saw it taken; that this was not necessary; and that the State relies upon circumstantial evidence to show that the defendant took the money. To this extent the instruction is correctly understood. It was shown without any attempt at contradiction that $171.00 was wrongfully taken from the place of business of the oil company on January 16, 1950; that it was the owner of the money; and that the evidence of the State was wholly circumstantial. The jury was instructed that it could not convict the defendant unless the evidence convinced it beyond a reasonable doubt that defendant unlawfully and feloniously stole or aided or abetted others in stealing money in some amount from the company, and that the money was its property. Instructions must be considered and understood as a whole. The jury

could not have understood from anything stated in the instruction on circumstantial evidence that the court intended for it to assume that defendant took the money from the company. It is also said that the court by this instruction charged the jury that circumstantial evidence, when properly connected, is as good, convincing, and reliable as direct and positive evidence. Defendant argues that this was a prejudicial determination by the court. This is a misconception. The instruction contains this language: "It is an invariable rule of law that, to warrant a conviction upon circumstantial evidence alone, such facts and circumstances must be shown as are consistent with the guilt of the party charged, and inconsistent with his innocence; and in this case, if all the facts and circumstances relied upon by the State to secure a conviction can reasonably be accounted for upon any theory consistent with the innocence of the defendant, then the Jury should acquit him."

The State, because of a motion of defendant, elected to proceed on the count accusing defendant of the crime of grand larceny. The court instructed the jury it might find defendant guilty if it found beyond a reasonable doubt from the evidence that he stole or aided and abetted others in stealing the money. Defendant objects that the charge of larceny did not contain the crime of aiding and abetting in the commission of the larceny; that this would subject defendant to conviction for an offense not charged in the information. This argument is contrary to the well established law of the state. § 28-201, R. R. S. 1943; Scharman v. State, 115 Neb. 109, 211 N. W. 613; Puckett v. State, 144 Neb. 876, 15 N. W. 2d 63; Moore v. State, 148 Neb. 747, 29 N. W. 2d 366.

The giving to the jury of each of the instructions Nos. 4, 6, 9 and 11 is assigned as error, but any defect claimed is not specified and any of these instructions are not discussed. Errors assigned but not discussed will be considered waived and will not be examined by this court. Owens v. State, *supra;* Little v. Loup River Public

Power District, 150 Neb. 864, 36 N. W. 2d 261, 7 A. L. R. 2d 355; Maher v. State, 144 Neb. 463, 13 N. W. 2d 641.

Defendant claims prejudice because of the failure of the court to give several instructions requested by him. One of these is not mentioned in the petition in error, some obviously did not state any applicable rule of law, and the substance of the others was given by the court. Defendant has no basis of complaint in this regard. Owens v. State, *supra;* Brice v. State, 138 Neb. 853, 295 N. W. 894.

The judgment of the district court should be, and is, affirmed.

AFFIRMED.

HAROLD R. SCHLUTER, PLAINTIFF IN ERROR, v. STATE OF NEBRASKA, DEFENDANT IN ERROR.

44 N. W. 2d 588

Filed November 10, 1950. No. 32779.

1. **Witnesses.** A witness may be impeached by showing that he testified differently on a former trial of a case than he did at a subsequent trial thereof in regard to a matter relevant to the issue.
2. ———. An impeaching declaration is not substantive evidence of the fact declared, unless made against interest by one who is a party to the record, and is received only to aid the court or jury in estimating the character and credibility of the witness.
3. **Automobiles: Homicide.** When one operates a motor vehicle in violation of law pertaining to the operation thereof on a public highway, and in so doing, as a result of the violation of law, causes the death of another, he is guilty of manslaughter.
4. **Indictments and Informations.** When words appear in an information which might be stricken out, leaving an offense sufficiently charged, and such words do not tend to negative any of the essential elements of the offense, they may be treated as surplusage and entirely disregarded.
5. **Indictments and Informations: Criminal Law.** A specification of an unlawful act in which the person was engaged at the time he wrongfully caused the death of another is not essen-

tial in charging the crime of manslaughter, and the State may not be required to state or elect upon what violation of law the prosecution is based, and the jury may not be compelled to find or disclose upon what violation of law it founded the conviction.

6. **Automobiles: Witnesses.** Ordinarily the speed of an automobile is not a matter of exclusive expert knowledge, and any one who has knowledge of time and distance and a reasonable opportunity to formulate a basis for an opinion is a competent witness to give an estimate of speed.
7. ———: ———. A witness who has shown himself qualified to give an opinion as to the speed of a motor vehicle may do so even though it had bright lights on the front part of it and was coming directly toward him in the nighttime. Such facts go to the weight and not the competency of the evidence.
8. **Intoxicating Liquors: Witnesses.** Intoxication is a fact which a witness may learn as he ascertains other facts. He may give the details upon which he bases his conclusion and may then state the ultimate fact of intoxication as derived from his observation of the person alleged to have been intoxicated.
9. **Appeal and Error.** Errors assigned by plaintiff in error but not discussed by him will be considered waived and will not be examined by this court.

ERROR to the district court for Douglas County: JAMES T. ENGLISH, JUDGE. *Affirmed.*

Bernard J. Boyle and *Hugh J. Boyle,* for plaintiff in error.

Clarence S. Beck, Attorney General, *Walter E. Nolte,* and *Henry M. Grether,* for defendant in error.

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

BOSLAUGH, J.

Harold R. Schluter, defendant and plaintiff in error, was convicted of the crime of manslaughter and was adjudged to be confined in the Nebraska State Reformatory. He, by these proceedings, seeks to have the conviction and sentence reversed.

The information alleged that on the 11th day of October 1947, defendant in Douglas County, Nebraska, did

unlawfully and feloniously, but without malice, kill Freddie Freelin; and that the unlawful acts of defendant which caused the death of deceased were the operation of his motor vehicle while under the influence of intoxicating liquor, its operation at a high, dangerous, and reckless speed, not proper under the circumstances, viz 60 miles an hour, and its operation on the wrong side of the highway.

Defendant at about 10:30 p. m. on the date alleged, riding in and operating his automobile, left Hummel Park in Omaha and drove south on the street known as River Road. A wagon equipped with a hayrack was then being driven north on the road. There were on it a driver and about thirty Omaha University students. It was stopped on the right or east side of the road, and some of the riders got off and were standing near the wagon. The defendant approached from the north, and when near the front of the wagon suddenly swerved his car to the east, the left front fender of it struck the left hand or west front corner of the hayrack, and then it proceeded down the road a considerable distance. Freddie Freelin was a member of the party who had been riding on the hayrack. He was injured in the collision and died as a result of his injuries. His body was found about 36 feet to the rear of the hayrack near the center of the road. Insufficiency of the evidence received on the trial to sustain the verdict is not discussed except in the respects and to the extent subsequently indicated. The evidence will not be summarized, but mention of such parts of it as are deemed necessary will be made in the consideration of the assignments of error made and discussed by the defendant.

The State at the trial examined as witnesses LeRoy Wilson, Mary Lou Saxton, Anola Saxton Wheeler, and Robert Boettger. They were not willing witnesses. The State claimed they each testified differently on matters pertaining to the issues involved than they did at the first trial. Schluter v. State, 151 Neb. 284, 37 N. W.

2d 396. The State, for the purpose of impeachment of them, offered, and the court received, evidence of their previous testimony that conflicted with and contradicted part of their testimony on this trial. Defendant, by request timely made, asked the court to advise the jury that the State had offered evidence tending to impeach certain of its witnesses, and that if the jury found from the evidence that the witnesses were impeached, then it should disregard all of the evidence of such witnesses relating to the matters concerning which they had been impeached. The refusal of the court to instruct in accordance with this request is one of the errors assigned by defendant. The instruction proposed by the defendant did not correctly state any rule of law. Evidence tending to show that a person made, before becoming a witness in a case, statements inconsistent with and contrary to his testimony as a witness on the trial thereof, does not dispose of his testimony as to the matters involved. It constitutes a part of the evidence in the case to be weighed and considered in the determination thereof. Proof of contradictory statements of a witness is received not as evidence of the facts declared, unless made against interest by one who is a party to the record, but for the purpose only of aiding the jury in estimating the credibility of the witness. This is clearly stated in Zimmerman v. Kearney County Bank, 59 Neb. 23, 80 N. W. 54: "A witness may be impeached by showing that he made statements out of court contrary to those made in court in regard to some matters relevant to the issue. * * * Such declarations are not substantive evidence of the fact declared, unless made against interest by one who is a party to the record. * * * Such declarations are received to aid the court or the jury in estimating the character and credibility of the witness." This has frequently been approved as the rule in this jurisdiction. Sindelar v. Hord Grain Co., 116 Neb. 776, 219 N. W. 145; Bernhardt v. Chicago, B. & Q. R. R. Co., 132 Neb. 346, 272 N. W. 209, 302 U. S. 685, 82 L. Ed.

529, 58 S. Ct. 34; Mantell v. State, 141 Neb. 15, 2 N. W. 2d 586; Costello v. Hild, 152 Neb. 1, 40 N. W. 2d 228. The correctness of the instruction given to the jury on the subject of impeachment of witnesses is not challenged by defendant in the assignments of error and may not be considered. Exchange Elevator Company v. Marshall, 147 Neb. 48, 22 N. W. 2d 403.

The failure of the court to advise the jury as proposed by defendant to the effect that before the jury could convict him it must find from the evidence beyond a reasonable doubt that at the time the deceased came to his death "the defendant was guilty of such gross negligence as to indicate a wanton disregard of human life" is challenged as being prejudicial to the defendant. This introduced an element not heretofore recognized in this state as a prerequisite for conviction of the crime of manslaughter. The offense is, so far as applicable here, defined by statute (§ 28-403, R. R. S. 1943) as follows: "Whoever shall unlawfully kill another without malice, * * * unintentionally, while the slayer is in the commission of some unlawful act, shall be deemed guilty of manslaughter." The operation of motor vehicles is governed by many legal restrictions and requirements which are designed and intended to secure reasonable safety of persons upon the highways of the state. They were adopted because experience had established that a disregard thereof was likely to result in serious bodily harm or death. It has been considered in this state that a negligent violation of any of these by the operator of a motor vehicle on a public highway directly resulting in death of another person may render the operator guilty of manslaughter. In Benton v. State, 124 Neb. 485, 247 N. W. 21, it is said: "When one drives an automobile in violation of law pertaining to the operation of such vehicles on the public highway and in so doing, as a result of the violation of law, causes death to another, he is guilty of manslaughter." This has been approved in later cases. Puckett v. State, 144 Neb. 876,

15 N. W. 2d 63; Fielder v. State, 150 Neb. 80, 33 N. W. 2d 451; Vaca v. State, 150 Neb. 516, 34 N. W. 2d 873. There is much agreement in the decisions of the courts that if a person negligently and carelessly operates a motor vehicle in violation of law, and death of another results from the negligent operation, the operator is guilty of manslaughter. State v. Sudderth, 184 N. C. 753, 114 S. E. 828, 27 A. L. R. 1180; Annotations, 16 A. L. R. 914, 30 A. L. R. 66. The argument of defendant in this regard is based on one sentence of an instruction segregated from the balance thereof and from all of the remainder of the charge of the court to the jury. The sentence challenged is: "That the defendant unintentionally while in the commission of such unlawful acts charged, or any one thereof, and as a result thereof, unlawfully and feloniously but without malice did kill and slay Freddie Freelin." Instructions must be considered as a whole in determining whether a particular instruction or a part thereof is prejudicial. Blanchard v. Lawson, 148 Neb. 299, 27 N. W. 2d 217. The defendant has taken a portion of an instruction and in considering it out of context has attached to it a different meaning than when read and considered in context. The view urged proceeds from the incorrect belief that the instructions make the crime of manslaughter for any death that resulted from any violation of any law regardless of the circumstances. They are not properly subject to this construction and understanding. The instructions embrace the following: One was in substance a recitation of the information which charged manslaughter in the language of and in the form permitted by statute, and included the three unlawful acts attributed to defendant at the time of the accident in which Freddie Freelin, deceased named in the information, received injuries resulting in his death, to wit: operating his motor vehicle while under the influence of intoxicating liquor; operating it at a high, dangerous, and reckless rate of speed, not proper under the existing circumstances, at

60 miles an hour; and operating it on the wrong side of the highway. Another instruction specified the material allegations and elements which the State was required to establish by evidence beyond a reasonable doubt before the jury could find the defendant guilty. These allegations were that the defendant did "commit the unlawful acts or any one thereof charged in the Information" and that "the defendant unintentionally while in the commission of such unlawful acts charged, or any one thereof, * * * did kill * * * Freddie Freelin." This was followed by a statement that if the jury did not find that the State had established both of the propositions stated beyond a reasonable doubt, then it should acquit the defendant. Instructions were given containing statements as to the law of Nebraska that it is unlawful to operate a motor vehicle while under the influence of alcoholic liquor and that the driver shall operate his vehicle upon the right half of the highway unless it is impracticable to do so. An instruction was given that, under a city ordinance, the maximum rate of speed within the area in which the accident took place was 35 miles an hour. An instruction also stated that where one operating a motor vehicle is confronted suddenly with an emergency not created by his conduct and is required to act quickly, the law only requires him to conduct himself as an ordinary, careful, and prudent person would have done under similar circumstances, and if he does that he is not held to be in the commission of an unlawful act even though he was guilty of an error of judgment.

The argument of defendant is premised on the rationale that the instructions given the jury would make any kind of violation of law manslaughter if a death resulted. They do not, when considered as a whole, convey such an idea. They limit the unlawful acts to the particular ones specified in the information by the use of the words "such unlawful acts charged" and not to any unlawful act, as contended by defendant. He

was favored with greater protection than the law required because it was not necessary for the State to specify the unlawful acts with which he was charged.

The charge against defendant was substantially in the words of the manslaughter statute, except that three unlawful acts attributed to him were specified as previously stated. The information charged but one offense —manslaughter, but it did also the unnecessary additional thing of setting out the unlawful acts the State claimed the defendant was guilty of at the time the deceased received the injuries which resulted in his death. The court denied the request of defendant timely made and sufficiently maintained to have the jury, in the event of a verdict of guilty, disclose the unlawful act or acts charged against defendant upon which the verdict was based. The claim of error and prejudice because of this is not well founded. It fails to distinguish between charging a person with separate offenses in one information, and rendering one general verdict on the separate offenses, and the situation in this case where only one offense is alleged in the information but there are several unlawful acts stated as one of the elements of that offense. The statement of the claimed unlawful acts of defendant was in substance a bill of particulars which limited the State and furnished defendant advance information to which he was not legally entitled. The crime was sufficiently stated in the language of the statute, and the additional allegations might have been properly rejected and stricken as surplusage. Frank v. State, 150 Neb. 745, 35 N. W. 2d 816. The determination made in a recent case is decisive of this contention: "* * * the state was not required to either specifically charge in the information or thereafter elect, as moved and argued by defendant, upon what violation of law the prosecution was based or it sought to obtain a conviction." Vaca v. State, *supra*.

The information identified one of the unlawful acts of defendant claimed to have caused the death of the

deceased as driving at the high, dangerous, and reckless rate of speed of 60 miles an hour, an improper speed under the existing circumstances. The State produced, and there was received in evidence, an ordinance of the city of Omaha. It prohibits the operation of a vehicle in the area important to this case at a rate of speed greater than is reasonable and prudent, having due regard for the traffic, surface, width, and condition of the road, or at a rate of speed such as to endanger life or limb of any person, or at more than 35 miles an hour. The contents thereof was the subject matter of one of the instructions to the jury. Defendant asserts this was error and that before he could be convicted in this case the State must prove and the jury must find beyond a reasonable doubt that he was operating his automobile at a speed of not less than 60 miles an hour, as alleged in the information. When a person drives a vehicle upon a public thoroughfare at a speed greater than is reasonable and prudent, and in excess of a speed allowed by law for that location, and death of another is caused as a result of the violation, the driver of the vehicle is guilty of manslaughter. The State is not required to show the precise and exact speed of the vehicle, but it is sufficient if it proves that it was in excess of the legal rate, contrary to the law pertaining to the operation of it within the territory embracing the place where the unlawful act took place, and death was caused by the unlawful act. Defendant was accused of operating his car at 60 miles an hour, an improper speed under the existing conditions. This allegation was only a particular, and the essential element was that defendant committed an unlawful act which would sustain a conviction of manslaughter. The point involved with respect to the offense charged in the information is not that the defendant was traveling 60 miles an hour, but that he was going faster than the applicable rate or a proper rate of speed. It was not material whether or not he was proceeding at 60 miles an hour since any rate of speed

faster than a lawful rate sustained the alleged violation in that regard. The essence of the matter raised by this argument of defendant is, what must the State establish to warrant a conviction of manslaughter. The question as to the alleged wrongful act of speed is whether or not defendant was driving his car at an unlawful and excessive speed under the existing circumstances. Some of these were: That there was an applicable ordinance of the city of Omaha restricting speed to not more than 35 miles an hour; that it was in the nighttime; that defendant had indulged in intoxicating beverage; and he was to some extent under the influence thereof. The ordinance was some evidence of the fact sought to be established by the State. Such an ordinance is competent evidence in a civil case for damages grounded on alleged negligence of the defendant, in the absence of allegation of its existence, if the averment of negligence is general. Omaha Street Ry. Co. v. Larson, 70 Neb. 591, 97 N. W. 824; Carter v. Zdan, 151 Neb. 185, 36 N. W. 2d 781. It must logically follow that such an ordinance is competent evidence to be received and considered in support of an alleged wrongful act of speeding involved in a manslaughter charge in which the manner and means by which the death was caused is not an essential element. Vaca v. State, *supra.* A speed in excess of the restrictions of the ordinance may have been excessive, reckless, and grossly negligent. What is a reasonable or an excessive and reckless rate of speed usually depends upon the situation and circumstances. A speed safe, reasonable, and proper in some places and under some circumstances may be highly dangerous and improper in another place where a different situation exists. Proper speed under certain conditions may be excessive under others, and a proper speed in the daytime may be reckless and improper at night. Tews v. Bamrick, 148 Neb. 59, 26 N. W. 2d 499.

It is said that the evidence introduced by the State against objections of defendant as to the speed a motor

vehicle was operated by him at the time of the accident was improperly received because of the absence of proper foundation, and that there is no competent evidence to sustain the charge of unlawful speed. Witnesses estimated that the automobile of defendant was traveling from 50 to 60 miles an hour. The foundation for this was proper. It was shown that they had operated motor vehicles from two to five years, had observed the speedometer with reference to passing objects, and from their experience could judge the speed of a moving automobile. One witness saw and watched the car for two blocks as it approached, and noted the roar of the motor. The attention of another was directed to the car by its noise, and he observed it while it traveled about two blocks toward the place of the collision. There was testimony of other witnesses for the State of like character. There was no mistake in receiving this evidence. In In re Estate of Potts, 144 Neb. 729, 14 N. W. 2d 323, it is said: "Ordinarily the speed of an automobile is not a matter of exclusive expert knowledge and any one who has knowledge of time and distance and a reasonable opportunity to formulate a basis for an opinion is a competent witness to give an estimate of speed. * * * A witness who has shown himself qualified to give such an opinion as to the speed of a moving car may do so even though it appears that the car was coming directly toward him and that his view was partially blocked. Such facts go to the weight and not the competency of the evidence." This rule has been approved and applied in recent cases. Koutsky v. Grabowski, 150 Neb. 508, 34 N. W. 2d 893; Kraft v. Wert, 150 Neb. 719, 35 N. W. 2d 786. It is specifically urged that the rule is not applicable in this case because the accident in question occurred in the nighttime and the observations made by the witnesses were while the vehicle was moving directly toward them. These facts do not establish an exception to the rule. Patterson v. Kerr, 127 Neb. 73, 254 N. W. 704.

The problem is presented whether or not there was any competent evidence that defendant was under the influence of intoxicating liquor at the time of the collision involved in this case. The alleged defect is lack of foundation for the testimony produced by the prosecution and admitted by the court. Defendant had been drinking during the evening. He and three associates drank an entire case and all of a second case of beer except seven bottles. He admits consuming from nine to eleven bottles of beer, had a buzz, was kind of dizzy, became quarrelsome, wanted to fight, broke the glass of the windshield of his car with his fist, and broke the glass in one of the headlights of his car while it was parked at Hummel Park. The persons who went with him in his car to the park declined to accompany him on the return trip. One of them took the key from the ignition switch in an attempt to prevent him from driving his car. The young lady who was his date and who had been in his company before refrained from accompanying him back to the city because of his condition. As he came down the road immediately before the accident he was feeling the beer but did not think he fell asleep "at the wheel" but he was then dizzy. His associates who had been with him during the evening and the officers who saw him after the accident stated in detail what they observed and experienced in reference to the defendant, his manner of speech, and conduct, and expressed the opinion that he was intoxicated. It was testified that he was unsteady on his feet, his walk was unusual, he staggered along, his speech was thick, faulty, and not clear, and he had the odor of liquor on his breath. This evidence was competent and sufficient to sustain a finding of the jury that he was at the time important to this case under the influence of intoxicating liquor. In Howard v. State, 109 Neb. 817, 192 N. W. 505, it is said: "The rule, as deduced from the weight of authority, is that a witness may testify, from observation, whether a person

was intoxicated. Intoxication is a fact which a witness may ascertain in the same manner in which he ascertains other facts. He may give the details and then may state the ultimate fact of intoxication as derived from observation." See, also, Rhodes v. State, 124 Neb. 147, 245 N. W. 402; Annotations, 42 A. L. R. 1506, 68 A. L. R. 1362.

The defendant has assigned but has not discussed other errors. They are considered waived and will not be examined by this court. Owens v. State, 152 Neb. 841, 43 N. W. 2d 168.

The judgment of the district court should be, and is, affirmed.

AFFIRMED.

HAZEL M. ANDERSON, ADMINISTRATRIX OF THE ESTATE OF WILLIAM M. ANDERSON, DECEASED, APPELLANT, v. ROY NINCEHELSER, APPELLEE.

44 N. W. 2d 518

Filed November 10, 1950. No. 32790.

SUPPLEMENTAL OPINION

APPEAL from the district court for Nemaha County: VIRGIL FALLOON, JUDGE. *Motion for rehearing denied.*

Lloyd E. Peterson and *Betty Peterson Sharp,* for appellant.

Armstrong & McKnight, and *Dwight Griffiths,* for appellee.

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

MESSMORE, J.

At the conclusion of the plaintiff's evidence the trial court sustained a motion of the defendant to dismiss the plaintiff's cause of action on the ground that the evidence was insufficient to make a case for the jury.

We reversed the judgment and remanded the cause for new trial, holding that the plaintiff presented a prima facie case sufficient to go to the jury.

In the original opinion reported in 152 Neb. 857, 43 N. W. 2d 182, quoting from Engel v. Chicago, B. & Q. R. R. Co., 111 Neb. 21, 195 N. W. 523, we stated the law to be: " 'Where there is no eyewitness, no direct evidence of the accident causing the injury, the facts and circumstances may be proved by circumstantial evidence, and the presumption is raised by the instinct of self-preservation on behalf of the deceased that he was not guilty of contributory negligence, but was in the exercise of due care and caution for his own safety, unless the contrary is shown.' "

So that there may be no misunderstanding on a retrial of this case, this presumption of law prevails until such time as evidence is introduced that rebuts the presumption. In other words, where there is no witness to an accident causing death, the presumption is, in the absence of evidence to the contrary, that decedent exercised due care; but this presumption is rebutted when the circumstances proved show that decedent was negligent. See Kerwin v. Thompson, Belden & Co., 110 Neb. 251, 192 N. W. 692.

The presumption of due care arising out of the natural instinct of self-preservation is not evidence, but a mere rule of law, and obtains only in the absence of direct or circumstantial evidence justifying reasonable inferences one way or another upon that subject; when such evidence is produced the presumption disappears and is not entitled to be considered. See Eggeling v. Chicago, R. I. & P. Ry. Co., 119 Neb. 229, 228 N. W. 361.

As we have stated in the opinion, there was no competent evidence to rebut the presumption of law that favored the deceased when the trial court sustained the defendant's motion to dismiss the plaintiff's cause of action.

MOTION FOR REHEARING DENIED.

BEN W. TEMPERO, APPELLEE, V. LAVELLE E. ADAMS, APPELLANT.

44 N. W. 2d 604

Filed November 10, 1950. No. 32809.

1. **Negligence: Automobiles.** Proof of violation of a statute or city ordinance relating to speed does not of itself establish negligence in an action for damages but it is evidence which is to be considered in determining whether a party is guilty of negligence.
2. **Negligence: Pleading.** Contributory negligence is an affirmative defense, which must be pleaded, and ordinarily involves questions of fact for the determination of the jury.
3. ———: ———. In a case where a plaintiff has charged a defendant with negligence which he claims was the proximate cause of a particular accident and the defendant by cross-petition charges the plaintiff with negligence which he contends was the proximate cause of the same accident and the plaintiff fails in response to the cross-petition to affirmatively charge the defendant with contributory negligence but the case was tried and the jury instructed on the theory that he had so pleaded, the original petition will be regarded as an affirmative charge of contributory negligence as to the cross-petition.
4. ———: ———. In a case where there is no specific allegation of contributory negligence, the character of the plea will be determined by its effect; and if the parties by their introduction of evidence have assumed that such a defense was in issue, it is not reversible error for the court to instruct thereon.
5. **Trial.** The failure of the court to instruct on an issuable matter in any action is prejudicially erroneous and is a proper ground on which to grant a new trial.

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

Bernard Ptak, for appellant.

W. M. Beall, Frederick M. Deutsch, and *Daniel D. Jewell,* for appellee.

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

YEAGER, J.

This is an action by Ben W. Tempero, plaintiff and

appellee, against LaVelle E. Adams, defendant and appellant, for damages to person and property growing out of a collision between an automobile owned and operated by plaintiff and a truck owned by the defendant and operated by an employee of his. The date of the occurrence was September 8, 1947. By his petition plaintiff claims that the collision came about by reason of the negligence of the employee of defendant who was operating the truck. The defendant by answer claims that the collision was caused and contributed to by the negligence of the plaintiff and by cross-petition claims that it was caused by the negligence of the plaintiff.

The cause was tried to a jury. A verdict was returned in favor of defendant on his cause of action the effect of which was also to find in favor of the defendant on plaintiff's cause of action. Judgment was entered on the verdict. Thereafter the plaintiff filed a motion for new trial. The motion contained a large number of assignments of error committed by the district court. The motion was sustained and a new trial was granted.

The case comes here on appeal by defendant from the order sustaining the motion and the granting of a new trial. The inquiry therefore here is as to whether or not the district court erred prejudicially to the plaintiff in one or more of the respects enumerated in the motion for new trial.

The facts necessary to be stated herein in order to give comprehensive consideration to the matters involved are: U. S. Highway 81 is a highway running north and south along the southwest part of the city of Columbus, Nebraska. At the location involved here the east half of the highway is within the corporate limits of the city of Columbus and the west half is without. Shortly before the collision occurred the defendant's truck was being operated in a southerly direction on the west side of the center line. The plaintiff going in the same direction was behind defendant's truck and was also driving west of the center line. Plaintiff com-

ing from behind and attempting to pass to the left of the truck passed entirely east of the center line and into that portion of the highway which was within the corporate limits of the city. The truck was turned to the left so that a part of the front end was to the east of the center line and inside the corporate limits of the city. After the truck had come into this position plaintiff's automobile came into collision with it entirely east of the center line. The collision took place entirely within the corporate limits of the city of Columbus.

By his pleadings the defendant charged that one of the causes of the collision was negligence of the plaintiff in driving at an unlawful rate of speed. The plaintiff admitted that at the time of the collision he was traveling at about 35 miles an hour. There was other evidence that he was traveling much in excess of that rate.

Thus it becomes apparent that plaintiff's speed was a factor for consideration by the jury in determining whether or not he was guilty of negligence.

Relative to this the court instructed the jury as follows:

"The Statutes of the State of Nebraska and the Ordinances of the City of Columbus, effective at the time of the accident both provided, in substance, that it shall be unlawful to drive a motor vehicle in excess of twenty-five miles per hour in the residential district of the city, which included 33rd Avenue at the scene of the accident."

The plaintiff in his motion for new trial and in his presentation here urges that this instruction was prejudicially erroneous. Expressly on this ground the district court sustained the motion and granted a new trial.

This contention in the light of that which appears on the face of the record is without merit.

It appears that the substantial basis of the contention is that the instruction told the jury that the locus of

the collision was within a residential section of the city, whereas he says this was not true or at least whether or not it was within the city limits was in dispute, and hence an instruction setting forth the law of the state and ordinances of the city of Columbus relating to speed in residential areas was improper.

The record however shows that in open court and apparently for the benefit of the jury the plaintiff agreed that the locus of the collision was a residental district and that the speed limit fixed by ordinance in such district was 25 miles an hour. The following appears in the bill of exceptions: "MR. PTAK: This Exhibit 15 is a certified copy of Sections 727 and 728 of the Ordinance 393 of Columbus, Nebraska. 727 defines the business district and 728 defines all the rest of Columbus as a residential district. MR. PTAK: Do you have any objection to my telling the jury that 33rd Avenue is a residential district? MR. DEUTSCH: I don't agree that the west half of 33rd Avenue is in the town. MR. PTAK: The east half I mean. MR. DEUTSCH: Yes, I'll agree that the east half is. MR. PTAK: That the east half of 33rd Avenue, Highway 81, as shown here on the exhibit to the point where it says city limits, is a residential district under this ordinance. Exhibit 16 provides a speed limit of 25 miles an hour in a residential district. If there is anything else you would care to have read there, you may do so, Mr. Deutsch."

Section 39-7,108, R. S. Supp., 1949, provides: "* * * No person shall drive a vehicle in any residence district within any city or village at a speed greater than twenty-five miles per hour unless, by the ordinance of such city or village, a greater rate of speed is specifically permitted. * * *"

In the record, and admitted without objection, is an ordinance of the city of Columbus fixing the maximum speed limit in residential districts at 25 miles an hour. The statute and the ordinance respectively make speed

in excess of this limit unlawful. The plaintiff admitted that this was a residential district.

In the light of the record made by the parties it was the right of the defendant to have the illegal speed of the plaintiff along with the other evidence, under proper instructions, considered by the jury in determining whether or not the plaintiff was guilty of negligence or contributory negligence. This is under the rule that proof of a violation of a statute or city ordinance relating to speed does not of itself establish negligence in an action for damages but it is evidence which is to be considered in determining whether a party charged is guilty of negligence. Gleason v. Baack, 137 Neb. 272, 289 N. W. 349; Huston v. Robinson, 144 Neb. 553, 13 N. W. 2d 885; Watson Bros. Transp. Co. v. Chicago, St. P., M. & O. Ry. Co., 147 Neb. 880, 25 N. W. 2d 396.

Another ground on which the plaintiff insists that the motion for new trial was sustained is that the court failed to properly and sufficiently submit by instructions contributory negligence of the defendant with regard to the cause of action set out in the cross-petition.

This subject was not mentioned by the court as a ground for sustaining the motion for new trial but it was contained in plaintiff's motion for new trial, therefore its merit is proper for consideration and determination here.

The plaintiff by his petition charged the defendant with negligence. The answer contains what amounts to a charge of contributory negligence of the plaintiff. The cross-petition charges the plaintiff with negligence which was the proximate cause of the collision. To the answer and cross-petition the plaintiff filed an answer and reply, the pertinent part of which is the following:

"Comes now the plaintiff in the above entitled cause, and, for his Answer and Reply to the Answer and Cross Petition of the defendant, herein filed, denies each and every allegation therein contained, save and except

so much thereof as may have been heretofore expressly pleaded by the plaintiff in his petition."

With regard to contributory negligence this court has said: "Contributory negligence is an affirmative defense, which must be pleaded, and ordinarily involves questions of fact for the determination of the jury." Cook v. Chicago, R. I. & P. Ry. Co., 78 Neb. 64, 110 N. W. 718. See, also, Schrage v. Miller, 123 Neb. 266, 242 N. W. 649.

It is observable that in this pleading there is nothing amounting to a charge of contributory negligence against the defendant.

Literal application of this pronouncement would be to say that no complaint could be predicated upon failure to instruct with regard to contributory negligence on the part of the defendant. We think however that it should have no such literal application in the light of the pleadings and the theory on which the case was presented to the jury.

The plaintiff had already by his petition affirmatively charged the defendant with negligence which he claimed was the proximate cause of the collision, and only by technical and unreasonable refinement could it be said that by his answer and reply he abandoned it for the purposes of the cross-petition. We think the pleadings must be considered as a whole and that as so considered they contain a sufficient affirmative charge of contributory negligence as to the cross-petition.

While we have found no cases directly in point on this proposition other pronouncements we conclude support this reasoning. In Large v. Johnson, 124 Neb. 821, 248 N. W. 400, this court said: "Where there is no specific allegation of contributory negligence, the character of the plea will be determined by its effect; and if the parties by their introduction of evidence have assumed that such a defense was in issue, it is not reversible error for the court to instruct thereon." See, also, Grover v. Aaron Ferer & Sons, 122 Neb. 755, 241 N. W. 539; Traill

v. Ostermeier, 140 Neb. 432, 300 N. W. 375; Craig v. Cook, 28 Minn. 232, 9 N. W. 712; Pott v. Hanson, 109 Minn. 416, 124 N. W. 17; 49 C. J., Pleading, § 396, p. 326.

The evidence, which will not be reviewed here, was ample upon which to submit to a jury all of the charges and countercharges of negligence and contributory negligence.

The court did instruct and correctly on the theory that the plaintiff had pleaded contributory negligence of the defendant and that defendant had pleaded contributory negligence on the part of plaintiff. The failure complained of is that the trial court did not give the jury the necessary formula for comparing the negligence in case, as to defendant's cause of action, the plaintiff was found to be negligent and the defendant was found to be contributorily negligent.

Examination discloses that failure in this respect did exist as contended. The court gave the formula for comparison in case the defendant was found guilty of negligence as charged by plaintiff in his petition and the plaintiff was guilty of negligence which contributed to the collision but no like instruction was given on the other side either directly or by inference.

This was an issuable matter in the action and the plaintiff was entitled to instruction thereon. The failure of the court to so instruct was prejudicial error which was sufficient to and did require the granting of a new trial. McGrath v. Nugent, 133 Neb. 237, 274 N. W. 549; Yorke v. Seddon, 140 Neb. 101, 299 N. W. 333; Fimple v. Archer Ballroom Co., 150 Neb. 681, 35 N. W. 2d 680.

Having thus found, it is deemed unnecessary to consider any of the other grounds upon which it is insisted by the plaintiff that he was entitled to have his motion for new trial sustained.

The order of the district court sustaining the motion for and granting a new trial is affirmed.

AFFIRMED.

IN RE APPLICATION OF M. B. SILBERMAN ET AL. TRANSIT, INC., ET AL., APPELLANTS, V. M. B. SILBERMAN ET AL., APPELLEES.

44 N. W. 2d 595

Filed November 10, 1950. No. 32825.

1. **Statutes.** In construing a statute, the legislative intention is to be determined from a general consideration of the whole act with reference to the subject matter to which it applies and the particular topic under which the language in question is found, and the intent as deduced from the whole will prevail over that of a particular part considered separately.
2. **Public Service Commissions: Motor Carriers.** The Nebraska State Railway Commission has authority to act under section 75-240, R. R. S. 1943, only when the situations therein set forth are present and when the conditions therein specified are found to exist.
3. **Motor Carriers.** The term "such motor carrier" as used in the provision of section 75-240, R. R. S. 1943, construed in the opinion, means a motor carrier in intrastate commerce.

APPEAL from the Nebraska State Railway Commission: *Order reversed.*

Swenson, Viren & Turner, R. E. Powell, and *Rosewater, Mecham, Stoehr, Moore & Mecham,* for appellants.

Jack W. Marer, and *Bradshaw, Fowler, Proctor & Fairgrave,* for appellees.

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

SIMMONS, C. J.

This action is one on appeal from the Nebraska State Railway Commission. An interstate carrier contracted to purchase the stock of an intrastate carrier. The parties presented an application to the commission under section 75-240, R. R. S. 1943, for an order authorizing and directing the sale and transfer of the stock. Other carriers intervened and moved to dismiss or deny the application on the ground, among others, that the commission was without authority or jurisdiction to grant the order.

After hearing, the commission overruled the motion and granted the order. The interveners appeal. We reverse the order of the commission.

The fact situation so far as material to the issue here determined is not in serious dispute.

The M. & S. Transport Company is a Nebraska corporation. It will be referred to hereinafter as M. & S. All the outstanding common stock of M. & S. is owned and held by H. P. Milder and M. B. Silberman, who will hereafter be referred to as stockholders.

M. & S. holds a certificate of public convenience and necessity issued by the Nebraska State Railway Commission, hereinafter called the commission, authorizing it (M. & S.) to transport petroleum products in intrastate commerce.

Ruan Transport Corporation is a corporation created and existing under the laws of Iowa. It will be hereinafter referred to as Ruan. Ruan holds certificates of public convenience and necessity issued by the Interstate Commerce Commission authorizing it to engage as a common carrier in interstate transportation of petroleum products. It holds intrastate certificates in certain states other than Nebraska. At the time of the filing of the application herein, Ruan did not conduct intrastate operation in Nebraska and did not operate on any public highway in Nebraska in intrastate commerce. Ruan has no interstate operations on petroleum products to or from points in Nebraska. However, it has operations from Carter Lake, Iowa, to Iowa destinations. It traverses Nebraska territory in making these operations. It further appears that all the stock of Ruan is owned by John Ruan and that he, as an individual, does not own a controlling interest in any motor transportation company presently doing business in Nebraska.

On November 1, 1949, the stockholders and Ruan entered into a contract whereby Ruan agreed to purchase from the stockholders all the shares of stock of M. & S., subject to the approval of the commission. The con-

tract specifically recited that upon the closing date the purchaser would acquire all the outstanding stock of M. & S., and that as of that date M. & S. would own, free and clear of encumbrances, the intrastate operating authority of M. & S., and three trailer and tractor pieces of equipment. It further provided that as of the closing date there would be delivered to Ruan the resignations of the officers and directors of M. & S., effective as of that date. Other terms of the contract need not be recited.

It further appears that Ruan did not propose to change the corporate entity of M. & S.; that Ruan would be in a position to name its officers and directors; that Ruan would furnish whatever finances and equipment M. & S. required to operate; that Ruan would improve the M. & S. facilities; that the operations of M. & S. and Ruan would be coordinated under approximately the same management, direction, and control, and from the operations standpoint the operations of the two carriers would be approximately one and the same; and that Ruan did not consider any further proceedings necessary to enable M. & S. under the new ownership to operate under the existing certificate held by M. & S. It further appears that Ruan's purpose in acquiring the stock of M. & S. was "* * * to get an operation in the State of Nebraska to haul petroleum products in bulk," and to do that it had to have intrastate operating rights.

On November 4, 1949, the stockholders and Ruan jointly made application to the commission for authority to complete the transaction proposed in the contract, and for an order authorizing and directing the stockholders to sell, assign, and transfer the common stock of M. & S. to Ruan.

Notice was given and a hearing had. At the time of the hearing, Transit, Inc., a Nebraska corporation, and Mabel C. Herman, doing business as Herman Oil Company, common carriers of petroleum products under authority granted by the commission, appeared as intervener protestants and moved for denial or dismissal of

the application for the following reasons, among others: That the application is one purporting to come within the provisions of section 75-240, R. R. S. 1943; that the facts and circumstances surrounding the application do not meet the situations set forth in said section; and that as a result the commission does not have either jurisdiction or authority to grant the application.

The motion was renewed at the close of the applicants' case-in-chief and at the close of the hearing.

During the progress of the proceedings, other common carriers became intervener protestants.

The commission overruled the motion of intervener protestants, granted the application, and authorized the sale of the stock, subject to conditions not material here.

Motions for rehearing and reconsideration were made and overruled. The matter comes here with the intervener protestants as appellants and the stockholders and Ruan as appellees.

Sections 75-222 to 75-250, R. R. S. 1943, were originally enacted as chapter 142, Laws of 1937, page 526. Section 75-240, R. R. S. 1943, provides: "It shall be lawful, under conditions specified below, but under no other conditions, for two or more motor carriers to consolidate or merge their properties, or any part thereof, into one ownership, management or operation of the properties theretofore in separate ownership, or for any such motor carrier, or two or more such motor carriers jointly, to purchase, lease or contract to operate the properties, or any part thereof, of another such carrier; or for any such motor carrier, or two or more such carriers jointly, to acquire control of another such carrier through purchase of its stock; or for a person to acquire control of two or more motor carriers through ownership of their stock; or for any such person who has control of one or more motor carriers to acquire control of another such carrier through ownership of its stock. Whenever a consolidation, merger, purchase, lease, operating contract or acquisition of control is proposed, the carrier or

carriers or person seeking authority therefor shall present an application to the State Railway Commission, and thereupon the commission shall, if it deems a hearing necessary, notify such carriers and other parties known to have an interest, of the time and place for a public hearing in accordance with such rules and regulations as the commission may prescribe. If, after such hearing, the commission finds that the transaction proposed will be consistent with the public interest and does not unduly restrict competition, it may enter an order approving and authorizing such consolidation, merger, purchase, lease, operating contract or acquisition of control upon such terms and conditions as it shall find to be just and reasonable."

The parties here are in agreement that this application is brought under the provisions of the above section. The parties also agree that the authority to grant the application rests, if at all, on the clause "or for any such motor carrier, or two or more such carriers jointly, to acquire control of another such carrier through purchase of its stock."

Reduced down, the statutory provision which we are called upon to construe is this: "It shall be lawful, under conditions specified below, *but under no other conditions,* * * * for any *such* motor carrier, or two or more *such* carriers jointly, to acquire control of another *such* carrier through purchase of its stock * * *." (Emphasis supplied.)

We construed section 75-240, R. R. S. 1943, in the case of In re Application of Neylon, 151 Neb. 587, 38 N. W. 2d 552, and there held that the commission under the section has the authority to approve and authorize applications under the section only when the situations therein set forth are present and when the conditions therein specified are found to exist.

The question then is whether or not Ruan is "such motor carrier" under the act.

The term "motor carrier" is defined by section 75-223,

R. R. S. 1943, to mean "any person owning, controlling, managing, operating, or causing to be operated, any motor-propelled vehicle used in transporting passengers or property for hire over any public highway in this state"; the term "person" is defined to mean "any individual, firm, copartnership, corporation, company, association or joint stock association"; and the term "highway" means "the roads, highways, streets and ways in this state." If we are to stop there and follow the literal language of the definitions, then it must be held that Ruan is "such motor carrier" because of the operation in Nebraska on the Carter Lake, Iowa, haul from and to Iowa points. But it is obvious that we cannot stop there in construing this provision of the act.

The rules are:

"In construing a statute, the legislative intention is to be determined from a general consideration of the whole act with reference to the subject matter to which it applies and the particular topic under which the language in question is found, and the intent as deduced from the whole will prevail over that of a particular part considered separately.

"Provided always that the interpretation of a statute is reasonable and not in conflict with legislative intent, it is a cardinal rule of construction of statutes that effect must be given, if possible, to the whole statute and every part thereof and it is the duty of the court, so far as practicable, to reconcile the different provisions so as to make them consistent, harmonious, and sensible. Just as an interpretation which gives effect to the statute will be chosen instead of one which defeats it, so an interpretation which gives effect to the entire language will be selected as against one which does not." In re Application of Rozgall, 147 Neb. 260, 23 N. W. 2d 85. See, also, State ex rel. City of Grand Island v. Union Pacific R. R. Co., 152 Neb. 772, 42 N. W. 2d 867.

If an interstate carrier operating over any public highway in this state is a motor carrier within the in-

tent of the provision being construed, and authorized by section 75-240, R. R. S. 1943, to purchase the stock, it could be argued forcibly that "such carrier" whose stock is to be purchased may likewise be an interstate carrier operating over the highways of this state, for the words "such carrier" are used to describe both the purchasing carrier and the carrier whose stock is being purchased. It might also follow that wherever the term "motor carrier" is used without more in sections 75-222 to 75-250, R. R. S. 1943, it would likewise apply to such an interstate carrier. Such a construction is not warranted.

Section 75-222, R. R. S. 1943, declares the policy of the Legislature to be to "regulate transportation by motor carriers in intrastate commerce upon the public highways of Nebraska" and in the same sentence uses the term "such carriers" when referring to motor carriers in intrastate commerce.

Section 75-224, R. R. S. 1943, provides that the act shall apply "to the transportation of passengers or property by motor carriers for hire engaged in intrastate commerce" with certain exceptions not material here.

By section 75-223, R. R. S. 1943, "intrastate commerce" means "commerce between any place in this state and any other place in this state and not in part through any other state."

In the same section the definition of common carrier has the limiting "in intrastate commerce" phrase, while the succeeding definition of contract carrier does not.

However, section 75-228, R. R. S. 1943, requires a certificate of public convenience and necessity issued by the commission for a common carrier by motor vehicle, subject to the act, to engage in "any intrastate operations on any public highway in Nebraska." Likewise, section 75-233, R. R. S. 1943, requires a permit issued by the commission for a "contract carrier by motor vehicle in intrastate commerce on any public highway of Ne-

braska." The act deals generally with intrastate carriers and intrastate commerce.

It seems clear that the term "such motor carrier," as used in section 75-240, R. R. S. 1943, here under construction, means a motor carrier in intrastate commerce.

Not only does section 75-224, R. R. S. 1943, provide that the act shall apply to transportation in intrastate commerce, but the title of the act in which sections 75-222 to 75-250, R. R. S. 1943, have their source provides that it is "An act to regulate transportation of passengers and property by motor carriers in intrastate commerce upon the public highways * * *." Laws 1937, c. 142, p. 526.

"We have said that, 'When the legislative intent is left in doubt by failure to clearly express it in the act, resort may be had to the title as an aid to the discovery of such intent.' " McConnell v. McCook Nat. Bank, 142 Neb. 451, 6 N. W. 2d 599. As we held there, so we hold here: "The construction which we have placed upon the act appears to be entirely consistent with the legislative intent as expressed in the title of the act and the act itself." McConnell v. McCook Nat. Bank, *supra.*

It necessarily follows that Ruan is not a motor carrier within the intent and meaning of section 75-240, R. R. S. 1943; that the act does not authorize the commission to approve the application; and by the provision "but under no other conditions" denies the commission the power that it undertook to exercise. The commission is without authority to approve the application and erred in doing so. Its order is accordingly reversed.

This decision makes it unnecessary to state or determine the other matters presented.

ORDER REVERSED.

WILLIAM POSPISIL, APPELLANT, V. PETER N. JESSEN, APPELLEE.

44 N. W. 2d 600

Filed November 10, 1950. No. 32834.

1. **Drains: Waters.** The owner 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.
2. ———: ———. An owner of land has the right in the interest of good husbandry to drain ponds or basins thereon of a temporary character, and which have no natural outlet or course of flow, by discharging the waters thereof by means of an artificial channel into a natural surface-water drain on his own property, and through such drain over the land of another proprietor in the general course of drainage in that locality, even though the flow in such natural drain is thereby increased over the lower estate, and provided that this is done in a reasonable and careful manner and without negligence.
3. **Waters.** Water flowing in a well-defined watercourse cannot lawfully be diverted and cast upon the lands of another to his damage where it was not wont to run in the natural course of drainage.
4. **Waters: Injunction.** Where an obstruction in a natural drainage course constitutes a continuing and permanent injury to landowners, such landowners may, on a proper showing, obtain a decree ordering the removal of the obstruction.
5. ———: ———. Where a landowner wrongfully diverts waters flowing in a well-defined watercourse and casts them upon the lands of an adjoining landowner where it was not wont to run in its natural state, injunction affords a proper remedy.

APPEAL from the district court for Saunders County: HARRY D. LANDIS, JUDGE. *Reversed with directions.*

E. S. Schiefelbein and *Joseph L. Pallat,* for appellant.

H. A. Bryant, for appellee.

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

YEAGER, J.

This is an action in equity by William Pospisil, plaintiff and appellant, against Peter N. Jessen, defendant and appellee, to enjoin the maintenance of and to cause to be removed a dike on the lands of the defendant which dike it is claimed interferes with the natural course of drainage of water from about 120 acres of land belonging to the plaintiff.

In the action the defendant filed an answer which is in part in the nature of a cross-petition. By it he charged that on plaintiff's land there were two ponds or basins having no outlet; that plaintiff provided outlets which caused the water therefrom to flow upon defendant's land to his damage. He prayed for an injunction to restrain plaintiff from so diverting the waters from the ponds or basins.

Issues were joined and the action and cross-action were tried to the court. By the decree it was found that the lands of the defendant were generally subservient to the lands of the plaintiff. It was further found however that the waters flowing into the basin on plaintiff's land were not wont to flow naturally over the lands of the defendant.

Pursuant to the finding it was decreed that the plaintiff restore and reconstruct the obstruction which had previously prevented the flow of water from the pond or basin, and that defendant should thereafter lower the dike complained of by plaintiff so that it conformed to the natural topography as it existed prior to its construction. In terms injunction was not granted to either party.

The plaintiff has appealed from that portion of the decree which requires him to restore and reconstruct the obstruction which had previously prevented the flow of water from the pond or basin. The defendant has neither appealed nor cross-appealed.

The plaintiff is the owner of the north half of the southeast quarter and the south half of the northeast

quarter of Section 2, Township 16 North, Range 6 East, in Saunders County, Nebraska. The defendant is the owner of the south half of the southeast quarter in the same section. The land of the defendant immediately adjoins the land of the plaintiff on the south line. Plaintiff's land is higher than that of defendant and the natural course of drainage is southward onto defendant's land and thence southeast where it leaves the section at or about its southeast corner.

By defendant's pleadings two ponds or basins are referred to as existing on plaintiff's lands. There is some evidence of two but the description is of one consisting of a little more than ten acres. The maximum depth of water in the pond or basin when full before an outlet was provided appears to have been from 15 to 18 inches. There is some evidence that it attained a greater depth but this evidence is very indefinite and uncertain. The location of the pond or basin is not accurately established but it must be in the northwest part of plaintiff's land. Waters accumulated in the pond or basin for which there was no outlet until one was artificially made by plaintiff. There was not however a permanent body of water, pond, or lake. By evaporation and percolation the water would disappear and the area was farmed every year. On occasion crops were drowned but there is no evidence of any year when the area was not used for farming purposes.

The plaintiff went on his land in 1936 and sometime thereafter he plowed out a "dead furrow" from the pond or basin for drainage. This furrow allowed the water to escape into the regular drainageway for the flow of waters from his land onto and over the land of the defendant. This practice was followed yearly it appears until probably 1947 when he had a passage for water, also in the regular drainageway, made or graded. It is not ascertainable whether the base or bed of this passage was lower than the furrow but it clearly was of greater width. It was entirely on the land of plaintiff.

After this passage was constructed the defendant constructed a dike along the north line of his land immediately across from the south line of plaintiff's land. It was designed to and did obstruct the natural flow of water from plaintiff's land and caused it in times of heavy flow or heavy rainfall to back up and spread out over plaintiff's land.

The dike has been broken by the force of water which accumulated above but it appears that it still constitutes an obstruction to the free flow of water in this natural course of drainage.

It is this dike which the plaintiff seeks to have removed, and it is the passageway from the pond or basin which the defendant seeks to have obstructed as it was in its natural state.

The foregoing we think is a fair reflection of the material and uncontroverted facts. Under these facts and the manner in which the case comes to this court the only determinable question is that of whether or not the court properly required the plaintiff to restore the obstruction to the flow of water from the pond or basin on his own land so as to prevent the flow of water therefrom as it was prevented in the natural state.

In approaching a determination of this question it becomes necessary to bear in mind certain established principles of law.

By section 31-201, R. S. 1943, it is provided: "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."

This legislative pronouncement has been approved by the decisions of this court. Bures v. Stephens, 122 Neb. 751, 241 N. W. 542; Halligan v. Elander, 147 Neb.

709, 25 N. W. 2d 13; Skolil v. Kokes, 151 Neb. 392, 37 N. W. 2d 616.

In Aldritt v. Fleischauer, 74 Neb. 66, 103 N. W. 1084, 70 L. R. A. 301, it was said: "An owner of land has the right in the interest of good husbandry to drain ponds or basins thereon of a temporary character, and which have no natural outlet or course of flow, by discharging the waters thereof by means of an artificial channel into a natural surface-water drain on his own property, and through such drain over the land of another proprietor in the general course of drainage in that locality, even though the flow in such natural drain is thereby increased over the lower estate, and provided that this is done in a reasonable and careful manner and without negligence." See, also, Arthur v. Glover, 82 Neb. 528, 118 N. W. 111; Skolil v. Kokes, *supra.*

Water flowing in a well-defined watercourse cannot lawfully be diverted and cast upon the lands of another to his damage where it was not wont to run in the natural course of drainage. Leaders v. Sarpy County, 134 Neb. 817, 279 N. W. 809; Born v. Keil, 146 Neb. 912, 22 N. W. 2d 175; Andersen v. Town of Maple, 151 Neb. 103, 36 N. W. 2d 620; Jack v. Teegarden, 151 Neb. 309, 37 N. W. 2d 387; Pint v. Hahn, 152 Neb. 127, 40 N. W. 2d 328.

"Where an obstruction in a natural drainage course 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." Pint v. Hahn, *supra.* See, also, Leaders v. Sarpy County, *supra;* Andersen v. Town of Maple, *supra.*

"Where a landowner wrongfully diverts waters flowing in a well-defined watercourse and casts them upon the lands of an adjoining landowner where it was not wont to run in its natural state, injunction affords a proper remedy." Pint v. Hahn, *supra.* See, also, Jack v. Teegarden, *supra.*

Applying this statute and the appropriate principles to the facts of this case it becomes necessary to say that

the pond or basin was of a temporary character. Therefore no negligence or lack of reasonable care having been shown, plaintiff had the right to discharge the waters therefrom by means of an artificial channel on his own property in the natural course of drainage and to have it flow also in the natural course of drainage over the land of the defendant.

As to the dike which defendant constructed it was in the natural course of drainage for water coming down from plaintiff's land. It was constructed for no other purpose than to prevent the flow of this water over his land and on down over a natural course to ultimately empty into a creek some miles away. The dike diverted the water from its natural course and caused it to back up and inundate plaintiff's land.

This under the principles announced he had no right to do. The plaintiff was entitled unqualifiedly to have the dike removed to the extent that it interferes with the free flow of water in the natural course of drainage and to an injunction restraining its maintenance or reconstruction.

The decree of the district court is reversed as to that part which requires the plaintiff to reconstruct the obstruction to the flow of water from the pond or basin on his land as is also that part which only conditionally requires the defendant to remove the dike on his land with directions to enter decree granting the injunction as prayed for by plaintiff in his petition and denying the relief prayed for by defendant in his answer.

REVERSED WITH DIRECTIONS.

LOU ANN ARMER, A MINOR, BY IRWIN ARMER, HER FATHER AND NEXT FRIEND, APPELLANT, v. OMAHA & COUNCIL BLUFFS STREET RAILWAY COMPANY, APPELLEE.

44 N. W. 2d 640

Filed November 10, 1950. No. 32798.

1. **Witnesses.** An unexplained variance in the evidence of a litigant on a material fact from that given at a previous trial, not required by the exigencies pointed out in the previous trial, is a matter of impeachment, credibility, and weight for the jury to determine. The evidence of such witness is not incredible as a matter of law.
2. **Trial: Negligence.** When the evidence, although conflicting, is sufficient to sustain a verdict for the plaintiff, it is error for the trial court to sustain a motion for judgment notwithstanding the verdict on the ground that the contributory negligence of the plaintiff barred recovery.
3. **Trial.** When a party has filed a motion for judgment notwithstanding the verdict and in the alternative for a new trial, the granting of the motion for judgment notwithstanding the verdict operates as a denial of the motion for a new trial.
4. **Appeal and Error.** In an appeal from the entry of a judgment notwithstanding the verdict the parties must preserve all errors upon which they rely, alternative or otherwise, by adequate assignments in their respective briefs.
5. **Appeal and Error: New Trial.** Where an appeal is taken from the entry of a judgment notwithstanding the verdict, a failure to assign as error, in the alternative, the overruling of the motion for a new trial precludes this court from considering the correctness of the trial court's ruling on such motion for a new trial. Under such circumstances any right to a new trial will be deemed to have been waived.

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

Lyle Q. Hills, for appellant.

Kennedy, Holland, DeLacy & Svoboda, for appellee.

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

CARTER, J.

This is an action for damages for personal injuries sustained by plaintiff in a collision of a bus of the defendant and a bicycle which plaintiff was riding. The jury returned a verdict for the plaintiff. The trial court thereafter sustained defendant's motion for judgment notwithstanding the verdict and entered a judgment of dismissal for the defendant. Plaintiff appeals.

This is the second appeal to this court in this case. Armer v. Omaha & Council Bluffs St. Ry. Co., 151 Neb. 431, 37 N. W. 2d 607. In the former appeal it was held that the evidence was sufficient to take the case to the jury and that the trial court erred in directing a verdict for the defendant at the close of plaintiff's evidence. Plaintiff contends that this decision is the law of the case and requires the submission of plaintiff's case to the jury. The effect of the former decision will be discussed later in the opinion.

The accident occurred on Thirty-third Street in the middle of the block north of Lincoln Boulevard in Omaha. Plaintiff says she turned north from Lincoln Boulevard into Thirty-third Street and rode up the center of the street. She says that at a point about 50 feet south of the alley she angled to the west to enter the alley on the west side of the street. There is evidence that defendant's bus was coming north behind her at a rate of 38 to 40 miles an hour. The driver of the bus turned it to the left to avoid striking her, but hit the bicycle near the entrance to the alley on the west side of the street. A more detailed statement of plaintiff's evidence will be found in the former opinion by this court.

In addition to the evidence given at the previous trial, plaintiff produced one Lorenda Skeen, who testified that at the time of the accident she was sitting at the east front window of the second house north of the alley on the west side of the street. She says she saw plaintiff riding up the street on her bicycle, that she saw the bus angle to the left across the street, and that

the bus struck the bicycle near the entrance to the west alley. She testifies that she first saw the bus 65 or 70 feet back of the plaintiff and that it was traveling 40 or 45 miles an hour. The defendant contends that the evidence of this witness is not worthy of belief because of certain conflicts with the evidence of the plaintiff and the nature of the view of the accident as it was described by the witness. These are matters, however, for the jury to determine. It is for the jury and not the court to weigh the evidence and determine the credibility of the witnesses.

It is contended by the defendant that plaintiff made changes in her testimony from that given at the previous trial to meet the exigencies of the case as pointed out in the first appeal. It is asserted that plaintiff testified in the first trial that she proceeded north on Thirty-third Street to the first alley on the west side and "* * * turned and went into the alley. I wanted to go up the sidewalk." The record shows that she testified in the present case as follows: "Why, I was going in about the center of the street, and then I sort of angled across, and I was going to turn into the alley." She testifies that she started to angle over about 50 feet south of the point of the accident. The defendant cites Peterson v. Omaha & Council Bluffs St. Ry. Co., 134 Neb. 322, 278 N. W. 561, and Gohlinghorst v. Ruess, 146 Neb. 470, 20 N. W. 2d 381, in support of his contention. We do not think the foregoing cases are applicable.

The plaintiff was a young girl of 11 years at the time of the accident. It cannot be said that the change in the description of the accident as herein stated was a change to meet the exigencies of the previous appeal. It was held in the previous appeal that plaintiff had made a case for the jury. There were no exigencies that she had to meet, the court having held that all necessary requirements for submission to a jury had been met. It is true that her former testimony left a distinct impression that she came straight north in or

near the center of the street until opposite the west alley, at which point she turned west to enter it. The testimony given in the case now before us indicates that she came north to a point 50 feet south of the west alley and then angled across to it. The latter description tends to show that the driver of the bus was more negligent than in the former in that he had more notice of her intent to turn or angle across the street to the left. The jury was informed of this alleged change in plaintiff's testimony. It was for the jury, however, to weigh the impeaching effect of the evidence and to determine the weight to be given to it.

In Peterson v. Omaha & Council Bluffs St. Ry. Co., *supra,* it was held that a complete change in the evidence as to where the automobile was traveling, in order to get the case within the last clear chance doctrine, does not find favor and is discredited testimony as a matter of law. But in the present case the plaintiff was not confronted with any such dilemma. All that plaintiff had to do was to testify as before in order to make a case. The motive for the change was not the exigencies resulting from the former appeal as in the Peterson case. What the motive was that induced the change in the present case and the effect thereof upon the weight and credibility of her evidence was for the jury to determine under proper instructions. While a party will ordinarily not be permitted to insist at different times on the truth of two conflicting allegations according to the necessities of his own interest, the rule that a prior conflicting statement discredits subsequent testimony as a matter of law has no application where such motive does not exist. An unexplained change in the evidence of a litigant not required by the exigencies pointed out in a previous trial is a matter of impeachment, credibility, and weight for the jury to determine. See, also, Ellis v. Omaha Cold Storage Co., 122 Neb. 567, 240 N. W. 760; Gohlinghorst v. Ruess, *supra.* In any event, the present version of the facts was corrob-

orated and the evidence of plaintiff did not stand alone as the basis for the jury's finding. We think there is nothing in the record to warrant a direction that plaintiff did not make a case for the jury as we held in the former appeal. The ruling in the former appeal is therefore the law of the case, unless defendant's evidence is so conclusive of want of credence on the part of plaintiff's witnesses as to require a contrary verdict as a matter of law.

The rule in the latter instance is: "It is the duty of a trial court to direct a verdict at the close of the evidence where the evidence is undisputed, or where evidence, though conflicting, is so conclusive that it is insufficient to sustain a verdict and judgment." Fairmont Creamery Co. v. Thompson, 139 Neb. 677, 298 N. W. 551. This rule simply means that a mere scintilla of evidence is not enough to sustain a verdict. If there is evidence which, if believed, will sustain a verdict, it becomes a jury question.

In the present case the issue of fact, for all practical purposes, is whether plaintiff rode her bicycle up Thirty-third Street as she and her witness assert, or whether she rode up the sidewalk on the east side of Thirty-third Street and turned into Thirty-third Street at the alley entrance into the path of the oncoming bus. Defendant's witnesses, two passengers and the driver of the bus, testify unequivocally that plaintiff turned off the sidewalk at the alley entrance into the path of the bus without warning. Plaintiff's evidence is at least as strong as in the previous trial when this court held it sufficient to go to the jury. The evidence of defendant is clearly sufficient to sustain a verdict in its behalf. It is for the jury, however, to determine whether plaintiff's or defendant's witnesses are correctly reciting the facts. The jury found for the plaintiff on the conflicting evidence. The evidence being sufficient to sustain the verdict, and no error having been pointed out warranting the trial court in interfering therewith, plaintiff is en-

titled to the benefit of her verdict. Greenberg v. Fireman's Fund Ins. Co., 150 Neb. 695, 35 N. W. 2d 772. The trial court erred in sustaining the motion for a judgment notwithstanding the verdict.

The record shows that after the verdict of the jury was returned, finding for the plaintiff, the defendant filed a motion for judgment notwithstanding the verdict and, in the alternative, for a new trial. In sustaining the motion for judgment notwithstanding the verdict, the court in effect overruled the motion for a new trial. Krepcik v. Interstate Transit Lines, *ante* p. 98, 43 N. W. 2d 609. On an appeal taken by a party against whom a judgment notwithstanding the verdict has been entered, such appellant must assign the errors upon which he relies for a reversal. If the appellee is willing to submit the appeal on the assignments of error set out by the appellant, an answer brief is all that is required. On the other hand, if appellee desires to insist upon his right to a new trial, in case the entry of the judgment notwithstanding the verdict is held to be erroneous, he must assign such errors contained in his motion for a new trial upon which he intends to rely to obtain it. This is so for the reason that an appeal from a judgment notwithstanding the verdict is a final order which brings up everything the trial court had before it that is properly preserved and presented. Consequently, where an appeal is taken from the entry of a judgment notwithstanding the verdict, a failure to assign as error, in the alternative, the overruling of the motion for a new trial precludes this court from considering the correctness of the trial court's ruling on the motion for a new trial. In other words, the parties must preserve all errors upon which they rely, in the alternative or otherwise, by adequate assignments in their respective briefs. This is in furtherance of the beneficent purpose of sections 25-1315.02 and 25-1315.03, R. R. S. 1943, which had for their objectives the expedition of litigation by the elimination of unnecessary retrials and appeals.

In the present case the appellee relied solely upon the correctness of the trial court's action in sustaining the motion for judgment notwithstanding the verdict. He did not assign as error in the alternative the overruling of his motion for a new trial and he must therefore be deemed to have waived it.

For reasons stated, the judgment of the district court is reversed with instructions to reinstate the verdict of the jury and to enter judgment thereon.

REVERSED AND REMANDED WITH DIRECTIONS.

YEAGER, J., dissenting.

I have no fault to find with that part of the majority opinion which holds that the trial court erred in sustaining the motion for judgment notwithstanding the verdict. I agree that there was sufficient evidence to sustain the verdict which was returned in favor of the plaintiff, and that it was error after the verdict was returned for the court to substitute its judgment for that of the jury as was obviously done in this case.

I cannot however agree with that portion of the opinion the effect of which is to say that, where a motion for judgment notwithstanding the verdict and a motion for new trial are filed comformable to section 25-1315.02, R. R. S. 1943, and the motion for judgment notwithstanding the verdict is sustained without a ruling on the motion for new trial, and this court reverses the judgment notwithstanding the verdict, unless the appellee asserts in his brief the errors assigned in this motion for new trial he waives the right thereafter to have the district court or this court rule upon them.

In the latest majority opinion in Krepcik v. Interstate Transit Lines, *ante* p. 98, 43 N. W. 2d 609, with which I did not and do not now agree this court did not go that far.

It cannot well be said that the majority did not go that far because the attention of the court was not challenged to the theory and the matter was not presented for consideration. To the contrary, as is clearly demon-

strated by the numerous briefs filed in that case, the theory was vigorously and exhaustively presented, at the end of which it was not sustained, but hearing was allowed in this court. Moreover, on hearing in this court the assignments of error contained in the motion for new trial were considered and a new trial was granted on the basis of such assignments.

Since the hearing and decision in Krepcik v. Interstate Transit Lines, *supra*, there has been neither legislative change nor promulgation of rule authorizing this radical departure from what was done in that case.

The procedural history in that case is identical with the procedural history in this case, and if the defendant there was entitled to a hearing on its motion for new trial after disposition of the motion for judgment notwithstanding the verdict in this court a reasonable regard for consistency requires that the same treatment be given to the defendant in this case.

BOSLAUGH, J., concurs in this dissent.

WENKE, J., concurring.

The last paragraph of the dissent requires clarification. In Krepcik v. Interstate Transit Lines, *ante* p. 98, 43 N. W. 2d 609, it was for the first time decided by this court that the granting of a motion for judgment notwithstanding the verdict under the circumstances there shown had the effect of overruling the motion for a new trial. Consequently, any claimed error in the action of the trial court in granting a judgment notwithstanding the verdict or in overruling the motion for a new trial must be assigned as error on appeal to receive the consideration of this court as required by the rules of practice in the Supreme Court. Rules 8 a2 (4), 8 b2.

In the Krepcik case, it being a case of first impression, this court, on request, permitted the filing of a supplemental brief setting forth supplemental assignments of error with respect to the overruling of the motion for a new trial for the reason that the appellee had no

cause to believe previously that it was necessary to do so at that stage of the proceedings.

In the present case the appellee filed its brief on June 29, 1950. On July 19, 1950, the opinion of this court in the Krepcik case was handed down. The point here involved was mentioned in appellee's brief and the appellee referred the court to the Krepcik case, then pending, for the answer. From July 19, 1950, until September 27, 1950, the date the present case was argued before this court, the appellee did not request leave to file supplemental briefs nor present in any manner any claimed errors resulting from the overruling of the motion for a new trial, although it knew or ought to have known the necessity for so doing if error was to be predicated thereon. To this day the appellee has never claimed any error in the overruling of the motion for a new trial. The dissent asserts for the appellee a right not only to which it is not entitled, but one which appellee itself has never presented in the appeal. The case before us is clearly distinguishable from the Krepcik case.

HARRY C. BEETISON, APPELLANT, V. OTIS M. BALLOU, APPELLEE.

44 N. W. 2d 721

Filed November 22, 1950. No. 32807.

1. **Equity.** The relief ordinarily granted in equity is such as the nature of the case, the law, and the facts demand, not at the beginning of the litigation, but at the time the decree is entered.
2. **Drains: Waters.** It is the duty of those who build structures across natural drainways to provide for the natural passage through such obstruction of all waters which may be reasonably anticipated to drain there. This is a continuing duty.
3. **Waters.** A stream which is accustomed to extend itself beyond its banks in times of high water and to flow over the adjacent lands in its flood plane in a broader stream, retains its char-

acter as a live stream, and the law relating to floodwaters applies.

4. ———. The flood channel must be considered as a part of the channel of the stream and no structures or other obstructions can be placed in its bed which will have a tendency to dam the water back upon the property of upper riparian or adjacent owners.

5. ———. The owners or proprietors of lands bordering upon either the normal or flood channels of a natural watercourse are entitled to have its water, whether within its banks or in its flood channel, run as it is wont to run according to natural drainage, and no one has the lawful right by diversions or obstructions to interfere with its accustomed flow to the damage of another.

6. ———. A riparian owner may not dam, retard, or bank against the floodwaters of a running stream to the injury of lower proprietors.

7. **Injunction: Waters.** Injunction is a proper remedy to prevent recurring damages to crops or continuing injury to lands by water unlawfully diverted from a natural watercourse over or upon lands of adjacent or adjoining proprietors.

8. ———: ———. Where a person constructs a dam or dike that diverts floodwater from its natural flood plane where it was wont to flow in its natural state for many years before the construction of the obstruction, injunction affords the proper remedy to relieve from the continuing damage from recurring floods which are certain to occur in the future and which are the proximate result of the dam or dike construction.

APPEAL from the district court for Saunders County: HARRY D. LANDIS, JUDGE. *Reversed and remanded with directions.*

H. A. Bryant, for appellant.

Max Kier, for appellee.

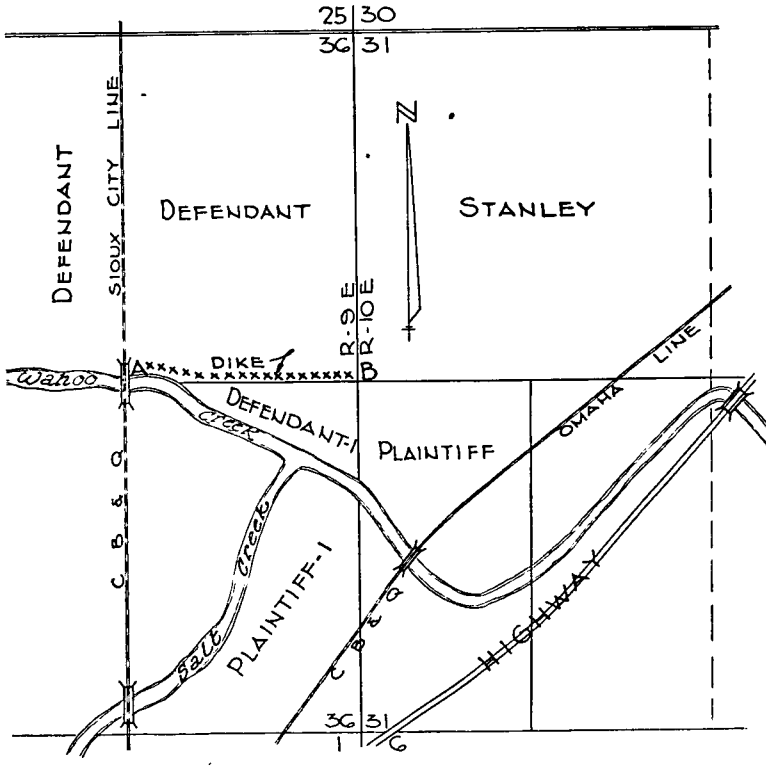
Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

SIMMONS, C. J.

So far as concerned in this appeal, plaintiff brought this action for a mandatory injunction ordering the defendant to remove a dike constructed on his land, and that the defendant be permanently enjoined from con-

structing or maintaining any embankment upon his land interfering with the natural flow of floodwaters from Wahoo and Salt Creeks, and for equitable relief. Defendant joined issue and prayed for a dismissal of the action. After trial the court found generally for the defendant and dismissed the plaintiff's petition. Plaintiff appeals. We reverse the judgment of the trial court and remand the cause with directions.

For brevity of description and better understanding of the factual situation, and without being accurate in detail, we have prepared and use a chart for the purpose of showing the relative position of the lands, the physical conditions, and the structures involved.



The land involved in this action is bottom land and generally in the flood plane of Wahoo and Salt Creeks. Wahoo Creek drains an area of about 500 square miles. Salt Creek at the point where Wahoo Creek joins it drains an area of over 1,000 square miles. The Sioux City line of the railroad forms a dam across the valley with the outlets as indicated under the bridges across the streams. Below the land involved, the Omaha line of the railroad and the highway form similar dams with similar outlets.

Plaintiff owns the land described on the chart as plaintiff and plaintiff-1, the latter tract apparently having been purchased about the time or after this action was initiated.

Defendant owns the land described as defendant and defendant-1, the latter tract having been purchased about the time or after this action was initiated.

In November 1945, defendant built a drain ditch and dike along the line indicated on the chart as A to B—a distance of 1,750 feet. The work began at the railroad track at A, followed the north bank of Wahoo Creek for some 400 feet, and then straight east—all on defendant's land. It is about this dike that plaintiff complains.

Plaintiff's evidence shows that by natural course, floodwaters from Wahoo Creek flow out and across the lands marked defendant-1, and then, in part at least, across defendant's land, then onto the Stanley land, and finally into Salt Creek. Plaintiff offered evidence that such was the course of the waters at flood periods in 1908 and on occasion thereafter, prior to the building of the dike.

Plaintiff's evidence further is that after the dike was constructed severe floods occurred in 1947 and thereafter; that in those floods the floodwaters from Wahoo Creek flowed across defendant-1, came against the dike, were turned and formed a channel along the south side of the dike, and flowed down upon his lands; that on several occasions flowing water was two or more feet

deep south of the dike; and that at the same time there was little, if any, water on the north side. He testified that those waters destroyed crops, washed his land, and left silt and debris upon it. Whenever we use the word "debris" here, we mean logs and material of that character that are carried by swiftly moving waters.

Defendant's evidence is in accord with that of the plaintiff. Defendant's witnesses testified that the natural course of the floodwaters from Wahoo Creek was across defendant's lands and onto the Stanley lands and plaintiff's lands.

Defendant testified that he dug the ditch in 1945; that he put the dirt removed on the south side of the ditch forming the dike because he had to put it somewhere, although one of his witnesses testified that he saw evidence of dirt having been removed from south of the dike at its lower end. Defendant testified that he built the ditch to drain surface waters, and that he put the dirt on the south side so as to protect his property and to prevent the floodwaters from Wahoo Creek filling his drain ditch with silt and rendering it useless. It seems obvious that if floodwaters from Wahoo Creek would come upon his land with sufficient volume and velocity to deposit damaging silt in his drain ditch, those waters would also flow upon and across defendant's lands, as plaintiff's evidence shows they did before the dike was built.

The evidence is that from about 500 feet east of point A, defendant's land slopes to the west. Defendant in constructing the dike put a tube and floodgate through it at point A. The floodgate was so constructed that it opened so that waters from defendant's lands would flow south into Wahoo Creek, but in the event of waters coming against it from Wahoo Creek, it would close and prevent the flow onto defendant's land at that point. Defendant testified that the floodgate was so constructed to prevent the tube filling with silt from floodwaters of Wahoo Creek. This part of the dike was washed out

in part in June 1947, and later restored by defendant.

That the dike had served its purpose of preventing the drain ditch from filling with silt is established by defendant for he testified that the land south of the dike from point A halfway to point B had been built up with silt deposited there by floodwaters. Again it appears obvious that floodwaters were materially retarded in their flow by the dike so as to cause the deposit of the silt. One of defendant's witnesses testified that he had seen floodwaters go across defendant-1, come against the dike at its lower end, form a channel, and then flow east upon plaintiff's land past point B. Defendant's engineer witness testified that south of point B "for some hundred feet" he saw where the "heavy flow" had gone across from defendant-1 onto plaintiff's land.

The evidence also is that, depending on the contour of the land, floodwaters from Wahoo Creek would have to rise between 14 inches and 3½ feet above the land south of the dike before they would flow across onto defendant's land. It also appears from the evidence that when all the land is flooded above the top of the dike, as it was once in 1947, after the waters had receded to the line of the dike, all the flow of the floodwaters south of the dike is across plaintiff's land and that the flow of waters on defendant's land north of the dike is the run-off from defendant's land.

There is evidence that following severe floods, debris is left on plaintiff's land. There is no evidence of debris being left on defendant's land. In one instance after one flood the defendant's evidence is that there was no debris left on his land.

Defendant's theory is that plaintiff has no cause for complaint for several reasons. One is that his land is open to the east and that water flowing past point B will seek its own level and flow backward and flood his lands. Obviously that would depend upon the volume and duration of the flood. This contention ignores the issue. Plaintiff is not complaining about waters being on de-

fendant's land but is complaining of the change of the course of the waters at floodtime. This contention seems to admit the merit of plaintiff's complaint. Defendant's second contention is that most of the floods in the area are caused by floodwaters of Salt Creek damming up the water at the junction with Wahoo Creek causing Wahoo Creek to back up and then overflow. It appears obvious that that situation is one caused by natural forces.

It is also defendant's contention that floodwaters are gathered and unable to escape to the east because of the Omaha railroad line and highway and then back up and flood all the lands involved here, and that in times of great floods, such as the one in June 1947, all the lands are flooded and the dike is of no avail to anyone. The evidence is that in one of the 1947 floods all that appeared of the dike was a ridge of brome grass showing through the waters. This contention ignores the situations that arise when floods are not that severe, but severe enough to do the damage about which plaintiff complains. It ignores the difference in effect on land and crops of swiftly moving high water in a flood plane, and rising shallow waters seeking their own level moving in against the current over relatively level land. It ignores the difference shown by the evidence of washed land, destroyed crops, debris deposited, etc. It is a difference illustrated again by this evidence as to silt. We have recited defendant's evidence as to the purpose and effect of the dam in keeping silt off his land. The evidence of defendant's engineer is that the waters moving in on defendant's land from the east deposited no harmful silt in the drain ditch. It is likewise apparent that the waters flowing over the dam at extreme high waters carried no material amount of silt, for the evidence is that the drain ditch operated and served its purpose after the floods.

Defendant contends that he has the right to drain as against surface waters. That problem is not an issue here.

We stated the rules of law applicable here in Stocker v. Wells, 150 Neb. 51, 33 N. W. 2d 445:

"The relief ordinarily granted in equity is such as the nature of the case, the law, and the facts demand, not at the beginning of the litigation, but at the time the decree is entered."

"It is the duty of those who build structures across natural drainways to provide for the natural passage through such obstruction of all waters which may be reasonably anticipated to drain there. This is a continuing duty."

"A stream which is accustomed to extend itself beyond its banks in times of high water and to flow over the adjacent lands in its flood plane in a broader stream, retains its character as a live stream, and the law relating to floodwaters applies."

"The flood channel must be considered as a part of the channel of the stream and no structures or other obstructions can be placed in its bed which will have a tendency to dam the water back upon the property of upper riparian or adjacent owners."

"The owners or proprietors of lands bordering upon either the normal or flood channels of a natural watercourse are entitled to have its water, whether within its banks or in its flood channel, run as it is wont to run according to natural drainage, and no one has the lawful right by diversions or obstructions to interfere with its accustomed flow to the damage of another."

"Injunction is a proper remedy to prevent recurring damages to crops or continuing injury to lands by water unlawfully diverted from a natural watercourse over or upon lands of adjacent or adjoining proprietors."

"Where a person constructs a dam or dike that diverts floodwater from its natural flood plane where it was wont to flow in its natural state for many years before the construction of the obstruction, injunction affords the proper remedy to relieve from the continuing damage from recurring floods which are certain to occur

in the future and which are the proximate result of the dam or dike construction."

We also held in Cooper v. Sanitary District No. 1, 146 Neb. 412, 19 N. W. 2d 619, that a riparian owner may not dam, retard, or bank against the floodwaters of a running stream to the injury of lower proprietors.

Defendant relies upon the Stocker case in that there we denied injunctive relief as to a dike that ran parallel to the bank of the river and parallel to the flow of the river, both at normal and flood stages. This contention ignores first the fact that for some 1,200 feet the dike here runs diagonal to the flow of the creek at flood stage. It ignores also the material fact that in the Stocker case the dike did not in anywise interfere with the flow of the water. Here the evidence of both parties is that the dike involved does interfere with the flow of the water.

There is no contention here that floods will not recur in the future. The admitted purpose of the dike is in anticipation of that recurrence.

The decree of the district court is reversed and the cause remanded with directions to enter a decree granting the plaintiff a mandatory injunction requiring the defendant to remove the dike so as not to dam, retard, bank against, or divert the flow of water at flood stage over the lands involved, and granting the plaintiff a permanent injunction against the rebuilding of such a structure.

REVERSED AND REMANDED WITH DIRECTIONS.

AVERY MAY, PLAINTIFF IN ERROR, V. STATE OF NEBRASKA, DEFENDANT IN ERROR.

44 N. W. 2d 636

Filed November 22, 1950. No. 32857.

1. **Criminal Law.** Crimes of the same class or grade subject to the same punishment may be charged in separate counts of an information.
2. **Divorce: Criminal Law.** The essential elements of the offense defined by section 28-450, R. R. S. 1943, are that a decree of divorce and support of children was rendered by a court of this state against the accused requiring him to pay an amount in a specified manner at a designated time for the benefit of his children, and that the accused has, without good cause, failed to pay it at the time and in the manner required by the decree.
3. **Indictments and Informations.** An information must inform the accused, with reasonable certainty, of the accusation made against him that he may have an opportunity to prepare a defense and plead the judgment as a bar in any later prosecution for the same offense.
4. ———. An information must allege directly each fact that is an essential element of the crime intended to be charged, so that the accused will not be required to go beyond it to be informed of the charge against him, and the information may not be aided by intendment, inference, implication, or matters stated by mere recital.
5. ———. The court will not disregard a defect as to any matter of pleading in a criminal action when because thereof the constitutional rights of the accused have been violated by failure to give him proper information of the nature and cause of the accusation against him.
6. **Criminal Law: Trial.** Where the record shows that the jury in arriving at a verdict of guilty in a criminal case disregarded the instructions of the court, the verdict is contrary to law and will be set aside and the judgment thereon reversed.
7. ———: ———. A verdict of guilty in a criminal case that is contrary to the evidence will not be sustained.

ERROR to the district court for Adams County: EDMUND P. NUSS, JUDGE. *Reversed and remanded.*

J. E. Willits, for plaintiff in error.

Clarence S. Beck, Attorney General, and *William T. Gleeson*, for defendant in error.

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

BOSLAUGH, J.

Avery May, defendant and plaintiff in error, was accused and convicted of failure to pay, without good cause, amounts provided for support of his children by a decree of divorce rendered in the district court for Adams County. He was given the maximum sentence. His application for a new trial was denied and he has presented the record of his conviction and sentence to this court for review.

The statute defining the crime of failure to pay, without justifiable reason, previously adjudged amounts for child support (§ 28-450, R. R. S. 1943) contains these provisions: "Whenever any husband, against whom a decree for divorce and alimony for the support of his children shall have been rendered by any court in this state, shall, without good cause, refuse or neglect to pay to the persons noted the amounts and manner provided by such decree for the support of such child or children, he shall on conviction be punished by imprisonment in the penitentiary for not more than one year, or be imprisoned in the county jail not more than six months for each offense. The refusal or neglect to so pay each separate installment or payment of such money as provided by the decree shall be held to be a separate offense and punishable as such." Contrary to the argument of the State, this act does not create or define "a continuing crime." It provides in the clearest language that the failure to pay without good cause each separate installment or payment of such money as provided by the decree shall be held to be a separate offense and punishable as such. In a prosecution based on this act, the facts constituting each obligation of the accused to pay child support as provided in the decree of divorce, and

each default made by him in that regard should be alleged with reasonable certainty as a distinct offense and, of course, more than one obligation to pay and more than one failure to perform might properly be included in separate counts in a single information. Sheppard v. State, 104 Neb. 709, 178 N. W. 616, 18 A. L. R. 1074; Forney v. State, 123 Neb. 179, 242 N. W. 441. See, also, Fussell v. State, 102 Neb. 117, 166 N. W. 197, L. R. A. 1918F 421.

The accusation made by the information is: "* * * that AVERY MAY * * * in the County of Adams, and State of Nebraska * * * then and there being, against whom a Decree of Divorce and child support has been rendered by this Court is and has been without good cause, refusing and neglecting to pay the child support as provided in the said Decree of Divorce for the support of his children, * * *."

The essential elements of the offense defined in the statute are that a decree for divorce and support of children was rendered against the accused by a court of this state requiring him to pay an amount in a specified manner at a designated time for the benefit of his children, and that the accused has, without good cause, failed to pay it at the time and in the manner required by the decree. The information does not by direct allegation assert that a decree of divorce and support for the children of the accused was rendered by a court of this state against him, that it adjudged him to pay in a designated manner for support of his children an amount on a specific date, or that he had failed to pay, without good cause, an amount of child support at the time and in the manner provided and required in the decree. These are essential facts to be alleged before it can be said the offense sought to be charged against the defendant is set forth in the manner required to constitute a sufficient charge of the crime.

An information must inform the accused with reasonable certainty of the charge against him that he

may prepare his defense and be enabled to plead the judgment thereon as a bar to a later prosecution for the same offense. Article I, section 11, Constitution of Nebraska; Pauli v. State, 151 Neb. 385, 37 N. W. 2d 717. It must state expressly and directly each fact that is an essential element of the crime intended to be charged so that the accused will not be required to go beyond the information to learn the nature of the charge against him or the issue he must meet, and it cannot be aided by intendment, by anything stated therein by way of mere recital, or by inference or implication. Anthony v. State, 109 Neb. 608, 192 N. W. 206; Myers v. State, 116 Neb. 287, 216 N. W. 807; Stowe v. State, 117 Neb. 440, 220 N. W. 826; Davis v. State, 118 Neb. 828, 226 N. W. 449; Hase v. State, 74 Neb. 493, 105 N. W. 253; Moline v. State, 67 Neb. 164, 93 N. W. 228; 42 C. J. S., Indictments and Informations, § 92, p. 968.

In charging the commission of a crime there is a commendable tendency to relax the requirements of ultra technical accuracy, the statement of confusing nonessential matters, and repetitious verbiage. Blazka v. State, 105 Neb. 13, 178 N. W. 832; Cowan v. State, 140 Neb. 837, 2 N. W. 2d 111. However, this does not relieve the State from complying with constitutional requirements in making a charge of the commission of a crime. Cowan v. State, *supra*. The court will not disregard a defect as to any matter of pleading or procedure in a criminal action when because thereof the constitutional rights of the accused have been violated by failure to give him proper notice of the nature and cause of the accusation against him. Barton v. State, 111 Neb. 673, 197 N. W. 423; Stowe v. State, *supra*.

The most astute and experienced person could not know from the information alone the nature of the charge against the accused and the issue he must meet. A judgment thereon could not be pleaded in bar of a subsequent prosecution. The objection that the infor-

mation fails to state a crime against the defendant must be sustained.

The charge to the jury, in an inadvisable attempt to save a case based on a hopeless foundation, instructed that the information was general and covered the whole period from the time of the rendition of the divorce decree to the filing of the information, but that the State had elected to rely upon the payment of $65.00 due on "May 1, 1949" and the only question for the jury to determine was whether or not defendant was guilty or innocent, in accordance with the material elements set forth in another instruction, as to the payment due "May 1, 1949." The other instruction referred to advised the jury that the accused must be found not guilty unless it found from the evidence beyond a reasonable doubt, among other things, that defendant "during the month of May 1949" without good cause, failed to pay the child support as provided in the decree of divorce for the support of his children. The verdict found defendant "guilty in manner and form as charged in the Information." The court construed the information and advised the jury that it charged failure of the defendant to pay all of the amounts required by the decree of divorce for child support from the date thereof, April 13, 1946, to the filing of the information, July 7, 1949. This meant 39 payments of $65.00 each. But the court limited the jury to ascertaining whether or not defendant had without good cause failed to pay the installment due on May 1, 1949. The jury in direct and obvious disregard of the instructions found the defendant guilty of all that was covered by the information as it had been construed by the court in its charge. A verdict of guilty in a criminal case arrived at in plain disregard of the instructions of the court is contrary to law. A jury is bound by, and must accept and be governed by, the instructions of the court, and where the record shows that the jury disregarded them, a conviction in a criminal case is wholly vitiated and the judgment thereon will

not be sustained. 23 C. J. S., Criminal Law, § 1118, p. 616; 53 Am. Jur., Trial, § 278, p. 235, § 510, p. 412; Annotation, 72 A. L. R. 911; Westinghouse Co. v. Tilden, 56 Neb. 129, 76 N. W. 416; Strong v. Eggert, 71 Neb. 813, 99 N. W. 647; Hawe v. Higgins, 89 Neb. 575, 131 N. W. 937; Long v. Railway Mail Assn., 145 Neb. 623, 17 N. W. 2d 675.

There is implicit in the verdict of the jury a finding that defendant had wholly failed without good cause to perform and satisfy any part of the decree requiring him to make monthly payments for the support of his children. This is contrary to the uncontradicted evidence. He admittedly paid $65.00, and $100.00 was produced by an execution issued upon the decree. A remittance was made by defendant while he was employed in the State of California. In addition to these facts, it is shown that for a part of the time involved the defendant was wholly disabled by illness, and had no property, money, earnings, or income. A verdict of guilty in a criminal case contrary to the evidence cannot be sustained. Sovereign Camp of the Woodmen of the World v. Hruby, 70 Neb. 5, 96 N. W. 998; Kenesaw Mill & Elevator Co. v. Aufdenkamp, 106 Neb. 246, 183 N. W. 294; Burchmore v. Byllesby & Co., 140 Neb. 603, 1 N. W. 2d 327.

The judgment should be and is reversed, and the cause is remanded to the district court.

REVERSED AND REMANDED.

IN RE ESTATE OF OSCAR R. THOMPSON, DECEASED. PEARL RAY THOMPSON, APPELLEE, V. MARTIN THOMPSON ET AL., APPELLANTS.

44 N. W. 2d 814

Filed December 8, 1950. No. 32817.

1. **Wills.** In a will contest on the ground of undue influence the burden is on the contestant to prove by a preponderance of the evidence (1) that the testator was a person who would be subject to such influence, (2) that there was opportunity to exercise such influence, (3) that there was a disposition to exercise such influence, and (4) that the result was the effect of such influence.
2. ———. In order to invalidate a will, undue influence must be of such a character as to destroy the free agency of the testator and substitute another person's will for his own.
3. ———. Undue influence cannot be inferred alone from motive or opportunity. There must be some evidence, direct or circumstantial, to show that undue influence not only existed, but that it was exercised at the very time the will was executed.
4. **Wills: Trial.** 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 inferences fairly deducible therefrom viewed in the most favorable light in testing the correctness of the ruling of the court granting the motion.
5. ———: ———. 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.
6. **Wills.** Mere suspicion, surmise, or conjecture is not enough to warrant a finding of undue influence. There must be a solid foundation of established facts upon which to rest an inference of its existence. This proposition applies with peculiar force when the result of drawing such an inference is to destroy the effect of a written instrument prepared with deliberation and signed and attested with all the formalities required by law for the execution of a will.
7. ———. There may be influences directing the will-maker's attention to proper obligations which it might be thought ought to be satisfied by testamentary provisions. Such influences may be persuasive and effective, but, so long as not coercive, they are

not undue. Circumstances often arise where such conduct is wholly justifiable.

8. **Wills: Trial.** The mere opportunity of the wife, when living happily with the husband, to influence the execution of a will favorable to herself is not alone sufficient to warrant submission to the jury of the question of undue influence.
9. **Wills.** Although in general confidential relations may raise strong suspicion of undue influence, this is not true to the same extent of the relation of husband and wife, where the relation has subsisted for a long time under circumstances which give rise to a strong legitimate influence and the disposition in question is not unjust or unnatural.
10. **Wills: Trial.** In a will contest on the ground of undue influence, if the evidence is insufficient to sustain a verdict upon that issue in favor of the contestants, then the trial court should direct a verdict.

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

Spear, Lamme & Flory, and *H. M. Nicholson,* for appellants.

Davis, Stubbs & Healey, and *Sidner, Lee & Gunderson,* for appellee.

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

SIMMONS, C. J.

This is a will contest. The issue was undue influence. Trial was had to a jury, resulting in a verdict for the proponent. The trial court entered judgment that the instrument was the last will and testament of testator. Contestants appeal. We affirm the judgment of the trial court.

The proponent of the will is the widow of Oscar R. Thompson, deceased, who died in 1949. She will be referred to hereinafter as proponent; he, as testator. The contestants are three brothers and several nieces and nephews of the testator. They will be referred to herein as contestants, except where more particular reference is necessary.

There is very little actual fact dispute in this record. Where it exists materially it will be mentioned.

The testator was born in Norway. He came to this country prior to or during the year 1869 with his parents and two older brothers. The father homesteaded near Wisner, Nebraska, where two brothers and two sisters were born. The father died in 1885. Two of the brothers had left the home prior to that time. The mother and the others continued to live on the homestead for a time. The mother moved to Wisner in 1897, where she died in 1904. Beginning about 1895, the testator and his brother Thomas operated the farm as a partnership. It appears that there was no settling of the father's estate or of the mother's estate immediately following their deaths. In 1907, testator and Thomas settled with the other members of the family and became the owners of the farm and personal property. They purchased other lands, and operated a general farming and livestock raising and feeding business. They closed out the direct operations in 1943, and thereafter continued to own and operate the farms as a partnership until testator's death.

The testator was married in 1900 and made his home on the homestead. Thomas was married in 1904 and established a home in Wisner, going to the farm each day. Testator largely handled the business operations while Thomas worked directly on the farming operations.

There appears to have been no discord between the two brothers or, for that matter, with the entire family, so far as testator is concerned, with exceptions to be hereafter noted.

Testator's first wife died in 1938. There were no children born to this union. Thereafter testator made a will leaving his entire estate to his brother Lewis, one of the contestants. During all this period Lewis operated a jewelry store in Wisner. At least during the latter years testator had a desk at his brother's place of business where he fairly regularly went to transact

business. It appears then that as early as 1938 or 1939, testator had determined that his relatives, Lewis excepted, would not be beneficiaries of his will.

We find in this evidence no facts upon which it can be successfully contended that any of the contestants contributed materially to the accumulation of testator's estate, and none upon which it can be urged that any of them had a particular reason, other than relationship, to be the beneficiaries of his will.

In October 1941, testator married the proponent. In 1943, he had a surgical operation to remove one leg, later a second operation was had to remove the other leg, and he was compelled to use a wheel chair in getting about.

The will involved here was made the day prior to the first operation. After provisions for payment of debts and other expenses, the will made proponent the sole beneficiary of testator's estate and appointed her as executrix. The will was offered for probate and this contest followed.

At the conclusion of contestants' case-in-chief and again at the close of all the evidence, proponent moved for a directed verdict on the ground that contestants had failed to establish undue influence. The motions were overruled. The case was submitted to the jury with the result of a verdict for proponent.

Contestants assign error based on (1) the refusal of the trial court to declare a mistrial because of opening statements to the jury made by proponent's counsel; (2) the admission of evidence of the proponent as to declarations made by testator subsequent to the execution of the will; (3) the admission of evidence of the physical incapacity of testator subsequent to the will and his dependence on the proponent; (4) the giving of one instruction and the refusal to give a requested instruction; and (5) the admission of evidence offered by proponent after contestants had rested.

The proponent here contends first that there was not

sufficient evidence to take this case to the jury on the issue of undue influence, and hence the errors assigned are immaterial. Secondly, she contests the alleged errors in any event.

The rule in this state is: "In a will contest on the ground of undue influence the burden is on the contestant to prove by a preponderance of the evidence (1) that the testator was a person who would be subject to such influence, (2) that there was opportunity to exercise such influence, (3) that there was a disposition to exercise such influence, and (4) that the result was the effect of such influence." In re Estate of Farr, 150 Neb. 615, 35 N. W. 2d 489. Proponent directs attention to elements (1) and (4) of the above rule.

"In order to invalidate a will, undue influence must be of such a character as to destroy the free agency of the testator and substitute another person's will for his own." In re Estate of Heineman, 144 Neb. 442, 13 N. W. 2d 569. See, also, In re Estate of Goist, 146 Neb. 1, 18 N. W. 2d 513.

"Undue influence cannot be inferred alone from motive or opportunity. There must be some evidence, direct or circumstantial, to show that undue influence not only existed, but that it was exercised at the very time the will was executed." In re Estate of Heineman, *supra.*

We consider first the question of the sufficiency of the evidence. We review the evidence in the light of the rule that "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 inferences fairly deducible therefrom viewed in the most favorable light in testing the correctness of the ruling of the court granting the motion." In re Estate of Bainbridge, 151 Neb. 142, 36 N. W. 2d 625.

We recognized in the Bainbridge case that "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. * * * 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." In re Estate of Bainbridge, *supra.*

Proponent, when she married testator, was the widow of J. I. Ray. She was Mr. Ray's second wife. Mr. Ray and proponent were teachers. The Rays and testator and his first wife first met when Mr. Ray was teaching at Wisner in 1919. The two families became friends and were often at each other's homes. Mr. Ray became county superintendent of schools in Dodge County. He became ill in 1936 and died in 1937. Mrs. Ray was appointed to that position and at the end of the term was elected to that office. Her service was completed in January 1943. Mrs. Ray, together with her sister and a lady friend, attended the funeral of the first wife of testator and on that occasion kissed him in the presence of relatives and friends. Thereafter on Memorial Day testator called on proponent in Fremont. He called upon her on other occasions. On occasion she called on him at his farm. The marriage followed. After the marriage Mrs. Ray concluded her term as county superintendent with testator's approval. Testator spent most of his time at the home on the farm; she, in Fremont. They were together when events permitted. When her term ended in January 1943, they made their home at

the farm, and later removed to Fremont where they lived together until testator's death. They lived and worked together. So far as appears in this record, their relations were congenial and harmonious throughout.

Testator was a man of many activities. He conducted an insurance business, made appraisals, and adjusted losses at different times. He was a member of the county board and of the fair board, an active member of a cooperative farmers' union, active in his political party and on one occasion a delegate to its national convention. He was selected as a Master Farmer; he was active in his lodge. He was president of and a principal stockholder in a telephone company, which seems to have been largely a family-owned corporation. It is shown by evidence admitted without objection, mostly in that of the contestants' case, that in all these activities he was a leader, a dominating personality, strong willed, determined to have his way, and when denied it, he had a resentment directed to those who opposed him.

Three illustrations appear in the evidence of contestants. In 1907, when the family settlement was made, testator fixed the amount to be paid to the others and on a take-it-or-leave-it basis. On one occasion his brother, a director of the telephone company, proposed an increase in wages to its employees. It does not appear that it had been discussed with testator beforehand. Testator, as presiding officer, refused to put the motion. Another director put the motion and it was carried. Bitter words were said and finger shaking at least indulged in. Testator resented it. During the period he was a widower he transferred $5,000 in telephone stock to his brother Lewis and other stock to a nephew. In 1946, testator asked his brother to return the stock. The brother refused and testified that thereafter the testator evidenced a coldness to him and did not speak to him in greeting, although testator continued to go to this brother's store and use the desk as had been his custom.

There is no evidence of any ill will or coldness toward proponent.

There is evidence that the testator was subject to flattery. However, there is no evidence anyone ever persuaded him by that means and none that proponent ever flattered him or undertook to do so.

The evidence all points directly to only one conclusion and that is that testator was not a person who would be subject to undue influence.

We go now to the evidence with reference to the making of the will. Testator became ill in 1942 with Buerger's disease. He was hospitalized for some time and the disease responded to treatment. He again was hospitalized in the spring of 1943. His physician advised testator that he would have to have the afflicted leg removed. Proponent was so informed. On July 27, 1943, with the doctor's permission, testator was allowed to leave the hospital at West Point and go to Wisner to take care of business matters. He had lunch and at 12 noon left the hospital for Wisner. He was on crutches. He and proponent went there by car, she driving. It does not appear when they arrived at Wisner. On reaching there he went into his brother's store where he remained for some time. Proponent went to visit one of the testator's sisters-in-law and told her and her family of the contemplated operation which was to be made the following day. She had lunch there. She returned to the store. Testator and proponent then returned to West Point, went to the office of John Gross, a lawyer, where the will was made, and then returned to the hospital at 3:45 p. m.

Either before they left Wisner or on the return trip to West Point, proponent testified that she asked the testator if he had taken care of everything and he answered, "'Yes, Louie is my heir'." Proponent said, "'Is that the way you want it?'" Testator said, "'No'." Nothing was said further and in a short time testator said, "'Drive me to John Gross's office'." That was

done. Mr. Gross was in. He had been testator's lawyer prior thereto. Testator asked to go into his private office. Proponent accompanied him. Testator told Mr. Gross he wanted to make a will and told him who his relatives were. He was asked to list his property, and in reply said that he wanted to leave it all to his wife. The will was so dictated in proponent's presence. She took no part in the conversation. Testator suggested an old friend as a witness. Mr. Gross called him. He came and visited with testator. Testator read the will. The friend and Mr. Gross signed as witnesses, using the usual witness recitals. The will then was placed in an envelope, sealed, endorsed as to its contents, and delivered to the testator. It remained in his possession until 1947, when testator handed it to proponent with other papers to be placed in a bank for safekeeping.

There was a variance in the evidence as to the conversation at Wisner. A niece of testator, one of the contestants, testified that early in April 1949, she and her husband visited testator at the hospital. Proponent was there. The three then went to the Thompson home and had a friendly visit for an hour or two. Proponent brought up the matter of testator's will. The niece testified as follows: "Well, she said that on several occasions that uncle Oscar Thompson had told her that if she ever needed money to go to Louis (Lewis) Thompson and she said that this day they were sitting out in their car in front or across from Martin's store at Wisner when he again made the remark that if she needed money to go to uncle Louis (Lewis) Thompson and she said she said to him—Just what do you mean by that. And he said that I have made a will and left all my money to Louis (Lewis) and she said to him—Well, we will do something about this right now—and she said I took him to an attorney and he left it all to her." The niece's husband testified that it was "exactly" as his wife related it, and that "We were talking and, I don't know, the conversation got around to relatives which it gen-

erally does and one thing led to another and out of the clear sky this remark about various things Oscar had mentioned, if she ever needed help or money to go to his brother Louis (Lewis) and this particular day that she mentioned, Oscar had been transacting some business in Wisner and was there in the store and the car was outside and after they had wheeled him out and he had got back in the car and they had that conversation before they started out and he repeated this statement about if you ever need any help or money. Well, she said, just what do you mean by that. And he answered —that he had made a will sometime back and left it all to his brother Louie (Lewis), so she said—Well, we will do something about that right now. She said—I drove him to an attorney and he made a will leaving it all to me or words to that affect (sic)."

Putting these two stories together, as appears necessary in order to fix the time about which the niece and husband testified, we have this as a result. Testator was a man of advanced years; he had considerable property; he was faced with a serious operation; he went to Wisner to transact business that he deemed needed attention. He did that without the presence of the wife. When she returned, she asked if he had transacted all the business he desired; he said he had. She asked him what she was to do if she needed money; he told her to go to his brother Lewis, and that he had left his property to Lewis. Proponent asked if that was the way he wanted it; he said it was not. She said "we" will do something about that now. "We" drove to West Point and at testator's direction to his lawyer's office. We find no evidence that proponent asked, urged, or demanded that she be made the beneficiary of the will. It was not mentioned. So far as this record discloses, proponent did not know that she was to be the beneficiary of the will in whole or in part until the testator directed Mr. Gross to so provide.

Putting aside proponent's testimony, we are left with the two statements of the niece and the husband. Do they

show sufficient facts to take this case to the jury on the issue of undue influence? At best the statements show only a determination on the part of the wife that her husband have a will before the operation that met his wishes, and likewise a determination that she be not compelled to go to a brother-in-law for money when and as she needed it. It shows nothing more than a disposition to exercise an influence.

We held in the case of In re Estate of Bainbridge, *supra,* that "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."

The Supreme Judicial Court of Massachusetts in Neill v. Brackett, 234 Mass. 367, 126 N. E. 93, held that "There may be influences directing the will-maker's attention to proper obligations which it might be thought ought to be satisfied by testamentary provisions. Such influences may be persuasive and effective, but, so long as not coercive, they are not undue. Circumstances often arise where such conduct is wholly justifiable. The mere opportunity of the wife, when living happily with the husband, to influence the execution of a will favorable to herself, or to cause discrimination against or amongst children, is not alone sufficient to warrant submission to the jury of the question of undue influence. Mere suspicion, surmise or conjecture are not enough to warrant a finding of undue influence. There must be a solid foundation of established facts upon which to rest an inference of its existence. This proposition applies with peculiar force when the result of drawing such an inference is to destroy the effect of a written instrument prepared with deliberation and signed and attested with all the formalities required by law for the execution of a will."

In McMackin v. McMackin, 283 Mass. 452, 186 N. E. 500, that court made a specific application of this rule in a case where the testator was, as here, shown to have been a normal person of dominating type with a strong mind and not easily susceptible to improper influence. The court there held that "With a person so endowed the evidence of undue influence should rest upon a foundation of solid fact and not upon mere speculation to warrant the submission of the issue of undue influence to a jury."

In Boggs v. Boggs, 62 Neb. 274, 87 N. W. 39, we had a case in many respects remarkably similar to this one. There, as here, the proponent was a wife; the contestants, brothers and sisters, nieces and nephews. There, as here, the testator was a man of unusual force and strength of will. There, as here, nothing appeared to indicate that a man so minded was under the dominion of his wife's will. There we held: "Although in general confidential relations may raise strong suspicion of undue influence, this is not true to the same extent of the relation of husband and wife, where the relation has subsisted for a long time under circumstances which give rise to a strong legitimate influence and the disposition in question is not unjust or unnatural."

In Carter v. Gahagan, 102 Neb. 404, 167 N. W. 412, the beneficiary accompanied the testatrix to the office of the lawyer who drew the will, but was not present while the testatrix conferred with the lawyer. The beneficiary was present when the will was dictated and read to testatrix. The beneficiary took no part in the conversation. Without specific reference to this situation, we held that the judgment for contestants based on undue influence was not supported by the evidence.

In Hann v. Hann, 202 Iowa 807, 211 N. W. 495, a son contested a will whereby his father was made a substantial beneficiary. There the father called a lawyer to the home to draw the will and was present when it was executed. There, as here, there was no evidence

that the father had anything to do with the preparation of the will or in any way dictated its terms and provisions. The "principal point" in the contest on undue influence was the presence in the room of the beneficiary when the will was drawn. The court held that the presence of the husband and beneficiary did "not bear very much significance."

Here there is a suggestion in the evidence that the proponent did the courting and was seeking the marriage. In Berry v. Moore, 220 Ky. 619, 295 S. W. 885, that court dealt with a case where the record showed very vaguely that the wife "sort of engineered the marriage." She was a second wife, married a year before the will was drawn. The contestants were collateral heirs. The parties lived very happily after the marriage. The court held that the fact that she engineered the marriage, if she did, did not tend to show any undue influence practiced a year afterward when the will was written.

Cook v. Morton, 241 Ala. 188, 1 So. 2d 890, was a case involving a will contest wherein property was left to a second wife. A daughter by the first marriage contested the will. The testator was a man of positive character and decision in his personal affairs, and did "not brook dictation in such matters." The beneficiary called the draftsman to the hospital. She was there. The evidence tended to show a conference between the husband and wife in preparing notes for the draftsman. The evidence disclosed no effort on her part to shape the terms of the will. It was held not to be evidence of undue influence per se.

Burdon v. Burdon's Administratrix, 225 Ky. 480, 9 S. W. 2d 220, was a will contest. The proponent was the wife; the contestant, the mother of testator. The issue was undue influence. The court held: "It has been often held by this court that it is not sufficient to authorize the trial court to submit the question of undue influence to a jury when the evidence merely establishes

that there was an opportunity to exercise such influence. It must not only be established by the evidence that there was an opportunity to exercise undue influence, but, in addition thereto, there must be testimony which shows facts and circumstances from which the jury would be authorized to infer that it was in truth exercised. * * * If establishment of opportunity to exercise undue influence should be held sufficient to authorize the court to submit that question to a jury, any person contesting the will of a husband who had left his property to his wife would always be assured of having his case submitted to the jury. A man's wife, if any one, should always be in a position to exercise influence over him. * * * It ought not to be said that it is unfair and unjust for a man to make provisions for the care and comfort of his wife above all others when he realizes that he is about to take his departure, and will no longer be able to give her the shelter and protection which he promised her at the altar."

In a will contest on the ground of undue influence, if the evidence is insufficient to sustain a verdict upon that issue in favor of the contestants, then the trial court should direct a verdict. In re Estate of Scoville, 149 Neb. 415, 31 N. W. 2d 284.

We find no evidence in this record sufficient to justify submission of the issue of undue influence to the jury. It follows that the trial court erred in not sustaining proponent's motions for a directed verdict. It follows also that the alleged errors about which contestants complain are immaterial matters.

The judgment of the trial court is affirmed.

AFFIRMED.

ALBERT E. TROWBRIDGE, APPELLEE, V. ETHEL G. BISSON ET AL., APPELLANTS.

44 N. W. 2d 810

Filed December 8, 1950. No. 32828.

1. **Homesteads.** A contract to convey the homestead of a married person is absolutely void and unenforceable unless voluntarily executed and acknowledged by both husband and wife, as required by section 40-104, R. S. Supp., 1949.
2. **Acknowledgments.** An acknowledgment is the act by which a party who has executed an instrument of conveyance as grantor goes before a competent officer or court, and declares or acknowledges the same to be his genuine and voluntary act and deed.
3. ———. If the party executing such an instrument knows that he is before an officer having authority to take acknowledgments, understands that such officer is present for the purpose of taking his acknowledgment, intends to then do whatever is necessary to make the instrument effective, and the acknowledging officer's official certificate is attached thereto, such acknowledgment, in the absence of fraud, will be conclusive in favor of those who in good faith rely upon it.
4. **Acknowledgments: Notaries.** On the other hand, a grantor in such an instrument of conveyance who never at any time appeared for the purpose of acknowledging the instrument as aforesaid is not bound in anywise by the recitals in the certificate of acknowledgment attached by a notary public.
5. ———: ———. In proceedings which involve only the rights of the parties to the transaction or other persons having notice of the facts, parol evidence is admissible to contradict the recitals of a notary certificate and show them to be false.
6. ———: ———. In that connection, however, a certificate of acknowledgment in proper form can only be impeached by clear, satisfactory, and convincing evidence that its recitals are false, and the burden is ordinarily upon the party alleging the same to so prove it.

APPEAL from the district court for Platte County: ROBERT D. FLORY, JUDGE. *Reversed and remanded with directions.*

Lightner & Johnson, for appellants.

Wagner & Wagner, for appellee.

Heard before SIMMONS, C. J., CARTER, MESSMORE,

YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

CHAPPELL, J.

Plaintiff brought this action seeking specific performance by defendants of a contract to sell their homestead. After hearing upon the merits, the trial court entered a judgment finding generally for plaintiff and ordering specific performance without any recovery of special damages. Defendants' motion for new trial was overruled, and they appealed, substantially assigning as error that the judgment for specific performance was contrary to the evidence and the law. We sustain that assignment.

Plaintiff cross-appealed, assigning that the trial court erred in refusing to enter a judgment for rent as special damages. In view of our conclusion that plaintiff was not entitled to specific performance, it follows that plaintiff's assignment in the cross-appeal has no merit, and will not be further discussed.

The primary and controlling issue is whether or not the alleged contract to sell the homestead was void and unenforceable because not acknowledged by both husband and wife, as required by section 40-104, R. S. Supp., 1949. We conclude that it was so void and unenforceable.

At the outset it should be stated that this is not a case where any innocent party in good faith relied upon a certificate of acknowledgment. Neither is it one involving the impeachment of a certificate of acknowledgment for mere irregularity in its execution or defect of wording. Rather, this is a case for trial de novo, wherein it appears from the evidence, clear, satisfactory, and convincing in character, that there was in fact no legal acknowledgment ever taken as required by law.

Section 40-104, R. S. Supp., 1949, provides that the homestead of a married person cannot be conveyed or encumbered unless the instrument by which it is done is executed and acknowledged by both husband and wife. In that connection, this court has held that a contract to convey the homestead of a married person is abso-

lutely void and unenforceable unless validly executed and acknowledged by both husband and wife. Anderson v. Schertz, 94 Neb. 390, 143 N. W. 238.

An acknowledgment has been defined as: "The act by which a party who has executed an instrument of conveyance as grantor goes before a competent officer or court, and declares or acknowledges the same as his genuine and voluntary act and deed." Black's Law Dictionary, (3d ed.), p. 31. See, also, Aultman & Taylor Co. v. Jenkins, 19 Neb. 209, 27 N. W. 117; § 76-216, R. R. S. 1943. In the light thereof, it is generally the rule that if the party executing such an instrument knows that he is before an officer having authority to take acknowledgments, understands that such officer is present for the purpose of taking his acknowledgment, intends to then do whatever is necessary to make the instrument effective, and the acknowledging officer's official certificate is attached thereto, then such acknowledgment, in the absence of fraud, will be conclusive in favor of those who in good faith rely upon it. Council Bluffs Savings Bank v. Smith, 59 Neb. 90, 80 N. W. 270, 80 Am. S. R. 669; Fisher v. Standard Investment Co., 145 Neb. 80, 15 N. W. 2d 355.

On the other hand, where the grantor has never appeared before the officer for the purpose of acknowledging the instrument as aforesaid, and it was never in fact acknowledged, a certificate of acknowledgment is not conclusive of the facts recited therein, and evidence showing its invalidity for such reason is admissible even against a bona fide holder. 1 C. J. S., Acknowledgments, § 124, p. 885; 1 C J., Acknowledgments, § 270, p. 890; Bacon v. Western Securities Co., 125 Neb. 812, 252 N. W. 317.

As stated in 1 Am. Jur., Acknowledgments, § 142, p. 376: "A grantor in an instrument of conveyance who never at any time appeared for the purpose of acknowledging the instrument is not bound in any wise by the recitals in the certificate of acknowledgment attached

by a notary public. The notary is without authority or jurisdiction to attach any certificate whatever. In such a case, the jurisdiction of the officer not having been invoked, his utterance is a nullity and his certificate has no evidentiary force whatever in favor or against anyone." See, also, Annotation, 72 A. L. R. 1302; Pereau v. Frederick, 17 Neb. 117, 22 N. W. 235.

This is particularly true in the case at bar, because, as stated in 1 Am. Jur., Acknowledgments, § 143, p. 376: "In proceedings, whether collateral or otherwise, which involve only the rights of the parties to the transaction or other persons having notice of the facts, there seems to be no good reason why parol evidence should not be admitted to contradict the recitals of a certificate and show them to be false, if such is the fact. Nor does it seem to be essential that the assailant of the certificate show fraud, mistake, collusion, or the like, although some such element in the transaction naturally and customarily constitutes the ground of attack." See, also, 1 Am. Jur., Acknowledgments, § 148, p. 377.

It is true, as held in Coe v. Talcott, 130 Neb. 32, 263 N. W. 596, and Kucaba v. Kucaba, 146 Neb. 116, 18 N. W. 2d 645, that a certificate of acknowledgment in proper form can only be impeached by clear, satisfactory, and convincing evidence that its recitals are false, and the burden is ordinarily upon the party alleging the same to so prove it, but, as heretofore stated, the evidence in this record so establishes that fact.

In the light of such applicable rules, we have examined the record. Concededly, the property involved was defendants' homestead. On April 27, 1949, defendant wife signed an unacknowledged contract listing the property for sale, exclusively for 30 days, with a real estate agent. The sale price stated therein was $11,500. Thereafter, the agent contacted plaintiff, who, on May 4, 1949, signed a uniform purchase contract offering to purchase the property for $10,300, out of which amount $300, or at least $260, was to be the agent's commission. On that

date the agent informed defendant wife of such offer, but she refused to accept or sign the contract until her husband came home in the evening. Later she called the agent and deferred any action until her daughter returned to the city. On May 6, 1949, the agent called at defendants' home with the contract, where, about 10 a. m. they signed the same and the agent delivered to them a carbon copy thereof, together with a check for $1,000, representing down payment. The agent was a notary public, but defendants were not then so informed by the agent, and they did not understand that he was present for the purpose of taking their acknowledgment. In fact, their acknowledgment was not in any sense then taken, and the certificate and official seal of the notary public were not then placed upon either the original or the carbon copy. It never was placed upon the carbon copy. The agent, as a witness for plaintiff, testified substantially that after the contract was signed, the agent picked up the papers, and as he was still in the same room defendant husband suggested that the contract "should be notarized" whereupon the agent said to him that "it didn't make any difference as far as they were concerned" but "if Trowbridge would kick on it and he wanted the notary seal put on I would put it on."

The agent then took the contract to plaintiff, who, after a conversation with his secretary, one F. H. Taylor, said "he wanted the seal on—he wanted it notarized." As stated by the agent, "Well, Trowbridge asked for it, and him and Taylor got into a huddle about it and I took the contract over and they said it wasn't no good. *Two smart guys like Trowbridge and Taylor—you couldn't get by with a contract that wasn't notarized.*" (Italics supplied.)

It was then about 11 a. m., so the agent took the agreement back to his office "saying that he would acknowledge it and return it." There, at about 1 p. m., without having ever contacted defendants again, the agent filled out the acknowledgment and put his official

seal on the original, which he delivered to plaintiff's secretary at about 2:15 p. m.

The foregoing material evidence appears generally and specifically in evidence adduced for plaintiff. However, defendant husband testified that he never made any statement of any kind to the agent about notarizing the instrument, and that nothing was ever said about it by the agent to him or anyone else, as stated by the agent. The defendant wife and defendants' daughter also testified that nothing ever was said in their presence and hearing about notarizing the instrument.

On May 25, 1949, defendant wife, 65 years old, ill and worried about losing and moving from their home, tendered back the down payment and elected to refuse to perform the agreement upon the ground that it was void and unenforceable for want of acknowledgment by both husband and wife, as required by the statute. In that connection, it should be said that there is competent evidence in the record from which a reasonable conclusion could be logically drawn that in fact the notary's official seal and acknowledgment were never placed upon the agreement until on or after May 25, 1949, although it bears the date of May 6, 1949, with a part of the word "May" written over a previous erasure. In that situation, plaintiff refused to permit defendants to rescind, and brought this action.

In the light of the evidence and applicable rules heretofore stated, this court concludes that the agreement was in fact never executed and acknowledged, as required by statute. It follows that the purported contract was void and unenforceable. Other propositions argued by counsel do not require discussion.

For the reasons heretofore stated, the judgment of the trial court should be and hereby is reversed and remanded with directions to enter a judgment in favor of defendants.

REVERSED AND REMANDED WITH DIRECTIONS.

STATE EX REL. NEBRASKA BEER WHOLESALERS ASSOCIATION, A CORPORATION, ET AL., APPELLEES, V. BLAINE YOUNG ET AL., AS MEMBERS OF THE NEBRASKA LIQUOR CONTROL COMMISSION, APPELLANTS.

44 N. W. 2d 806

Filed December 8, 1950. No. 32851.

1. **Intoxicating Liquors: Administrative Agencies.** Under sections 53-116 and 53-119, R. S. 1943, and 53-118, R. S. Supp., 1949, of the Nebraska Liquor Control Act the Nebraska Liquor Control Commission has the power to regulate all phases of the control of the manufacture, distribution, sale, and traffic in alcoholic liquors, except as otherwise specifically delegated in the act, and for that purpose may promulgate such reasonable rules and regulations as it may deem necessary to carry out the intent, purpose, and requirements of the act.
2. ———: ———. However, the commission may not adopt rules and regulations which are in conflict with the act as the power to regulate must be exercised in conformity with all the provisions of the Nebraska Liquor Control Act and in harmony with its spirit and expressed intent.
3. **Statutes.** A statute is not to be read as if open to construction as a matter of course. It is only in the case of ambiguous statutes of uncertain meaning that the rules of construction can have any application. Where the language of a statute is plain and unambiguous and its meaning clear and unmistakable there is no room for construction and the courts are not permitted to search for its meaning beyond the statute itself.
4. **Intoxicating Liquors.** Section 53-168, R. S. 1943, so far as here material, prohibits any manufacturer, distributor, or wholesaler of intoxicating liquor from giving, either directly or indirectly, money or anything of value to any retail licensee of intoxicating liquor or to the manager, representative, agent, officer, or director of such licensee.
5. ———. Likewise it prohibits such retail licensee or any officer, associate, member, representative, or agent of such licensee from accepting or receiving money or anything else of value, either directly or indirectly, from any person, partnership, or corporation engaged in such manufacturing, distributing, or wholesaling of intoxicating liquor, or from any person connected with or in any way representing, or from any member of the family of such manufacturer, distributor, or wholesaler, or from any stockholder in any corporation so engaged or from any officer, manager, agent, or representative thereof.

6. **Mandamus.** A court has no power by mandamus to control the decision of those matters which are left by statute to the discretion of the governing body of a governmental agency.
7. ———. Nor will mandamus lie to compel the repeal or revocation of the exercise of such discretion by the enactment of an ordinance or the promulgation of a rule although such ordinance or rule is not valid because not within their authority.
8. **Injunction.** Injunction to enjoin the enforcement thereof is the proper remedy.

APPEAL from the district court for Lancaster County: RALPH P. WILSON, JUDGE. *Remanded with directions to modify, and as modified, affirmed.*

Clarence S. Beck, Attorney General, and *Homer L. Kyle,* for appellants.

Max V. Beghtol and *John L. Riddell,* for appellees.

W. C. Fraser and *Jack W. Marer,* amici curiae.

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

WENKE, J.

This mandamus action was commenced in the district court for Lancaster County against the members of the Nebraska Liquor Control Commission to require them to revoke their rule No. 44 which was promulgated by them on November 3, 1949, particularly paragraphs 3 and 4 thereof. The defendants filed an answer which, among other things, admitted the allegations of fact as alleged in the petition. The cause was submitted on the pleadings. The trial court found generally in favor of the plaintiffs and ordered the defendants, as members of the Nebraska Liquor Control Commission, to rescind and revoke paragraphs 3 and 4 of said rule No. 44 and enjoined them from promulgating any rule or regulation of like nature. Defendants filed a motion for new trial and have appealed from the overruling thereof.

Appellants state that the primary question presented by this appeal is, are paragraphs 3 and 4 of rule No. 44

as promulgated by the Nebraska Liquor Control Commission in violation of the provisions of the Nebraska Liquor Control Act?

Rule No. 44, as promulgated by the commission, consists of six paragraphs but since no cross-appeal has been taken by the plaintiffs the only question presented by the appeal is the validity of paragraphs 3 and 4. These paragraphs are as follows:

"3. Consumer advertising specialties which bear advertising material of a manufacturer, distributor or wholesaler, but do not bear any advertising material of the retailer, and which are valuable primarily to the manufacturer, distributor or wholesaler as advertising media, such as ash trays, bottle or can openers, paper shopping bags, matches, printed recipes, wine lists, leaflets, blotters, calendars, post cards, license holders, pencils, desk weights, and other similar articles, may be furnished or sold to a retailer for unconditional distribution by the retailer to the general public if the retailer is not paid or credited in any manner, directly or indirectly, for such distribution service, provided, however, that any articles not specifically mentioned herein shall first be submitted to the Commission and its approval secured.

"4. Retailer advertising specialties which are primarily valuable to the retailer as point of sale advertising media, such as trays, coasters, beer mats, tap markers, thermometers, calendars, clocks, and other similar articles may be furnished or sold to a retailer if the aggregate cost to the manufacturer, distributor or wholesaler of such advertising specialties so furnished or sold to any one retailer in any one calendar year does not exceed $20.00."

Under section 53-116 and 53-119, R. S. 1943, and 53-118, R. S. Supp., 1949, of the Nebraska Liquor Control Act the commission has the power to regulate all phases of the control of the manufacture, distribution, sale, and traffic in alcoholic liquors, except as otherwise specific-

ally delegated in the act, and for that purpose may promulgate such reasonable rules and regulations as it may deem necessary to carry out the intent, purpose, and requirements of the act.

However, the commission may not adopt rules and regulations which are in conflict with the act.

As stated in Griffin v. Gass, 133 Neb. 56, 274 N. W. 193: "* * * the power to regulate must be exercised in conformity with all the provisions of the Nebraska liquor control act, and in harmony with its spirit and expressed legislative intent."

Section 53-168, R. S. 1943, provides as follows: "(1) It shall be unlawful for any person having a retailer's license to sell intoxicating liquor, or any officer, associate, member, representative or agent of such licensee to accept, receive, or borrow money, or anything else of value, or to accept or to receive credit, other than merchandising credit in the ordinary course of business for a period not to exceed thirty days, directly or indirectly, from any person, partnership or corporation engaged in the manufacturing, distributing or wholesaling of such liquor, or from any person connected with or in any way representing, or from any member of the family of such manufacturer, distributor or wholesaler, or from any stockholders in any corporation engaged in manufacturing, distributing or wholesaling of such liquor, or from any officer, manager, agent or representative of such manufacturer, distributor or wholesaler. It shall be unlawful for any manufacturer, distributor or wholesaler to give or lend money or anything of value or otherwise loan or extend credit, except such merchandising credit, directly or indirectly to any such licensee or to the manager, representative, agent, officer or director of such licensee. (2) If any recipient of a license to sell intoxicating liquors at retail or wholesale shall violate any of the provisions of subdivision (1) of this section, his license shall be suspended or revoked by the commission in the manner provided by law for

revocation or suspension for other violations of the laws of the state."

Appellants suggest several rules of statutory construction as applicable to assist us in determining the intent and meaning of the foregoing statute. However, in view of the language used by the Legislature, we think the following rule quoted in State ex rel. Sorensen v. First State Bank of Alliance, 122 Neb. 502, 240 N. W. 747, 79 A. L. R. 576, from 25 R. C. L. 957, § 213, is applicable: "'A statute is not to be read as if open to construction as a matter of course. It is only in the case of ambiguous statutes of uncertain meaning that the rules of construction can have any application. Where the language of a statute is plain and unambiguous and its meaning clear and unmistakable, there is no room for construction, and the courts are not permitted to search for its meaning beyond the statute itself.'" See 50 Am. Jur., Statutes, § 225, p. 204.

Section 53-168, R. S. 1943, so far as here material, prohibits any manufacturer, distributor, or wholesaler of intoxicating liquor from giving, either directly or indirectly, money or anything of value to any retail licensee of intoxicating liquor or to the manager, representative, agent, officer, or director of such licensee. Likewise, it prohibits such retail licensee or any officer, associate, member, representative, or agent of such licensee from accepting or receiving money or anything else of value, either directly or indirectly, from any person, partnership, or corporation engaged in such manufacturing, distributing, or wholesaling of intoxicating liquor, or from any person connected with or in any way representing, or from any member of the family of such manufacturer, distributor, or wholesaler, or from any stockholder in any corporation so engaged or from any officer, manager, agent, or representative thereof.

A study of paragraphs 3 and 4 of rule No. 44, promulgated by the commission, clearly evidences they are in conflict with the prohibitions of the foregoing

statute for the statute does not place any requirement that the value of the thing given be either great or small as long as it has value.

In this respect we have read with interest the discussion in the brief of amici curiae that paragraph 3 of rule No. 44 does not violate the foregoing because it merely provides for using the retail licensee as a distributing agent for the manufacturer, distributor, or wholesaler in distributing advertising media. Not only do we think the furnishing of these items by the manufacturer, distributor, or wholesaler to the retail licensee for distribution by him to the general public and the acceptance thereof by him for that purpose is directly in conflict with the language thereof but also that it violates the very purpose for which the statute was enacted.

It is further suggested that mandamus is not the proper remedy for the relief sought. We think that is correct.

A court has no power by mandamus to control the decision of those matters which are left by statute to the discretion of the governing body of a governmental agency. See State ex rel. Evans v. Brown, 152 Neb. 612, 41 N. W. 2d 862.

Nor will it lie to compel the repeal or revocation of the exercise of such discretion by the enactment of an ordinance or the promulgation of a rule although such ordinance or rule is not valid because not within their authority.

As stated in State ex rel. Kittel v. Bigelow, 138 Ohio St. 497, 37 N. E. 2d 41: "We know of no authority for issuing a writ, such as is sought by relator in cause No. 28852, commanding the legislative branch of government (city) to enact legislation repealing prior legislation (ordinances)."

And in State ex rel. Keville v. Faurot, 44 Ohio App. 461, 185 N. E. 59: "We know of no authority to com-

pel, by mandamus, a council or commission to repeal an ordinance because it is illegal."

"When a question has been decided by the officer or person to whose judgment or discretion the law has intrusted its determination, the writ of mandamus may not issue to review or reverse that decision or to compel another." Larsen v. Nordbye, 181 F. 2d 765.

" 'We grant it (mandamus) when that has not been done which the statute orders to be done, but not for the purpose of undoing what has been done.' (Ex parte Nash, 15 Queen's Bench 92.)" Gow v. Bingham, 57 Misc. 66, 107 N. Y. S. 1011.

Injunction to enjoin the enforcement thereof is the proper remedy. See, Griffin v. Gass, *supra;* Marsh & Marsh v. Carmichael, 136 Neb. 797, 287 N. W. 616.

By leave of court, prior to the decision of the court, the prayer of the appellees' petition was amended by adding thereto the following: "* * * that the defendants be perpetually enjoined from the enforcement of said Rule No. 44, or such parts thereof as are found invalid by the court, * * *." As to paragraphs 3 and 4 of rule No. 44, this part of the prayer should have been sustained.

Paragraph 10 of the decree is as follows: "Finds that the defendants Young and Pont have without just excuse refused and neglected to perform a duty specially enjoined by law as herein found, but further finds that under all the circumstances the court should not impose a fine upon them." In view of our holdings such a finding is improper and should be removed from the decree.

We therefore remand the cause to the district court with directions to modify its decree in accordance herewith, that is, in place of requiring the commission to rescind and revoke paragraphs 3 and 4 of rule No. 44 it should permanently enjoin the members of the commission, and each of them, from enforcing them and

remove from the decree paragraph 10 thereof. When so modified the decree is to stand affirmed.

REMANDED WITH DIRECTIONS TO MODIFY, AND AS MODIFIED, AFFIRMED.

STATE EX REL. HAROLD P. CALDWELL, RELATOR, V. VAL PETERSON ET AL., COMPRISING THE BOARD OF STATE CANVASSERS, RESPONDENTS.

45 N. W. 2d 122

Filed December 9, 1950. No. 32964.

1. **Constitutional Law.** By Article III, section 1, of the Constitution, the conditions and restrictions of the Constitution and statutes relative to the former Bicameral Legislature in the State of Nebraska, so far as they may be applicable, attach to the present Legislature of one chamber.
2. ———. The words and terms of a constitutional provision are to be interpreted and understood in their most natural and obvious meaning, unless the subject indicates or the text suggests that they have been used in a technical sense.
3. ———. Where the words of the Constitution are plain, direct, and unambiguous, no interpretation is needed to ascertain their meaning; a mere reading will suffice.
4. **Officers.** Within the contemplation of Article IV, section 1, of the Constitution the Attorney General of the state is an executive officer.
5. ———. Within the contemplation of Article IV, section 21, of the Constitution, if the office of Attorney General shall be vacated by resignation, it is the mandatory duty of the Governor to fill the same by appointment, and the appointee shall hold such office until his successor shall be elected and qualified in such manner as may be provided by law.
6. **Elections: Officers.** Article IV, section 4, of the Constitution requires the returns of every election for officers of the executive department of the state to be sealed up and transmitted by the returning officers to the Secretary of State, directed to the Speaker of the Unicameral Legislature.
7. ———: ———. The duty of a Speaker of the Unicameral Legislature, under a constitutional provision requiring him to open and publish the returns in an election for executive officers

of the state and to declare the result of such election, is an administrative duty.

8. ———: ———. Article IV, section 4, of the Constitution governs the canvass of votes and declaration of election of executive officers. Unless the declaration is made in the way so provided, the process of election is not complete.

9. **Constitutional Law.** The Legislature, the executive officers, and the judiciary cannot lawfully act beyond the limitations of the Constitution.

10. **Elections: Officers.** Section 32-928, R. S. 1943, which provides: "The board of state canvassers shall make an abstract stating the number of ballots cast for each office, the names of all the persons voted for, for what office they respectively received the votes, and the number of votes each received, in words at length, and stating whom it declares to be elected to the office, which abstract shall be signed by the canvassers in their official capacity, and as state canvassers, and have the seal of the state affixed," applies only and solely to the canvass of those votes for the offices for which the Board of State Canvassers is authorized by law to canvass, and does not apply to state executive offices.

11. ———: ———. A person elected to an executive office in this state, to fill a vacancy or otherwise, cannot qualify for such office, receive a certificate of election, and take office until Article IV, section 4, of the Constitution is complied with.

Original action in mandamus. *Writ denied.*

C. L. Clark and *Charles F. Barth,* for relator.

Clarence A. Davis, for respondents.

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

MESSMORE, J.

This is an original action in mandamus, instituted in this court by the relator Harold P. Caldwell, against the members of the Board of State Canvassers as respondents, to require them to immediately proceed to a canvass of the votes cast at the general election held November 7, 1950, the returns of which are now in the possession of the Secretary of State; that upon the conclusion of the canvass the respondents declare the relator to be

the duly elected Attorney General of the state until January 4, 1951; and that the Governor of the state as chairman of the Board of State Canvassers issue to the relator a certificate of election instanter.

The relator's application for a writ of mandamus alleges in substance the following, which is admitted by the respondents' answer: At the regular general election held in this state in November 1948, James H. Anderson was elected Attorney General. He legally qualified for the office and served as Attorney General until he resigned in March 1950. Thereafter the Governor appointed Clarence S. Beck to serve as Attorney General until January 4, 1951, or until his successor should be elected and qualified. The appointee qualified by taking the oath and filing the bond, entered upon the duties of the office, and is still serving. On June 29, 1950, Harold P. Caldwell, the relator, filed on the Democratic ticket for the nomination for office of Attorney General to fill vacancy. He was the sole candidate to file. On August 8, 1950, the primary election was held in this state. The relator received practically all the votes cast on his party ticket for "Attorney General to Fill Vacancy." Thereafter the Board of State Canvassers, the respondents herein, did issue to the relator a certificate of nomination. Subsequent thereto the Secretary of State, in instructions to the various county clerks and election commissioners, directed that they should place upon the ballot for the general election of November 7, 1950, the relator's name as a candidate for the office of "Attorney General to Fill Vacancy." The instructions were complied with. The various county clerks and election commissioners did, in the official returns submitted to the Secretary of State, show the number of votes the relator received. There were no other candidates at the general election for Attorney General to fill vacancy. On November 27, 1950, the respondents, as members of the Board of State Canvassers, did meet in the office of the Secretary of State as required by

law, and then and there did inspect the returns of the various county clerks and election commissioners, and determined that the relator received 285,131 votes for the office as designated on the ballot. The respondents herein constituting the Board of State Canvassers thereafter informed the relator, on advice of counsel, they would not issue a certificate of election to the relator for the office for which he had been a candidate, refused to canvass said votes and to declare the relator elected to any office, and refused to issue to the relator a certificate of election as Attorney General to fill vacancy. (Apparently offer was made by the relator to qualify so that certificate of election might be issued to him.)

Respondents in their answer waived the service upon them of any process and summons or alternative writ of mandamus, and consented to the immediate hearing of the said cause.

No one at any time contested the relator's filing for nomination and the placing upon the ballots of the name of the relator.

The question to be determined is as follows: Is the Board of State Canvassers vested with the legal authority to canvass the votes of officers of the executive department of the state, to declare the officers elected, and to issue to them certificates of election?

There are certain sections of the articles of the state Constitution involved in this cause. In approaching a determination of this cause it is well to have in mind certain rules of law applying to the Constitution.

"The language of the constitution is to be interpreted with reference to the established laws, usages and customs of the country at the time of its adoption, * * *." In re Hammond, 83 Neb. 636, 120 N. W. 203, 23 L. R. A. N. S. 1173. See, also, State ex rel. Central Realty & Inv. Co. v. McMullen, 119 Neb. 739, 230 N. W. 677; State ex rel. Johnson v. Chase, 147 Neb. 758, 25 N. W. 2d 1; State v. Sheldon, 78 Neb. 552, 111 N. W. 372.

The words and terms of a constitutional provision are

to be interpreted and understood in their most natural and obvious meaning, unless the subject indicates or the text suggests that they have been used in a technical sense. See, Elmen v. State Board of Equalization and Assessment, 120 Neb. 141, 231 N. W. 772; Mekota v. State Board of Equalization and Assessment, 146 Neb. 370, 19 N. W. 2d 633; State ex rel. Johnson v. Chase, *supra.*

"Where the words of the Constitution are plain, direct, and unambiguous, no interpretation is needed to ascertain their meaning; a mere reading will suffice." Mekota v. State Board of Equalization and Assessment, *supra.*

The relator raises the point that Article IV, section 4, of the state Constitution relates to the former Bicameral Legislature and for that reason is not applicable to the present Unicameral Legislature. In this connection the relator asserts that Article IV, section 4, of the state Constitution was not amended when the Unicameral Legislature was established in this state and that accordingly there is no Speaker of the House of Representatives, and no "each house" of the Legislature, so the section and article of the Constitution cannot in any event be literally followed and complied with.

By the terms of Article III, section 1, of the Constitution, the restrictions and limitations of Article IV, section 4, of the document apply with the same force and effect to legislative proceedings under the unicameral system as it would to the bicameral. The portion of the section so declaring is the following: "All authority vested by the constitution or laws of the state in the Senate, House of Representatives, or joint session thereof, in so far as applicable, shall be and hereby is vested in said Legislature of one chamber. All provisions in the constitution and laws of the state relating to the Legislature, the Senate, the House of Representatives, joint sessions of the Senate and House of Representatives, Senator, or member of the House of Representatives,

shall, in so far as said provisions are applicable, apply to and mean said Legislature of one chamber hereby created and the members thereof." See Mekota v. State Board of Equalization and Assessment, *supra.*

Article IV, section 1, of the state Constitution provides: "The executive officers of the state shall be the Governor, Lieutenant Governor, Secretary of State, Auditor of Public Accounts, Treasurer, Attorney General, * * *."

There is no dispute in this cause but that the Attorney General is an executive officer. In this connection, where we use the terms "Attorney General" and "election of and canvass of votes for such executive officer" in this opinion, we mean also "Attorney General to Fill Vacancy" as the relator's name appeared on the ballot at the last general election.

Article IV, section 21, of the Constitution provides: "If the office of * * * attorney general, * * * shall be vacated by * * * resignation, * * * it shall be the duty of the governor to fill the same by appointment, and the appointee shall hold his office until his successor shall be elected and qualified in such manner as may be provided by law."

In compliance with this section and article of the Constitution, upon the resignation of James H. Anderson as Attorney General the Governor appointed Clarence S. Beck to the office.

This brings us to the canvass of votes of officers of the executive department and the declaration of the election of such officers.

The manner or method of determining and declaring the result of an election is in the first instance dependent on, and controlled by, the terms of the organic or fundamental law. See, 29 C. J. S., Elections, § 222, p. 325; Gragg v. Dudley, 143 Okl. 281, 289 P. 254.

Article IV, section 4, of the Constitution provides: "The returns of every election for the officers of the executive department shall be sealed up and trans-

mitted by the returning officers to the Secretary of State, directed to the speaker of the House of Representatives, who shall immediately after the organization of the house, and before proceeding to other business, open and publish the same in the presence of a majority of each house of the legislature, * * *. The person having the highest number of votes for either of said offices shall be declared duly elected; * * *."

We have heretofore pointed out that the quoted section and article is applicable to the Unicameral Legislature.

The following authorities are applicable to the effect of a constitutional provision such as Article IV, section 4, of the Constitution.

"A written Constitution is not only the direct and basic expression of the sovereign will, but is the absolute rule of action and decision for all departments and offices of government with respect to all matters covered by it and must control as it is written until it shall be changed by the authority that established it. * * * the legislature, the executive officers, and the judiciary cannot lawfully act beyond the limitations of such Constitution." 11 Am. Jur., Constitutional Law, § 44, p. 651. See, also, Travelers' Ins. Co. v. Marshall, 124 Tex. 45, 76 S. W. 2d 1007, 96 A. L. R. 802; Collins v. Martin, 290 Pa. 388, 139 A. 122, 55 A. L. R. 311.

We believe the language appearing in Article IV, section 4, of the Constitution heretofore quoted is plain, direct, and unambiguous, and means exactly what it says, that is, the votes cast for executive officers of the state are not to be canvassed by the Board of State Canvassers, but are to be canvassed by the Legislature.

In connection with Article IV, section 4, of the Contitution heretofore quoted, the following sections of the statutes are pertinent and consistent with the constitutional provision.

Section 32-923, R. S. 1943, provides: "Immediately upon the completion of the canvass by the county board the county clerk shall prepare a copy of the abstract

of the votes cast for President, Vice President, United States Senator, Congressman, all state officers, regents, judges of the Supreme Court and district courts, and all questions under the constitution voted upon by the whole people, which he shall seal up and endorse 'Abstract of votes of _____ county'; and direct to the Secretary of State, who shall prepare a tabular sheet of the votes cast for such officers and measures and preserve the same with the abstract of votes *from the respective counties for the use of the Legislature in making the official canvass as required by the constitution.*" (Emphasis supplied.)

Section 32-924, R. S. 1943, provides that the Board of State Canvassers shall consist of the Governor, Secretary of State, Auditor of Public Accounts, State Treasurer, and Attorney General.

Section 32-926, R. S. 1943, provides: "The abstracts of votes to be canvassed by the board of state canvassers shall be kept in the office of the Secretary of State, and shall only be opened in the presence of such board at the time provided in section 32-927."

Section 32-927, R. S. Supp., 1949, provides: "The board of state canvassers shall meet at the office of the Secretary of State on the third Monday after the election. If all of said returns have not been received at the office of the Secretary of State, the board may adjourn from day to day until the same shall have been received."

The Board of State Canvassers met as required by this section of the statutes.

Section 32-930, R. S. 1943, provides: "The votes cast for United States Senator, Congressmen, regents, judges of the Supreme Court and district courts, all state officers, and all questions under the constitution voted upon by the whole people, shall be canvassed by the Legislature at its next regular session."

Referring again to section 32-924, R. S. 1943, this section also provides specifically that the votes cast for President and Vice President shall be canvassed by a

board of canvassers, and, such canvass of the votes for candidates for President and Vice President and the return thereof shall be a canvass and return of the votes cast for the electors of the same party or group of petitioners respectively, and the certificate of such election made by the Governor shall be in accord with such return.

It is clear that in this special instance the State Canvassing Board is granted the power to canvass the votes as stated in this section of the statutes, and the Governor is authorized to issue a certificate of election in accordance therewith. This section does not conflict with the provisions of the Constitution.

Section 32-928, R. S. 1943, provides: "The board of state canvassers shall make an abstract stating the number of ballots cast for each office, the names of all the persons voted for, for what office they respectively received the votes, and the number of votes each received, in words at length, and stating whom it declares to be elected to the office, which abstract shall be signed by the canvassers in their official capacity, and as state canvassers, and have the seal of the state affixed."

In the light of the language appearing in Article IV, section 4, of the Constitution referring to state executive officers and the canvass of the vote of such officers and the declaration of the election, it is obvious that the last-quoted section of the statutes applies only and solely to the canvass of those votes which the Board of State Canvassers is authorized by law to canvass.

In the case of State ex rel. Benton v. Elder, 31 Neb. 169, 47 N. W. 710, 10 L. R. A. 796, the relator made a formal application for a writ of mandamus to compel the Speaker of the House of Representatives to open and publish the returns of the general election held on November 4, 1890, in the presence of a majority of each house of the Legislature, before proceeding to other business. The case deals directly with the canvass of

votes of executive state officers and interpreted Article V, section 4, of the Constitution, which is in identical language as Article IV, section 4, of the present Constitution. The court held that, as provided for in the constitutional provision, it was the duty of the Speaker of the House of Representatives, immediately upon the organization of the house, and before proceeding to any other business, to open and publish the returns of election as a duty resulting from his office of Speaker, and constitutes a ministerial duty positively imposed upon him by law. These duties were to be performed at the beginning of the session so that the parties elected to state executive offices might enter upon the duties of their respective offices.

In the case of State ex rel. Oldham v. Dean, 84 Neb. 344, 121 N. W. 719, an action in the nature of a quo warranto instituted by the relator against the respondent for the purpose of testing the right of the respondent to the office of judge of the Supreme Court, insofar as necessary here, this case approved the holding in State ex rel. Benton v. Elder, *supra,* as to the interpretation of what is now Article IV, section 4, of the Constitution with reference to the canvass of votes of executive state officers and the duty of the Speaker of the House of Representatives with respect thereto.

For cases from foreign jurisdictions covering the same propositions with provisions of constitutions identical or similar and holding the same as State ex rel. Benton v. Elder, *supra,* see State ex rel. Donnell v. Osburn, 347 Mo. 469, 147 S. W. 2d 1065, 136 A. L. R. 667; Gragg v. Dudley, *supra;* State ex rel. Morris v. Bulkeley, 61 Conn. 287, 23 A. 186, 14 L. R. A. 657.

The declaration of the result of an election is an indispensable adjunct to that choice, because the declaration of the election furnishes the only authentic evidence of what the choice is for the executive offices. The courts can take judicial notice of the fact of an election, but never the result of an election until some

declaration is made. Article IV, section 4, of the Constitution governs the canvass of the votes and declaration of election of executive officers. Unless the declaration is made in the way so provided, the process of the election is not complete.

The canvass of the votes and the declaration thereof is a necessary part of the election machinery. That the Speaker has a constitutional obligation to open, publish, and declare the returns of such elections is manifest by Article IV, section 4, of the Constitution.

The reason for the canvass of votes of executive officers as provided for in Article IV, section 4, of the Constitution is clear. The principle executive officers of the state constitute the Board of State Canvassers, and the framers of the Constitution obviously thought that such officers should not be involved in a canvass of votes pertaining to offices to which they were elected or in which they had an interest. Likewise, the canvass of votes of the members of the Legislature was not left to the Legislature, but placed with the Board of State Canvassers for the same reasons, and in addition, for the reason that members of the Legislature would, by necessity, have to be qualified as provided for by law to organize the Legislature and carry into effect Article IV, section 4, of the Constitution.

The law of this state, at least since 1875, has never provided that the Board of State Canvassers canvass the votes of an election of the executive officers and declare the result thereof, or issue certificates of election to the parties elected. Likewise, the law of this state has not provided that the Legislature canvass the votes of the members of the Legislature to determine the result of the election, the declaration of election, or the issuance of certificates of election to the duly elected members of such body.

From an analysis of the authorities heretofore set forth it is obvious that a person elected to an executive office in this state cannot qualify for such office, re-

ceive a certificate of election, and take office until Article IV, section 4, of the Constitution is complied with, as heretofore stated.

The canvass of votes for executive state officers, as provided for in Article IV, section 4, of the Constitution will in all probability occur when the Legislature convenes as provided for in Article III, section 10, of the Constitution, as follows: "The Legislature shall meet in regular session at 12:00 o'clock (noon) on the first Tuesday in January in the year next ensuing the election of the members thereof." This would be Tuesday, January 2, 1951.

For reasons heretofore given, we conclude that the application for writ of mandamus as prayed for by the relator should be and is denied.

WRIT DENIED.

BERTHA SCHOMBERG, APPELLEE, V. DAVID E. KUTHER, APPELLANT.

45 N. W. 2d 129

Filed December 15, 1950. No. 32833.

1. 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.
2. ———. 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 used his own property as not to unnecessarily and negligently injure another.
3. ———. Every proprietor may lawfully improve his property by doing what is reasonably necessary for that purpose, and unless guilty of some act of negligence in the manner of its execution, will not be answerable to an adjoining proprietor, although he may thereby cause the surface water to flow on

the premises of the latter to his damage; but if, in the execution of such enterprise, he is guilty of negligence, which is the natural and proximate cause of injury to his neighbor, he is accountable therefor.

4. ———. A proprietor may not collect surface waters on his estate into a ditch or drain and discharge them in a volume on the lands of his neighbor, nor can he divert them so they go in a direction different from the natural flow.
5. ———. 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.
6. **Injunction: Waters.** 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.
7. ———: ———. Equity will afford relief by injunction against a continuing injury to land caused by an unlawful discharge of surface waters by an adjoining landowner.

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

Bernard A. Ptak, for appellant.

Wagner & Wagner, Frederick M. Deutsch, and *Daniel D. Jewell,* for appellee.

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

MESSMORE, J.

The plaintiff Bertha Schomberg brought this action in equity against the defendant David E. Kuther in the district court for Pierce County to restrain and enjoin the defendant from diverting surface water from the natural course of drainage on his land onto the land of the plaintiff; to compel the defendant to remove dikes and dams made by him, and to replace and fill in any ditches that he may have dug, all of which contributed to and caused the unlawful diversion of such water; and to recover damages alleged to have been sustained by

the plaintiff due to the negligence of the defendant in such respect. The defendant's answer denied generally the affirmative allegations of the plaintiff's petition and, in the nature of a cross-action, charged that the plaintiff, with the assistance of her father, entered upon the defendant's land and built dikes and dams and dug ditches, all of which contributed to and interfered with the natural flow of water therefrom, causing the same to flow over his land to his damage; and prayed for damages. Issues were joined and trial had to the court.

There were two decrees entered by the trial court, the first which was vacated and set aside, and the second, a final decree which was subsequently clarified. Suffice it is to say at this time that the final decree found generally in favor of the plaintiff and against the defendant, and that the allegations of the plaintiff's petition were true. Later in the opinion these decrees will be discussed as occasion requires.

Upon the overruling of the defendant's motion for new trial, the defendant perfected appeal to this court.

For convenience we will refer to the parties as originally designated in the district court.

The plaintiff purchased the northwest quarter and the east half of the southwest quarter of Section 25, Township 26 North, Range 4 West of the 6th P. M., in Pierce County from E. A. Lambrecht December 1, 1936. She resides on this land with her father, brother, and husband. The plaintiff's buildings are located in the southeast corner of the northwest quarter of Section 25. The southeast quarter of the above-described section is owned by the defendant. He has lived on it for 48 years. Previous to defendant acquiring title to this land it was owned by his father who lived on it for 68 years. Immediately north of the defendant's land on the northeast quarter of Section 25 is what is known as the Strasheim land.

In 1912, E. A. Lambrecht's mother, then the owner of the land now owned by the plaintiff, opened a road

along the east side of her property line to the section line south, to meet the county road which runs east to Pierce and is a mail route. At the time this road was opened it was level with the land both to the east and west of it. This road is an ordinary driveway about 20 feet wide. It is flat with no ditches on either side of it, and there is nothing to indicate that there had ever been a ditch through this part of plaintiff's land before the road was made. By usage and erosion this road has been cut down so that it is below the natural ground on either side of it. At the south end of the road the soil is heavy black muck. The defendant testified that the soil at the north end of the roadway for a distance of about 80 rods was a mixture of sand and black loam, and in the south 80 rods was black muck; that the road was graded its full length; and that the north thousand feet or more of the road was immediately west of his field and was lower than his field for not quite 80 rods. Two years previous to this trial the road to the south section line had been graded on two occasions.

The road north of the center of the section swings west from that point and northwest among the plaintiff's buildings to the north section line. It is an ordinary field road.

The surface waters involved in this proceeding originate on 50 to 60 acres of the Strasheim land in the southwest corner of the northeast quarter and 10 acres above the building site on the northwest quarter of the plaintiff's land. The water from the 10 acres on the plaintiff's land flows to the east where it meets some of the water from the 50 to 60 acre watershed on the Strasheim land and flows in the natural draw south onto the defendant's land. There is a natural ditch or draw on the Strasheim land that runs in a southwesterly direction close to the west fence boundary line on said land, south onto the defendant's land a rod or two east of the center of the section, then south and southeast on the defendant's

land. There is another draw on the Strasheim land running generally in a southwesterly direction, and also a draw running in a westerly direction, all converging and draining surface water onto the land of the defendant. The plaintiff's engineer states that the natural draw is 35 to 37 feet east of the center of the section. There is a natural ditch or swale that runs south and southeast on the defendant's land that carries the surface water from the north. This swale or draw is a short distance east of the man-made ditch which we will refer to later, and runs in a southeasterly direction where the water fans out onto the low land of the defendant in the south part of the section.

The defendant's testimony with reference to the natural drainage of the surface water from the northeast quarter and 10 acres on the northwest quarter is to the effect that when this water came from the north, just north of the east-west fence dividing the Strasheim land from his property, the water would proceed west under the west fence line onto the plaintiff's property and south down the plaintiff's roadway, and that the natural ditch about 6 or 8 feet east of the man-made ditch on his property carried the water that drained southwest from the northeast quarter, but was distinct and separate from the natural draw coming down from the north on the Strasheim land close to the west fence line of said land.

Along the north property line of the defendant extending east and west there is a row of boxelder trees located on the Strasheim land about 3 feet north of the fence line. The testimony of E. A. Lambrecht is to the effect that while he lived on the land which is now owned by the plaintiff, the defendant's father dug a ditch and constructed a dike east and west in the line of the boxelder trees, and filled in between the trees and the fence line with brush and dirt. This ditch and dike caused the water that would otherwise flow south from the Strasheim land onto the defendant's

land to be diverted west to the center of the section and onto the Lambrecht land. The Lambrechts filled in this ditch at their property line as often as this kind of construction occurred.

The plaintiff's testimony and that of her witnesses with reference to the drainage of surface water at the time she purchased the land is that the ditch on the northeast quarter, or the Strasheim land, came into the defendant's land just west of a large boxelder tree located 10 to 20 feet east of the center of the section, went east and south, and southeast about one-third of the way across the defendant's farm land, then flattened out. No water came onto her land from the Strasheim land. There is also evidence that during the time the plaintiff has resided on her land the defendant, with the assistance of his family, filled in with brush and dirt between the north fence line of the defendant's property and the boxelder trees, for the purpose of diverting the water that would flow south from the Strasheim land onto the defendant's land to the west near the center of the section.

An engineer's testimony with reference to the natural drainage at the points before mentioned is substantially in accord with the testimony of the various witnesses. He testified that any water north of the plaintiff's building site proceeds east to the natural ditch of a depth of approximately 2 feet below the natural ground on the Strasheim land which comes down from the Strasheim land about 300 feet east of the west property line of that land, and comes out at the southwest corner of the land. This water follows the swale down to that corner and the northwest corner of the defendant's land. The depression or low spot is about 35 to 37 feet east of the center of the section or fence corner, and that is where the east and west dike is in the fence line. The testimony was that prior to the construction of this ditch and dike the water from the northwest corner

of defendant's land went south and southeast over his land.

Testimony adduced in behalf of the defendant is that when Lambrecht closed the drainageway north of the center of the section several years ago the water that came onto the defendant's land formed a ditch 2 feet wide and 1½ feet deep which ran south along his west fence line. In 1939, with the use of a maintainer, the defendant made this ditch wider and deeper and extended it south as close to the west fence line of his property as possible a distance of 876 feet to what is called the "north cross-fence." This ditch was about 3 feet deep. The purpose of this man-made ditch was to take the water, which the defendant claimed had been diverted by Lambrecht, that comes from the Strasheim ditch and passes under the defendant's north line fence just west of the boxelder tree heretofore described. No other water goes into that ditch because there is a natural ditch a short distance to the east of the man-made ditch.

The plaintiff and her witnesses testified that the man-made ditch was constructed in 1940, and at that time it extended south from the center of the section along the property line between the plaintiff and defendant a distance of a little more than 1,000 feet. In the fall of 1941, the defendant extended the ditch 300 feet farther south. In the construction of the man-made ditch the defendant pushed the dirt from the ditch to the east side thereof, and put brush on top of this dirt the full length of the ditch.

The testimony of the plaintiff's engineer is that the man-made ditch extends from the center of the section south, parallel with the defendant's west property line, and there is a dike along the east side of the ditch constructed of brush, tree limbs, and junk. The approximate height of the dike above the natural ground immediately east of it varies from 18 inches to 2 feet. The ground immediately west of the fence line is a foot lower

than the dike and slightly higher than the ground east of the dike. The bottom of the ditch is about 2 feet lower than the natural ground on the west side of the ditch. The dike along the east side of the ditch is about 3 feet higher than the land along the west side of the ditch.

Commencing about the center of the section and running not quite halfway to the south side of the section are a number of ash and large cottonwood trees and brush growing along the fence line which divides the plaintiff's and defendant's land. To the east of the trees the defendant's land is cultivated. At the approximate south end of the trees and to the east thereof the defendant's land is pasture and hay meadow. The south cross-fence which is 178 feet south of the north cross-fence is along the north side of the defendant's meadow, and north of the meadow is a pasture which is between the farm land and the meadow.

The defendant's testimony is that two or three years before the man-made ditch was constructed a large cottonwood tree fell across east on his land, between the north cross-fence and the south cross-fence. The man-made ditch ended north of the fallen cottonwood tree. This cottonwood tree was 26 feet in length and 2 feet in diameter. The plaintiff's testimony is to the effect that the cottonwood tree fell across onto the defendant's land in 1943, and the defendant, by the use of dirt, tree branches, and limbs, created a dam which blocks the water coming from the north of this dam. The defendant testified that the log of the cottonwood tree was crooked, and there was considerable space under it. He cut off the top of the tree and placed some limbs loosely along the west side between the log and the fence.

The plaintiff's engineer testified that about 50 feet below the cottonwood dam the defendant constructed a dirt and brush dam in the shape of a horseshoe which connected with the cottonwood dam. There is a sand

deposit on the plaintiff's driveway which starts about 50 feet north of the cottonwood tree dam. There is a sand deposit on the defendant's land which is much longer, and extends from the cottonwood dam southeast into his pasture. The man-made ditch had a rapid run-off and a high grade, and there was nothing to hold the water back from the north until it reached the log dam.

The plaintiff's testimony is that due to the manner in which the man-made ditch was dug and the dike and dams were constructed, and due to the elevation of the ground in that vicinity, when it rained or when snow melted the water that came down the man-made ditch ran across the property line between the plaintiff and defendant onto the plaintiff's roadway 50 feet north of the cottonwood log and south on the plaintiff's road for 20 or 30 rods, washing dirt from the roots of trees and depositing sand and silt on the plaintiff's driveway and making it impassable. This caused the plaintiff to use the driveway to the north section line, and if that was impassable, to stay at home, and on occasions to use a horse to get to the mailbox on the south section line. There is also evidence that the defendant dug a trench under the hogtight fence approximately 50 feet below the log dam which permitted the water to flow onto the plaintiff's land at that point. This the defendant denies. Further testimony of the plaintiff is that the water that would go under or around the cottonwood dam would also flow onto her land because of the horseshoe dam.

The trial court viewed the premises.

The court, on April 16, 1948, entered a decree directing and ordering the defendant to remove the dam at the mouth of the man-made ditch, the cottonwood tree trunk across the ditch, and the dike along the east edge of the ditch, and to close up the openings cut under or through the division line fence between the respective lands of these litigants; to clean out the lower end of

the ditch, and to allow henceforth the surface waters discharged through the said ditch to proceed and seek their natural drainage; and that the defendant be perpetually enjoined from raising the east bank of the dike of the man-made ditch above the west bank or dike, and from in any manner diverting the water from the man-made ditch onto the land of the plaintiff to the west thereof, or in any way obstructing or interfering with the flow of the water through the ditch, and thence in its natural course of drainage. After the entry of this decree the defendant filed a report to the effect that he had strictly complied with the terms of the decree. Shortly thereafter the plaintiff filed an affidavit in indirect proceedings to compel the defendant to show cause why he should not be cited for contempt of court. The basis of the plaintiff's claim was that the defendant failed to abide by the terms of the decree in not lowering the grade on the east side of the man-made ditch to the elevation and grade of the surrounding area, and wholly failed to clean out the lower end of the ditch.

Hearing was had to the court. The testimony in behalf of the plaintiff was that the defendant scraped the dirt out of the man-made ditch and leveled dirt from the east dike, pushing such dirt into the natural ditch to the east of the man-made ditch. In addition, the defendant failed to farm an area 50 to 100 feet along the entire length of the man-made ditch on the east side thereof, and had not been cultivating that land except that some sudan grass had been planted in that area, but generally weeds were permitted to grow to a height in some instances of 6 feet. This caused the accumulation of silt and other debris and retarded the surface water that would normally flow to the south and southeast over the defendant's land, and caused it to flow west onto the plaintiff's land in greater quantity than before. The evidence of the defendant's witnesses was to the effect that he had substantially complied with

the court's original decree of April 16, 1948.

It appears from the cross-examination of the plaintiff's witnesses that after the log dam had been removed, the water went across the plaintiff's land south of that point, and none of it above, although there is testimony on the part of the plaintiff's engineer that water would come across from the defendant's land above where the cottonwood log dam had been, and also below it.

The defendant was discharged from the citation for contempt.

On December 3, 1949, the trial court set aside the decree of April 16, 1948, for the reason that this decree was not sufficiently clear as became apparent to the court upon the petition of the plaintiff in endeavoring to enforce the mandatory injunction against the defendant under said decree. The court found generally in favor of the plaintiff and against the defendant, that the allegations of the plaintiff's petition were true, and plaintiff was awarded damages in the amount of one dollar. The court then made a finding setting forth a plan and solution of the problem for the best interests of the parties, and the plan was subject to acceptance of the parties, especially the defendant. The decree provided that in the event the interested parties voluntarily accepted the plan the district court would retain jurisdiction for the purpose of enforcing the agreement. There was nothing compulsory or coercive in this portion of the decree. The defendant and his wife did avoid its effect by the simple expedient of not accepting it.

The decree of December 3, 1949, by a decree entered December 29, 1949, was amended by the trial court in the following respect: " 'In the event that the defendant, David Kuther fails to consent as aforesaid (in conformity with the findings in the decree of December 3, 1949), then it is adjudged and decreed that he be permanently enjoined from further use of the "man-made ditch" referred to in the findings of April 16, 1948, and

from using tree trunks, brush or dikes in any manner diverting the natural drainage of waters upon his premises in any manner that will cause unnecessary damage to the plaintiff, and that the defendant David Kuther be required to completely remove the east bank of said ditch and all embankments on his premises east thereof which would divert flow into the present ditch, and that the excavated portion of said ditch be filled and kept at the level of the adjoining ground in such manner that waters will not be diverted into the present channels of said man-made ditch and will be perpetually allowed to drain across his premises in their natural manner.'" It was further decreed that the findings of April 16, 1948, be adopted by reference, and that the record show that the decree of December 3, 1949, was entered pursuant thereto.

The defendant assigns as error that the decree of the trial court is not sustained by sufficient evidence. This contention is based on the testimony of the plaintiff and some of her witnesses in the contempt proceedings, that after the decree of April 16, 1948, was entered and complied with by the defendant, no water flowed from the defendant's land onto the plaintiff's land north of the place where the log dam was constructed, but that water did cross over onto the plaintiff's land about 20 rods south of that point. Further, this evidence corroborates that of the defendant's engineer to the effect that had the cottonwood tree been promptly removed, the plaintiff would have received all of the excess water from the man-made ditch and other drainage water from the natural draw east of the man-made ditch for the reason that the defendant's land south of the south end of the man-made ditch slopes southwesterly and the surface water from the defendant's land at a distance of 1,054 feet south of the center of the section flows in a southwesterly direction, and due to the terrain this water by natural force of gravity would flow southwest onto the plaintiff's driveway.

The trial court found that south of the cottonwood trees on the half section line between the plaintiff's and defendant's lands, there is some drainage from the defendant's land to the plaintiff's land, but none from the plaintiff's land to the defendant's land.

The defendant contends that the decree of the trial court is contrary to law. Among the reasons given are the following: That the surface water from the Strasheim land naturally flows onto the defendant's land near the northwest corner thereof and has created a ditch or channel as it flows under the divison fence line upon defendant's land which the trial court, by the decree, requires the defendant to keep filled. Further, the defendant contends that the decree requires that the water be perpetually allowed to drain across the defendant's premises in its natural course which is contrary to law for the reason that the defendant does not have to accept any water coming off the Strasheim quarter. He may legally put a dike across his north property line and refuse to accept any of the surface water flowing south from the Strasheim quarter section. Thus the decree prevents the defendant from doing what he has a legal right to do.

Applicable here is the following: "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. But in a case wherein the 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 reconciled, 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." Probert v. Grint, 148 Neb. 666, 28 N. W. 2d 548.

"The trial court is required to consider any compe-

tent 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.

The defendant relies on the following rule of law: "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." Skolil v. Kokes, 151 Neb. 392, 37 N. W. 2d 616. See, also, Robinson v. Central Neb. Public Power & Irrigation District, 146 Neb. 534, 20 N. W. 2d 509; 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, 72 Neb. 207, 100 N. W. 299, 66 L. R. A. 561.

"Every proprietor may lawfully improve his property by doing what is reasonably necessary for that purpose, and unless guilty of some act of negligence in the manner of its execution will not be answerable to an adjoining proprietor, although he may thereby cause the surface water to flow onto the premises of the latter to his damage." Anheuser-Busch Brewing Assn. v. Peterson, 41 Neb. 897, 60 N. W. 373. See, also, City of Beatrice v. Leary, 45 Neb. 149, 63 N. W. 370, 50 Am. S. R. 546.

However, the foregoing rule is a general one and subject to another common-law rule that a proprietor must so use his own property as not to unnecessarily and negligently injure his neighbor. See, Lincoln & B. H. R. R. Co. v. Sutherland, 44 Neb. 526, 62 N. W. 859; Snyder v. Platte Valley Public Power & Irrigation District, 144

Neb. 308, 13 N. W. 2d 160, 160 A. L. R. 1154.

"A proprietor may not collect surface waters on his estate into a ditch or drain and discharge them in a volume on the lands of his neighbor, nor can he divert them so they go in a direction different from the natural flow." Hengelfelt v. Ehrmann, 141 Neb. 322, 3 N. W. 2d 576. See, also, Pint v. Hahn, 152 Neb. 127, 40 N. W. 2d 328; Todd v. York County, *supra.*

This case involves surface water, defined as follows: "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, * * *." Jack v. Teegarden, 151 Neb. 309, 37 N. W. 2d 387.

It is apparent from the evidence that the surface water here involved did flow in a well-defined course in a ditch from the Strasheim land south under the division line fence between that land and the defendant's land as heretofore described, thence south in a southeasterly direction in a ditch east of the man-made ditch, where this water subsequently fanned out over the low bottom land of the defendant, thence south across the section line into the Willow Creek valley, which is about one-quarter of a mile south of the south line of Section 25.

"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. See, also, Seibold v. Whipple, 143 Neb. 167, 9 N. W. 2d 154.

We conclude the defendant collected the surface waters on his estate into the man-made ditch in such a manner as to discharge them in volume onto the lands of the plaintiff, and by his actions and negligence he diverted the surface waters so that they would flow in a direction

different than the natural flow. See, Hengelfelt v. Ehrmann, *supra;* Pint v. Hahn, *supra.*

"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 magnitude of the damage inflicted, as the ground of affording relief." Skolil v. Kokes, *supra.*

"Equity will afford relief by injunction against a continuing injury to land caused by an unlawful discharge of * * * surface waters by an adjoining landowner." Pint v. Hahn, *supra.* See, also, Jack v. Teegarden, *supra;* Seibold v. Whipple, *supra.*

In view of our holding, we deem other assignments of error need not be discussed.

For the reasons given in this opinion, the decree of the district court is affirmed.

AFFIRMED.

EDWIN J. OHM ET AL., APPELLEES, V. CLEAR CREEK DRAINAGE DISTRICT, APPELLANT.
45 N. W. 2d 117

Filed December 15, 1950. No. 32849.

1. **Estates.** An estate in fee simple determinable is created by any limitation which, in an otherwise effective conveyance of land, creates an estate in fee simple and provides that the estate shall automatically expire upon the occurrence of a stated event.
2. ———. An estate in fee simple subject to a condition subsequent is created by any limitation which, in an otherwise effective conveyance of land, creates an estate in fee simple and provides that upon the occurrence of a stated event the conveyor or his successor in interest shall have the power to terminate the estate so created.
3. ———. The holder of a fee, defeasible upon condition subsequent, has all the rights in respect to it of a fee simple owner until the happening of the condition and divestment by re-entry of the grantor or his successor for breach of the condition.

4. **Waters.** An owner of land on the shore of an unnavigable river, in the absence of restrictions in his grant, owns to the thread of the stream and subsequent accretions formed by the gradual recession of the bank of the stream attach to and become a part of the grant.
5. **Adverse Possession.** A person claiming title by adverse possession must, to establish it, prove open, notorious, exclusive, continuous, and adverse possession of the real estate for the full period of ten years.
6. ———. In order to create title by adverse possession, the possession, in addition to other elements, must be exclusive for the period of limitations.
7. ———. One claiming ownership of real estate by adverse possession must recover upon the strength of his title and not because of a possible weakness in the title of his adversary.

APPEAL from the district court for Saunders County: HARRY D. LANDIS, JUDGE. *Reversed and remanded with directions.*

Myrl D. Edstrom and *Ralph D. Nelson,* for appellant.

Clyde R. Worrall and *H. A. Bryant,* for appellees.

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

BOSLAUGH, J.

This is a suit to quiet title to land in appellees. They and Clear Creek Drainage District, appellant, are the contesting parties.

The real estate, consisting partly of accretion land, is an irregular tract in Sections 17, 18, and 20, Township 14 North, Range 10 East of the 6th P. M., in Saunders County, described in detail in the petition and decree, and the unusually long description of it need not be repeated herein. Appellees claim to have acquired title thereto by adverse possession of more than ten years and by chain of title from John Peters and Lena Peters, husband and wife, who were once the owners of it in fee. Appellant asserts it is the owner of the real estate by purchase and conveyance to it by general warranty deed for a valuable consideration. The district court found

for appellees and by decree quieted the title to the premises in them. There is no irreconcilable conflict in the evidence. The appeal by appellant requires a determination of the case de novo without regard to the findings and decree of the district court.

The foundation of the claim of appellant that it is owner of the land affected by these proceedings is the warranty deed to it from John Peters and Lena Peters, husband and wife, who were the owners in fee simple of the land at the time of the execution and delivery of the deed. It contains the condition that the real estate conveyed is "to be used for ditching, diking and drainage purposes, and if abondoned or not used for that purpose to revert to" the grantors, their heirs and assigns. The habendum clause is without restriction, the warranties are unlimited, and the grantors "relinquish all right of homestead or other right, title or interest in and to the" premises. The position of appellees until after the trial and submission of the case in district court was that appellant claimed some title to and interest in the land, the facts concerning which were unknown to them. After the case was submitted in the district court, but before a decree was rendered, appellees obtained leave to amend and amended their petition and alleged that because of the "conditions, reservations and description" contained in the deed the district "acquired an easement only" to the real estate described in and conveyed by the deed. They have abandoned each of the positions taken by them in the district court as to the character of the estate conveyed by the deed, and now make the contention for the first time that the deed of Peters to the district "created a fee simple determinable." This contention is without foundation.

Restatement, Property, § 44, p. 121, states: "An estate in fee simple determinable is created by any limitation which, in an otherwise effective conveyance of land, (a) creates an estate in fee simple; and (b) provides

that the estate shall automatically expire upon the occurrence of a stated event." The comment is: "The existence of an estate in fee simple determinable requires the presence of a special limitation." Section 23, p. 55, defines special limitation: "The term 'special limitation' denotes that part of the language of a conveyance which causes the created interest automatically to expire upon the occurrence of a stated event, and thus provides for a terminability in addition to that normally characteristic of such interest." This is followed by an illustration: "A, owning Blackacre in fee simple absolute, transfers Blackacre 'to B and his heirs so long as the town of C remains unincorporated.' In the broad and usual meaning of the word 'limitation,' as used in this Restatement, the entire quoted phrase is a 'limitation.' The part of the quoted phrase beginning 'so long as' is a 'special limitation.'" See Univ. of Vt. and State Agri. College v. Ward, 104 Vt. 239, 158 A. 773.

Restatement, Property, § 45, p. 133, defines fee simple subject to a condition subsequent in this way: "An estate in fee simple subject to a condition subsequent is created by any limitation which, in an otherwise effective conveyance of land, (a) creates an estate in fee simple; and (b) provides that upon the occurrence of a stated event the conveyor or his successor in interest shall have the power to terminate the estate so created." Section 24, p. 59, defines condition subsequent: "The term 'condition subsequent' denotes that part of the language of a conveyance, by virtue of which upon the occurrence of a stated event the conveyor, or his successor in interest, has the power to terminate the interest which has been created subject to the condition subsequent, but which will continue until this power is exercised." The comment following this section states: "Whenever an estate subject to a condition subsequent is created, some person has the power to terminate this estate upon the occurrence of the stipulated event. Thus such an estate does not end automatically and by ex-

piration as does an estate subject to a special limitation. On the contrary, it is cut short, or divested, if, but only if, the person having the power chooses to exercise it."

A deed which conveys an estate in fee simple, but provides the grantor or his successor has power to terminate this estate, upon the happening of some event or condition, creates an estate in fee simple subject to a condition subsequent. Brooks v. Kimball County, 127 Neb. 645, 256 N. W. 501; Dyer v. Siano, 298 Mass. 537, 11 N. E. 2d 451; Halvorsen v. Pacific County, 22 Wash. 2d 532, 156 P. 2d 907, 158 A. L. R. 555; Northwestern University v. Wesley Hospital, 290 Ill. 205, 125 N. E. 13; Univ. of Vt. and State Agri. College v. Ward, *supra;* Dolby v. State Highway Commissioner, 283 Mich. 609, 278 N. W. 694, 117 A. L. R. 538; 26 C. J. S., Deeds, § 110, p. 400. The deed to the district created and conveyed to it an estate in fee subject to a condition subsequent.

The deed vested in the district all the rights of a fee simple owner of real estate until it ceases to use the land for the purposes specified and divestment of its estate by re-entry. Until such termination it has the same rights and powers in connection with the estate conveyed by the deed as if the condition did not exist. Restatement, Property, § 45, p. 133, comment a, says: "* * * When a transferor, having an estate in fee simple absolute transfers an estate in fee simple subject to a condition subsequent, the transferee is regarded as having received the entire estate of the transferor, who, by virtue of his reserved power of termination has the power to regain his former estate, if and when there is a breach of the condition subsequent." See, also, Halvorsen v. Pacific County, *supra;* Univ. of Vt. and State Agri. College v. Ward, *supra;* Union Colony v. Gallie, 104 Colo. 46, 88 P. 2d 120; 26 C. J. S., Deeds, § 147, p. 482. In any event, if appellees are to prevail in the litigation it must be upon the strength of their title to the land and not by any weakness in the title of appellant. Garner v. McCrea, 147 Neb. 541, 23 N. W. 2d 731.

The description in the deed to appellant is by metes and bounds and contains the following: "thence east on said line to the west bank of the Platte River, thance northwesterly along the west bank of said Platte River to a point where the west bank of the said Platte River intersects the north line of the Southeast Quarter of the Northeast Quarter of said Section Eighteen (18)," and "being a strip of land along the west bank of said Platte River, thirteen (13), feet west and parallel to the center line of the top of the said levee or embankment, and east from the center line of the top of said levee or embankment to the west bank of the Platte River, and extending through the real estate above described containing Twenty-two and three hundredths (22.03) Acres, * * *." Appellees contend that the premises conveyed extended only to the west bank of the river and that the deed did not convey to the thread of the stream of the Platte River and conveyed no part of the bed of the river. Where the bank of a nonnavigable river is mentioned as one of the boundaries of real estate conveyed by deed, the grant extends to the thread of the stream and accretions to the bank of the river attach to and become a part of the land conveyed. In Topping v. Cohn, 71 Neb. 559, 99 N. W. 372, this court said: "Where, at the time of a grant from the United States, the bank of a river formed a part of the boundary of the grant, subsequent accretions formed by the gradual recession of such bank attached to and became a part of the grant." In Haney v. Hewitt, 105 Neb. 746, 181 N. W. 861, it is said: "An owner of land on the shore of an unnavigable river, in the absence of restrictions in his grant, owns to the thread of the stream, and his riparian rights extend to existing and subsequently formed islands." See, also, Mulhall v. State, 140 Neb. 341, 299 N. W. 481; State v. Ecklund, 147 Neb. 508, 23 N. W. 2d 782; McBride v. Whitaker, 65 Neb. 137, 90 N. W. 966, 197 U. S. 510, 49 L. Ed. 857, 25 S. Ct. 530.

Clear Creek Drainage District, appellant, organized

to protect land in Saunders County and authorized to purchase such real estate as it reasonably required (§ 31-401 et seq., R. S. 1943), constructed a dike or embankment 10 to 15 feet high to prevent overflow of the Platte River from flooding the area of the district. A part of the dike extends through portions of Sections 17, 18, and 20, Township 14 North, Range 10 East of the 6th P. M., in Saunders County. The district purchased and there was conveyed to it by the fee simple owners thereof by general warranty deed, a part of the three sections described as a tract of land along the west bank of the Platte River from 13 feet west of and parallel to the center line of the top of the dike as located on the three sections and extending east to the west bank of the river. The dike was built before 1912 and has since been maintained. The stream of the river the entire distance across the land was "right close to the dike" from 1912 to 1919. Numerous jetties were constructed in the river opposite the land of the district—a new one about every year. It was necessary to have and extend jetties along the bank into the river to widen the area between the dike and the river and reduce the hazard to the dike. As land was formed by them they were covered up and they were again extended out in the water. Some have been extended three or four times to a total length of about 700 feet. Work of this nature was done in 1948. A part of the dike was sanded about 1940 by floating a boat down the river that had a pump on it that took sand from the bottom of the river and threw it against the bank. That is the way it was built up. The dike was inspected at least once a year. In 1946 after an inspection thereof, appellant requested appellees to repair the paths across the dike worn therein by their cattle passing over it and to keep the dike free from them, and appellees agreed to do so.

The area deeded to the district was fenced. A part of the fence along the west thereof was removed about the year 1933 as the result of an arrangement between

the owner of the pasture land west of a part of the land of the district and members of the board of the district. They thought it would be beneficial to permit stock to graze on and around the dike; that it would make it firmer. It was because of this that they consented to the removal of the fence and permitted stock of the adjoining proprietor to have access to and be upon the land of the district.

The owner of the land west of that of the district made no adverse claim to any of its real estate. He sold his land and deeded it to one of the appellees and he took possession in December 1935. He deeded a half interest therein to his brother in 1946 and he occupied the land commencing in 1947. The stock in their pasture wandered on and over the dike and land of the district. "* * * we have got a pasture on the west side of the dike and we run them in there, and then they can go over the dike to the other side any place they wish." There was no fence between it and the pasture land of appellees. They repaired the fences more or less which were necessary to retain the stock. They gave their consent to the construction of a cabin 14 x 14 feet on a part of Section 17, about half way between the dike and the river on land of the district, and collected $25.00 a year from the owner for three or four years, and after it was sold to Omaha parties appellees collected $50.00 a year for two or three years. Appellees collected some amounts from persons who wanted to hunt and fish. They gave evidence that the money they collected was for the privilege of going over their land to get to the river, but later they said: "We figured part of that for our trouble, and things of that sort" and part "for the right to hunt and fish on the river." They cut a small amount of wood for fuel in 1946 and 1947, but gave no details.

There is some mention by appellees of a written lease made by them in 1947 and recorded in the real estate records of the county, but it was not placed in

evidence and it is not shown that it is material or important to this controversy. It was not the intention of the appellees to claim any land owned by the district. Appellees intended to claim only what they thought was theirs. They knew the district had maintained and repaired the dike and jetties, but they did not know it owned any real estate until they looked up the record in 1947. They did not object to, attempt to interfere with, or prevent anything the district did on the land of which it was the record owner, or in or along the river adjacent thereto.

A person claiming title by adverse possession must, to establish it, prove open, notorious, exclusive, continuous, and adverse possession of the real estate for the full period of ten years. In Curren v. Certain Parcel of Land, 149 Neb. 477, 31 N. W. 2d 405, it is said: "To secure a title by adverse possession, the plaintiff must prove open, notorious, exclusive, continuous, and adverse possession of the real estate for the full period of ten years." See, also, Foltz v. Brakhage, 151 Neb. 216, 36 N. W. 2d 768; Garner v. McCrea, *supra.*

It is virtually undenied by any authority, and is asserted by a great majority of cases, that an essential element of adverse possession is that it shall be exclusive. In Hanlon v. Union P. Ry. Co., 40 Neb. 52, 58 N. W. 590, this is affirmed: "In order to create title by adverse possession, the possession, in addition to other elements, must be exclusive for the period of limitations." In Smith v. Hitchcock, 38 Neb. 104, 56 N. W. 791, this court said: "To constitute an adverse possession of land, such as, if it continued for ten years, would establish title in the occupant, it is necessary that he should actually hold the land as his own during that period, in opposition to the constructive possession of the legal proprietor." See, also, Hoffine v. Ewings, 60 Neb. 729, 84 N. W. 93; Knight v. Denman, 64 Neb. 814, 90 N. W. 863; Annotation, 15 L. R. A. N. S. 1196; 2 C. J. S., Ad-

verse Possession, § 47, p. 566; 1 Am Jur., Adverse Possession, § 141, p. 875.

The evidence does not show that the possession of appellant of the real estate, the subject of this action, has been questioned, interfered with, or interrupted. Appellees have no paper title thereto and the record establishes that they have not had exclusive possession thereof. They have not acquired title by adverse possession.

The decree of the district court should be, and is reversed, and the district court should be and is directed to enter a decree quieting title to the whole of the premises involved herein in appellant.

REVERSED AND REMANDED WITH DIRECTIONS.

J. RICHARD MANNERS ET AL., APPELLANTS, V. CITY OF WAHOO, A CORPORATION, APPELLEE, CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, A CORPORATION, INTERVENER AND APPELLEE.

45 N. W. 2d 113

Filed December 15, 1950. No. 32854.

1. **Municipal Corporations.** Powers conferred upon municipal boards by legislative charter will not be extended beyond the plain import of the language used therein.
2. ———. Statutes empowering municipal boards to perform certain functions will be strictly construed, and all doubt will be resolved against the exercise of the power rather than in favor of it.
3. ———. Under the law of this state, a city council cannot, by enactment of an ordinance, extend its powers beyond the limits prescribed in its charter.
4. ———. The method prescribed by section 17-512, R. S. 1943, granting to cities of the second class and villages power to pave or otherwise improve their streets, is mandatory and jurisdictional, and unless the governing boards of such municipalities act within the prescribed limitations thereof, they have no power and authority to act thereunder.

APPEAL from the district court for Saunders County:

HARRY D. LANDIS, JUDGE. *Reversed and remanded with directions.*

H. A. Bryant, for appellants.

Joseph L. Pallat and *William T. Gleeson,* for appellee.

Myrl D. Edstrom, J. W. Weingarten, and *W. P. Loomis,* for intervener and appellee.

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

CHAPPELL, J.

Plaintiffs, as residents and owners of abutting or adjacent real property in Wahoo, a city of the second class, brought this action to enjoin the city from letting contract for and levying special assessments to pay the cost of paving certain streets therein pursuant to ordinance No. 585, purportedly enacted under authority of section 17-512, R. S. 1943. By leave of court, the Chicago, Burlington, and Quincy Railroad Company, also owner of property affected, intervened, seeking similar relief. After hearing upon the merits, the trial court entered its decree finding and adjudging the issues generally in favor of defendant and against plaintiffs and intervener. Motions for new trial were overruled, and plaintiffs appealed, assigning substantially that the judgment was not sustained by the evidence but contrary thereto, and contrary to law. We sustain the assignment.

The right of plaintiffs to maintain the action and the legal formalities in enacting the ordinance are not questioned. The sole question is not one of expediency but rather whether or not, under the facts and circumstances, the city had any power and authority to create paving districts Nos. 28 and 30 under the provisions of section 17-512, R. S. 1943.

In that connection, section 17-509, R. S. 1943, empowers governing bodies of cities of the second class

and villages to pave or otherwise improve their streets and pay therefor by special assessments levied upon the property especially benefited thereby, proportionate to benefits. However, the exercise of such power is expressly limited by the proviso, reading: "Provided, that none of the improvements hereinbefore named shall be ordered except as provided in sections 17-510 to 17-512." By virtue of such limitation of power, this court has concluded that the streets of a city of the second class or village can be paved and so paid for only by legally following one of the three factually applicable methods provided in said sections. Garver v. City of Humboldt, 120 Neb. 132, 231 N. W. 699; Musser v. Village of Rushville, 122 Neb. 128, 239 N. W. 642.

Under section 17-510, R. S. 1943, action of the governing board in such respect may be initiated by petitions signed by 60 percent of the resident owners of directly abutting property.

Under section 17-511, R. S. 1943, the governing body of the city or village may, by ordinance without petition, create paving districts and publish notice thereof, whereupon a majority of the resident owners of directly abutting property may, within a prescribed period, file objections and prevent such paving.

At this point it should be said that in June 1949, the city council of Wahoo, concededly acting under section 17-511, R. S. 1943, aforesaid, created paving districts Nos. 28 and 30 by enacting ordinance No. 579, which included all of the streets here involved except Locust from First to Fifth, whereupon more than a majority of resident owners of property directly abutting thereon filed objections, and the ordinance was repealed.

Nevertheless, in August 1949, the council, purportedly acting under section 17-512, R. S. 1943, enacted ordinance No. 585, creating paving districts Nos. 28 and 30, respectively, including therein streets formerly included in ordinance No. 579, and adding thereto Locust from First to Fifth Street.

In that connection, section 17-512, R. S. 1943, gives the city council power, by three-fourths vote of all its members, to enact an ordinance creating a paving district without a petition therefor, "upon any main thoroughfare that connects with or forms a part of the state highway system." If such a factual situation exists, they have the power to contract for such improvement and levy assessments on the lots and parcels of land abutting on or adjacent to such street or streets especially benefited thereby in such created district in proportion to such benefits to pay the cost of such improvement. Exercise of the power, however, as heretofore seen, is dependent upon the construction and factual application of that portion of the statute above quoted.

An examination of the record discloses that State Highway No. 92 and U. S. Highways Nos. 77 and 30-A, enter the city from the east on Twelfth Street, thence go west to Chestnut, thence south to First, where No. 77 continues south on Chestnut, but Nos. 30-A and 92 go west out of the city on First Street, passing Locust, the last street open on the south which terminates at its intersection with First Street. The city route of highways Nos. 92, 77, and 30-A, goes south from Twelfth Street over Linden to Fifth, thence west to Chestnut.

Ordinance No. 585 generally described paving district No. 28 as extending on Fifth Street from the west line of Walnut, a north and south street one block west of Chestnut, then across Sycamore and Locust, north and south streets, to the east line of Laurel, a north and south street not yet open at the south end. The district was also extended on Locust from the north line of First Street to the south line of Eighth, an east and west street, and on Sixth, an east and west street, from the west line of Sycamore two blocks west of Chestnut, to the east line of Locust. Paving district No. 30 commenced at the south end of the south terminus of Washington about a block north of Eighth Street and pro-

ceeded north for a short block to the north line of Block 2 in Remington's Addition.

Ordinance No. 585 itself simply determined "that the streets within said districts, and said districts generally, connect with and are part of the State Highway system," without finding therein that any of them were a "main thoroughfare," and the record conclusively discloses that in fact they were not. The record affirmatively discloses that the paving project was in fact primarily undertaken to handle a drainage problem on the west side, which the council figured could only be handled through creation of such a project, anticipating that Washington-Locust could be made a "main street."

Locust is an ordinary north and south graveled street, without stop signs or any other directions for traffic upon it except as it enters First Street. There were no business establishments located thereon except a greenhouse and two residents who transacted some business from their property. The properties abutting upon it were empty lots and parcels of ground or homes, all generally of lesser comparative value. Traffic upon it was mostly by local residents traveling to and from their homes and to softball games once or twice a week during the summer. It was not in any sense a "main thoroughfare that connects with or forms a part of the state highway system." It was simply an ordinary side street which ended by joining a state highway on the south. Fifth Street had more traffic of like character upon it, and Sixth had less than Fifth, but each had more than Locust. In the aforesaid situation, it naturally follows that they were both simply side streets intersecting Locust, which was not a "main thoroughfare," on the west, and intersecting Chestnut, a state highway, on the east. To hold otherwise would permit the city to so pave any side street intersecting a state highway, which the Legislature clearly never intended to permit.

Washington is simply a continuation of Locust Street

north from Eighth Avenue, a short block north of Eighth Street, to the Luther College campus. Concededly, Locust-Washington is in fact a continuous single street, which, by stipulation, terminates at the south edge of the Luther College campus, where "it does not connect with any main thoroughfare nor highway nor street at the north end of said Washington Street."

In the construction and application of the very statute here involved, this court has held in Garvey v. City of Humboldt, *supra*: "Powers conferred upon municipal boards by legislative charter will not be extended beyond the plain import of the language used therein.

"Statutes empowering municipal boards to perform certain functions will be strictly construed, and all doubt will be resolved against the exercise of the power, rather than in favor of it.

"Under the law of this state, a city council cannot, by enactment of an ordinance, extend its powers beyond the limits prescribed in its charter."

In Musser v. Village of Rushville, *supra,* such holdings were reaffirmed, and it was held that the three methods prescribed by the statutes aforesaid were each "mandatory and jurisdictional, and unless the governing boards of such municipalities act within one of the three prescribed methods, no valid assessment can be made against property to pay the costs of such improvement."

Bearing the foregoing in mind, we are so bound by the particular relevant language used in the act. Such language is: "upon any main thoroughfare that connects with or forms a part of the state highway system." By no stretch of construction or application of such language could it be said, under the facts appearing in this record, that the streets in districts Nos. 28 and 30 formed any part of the state highway system. The remaining words are then "upon any main thoroughfare that connects with * * * the state highway system." In that connection, it will be noted that the Legislature

did not use the words "upon any main street that intersects a state highway."

The Legislature used the word "main" as an adjective modifying "thoroughfare." As so used, "main" ordinarily means principal, primary, chief, or most important comparatively in size, extent, use, or utility for traffic. 54 C. J. S., Main, p. 897; 38 C. J., Main, p. 333; 26 Words and Phrases, Main, p. 51, and also alphabetically in the Cumulative Annual Pocket Part; Black's Law Dictionary (3d ed.), p. 1142; Webster's New International Dictionary (2d ed.), p. 1483. In that regard, the mayor of the city, a witness for defendant, testified that Locust Street, included in district No. 28, was not even a main street and never had been, but added, "I think it can be made a main street."

It will be observed, however, that the Legislature did not use the words "main street" but did use the words "main thoroughfare." The term "thoroughfare" itself, as ordinarily defined, means, "A passage through, as from one street or opening to another; an unobstructed way open to the public; a public road or street open at both ends; esp., a street or way through which there is much passing." Webster's New International Dictionary (2d ed.), p. 2631. As legally defined: "The term means, according to its derivation, a street or passage through which one can fare, (travel;) that is, a street or highway affording an unobstructed exit at each end into another street or public passage. If the passage is closed at one end, admitting no exit there, it is called a 'cul de sac.'" Black's Law Dictionary (3d ed.), p. 1728. In 3 Bouvier's Law Dictionary, Rawle's Third Revision, p. 3270, a thoroughfare is defined as: "A street or way opening at both ends into another street or public highway, so that one can go through and get out of it without returning. It differs from a *cul de sac,* which is open only at one end." See, also, 41 Words and Phrases, Thoroughfare, p. 586, and alphabetically in the Cumulative Annual Pocket Part; 62 C. J., Thoroughfare, p. 926.

In the light of the foregoing, it is apparent that Locust-Washington, one continuous street, although open on the south end, was not only not a main street, but was closed at the north end, which made it a "cul de sac," and not a "thoroughfare." Upon either horn of defendant's dilemma, Locust-Washington was not even a "thoroughfare" much less a "main thoroughfare." Further, the statute did not include any street which simply touches or intersects a state highway as argued by defendant, but specifically provides that it must be a "main thoroughfare that connects * * * with the state highway system," in order to give primary streams of traffic to or from the city or village a suitable passage to or from a state highway.

Fifth and Sixth Streets, a part of which were each respectively included in the purported paving districts, were simply side streets running west from Chestnut to Laurel and Locust respectively, neither of which is a main thoroughfare nor part of a main thoroughfare.

Clearly, under section 17-512, R. S. 1943, the city had the power to create paving districts only upon a street or streets which constitute a main thoroughfare that connects with the state highway system, or upon a main thoroughfare which actually forms a part of the state highway system. We conclude that none of the streets involved herein come within the construction and factual application of said section, therefore the city council was without any power and authority to act thereunder.

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

REVERSED AND REMANDED WITH DIRECTIONS.

CARTER, J., participating on briefs.

IN RE APPLICATION OF ROSE BRUNO. ROSE BRUNO, APPELLANT, V. REVEREND FLOYD FISCHER ET AL., APPELLEES.

45 N. W. 2d 178

Filed December 20, 1950. No. 32810.

1. **Habeas Corpus.** In a habeas corpus action involving the custody of a child, where respondents failed to file a return before hearing began on the merits but did so before petitioner's case-in-chief was concluded, and petitioner made no objection to the lack of a return or to the right of the parties to proceed and the right of the court to hear and determine the matter, the failure to file the return was not such a defect as to render the hearings and judgment invalid.
2. ———. In the return to a writ of habeas corpus facts must appear which warrant restraint of the relator.
3. **Appeal and Error.** Upon appeal the same cause must be presented in this court that was tried in the court below. If an issue is there tried by both parties, and without objection from either that the issue is not sufficiently pleaded, such objection will not be considered in this court as ground for reversal.
4. **Habeas Corpus.** The writ of habeas corpus is not a corrective remedy and is never allowed as a substitute for appeal or proceedings in error for the purpose of reviewing mere errors or irregularities in the proceedings of a court having jurisdiction over the person and the subject matter.

APPEAL from the district court for Douglas County: HERBERT RHOADES, JUDGE. *Affirmed.*

Harold L. Hunt and *Ralph R. Bremers,* for appellant.

Leary & Leary, for appellees.

James J. Fitzgerald and *Joseph P. Inserra,* amici curiae.

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

SIMMONS, C. J.

This is an appeal from an order denying an application for a writ of habeas corpus. We affirm the judgment of the trial court.

The general factual situation is as follows:

Petitioner, Rose Bruno, on a promise of a future mar-

riage, lived with a man for some months. During the spring of 1948, she consulted a physician, who advised her that she was pregnant and referred her to The Catholic Charities. That organization arranged for her medical care and hospitalization.

On February 20, 1949, the child Rosemary was born. The petitioner saw her once at the hospital. The mother was discharged from the hospital four days after the child's birth. The child remained in the hospital for two weeks when, with petitioner's consent, she was placed in St. James Orphanage. Petitioner testifies that she saw Mary C. Neugent, one of the respondents and an employee of The Catholic Charities, approximately every two weeks thereafter. That is denied by Miss Neugent. In any event, there were discussions about the future of the child. Successful treatment was had to correct a deformity of the child's feet. Petitioner did not pay any of these expenses and never saw the child again until September 1949. At that time she saw the child for several minutes at the orphanage. On September 23, 1949, after an extended discussion of the situation, both as to herself and as to the child, she signed a relinquishment of the child to The Catholic Charities of the Archdiocese of Omaha, Inc., and consented to the adoption of the child. This was acknowledged before a notary public.

Petitioner undertook to testify that she did not understand what she was doing, but it is patent from a reading of the testimony that she knew fully. She told her mother that evening, she became despondent and regretted what she had done.

During the next two or three days petitioner, her sister, and her mother undertook to secure a "withdrawal" of the relinquishment. On October 15, 1949, a hearing was had in the district court for Douglas County in an action entitled "An Inquiry into the Case of Bruno, Rosemary." No pleadings appear in the record. It is suggested that this action was either con-

templated or pending prior to the relinquishment signing. In any event, it proceeded after those events. Summons was served on the petitioner and she appeared with her attorney. As a result of that proceeding, the trial court entered the following order on that day: "Submitted on Petition and Evidence. Mother having been duly served as provided for by law and being present in Court and represented by Counsel, Mr. Harold Hunt, Atty. Charges of dependency as set forth in the Petition are found to be true. Said Rosemary Bruno is ordered placed in the care and custody of the Catholic Charities of the Archdiocese of Omaha, Inc., a child placing agency, as guardian, for placement or adoption."

Thereafter on November 16, 1949, petitioner filed her application for a writ of habeas corpus for Rosemary Bruno, a minor. In it she alleged that she was the mother of Rosemary and entitled to her care, custody, and control; that the Reverend Floyd Fischer was the executive director of The Catholic Charities and St. James Orphanage; that Mary C. Neugent was an employee of The Catholic Charities; that Mary C. Neugent had fraudulently and unlawfully obtained the care, custody, and control of the child and had it in St. James Orphanage, and that she and the Reverend Floyd Fischer refused to turn the child over to her; that Mary C. Neugent and St. James Orphanage claimed the child by virtue of "certain papers" which purportedly relinquished the child; that petitioner had signed as a result of misrepresentation and fraud; that The Catholic Charities and the orphanage claimed the custody because of claims for money for the child's care; and that they had no right to the child. Petitioner prayed for a writ granting her the care, custody, and control of the child. A writ was issued and served, returnable December 1, 1949. On that day the cause was called for trial. There was an appearance of counsel for petitioner and respondents.

The parties stipulated that they would waive the presence of the child, and that the child should be subject to the orders of the court. Petitioner then testified on direct examination. At its close the court, apparently on its own motion, adjourned the case to December 12, 1949.

On December 6, 1949, an answer was filed by St. James Orphanage, the Reverend Floyd Fischer, and Mary C. Neugent, in which they alleged the cause for their custody to be (1) that on February 28, 1949, petitioner surrendered the custody of the child to St. James Orphanage and that it has since had it; (2) that petitioner had abandoned the child since that date; (3) that on September 23, 1949, she relinquished the child for adoption to The Catholic Charities, which is the agent of St. James Orphanage; and (4) that on October 15, 1949, the district court had ordered the child placed in the care and custody of The Catholic Charities, as guardian, for placement or adoption.

On December 12, the trial proceeded with both petitioner and respondents offering evidence. The trial court entered an order denying the writ. Motion for a new trial was made and denied. Petitioner then appealed here.

Petitioner's first argued assignment of error goes to the answer to the writ. She charges that because it was not filed on December 1, she was entitled that day to a writ on making a prima facie case, and, second, that the answer when filed did not comply with the provisions of section 29-2817, R. R. S. 1943, in that it did not set forth the requirements of that section. This contention appears to be presented here for the first time.

It should be noted that on December 1, the trial proceeded as though an answer to the writ had been filed. Petitioner made no objection thereto in any way. The answer was on file before the cross-examination of petitioner and when the balance of the case was heard on the merits. Petitioner made no objection.

This contention was presented in Commonwealth ex rel. Zimbo v. Zoretskie, 124 Pa. Super. 154, 188 A. 365. The court held that the failure to file a return was not such a defect as to render invalid a hearing on the merits, in view of the petitioner's failure to make objection to the lack of a return or to the right of respondents and their witnesses to be heard, and refused to reverse on such a technical point. This decision was followed in State v. Wilson, 135 N. J. Law 398, 52 A. 2d 50. We so hold here.

The second contention presents a different question. The answer did not set out "a copy of the writ, warrant, or other process, if any, upon which the party is detained," as provided in section 29-2817, R. R. S. 1943. However, it clearly referred to the proceeding and the order of October 15, 1949. We held in the case of In re Application of Niklaus, 144 Neb. 503, 13 N. W. 2d 655, that "This court in interpretation of this statutory provision has held that in the return to a writ of habeas corpus facts must appear which warrant restraint of the relator."

As we have pointed out, petitioner raised no question in the trial court of the sufficiency of the answer and when the order of October 15, 1949, was offered in evidence, did not raise this objection to its introduction.

The applicable rule is: "Upon appeal the same cause must be presented in this court that was tried in the court below. If an issue is there tried by both parties, and without objection from either that the issue is not sufficently (sic) pleaded, such objection will not be considered in this court as ground for reversal." Boyd v. Lincoln & N. W. R. R. Co., 89 Neb. 840, 132 N. W. 529, on rehearing, 92 Neb. 434, 138 N. W. 560. See, also, Sjogren v. Clark, 106 Neb. 600, 184 N. W. 159; Auld v. Walker, 107 Neb. 676, 186 N. W. 1008; Hensley v. Chicago, St. P., M. & O. Ry. Co., 118 Neb. 690, 226 N. W. 421.

Petitioner's next argued assignment goes to the suf-

ficiency of the evidence to sustain the judgment of the court, arguing that the petitioner desired to have her child; that she is physically, mentally, and financially competent to care for the child; and that she surrendered the child through duress and undue influence of Miss Neugent.

The trial court made no findings of fact. We have reviewed the evidence. We deem it ample to sustain findings contrary to the contentions of the petitioner. However, the decision here does not turn on those matters. After having secured the formally executed relinquishment of the petitioner, and that being questioned, the respondents then had the matter of custody presented to the court with the result of the order of October 15, 1949, placing the child in the care and custody of The Catholic Charities "for placement or adoption." This order was offered and received in evidence over the objections of the petitioner. Petitioner assigns as error here that it was erroneously received because based upon an informal conference held in chambers, and that no evidence was taken or sworn testimony given and no record was made, and hence it was not "a regular Court hearing." The above are recitals of alleged facts made in the objection. No offer of evidence was made upon which they were based.

Petitioner's contention here does not challenge the jurisdiction of the court over the person and the subject matter, but rather asserts that the order of October 15, 1949, should not have been received in evidence because of alleged irregularities in the proceedings prior to that entry. So far as this record discloses, the order stands as the final order of the court in that proceeding. This brings the matter within the rule approved in the case of In re Application of Schwartzkopf, 149 Neb. 460, 31 N. W. 2d 294: "'* * * While a writ of habeas corpus is in the nature of a writ of error in so far as it brings into review the legality of the authority by which the prisoner is confined, it is well settled that

such writ will not be permitted to perform the functions of a writ of error or appeal for the purpose of reviewing mere errors or irregularities in the proceedings of a court having jurisdiction over the person and subject matter'" and restated the rule there that "'The writ of habeas corpus is not a corrective remedy, and is never allowed as a substitute for appeal or proceeding in error.'"

It follows that the trial court did not err in the admission of the order and did not err in denying the writ.

The judgment of the trial court accordingly is affirmed.

AFFIRMED.

SCHOOL DISTRICT OF SCOTTSBLUFF, A CORPORATION, APPELLANT, V. OLSON CONSTRUCTION COMPANY, ET AL., APPELLEES.

45 N. W. 2d 164

Filed December 20, 1950. No. 32811.

1. **Reformation of Instruments: Rescission.** Although the mistake of one party to a contract is not a ground for its reformation, it may afford a basis for rescission.
2. **Equity: Rescission.** The proper remedy in a court of equity for a unilateral mistake in a contract is rescission.
3. ———: ———. A court of equity will afford relief by way of rescission for a unilateral mistake where it appears that the mistake was of so great a consequence that to enforce the contract as made would be unconscionable; where the matter as to which the mistake was made relates to a material feature of the contract; where it occurred notwithstanding the exercise of reasonable care by the party making the mistake; and where such relief is without serious prejudice to the other party, except for the loss of the bargain.

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

Mothersead, Wright & Simmons, for appellant.

Woods, Aitken & Aitken, and *Neighbors & Danielson,* for appellees.

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

CARTER, J.

This is an action against the Olson Construction Company and its bondsman, Maryland Casualty Company, because of the failure of the former to comply with its bid and to contract for the construction of the buildings for the doing of which the bid was submitted. The trial court held against the plaintiff school district and for the defendants. The plaintiff appeals.

The school district advertised for bids for the construction of a new vocational agriculture and grandstand building and an addition to the Bryant Elementary School. The defendant Olson Construction Company was the successful bidder at $177,153.00. Pursuant to the instructions to bidders, contained in the advertisement for bids, the bid was accompanied by a bid bond in the amount of 5 percent of the bid, the defendant Maryland Casualty Company appearing as the surety thereon. The closing time for the acceptance of bids was fixed as of April 15, 1948, at 8 p. m. The bid of the Olson Construction Company was submitted on the evening of April 15, 1948, prior to 8 p. m. It was accepted and the contract awarded to the Olson Construction Company by the school board of the school district before the adjournment of the board thereafter on that day. The Olson Construction Company refused to comply with its bid and this action was brought to recover from the Olson Construction Company and its bondsman the sum of $8,857.65, the same being 5 percent of the bid, the amount the defendants obligated themselves to pay if the Olson Construction Company failed to enter into a contract to perform the work in accordance with its bid.

The bid of the Olson Construction Company was

$177,153.00 which showed an itemization of $68,410.00 for the construction of the vocational agriculture and grandstand building. The only other bid was in the amount of $203,758.00 and showed an itemization of $89,905.00 on the vocational education and grandstand building. The architect's estimate on the latter building was $89,340.00. The defense of the Olson Construction Company is based on a typographical error in computing the total of its bid, which resulted in a reduction of the intended bid by an amount of $23,600.

The evidence shows that on April 15, 1948, John H. Miller, the vice president and secretary of the Olson Construction Company, was in Scottsbluff for the purpose of preparing the bid in final form for submission to the school district. In preparing the bid, form estimate sheets were used. Each of these form estimate sheets listed different items such as materials, labor, unit price, bids of subcontractors, and similar items. In order to arrive at the bid to be submitted it was necessary to tabulate the various sheets and add them up to secure the total amount of the bid. This latter work was assigned to one Erma Price, an experienced employee of the company. In tabulating the amounts shown on the estimate sheets relating to the bid on the vocational agriculture and grandstand building she inadvertently dropped a figure from the amount for which the structural steel was subcontracted, so that it was listed on the adding machine as $2,689 instead of $26,289. This resulted in a total being entered upon this particular estimate sheet in the amount of $6,624.50 instead of $30,224.50, even though one of the items alone amounted to $26,289. The erroneous total of $6,624.50 was carried into the total bid and resulted in the bid of $177,153.00 instead of $200,753.00 which the bid would have been except for the error. The evidence shows that Mrs. Price checked the items back after the addition was completed and again overlooked the error made in tabulating the amounts on the adding

machine. The evidence shows also that Miller and those engaged with him in preparing the bid were in a hurry because of the approaching deadline for the filing of bids. The delay in preparation is shown to have been the result of slowness on the part of subcontractors in submitting their bids, and delays in calculating certain items due to the rising costs of labor and materials.

The evidence is that the error was not observed by anyone connected with the preparation of the bid. The sealed bid was filed with the school district by a construction superintendent who was not familiar with its contents. Miller left Scottsbluff shortly before 8 p. m. on the last day for the filing of bids. It was not until he learned on the next day of the great variance in the two bids filed that he suspected a mistake in one of them. He immediately requested that the estimate sheets be sent to him at the home office at Lincoln. They were received the following Monday and the error was immediately discovered. The architect for the school district and the school district were immediately informed of the mistake. A number of conferences were had with reference to the matter. The school district decided to insist upon compliance with the bid and upon refusal of the Olson Construction Company to do so this suit was instituted.

The record establishes that the claimed error of $23,600 in the amount of the bid was a clerical mistake in tabulating and computing the bid. It was not an error of judgment in computing the quantity or cost of materials and labor. The mistake was unilateral, there being no allegations or evidence of mutual mistake. The school district contends that under such circumstances a bidder may not be relieved of his bid except where it is shown that the party receiving the bid knew or ought to have known, because of the amount of the bid or otherwise, that the bidder had made a mistake. Restatement, Contracts, § 503, p. 966; Saligman v. United States, 56 F. Supp. 505. While we think it could be said that the

difference in the bids on the vocational agriculture and grandstand building was such as to indicate to the school district that a mistake had been made and thereby bring it within the rules applicable to mutual mistake, the bidder has the right under the facts shown by the record to withdraw its bid even though it was the result of unilateral error.

The rule under such circumstances is: When the mistake is so fundamental in character that the minds of the parties have not, in fact, met, or where an unconscionable advantage has been gained by mere mistake, equity will intervene to prevent intolerable injustice where there has been no failure to exercise reasonable care on the part of the bidder and where no intervening rights have accrued. St. Nicholas Church v. Kropp, 135 Minn. 115, 160 N. W. 500, L. R. A. 1917D 741. In the case before us the mistake was discovered and notice thereof given to the school district within four days after the opening of the sealed bids. It was a fundamental mistake as distinguished from an incidental one. While the bid of the Olson Construction Company had been accepted and the contract awarded to it, no contract had been entered into; it was wholly executory. Failure to use reasonable care on the part of the Olson Construction Company is not shown and rights of third persons had not intervened. The parties could have been placed in status quo at the time of the withdrawal of the bid. The reason for the latter statement is well stated in Kutsche v. Ford, 222 Mich. 442, 192 N. W. 714, wherein it is said: " 'In the instant case it may be thought that the school district cannot be said to be placed in statu quo when it is considered that the building cost nearly six thousand dollars more than plaintiff's bid. To place in statu quo does not mean that one shall profit out of the mistake of another. It does not appear that plaintiff's mistake has made the school building cost more than it otherwise would have cost. The school district, if placed back where it was before the bid, loses nothing

except what it seeks to gain out of plaintiff's mistake. To compel plaintiff to forfeit his deposit, because of his mistake, would permit the school district to lessen the proper cost of the school building at the expense of plaintiff, and that, in equity, is no reason at all for refusing plaintiff relief. * * *.' "

Numerous cases support the granting of relief to a bidder on the ground of unilateral mistake under the circumstances shown to exist in the present case. In Conduit & Foundation Corp. v. City of Atlantic City, 2 N. J. Super. 433, 64 A. 2d 382, the opinion shows that the president and general superintendent of the bidder worked all night preparing estimate sheets from which the bid was computed. In preparing the final bid one page of the estimate sheets was inadvertently omitted from the total, resulting in a failure to include the amount of $50,250, as shown on this estimate sheet. The day after the bids were considered, the president of the bidding company, struck by the lowness of his bid as compared with other bids, investigated and discovered the error. He immediately notified the city and, after conferences with the governing body of the city, withdrew his bid. In granting relief to the bidder in an action to recover the $5,000 deposit which accompanied his bid, the court said: "The facts proven herein further demonstrate that relief by way of rescission could be accomplished without serious prejudice to the defendant, except for the loss of its bargain, and this is not a sufficient ground to deny relief. Barlow v. Jones, *supra.*

"Therefore, it is held that a unilateral mistake existed in the preparation of the plaintiff's bid and that under the facts here present, such bid was promptly rescinded within time.

"It is further held that under the facts here present the plaintiff is entitled to the return of the money deposited with its bid."

In St. Nicholas Church v. Kropp, *supra,* the church committee awarded the contract for a new church

building to the defendant, the low bidder. The next day the defendant notified the church committee that through oversight he had omitted an item for structural iron in the amount of $2,350, and refused to execute a contract at the bid figure. Defendant stopped payment on the check which accompanied the bid. The church sued the defendant for the amount of his check. The court in denying a recovery said: "The question here is whether a mistake of over $2,000 in the bid upon the construction of this church is merely incidental or fundamental. We think the amount is so large that it is unreasonable to suppose that Kropp would have made the bid he did make, if he had known that the structural iron work was not included therein. Here the finding is that it was an honest mistake made without negligence. Plaintiff was apprised of the error at once. No intervening rights accrued. The belated bid which plaintiff accepted was a trifle less than the one Kropp intended to make. There can be no question of not placing plaintiff in statu quo. It did nothing in reliance upon Kropp's bid, and did not change its position in the least between the time it notified him of the acceptance and the time it received notice of his mistake. * * * The bid was, at most, but a step in the making of the contract. It was well understood that before Kropp would be permitted to begin the erection of the building he must execute a formal contract and give adequate bond. The contract was therefore wholly executory. This case upon its facts is not distinguishable from Moffet, Hodgkins & Clark Co. v. Rochester, 178 U. S. 373, 20 Sup. Ct. 957, 44 L. ed. 1108, except that there notice of the error was given when the bids were opened; but that can be of no consequence, since under the statute there applicable the bid could not be withdrawn after being submitted. The court rescinded the accepted proposal to construct certain municipal improvements. This power of a court of equity to rescind or cancel a contract, entered while one party labored under a mistake as to a

fact of impelling importance to him in entering it, is recognized in Brown v. Lamphear, 35 Vt. 252. And in speaking of the case of Diman v. Providence, W. & B. Ry. Co., 5 R. I. 130, the court, in Fehlberg v. Cosine, 16 R. I. 162, 13 Atl. 110, says: 'This case recognizes another rule of equity, that where there has been a material mistake upon one side the court may rescind and cancel the agreement, where it can do so without injustice to the other party. There are two principal classes of cases in which this power of the court is exercised. One includes cases of executory contracts and the like, where the parties can be put in statu quo. In these cases the parties have not, in reality, agreed; their minds have not met; and if one, without fault on his part, has bound himself to something materially different from what he supposed it to be, which can be annulled without loss or injustice to the other side, it is deemed inequitable to enforce it.' See also Smith v. Mackin, 4 Lans. (N. Y.) 41; Board of School Commrs. of City of Indianapolis v. Bender, 36 Ind. App. 164, 72 N. E. 154; Goodrich v. Lathrop, 94 Cal. 56, 29 Pac. 329, 28 Am. St. 91; and Werner v. Rawson, 89 Ga. 619, 15 S. E. 813, where the vendor made a mistake in respect to the purchase price of land and the contract had been executed, still the court rescinded the deal holding: 'While a court of equity will not reform a written contract upon the ground of mistake unless the mistake is shown to be common to both parties, yet it may exercise its powers to grant relief, in a proper case, by rescinding and canceling the writing upon the ground of a mistake of facts material to the contract by one party only.' "

In Kutsche v. Ford, *supra,* the plaintiff's bid was low and the contract was awarded to him. Several days later he discovered that he had omitted from his bid the subcontract of the plasterers in the sum of $6,400 and he immediately notified the architect. He refused to sign the contract and sued to recover back the deposit which accompanied the bid. In sustaining the

claim the court said: "An examination of the authorities leads to the conclusion that, under the evidence the plaintiff should have relief, and he is granted a decree rescinding and canceling the bid, and contract arising out of its acceptance, and adjudging that the defendant school district pay to him the $3,200, without interest, and that he have process for the enforcement of the same."

Other cases sustaining this principle are: Moffett, Hodgkins & Clarke Co. v. City of Rochester, 178 U. S. 373, 20 S. Ct. 957, 44 L. Ed. 1108; Board of Regents of Murray Normal School v. Cole, 209 Ky. 761, 273 S. W. 508; Board of School Commissioners v. Bender, 36 Ind. App. 164, 72 N. E. 154; Geremia v. Boyarsky, 107 Conn. 387, 140 A. 749.

The appellant contends that In re Estate of Davenport, 140 Neb. 769, 2 N. W. 2d 17, and Garsick v. Dehner, 145 Neb. 73, 15 N. W. 2d 235, adopt a different view of the law. Both cases involve questions of mutual mistake. The question of a unilateral mistake was not before the court. In any event, both cases indicate that relief can be had from the effects of a unilateral mistake where the mistake goes to a fundamental element of the contract. It is elemental, of course, that a contract cannot be reformed upon the basis of a unilateral mistake, although rescission may be had for such a mistake in a proper case. We find no previous decisions of this court which control the result in the case before us.

The essential conditions to relief from a unilateral mistake by rescission are: The mistake must be of so fundamental a nature that it can be said that the minds of the parties never met and that the enforcement of the contract as made would be unconscionable. The matter as to which the mistake was made must relate to the material feature of the contract. The mistake must have occurred notwithstanding the exercise of reasonable care by the party making it. Relief by way of rescission must be without undue prejudice to

the other party, except for the loss of his bargain.

The school district contends that at a meeting of the school board on April 28, 1948, Miller orally ratified the erroneous bid by stating that if the board insisted the Olson Construction Company would construct the buildings for the amount of the erroneous bid. What was actually said by Miller is in dispute. The defendants contend that Miller stated in effect that "if we were liable under this bond that we would perform because I would not forfeit the bond." We think the evidence on this point clearly preponderates in favor of the defendants. It is supported by the affirmative testimony of three members of the school board. The burden of proving a ratification in the present case rests upon the plaintiff. The trial court found against the plaintiff on this issue. The evidence sustains this finding by the trial court.

The judgment of the trial court is supported by the law and the evidence. The judgment is affirmed.

AFFIRMED.

THOMAS L. DAVIS ET AL., APPELLEES, IMPLEADED WITH WALTER DUDA, INTERVENER AND APPELLEE, V. THE CITY OF OMAHA, A MUNICIPAL CORPORATION, ET AL., APPELLANTS, IMPLEADED WITH THE KIEWIT COMPANY, A CORPORATION, ET AL., INTERVENERS AND APPELLANTS.

45 N. W. 2d 172

Filed December 20, 1950. No. 32884.

1. **Municipal Corporations: Zoning.** Cities of the metropolitan class are, for the purpose of promoting the health, safety, morals, or the general welfare of the community, empowered to regulate and restrict the height, number of stories, and size of buildings and other structures; the percentage of lot that may be occupied; the size of yards, courts, and other open spaces; the density of population; and the location and use of buildings, structures, and land for trade, industry, residence, or other purposes.

2. ———: ———. Pursuant to this power for any or all of said purposes the city council may divide the municipality into districts of such number, shape, and area as may be deemed best suited to carry out the purposes of regulation. Within such districts it may regulate, restrict, or prohibit the erection, construction, reconstruction, alteration, or use of buildings, structures, or land. All such regulations shall be uniform for each class or kind of buildings throughout each district, but the regulations in one district may differ from those in other districts.
3. ———: ———. Restrictions upon the power are that such regulations shall be made in accordance with a comprehensive plan and designed to lessen congestion in the streets; to secure safety from fire, panic, and other dangers; to promote health and the general welfare; to provide adequate light and air; to prevent the overcrowding of land; to avoid undue concentration of population; to facilitate the adequate provision of transportation, water, sewerage, schools, parks, and other public requirements; and to promote convenience of access. Such regulations shall be made with reasonable consideration, among other things, as to the character of the district and its peculiar suitability for particular uses, and with a view to conserving the value of buildings and encouraging the most appropriate use of land throughout the municipality.
4. **Zoning.** The zoning of property is permissible under the police power and its exercise may not be denied on the ground that individual property rights may be adversely affected.
5. ———. The validity of a zoning ordinance will be presumed in the absence of clear and satisfactory evidence to the contrary.
6. ———. In zoning what relates to the public good is a question primarily for determination by the zoning authority and in the absence of violation of law or unreasonable or arbitrary action its determination will be allowed to control.
7. **Zoning: Courts.** The courts will in an appropriate action instituted for that purpose declare invalid a zoning ordinance where it is made to appear that such ordinance is unreasonable and arbitrary.

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

Edward F. Fogarty, Edward Sklenicka, James M. Paxson, and *Herbert M. Fitle,* for appellants.

Fraser, Connolly, Crofoot & Wenstrand, for interveners and appellants The Kiewit Company et al.

G. M. Tunison and *G. H. Seig,* for appellees.

Jack W. Marer, for intervener and appellee Duda.

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

YEAGER, J.

This is an action by Thomas L. Davis and Bess B. Davis, plaintiffs and appellees, against the City of Omaha, a municipal corporation, and the members of the city council of said city, defendants and appellants, attacking the validity of two zoning ordinances adopted and promulgated by the city council. Walter Duda intervened on the side of plaintiffs and before this court he is an appellee. The Kiewit Company, a corporation, Leo A. Daly Company, a corporation, and G. E. Shukert intervened on the side of the defendants and here they are appellants.

The trial court at first decreed that one of the ordinances, designated as No. 16522, was void and in the light of the finding as to this one there was nothing to which to apply the other which was designated as No. 16521. Later the court decreed that the second "except as to its provisions as to height and set back restrictions, is null and void, * * *."

It is thought well to point out here that if the decree as to No. 16522 is sustained a consideration of No. 16521 will not be necessary since in the light of such a conclusion it would not present an issuable matter in this case.

From the decree in its final form the parties designated as appellants have brought the case here for review. The assignments of error are numerous and need not be detailed here since the gist of them all is that the two ordinances constituted a valid exercise of the zoning power of the city of Omaha and that the decree which found otherwise is erroneous.

As a background for a consideration of the questions

involved it is pointed out here that the city of Omaha was first granted power to zone the city in 1915. (Laws 1915, Chapter 213.) The provisions were amended in 1919. (Laws 1919, Chapter 185.) This power was amplified in 1925 (Laws 1925, Chapter 45) and the pertinent provisions as then enacted are the following:

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

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

"Such regulations shall be made in accordance with a comprehensive plan and designed to lessen congestion in the streets; to secure safety from fire, panic and other dangers; to promote health and the general welfare; to provide adequate light and air; to prevent the overcrowding of land; to avoid undue concentration of population; to facilitate the adequate provision of transpor-

tation, water, sewerage, schools, parks and other public requirements, and to promote convenience of access. Such regulations shall be made with reasonable consideration, among other things, as to the character of the district and its peculiar suitability for particular uses, and with a view to conserving the value of buildings and encouraging the most appropriate use of land throughout such municipality." § 14-403, R. S. 1943.

The first zoning ordinance was adopted in 1920. A later "comprehensive" zoning ordinance was adopted in 1924, another in 1942, another in 1945, and still another in 1948. The term "comprehensive" has been used freely in the record without exact definition but we take it from what has been said that it was designed to embrace all property within the city and to include all permissible areas outside with due consideration to its existing use and occupancy and the use to which it could feasibly and equitably be put comformable to the power contained in the statute. By these ordinances the areas were classified and assigned designations.

From the record it is made clear that through the succeeding comprehensive zoning ordinances changes were made to meet changing conditions. It is also made clear that quite frequently individual changes were made in zoning which did not comprehend the entire city but which were contemplated to respond to local necessity or desirability.

The issues here involve ordinances the design of which is to bring about local departure from the "comprehensive" zoning ordinance adopted in 1948.

From the beginning of zoning up to 1945 the area bounded on the north by Farnam Street, on the east by Thirty-sixth Street, on the south by Leavenworth Street, and on the west by Fortieth Street, except about a half block on the south side of Farnam Street and likewise a half block on the north side of Leavenworth Street, and possibly another area so far from the location in question that it can have no bearing on the de-

termination of the issues involved here, was classed as residence property. In 1945 however the area was given new classifications. The new classifications, with some changes, were apparently carried into the "comprehensive" zoning of 1948. By that zoning the area was placed in residence zones 7 and 8. This of course did not affect the nonconforming structures in the area which had been erected before zoning of which there were a few.

By this zoning the single family residences in zone 7 were allowed to be divided into not to exceed six apartments or family units provided there was at least 3,000 square feet of ground space for each unit and provided that no material change was made in the exterior of the building. In zone 8 the erection of apartments not to exceed 65 feet in height was permitted.

The area out of which this action arises is what is known as Block 9, West Omaha Addition. It is bounded on the north by Jackson Street, on the east by Thirty-seventh Street, on the south by Jones Street, and on the west by Thirty-eighth Street. Thus it is one block from Leavenworth Street, two blocks from Farnam Street one of which blocks is extremely long, one block from Thirty-sixth Street, and about three blocks from Fortieth Street. The block in its entirety was in zone 7. It was surrounded on all four sides by properties which were in zones 7 and 8 most of which were in zone 7.

The "comprehensive" ordinance of 1948 classified parts of the city as zone 9. None of these zones was in the area described or near it. In zone 9 apartments of the height of 105 feet were permissible. Business or commercial establishments were not permissible in such buildings.

On January 10, 1950, the city council of the city of Omaha adopted ordinances Nos. 16521 and 16522. Ordinance No. 16521 provided among other things not necessary to be mentioned here that buildings in the 9th zone could have a height of 165 feet with not to exceed 15

stories and that the buildings could contain retail stores or restaurants when operated in connection with and as a part of the hotel or apartment, provided the entrances thereto were either inside the building or from a court.

By ordinance No. 16522 this one block was rezoned and placed in the zone 9 classification.

The appellees substantially contended in the district court, which contention is renewed here, that these ordinances were void for the reason that they were violative of the statutes pertaining to and granting to the city of Omaha the power to zone the city and its environs and for the reason that no due regard was given to the area, the character of the property in the area, and the preservation of the uses and values of the property in the area.

As already indicated ordinance No. 16522 must receive first consideration. This is true since if the transfer of this block from zone 7 to zone 9 is void the question of whether or not the changes sought to be accomplished by ordinance No. 16521 has no pertinence.

In the approach to a determination of the question of whether or not ordinance No. 16522 is invalid it appears proper to set forth certain fundamental principles relating to the subject of zoning by a city.

As pointed out the statutes of this state permit the zoning of property in the city of Omaha. §§ 14-401, 14-402, and 14-403, R. S. 1943.

The zoning of property is permissible under the police power and the exercise of the power to zone may not be denied on the ground that individual property rights may be adversely affected thereby. Dundee Realty Co. v. City of Omaha, 144 Neb. 448, 13 N. W. 2d 634.

The validity of a zoning ordinance will be presumed in the absence of clear and satisfactory evidence to the contrary. Pettis v. Alpha Alpha Chapter of Phi Beta Pi, 115 Neb. 525, 213 N. W. 835; Dundee Realty Co. v. City of Omaha, *supra;* Cassel Realty Co. v. City of

Omaha, 144 Neb. 753, 14 N. W. 2d 600; City of Omaha v. Glissmann, 151 Neb. 895, 39 N. W. 2d 828.

In zoning what relates to the public good is a question primarily for determination by the zoning authority and in the absence of violation of law or unreasonable or arbitrary action its determination will be allowed to control. Pettis v. Alpha Alpha Chapter of Phi Beta Pi, *supra*.

These principles have become crystallized in this jurisdiction by the opinions and decisions cited wherein, as examination will disclose, the opinions of the courts of other jurisdictions dealing with the subjects were carefully considered.

Referring now to the sections of the statutes quoted it is observable that along with the power granted to zone there are also restrictions and limitations upon that power. Section 14-401 may well be said to be a grant of power. Section 14-402 likewise may be said to be for the most part a grant, however it does contain a restriction and limitation. The restriction is that "All such regulations shall be uniform for each class or kind of buildings throughout each district, * * *." Section 14-403 in its entirety is restrictive and limiting.

According to the mandate of this section the zoning of any area must (1) follow a comprehensive plan and a design to lessen congestion in the streets; (2) it must pursue a design to secure safety from fire, panic, and other dangers; (3) it must be calculated to promote health and the general welfare; (4) it must provide adequate light and air; (5) it must be designed to prevent overcrowding of the land; (6) it must be calculated to avoid undue concentration of population; (7) it must comprehend the facilitation of adequate provision of transportation, water, sewerage, schools, parks, and other public requirements and promote convenience of access; and (8) the regulations must be made with reasonable consideration for the character of the district and its peculiar suitability for particular uses, and with a view

to conserving the value of buildings and encouraging the most appropriate use of land throughout the city.

What these ordinances, on their faces, were designed to accomplish has been pointed out. Factually however their design was to place this one block in zone 9 with no other part of the city within quite a number of blocks in a like or similar zone for the single purpose of allowing the parties hereto who intervened on the side of the defendants to erect on this plot two buildings of a proposed height of about 119 feet containing more than 400 small units of space for family occupancy, or in other words apartment houses containing more than 400 apartments. Also car storage or garage space inside and outside was to be provided for 80 percent of the units or apartments. More than half of this was to be provided for in the open at or above the level of the ground. The outside parking space was to be kept lighted throughout the night. The entrance to the inside parking or storage was to be on the east side of the block and the outside the opposite. This was to be allowed on a block which previous to the adoption of the ordinance would permit of a maximum of 30 family occupancy units. There were and are five houses on the block and the previous ordinance permitted each to be divided into, under conditions already referred to, a maximum of six units each.

The streets around the block are 30 feet in width as is also true of the other streets within the surrounding area. The properties which surround the block except certain properties which are occupied by nonconforming structures erected before zoning and by structures erected by permission of zone 8 regulations have on them large, old, and valuable and well-kept single family residences or such residences converted to multiple family residences agreeable to the provisions relating to zone 7.

A considerable number of the owners of adjoining property presented themselves in opposition to this zoning on the ground that it would damage and destroy

the value and the use and utility of their property and grounds and that of the area. None has come forward favoring it.

That the properties in the vicinity are valuable is true is undeniable as is borne out by evidence that the interveners on the side of the defendants have purchased part of this block and have options to purchase the remaining parts at a total cost of $145,000, and further evidence that the adjoining property is not less valuable.

In the light of the statutes, the stated legal principles, and what has been set forth with regard to the facts, which statement it is thought reflects essentially the factual picture upon which the determination herein must depend, it must be ascertained whether or not the ordinances in question are vulnerable to the attack made upon them by the appellees.

By way of application of section 14-403, R. S. 1943, to the disclosed situation this zoning action clearly did not follow a comprehensive plan. It applied to only one block among several whose condition, position, and relation to each other was the same or similar.

It could not operate to lessen congestion in the streets. It could have only the opposite effect. By it the design was to make possible more than 400 family units where previously only a maximum of 30 was possible. Provision was also made for storage and parking of automobiles for 80 percent of the more than 400 families whereas previously only the number sufficient to satisfy the needs and desires of the 30 could be expected to be upon the block.

Whether or not due regard was given to the matter of safety from fire, panic, and other dangers is by the record left in the field of conjecture. There is little information of value as regards this in the record. One witness however did testify that because of the elevation of this area and the height of the pumping station serving it present water pressure is only sufficient to

permit water to flow from one faucet at a time on the third floor of his home.

As to light and air there is a wide difference of opinion as to whether or not it would be adequate. It appears reasonable to conclude that for the purposes of health this would not materially affect the health of the people living in the surrounding area. It would of course cut off sunlight very materially from property to the north and to some extent from property to the east and west. The greatest effect in this respect would probably be in relation to the uses of the grounds surrounding the buildings on the adjacent properties.

That there would be crowding of the land there can be little question. Whether the terminology of the statute was meant to embrace the surrounding area or only the area zoned is none too clear but we infer that it has reference to a prospective condition which of course would cause it to contemplate the two areas. If undue congestion were brought about it appears reasonable to say that there would be overcrowding within the meaning of the statute.

Whether or not this would cause undue concentration of population would depend upon many things including congestion of streets, safety, health, light, air, transportation, convenience, and availability of land for the city or community housing needs. Most of these elements have been considered separately herein.

That this location would be convenient for the purposes of those seeking to build upon the zone or block there can be no doubt. There is no doubt also that it would be a convenient location for the prospective occupants. It cannot be said however that reasonable necessity requires that this block be made available for the erection of these structures. The record abundantly discloses that there are other areas not great distances from this area classified as zone 9 where these contemplated structures could be erected. The summary of the objection to the other locations is not that the other

locations are not available but that this one is aesthetically and economically more desirable to those who would build.

The zone of which this block was a part before rezoning has been described. It is difficult if not impossible to see how it can be said that the defendants in rezoning took into reasonable consideration the character of the district and its suitability for particular uses with a view to conserving the value of buildings and encouraging the most appropriate use of lands throughout the city. Instead if the testimony of the witnesses for the plaintiffs and at least one for the defendants is to be regarded as of value a reasonable conclusion is that the effect of this rezoning would produce a trend toward abandonment and destruction of these valuable old properties rather than the conservation of their values.

By the record it is made to appear that the city council by ordinance No. 16522 regarded only the bare zoning power conferred upon it by the statutes and gave scant regard to the restrictions, limitations, and inhibitions upon that power contained in the same statutes. In this view it is concluded that the rezoning of the block in question was an unreasonable and arbitrary exercise of zoning power and that therefore the ordinance so rezoning it is void.

This conclusion renders unnecessary and improper a consideration of the validity of ordinance No. 16521. With this conclusion and determination the validity of ordinance No. 16521 ceases to be an issuable matter in this action.

The original decree of the district court is affirmed. The supplemental decree is reversed and declared of no effect.

AFFIRMED IN PART, REVERSED IN PART.

COUNTY OF LANCASTER, APPELLEE, V. ALBERT P. SCHWARZ ET AL., APPELLEES, OTTO H. SCHMIDT, APPELLANT, REES WILKINSON, JR., OBJECTOR AND APPELLEE.

45 N. W. 2d 432

Filed December 27, 1950. No. 32844.

1. **Executions.** Under our law governing sales of real property on execution, the title of a purchaser thereat depends upon a final confirmation of the sale made; and until this is had, and a conveyance of the real estate is executed and delivered in pursuance of such confirmation, the legal title of the execution debtor to the real estate is not devested.
2. **Taxation.** The right of redemption from a tax sale is a property right and, as such, may be sold or transferred by the owner.
3. **Deeds.** A quitclaim deed, such as used here, is sufficient to convey the right of redemption.
4. **Taxation.** Article VIII, section 3, of the Constitution is self-executing. No statute or decree is necessary to enforce it or place it in operation.
5. ———. Where a tax foreclosure has gone to decree and sale, and the owner subsequently and before confirmation conveys to another, the grantee of such a conveyance has the right of redemption.

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

Miles W. Johnston, for appellant.

Frederick H. Wagener, Herbert A. Ronin, Arthur E. Perry, and *William L. Schaumberg,* for appellee County of Lancaster.

Chambers, Holland & Groth, for appellee Wilkinson.

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

SIMMONS, C. J.

The trial court in this action refused to confirm a tax sale where there had been a full payment of the amount required to redeem, a payment made by one holding a conveyance from the owner at the time of the

decree and sale. The purchaser at the foreclosure sale appeals. We affirm the judgment of the trial court.

On August 9, 1946, petition was filed for the foreclosure of tax liens on three lots in the city of Lincoln involved in this action, and other lands. Maude K. Sutton, as owner, was a party defendant. On September 18, 1946, the cause went to decree in which the court found the amount of the lien to be $4,080.09. The court decreed that in default of payment for a period of 20 days, the lands not redeemed be sold as upon execution; that the purchaser pay all subsequently accruing taxes; and that upon the expiration of two years from the date of sale and upon a showing of payment of subsequent taxes upon lands that remained unredeemed at that time, the purchaser shall be entitled to confirmation and sheriff's deed. It further was ordered that "any person entitled to redeem" could do so at any time before final confirmation by paying the amount found due with interest, costs, and the amount of subsequent taxes paid by the purchaser, with interest, and that "It is further ordered that defendants and each of them be and are hereby foreclosed, and forever barred of any and all claims upon, interest or estate in, right or title to, or lien upon, or equity of redemption in or to said herein described real estate, and that upon a showing having been made that all subsequent taxes have been paid by the purchaser and upon confirmation of said sale as provided by law, that the purchaser or purchasers thereof, take a good and indefeasible title to said real estate so purchased, and be placed in possession of the same."

On November 19, 1946, the property was sold at sheriff's sale, pursuant to the decree, to Otto Schmidt for $1,000.

On November 18, 1948, one Kenneth Green filed objections to the confirmation and offered to purchase the property for $1,500. Schmidt moved to strike the objections on November 23, 1948. The court overruled

the objections to confirmation on January 24, 1949. Green thereupon filed amended objections to confirmation, raising his offer to purchase to $2,000. On February 14, 1949, the amended objections were overruled. Green and the county appealed here, resulting in our decision in County of Lancaster v. Schwarz, 152 Neb. 15, 39 N. W. 2d 921, in which the appeal was dismissed. Our mandate was filed in the office of the clerk of the district court on February 4, 1950. On that date Schmidt moved for confirmation, reciting that he had paid all subsequent taxes levied on the property.

On February 7, 1950, Rees Wilkinson, Jr., hereinafter referred to as Wilkinson, filed objections to confirmation, reciting that on February 4, 1950, he, being the owner of the land, redeemed said lots from the sale by paying $7,101.06 to the clerk of the court, that being the amount determined by the clerk to redeem the property.

On February 7, 1950, the court on application of Green, ordered the money deposited by him returned, less costs charged to him.

The matter was heard on the motion of Schmidt to confirm and the objections of Wilkinson. At the hearing it was stipulated that Wilkinson on February 4, 1950, paid $7,101.06, and on February 7, 1950, $75.40, a total of $7,176.46, to the clerk of the court, and that that amount was the correct amount for redemption.

A deed from Maude K. Sutton to Wilkinson was admitted in evidence by stipulation. It is dated November 20, 1947, recites one dollar and other valuable consideration, and provides that Sutton does "remise, release and forever quit-claim and convey" the described property (which includes also other property than that involved here) to Wilkinson. Schmidt offered evidence that Rees Wilkinson negotiated the purchase, paid $225 for the deed and directed that the grantee be Rees Wilkinson, Jr., and that he, Schmidt, had paid all subsequent taxes.

The court found that on November 20, 1947, Sutton

conveyed the property to Wilkinson; that Wilkinson had paid the amount necessary to redeem the property; and that on February 7, 1950, Wilkinson had the right to redeem and did redeem. The court denied Schmidt's motion to confirm and sustained Wilkinson's objections to confirmation. Motion for rehearing was made and overruled. Schmidt appeals.

Appellant's contentions here may be summarized as follows: That the decree fixed the right of the parties as of its date; that the decree cut off all rights of Sutton in the property including her equity of redemption; that thereafter she had only the constitutional and statutory right of redemption; that the right of redemption is a personal privilege and not a property right; that Sutton had no interest in the land to convey when the deed to Wilkinson was executed and delivered; that the deed did not carry with it the right to redeem; that the constitutional and statutory right of redemption is limited to the owner at the time of the decree and sale; that accordingly Wilkinson had no right in the matter and got none by paying the taxes and charges; and that his objections should have been overruled and appellant's motion to confirm sustained.

We have heretofore summarized the provisions of the decree and quoted that part upon which appellant relies.

We think it patent from the terms of the decree itself that the trial court therein protected the owner or any person entitled to redeem in his right of redemption; that the purchaser is entitled to confirmation and sheriff's deed only as to lands remaining unredeemed; and that that part of the decree which purports to foreclose and bar the equity of redemption does not become absolute prior to the confirmation of the sale. Obviously, were everything cut off finally as of the date of the decree, save the right to redeem, that right would become an empty thing. Obviously, also, if the equity of redemption were cut off as of the date of the decree, then, in the event of redemption, to make it mean anything, affirma-

tive action of the court would be required to reinvest the owner with those rights. Such is not the purpose, effect, or requirements of the decree.

To so construe the decree is to keep it in accord with the long established rule in this state that "Under our law governing sales of real property on execution, the title of a purchaser thereat depends upon a final confirmation of the sale made; and until this is had, and a conveyance of the real estate is executed and delivered in pursuance of such confirmation, the legal title of the execution debtor to the real estate is not devested." Westerfield v. South Omaha Loan & Building Assn., 75 Neb. 53, 105 N. W. 1087, on rehearing, 75 Neb. 58, 107 N. W. 1010.

The right of redemption from a tax sale is a property right and, as such, may be sold or transferred by the owner. County of Douglas v. Christensen, 144 Neb. 899, 15 N. W. 2d 53.

The Supreme Court of Iowa in Central Life Assurance Society v. Spangler, 204 Iowa 995, 216 N. W. 116, held: "* * * the ownership of real estate and the right of redemption thereof are inseparable, and in a sense identical, in that they are parts of the same thing. * * * Ownership is always transferable. Its transfer necessarily carries the statutory right of redemption. The practical effect of such statute is that, when the distressed, and perhaps helpless, owner of real estate is approaching the end of his period of redemption, he may barter to another the remnant of his rights, both contractual and statutory. In such a case, the right of redemption carries the only value which the ownership has. Such value is potential, and can be realized only by the exercise of the right of redemption. The exercise of such right saves the ownership. If the owner is not able to exercise such right, then neither ownership nor right of redemption has any value."

A quitclaim deed, such as used here, is sufficient to convey the right of redemption. Lynde v. Wakefield,

19 Mont. 23, 47 P. 5; Bateman v. Donovan, 131 F. 2d 759.

Under these authorities Wilkinson held the rights formerly vested in Sutton, including the right to redeem. When he paid the amount due into court, it then became the court's duty to deny confirmation of the sale to appellant, unless there be merit in appellant's contention that the constitutional and statutory right of redemption is limited to the owner at the time of the decree and sale.

Article VIII, section 3, of the Constitution, involved here, provides: "The right of redemption from all sales of real estate, for the non-payment of taxes or special assessments of any character whatever, shall exist in favor of owners and persons interested in such real estate, for a period of not less than two years from such sales thereof."

The statutory provision is: "Any person, entitled to redeem * * * may do so at any time after the decree of foreclosure and before the final confirmation * * *." § 77-1917, R. R. S. 1943.

The constitutional provision is self-executing. No statute or decree is necessary to enforce it or place it in operation. County of Douglas v. Christensen, *supra.*

The question then is, was Wilkinson an "owner" or "person interested" in the real estate within the constitutional provision?

It is obvious that the word "owner," as used here, is one of broad inclusion for the constitutional framers used the words "owners and persons interested." Had the constitutional framers desired to limit the right to one having the ownership at the beginning of the period of redemption, they could easily have said so. They did not, and, we think, for obvious reasons.

The purpose of the laws providing for the enforced collection of taxes by foreclosure is to secure tax revenues for the governmental subdivisions entitled thereto. If the right of redemption is frozen in the owner as of the time of the sale, then the probability of someone paying

the taxes in full would be materially lessened with the probable loss of tax revenues, as this case well illustrates.

The obvious purpose of the constitutional provision is to give the owner a very reasonable opportunity to save the value of the land, if value there be, over and above tax burdens. The opportunity of the owner to save the value by sale would be cut off if the contention of the appellant is sound. There is no purpose indicated to so penalize the owner; the opposite conclusion is indicated.

Accordingly we hold that where a tax foreclosure has gone to decree and sale, and the owner subsequently and before confirmation conveys to another, the grantee of such a conveyance has the right of redemption.

We find no merit in appellant's contentions.

The judgment of the trial court is affirmed.

AFFIRMED.

MELVIN C. FICKE, APPELLEE, V. RAY G. GIBSON, DOING BUSINESS AS KEARNEY ROOFING COMPANY, ET AL., APPELLANTS.

45 N. W. 2d 436

Filed December 27, 1950. No. 32845.

1. **Evidence: Automobiles.** Evidence as to conditions at the place of a traffic accident an appreciable time thereafter, such as the existence and location of marks or tracks, is admissible upon a proper showing that the conditions have not been changed in the meantime.
2. **Negligence.** Violations of ordinances and traffic regulations constitute evidence of negligence only, which the jury may properly consider in determining a question of negligence and the degree thereof.
3. **Highways: Negligence.** One who attempts to cross a street between intersections without looking is guilty of such negligence as will bar a recovery as a matter of law. If he testifies

that he did look, it is implied that he looked in such a manner that he would see that which was in plain sight, unless some reasonable excuse for not seeing is shown.

4. **Trial.** Where a certain fact or group of facts, if established, leaves no room for men of ordinary intelligence to differ as to the legal effect thereof, it is proper to instruct the jury what such legal effect is.
5. ———. The trial court is charged with the duty of informing the jury of the legal effect of facts which they find to be true from the evidence.
6. **Automobiles.** 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.
7. ———. Reasonable control by drivers of motor vehicles is such as will enable them to avoid collision with other vehicles operated without negligence in streets or intersections, and with pedestrians in the exercise of due care.
8. **Trial.** An instruction on the burden of proof which fails to inform the jury as to what their verdict should be in the event the evidence is equally balanced or preponderates in favor of the defendant is prejudicially erroneous.

APPEAL from the district court for Garfield County: ERNEST G. KROGER and WILLIAM F. SPIKES, JUDGES. *Reversed and remanded for new trial.*

William F. Manasil, and *Davis, Stubbs & Healey,* for appellants.

McKillip, Barth & Blevens, and *Guy A. Laverty,* for appellee.

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

WENKE, J.

Melvin C. Ficke brought this action in the district court for Garfield County against Ray G. Gibson, doing business as Kearney Roofing Company, and Sam Staten. The purpose of the action is to recover damages resulting from personal injuries suffered by plaintiff when struck by a truck owned by defendant Ray G. Gibson. Plaintiff recovered a verdict. Defendants thereupon filed

a motion for new trial and have appealed from the overruling thereof.

The accident in which appellee was injured happened on November 26, 1948, between 3:30 and 4:00 p. m. on State Highway No. 11 about three miles south of Burwell, Nebraska. At the point of the accident State Highway No. 11 runs a little northwest to southeast but generally north and south. At the time appellee was returning to his home from Burwell. He was riding with a neighbor. His neighbor stopped his truck and let appellee get out. Appellee got out on the west side of the oil-mat. The highway at this point is surfaced with oil-mat or black-top some 26 feet in width. After getting out appellee proceeded to cross this black-top to get to his home, which is located at this point just east of the highway. While proceeding to cross he was struck by a truck.

The truck which struck appellee was owned by appellant Ray G. Gibson and was at the time being driven by appellant Sam Staten. Staten was an employee of Gibson and at the time was proceeding to Burwell to fix a roof, that being the business in which Gibson was engaged.

Without setting out the evidence in further detail it will suffice here to say that it is sufficient to raise issues for the jury as to whether appellant Staten was guilty of negligence in operating the truck which was the proximate cause of the accident and also whether appellee was guilty of contributory negligence such as might defeat his right to recover.

Appellants complain of the court's admitting evidence of foot and tire marks observed at the scene of the accident some 15 or 16 hours after the accident happened when there was no showing that the conditions had not been changed since the accident. They also complain of these witnesses being permitted to give their opinions, in the form of conclusions, as to the meaning thereof.

The accident happened about 3:30 or 4:00 p. m. on November 26, 1948. LeRoy C. Ficke and C. D. Ficke, brother and father respectively of appellee, testified they examined the scene thereof the next morning between 7:30 and 8:00 a. m. They were then permitted to testify as to the marks, both foot and tire, which they observed there and to state, in the form of a conclusion, that they were the marks made by the respective parties and how the accident happened. There was no affirmative showing that the conditions at the scene of the accident had not changed by the time it was visited by these two witnesses the next morning.

As stated in 9 Blashfield's Cyclopedia of Automobile Law and Practice, § 6179, p. 609: "Evidence as to conditions at the place of a traffic accident an appreciable time thereafter, such as the existence and location of marks or tracks, is admissible upon a proper showing that the conditions have not been changed in the meantime. * * * A different rule applies, however, where there is no showing that the conditions have not been changed since the accident."

The foregoing text goes on to state: "While it is a matter of discretion with the court whether the length of time after the accident is sufficient to bar such testimony, ordinarily the fact that testimony as to conditions relates to a time somewhat remote from the accident affects its weight rather than its competency."

In this respect we said in Potach v. Hrauda, 132 Neb. 288, 271 N. W. 795: "Plaintiff contends that the court unduly restricted him in his attempt to produce evidence of the location of oil spots and glass in and about the scene of the accident. The witnesses produced did not arrive at the scene of the accident until almost three hours after it occurred. There is evidence in the record that there was much traffic over the highway and that the glass had been kicked and swept off the pavement to prevent damage to tires. We find no prejudicial error in the ruling of the trial court, under the circum-

stances of this case, that the evidence tendered was too remote."

As stated in Billingsley v. Gulick, 252 Mich. 235, 233 N. W. 225: "A witness visited the scene early the next morning, and, over objection, was permitted to testify that there was a pool of blood on the gravel at the side of the pavement, also a deep impression in the gravel for about 30 feet from the south to the pool of blood, that a metal cap of an oil bottle was about 3 feet from the pavement and south of the pool of blood, and a shoe and a side windshield from a roadster were over in a dooryard.

"The accident happened between 11 and 12 o'clock at night, and upon a much-traveled road, and the court was in error in receiving the testimony of the finding and location of articles, without affirmative proof that there had been no change of position after the accident."

As stated in 5 Am. Jur., Automobiles, § 633, p. 852: "Evidence as to tracks or other marks made by motor vehicles on the pavement or roadway is generally admissible in civil actions for injury or damage, where the witness testifying had an opportunity to make an observation of the marks before any change had taken place. A proper foundation for the introduction of such evidence should first be laid, however, by showing how soon after the accident the witness observed the markings, his opportunities for accurate observation, and any other factors explanatory of the skid marks or tracks, and the conditions under which they were made."

There is no direct proof in the record that the conditions at the scene of the accident, with reference to the foot marks and tire tracks or skid marks, were the same the next morning as they had been the previous afternoon immediately after the accident. Therefore it was error to admit the evidence relating thereto as of the next morning. Whether, considering all of the facts and circumstances disclosed by the record, it was

prejudicial we need not decide because other errors complained of require a reversal and retrial.

In regard to the second part of the claimed error appellee's witnesses did not only testify that the foot marks or tracks were those of appellee and the tire marks or skid marks were those of appellant Gibson's truck but referred to them as such in testifying and, by their location, described how and where the accident happened.

As stated in Chicago, R. I. & P. Ry. Co. v. Holmes, 68 Neb. 826, 94 N. W. 1007: "He should have been required to state the facts from which his opinion was derived, so long as it was practicable to place those facts before the jury, and to state what would be a prudent and careful course in doing what Oakleaf had to do. The jurors would then have been left to form their own opinion from such facts and from the evidence as to what would be a proper way of doing the work. It is contended on behalf of the plaintiff that the error was not prejudicial, because the conclusion was one which the jurors must have drawn necessarily from the facts if the witness had not given his opinion. We can not agree."

As stated in In re Estate of Potts, 144 Neb. 729, 14 N. W. 2d 323: "The objections to these questions should have been sustained as calling for the conclusion of the witness."

We said in In re Estate of Potts, *supra*: "While objections to conclusions of fact should ordinarily be sustained by the trial court, yet where there is other competent evidence on the subject in the record, their improper admission will not be considered as reversible error where prejudice is not shown."

Here appellant Staten testified that when he first saw appellee he was across the center of the black-top; that he then turned to the left to pass appellee to his (appellee's) rear; that appellee then looked up for the first time and saw the truck; and that appellee then suddenly jumped back and into the path thereof and

was hit. Appellee testified that he had only started to cross the black-top when he looked to his right and saw the truck; that he then waited for the truck to pass; that he was then only two steps or about five feet from the west edge of the black-top; that suddenly the truck swerved toward him; that he "froze" in his tracks; and that the truck then hit him causing his injuries. The evidence of the two witnesses fully corroborates the appellee in his version of the story.

As to which of these parties was telling the truth as to how the accident happened is material to the jury's determination of their respective rights. Under this situation we think the form in which this testimony was given prevented appellants from having this question fairly submitted and decided; consequently it was prejudicial.

Appellants contend that the court, by its instruction No. 4, did not properly inform the jury of the legal effect of the failure of a pedestrian to look for approaching vehicles before and while crossing a public highway.

The court gave instruction No. 4 in this regard which is as follows:

"You are instructed that on the 26th day of November, 1948, it was the law of the State of Nebraska that the driver of a motor vehicle shall at all times cause such vehicle to travel on the right half of the highway, unless such right half is obscured or impassable.

"You are instructed that on said date it was the law of the State of Nebraska that no person should operate a motor vehicle upon a public highway in such a manner as to endanger the life or limb of any person lawfully upon such highway.

"You are further instructed that a pedestrian has an equal right to the use of a highway with that of a driver of a motor vehicle and he is entitled to assume that the driver of a motor vehicle will obey the traffic laws; it is, however, the duty of such pedestrian before

crossing a public highway to exercise due care for his own safety, and to look for approaching vehicles before attempting to cross such highway, and to see that which was in plain sight, unless some reasonable excuse for not seeing is shown.

"If you find from a preponderance of the evidence introduced upon the trial of this case that these rules, or any of them, were violated by either the plaintiff or the defendant, Sam Staten, such violation would not in and of itself constitute negligence, but would be a circumstance which you may take into consideration in determining whether or not the party who violated such rule or rules was guilty of negligence."

No fault is found with this instruction as paragraph four relates to paragraphs one and two, and properly so, for this court has often said: "* * * violations of ordinances and traffic regulations constitute evidence of negligence only, which the jury may properly consider in determining a question of negligence and the degree thereof. Violations of such are not negligence per se. Huston v. Robinson, 144 Neb. 553, 13 N. W. 2d 885; Gleason v. Baack, 137 Neb. 272, 289 N. W. 349." Watson Bros. Transp. Co. v. Chicago, St. P., M. & O. Ry. Co., 147 Neb. 880, 25 N. W. 2d 396.

We have also applied this principle to the violation of common law duties. As stated in Chicago, B. & Q. R. R. Co. v. Metcalf, 44 Neb. 848, 63 N. W. 51, 28 L. R. A. 824: "We cannot see that any distinction in kind arises between a case where the defendant has violated a statutory obligation and one where he has violated the common law obligation to conduct himself for the safety of others in such a manner as one of ordinary prudence would conduct himself under similar circumstances." See, also, Omaha & R. V. Ry. Co. v. Brady, 39 Neb. 27, 57 N. W. 767.

As stated in A. & N. R. R. Co. v. Bailey, 11 Neb. 332, 9 N. W. 50, from Detroit & Milwaukee R. R. Co. v. Van Steinburg, 17 Mich. 99: "'* * * When the question

arises upon a state of facts on which reasonable men may fairly arrive at different conclusions, the fact of negligence cannot be determined until one or the other of those conclusions has been drawn by the jury. * * *' "

As quoted from Railroad Co. v. Stout, 17 Wall. 657, we approved in City of Lincoln v. Gillilan, 18 Neb. 114, 24 N. W. 444, the following: " 'Upon the facts proven in such cases, it is a matter of judgment and discretion, of sound inference, what is the deduction to be drawn from undisputed facts. Certain facts we may suppose to be clearly established from which one sensible, impartial man would infer that proper care had not been used and that negligence existed; another man, equally sensible and equally impartial, would infer that proper care had been used and that there was no negligence. It is this class of cases and those akin to it that the law commits to the decision of a jury. * * *' " See, also, Omaha Street Ry. Co. v. Craig, 39 Neb. 601, 58 N. W. 209; Anderson v. Nincehelser, 152 Neb. 857, 43 N. W. 2d 182.

However, as to the duty set out in paragraph three of instruction No. 4, namely, "* * * it is, however, the duty of such pedestrian before crossing a public highway to exercise due care for his own safety, and to look for approaching vehicles before attempting to cross such highway, and to see that which was in plain sight, unless some reasonable excuse for not seeing is shown," we said in Trumbley v. Moore, 151 Neb. 780, 39 N. W. 2d 613: "It is elementary that one who attempts to cross a street between intersections without looking is guilty of such negligence as would bar a recovery as a matter of law. If he testifies that he did look, it is implied that he looked in such a manner that he would see that which was in plain sight, unless some reasonable excuse for not seeing is shown. The decisions of this court have consistently held to this rule. Vandervert v. Robey, 118 Neb. 395, 225 N. W. 36; Bergendahl v. Rabeler, 133 Neb. 699, 276 N. W. 673; Whitaker v. Keogh, 144 Neb. 790, 14

N. W. 2d 596; Simcho v. Omaha & C. B. St. Ry. Co., 150 Neb. 634, 35 N. W. 2d 501." See, also, Kubo v. Fish, 152 Neb. 74, 40 N. W. 2d 270.

As stated in Seyfer v. Otoe County, 66 Neb. 566, 92 N. W. 756: "Where a certain fact or group of facts, if established, leaves no room for men of ordinary intelligence to differ as to the legal effect thereof, it is proper to instruct the jury what such legal effect is."

And in Lamberth v. Omaha & C. B. St. Ry. Co., on rehearing, 146 Neb. 217, 21 N. W. 2d 425: "The trial court is charged with the duty of informing the jury of the legal effect of facts which they find to be true from the evidence."

We think the trial court should have informed the jury of the legal effect of appellee's failure to perform this duty, if such they found to be a fact, and by failing to do so did not place the responsibility on appellee that was legally his.

Appellants contend that in submitting the issues of negligence the court placed upon appellant Staten a greater duty or responsibility than our holdings justify.

By instruction No. 1 the court advised the jury as follows: "Plaintiff (appellee here) * * * alleges that the defendant, Sam Staten (appellant here), was negligent in his operation of a truck in the following particulars: * * * 3. By failing to have said truck under control so that he could stop the same before colliding with the plaintiff."

By its instruction No. 3 the court advised the jury that the issues of fact submitted for their determination included, among others, the following: "2. Was the defendant Sam Staten negligent."

By its instruction No. 5 the court advised the jury: "You are instructed that the fact that an accident happens raises no presumption that either party thereto was negligent, but the specific acts of negligence alleged in the petition on the part of the defendant must be

proven by the plaintiff by a preponderance of the evidence."

By its instruction No. 6 the court advised the jury, insofar as here material, as follows: "You are instructed that the burden or (of) proof is upon the plaintiff to show, by a preponderance of the evidence, the negligence charged in the petition and that such negligence was the proximate cause of plaintiff's injuries."

We have held, in this respect, as follows:

" 'Complete control' is not required by the laws of Nebraska, as stated in the instruction. The required degree of care has been defined as follows:

" '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.' Thrapp v. Meyers, 114 Neb. 689; De Griselles v. Gans, 116 Neb. 835.

" 'Reasonable control' by drivers of motor vehicles is such as will enable them to avoid collision with other vehicles operated without negligence in streets or intersections, and with pedestrians in the exercise of due care; but 'complete control' such as will only prevent a collision by anticipation of negligence or illegal disregard of traffic regulations, in absence of notice, warning or knowledge, is not required by the laws of Nebraska. The instruction given by the trial court in the present case imposed upon defendant too high a degree of control under the circumstances." Spomer v. Allied Electric & Fixture Co., 120 Neb. 399, 232 N. W. 767.

"One is required only to have his car under such reasonable control as to be able to avoid a collision with other vehicles whose drivers exercise due care. Complete control which is such as will prevent collision by the anticipation of negligence on the part of another in the absence of warning or knowledge is not required. Spomer v. Allied Electric & Fixture Co., 120 Neb. 399." Patterson v. Kerr, 127 Neb. 73, 254 N. W. 704.

There is no instruction which advises the jury of the foregoing with reference to the issue of negligence submitted in instruction No. 3 hereinbefore set out. In the absence thereof the instructions placed on the appellant Staten too great a duty or responsibility.

There is also discussed, with reference to instruction No. 6 as given by the court, the proposition that it does not fully inform the jury as to when it should find for the appellants.

Instruction No. 6 is in full as follows: "You are instructed that the burden or (of) proof is upon the plaintiff to show, by a preponderance of the evidence, the negligence charged in the petition and that such negligence was the proximate cause of plaintiff's injuries. If plaintiff has proven these facts, by a preponderance of the evidence, and you find that the plaintiff was not guilty of contributory negligence which was a proximate cause of his injury, then the plaintiff would be entitled to recover such damages as he has shown, by a preponderance of the evidence, to have sustained by reason of the negligence of the defendant; but if you find, from a preponderance of the evidence, that plaintiff has been guilty of negligence which contributed to his injuries, then plaintiff's right to recovery will be governed by Instruction No. 7."

We said in Fitzsimons v. Frey, *ante* p. 124, 43 N. W. 2d 531: "An instruction on the burden of proof which fails to inform the jury as to what their verdict should be in the event the evidence is equally balanced or preponderates in favor of the defendant is prejudicially erroneous."

It will be observed that the court informed the jury that the burden of proof was on the plaintiff to show, by a preponderance of the evidence, the negligence charged in the petition and that such negligence was the proximate cause of his injuries and that if he did so, without their finding that he was guilty of contributory negligence which was the proximate cause of his in-

juries, that appellee would be entitled to recover. Nowhere in this or any other instruction is the jury informed of what their verdict should be if the appellee has not sustained this burden.

The instruction does go on to state what they are to do if, from a preponderance of the evidence, they find appellee guilty of negligence which contributed to his injuries and the rule they are to apply, which is fully set out in instruction No. 7. But this does not relate to the question of what their verdict should be if they fail to find, by a preponderance of the evidence, that appellants were guilty of negligence. It relates to the question of contributory negligence only after they have found appellants guilty of negligence which was the proximate cause of appellee's injuries.

We find the court failed to fully instruct the jury as to when they should find for appellants.

In view of the foregoing appellants are entitled to a new trial. We therefore reverse the judgment of the trial court and remand the cause with directions for a new trial.

REVERSED AND REMANDED FOR NEW TRIAL.

RICHARD LEON BRYANT, PLAINTIFF IN ERROR, V. STATE OF NEBRASKA, DEFENDANT IN ERROR.

45 N. W. 2d 169

Filed December 27, 1950. No. 32897.

1. **Appeal and Error.** The maximum time allowed in a criminal case, unless the time is extended by this court, for service of a bill of exceptions is within 90 days, and for the allowance and settlement thereof is within 110 days, from the time of the filing of the petition in error in this court.
2. ———. The Supreme Court is authorized to grant an extension of time for the preparation of a bill of exceptions upon application and good cause shown therefor; however, a situation justifying an exercise of this authority must be one beyond the capacity and power of the applicant to have prevented.

3. ———. In the absence of a bill of exceptions, it will be presumed in this court that any issue of fact in the case proper for the trial court to consider was correctly determined, and the judgment rendered will be affirmed if the pleadings state a cause of action or a defense and support the judgment.
4. **Judgments.** All presumptions exist in favor of the regularity and correctness of judgments of courts of general jurisdiction, and he who asserts the contrary is required to establish the alleged defect or error by an exhibition of the record.
5. **Indictments and Informations.** The information or indictment and a plea of not guilty are the pleadings and formulate the issue on the merits in a criminal case.
6. ———. An information which alleges the essential elements of an offense described in the statute and intended to be charged against the accused is sufficient.
7. **Homicide: Indictments and Informations.** An information which charges the crime of murder in the first degree includes murder in the second degree, and a conviction of the accused of the latter is sustained thereby.

ERROR to the district court for Douglas County: JAMES T. ENGLISH, JUDGE. *Affirmed.*

H. J. Pinkett, for plaintiff in error.

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

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

BOSLAUGH, J.

Plaintiff in error was charged with the crime of first degree murder and was convicted of murder in the second degree. The sentence imposed was the minimum permitted for that crime. The record of his conviction and sentence is presented for review.

His motion for new trial was denied and judgment was rendered and entered on June 10, 1950. Promptly thereafter a transcript of the evidence was ordered by counsel for the accused and a promise of payment of the expense "in a few days" was made by him to the reporter. The amount required to pay the expense of

preparing the transcript was furnished by the accused to his counsel, but no payment was made the reporter until October 29, 1950. The transcript was completed and delivery to the counsel for defendant tendered by the reporter on September 8, 1950. Plaintiff in error knew his attorney had not paid the reporter for and had not secured delivery of the transcript. He learned this by repeated personal calls on the reporter and also by telephone inquiry. The draft of the bill of exceptions was not at any time served upon the State or anyone representing it. The petition in error was filed July 8, 1950. The last day on which service thereof could have been made was October 6, 1950, and it could not have been allowed and settled after October 26, 1950, except by an extension of time therefor granted by action of this court. § 24-342, R. S. Supp., 1949; § 25-1140, et seq., R. R. S. 1943; Scotts Bluff County v. McHenry, 128 Neb. 613, 259 N. W. 754; Bonzo v. Bonzo, 138 Neb. 92, 292 N. W. 61.

The draft of the bill of exceptions was available to the defendant and his counsel on September 8, 1950. It was delivered to and received by counsel for the defendant on October 29, 1950. No attempt was made for more than a month thereafter to secure consideration by this court of an application for an extension of time. A motion was made on November 30, 1950, by plaintiff in error for an order "extending the time for the preparation of the Bill of Exceptions * * * until December 15, 1950." This court is authorized to grant an extension of time for settlement and allowance of a bill of exceptions, but only "upon application and showing of good cause therefor." § 25-1140.07, R. R. S. 1943. A situation justifying the intervention of this court by virtue of that provision must be one beyond the capacity and power of the applicant to have prevented. The showing made in support of the motion for an extension of time does not show a situation of that character. The good cause required as a prerequisite of a further grant of

time by this court means the intervention of something beyond control of the litigant. Negligence or the absence of diligence or alertness of the litigant or his counsel is not within the meaning of the law unavoidable casualty or misfortune. Shipley v. McNeel, 149 Neb. 793, 32 N. W. 2d 636; Lyman v. Dunn, 125 Neb. 770, 252 N. W. 197. The application of defendant for a grant by this court for additional time to serve and settle a bill of exceptions was, because of what has been said herein, properly denied before the final submission of the case.

The assignments of error are: (1) That plaintiff in error was deprived of aid of counsel and the benefit of due process of law because the counsel who appeared for him in the trial was suffering from a disabling physical condition and was thereby rendered incapable of conducting a defense for defendant; (2) that it was prejudicial error for the court not to declare a mistrial because of the illness of the attorney for the defendant and his misconduct during the trial; and (3) that a denial of the motion of the defendant for a new trial was error. The first two assignments of error are not referred to in the motion of plaintiff in error for a new trial. It is mandatory that alleged errors occurring in the trial of a criminal case must be pointed out to the trial court in a motion for new trial and a ruling obtained thereon as a prerequisite to a review of them in this court. Luster v. State, 142 Neb. 253, 5 N. W. 2d 705; Fisher v. State, *ante* p. 226, 43 N. W. 2d 600. A review of any of the alleged errors would require an examination and consideration of evidence produced at the trial and the record of the trial made in the district court. There is no bill of exceptions. In the absence of a bill of exceptions there is no question of fact determined by the district court for review in this court, and no question will be considered here, a determination of which necessitates an examination of evidence produced in the trial court. Darlington v. State, *ante* p. 274,

44 N. W. 2d 468; Wabel v. Ross, *ante* p. 236, 44 N. W. 2d 312.

When the record shows such a situation, it is presumed that any issue of fact which it was proper for the trial court to consider and decide was sustained by evidence and was correctly determined, and the judgment will be affirmed if the pleadings state a cause of action or a defense and support the judgment rendered. McQueen v. Jones, 150 Neb. 853, 36 N. W. 2d 271; Wabel v. Ross, *supra*. All presumptions exist in favor of the regularity and correctness of the judgments of courts of general jurisdiction, and he who asserts the contrary is required to establish the alleged defect or error by an exhibition of the record. Darlington v. State, *supra*.

The information or indictment and the plea of not guilty are the pleadings and formulate the issue in a criminal case. Bundy v. State, 114 Neb. 121, 206 N. W. 21; Fetty v. State, 118 Neb. 169, 223 N. W. 955. The information upon which the defendant was convicted asserts that about January 8, 1949, defendant in Douglas County, Nebraska, feloniously, purposely, and with deliberate and premeditated malice, shot Robert Yourell with an automatic pistol, thereby caused his death, and thus committed murder in the first degree. The information was sufficient to charge defendant with the crime of first degree murder. Nichols v. State, 109 Neb. 335, 191 N. W. 333; Veneziano v. State, 139 Neb. 526, 297 N. W. 920. The crime of murder in the second degree was included in the charge of murder in the first degree. The information supports the judgment rendered in this case. Moore v. State, 148 Neb. 747, 29 N. W. 2d 366.

The judgment of the district court must be, and it is, affirmed.

AFFIRMED.

MARY SHAMBURG, APPELLEE, V. VERNON SHAMBURG, DOING BUSINESS AS FAIRBURY CEMENT BLOCK COMPANY, APPELLANT.

45 N. W. 2d 446

Filed December 27, 1950. No. 32912.

1. **Workmen's Compensation.** Under the Workmen's Compensation Act the relation of employer and employee is dependent upon the contract for hire.
2. **Master and Servant: Workmen's Compensation.** The relation of employer and employee is the same relation as is familiar throughout the law under the name of master and servant, except that to be an employee, as distinguished from a servant, one must serve under a contract of hire.
3. **Workmen's Compensation.** In ascertaining when a person is an employee of another, although his contract of employment is not directly made with such person, each case must be decided on its peculiar facts and ordinarily no one feature of relationship is determinative.
4. ———. The general test in determining whether an employee is a servant of his original master or of the party to whom he has been furnished, is whether in the particular service which he is engaged to perform he continues to be liable to the direction and control of his master, or becomes subject to that of the party to whom he is lent or hired. Other factors are looked to only to aid in determining whether such relationship exists in a given case.
5. ———. In order to transfer liability from the general employer of a loaned employee to the borrowing employer, there must be some consensual arrangement sufficient to create a new employer-employee relationship.
6. ———. Where an employee at the command and pursuant to the direction of his employer enters the service of another, no new employer-employee relationship is created; the consent necessary to shift the employer-employee relationship from the general to the special employer cannot be inferred from the fact that the employee obeyed the commands of the master in entering such service.
7. ———. From a review of the evidence in this case, the loaned employee at all times remained the employee of the original employer with whom he had a contract for hire, and the compensation award entered by the district court is conclusively supported by the evidence.

APPEAL from the district court for Jefferson County:

CLOYDE B. ELLIS, JUDGE. *Affirmed.*

Jack, Vette & Elliott, for appellant.

Hubka & Hubka, for appellee.

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

MESSMORE, J.

This is a workmen's compensation case brought by Mary Shamburg against Vernon Shamburg, doing business as the Fairbury Cement Block Company, to recover death benefits under the workmen's compensation law by reason of an accident sustained by her husband Orin Shamburg which resulted in his death while in the employ of the defendant.

On December 15, 1949, plaintiff filed her petition in the Nebraska Workmen's Compensation Court, wherein she alleged her husband was killed while in the employ of the defendant, and prayed for relief in accordance with the workmen's compensation law. The defendant and his insurance carrier filed answer to the petition, and alleged that the plaintiff's husband, at the time of his death, was not an employee of the defendant but was actually in the employ of one R. M. Weblemoe; prayed for dismissal of the plaintiff's petition and that R. M. Weblemoe, doing business as the Weblemoe Sand and Gravel Company or Weblemoe & Company, be made a party to the action; and that the cause be continued until process could be completed on R. M. Weblemoe as designated, and the issues joined. The motion to make R. M. Weblemoe, as before mentioned, a party was overruled.

On February 16, 1950, after hearing had before a judge of the workmen's compensation court, an award was entered in favor of the plaintiff and against the defendant in the sum of $22 a week for a period of 325 weeks from and after September 30, 1949, the date of the accident resulting in the death of the plaintiff's hus-

band, and in addition, the sum of $250 funeral benefits.

On February 28, 1950, the defendant filed an application for rehearing before the entire workmen's compensation court, setting up the errors alleged to have been committed by the judge granting the award. On May 6, 1950, after hearing had before the entire compensation court on rehearing, an award was granted the plaintiff sustaining the award previously granted. Notice of appeal from rehearing was filed by the defendant May 12, 1950, in the workmen's compensation court.

On May 19, 1950, the defendant filed a petition on appeal in the district court for Jefferson County setting forth the proceedings had in the workmen's compensation court; alleging in addition that the deceased was at the time of his accidental death an employee of R. M. Weblemoe; and alleging error in the granting of the award by the workmen's compensation court in its findings of fact and in failing to join R. M. Weblemoe in the action. The plaintiff filed an answer to the petition on appeal reiterating the allegations of her petition filed in the workmen's compensation court, and prayed for death benefits as provided for by law. The cause was tried before the district court for Jefferson County on the evidence adduced in the hearing before the entire workmen's compensation court. The trial court entered an award affirming the award granted by the workmen's compensation court.

Upon the overruling of the defendant's motion for new trial, defendant perfected appeal to this court.

We will refer to the parties as originally designated in the workmen's compensation court.

The principal assignments of error are: (1) The findings of fact by the trial court are not sustained by the evidence; and (2) the award entered by the trial court is contrary to law.

That the plaintiff is entitled to the benefits under the workmen's compensation law is not questioned. The question as to whether the defendant is liable for

the payments of the same constitutes the sole issue in the case.

Both parties treat the assignments of error as sufficient to require a review here under the provisions of section 48-185, R. S. 1943, that a judgment of the district court may be modified or set aside only upon the ground that "the findings of fact are not conclusively supported by the evidence as disclosed by the record, and if so found, the cause shall be considered de novo upon the record."

Defendant asked for a trial de novo. Plaintiff submits that the award is conclusively supported by the record. This procedure calls for us to review the evidence. If upon that review we find the award is conclusively supported by the evidence, that ends the matter. If, however, as a result of a review of the evidence on a trial de novo we find that the award should be sustained, it is not necessary to determine the question as to whether the award is "conclusively supported by the evidence." If we find as a result of a trial de novo that the award should be modified or set aside, then obviously it is not conclusively supported by the evidence. We so review this evidence. See Werner v. Nebraska Power Co., 149 Neb. 408, 31 N. W. 2d 315.

For convenience we will refer to Orin Shamburg as Orin, to Vernon Shamburg as Vernon, and to R. M. Weblemoe as Weblemoe.

The facts are in little dispute, if any. Mary Shamburg, her husband Orin, and a minor son lived together in Fairbury and were so living on September 30, 1949, at the time Orin met with an accident which proved fatal. The wife and son were dependents of the husband and father. Vernon, an elder son, had full time employment with an electric company. In October 1947, he purchased a building and equipment located on the ground belonging to Weblemoe who is engaged in the sand and gravel business. The purchase was made from Weblemoe, and Vernon became the sole owner of the

property, his purpose being to manufacture and sell cement blocks. Due to the fact that he was steadily employed, he hired Orin to oversee, supervise, and manage the cement block business. He paid Orin by the hour, once a month, carried him as an employee on the records, noted the payment of salary on the audit account, turned in the wages of Orin for compensation insurance, and paid the social security assessments on Orin's wages. Orin's occupation was given as yard worker in the workmen's compensation insurance policy carried by Vernon. A stock pile of cement blocks was kept on hand for sales, which in such industry are generally made during the building season in the spring and fall. During the winter when the days are warm enough the cement blocks are manufactured. These matters were attended to by Orin. Vernon did the book work involved in the business.

In the fore part of January 1949, Vernon and Weblemoe entered into an arrangement whereby Orin would work for Weblemoe who at the time had something for Orin to do. Orin was not needed full time at the cement block plant, so Vernon loaned Orin to Weblemoe. Orin had no knowledge of the arrangement and made no objections to working for Weblemoe. Some discussion was had between Vernon and Weblemoe with reference to the compensation insurance. Vernon had always carried such insurance on Orin and it was agreed that that would continue, and that Orin would remain in the employ of Vernon.

Orin received wages of one dollar an hour. Vernon purchased sand from Weblemoe, and Weblemoe purchased products from Vernon. They had accounts between themselves, and Vernon was indebted to Weblemoe. Orin kept a record of the number of hours he worked for Weblemoe, and turned his report of the same over to Vernon once a month. The wages paid Orin by Vernon were in no manner dependent upon any money that might be received from Weblemoe.

Weblemoe credited Vernon's account with the labor of Orin, which amounted to a dollar and ten cents an hour and included truck service and assessments on social security of Orin.

Orin always opened the business of the cement block company while he worked for Weblemoe, and, if needed, he would return to the business and attend to any matters in connection therewith that required attention. That was part of the arrangement between Weblemoe and Vernon. Weblemoe had no ownership or interest in the cement block business.

Weblemoe testified that he made the arrangement with Vernon to have Orin work for him; that he had no contract for hire with Orin; and while Orin was working for him he directed the work that Orin was to do. The reason for the arrangement was that he needed help, and it was not necessary to have a man at the cement block plant at all times, so he arranged to have Orin work for him while he wasn't working at the cement block plant and wasn't needed at the plant. He kept no record of Orin's time, paid him nothing, did not carry him as an employee, and upon being billed by Vernon for the labor he in turn credited Vernon's account with him for such amounts.

The exhibits in the record, consisting of checks, show the payments made to Orin by Vernon for the amount of wages he was entitled to, and other exhibits show the number of hours Orin worked for Weblemoe.

Weblemoe was present when on September 30, 1949, on his property, Orin met his death. Just prior to his death Orin was giving instructions in moving a dragline as to where it should be set because the operator was not in an advantageous position to properly set the dragline. The bucket from the dragline fell, struck Orin, and killed him.

The foregoing constitutes the relevant and material evidence upon which the trial court affirmed the award granted by the workmen's compensation court.

Under the Workmen's Compensation Act of this state the relation of employer and employee is dependent upon the contract for hire. The pertinent sections of the statutes are sections 48-114 and 48-115, R. S. 1943. Under section 48-114, R. S. 1943, every person, firm, or corporation engaged in any business, who has any person in service under any contract of hire, express or implied, oral or written, is defined as an employer. Section 48-115, R. S. 1943, provides that the term "employee" means every person in the service of an employer under any contract of hire, express or implied, oral or written.

The relation of employer and employee is the same relation that is familiar throughout the law under the name of master and servant, except that to be an employee, as distinguished from a servant generally, one must serve under a contract of hire. See McDermott's Case, 283 Mass. 74, 186 N. E. 231.

In approaching a determination of this appeal we are cognizant of the complexities that arise due to the interchange and loaning of employees in modern business, and the variance in the decisions in this field. We shall not attempt to reconcile the various decisions on this subject matter. Generally most courts agree that the main test is the right of control, and that right, in the actual exercise of that control, governs. See, Bernardy v. Beals, 75 N. D. 377, 28 N. W. 2d 374; McDermott's Case, *supra;* McDowell v. Stilley Plywood Co., 210 S. C. 173, 41 S. E. 2d 872; Yergey v. Montgomery Ward & Co., 239 Iowa 258, 30 N. W. 2d 153; Burnett v. Industrial Commission (Ohio App.), 63 N. E. 2d 240; Peterson v. Highland Crate Cooperative, 156 Fla. 539, 23 So. 2d 716. Other factors are looked to only to aid in determining whether such relationship existed in a given case.

In ascertaining when a person is an employee of another although his contract of employment is not directly made with such person, each case must be decided on its peculiar facts and ordinarily no one feature of re-

lationship is determinative. See Cimorelli v. New York Cent. R. R. Co., 148 F. 2d 575.

While there is considerable conflict in the decisions, it appears that according to the great weight of authority in the United States, the general test in determining whether an employee is a servant of his original master, or of the party to whom he has been furnished, is whether in the particular service which he is engaged to perform he continues to be liable to the direction and control of his master, or becomes subject to that of the party to whom he is lent or hired. See, Independence Indemnity Co. v. Industrial Accident Comm., 203 Cal. 51, 262 P. 757; Parsons v. Daly & Sons, 114 Conn. 143, 158 A. 216; Allen-Garcia Co. v. Industrial Comm., 334 Ill. 390, 166 N. E. 78; Gagnon's Case, 128 Me. 155, 146 A. 82; Chisholm's Case, 238 Mass. 412, 131 N. E. 161; Oklahoma General Power Co. v. State Industrial Comm., 108 Okl. 251, 235 P. 1095; Persing v. Citizens Traction Co., 294 Pa. 230, 144 A. 97; Lewis v. Byers Motor Car Co., 102 Pa. Super. 434, 156 A. 899; Schneider's Workmen's Comp. Law, (2d ed.), § 24, p. 213; 71 C. J., Workmen's Compensation Acts, § 139, p. 403; Berrier v. Associated Indemnity Co., 142 Fla. 351, 196 So. 188.

As stated in Rhinelander Paper Co v. Industrial Comm., 206 Wis. 215, 239 N. W. 412: "It is quite generally agreed that in order to transfer liability from the general employer to the one to whom the employee is loaned, there must be some consensual relationship between the loaned employee and the employer whose service he enters, sufficient to create a new employer-employee relationship. Where an employee enters the service of another at the command and pursuant to the direction of the master, no new relationship is created. While the employee may be subject to the direction of the temporary master, he is there in obedience to the command of his employer, and in doing what the new master directs him to do he is performing his duty to the employer who gave the order. * * * Consent cannot

be inferred merely from the fact that the employee obeyed the commands of his master in entering the services of another."

In Dahl v. Wunderlich, 194 Minn. 35, 259 N. W. 399, the court said: "Before such new relationship can be made effective the servant must understand that he is submitting himself to the control of the new master." See, also, Snetcher & Pittman v. Talley, 168 Okl. 280, 32 P. 2d 883.

It is the weight of authority that while payment of wages is a circumstance which may aid in determining the employer, that payment of wages or salary, of itself, is insufficient to establish that the receiver thereof is the servant of the one paying the wages or salary. See Berrier v. Associated Indemnity Co., *supra*. See, also, Nilsson v. Nepi Bros., 138 Pa. Super. 107, 9 A. 2d 912.

The defendant contends that during the greater part of the year of 1949, up to the time of his death, the deceased performed little service for Vernon, but that a considerable portion of his work was with Weblemoe.

Duration of time of employment is not a controlling factor to the establishment of the relationship of master and servant, or in other words, employer and employee. See, Northern Trust Co. v. Industrial Comm., 231 Wis. 133, 285 N. W. 339; Johnson v. Wisconsin Lumber & Supply Co., 203 Wis. 304, 234 N. W. 506, 72 A. L. R. 1279.

With the foregoing authorities in mind, and applying the facts in the instant case thereto, we believe the cited authorities are controlling. The evidence in the instant case shows that Orin's contract for hire was made with Vernon. He made no such contract with Weblemoe, and at all times he was subject to the general orders of Vernon. There is no evidence in the record that Vernon ever relinquished or resigned full control over Orin to Weblemoe. When the business of the defendant required Orin's attention, he turned from the work that he was doing for Weblemoe and

attended to the business of the defendant, and did not return to Weblemoe's work until he had completed such business. Weblemoe could not exercise the right to discharge him, nor to order him to do work directed by him to the exclusion of the defendant's business. The fact that Weblemoe and his agents directed the deceased in the performance of the work he was doing for Weblemoe does not change the situation. In the case of a loaned employee such direction and control is necessary and present.

It is apparent that Vernon benefited from the labor performed by Orin for Weblemoe. It made it possible, while he was employed elsewhere full time, to keep the business of the cement block company open at considerable less expense. Likewise, Weblemoe benefited from Orin's labor, because at the time he needed a man of that type to do work for him.

We conclude the trial court's findings in such respect were correct.

The plaintiff requests that under the authority of section 48-125, R. S. 1943, the court, in addition to allowing the maximum compensation also grant a penalty in favor of the plaintiff, with respect to all delinquent payments, for the reason that no reasonable controversy existed and there was no reason for the continued failure to pay the installments as they became due. We are not in accord with the plaintiff's contention in such respect. A reasonable controversy did exist, and the defendant had a right to have such controversy determined. However, as provided for in section 48-125, R. S. 1943, in the event the employer appeals to the district court from the award of the compensation court, or any judge thereof, and fails to obtain any reduction in the amount of such award, the district court may allow the employee a reasonable attorney's fee to be taxed as costs against the employer, and the Supreme Court shall in like manner allow the employee a reasonable sum as attorney's fees for the proceedings in this court. The

plaintiff requests an attorney's fee in this court. The statute authorizes it. See Faulhaber v. Roberts Dairy Co., 147 Neb. 631, 24 N. W. 2d 571. The plaintiff is allowed an attorney's fee of $250 for services in this court.

Upon a review of the evidence we find and conclude the award is conclusively supported by the evidence. The judgment of the district court is affirmed.

AFFIRMED.