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REPORTS OF CASES

DECIDED BETWEEN
JUNE 19, 1954 AND FEBRUARY 18, 1955

IN THE

Supreme Court of Nebraska

JANUARY TERM 1954, SEPTEMBER TERM 1954,
AND
JANUARY TERM 1955

VOLUME CLIX

WALTER D. JAMES
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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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CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

JANUARY TERM, 1954

VELDA J. ENO, APPELLANT, V. GORDON M. ENO, APPELLEE.
65 N. W. 2d 145

Filed June 25, 1954. No. 33474.

1. **Divorce.** In determining the question of alimony 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 probably would 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 of each thereto.
2. ———. The amount of alimony to be granted a wife is not to be determined alone from the property possessed by the husband. Many other factors enter into the determination, such as the husband's age, health, earning capacity, future prospects, and social standing.

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

Perry & Perry, J. Jay Marx, Davis, Healey, Davies & Wilson, and *Robert A. Barlow, Jr.,* for appellant.

Ralph W. Slocum and *Ginsburg & Ginsburg,* for appellee.

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

CARTER, J.

Plaintiff, Velda J. Eno, brought a suit for divorce against the defendant, Gordon M. Eno. The trial court granted a divorce to the plaintiff and made an allowance of alimony to the wife. The custody of the two minor children was given to the wife and an allowance made for their support during their minority or until the further order of the court. The plaintiff appeals, asserting the allowance of alimony and child support to be grossly inadequate. The defendant cross-appeals, asserting that the allowance of alimony is excessive.

The record shows that the plaintiff and defendant were married on January 18, 1930. Three children were born to the marriage, Gene Leroy, 20, Gordon Robert, 18, and Earl Eldon, 15. Gene Leroy is married and was not residing with either of his parents at the time the decree was entered. The custody of the other two children was awarded to the plaintiff. The trial court found that the parties had accumulated an estate of $50,000 since their marriage. Plaintiff was awarded $27,000 as permanent alimony, payable $225 per month, and the right to live in the family home for a period of 5 years, or until the youngest son dies or becomes self-supporting, or until the plaintiff remarries, whichever event is the sooner, without the payment of rent or taxes on the aforesaid property. An award of $100 per month was allowed for the support of the two minor children. She was also awarded the De Soto automobile she had in her possession. It is from this decree that the respective appeals of the parties have been taken.

The only questions to be decided in this case are the correctness of those parts of the trial court's decree fixing the alimony and child support. The evidence is ample to sustain the granting of a divorce to the plaintiff. Neither party complains that the evidence is in-

sufficient in this respect. The main dispute revolves around the finding of the value of the property accumulated by the parties. The trial court found it to be $50,000.

The real estate owned by the parties, briefly described, is as follows: (1) The family home known as 3611 Washington Street; (2) the former family home known as 4517 Hillside; (3) five residences in University Place; (4) Lot 8, Block 11, Eastmont Addition; and (5) Lots 38 and 39, Fairfax Addition. The above properties are all in Lincoln, Nebraska, and are more particularly described in the trial court's decree. We conclude from the record that the family home at 3611 Washington Street has a reasonable market value of $16,000 and a net value above the mortgage on the premises of $5,472.48; the former family home at 4517 Hillside, $8,500; the five residences in University Place, $30,000, with a net value of $10,051.12 over and above the existing mortgage of $19,948.88; the lot designated as Lot 8, Block 11, Eastmont Addition, $1,650; and Lots 38 and 39, Fairfax Addition, $800. The net value of the real estate holdings as shown by the record is $26,473.60.

Personal property concerning the value of which there was little or no dispute consists of the following: A 1949 De Soto automobile, $1,000; a 1951 Ford automobile, $1,400; a 1938 Chevrolet automobile, $100; a 1949 Ford automobile, $800; a 1952 Chevrolet automobile, $1,500; household goods, $3,500; and cash value of life insurance, $6,200. These items total $14,500.

The most difficult problem is the determination of the value of the Eno Insurance Agency. The evidence is very conflicting as to the method to be employed in fixing its value. We think the value of the leasehold at the place where the agency is located, including leasehold improvements, is $6,145.82. The net value of the office equipment and leasehold improvements is approximately $10,000. It appears from the evidence that the valuation to be placed upon the business of an insur-

ance agency is dependent to a great extent upon the expectation of being able to renew policies issued. This, of course, depends upon a number of factors, such as the nature of the business written, the reputation of the agency, the class of business written, and other more or less uncertain contingencies. The evidence shows that the Eno Insurance Agency has been progressively increasing its business since its inception. Insurance policies that are written directly are of greater value than those which are written through a broker. Evidence of persons in the business is in conflict as to the proper method to value the agency. Two qualified witnesses state that the agency is worth two and one-half times the annual net commissions earned. Another qualified witness states that the value of the agency is equal only to the total net commissions earned. The record shows that the agency produced a net income to the defendant of $16,261.48 in 1952. The agency received commissions of $10,624.73 from indirect writing companies and $13,541.49 in commissions from direct writing companies. It is fundamental that the nature and class of business written, the commissions earned, and the net income of the agency are factors to be considered in determining the value of the agency. Considering all the evidence and the factors to be considered in fixing the value, we conclude that the reasonable value of the agency, including both direct and indirect writing of policies, is approximately $24,166.22. The total of the items here discussed pertaining to the business of the Eno Insurance Agency is $34,166.22.

Many other items of property are listed. They include $4,000 of surplus notes in the National Auto Insurance Company; a share of stock in the General Insurance Agency; 7½ units of the face value of $7,500 in the Ivanhoe Trust, a mining venture; some government bonds, the number and amounts not definitely established; a $2,000 investment in oil leases; and other smaller items. In some instances the existence of these

items is not established; in other instances the value is not sufficiently shown.

We conclude that the property of the parties has a reasonable value of $75,139.82. This court has consistently adhered to the rule that in determining the question of alimony 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 that each has made thereto. Strasser v. Strasser, 153 Neb. 288, 44 N. W. 2d 508. The amount of alimony to be granted a wife is not to be determined alone from the property possessed by the husband. The husband's age, health, earning capacity, future prospects, and social standing are proper to be considered. Prosser v. Prosser, 156 Neb. 629, 57 N. W. 2d 173. The foregoing rules will be applied in considering the case de novo as we are required to do.

Plaintiff and defendant were married in 1930. Plaintiff was 19 and defendant 24 years of age at the time of their marriage. Defendant was attending college at the time and all the property they possessed was an old Ford automobile. Plaintiff was working, and defendant had part time employment while attending school. They started with little or nothing. After a few years defendant entered the insurance business and at the time of the trial had accumulated and acquired the property which we have heretofore discussed. Defendant served in World War II, during which period of time the plaintiff successfully carried on the insurance

business. On November 19, 1950, plaintiff was injured in a car accident. Prior thereto she had been seriously injured by tripping over a bicycle. She received a settlement of $3,500 for the injuries she suffered in the car accident, which appears to have been used for the payment of medical and hospital bills and in the purchase of an automobile. Plaintiff has had three operations involving her spine as a result of these accidents. She has a 35 percent total bodily disability resulting therefrom. The defendant was 47 years of age at the time of the trial and is in good health.

It would serve no useful purpose to recite the marital difficulties of the parties. While ample grounds sustain the petition of the plaintiff for a divorce, she has not been free from blame. The evidence shows that until shortly before the filing of the divorce petition she maintained a good home and was a good mother to her three boys. She became associated with feminine friends who were objected to for various reasons by the defendant. Plaintiff chose to continue the course she had been following. Friction continued and the divorce action resulted. The conduct of the plaintiff, though not sufficient to prevent her from obtaining a divorce, was a contributing factor to their marital troubles. She assumed that defendant was financially able to provide whatever she wanted. She exceeded a reasonable budget allowance and purchased clothing, furniture, and other household effects far beyond their means. The defendant likewise persisted in activities that could only accelerate the arrival of the parties in the divorce court.

The parties have acquired considerable real estate, some of which is heavily encumbered. The defendant's business is a growing one and his personal earnings have increased as the business progressed. There is evidence that the business had been losing money immediately prior to the trial. There is no evidence that the condition was unusual, or that it would continue. Defendant continued to draw $700 monthly from the agency during

this period. The record shows also that defendant purchased a $3,800 bookkeeping machine during the time a book loss was shown by the agency records.

The evidence shows that plaintiff is a suitable person to have the care and custody of the two minor children. The allowance for the support of the minor children is in accordance with the standards of living of the parties. That part of the decree dealing with the minor children is in all respects affirmed. The alimony allowed the plaintiff is increased to $32,000, payable $250 per month beginning July 1, 1954, and to continue monthly until fully paid. That part of the decree of the trial court relating to the occupancy of the family home is approved as made. An attorney's fee of $3,000 was awarded the plaintiff by the trial court. An additional fee of $1,000 is allowed the plaintiff for the services of her attorneys in this court. The cross-appeal of the defendant has no merit. Every issue therein raised is disposed of by the rulings in plaintiff's appeal. Except as herein modified, the decree of the district court is affirmed.

AFFIRMED AS MODIFIED.

JOHN VOCKE ET AL., APPELLEES, V. DELMAR THOMAS ET AL., APPELLANTS.
65 N. W. 2d 151

Filed June 25, 1954. No. 33532.

1. **Trial: Appeal and Error.** A motion for directed verdict or its equivalent, or for judgment notwithstanding the verdict, must be treated as an admission of the truth of all material and relevant evidence submitted on behalf of the party against whom the motion is directed, and such party is entitled to have every controverted fact resolved in his favor and have the benefit of every inference that can reasonably be deduced from the evidence.
2. ———: ———. Where on an issue of fact the evidence is conflicting it is error for the court to direct a verdict or to render

judgment notwithstanding the verdict with such conflicting evidence as a basis.

APPEAL from the district court for Hall County: WILLIAM F. SPIKES, JUDGE. *Reversed and remanded with directions.*

Luebs & Elson, for appellants.

Cunningham & Cunningham, for appellees.

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

CHAPPELL, J.

Plaintiffs John and Frances Vocke originally filed this forcible entry and detainer action in the county court of Hall County against defendants Delmar and Harold Thomas, seeking restitution of described farm lands owned by plaintiffs in said county. Upon trial to a jury of the issues made by plaintiffs' petition and defendants' pleas of not guilty, it returned a verdict finding defendants not guilty and judgment was rendered thereon for defendants at plaintiffs' costs. Therefrom plaintiffs appealed to the district court where the cause was tried to a jury upon like issues. At conclusion of all the evidence, plaintiffs' motion to direct a verdict for them and against defendants was overruled, and the jury returned a verdict finding defendants not guilty, and judgment was rendered thereon for defendants at plaintiffs' costs. Thereafter, plaintiffs' motion to vacate the judgment, set aside the verdict, and render judgment for plaintiffs notwithstanding the verdict, was sustained and judgment was rendered finding defendants guilty of unlawful and forcible detention and awarding plaintiffs restitution of the premises and costs, in conformity with the motion. Thereafter defendants filed a motion for new trial and to vacate such judgment and reinstate the verdict and judgment rendered thereon. In that connection, such a motion was not necessary for a review on appeal to this court. Krepcik v. Interstate

Transit Lines, 151 Neb. 663, 38 N. W. 2d 533. However, defendants' motion was overruled and they appealed, assigning that the trial court erred in sustaining plaintiffs' motion for judgment notwithstanding the verdict and rendering judgment in conformity therewith. We sustain the assignment.

In Paxton v. Nichols, 157 Neb. 152, 59 N. W. 2d 184, we reaffirmed that: "A motion for directed verdict or its equivalent, or for judgment notwithstanding the verdict, must be treated as an admission of the truth of all material and relevant evidence submitted on behalf of the party against whom the motion is directed, and such party is entitled to have every controverted fact resolved in his favor and have the benefit of every inference that can reasonably be deduced from the evidence."

It is elementary that ordinarily the credibility of witnesses and the testimony given by them is exclusively a question for the jury. McCown v. Schram, 139 Neb. 738, 298 N. W. 681. Also, in the absence of controlling elements of estoppel, as here, such rule applies notwithstanding the fact that quasi admissions made by witnesses may appear in the evidence tending to contradict or impeach such witnesses and the testimony given by them. Kipf v. Bitner, 150 Neb. 155, 33 N. W. 2d 518. Further, in Krepcik v. Interstate Transit Lines, 152 Neb. 39, 40 N. W. 2d 252, modified upon rehearing in another aspect unimportant here at 153 Neb. 98, 43 N. W. 2d 609, this court held: "Where on an issue of fact the evidence is conflicting it is error for the court to direct a verdict or to render judgment notwithstanding the verdict with such conflicting evidence as a basis."

The record discloses that plaintiffs pleaded and relied upon the contentions that: As owners of the described farm lands they orally leased same to defendants on or about February 15, 1952, for the year 1952, which lease by agreement was to expire March 1, 1953. Defendants thus farmed the lands during 1952. On or about July 1, 1952, defendants orally informed plaintiffs that

they did not desire any lease of the lands for the year 1953, and agreed to surrender possession thereof on March 1, 1953. Thus, plaintiffs claimed that defendants' lease expired on March 1, 1953, and that plaintiffs were entitled to possession on that date, but defendants refused to vacate the premises, and unlawfully and forcibly detained the same. Therefore, on March 24, 1953, plaintiffs caused a legal 3-day notice to vacate the premises to be respectively served upon defendants. However, they refused to obey the same and continued to unlawfully and forcibly detain possession from plaintiffs, and this action was brought. In that regard, the record discloses competent evidence which if believed by the jury would be sufficient to sustain those contentions and support a verdict of guilty with judgment rendered thereon for restitution and costs. For discussion of the principles involved, see, 51 C. J. S., Landlord and Tenant, § 89, p. 648; Montgomery v. Willis, 45 Neb. 434, 63 N. W. 794; West v. Lungren, 74 Neb. 105, 103 N. W. 1057; Corcoran v. Leon's, Inc., 126 Neb. 149, 252 N. W. 819; Bailey v. Lund, 134 Neb. 319, 278 N. W. 506.

On the other hand, however, defendants pleaded not guilty and contended that no such agreements, actual or implied, were ever made by them as claimed by plaintiffs. Defendants contended that they were simply tenants from year to year, and as such were entitled to a 6-months' notice to terminate their tenancy before they were required to surrender possession on March 1, 1953, which notice plaintiffs concededly never gave defendants. In that regard, the record discloses competent evidence which if believed by the jury, as it evidently was, would be sufficient to sustain those contentions and support a verdict of not guilty with judgment rendered thereon for defendants at plaintiffs' costs. For discussion of the principles involved, see, 51 C. J. S., Landlord and Tenant, § 142, p. 742; Critchfield v. Remaley, 21 Neb. 178, 31 N. W. 687; Farley v. Mc-

Keegan, 48 Neb. 237, 67 N. W. 161; Fenster v. Isley, 143 Neb. 888, 11 N. W. 2d 822.

The record further discloses that on March 6, 1953, plaintiffs first filed a duly verified complaint in the county court seeking restitution of the premises involved from defendants. That complaint was concededly dismissed before the second or present case was filed in that court. A copy of such first complaint appears in the evidence. Therein, plaintiffs specifically alleged that they leased the lands to defendants "by oral lease, from year to year, expiring on the first day of March of each year; that prior to September 1, 1952, these plaintiffs notified the defendants that the said lease would not be extended for another year, but that the same would be terminated as of the date of the expiration of said oral lease, to wit: March 1, 1953; * * *." Such language was of course an admission by plaintiffs which tended to contradict or impeach them and their testimony given herein, and support defendants' theory. On the other hand also, defendants' testimony given in the county court was in some respects conflicting with that given by them in the district court. However, as heretofore observed, the evidence aforesaid was given in such manner as not to be conclusive upon the parties, and the credibility of all witnesses and their testimony was a question for the jury.

An examination of the record discloses that in all material respects the evidence adduced by the parties was conflicting and the issues were properly submissible to the jury for decision thereof by it. In that regard plaintiffs in their brief concede that: "The evidence on all material issues is in dispute." In such a situation, the trial court could not properly have rendered a judgment notwithstanding the verdict.

For reasons heretofore stated, we conclude that the trial court erred in sustaining plaintiffs' motion for judgment notwithstanding the verdict and in rendering a judgment in conformity with such motion. Therefore,

the judgment should be and hereby is reversed and the cause is remanded with directions to reinstate the verdict finding defendants not guilty and the judgment rendered thereon in favor of defendants, at plaintiffs' cost. All costs are taxed to plaintiffs.

REVERSED AND REMANDED WTIH DIRECTIONS.

GEORGE H. BRASIER, APPELLANT, V. CITY OF LINCOLN, NEBRASKA, ET AL., APPELLEES.
65 N. W. 2d 213

Filed June 25, 1954. No. 33546.

1. **Municipal Corporations.** Where a city council by its home rule charter is empowered to create a water district and by ordinance has created such a district, and by the home rule charter additional procedural steps must be taken before the actual construction of the water district may be had, the city council in its discretion may repeal the ordinance creating the water district when none of the additional procedural steps have been taken as required by the home rule charter.
2. ———. Where a city council in conformity with the home rule charter has created a water district by ordinance and repealed the same prior to taking the necessary additional steps to improve the water district as provided for by the home rule charter, the city council has not abused its discretion in such respect and its decision is determinative, and mandamus will not lie to control or review it.

APPEAL from the district court for Lancaster County: PAUL W. WHITE, JUDGE. *Affirmed.*

Herbert W. Baird, for appellant.

John H. Comstock and *Jack M. Pace,* for appellees.

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

MESSMORE, J.

This is an action in equity brought in the district court for Lancaster County by George H. Brasier, plain-

tiff, against the city of Lincoln, the mayor, and the members of the city council, defendants, the purpose of the action being to enjoin the defendants and each of them from repealing city ordinance No. 5337, and that the court issue an alternative writ of mandamus directing the defendants to forthwith proceed to construct or have constructed a water main in conformity with ordinance No. 5337 which created water district No. 313. The trial court decreed that the alternative writ of mandamus which was issued be dissolved; that the plaintiff's petition be dismissed with prejudice; and that judgment be entered in favor of the defendants, plaintiff to pay the costs. The plaintiff's motion for new trial was overruled. From the order overruling the motion for new trial, the plaintiff appeals.

The record shows that the plaintiff owned real estate in the city of Lincoln which he purchased in May or June of 1952. This real estate is described as being 510 feet in length and 50 feet in width, bounded on the west by Twelfth Street, on the east, north, and south by public alleys, being Lot 15, Block 1, Cahn, Metcalf, and Farwell's Subdivision of the city of Lincoln. The plaintiff described this property as an isolated piece of property. Its peculiar shape is apparently the result of the failure of two subdivisions to properly coincide. The plaintiff sought to develop this property for the purpose of having a "mobile home subdivision," which was to be set out in lots, and which he proposed to rent on a yearly basis. This type of home requires no foundation or concrete construction. In order to properly operate such an enterprise, water, sewerage, and electric services are the physical improvements that go with the installation of such units. Plats were made by engineers employed by the plaintiff to assist in the preparation of the land for the purpose to which he proposed to use it, and the premises were cleaned up for that purpose.

The council record shows that on August 4, 1952, the plaintiff petitioned the city council to create a water

district and to construct a water main to serve his property. On September 2, 1952, ordinance No. 5337 creating water district No. 313 was adopted by the city council. The ordinance provides as follows: "BE IT ORDAINED by the City Council of the City of Lincoln, Nebraska: Section 1. That Water District No. 313 be and the same is hereby created; that said water district is created for the purpose of constructing a water main or water mains to supply water for domestic and fire purposes, for the following described real estate, which is hereby included in said water district, to-wit: Lots 2 and 3 in Block 18, Riverside Addition; Lot 15 in Block 1, Cahn, Metcalf and Farwell's Subdivision. The cost of constructing said water mains, including the cost of fire plugs, valves, and all other expenses incidental to said improvement, shall be assessed against the property benefited in said district, not exceeding the special benefits accruing on account thereof." There is an affidavit of publication of the ordinance dated September 4, 1952, in the record.

The plaintiff, from an examination of the records of the city council, ascertained that no objections had been filed by property owners to the adoption of ordinance No. 5337.

The record of the city council for September 22, 1952, shows a request addressed to the city council that a paving district be created in Holdrege Street from Twelfth Street to and across Thirteenth Street, described as 16-foot alley-type paving, to be assessed against the properties of the plaintiff and the other property owners. Ordinance No. 5353 was passed by the city council and adopted on September 22, 1952, creating paving district No. 252, which includes all of that portion of the east and west alley lying north of and adjacent to Lot 15, Block 1, Cahn, Metcalf and Farwell's Subdivision, which is included between the east curb line of Twelfth Street and the east line of Eva Place extended south, and Lots 1, 2, and 3 in Block 18,

Riverside Addition, and the west 210 feet of Lot 15, Block 1, Cahn, Metcalf and Farwell's Subdivision, to be 16 feet in width.

On October 6, 1952, the Spartan Enterprises, a partnership consisting of the plaintiff and another person, petitioned the city council to pave in paving district No. 252, and charge its property with the cost by special assessment.

On or about November 19, 1952, there was a plan and profile of water district No. 313 prepared by the city engineer's office which did not become a part of the records of such office. It was merely a plan to be presented to the city council for its consideration. The plaintiff saw this plan. However, the plan was not approved or put into effect.

On April 15, 1953, the plaintiff inquired of the city engineer's office concerning the water main to be laid. He testified that the city engineer's office reacted favorably and informed him that possibly the city would go ahead and install the water main. A few days later, in a letter dated April 18, 1953, the deputy city engineer informed the plaintiff that he had taken up with his superiors the matter of constructing the water main in Thirteenth Street from Court Street south to the alley; that it was the present opinion of his superiors that the necessary water service to the plaintiff's property could be better secured by the plaintiff constructing, at his own expense, his own water service line from Court Street south to his property; that a city water main in the plaintiff's location was not needed; and that any further discussion about the matter should be had with the city engineer.

The plaintiff testified that prior to receiving the letter from the deputy engineer's office, he relied on the ordinance creating water district No. 313 and commenced to improve his property for the purpose of installing a mobile home subdivision.

By stipulation appearing in the record it was stipu-

lated that the plaintiff made a request for the creation of a water district about July 15, 1952; that at that time the deputy city engineer assured the plaintiff that a water district would be formulated by the usual procedure; that the plaintiff, relying upon this assurance proceeded to improve his property in the matter of cutting down the elevations and filling up the depressions; that between July 25, 1952, and August 19, 1952, the plaintiff moved about 150 cubic yards of earth in connection with the improvement by the use of rented machinery at a cost of $45.05, and also for surveying and drafting in connection with the improvement he expended the sum of $33.50; that the plaintiff himself performed the labor involved; that between September 9, 1952, and July 7, 1953, after the enactment of the ordinance creating the water district, the plaintiff moved about 100 cubic yards of earth in connection with the said improvement by rented machinery at a cost of $26; and that these items of expense were incurred by the plaintiff upon the faith and reliance of city ordinance No. 5337 creating water district No. 313 and in conformity thereto.

After receiving the letter from the deputy city engineer, the plaintiff made demands upon the city council to order the construction of water district No. 313 in conformity with ordinance No. 5337. Appearances were made before the council for that purpose. On September 8, 1953, the city council, by ordinance No. 5600, adopted on that date, repealed ordinance No. 5337 creating water district No. 313.

It appears from the record that the improved property in the vicinity of this water district created by ordinance was served either directly from a city main or by private line connected thereto. It also appears that there were sufficient fire hydrants in the area which were adequate for fire protection. The plaintiff was never denied the right to connect with the city water main, and the city council stood ready at all times to

grant him the privilege to do so. It also appears from the record that a great deal of the work done by the plaintiff to improve his property was done prior to the time the ordinance creating the water district was adopted, and a part of it was done after the plaintiff had received the letter from the deputy city engineer to the effect that it was not feasible to create the water district under the circumstances. This indicates that the plaintiff did not act to his detriment in reliance upon the conduct of the defendants.

From the record it appears that the plaintiff, about the time he requested the water service and paving, petitioned the city for a special permit to construct and operate mobile home units on his property. The council referred the matter to the zoning board. On August 11, 1952, the zoning board recommended that the plaintiff's application for such permit be denied. The city council denied the application. There was no appeal taken from the decision of the city council. This property was zoned for residence "A" building. At the time of trial the plaintiff testified that he still intended to use the property for a mobile home subdivision, which apparently means that he was not going to construct residential property on his property as required by the zoning ordinance, or request a building permit for such purpose.

On September 8, 1953, the date ordinance No. 5600 was adopted which repealed ordinance No. 5337 creating water district No. 313, the instant case was commenced, apparently prior to the adoption of ordinance No. 5600.

The plaintiff assigns as error that: (1) The trial court erred in dissolving the alternative writ of mandamus and dismissing plaintiff's petition. (2) The trial court erred in failing to find the attempted repeal of ordinance No. 5337 was in excess of the powers of the city council. (3) The trial court erred in failing to issue a peremptory writ of mandamus compelling the defendants to make the improvement in water district No. 313 in

conformity to ordinance No. 5337. (4) The trial court erred in ignoring the vested constitutional rights of the plaintiff in the continued existence of water district No. 313. (5) The trial court erred in overruling plaintiff's motion for a new trial.

Section 2 of Article VI of the home rule charter of the city of Lincoln provides in part: "The city council shall have power to create water districts for the purpose of supplying water for domestic, industrial or fire purposes, or for any one or more of said purposes, or for the purpose of enlarging any water mains now existing or hereafter constructed. All such districts, to be known as 'water districts,' shall be created by ordinance and shall designate the property in the district to be benefited. Upon the creation of any water district, the city council shall have power to construct or cause to be constructed, either by contract with the lowest responsible bidder or directly by the city, such water main or mains, or extensions or enlargements, including all necessary appliances for fire protection, within such districts as the council shall determine, and assess the costs thereof against the property in such district, not exceeding the special benefits accruing on account thereof * * *."

When a water district is created as above provided for, then section 19 of Article IV of the home rule charter of the city governs the city council's procedure. It provides: "Before the city council shall enter into any contract or authorize any expenditures involving over $500.00, they shall cause to be made and filed an estimate of the total cost thereof, together with detailed plans and specifications, which, if approved by the city council, shall be kept subject to public inspection and the work or improvement shall be done substantially in accordance therewith. No contract shall be entered for a price exceeding such estimate, and the city council shall, except in cases of emergency, advertise for bids and cause the amount of such estimate to be published therein."

The city council did nothing more than to create a water district, and subsequently, by ordinance, repealed the ordinance creating the water district. From a reading of the above articles and sections of the home rule charter of the city of Lincoln it is apparent that before the city council can legally commence to construct a water district the steps as set forth in section 19 of Article IV of the city charter must occur in sequence. The question arises, did the city council, in repealing ordinance No. 5337 creating the water district, violate any contractual and vested rights as claimed for by the plaintiff, or whether the city council, in the exercise of its discretion, could legally repeal the ordinance creating the water district.

The case of Hiddleson v. City of Grand Island, 115 Neb. 287, 212 N. W. 619, is applicable. In that case the city of Grand Island, by ordinance, created a paving district and after more than 2 years had taken no steps towards the laying of the pavement. A mandatory injunction was sought to require the city council to proceed with the paving in conformity with the ordinance creating the paving district. At that time section 4084, Comp. St. 1922, was in force. It provided in part: "The mayor and council shall first, by ordinance, create a paving district or districts. * * * If the owners of the record title representing a majority of the abutting property owners in the district shall file with the city clerk within twenty days * * * written objections to the paving * * * said work shall not be done in said district under said ordinance, * * *. If said objections be not filed against any district in the time and manner aforesaid, the mayor and council shall forthwith proceed to construct such paving, * * *."

The section of the statute above referred to has on occasions been amended by the Legislature. It is now referred to as section 16-620, R. S. Supp., 1953. The applicable language appearing therein, as it applies to cases such as Hiddleson v. City of Grand Island, *supra*,

has not been substantially changed to effect any different meaning.

It has long been the rule that if the words used in a legislative act had, at the time used, received a settled construction, we must presume that the Legislature adopted them in that sense. See Franzen v. Blakley, 155 Neb. 621, 52 N. W. 2d 833.

In Hiddleson v. City of Grand Island, *supra,* the court said: "The failure to pave during this period, in our judgment, could not operate to invalidate the ordinance creating the district. The district is still in existence and it is still within the power of the council to pave at a future date, and, if there is no good reason for further delay, the council should proceed to advertise for bids and to pave the district as directed by the statute, unless the council, in its wisdom, should see fit to repeal the ordinance creating the district. Without deciding the questions, we assume that it is within the discretion of the council to repeal the ordinance which created the district, but, unless the council has the right to and does repeal the ordinance, then it should proceed, as expeditiously as circumstances and prudence will permit, to advertise for bids and construct the paving, as provided by statute."

It will be noted that in Article VI, section 2, of the home rule charter of the city of Lincoln the language used therein is as follows: "Upon the creation of any water district, the city council shall have power to construct or cause to be constructed," and then it states the method of construction, "within such districts as the council shall determine." In Hiddleson v. City of Grand Island, *supra,* the statute provided that the council "shall forthwith proceed to construct such paving."

It appears from the foregoing that the home rule charter of the city of Lincoln in creating a water district requires a step which is a condition precedent before other steps can be taken for the purpose of constructing a water district as provided for by the articles and sections of the

home rule charter cited above. We conclude that the case of Hiddleson v. City of Grand Island, *supra*, is in point in determining that the city council had the discretionary power to repeal the city ordinance creating water district No. 313.

In 6 McQuillin, Municipal Corporations (3d ed.), § 21.17, p. 199, it is said: "Street and other improvement ordinances, and indeed all ordinances involving the creation of contracts or rights thereunder, may be repealed under like conditions and restrictions as other municipal legislation, provided that the repeal does not invade property rights or destroy vested interests or impair the obligation of contracts."

The plaintiff contends that a proposition or offer made to the proper corporate authorities and an acceptance of the terms thereof by an ordinance constitutes a contract, and that an ordinance passed by the governing body of a municipality granting a right, if accepted and acted upon by the grantee, becomes an irrevocable contract, citing Winklebleck v. City of Portland, 147 Or. 226, 31 P. 2d 637; 10 McQuillin, Municipal Corporations (3d ed.), § 29.03, p. 163. In addition, the plaintiff contends that a legislative grant, right, or privilege made by ordinance through a municipal corporation duly authorized to act, and accepted and acted upon by the grantee constitutes a contract and creates a vested right in the grantee which cannot be impaired, altered, or abolished by a repeal or amendment of the ordinance unless the right to repeal or amendment is reserved in the enactment itself. Otherwise a repeal of such ordinance is an impairment of the obligation of such contract by the municipality and constitutes a violation of Article I, section 10, of the Constitution of the United States, section 1 of the Fourteenth Amendment to the Constitution of the United States, and Article I, section 3, of the Constitution of the State of Nebraska.

Many cases have been cited in support of the above propositions which are clearly distinguishable from the

case at bar and it would unduly lengthen this opinion to set such cases out and discuss the distinction between them and the instant case. The repeal of the ordinance in question did not invade any property rights or destroy any vested interests as claimed by the plaintiff, nor impair any obligation of a contract in violation of the Constitution of the United States or the Constitution of the State of Nebraska.

In 34 Am. Jur., Mandamus, § 199, p. 970, it is said: "Ordinarily, a municipality or quasi municipality, such as a district organized to supply its inhabitants with water, gas, etc., is not bound to furnish a supply to everyone that demands it, regardless of the expense involved and the returns which will result in so doing, * * *. As a general rule, the municipality which engages in furnishing water or other such supply to its inhabitants has a governmental discretion as to the limits to which it is advisable to extend its mains, and unless such discretion is abused, the decision of the municipality in the matter is determinative, and mandamus will not lie to control or review it. The writ has been refused when sought to compel a municipality or a water district to extend its water system or mains, * * *."

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; State ex rel. Weinberger v. Gormley, 155 Neb. 242, 51 N. W. 2d 343; State ex rel. Nebraska Beer Wholesalers Assn. v. Young, 153 Neb. 395, 44 N. W. 2d 806; State ex rel. Kittel v. Bigelow, 138 Ohio St. 497, 37 N. E. 2d 41; Larsen v. Nordbye, 181 F. 2d 765; Annotation, 45 A. L. R. 829.

We conclude, for the reasons given herein, the trial court did not err in dissolving the alternative writ of mandamus and dismissing the plaintiff's petition at plaintiff's costs.

AFFIRMED.

GERALDINE M. BENEDICT, APPELLEE, V. EPPLEY HOTEL COMPANY, A CORPORATION, DOING BUSINESS UNDER THE NAME AND STYLE OF ROME HOTEL, APPELLANT.
65 N. W. 2d 224

Filed June 25, 1954. No. 33552.

1. **Negligence.** The proprietor of a hotel is not an insurer against accident to persons invited upon the hotel premises, but he must exercise reasonable care to keep the premises and facilities reasonably safe for the purposes for which they are to be used.
2. ———. The doctrine of res ipsa loquitur means that the facts of the occurrence permit, but do not compel, an inference of negligence. It is a rule of evidence and not a rule of substantive law. It is a qualification of the general rule that negligence is not to be presumed but must be proved. The doctrine takes the place of evidence as affecting the burden of proceeding with the case.
3. ———. An invitee upon hotel premises injured by the failure of a chair furnished by the hotel for his use and occupied by him at the time of the injury who does not know the cause of the accident is entitled to the benefit of the doctrine of res ipsa loquitur in an action by him to recover damages because of injury inflicted by the accident.
4. ———. A proprietor of a hotel is not deprived of the control and management of a chair owned by it by the fact that an invitee on the hotel premises occupied it for some time before and at the time of its collapse so as to deny the invitee the benefit of the doctrine of res ipsa loquitur in an action by him for damages on account of injuries inflicted by the accident.
5. ———. If facts are shown to which the doctrine of res ipsa loquitur has application an inference of negligence arises, that is, the thing speaks for itself and a question is presented for the jury as to liability.
6. ———. A latent defect is one that exists in such manner that discovery of it is impossible by reasonable inspection and care.
7. **Trial.** It is the duty of the trial court, without request, to instruct the jury on each issue presented by the pleadings and supported by evidence.
8. ———. It is the duty of the trial court to instruct the jury fully and fairly as to items of damage it should consider in arriving at its verdict and as to the proper basis upon which damage should be assessed for each item.

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

Mecham, Stoehr, Mecham & Hills, for appellant.

Mathews, Kelley, Fitzgerald & Delehant, for appellee.

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

BOSLAUGH, J.

This is an action for damages claimed to have been sustained by appellee because of injuries inflicted upon her as a result of negligence of appellant. Appellee had a verdict and judgment. A motion of appellant for a directed verdict at the close of all the evidence was denied. A motion for judgment notwithstanding the verdict and a motion for a new trial were overruled.

Appellee pleaded as a cause of action that: Appellant, a corporation, maintains and operates hotels in Omaha. One of them is the Rome Hotel. Appellant on or about March 5, 1949, operated a bingo game as a part of its activities and as an attraction to induce persons of the city and surrounding territory to the Rome Hotel. The facilities for the game, including the place where it was conducted, the tables, and the chairs, were provided by appellant. The appellee at the invitation of appellant attended the game, procured from an attendant in charge a chair, and occupied it at one of the bingo tables. She sat on the chair for a short time when it collapsed and hurled her to the floor with force and violence, and she sustained numerous and severe permanent injuries. The chair was defective in a respect unknown to appellee. The defect therein caused it to collapse and injure her. It was a folding chair constructed so that when it was not in use the seat could be folded up against the front of the back of the chair. If it was not defective or out of repair it could not and would not collapse or cause injury to a person sitting on it. The appellee invoked the doctrine of res ipsa loquitur. The defenses interposed by appellant were a denial and a plea of contributory negligence of appellee.

The Military Order of the Cooties, a branch of the Veterans of Foreign Wars, as one of its activities to raise money, had an arrangement with the Rome Hotel to put on a bingo game therein. The ballroom was usually used but on occasions more than one room was required. An amount was paid to appellant each time the accommodations were used for this purpose. Appellant had supervision of the space used for the game. It furnished the accommodations where the game was played, the tables, the chairs, and all other facilities, but the supplies required in the conduct of the game were not furnished by it. The employees of the hotel set up the tables and arranged the chairs for use of the participants and after the game they dismantled the tables and removed the chairs. A Mr. Pennington and his helpers, acting for the Military Order of the Cooties, directed the playing of the game. Appellant had a bar adjoining the bingo room or rooms and its employees served beer, mixed drinks, and other beverages as they were desired by persons attending the game. The hotel had a lunch stand and made available to anyone present coffee and sandwiches. These concession rights were reserved exclusively to appellant and it served the public for profit.

The game was scheduled to start at 8 p. m. The mother of appellee, accompanied by a friend, was at the hotel when the game started the evening of March 5, 1949. Appellee arrived there about 9:30 p. m. She paid the charge required to become one of the players, secured a chair from an attendant, took it some distance to one of the bingo tables, and placed it at the table opposite where her mother was seated, sat on the chair, and entered the game. She continued to occupy the chair for about 20 or 30 minutes when, without warning, it collapsed and caused her to suddenly descend onto the floor. She observed nothing unusual about the chair when it was furnished to her or while she was taking it to the table and experienced nothing

unusual while she was occupying it before it gave way. She used it for no purpose except to sit on it. It was a folding chair with braces, screws, and bolts to maintain it in proper condition for its intended use. After the accident it was discovered the screws and bolts on one side of the chair were missing from it.

It was the duty of the lobby porter of the hotel to inspect its chairs for defects. He did not testify and there is no proof that he performed this duty. A porter assigned to the housekeeping department was a witness for appellant. He said he sometimes helped other porters set up tables and arrange chairs for banquets and parties. He examined each chair he handled for any defects in it and if he found any he took the defective chair to the carpenter shop of the hotel. He gave no date when he made an inspection of chairs, did not claim that he handled any of the chairs provided and arranged for the bingo game the night appellee was injured, or that he had seen the chair she used that was not in normal condition that night. The other porters who handled the chairs were not produced at the trial. The Military Order of the Cooties had nothing to do with the maintenance, inspection, or repair of the chairs made available by the hotel for the use of persons attending the bingo game. The chair sometime after it had collapsed was taken and delivered by Mr. Pennington to the man who was in charge of the Rome Hotel that night. It was not produced at the trial and no evidence concerning this specific chair or its condition was offered by appellant at the trial.

It is correctly asserted by appellant that an innkeeper is not an insurer against accident and injury to invited persons upon the premises, but he must exercise reasonable care to keep the premises and facilities of the inn reasonably safe for the purposes for which they are to be used by guests and other invitees. Liability arises from failure to exercise reasonable care and prudence in that regard. The rule is stated in Pierce v. Burlington

Transportation Co., 139 Neb. 423, 297 N. W. 656: "The premises upon which the plaintiff was invited to enter and where the accident happened was a hotel which must be kept reasonably safe for all persons invited to use its facilities. The proprietor of a hotel is not an insurer against accidents to guests or other invitees. Liability arises only from a failure to exercise reasonable care and prudence in keeping the premises safe." In McMahon v. Regis Hotel Co., 147 Neb. 751, 25 N. W. 2d 24, the court said: "The law imposes a duty on an innkeeper to furnish safe premises to his guests, and to provide the customary articles of furniture, which may be used by them in the ordinary and reasonable way, without danger. * * * The duties and liabilities of an innkeeper are not those of an insurer, and extend only to the exercise of reasonable care * * *." See, also, Annotation, 18 A. L. R. 2d 973.

Appellee did not allege or attempt to prove specific negligence. She says a chair does not ordinarily collapse when it is sat on by a person if the one responsible for its maintenance and who has its management uses reasonable care to keep it reasonably safe for the purpose of its intended use. She relies upon res ipsa loquitur. This doctrine of the law is that if a thing which causes injury is shown to be under the control and management of a defendant and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence in the absence of explanation by the defendant that the accident arose from want of proper care. That is, the thing shown speaks of the negligence of the defendant. The facts of the occurrence permit, but do not compel, an inference of negligence. It is said in Miratsky v. Beseda, 139 Neb. 229, 297 N. W. 94: "Where a structure, the collapse of which causes an injury, is shown to be under the management of a defendant, and the collapse is such as in the ordinary course does not happen if those who have

its management use proper care, the collapse affords reasonable evidence, in the absence of explanation by the defendant, that it arose from want of care." See, also, Johnson v. Weborg, 142 Neb. 516, 7 N. W. 2d 65; Watson Bros. Transp. Co. v. Chicago, St. P., M. & O. Ry. Co., 147 Neb. 880, 25 N. W. 2d 396; Security Ins. Co. v. Omaha Coca-Cola Bottling Co., 157 Neb. 923, 62 N. W. 2d 127.

Appellant attempts to avoid the application of the doctrine of res ipsa loquitur to this case by asserting the defect in the chair concerned in the accident was latent and could not have been discovered by reasonable care. It was a folding chair equipped with metal braces fastened to it with screws or bolts so that it could be operated and when not folded up could be safely used as a chair. There is no proof that the braces or fasteners were not exposed to view. It is a reasonable inference that they were and that a casual examination before or at the time the chair was given to appellee to be used by her would have disclosed the defect in the chair because the screws and bolts on one side of the chair were missing and this was learned after it collapsed by merely looking at it. A latent defect in an article of this nature is one that exists in such a way that discovery is impossible by the exercise of reasonable inspection and care. Knies v. Lang, 116 Neb. 387, 217 N. W. 615, 57 A. L. R. 1022; McMahon v. Regis Hotel Co., *supra;* Watson Bros. Transp. Co. v. Chicago, St. P., M. & O. Ry. Co., *supra.* The defect in the chair was not latent.

The McMahon case above cited is confidently relied upon by appellant to sustain its assertion that the defect in the chair was latent. Its effort in this respect is not convincing. The defect in the bench which caused the accident involved in that case was obviously latent. There was no proof that defendant knew or ought to have known of the defective condition existing in the bench. The doctrine of res ipsa loquitur was not attempted to

be invoked therein by the person who was injured. She charged and attempted unsuccessfully to prove specific negligence. The McMahon case is not helpful in the disposition of this case.

The applicability of the doctrine of res ipsa loquitur to this case is denied by appellant because it asserts that its chair occupied by appellee at the time of the accident was in her exclusive possession and control from the time she got it from a person who had been using it, moved it up to the table, and sat on it, a period of about 30 minutes. Her acts in reference to the chair were limited to transportation of it from where she first saw it in the hallway connecting the Embassy Room and the ballroom of the Rome Hotel to the table in the latter room where the game was in progress and sitting on it. She occupied the chair as an invitee of appellant. She had no right or duty to examine it for defects. She had a right to assume it was a safe instrumentality for the use she had been invited by appellant to make of it. Appellant had the ownership, possession, and control of the chair under the circumstances of this case and it was obligated to maintain it in a reasonably safe condition for the invited use made of it by the appellee. The fact that the chair when it was being properly used for the purpose for which it was made available gave way permits an inference that it was defective and unsafe and that appellant had not used due care in reference to it.

In Miratsky v. Beseda, *supra,* this court said: "Here the bleachers were under the management and control of the defendant Katolicka Sokol. The plaintiff Bessie Miratsky had an implied invitation not only to enter the grounds where the exhibition was staged, but also to occupy a seat in the stands provided by the management for the use of its patrons. She had a right to rely upon the safe condition of the seat provided for her. In the ordinary course of things, such bleachers do not collapse if proper care is used in their construction and

maintenance. The collapse of the bleachers affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of care."

Rose v. Melody Lane, 39 Cal. 2d 481, 247 P. 2d 335, involved the fact that a patron of a cocktail lounge was injured when the stool on which he was sitting collapsed. He sought to recover damages by application of the doctrine of res ipsa loquitur. The court said: "Plaintiff was entitled to rely upon the doctrine of res ipsa loquitur. * * * That doctrine applies if the accident in question would not ordinarily have happened in the absence of negligence and if defendant had exclusive control over the instrumentality causing the injury. * * * Seats designed for use by patrons of commercial establishments do not ordinarily collapse without negligence in their construction, maintenance, or use. * * * Defendant and its agents were in exclusive control of the stool up to the time plaintiff sat upon it. It is true that in one sense plaintiff was in control of the stool while he was using it; at least one court has held that this circumstance is sufficient to prevent the application of res ipsa loquitur. (Kilgore v. Shepard Co., 52 R. I. 151, 154 [158 A. 720]; * * *.) Such a view is artificial and ignores the purpose of the requirement that defendant have exclusive control. * * * Once it has been established that the accident was more probably than not the result of negligence, it need only be determined that defendant is the sole person who could have been guilty of that negligence. * * * Here it was the condition of the stool, not the use made of it, that was responsible for the fall. Plaintiff had done no more than sit upon it when it gave way, and there is no suggestion that his conduct was in any way improper. So far as construction, inspection, or maintenance of the stool were concerned, defendant had exclusive control. Plaintiff's action had no more legal significance as a cause of the accident than those of the innocent bystander in the typical res ipsa loquitur case."

The plaintiff in Gow v. Multnomah Hotel, Inc., 191 Or. 45, 224 P. 2d 552, 228 P. 2d 791, sued the hotel of which he was a guest for damages because a counter stool on which he was sitting broke and threw him to the floor. He relied upon res ipsa loquitur. It was contended he could not prevail because he had possession of the broken stool. The court said: "Under the doctrine of res ipsa loquitur plaintiff's mere possession of a chattel injuring him does not prevent a res ipsa loquitur case where it is clear that he has done nothing abnormal and has used the thing only for the purpose for which it was intended."

Fox v. Bronx Amusement Co., 9 Ohio App. 426, concerned the circumstance of a patron of a motion picture theatre being injured therein during a performance by the collapse of a seat occupied by the patron. The court sustained the claim that the doctrine of res ipsa loquitur was available to the plaintiff. The opinion contains this: "This theatre was under the management of the defendant, and in the ordinary course of things such accidents do not happen if proper care is used. The plaintiff was lawfully in this theatre, had an implied invitation not only to enter the theatre but occupy a seat provided by the management thereof, and she had a right to rely upon the safe condition of the seat provided for her, and the breaking of the seat itself affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of care."

See, also, Brown v. Cleveland Baseball Co., 158 Ohio St. 1, 106 N. E. 2d 632; Gross v. Fox Ritz Theatre Corp., 12 Cal. App. 2d 255, 55 P. 2d 227; Bell v. Dorchester Theatre Co., 314 Mass. 536, 50 N. E. 2d 814; Clark-Daniel's, Inc. v. Deathe (Tex. Civ. App.), 131 S. W. 2d 1091; Herries v. Bond Stores, Inc., 231 Mo. App. 1053, 84 S. W. 2d 153; Burchmore v. Antlers Hotel Co., 54 Colo. 314, 130 P. 846; Schueler v. Good Friend North Carolina Corp., 231 N. C. 416, 57 S. E. 2d 324, 21 A. L. R. 2d 417; Zappala v. Stanley Company of America, 124 N. J. Law 569, 12 A. 2d 691; Reinzi v. Tilyou, 252 N. Y. 97, 169 N. E.

101; Jesionowski v. Boston & Maine R. R., 329 U. S. 452, 67 S. Ct. 401, 91 L. Ed. 416, 169 A. L. R. 947; Annotation, 21 A. L. R. 2d 454.

Appellant stresses Kilgore v. The Shepard Co., 52 R. I. 151, 158 A. 720, as sustaining its claim that appellee had control of the chair while she was using it and that this circumstance prevents her having the benefit of the doctrine of res ipsa loquitur. Appellant has correctly stated the conclusion of the Rhode Island court. That case is substantially sui generis. A decision of any court has not been found that approves the doctrine of the Rhode Island court in this regard. It has been condemned by other courts as expressing an artificial view, ignoring the purpose of the requirement that defendant have exclusive control of the instrumentality in question, and as not being in line with current authority on the subject. Herries v. Bond Stores, Inc., *supra;* Clark-Daniel's, Inc. v. Deathe, *supra;* Rose v. Melody Lane, *supra.* It opposes the principle of the decisions of this court referred to herein.

An issue in this case was the amount appellee was entitled to recover if the jury found for her. The evidence concerning this issue was conflicting. The trial court gave no instruction on this subject. The charge to the jury did advise it that appellee was required to prove by a preponderance of the evidence as one of the indispensable elements of her case "The character and extent of plaintiff's injuries and the amount of her damages, if any." There was no other mention of damages or of amount of recovery in the charge. The jury was not advised as to any basis upon which damages could be assessed by it. This omission is plain prejudicial error. It cannot be ascertained from the record what was the basis of the recovery awarded appellee. It is mandatory that the district court instruct the jury as to each issue in the case. McKain v. Platte Valley Public Power & Irr. Dist., 151 Neb. 497, 37 N. W. 2d 923; Krepcik v. Interstate Transit Lines, 154 Neb. 671, 48 N. W. 2d

839. Borcherding v. Eklund, 156 Neb. 196, 55 N. W. 2d 643, is decisive of this phase of the case: "A jury should be fully and fairly informed as to the various items of damages which it should take into consideration in arriving at its verdict. In this respect it is the duty of the trial court to instruct as to the proper basis upon which damages are to be assessed for each such item." See, also, Hickman-Williams Agency v. Haney, 152 Neb. 219, 40 N. W. 2d 813.

Instructions given the jury are challenged. The substance of the first of these advised the jury that appellee was required to prove by a preponderance of evidence that the chair occupied by her at the time of the accident was in the control and management of appellant; that the circumstances shown by the evidence according to common knowledge and experience created a clear inference that the accident would not have happened if appellant had not been negligent; and the character and extent of the injuries of appellee, and the amount of any damages she sustained. This was followed by a statement that if the jury found appellee had sustained this burden and that the evidence offered by appellant "fails to rebut the presumption or destroy the inference, then your verdict will be in favor of plaintiff." If considering all the evidence the presumption is rebutted or destroyed appellee could not recover. "Rebut" means to meet, to contradict, or to refute. The other instruction in effect informed the jury that appellee had the burden of proving negligence and this was not changed by the "doctrine of law mentioned"; that appellant was not required to overcome the inference by a preponderance of the evidence; that to hold appellant liable the inference of negligence must have greater weight and more convincing force on the mind of the jury "than the opposing explanation offered by the defendant"; and that "If such a preponderance in plaintiff's favor exists, then it must be found that some negligent conduct on the part

of the defendant was a proximate cause of the accident and injury * * *."

The first instruction objected to says if the evidence offered by appellant "fails to rebut the presumption" and if "the presumption is rebutted." There was no previous mention of presumption. The word inference had been used by the court. It was proper if not necessary for the jury to understand that inference and presumption were different things, because of the language "fails to rebut the presumption or destroy the inference." The jury was wholly unaided concerning the meaning of the words "the presumption" as employed by the trial court. The advice to the jury that if the evidence of the defendant "fails to rebut the presumption or destroy the inference, then your verdict will be in favor of the plaintiff" permitted it to understand that appellant was obliged to explain how the accident happened and to overcome by evidence any inference of negligence that arose because of the collapse of the chair. Appellant was not required to explain the cause of the accident or to overcome any inference of negligence. It was privileged but not required when appellee rested her case to go forward with any proof that was available that it had used due care to furnish a safe chair. If appellant submitted no proof it remained a question for the jury to decide whether appellee had shown circumstances sufficient to justify finding negligence on the part of appellant that was the proximate cause of the accident and injury.

In Schroble v. Lehigh Valley R. R. Co., 62 F. 2d 993, the court considered an instruction which informed the jury that there was a presumption of negligence arising from the happening of the accident which the " 'defendant should meet' " and " 'It is for you to consider whether that testimony explains away the presumption of negligence that I have just outlined to you.' " The testimony referred to was produced by the defendant and concerned the inspection of the railroad cars prior

to the accident and that they were found to be in good condition. The court in condemning the instruction said: "As the charge then stood, the jury might have thought that the defendant was obliged to explain how the accident happened and to overcome by evidence any inference of negligence that arose from the derailment. There was * * * an inference of negligence. * * * But the burden of establishing by a preponderance of evidence that the defendant was negligent was always upon the plaintiff, and, if the inference of negligence arising from the unusual occurrence and defendant's proof of inspection and due care finally left the jury in doubt whether the derailment was caused by the negligence of the railroad or not, the defendant was entitled to a verdict. Consequently the instruction that the defendant was bound to 'explain away the presumption of negligence' was not correct. Nor was it fairly cured by the instruction that 'the burden is on the plaintiff to prove negligence,' for the instruction about the burden of proof was confused by the prior statement that it was the duty of the defendant to 'explain away the presumption of negligence.' The defendant was not obliged to explain the cause of the derailment, but only to go forward with proof that it had exercised due care to furnish a safe equipment."

In Sweeney v. Erving, 228 U. S. 233, 33 S. Ct. 416, 57 L. Ed. 815, Ann. Cas. 1914D 905, the court said: "In our opinion, res ipsa loquitur means that the facts of the occurrence warrant the inference of negligence, not that they compel such an inference; that they furnish circumstantial evidence of negligence where direct evidence of it may be lacking, but it is evidence to be weighed, not necessarily to be accepted as sufficient; that they call for explanation or rebuttal, not necessarily that they require it; that they make a case to be decided by the jury, not that they forestall the verdict. * * * When all the evidence is in, the question for the jury is, whether the preponderance is with the plaintiff." In that case the

Supreme Court of the United States quoted with approval this language from Stewart v. Carpet Co., 138 N. C. 60, 50 S. E. 562: "The rule of res ipsa loquitur does not relieve the plaintiff of the burden of showing negligence, nor does it raise any presumption in his favor. Whether the defendant introduces evidence or not, the plaintiff in this case will not be entitled to a verdict unless he satisfies the jury by the preponderance of the evidence that his injuries were caused by a defect in the elevator attributable to the defendant's negligence. The law attaches no special weight, as proof, to the fact of an accident, but simply holds it to be suffiicent for the consideration of the jury even in the absence of any additional evidence." See, also, Security Ins. Co. v. Omaha Coca-Cola Bottling Co., *supra;* Keithley v. Hettinger, 133 Minn. 36, 157 N. W. 897, Ann. Cas. 1918D 376; Annotation, 53 A. L. R. 1511; 65 C. J. S., Negligence, § 220, p. 1025; 38 Am. Jur., Negligence, § 309, p. 1006.

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

REVERSED AND REMANDED.

EDNA M. SCOTT, APPELLANT, V. SERVICE PIPE LINE COMPANY, A CORPORATION, ET AL., APPELLEES.
65 N. W. 2d 219

Filed June 25, 1954. No. 33553.

1. **Negligence: Trial.** Contributory negligence is ordinarily a question for the jury, but where there is no evidence to sustain a finding of contributory negligence it is error to instruct on the subject and thereby submit to the jury an issue not supported by evidence.
2. **Automobiles.** The duty of a guest riding in an automobile is to use care in keeping a lookout commensurate with that of an ordinary prudent person under like circumstances.
3. ———. A guest is not required to use the same degree of care as the driver of the automobile. If a guest perceives danger, or should have perceived it under the circumstances shown by the

evidence, a duty to warn the driver arises. Ordinarily, however, a guest need not watch the road or advise the driver in the management of the automobile.

4. ———. Where the evidence shows that the driver of an automobile observed the danger simultaneously with or prior to the guest, no duty to warn the driver arises.

5. ———. It is not contributory negligence for a guest to sleep while riding in an automobile when she has no knowledge of negligent driving on the part of her host or of impending danger on the highway.

6. ———. It is the duty of a guest with knowledge of approaching danger, in the exercise of ordinary care, to warn the host if there is time and opportunity, unless it reasonably appears that a warning would not be heeded or that the driver observed the danger the same as the guest.

7. **Master and Servant.** The acts of an employee are within the scope of the employment if, and only if, such acts are of the class he is employed to perform or incidental thereto, or are the result of special instructions or directions to perform them.

8. ———. In the absence of special authority it is not enough, in order to establish liability on the part of an employer, to show that the employer has an interest in what is being done; it must be made to appear that the employee whose act is in question has authority to perform the class of service to which the act belongs.

9. **Automobiles.** Where the negligence, if any, of the driver of an automobile cannot be imputed to a guest, and there is no evidence of contributory negligence on the part of such guest, it is prejudicial error to instruct on comparative negligence in a suit by the guest against the driver of another automobile who is charged with the negligence which is alleged to have caused the accident.

APPEAL from the district court for Buffalo County: ELDRIDGE G. REED, JUDGE. *Affirmed in part, and in part reversed and remanded.*

Dryden, Jensen & Dier, for appellants.

Hamer, Tye & Worlock and *Blackledge & Sidner,* for appellee.

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

CARTER, J.

This is an action by Edna M. Scott, plaintiff, to re-

cover damages for personal injuries sustained in an automobile collision, against the defendants Service Pipe Line Company, a corporation, and Vernie L. Fields. A verdict was directed in favor of the Service Pipe Line Company. The jury found for the plaintiff against the defendant Fields in the amount of $10,000. The plaintiff appeals.

The evidence shows that on October 11, 1952, at about 3:15 p. m., an automobile owned and driven by Don Scott collided with a car owned and driven by the defendant Vernie L. Fields about 1 mile east of Elm Creek, Nebraska. The plaintiff, Edna M. Scott, is the mother of Don Scott and was riding in the front seat with him at the time of the accident. She was holding Ann Scott, Don's 3-year-old daughter, on her lap at the time. Don Scott's wife, Lucille, was riding in the back seat with their 1-year-old daughter, Susie. The Scott car was being driven east on U. S. Highway No. 30 at about 60 miles per hour as it left Elm Creek. As the car approached the intersection of U. S. Highway No. 30, with a graveled county road 1 mile east of Elm Creek, Don Scott observed the Fields car approaching from the east.

The testimony of Don Scott was to the effect that he approached the intersection at the rate of 60 miles per hour. He observed the Fields car start to turn left at the intersection and he slowed down to 45 or 50 miles per hour. The Fields car then turned back onto its side of the highway. Don Scott thereupon speeded up his car to go on by. The Fields car then turned left in front of him without signaling and the Fields car was hit broadside in the south half of the intersection. There is evidence that the Scott car made tire marks for a distance of 56 feet on the south side of the pavement.

The defendant testified that he was driving west on the north side of the highway as he approached the intersection. He slowed down to 20 miles per hour and started to turn left across the center line when he saw

the Scott car coming. He turned back to the right side of the highway and then, without signaling, turned left in front of the Scott car. The manner of the happening of the accident appears to have been correctly described in a statement which he admitted giving in the following words: "I started over into his lane, and then I saw that he was coming pretty fast, so I pulled back; and then I saw him slow down, so I thought I could shoot across, but I didn't make it across."

The evidence was clearly sufficient to sustain the finding of the jury that Fields was negligent in turning in front of the Scott car without signaling such intention.

The plaintiff complains of the trial court's action in submitting the question of contributory negligence to the jury. In this respect the evidence shows that Edna M. Scott, the plaintiff, was a resident of Peoria, Illinois. The son, Don, also lived in that city. Plaintiff accompanied Don and his family on a vacation trip to Albuquerque, New Mexico, to visit plaintiff's daughter. There is some evidence that plaintiff was paying her own expenses and that her husband had indicated that he would pay some part of the car expense. It was not a joint enterprise as that term is legally used. Plaintiff was clearly the guest of her son Don on the trip, and the negligence of Don, if any, was not imputed to her. The trial court correctly instructed the jury on this issue.

The only evidence in the record as to any contributory negligence on the part of the plaintiff was that which the plaintiff gave. She testified that she was riding in the front seat holding her 3-year-old granddaughter who was sleeping. She says that Don was driving his car at a moderate rate of speed, but that she was paying no particular attention. She saw the Fields car coming approximately a half mile distant. Each car was on its own side of the road at that time. She says they had traveled a long time and that she was tired. She was drowsy and closed her eyes from time to time but

did not sleep. After seeing the car a half mile distant she closed her eyes. The next time she saw the Fields car it was crossing the intersection immediately in front of them. When she saw the car there was no time to do or say anything. She says the car was so close that she "held Ann a little tighter and just breathed a silent prayer." The next thing she knew she was coming to after the accident. Upon this evidence the trial court submitted the question of her contributory negligence to the jury.

The duty of a guest riding in an automobile is to use care in keeping a lookout commensurate with that of an ordinary prudent person under similar circumstances. The guest is not required to exercise the same degree of care as the driver. If the guest observes danger, or if danger should ordinarily be anticipated, the guest should warn the driver, but ordinarily a guest is not required to watch the road or advise the driver in the management of the car. Where a driver observed or should have observed the danger as well as the guest, the guest is not ordinarily negligent in failing to warn the driver. There is no evidence in the present case that plaintiff knew of or observed any danger until it was too late to avoid the accident. The danger was suddenly created by the defendant Fields turning into the path of the Scott car without signaling an intention to do so. It is not contributory negligence for a guest to sleep while riding in an automobile when she has no knowledge of negligent driving on the part of her host or of impending danger on the highway. Davis v. Spindler, 156 Neb. 276, 56 N. W. 2d 107; Montgomery v. Ross, 156 Neb. 875, 58 N. W. 2d 340. Under the evidence in this case the accident could not have been avoided if plaintiff had been watching the road and had observed the danger when it arose. Under such circumstances it was reversible error to submit the question of plaintiff's contributory negligence to the jury. Costello v. Hild, 152 Neb. 1, 40 N. W. 2d 228; Hendrix v. Vana, 153 Neb.

531, 45 N. W. 2d 429; Kuska v. Nichols Construction Co., 154 Neb. 580, 48 N. W. 2d 682.

The plaintiff complains of the ruling of the trial court in dismissing the action as to the Service Pipe Line Company. The evidence shows that the defendant Fields was an employee of the pipe line company. He was employed at Alfalfa Center pumping station as the chief station engineer. He was the supervisor of eight employees working at the pumping station. There is evidence that he was authorized to use his automobile in obtaining repairs required at the pumping station and in attending supervisory meetings. For this use of his car he was paid mileage of 8 cents per mile. The evidence shows that on the day of the accident a train crew on a railroad paralleling the company's pipe line reported a leak in the pipe line west of the Alfalfa Center pumping station. The duty of patrolling the pipe line and making repairs when the same were needed was that of the connection foreman and a crew working under him. There is no evidence in the record, written or oral, that it was a duty of the defendant Fields. It is not shown that mileage was paid for the use of his car for any such purpose. It is true that in case of major breaks in the pipe line it was the duty of the chief station engineer to close down the pumping station over which he had control. On the day in question the connection foreman and his crew were walking the pipe line in an attempt to find the reported leak before the report came to the attention of Fields. On his own initiative he took his car and traveled west. He was turning south towards the pipe line when the accident happened.

The burden of proof was upon the plaintiff to prove that Fields was acting within the scope of his employment at the time of the accident. Riesland v. Dawson County Irr. Co., 134 Neb. 773, 279 N. W. 726. A corporation is liable for the negligent operation of an automobile by its agent or servant only when such agent or

servant is engaged in the employer's or principal's business with his knowledge and direction. Simcho v. Omaha & C. B. St. Ry. Co., 150 Neb. 634, 35 N. W. 2d 501. It was not enough to show only that Fields was in the employ of the Service Pipe Line Company. An employee is within the scope of his employment only if his acts are of the same general nature as that authorized, or incidental thereto. See Restatement, Agency, §§ 228, 229, pp. 505, 507. In Rose v. Gisi, 139 Neb. 593, 298 N. W. 333, we quoted the following with approval from Stone v. Commonwealth Coal Co., 259 Mass. 360, 156 N. E. 737: " 'It is not enough, in order to establish liability, to show that the master has an interest in what is being done. It must also be made to appear that the servant whose act is in question has authority from the master to perform the class of service to which the act belongs. If the act is within the class, the master is bound although the servant is forbidden to perform the particular act. * * * Driving motor trucks upon the roads was not within the class of work for which McDonnell was hired. His general employment did not confer the authority, and no special authority is shown to have been given.' "

In the present case Fields was the owner of the automobile he was driving. He was employed as chief station engineer at the Alfalfa Center pumping station. His work was generally confined to that station. It is not shown that it was his duty to walk pipe lines, make repairs thereon, or to search for breaks in the pipe line. These were the assigned duties of the connection foreman and his crew, over whom Fields had no supervision. Fields did have authority to use his automobile in the company's business for certain purposes, but the checking of pipe lines for breaks was not one of them. At the time of the accident he was not engaged in the general class of work he was authorized to perform, nor was it incidental thereto. It had not been generally performed by him previously, nor by others having simi-

lar positions with the company. The work at the pumping station was assigned to one group of employees, while that of walking and repairing pipe lines was assigned to an entirely separate group. The conduct of Fields at and immediately before the accident cannot be fairly and reasonably regarded as a part of or incidental to the work specifically directed, or that usually done in connection with his work. We hold that the conduct of Fields was outside the class of service for which he was employed and, no special instructions or directions being shown to authorize it, the pipe line company is not liable for his negligence. The trial court therefore correctly dismissed the action as to the Service Pipe Line Company.

The plaintiff complains of the action of the court in giving an instruction on comparative negligence. The plaintiff being a guest, the negligence of the driver, if any, was not imputable to her, and there being no evidence of contributory negligence on the part of the plaintiff sufficient to take that issue to the jury, the court was in error in instructing on comparative negligence.

For the reasons stated, the judgment is reversed and the cause is remanded for a new trial as to the defendant Fields.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED.

DALE W. ANDERSON, APPELLEE, V. N. CHRIS NELSEN, APPELLANT.
65 N. W. 2d 149

Filed June 25, 1954. No. 33565.

1. **Appeal and Error.** Where in an action at law the evidence is in conflict on a material matter the verdict of a jury thereon will not be disturbed unless it is clearly wrong.
2. ———. A prerequisite to review on appeal of alleged improper conduct or statements of a trial judge is an exception thereto at the time.

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

Sidner, Lee, Gunderson & Svoboda, for appellant.

Richards, Yost & Schafersman, for appellee.

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

YEAGER, J.

This is an action based upon an alleged contract between Dale W. Anderson, plaintiff and appellee, and N. Chris Nelsen, defendant and appellant. The plaintiff alleged for his cause of action substantially that on or about April 10, 1952, he entered into an oral contract with the defendant whereby he agreed to perform farm work for the defendant for $175 a month and that if he stayed until after the crops were harvested he would receive an additional $25 a month for his services as a bonus. Other considerations were involved but they constitute no part of the controversy here. He further alleged that the crops were harvested by December 1, 1952; that he stayed until after that date; and that he made demand for the bonus for the period from April 10, 1952, to December 1, 1952, amounting to $190, which was refused.

The defendant denied that he agreed to pay the bonus and refused payment.

The case was tried to a jury and a verdict was returned in favor of the plaintiff for the amount claimed.

After the verdict was returned the defendant filed a motion for new trial and a motion for judgment notwithstanding the verdict. These motions were in due course overruled. From the order overruling the motions the defendant has appealed.

On the evidence adduced it cannot be said that the court erred in overruling either or both of the motions. The testimony on behalf of the plaintiff as to the entry into the agreement is clear, complete for the purposes

of establishing the agreement, and unequivocal in its terms. This evidence was denied by the defendant.

Under the rule that where in an action at law the evidence is in conflict on a material matter the verdict of a jury thereon will not be disturbed unless it is clearly wrong, the verdict in this case must be upheld. See Bolio v. Scholting, 152 Neb. 588, 41 N. W. 2d 913.

The defendant insists that the court erred in its refusal to instruct on the nature of a contract as requested in his tendered instruction No. 7. This insistence is without merit. The full and complete substance of the requested instruction appears in instruction No. 2 given by the court on its own motion.

The defendant urges that the court erred in refusing to instruct on circumstantial evidence as requested by the defendant. This assignment is without merit.

No circumstances were testified to which either tended to sustain plaintiff's cause of action or the pleaded defense thereto. The material testimony on both sides was direct.

It is urged that the court prejudicially abused its discretion in the rejection of evidence and by remarks which prevented the defendant from having a fair trial.

We have found no instance wherein any relevant, competent, or material evidence was rejected by the court either on the court's own motion or by ruling on objection or offer of proof. As to the matter of prejudicial remarks none have been found, and furthermore the record does not disclose objection or exception to any remark or remarks of the court.

It is the rule that a prerequisite to review on appeal of alleged improper conduct or statements of a trial judge is an exception thereto at the time. Morrow v. State, 146 Neb. 601, 20 N. W. 2d 602; Bolio v. Scholting, *supra*.

For the reasons herein set forth the judgment of the district court is affirmed.

AFFIRMED.

BEN L. SELIG ET AL., CO-PARTNERS DOING BUSINESS UNDER THE FIRM NAME AND STYLE OF ESSE SALES SERVICE AND ENGINEERING AND ESSE RADIO COMPANY, APPELLEES, V. WUNDERLICH CONTRACTING COMPANY, A CORPORATION, APPELLANT.

65 N. W. 2d 233

Filed July 2, 1954. No. 33477.

1. **Trial.** A motion for directed verdict or its equivalent must, for purpose of decision thereon, be treated as an admission of the truth of all competent evidence submitted on behalf of the party against whom the motion is directed. Such party is entitled to have every controverted fact resolved in his favor and to have the benefit of every inference that can reasonably be deduced from the evidence.
2. **Agency.** Notice to or knowledge by an agent is imputed to his principal in those cases only in which it is his duty to act upon it, or to communicate it to his employer, in the proper discharge of his trust as such agent, and it possesses that character in those cases only in which it has a direct relation to the act or business which the agent is employed to do.
3. **Contracts.** A contract containing mutual obligations of the parties thereto by mutual consent may be changed or modified in one or more of its details at any time after its execution, and before a breach has occurred, by a new agreement without any new, independent, or distinct consideration.
4. **Definitions.** The generally accepted meaning of hoodwinked is to deceive as if by blinding, to impose upon, to delude.
5. **Compromise and Settlement.** Where parties settle a dispute upon a legal question, the fact that there was in truth no actual doubt about the law will not render such settlement nugatory; and the fact that the point which was compromised could have been decided but one way under the facts in the case is no ground for repudiating the compromise.
6. ———. Voluntary settlement of doubts and disputes between parties are to be encouraged and will not be disturbed for any ordinary mistake, either of law or of fact, since their very object is to settle disputes without judicial controversy.
7. ———. The mistake which would authorize the setting aside of an ordinary contract will not in all cases justify the setting aside of a compromise agreement.
8. ———. A compromise will not be disturbed for mistake where the means of knowledge were accessible and the complaining party failed to exercise reasonable diligence to inform himself.

In the absence of any confidential or fiduciary relation, a party cannot complain because the opposite party failed to volunteer information, or even made false statements as to matters as to which the complaining party could have informed himself.

9. ———. A party to an agreement of compromise and settlement may, on the theory of ratification, waiver, or estoppel be precluded from objecting thereto or avoiding it, as by acceptance and retention of the benefits of the agreement with knowledge of facts invalidating it.

10. ———. If a party makes a compromise in ignorance of facts, and after the facts are known receives without objection the balance due him by the compromise, he thereby waives the rights which he might otherwise have had.

APPEAL from the district court for Lancaster County: HARRY A. SPENCER, JUDGE. *Reversed and remanded with directions.*

Fraser, Connolly, Crofoot & Wenstrand, C. Russell Mattson, Ben H. Powell, Jr., and *W. Morgan Hunter*, for appellant.

C. L. Clark, Davis, Healey, Davies & Wilson, and *Robert A. Barlow, Jr.*, for appellees.

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

SIMMONS, C. J.

This is an action for damages for failure to deliver merchandise which it is alleged defendant agreed to sell to the plaintiffs. Issues were made and trial had. At the close of all the evidence defendant moved for a directed verdict. This motion was overruled. The jury returned a verdict for the plaintiffs upon which judgment was entered. Defendant moved for judgment notwithstanding the verdict or in the alternative for a new trial assigning many alleged errors. Plaintiffs moved for an order allowing interest on the judgment from the date of breach of contract. All motions were denied. Defendant appeals. Plaintiffs cross-appeal on the interest matter. We reverse the judgment of the trial court and

remand the cause with directions to sustain defendant's motion for judgment notwithstanding the verdict.

The first question presented is that the trial court erred in not sustaining the motion for a directed verdict and for judgment notwithstanding the verdict. For the determination of this question we review the evidence subject to the rule that: "A motion for directed verdict or its equivalent must, for purpose of decision thereon, be treated as an admission of the truth of all competent evidence submitted on behalf of the party against whom the motion is directed. Such party is entitled to have every controverted fact resolved in his favor and to have the benefit of every inference that can reasonably be deduced from the evidence." Cunning v. Knott, 157 Neb. 170, 59 N. W. 2d 180.

The plaintiffs are co-partners. The defendant was the purchaser from the government of a large number of airplanes which were to be dismantled. For the most part the evidence of plaintiffs, recited herein, was given by one of the partners who was active in negotiating the contracts involved.

On January 15, 1947, the plaintiffs submitted a written purchase order to defendant for some 17 items which either had been or were to be stripped from these planes. Defendant accepted the offer. The terms of payment were "Cash prior to shipment $2000.00 Deposit." The contract was entered into at Kingman, Arizona. Plaintiffs' home office and place of business was in Indianapolis, Indiana. As payment of the deposit plaintiffs gave defendant their check for $2,000 drawn on an Indianapolis bank. Defendant endorsed the check payable to the order of a Kingman bank "FOR DEPOSIT ONLY." The Kingman bank sent the check to the Harris Trust and Savings Bank of Chicago. From there it went to the Federal Reserve Bank of Chicago. That bank sent it by "cash" letter to the Indianapolis bank where it was received on January 21, 1947. Payment was refused for insufficient funds and the check was sent to

the clearing house for protest on behalf of the Indianapolis bank. The Federal Reserve Bank was advised by wire that the check was being sent to protest and the Harris Trust and Savings Bank was in turn advised of that fact by telephone.

Certificate of protest was made on January 21, 1947. Eight carbon copies of the notice of protest were made and sent to the Federal Reserve Bank.

The check with certificate of protest was returned by the clearing house to the Indianapolis bank on January 22, 1947. On that day the plaintiffs made a deposit of $5,000. The Indianapolis bank accordingly accepted and paid the check and wired the Federal Reserve Bank that payment was being made. That bank in turn telephoned the fact of payment to the Harris Trust and Savings Bank. Its credit of the item with the Federal Reserve Bank was not disturbed. The check was charged to plaintiffs' account on January 23.

Defendant apparently received notice from the Kingman bank that the check had been protested on January 27, 1947, for under that date it issued instructions to make no shipment on the contract of January 15.

Defendant received the notice of protest on January 28, 1947. Defendant, through its broker, advised plaintiffs that the check had been protested.

On that day plaintiffs wrote defendant that they could not understand why the check was "returned"; that "the bank informs us" that it refused to honor checks against deposits which were uncollected funds; that there were discrepancies in their books; that they had discharged their bookkeeper and had a "CPA, now engaged on the books"; that their next remittances would be made by cash or certified check; and that one of the plaintiffs would be in Kingman about February 15, 1947, and "inform you the reason for our trouble." On the same day plaintiffs wired defendant that the check was "okay. Send through again. Explain in letter."

Plaintiffs' office was 5 blocks from its bank. They

deny having a conversation with the bank about the check "before we sent the certified check," although it is noted that their letter of January 28, 1947, referred to what their bank "informs us."

On February 12, 1947, defendant wrote plaintiffs referring to the request that the check "which was under protest should be resent through the banks for payment. To date the bank has been unable to collect on this check" and requested a certified check.

One of the plaintiffs went to Kingman, arriving there on February 12, 1947, and was advised that defendant was "still not delivering merchandise and still denying payment of the two-thousand dollars." He testified that he was told the check had been sent through for a second time and that there was no reason to disbelieve defendant. Defendant asked for another check and plaintiff promised to have a certified check sent. Plaintiff arranged to have a certified check sent to its representative in care of defendant. He then departed from Kingman agreeing to return on February 20, according to plaintiff. Defendant testified that plaintiff agreed to deliver either cash or a certified check by February 18.

On February 19, 1947, defendant received an offer from another party for one of the items covered by the contract of January 15 with plaintiff and confirmed the offer upon receipt of purchase order and $750 deposit. The purchase order was executed on March 1.

Also on February 19, 1947, defendant wrote plaintiffs that due to the fact that they had not adjusted the deposit matter, it "reserves the right to dispose of any or all items on your purchase order which are to be sold from this field to other purchasers." This letter was received by plaintiffs on February 21.

On February 20, 1947, one of the plaintiffs was at Kingman, talked to defendant, and tendered a $2,000 certified check. Defendant refused to accept the check and advised plaintiff that it had cancelled the contract and

had sold two of the items to others and " 'If you do want the rest of the items you can have them.' "

Plaintiff testified, "I knew I was being hoodwinked at that time. There was something wrong. I couldn't understand the original instrument being bad. * * * so I let it be known." Defendant offered to cancel the whole contract. Plaintiff testified, "There was, of course, these other items we could make money on, so I said, 'No, I would like to have the other items.' " The defendant refused to reinstate the contract " 'without taking these two items off.' " So after "considerable argument" plaintiff agreed " 'under protest.' " Plaintiff "did consent" to the deletion of the two items. The parties then endorsed the contract opposite the two items here involved (and one other) "None from Kingman," and initialed the change.

Plaintiff testified that he asked for the original check and that defendant promised to get it from the bank and return it the next day, which was not done.

Other and subsequent fact matters will be referred to later herein.

The issue on the assignment now being considered narrows down to this. Was the contract of January 15, 1947, modified by the contract of February 20, 1947, so that defendant was under no obligation to deliver the deleted items?

There is argument in the briefs that the banks that handled the check from Kingman to Indianapolis were agents of defendant and hence defendant had imputed knowledge that the check had been paid. Defendant does not dispute that but asserts that the Indianapolis bank in making the payment was an agent of the plaintiffs and hence plaintiffs had imputed knowledge also. The plaintiffs say there was no duty of the drawee bank to give notice of payment. We are cited to no authority holding that the banks handling the check, as was done here, had a duty to notify of the payment of the check. It is contrary to ordinary business practices. In Harga-

dine McKettrick Dry Goods Co. v. Krug, 2 Neb. (Unoff.) 52, 96 N. W. 286, it was pointed out that the imputed knowledge rule was a harsh and severe one and was to be rigidly confined to those cases to which it is strictly applicable. The rule is there stated: "Notice to or knowledge by an agent is imputed to his principal in those cases only in which it is his duty to act upon it, or to communicate it to his employer, in the proper discharge of his trust as such agent, and it possesses that character in those cases only in which it has a direct relation to the act or business which the agent is employed to do."

The argument about imputed knowledge may be put aside for another reason. Plaintiffs state that both parties thought the check had not been paid, that the deposit had not been made, and that belief was crucial to all negotiations underlying the agreement of February 20, 1947. Plaintiffs assert that the contract of February 20, 1947, had no legal effect between the parties because it was without consideration and was based on a mutual mistake of fact and was a legal nullity. Of course, there could be no mutual mistake if defendant had imputed knowledge of the payment of the check.

As to consideration the rule in this state is: "A contract containing mutual obligations of the parties thereto by mutual consent may be changed or modified in one or more of its details at any time after its execution, and before a breach has occurred, by a new agreement without any new, independent or distinct consideration." Moore v. Markel, 112 Neb. 743, 201 N. W. 147.

We are not here dealing with an ordinary modification of a contract but rather with a compromise and settlement.

Giving the plaintiffs the benefit of the inferences involved, we start with the proposition, as plaintiffs suggest, that both parties entered into the agreement of February 20, 1947, believing that the check had not been paid. Neither party made inquiry at the source

that was available to it. Plaintiffs made no effort to go to their bank, 5 blocks away, to find out what happened to the check. Defendant made no effort to find out what disposition had been made of the check. Beginning with the notice of protest defendant assumed and thereafter made representations that the check had not been paid. There was ample time, at least as to a part of these representations, for plaintiffs to have inquired and determined their truth before February 20, 1947. Plaintiffs did not do so.

With that situation existing we come then to the agreement of February 20, 1947.

There is no dispute about the following facts. Plaintiffs' evidence shows them. On February 19, 1947, defendant wrote plaintiffs at Indianapolis that due to the fact that the deposit matter had not been adjusted defendant reserved the right to dispose of any and all items on the purchase order to other customers. This letter did not reach Indianapolis until February 21.

However, on February 20, 1947, when plaintiffs tendered the $2,000 certified check to defendant it was refused on the ground that defendant had cancelled the contract. Defendant prior thereto had refused to make delivery of merchandise.

Plaintiffs on February 20, 1947, were confronted with those facts. Defendant offered to " 'cancel the whole contract and forget everything.' " Plaintiffs knew something was wrong and that they were being "hoodwinked." The word is defined as meaning to deceive by false appearance, to impose upon. Webster's New International Dictionary (2d ed.), 1197. The generally accepted meaning of hoodwinked is "to deceive as if by blinding, to impose upon, to delude." State ex rel. Green v. Holzmueller, 40 Del. 16, 5 A. 2d 251.

With knowledge of those facts plaintiffs elected to enter into the agreement of February 20, 1947, and to accept the modified contract. They state their reason. "There was, of course, these other items we could make

money on" and they "would like to have the other items." The modification of the contract was then made and the $2,000 certified check was tendered and accepted.

Whether or not defendant had a legal right to declare the January 15, 1947, contract cancelled is not material here. It did so. The rule is: "* * * where parties settle a dispute upon a legal question, the fact that there was in truth no actual doubt about the law, will not render such settlement nugatory; the fact that the point which was compromised could have been decided but one way under the facts in the case is no ground for repudiating the compromise." Connor v. Etheridge, 3 Neb. (Unoff.) 555, 92 N. W. 135.

Thereafter plaintiffs and defendant proceeded to perform under the February 20, 1947, agreement.

On March 4 and March 11, 1947, by letter plaintiffs advised defendant that they had discovered that the first $2,000 check had been paid, asked for credit for the $4,000 paid, and asked for advice as to whether or not the original contract had been reinstated. Defendant replied March 18, advising that credit had been given for the $2,000 on purchases made or to be made and that the original contract was not reinstated. Plaintiffs then on March 21, 1947, demanded full reinstatement which defendant denied on April 11, 1947.

Thereafter it appears that plaintiffs accepted goods and defendant delivered goods covered by the February 20, 1947, agreement until as late as October 1947. Plaintiffs did that with full knowledge of the facts of the payment of the protested check, and with full knowledge of the fact that defendant refused to reinstate the January 15, 1947, agreement and considered the February 20, 1947, agreement as binding and controlling.

"It is a well-established rule that voluntary settlement of doubts and disputes between parties is to be encouraged * * * and will not be disturbed for any ordinary mistake either of law or of fact, since their very object is to settle disputes without judicial controversy.

In the absence of fraud, misrepresentations, concealments or other misleading incidents a voluntary compromise must stand." Bakke v. Bakke, 242 Iowa 612, 47 N. W. 2d 813. See, also, 11 Am. Jur., Compromise and Settlement, § 4, p. 249; 15 C. J. S., Compromise and Settlement, § 23, p. 738.

"* * * the mistake which would authorize the setting aside of an ordinary contract will not in all cases justify the setting aside of a compromise agreement; and the rule has been stated to be that such agreements will not be disturbed for an ordinary mistake of law or fact, in the absence of other circumstances rendering it inequitable to sustain them." 15 C. J. S., Compromise and Settlement, § 36, p. 757.

"A compromise will not be disturbed for mistake where the means of knowledge were accessible and the complaining party failed to exercise reasonable diligence to inform himself. In the absence of any confidential or fiduciary relation, a party cannot complain because the opposite party failed to volunteer information, or even made false statements as to matters as to which the complaining party could have informed himself." 15 C. J. S., Compromise and Settlement, § 36, p. 759.

"A party to an agreement of compromise and settlement may, on the theory of ratification, waiver, or estoppel be precluded from objecting thereto or avoiding it, * * * or by acceptance and retention of the benefits of the agreement with knowledge of facts invalidating it. So, if a party makes a compromise in ignorance of facts, and after the facts are known receives without objection the balance due him by the compromise, he thereby waives the rights which he might otherwise have had." 15 C. J. S., Compromise and Settlement, § 40, p. 761.

We have then an executed compromise and settlement of an agreement between these parties based on a valuable consideration.

Defendant's motion made at the close of all the evi-

dence and its motion made for judgment notwithstanding the verdict should have been sustained.

Other assignments of error and the cross-appeal need not be considered.

The judgment is reversed and the cause is remanded with directions to sustain defendant's motion for a judgment notwithstanding the verdict.

REVERSED AND REMANDED WITH DIRECTIONS.

CHAPPELL, J., dissents.

MYRTLE PESTEL, APPELLANT, V. BERNHARD PESTEL, APPELLEE.
65 N. W. 2d 233

Filed July 2, 1954. No. 33500.

SUPPLEMENTAL OPINION

APPEAL from the district court for Stanton County: FAY H. POLLOCK, JUDGE. *Former opinion modified, motion for rehearing denied.*

T. L. Grady, for appellant.

Deutsch & Jewell, for appellee.

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

MESSMORE, J.

The original opinion will be found in 158 Neb. 611, 64 N. W. 2d 299.

In the motion for rehearing, this court's attention was called to the matter of the allowance of attorney's fee in the district court, and that the appellant prevailed in procuring a reversal of the trial court's decree awarding the appellee a divorce.

The record discloses that attorney's fees were awarded as costs to the appellant in the district court, in the amount of $650. The attorney's fee so awarded is affirmed. Appellant's counsel is awarded an additional

attorney's fee for services rendered in this court in the amount of $350. The appellee shall be required to pay the costs of this appeal.

The concluding paragraph of the original opinion is modified to read as follows: The decree of the district court granting a decree of divorce to the appellee is reversed and the cross-petition of the appellee is dismissed. The decree of the district court denying a divorce to the appellant is affirmed. The costs of suit and allowances as above set forth should be taxed to the appellee. The decree of the district court should be modified in accordance with this supplemental opinion. Motion for rehearing is denied.

THE KINNEY LOAN AND FINANCE COMPANY, A CORPORATION, APPELLANT, V. GEORGE SUMNER, APPELLEE.
65 N. W. 2d 240

Filed July 2, 1954. No. 33521.

1. **Pleading.** A general demurrer admits all allegations of fact in the pleading to which it is addressed, which are issuable, relevant, material, and well pleaded; but does not admit the pleader's conclusions of law or fact.
2. ———. A general demurrer tests the substantive legal rights of parties upon admitted facts, including proper and reasonable inferences of law and fact which may be drawn from facts which are well pleaded. If the petition states facts which entitle the plaintiff to relief, whether legal or equitable, it is not demurrable upon the ground that it does not state facts sufficient to constitute a cause of action.
3. ———. In passing on a demurrer to a petition, the court must consider an exhibit attached thereto and made a part thereof, if the allegations stated therein either aid the petition in stating a cause of action or charge facts going to avoid liability on the part of the defendant.
4. **Conflict of Laws.** Ordinarily, foreign law or valid rights based thereon will be given effect or enforced under the doctrine of comity unless opposed to the settled public policy of the forum.
5. ———. Bona fide contracts which are valid and enforceable in the state where made and to be performed do not in the

absence of any statute requiring the application of a contrary rule offend the public policy of a forum although they reserve a rate of interest which would be usurious with penalizing consequences even to the extent of forfeiture of principle and interest if made in the law of the forum.

6. ———. When a valid contract made and to be performed in one state is secured by a mortgage or other lien on land or personal property situated in another state, the question of whether the interest reserved is usurious should generally be determined by the law of the former state because the mortgage is simply collateral to the principal obligation.
7. Interest: Usury. The phrase "a regulatory small loan law similar in principle to this act" appearing in section 45-158, R. R. S. 1943, means a law resembling our own installment loan act in origin, purpose, and result, which licenses, controls, and regulates those engaged in loaning money at conventional higher rates of interest in order to combat the reservation of extortionate and oppressive rates.
8. ———: ———. Section 45-158, R. R. S. 1943, comprehensively defines the public policy of this state with regard to enforceability therein of loans lawfully made and to be performed outside this state, and avoids the consequences of Personal Finance Co. v. Gilinsky Fruit Co., 127 Neb. 450, 255 N. W. 558.

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

McGinley, Lane, Powers & McGinley, Van Pelt, Marti & O'Gara, and Warren K. Dalton, for appellant.

Firmin Q. Feltz and *Robert A. Nelson,* for appellee.

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

CHAPPELL, J.

Plaintiff, The Kinney Loan and Finance Company, a Colorado corporation, brought this action against defendant George Sumner, now a resident of this state, to replevin a described trailer coach. Defendant's general demurrer to plaintiff's amended petition was sustained, and plaintiff, electing to stand thereon, judgment was rendered in favor of defendant against plaintiff for return of the property taken, or for its value.

Therefrom plaintiff appealed, assigning that the trial court erred in so doing. We sustain the assignment.

In Freeman v. Elder, 158 Neb. 364, 63 N. W. 2d 327, this court recently reaffirmed that: "A general demurrer admits all allegations of fact in the pleading to which it is addressed, which are issuable, relevant, material, and well pleaded; but does not admit the pleader's conclusion of law or fact.

"A general demurrer tests the substantive legal rights of parties upon admitted facts, including proper and reasonable inferences of law and fact which may be drawn from facts which are well pleaded. If the petition states facts which entitle the plaintiff to relief, whether legal or equitable, it is not demurrable upon the ground that it does not state facts sufficient to constitute a cause of action.

"In passing on a demurrer to a petition, the court must consider an exhibit attached thereto and made a part thereof, if the allegations stated therein either aid the petition in stating a cause of action or charge facts going to avoid liability on the part of the defendant."

Bearing those rules in mind, we have examined plaintiff's petition which alleged substantially as follows: That plaintiff is a Colorado corporation duly authorized and licensed by that state under its Money Lenders Act of 1913, and Senate Bill No. 47, both effective at all times involved, which are regulatory small loan laws similar in principle to sections 45-114 to 45-158, R. R. S. 1943. Copies of such Colorado laws were attached to and made a part of plaintiff's petition. That on or about May 6, 1953, defendant, being justly indebted to plaintiff on a compromise settlement of a disputed claim, made, executed, and delivered to plaintiff at Greeley, Colorado, his installment promissory note therefor in the amount of $2,712.16, payable at plaintiff's office in Greeley, Colorado, with interest from date until paid, at 2 percent per month, computed upon unpaid balances in installments of $100, to be paid on the 15th day of

each month for 11 months beginning June 15, 1953, with the balance due and payable May 15, 1954. That defendant acknowledged on the face of the note that he had received a statement of the loan in conformity with section 5, chapter 108, 1913 Session Laws of Colorado. Also, on May 6, 1953, defendant made, executed, and delivered to plaintiff at Greeley, Colorado, where performance was to be completed, a chattel mortgage upon the described trailer coach then located in Lexington, Dawson County, Nebraska, as security for payment of the note. A copy of such chattel mortgage, together with certificate of title to the trailer, was delivered to the county clerk of Dawson County on May 8, 1953, whereupon the chattel mortgage lien was noted upon the certificate of title. Copies of the note and mortgage were attached to and made a part of plaintiff's petition. Nevertheless, that defendant wholly failed to pay any part of even the first installment of $100 due June 15, 1953, whereupon, as provided in the note and mortgage, the entire balance became due and payable at once, and plaintiff elected to so declare the whole amount due, and demanded delivery of the trailer to it, which defendant refused to do, and being entitled to foreclose, this action was brought by plaintiff to obtain possession of the trailer and damages.

Assuming as we must upon demurrer, that such note and mortgage were not usurious under the laws of Colorado where they were made and to be performed, and that they were valid under the laws of that state, the sole question presented here for determination is whether or not they are enforceable in this state simply because they both reserved a rate of interest higher than that permitted by law in this state. The trial court concluded that they were not, but we conclude otherwise.

The general rule is that: "While no law has of its own force any effect outside the territory of the state or nation from which its authority is derived, foreign

laws or rights based thereon will, within certain limits, be given effect or enforced everywhere." 15 C. J. S., Conflict of Laws, § 3, p. 833. As stated in § 3, p. 836: "Foreign law or rights based thereon are frequently given effect or enforced under the doctrine of comity under which such recognition or enforcement is permitted." However, as stated in § 4, p. 853: "It is thoroughly established as a broad general rule that foreign law or rights based thereon will not be given effect or enforced if opposed to the settled public policy of the forum." See, also, Restatement, Conflict of Laws, § 612, p. 731; Midland Savings & Loan Co. v. Henderson, 47 Okl. 693, 150 P. 868, L. R. A. 1916D 745, with annotation at p. 750.

Ordinarily, also, in the absence of any statute requiring the application of a contrary rule: "Usury laws are not so distinctive a part of the public policy of the forum that the courts will, on the ground of public policy, decline to enforce any contract which would be invalid, if tested by them, though valid according to its proper law." 11 Am. Jur., Conflict of Laws, § 156, p. 458. As stated in § 158, p. 464: "Contracts which are valid where made do not offend the public policy of a forum, although they provide for a rate of interest which would be usurious with penalizing consequences, even to the extent of forfeiture of principal and interest as to such a contract, if made in the law of the forum." See, also, 66 C. J., Usury, § 33, p. 158; and International Harvester Co. v. McAdam, 142 Wis. 114, 124 N. W. 1042, 26 L. R. A. N. S. 774, a case frequently cited. As stated in 11 Am. Jur., Conflict of Laws, § 159, p. 465: "Where a contract made and to be performed in one state is secured by a mortgage or other lien on land situated in another state, the question as to whether the interest provided for is usurious is generally held to be determined by the law of the former, on the ground that the mortgage is merely collateral to the principal obligation. The rule applies with

respect to chattel mortgages as well as to mortgages on real estate." See, also, Annotation, 125 A. L. R. 497.

This court has in effect recognized the foregoing rules as applied to the general usury laws, and has enforced bona fide contracts which were valid under the laws of the state where made and to be performed. Coad v. Home Cattle Co., 32 Neb. 761, 49 N. W. 757, 29 Am. S. R. 465; Hewit v. Bank of Indian Territory, 64 Neb. 463, 90 N. W. 250, which, upon rehearing reported at 64 Neb. 468, 92 N. W. 741, was reversed upon other grounds.

However, an exception appears to have been judicially adopted by this court in Personal Finance Co. v. Gilinsky Fruit Co., 127 Neb. 450, 255 N. W. 558, certiorari denied 293 U. S. 627, 55 S. Ct. 348, 79 L. Ed. 714, relied upon by defendant. There was also a comprehensive dissenting opinion therein separately reported at 127 Neb. 452, 256 N. W. 511, which followed the general rule of enforceability. The case was comparable in all material respects with that at bar. In the opinion this court said: "It is our view that plaintiff's petition does not state a cause of action, in that, though the assignment may be valid under the laws of the state of Iowa, it is contrary to the settled public policy of this state. Ordinarily, assignments of this character are judged as to their validity by the law of the state where the assignment is made, but if the enforcement of the contract is contrary to the public policy of the state in which its enforcement is attempted, the law of the latter state will prevail. * * * Only slight consideration of circumstances attending this legislation is required to distinguish these laws from the conventional type against usury. The latter were to guard against excessive rates; the former to combat those which were extortionate and oppressive."

Section 45-119, Comp. St. 1929, then effective, provided that licensees might charge the borrower "not to exceed the rate of ten per centum per annum and a brokerage fee of not more than one-tenth of the amount

actually loaned." Also, section 45-120, Comp. St. 1929, provided in part: "No assignment or order for wages shall be valid which contains an amount in excess of the sum borrowed, together with the legal rate of interest and charges as provided herein." Such sections were the basic foundation for that opinion and there were then no specific legislative provisions establishing a public policy relating to the enforceability of loans made outside of this state.

Laws of Nebraska 1941, chapter 90, page 344, amended certain sections and repealed others "relating to the lending of money." Among those repealed were sections 45-119 and 45-120, Comp. St. 1929, and others unimportant here. Portions of such 1941 act were again amended by Laws of Nebraska 1943, chapter 107, page 369, which greatly increased the permissible interest rate. Thus, provisions relating to "installment loans" now appear as sections 45-114 to 45-158, R. R. S. 1943. Such 1943 act included section 9, page 375, now section 45-158, R. R. S. 1943, which provides: "No loan, made outside this state, in the amount or of the value of one thousand dollars or less, for which a greater rate of interest, consideration or charges than is permitted by section 45-138 has been charged, contracted for or received, shall be enforced in this state and every person, in anywise participating therein in this state, shall be subject to the provisions of this act; Provided, that the foregoing shall not apply to loans legally made in any state under and in accordance with a regulatory small loan law similar in principle to this act."

Section 45-137, R. R. S. 1943, provides in part: "Every licensee hereunder may make loans, not exceeding one thousand dollars in principal amount, and may contract for and receive thereon charges at a rate not exceeding thirty-six per cent per annum on that part of the unpaid principal balance on any loan not in excess of one hundred and fifty dollars, thirty per cent per annum on that part of the principal balance on any loan in excess of

one hundred and fifty dollars and not in excess of three hundred dollars, and nine per cent per annum on any remainder of such unpaid principal balance."

In that connection, section 45-138, R. R. S. 1943, specifically incorporated by reference in section 45-158, R. R. S. 1943, provides in part: "No licensee shall directly or indirectly charge, contract for or receive a greater rate of interest than nine per cent per annum upon any loan, or upon any part or all of any aggregate indebtedness of the same person, in excess of one thousand dollars."

It will be noted that plaintiff herein was admittedly duly authorized and licensed to make loans and take security therefor, such as that at bar, under the Money Lenders Act of 1913, enacted by the General Assembly of Colorado, approved April 12, 1913, found at Laws of Colorado of 1913, chapter 108, page 400, and Senate Bill No. 47, enacted by the General Assembly of Colorado, approved February 4, 1943, found at Laws of Colorado of 1943, chapter 121, page 345. The first such Colorado statute relates to the licensing, control, and regulation of persons engaged in the business of making loans wherein a greater rate of interest than 12 percent per annum is reserved, and restricts the same to 2 percent per month on any loan or unpaid balances after any partial payments, which charge "shall cover all expenses, demands, and services of every character, including notarial and recording fees and charges, except upon the foreclosure of the security. The foregoing interest or foreclosure expenses shall not be deducted from the principal of loan when same is made." Its provisions with relation to licensing, bonding, appointment of resident agents, the giving and keeping of records for inspection, making and publishing annual reports, general administrative regulation, and disciplinary enforcement under and by the State Bank Commissioner are similar in material respects with our own statutory requirements.

The second such Colorado statute relates to the licensing, control, and regulation of persons engaged in the business of making loans of $300 or less, and reserving a greater rate of interest than 12 percent per annum. It restricts the same to "not exceeding 3½% per month on that part of the unpaid principal balance of any loan not in excess of $150, and 2½% per month on any remainder of such unpaid principal balance. * * * Charges on loans made under this Act shall not be paid, deducted, or received in advance. Such charges shall not be compounded; provided that, if part or all of the consideration for a loan contract is the unpaid principal balance of a prior loan, then the principal amount payable under such loan contract may include any unpaid charges which have accrued within sixty days on the prior loan." Its other provisions are more comprehensive in scope, but in all material respects they are comparable with those in the Money Lenders Act of 1913 and our own statutory requirements. In that regard, section 22 of the act specifically provides: "Any loan lawfully made in any other state may be enforced in Colorado."

To meticulously compare each section of such Colorado statutes under which the loan here involved was made with our own relating to installment loans would serve no useful purpose and unduly prolong this opinion. It is sufficient for us to say that they are not identical, but they are "similar in principle" with our own act within the meaning of section 45-158, R. R. S. 1943.

Howell v. Fletcher, 157 Neb. 196, 59 N. W. 2d 359, involved the phrase "a law substantially similar" wherein we held that it "refers to the substance of the remedy thereby afforded." Quoting with approval from Smith v. Mitchell, 185 Tenn. 57, 202 S. W. 2d 979, we said: "'Now what is meant by statutes being "substantially similar"? We think they are substantially similar when they effectuate the same result * * *.'" See, also, Commercial National Bank of Checotah v. Phillips, 61 Okl. 179, 160 P. 920, citing Sigsbee v. Birmingham, 160 Ala.

196, 48 So. 843, wherein the phrase "any similar law," was defined as one not "precisely like," but "with more or less resemblance."

"Principle" means "a general law or rule adopted or professed as a guide to action; a settled ground or basis of conduct or practice; a fundamental motive or reason of action, esp. one consciously recognized and followed." The Oxford Dictionary, Vol. VII, pt. II, p. 1377. By use of the phrase "a regulatory small loan law similar in principle to this act" in section 45-158, R. R. S. 1943, our Legislature clearly did not mean "identical" or "precisely like," or the statute would be of little use. It meant a regulatory small loan law resembling our own installment loan act in origin, purpose, and result, which licenses, controls, and regulates those engaged in lending money at conventional higher rates of interest in order to combat the reservation of extortionate and oppressive rates.

It will be presumed that our Legislature had knowledge of the opinions of this court in Personal Finance Co. v. Gilinsky Fruit Co., *supra;* Coad v. Home Cattle Co., *supra*; and Hewitt v. Bank of Indian Territory, *supra*, when it enacted Laws of Nebraska, 1943, chapter 107, page 369, approved May 28, 1943, of which section 9 thereof, new section 45-158, R. R. S. 1943, was a part. Halligan v. Elander, 147 Neb. 709, 25 N. W. 2d 13; 59 C. J., Statutes, § 600, p. 1008; 82 C. J. S., Statutes, § 316, p. 540.

Section 45-158, R. R. S. 1943, was doubtless enacted to legislatively define the public policy of this state with regard to the enforceability in this state of loans lawfully made outside this state, and avoid the consequences of Personal Finance Co. v. Gilinsky Fruit Co., *supra.* In that regard, it will be noted that after section 45-137, R. R. S. 1943, considers loans of $1,000 or less, and after section 45-138, R. R. S. 1943, considers loans in excess of $1,000, then section 45-158, R. R. S. 1943, denies enforcement in this state of all loans "made outside this state,

in the amount or of the value of one thousand dollars or less, for which a greater rate of interest, consideration or charges than is permitted by section 45-138 has been charged, contracted for or received, * * *." It then provides, however, by all-inclusive language, without any specific limitation with regard to the amount thereof, that "loans legally made in any state under and in accordance with a regulatory small loan law similar in principle to this act" would be enforced in this state.

As stated in 82 C. J. S., Statutes, § 323, p. 593, citing innumerable authorities from this and other jurisdictions: "In construing a statute, the court must look to the object to be accomplished, the evils and mischief sought to be remedied, or the purpose to be subserved, and place on it a reasonable or liberal construction which will best effect its purpose rather than one which will defeat it." In § 381, p. 882, it is said: "Generally, a proviso is a clause engrafted on a preceding enactment for the purpose of restraining or modifying the enacting clause, or of excepting something from its operation which otherwise would have been within it, or of excluding some possible ground of misinterpretation of it, as by extending it to cases not intended by the legislature to be brought within its purview."

"The fundamental rule of statutory construction is to ascertain and, if possible, give effect to the intention or purpose of the legislature as expressed in the statute." 82 C. J. S., Statutes, § 321, p. 560. The same rule applies to a proviso. In that regard, as stated in § 381, p. 885: "A proviso should be construed together with the enacting clause or body of the act, with a view to giving effect to each and to carrying out the intention of the legislature as manifested in the entire act and acts in pari materia. A strict but reasonable construction is to be given to the proviso so as to take out of the enacting clause only those cases which are fairly within the terms of the proviso." As stated in § 381, p. 887: "The operation of a proviso is usually and properly confined to the

clause or distinct portion of the enactment which immediately precedes it, or to which it pertains, and does not extend to or qualify other sections or portions of the statute, unless the legislative intent that it shall so operate is clearly disclosed. * * * However, where necessary to effectuate the legislative intent, a proviso will be construed as applying also to other paragraphs or sections, either preceding or subsequent, or to the entire act in which it appears or to other acts in pari materia." See, also, Pierson v. Faulkner, 134 Neb. 865, 279 N. W. 813. As stated in 82 C. J. S., Statutes, § 381, p. 888: "The appropriate office of a proviso is to restrain or modify the enacting clause, and not to enlarge it or confer a power; but, where from the language employed it is apparent that the legislature intended a more comprehensive meaning, it must be construed to enlarge the scope of the act, or to assume the function of an independent enactment." See, also, 59 C. J., Statutes, §§ 640, 641, p. 1090.

As concluded in State ex rel. Bullard v. Searle, 86 Neb. 259, 125 N. W. 590, and Megan v. Boyd County, 133 Neb. 539, 276 N. W. 160, ordinarily a proviso or exception in a statute will be held to apply to the clause or sentence immediately preceding it, but this rule is not unbending and if a consideration of all statutes bearing upon the subject indicates a different legislative intent, this will prevail over a construction based upon the rules of syntax. See, also, Radil v. Morris & Co., 103 Neb. 84, 170 N. W. 363, 7 A. L. R. 539, and State ex rel. Higgs v. Summers, 118 Neb. 189, 223 N. W. 957, which concluded that the general purpose of a proviso is to qualify the statute in part or in whole, but it is not always so used and may, in the light of related provisions, be merely a conjunction.

In the light of the foregoing rules and circumstances presented in this case, we conclude that the loan here involved came within the purview of the proviso and that, unless there are other defenses thereto, which

are not an issue here, the public policy of this state permits its enforcement in this state.

In Chaffee v. Farmers' Co-Operative Elevator Co., 39 N. D. 585, 168 N. W. 616, the court said: "Public policy is but the manifest will of the state (Jockoway v. Denton, 25 Ark. 625, 634) which must and does vary with the habits, capacities, and opportunities of the public. * * * And when the legislature has spoken and enacted a law embodying a certain principle, the policy is determined. And the courts are not concerned with the wisdom or expediency of the legislation or policy adopted, but are merely concerned with the interpretation of the law for the purpose of ascertaining the intent of the legislature. The only limits upon the legislative power in the establishment of public policy are the restrictions contained in the state and Federal Constitutions." See, also, Black's Law Dictionary (3d ed.), p. 1374, citing numerous authorities.

Our Legislature in enacting section 45-158, R. R. S. 1943, evidently recognized that because of modern transportation and communication facilities, residents of this state and other states carry on frequent interchanges of business, including the borrowing and lending of money by people of one state in another, and that to permit enforcement in this state of bona fide contracts therefor lawfully made and to be performed in another state would not, except as specifically limited therein, be contrary to the public policy of this state.

For reasons heretofore stated, we conclude that plaintiff's petition stated a cause of action, and the trial court erred in sustaining defendant's demurrer thereto and rendering judgment for defendant upon such theory. Therefore, the judgment of the trial court should be and hereby is reversed and the cause is remanded for further proceedings in accord with this opinion. All costs are taxed to defendant.

REVERSED AND REMANDED.

TIM GRANTHAM, DOING BUSINESS AS H. V. GRANTHAM & SONS, APPELLEE, V. KEARNEY MUNICIPAL AIRPORT CORPORATION, A CORPORATION, ET AL., APPELLEES, IMPLEADED WITH RICHARD R. DUTTON ET AL., APPELLANTS.

65 N. W. 2d 325

Filed July 2, 1954. No. 33564.

1. **Mechanics' Liens.** A contractor's lien for the leveling of land is authorized by section 52-101, R. R. S. 1943, and the right of a subcontractor to a lien is provided by section 52-102, R. R. S. 1943.
2. ———. A contractor's lien for land leveling may properly attach to a leasehold.
3. ———. The object of the mechanic's lien law being to secure the claims of those who have made improvements within its terms, it should receive a liberal interpretation to give full effect to its provisions.
4. ———. The general rule is that property acquired by a municipality in its proprietary capacity is subject to the provisions of the mechanic's lien law.
5. ———. Where a fund is created to pay for improvements made, the holder of a valid contractor's lien for the making of such improvements has an equitable lien on the fund for the payment of the obligation represented by the lien.
6. ———. An assignment of the proceeds of a contract by a general contractor creates no right as against the valid lien of a subcontractor even though the general contractor's assignment was made before the work was commenced.

APPEAL from the district court for Buffalo County: ELDRIDGE G. REED, JUDGE. *Reversed and remanded.*

William H. Meier, for appellants.

Dryden, Jensen & Dier, De Wayne Wolf, and *Barlow Nye,* for appellees.

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

CARTER, J.

This is an action by the plaintiff to recover a judgment against the Kearney Municipal Airport Corpora-

tion in the amount of $1,512 by virtue of an assignment from a general contractor holding a contract to level certain lands operated by the airport corporation. Other parties claiming an interest were made parties defendant. The airport corporation, among other things, admitted having the sum of $1,512 in its hands, which it paid into court for the purpose of distribution to the parties entitled thereto. The trial court found that the fund belonged to plaintiff and ordered it paid over to him. The defendants Richard R. Dutton and The Minden Exchange National Bank seek a review on appeal in this court.

Briefly stated, the evidence is as follows insofar as it is pertinent to the disposition of the case: The Kearney Municipal Airport Corporation is the operator of the lands and buildings formerly known as the Kearney Airforce Base, near Kearney, Nebraska, and now owned by the city of Kearney. Certain lands were leased out to tenant farmers for agricultural purposes. It appears that certain land leveling was required by the tenant farmers, resulting in an agreement that the airport corporation would have the work done at the expense of the tenants. On March 2, 1950, the airport corporation and the tenants entered into a written land-leveling contract with Holcomb and Sisson covering a number of tracts of land. It appears that Holcomb and Sisson purchased tractor fuel and oil from the plaintiff and at some time thereafter they executed an assignment of all amounts due them for land leveling to the plaintiff to pay therefor. On March 1, 1951, Holcomb and Sisson were unable to continue the work of land leveling under their contract and they sublet the leveling of two tracts to Richard R. Dutton, they to receive 5 percent of the contract price of $9 per hour and Dutton to receive 95 percent thereof. Dutton proceeded with and completed the land leveling during the months of March and April 1951. The amount due Dutton was $1,436.41, the same being 95 percent of the contract price.

A check was issued by the airport corporation for the full amount of $1,512 with the names of Holcomb and Sisson, C. T. Grantham, Richard R. Dutton, and Minden Exchange National Bank, an assignee of Dutton, as payees. Plaintiff claimed the whole of the check and Dutton, on April 30, 1951, filed a mechanic's lien for $1,436.41. On June 22, 1951, plaintiff filed this action to obtain the whole of the fund. All parties claiming an interest in the fund were before the court.

It is clear from the record that the work of leveling the tracts of land in question was subcontracted by Holcomb and Sisson to Dutton, with the knowledge and consent of the officers of the airport corporation of which the plaintiff was one. A contractor's lien is authorized for the leveling of land by the express provisions of section 52-101, R. R. S. 1943. A subcontractor is authorized to file a lien for performing labor and furnishing materials for any of the purposes mentioned in section 52-101, R. R. S. 1943, by virtue of section 52-102, R. R. S. 1943. A lien may properly attach to the interest of a leaseholder. Zabriskie v. Greater America Exposition Co., 67 Neb. 581, 93 N. W. 958, 62 L. R. A. 369.

The purpose of the mechanic's lien law is to secure the claims of those who have performed the labor or furnished the materials for the improvement, and it will be given a liberal construction to accomplish that purpose. Way v. Cameron, 94 Neb. 708, 144 N. W. 172; Central Construction Co. v. Highsmith, 155 Neb. 113, 50 N. W. 2d 817. The contention is advanced that the lien was unlawful because the property belonged to the city of Kearney. We point out, however, that the leasehold belonged to private persons who were primarily liable for the improvement. The airport corporation, after voluntarily providing the fund out of which payment for the improvement was to be paid, thereby provided a substitute for the contractor's lien to which the latter could properly look for his compensation. Even if this were not so, the general rule is that prop-

erty acquired by a municipality in its proprietary capacity is subject to the provisions of the mechanic's lien law.

The assignment by Holcomb and Sisson impressed no lien upon the fund. The mechanic's lien filed by Dutton being in all respects valid, the fund provided for the payment of the improvement is impressed with an equitable lien which is prior to the claim of the assignment made by the general contractor. If this were not so, the beneficial purpose of the law giving a subcontractor the benefit of a lien could in all cases be defeated by the general contractor by the simple expedient of making an assignment. It would leave the owner of the leasehold estate helpless in protecting himself against the liens of subcontractors. 36 Am. Jur., Mechanics' Liens, § 198, p. 131; Florida East Coast Ry. Co. v. Eno, 99 Fla. 887, 128 So. 622, 70 A. L. R. 506. In the latter case the court said: "Eno had the right to assign to the bank all moneys due or to become due him under his construction contracts with the railway. * * * Such assignment, however, is cum onere as to the valid rights of lien claimants theretofore or thereafter perfected. The assignment by a contractor of the balance due or to become due him under his contract with the owner will not defeat a laborer's or materialman's lien duly perfected before the owner has actually paid the balance to the assignee. Such a lien is enforceable, notwithstanding the assignment, to the extent of the balance due and unpaid by the owner under the contract at the time the lien is acquired * * *." The assignment by Holcomb and Sisson to plaintiff is valid as to the interest of Holcomb and Sisson. The interest of the latter, however, is subject to the valid liens of subcontractors. The defendant Dutton has a lien on the fund for $1,436.41 for the reasons herein stated. The plaintiff has a valid claim to $75.59 of the fund by virtue of his assignment. We do not need to discuss the contentions of the Minden Exchange National Bank,

the assignee of a part of the claim of Richard R. Dutton. As against the plaintiff, the claim of the bank is identical with that of Dutton. The claim of the bank is superior to that of Dutton by virtue of Dutton's assignment to the bank to the extent of the amount owing to the bank by Dutton. The order of the trial court directing the payment of all of the fund to the plaintiff is therefore erroneous.

It would appear that a new decree is desirable, fixing the rights of the parties to the fund. The decree of the district court is reversed and the cause is remanded with directions to enter a decree conforming to the views expressed herein.

REVERSED AND REMANDED.

IN RE APPLICATION OF WILLIAM BIRDSLEY FOR A WRIT OF HABEAS CORPUS. WILLIAM BIRDSLEY, APPELLEE, V. GEORGE F. KELLEY, SHERIFF OF NEMAHA COUNTY, APPELLANT.

65 N. W. 2d 328

Filed July 9, 1954. No. 33548.

1. **Habeas Corpus.** The sufficiency of evidence adduced at a preliminary examination to hold an accused to answer for a crime with which he is charged may be raised and tried in habeas corpus proceedings.
2. ———. In a habeas corpus proceeding instituted for the purpose of testing the sufficiency of evidence taken at a preliminary examination to require a person to be tried on a criminal charge, the court will not weigh the evidence but will only inquire as to the existence of evidence to sustain the charge.
3. **Homicide: Automobiles.** By statute it is provided that whoever shall cause the death of another without malice while engaged in the unlawful operation of a motor vehicle shall be deemed guilty of motor vehicle homicide.
4. **Automobiles.** By statute it is made unlawful to drive a motor vehicle on a public highway at night in excess of 50 miles an hour.

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

Clarence S. Beck, Attorney General, *Robert A. Nelson,* and *Fred C. Kiechel,* for appellant.

Robert S. Finn and *Dwight Griffiths,* for appellee.

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

YEAGER, J.

This is an action wherein William Birdsley filed an application for a writ of habeas corpus against George F. Kelley, sheriff of Nemaha County, Nebraska, respondent, wherein the applicant charged that he was unlawfully restrained of his liberty. The writ was allowed and the applicant was ordered discharged. From the order allowing the writ and discharging the applicant from custody the respondent has appealed. The respondent is appellant and the applicant is appellee.

The basic facts are that on December 1, 1953, a criminal complaint was filed in the county court of Nemaha County, Nebraska, charging that the appellee on September 19, 1953, in Nemaha County, Nebraska, caused the death of Alvin Carl Steffens and Dale Bize while he was engaged in the unlawful operation of a motor vehicle and that thereby he was guilty of motor vehicle homicide.

A preliminary examination was held on the charge, at the conclusion of which appellee was held to the district court for trial, and for failure to enter into the recognizance required of him he was committed to the county jail and to the custody of appellant to await trial.

After thus being committed the appellee filed his application for writ of habeas corpus. The basis of his claim for a writ is his contention that the evidence adduced at the preliminary examination was insufficient to show that the crime charged had been committed and

was further insufficient to show that if the crime charged was committed that it was probably committed by the appellee.

The controlling legal principles are well settled and require statement only herein.

It is the rule in this jurisdiction that the sufficiency of the evidence adduced at a preliminary examination to hold an accused to answer for a crime with which he has been charged may be raised and tried in habeas corpus proceedings. Jahnke v. State, 68 Neb. 154, 94 N. W. 158; State ex rel. Flippin v. Sievers, 102 Neb. 611, 168 N. W. 99.

In such a proceeding if the evidence shows that an offense has been committed and there is testimony tending to show that the accused committed the offense, the court will not weigh the evidence further to see whether or not it is sufficient to sustain the charge. Jahnke v. State, *supra;* State ex rel. Flippin v. Sievers, *supra.*

In the light of these rules the district court examined the evidence adduced at the preliminary hearing and came to the conclusion and adjudicated that this evidence was insufficient upon which to hold appellee to the district court for trial. It is from this conclusion and adjudication that the appeal herein is taken. This requires an examination and review of the evidence.

The incidents involved occurred in the nighttime and on a public highway in the State of Nebraska. Appellee was the owner of a 1950 Ford automobile. He appeared with it in Falls City, Nebraska. He stopped at a refreshment place in Falls City where he was seen to obtain some beer in cans or bottles which he took to the driver's side of his automobile. He entered the automobile and the automobile proceeded northward toward Auburn, Nebraska. Auburn is about 35 miles distant. From the point of departure to the scene of the incidents which are the basis of the criminal charge the automobile was operated at speeds at different points estimated by an eye witness from 60 to 95 miles an hour. This

witness was the operator of another 1950 Ford automobile. The two automobiles went along in close proximity one to the other, with one sometimes in front and sometimes the other. When the two automobiles were a few miles south of Auburn the witness stated that he was traveling from 90 to 95 miles an hour and appellee was following with the distance separating the two about one-half of or the length of an automobile, appellee's automobile traveling on a line about 2 feet farther toward the left side of the highway than was that of the witness. An automobile was observed coming from the opposite direction on its right side of the highway. The witness passed this automobile without incident. As soon as he passed however he no longer observed the automobile of appellee following. He had been observing it in his rear vision mirror. He went on for some distance and turned and came back. When he returned the automobile which had come from the north was standing in the highway with its front end somewhat across the center line to the east. This witness had not yet found out what had become of appellee's automobile. The driver of the automobile which came from the north testified that his automobile while on its right side of the road was side-swiped by appellee's automobile. The sheriff came to the scene and he testified as to the position and condition of appellee's automobile and of persons who had been occupants thereof. He testified that the automobile had left the highway and turned over and that two of the occupants, namely Alvin Carl Steffens and Dale Bize, were dead. This he observed to be several hundred feet north of the point of the side-swiping of the two cars. The witness whose automobile traveled along with that of appellee did not testify that he saw appellee get into the driver's seat at Falls City but he gave testimony the purport of which was that appellee was driving during the incidents which he observed between Falls City and the point where he last saw appellee's automobile on the highway.

It is clear from this résumé of the pertinent evidence, the principles of law hereinbefore announced, and appropriate statutes that it was proved sufficiently that the crime of motor vehicle homicide was committed.

The statute to the extent necessary to set it forth here defining motor vehicle homicide is as follows: "Whoever shall cause the death of another without malice while engaged in the unlawful operation of a motor vehicle shall be deemed guilty of a crime to be known as motor vehicle homicide * * * ." § 28-403.01, R. S. Supp., 1953.

By section 39-723, R. R. S. 1943, it is made unlawful to drive a motor vehicle on a public highway at night in excess of 50 miles an hour.

The evidence on which the county court relied in holding the appellee to the district court for trial was sufficient on which to base a finding that the two people came to their death in consequence of the operation of appellee's automobile on a public highway of the State of Nebraska at a rate of speed in excess of 50 miles an hour. Thus within the meaning of the law the commission of a crime was proved.

The proof was also sufficient to permit the county court on the preliminary examination to find that the appellee probably committed the proved crime.

This being true it was error on the part of the district court to sustain the petition for writ of habeas corpus and to order appellee released from the custody of the appellant.

The judgment of the district court is reversed and the cause is remanded with directions that the appellee be recommitted to the custody of appellant.

REVERSED AND REMANDED WITH DIRECTIONS.

STATE OF NEBRASKA EX REL. FRED EBKE, APPELLEE, V. BOARD OF EDUCATIONAL LANDS AND FUNDS OF THE STATE OF NEBRASKA ET AL., APPELLANTS, RAMEY C. WHITNEY, INTERVENER-APPELLEE.

65 N. W. 2d 392

Filed July 9, 1954. No. 33559.

1. **Public Lands.** The provision of the Enabling Act making the grant of public school lands, and of the Constitution of 1866 designating the lands, and the subsequent act admitting the state into the Union under the Constitution constituted a contract between the state and the national government with regard to such grant.
2. **Public Lands: Trusts.** The title to the state school lands was vested in the state upon an express trust for the support of common schools without right or power of the state to use, dispose of, or alienate the lands or any part thereof except as allowed by the Enabling Act and the Constitution.
3. ———: ———. The public school lands of the State of Nebraska are a trust held by the state and by constitutional provision are in the control of the Board of Educational Lands and Funds, which board is subject to control by the Legislature within constitutional limitations.
4. ———: ———. The public school lands of the state are held in trust for educational purposes by the terms of Article VII, section 9, of the Constitution of this state.
5. ———: ———. As a trustee of the public school lands and the income derived therefrom, the state is required to administer the trust estate under the rules of law applicable to trustees acting in a fiduciary capacity.
6. **Public Lands: Attorney and Client.** An action for a declaratory judgment was brought to test the validity of statutes dealing with the leasing of school lands, such statutes were declared unconstitutional, and as a result thereof the lease which the litigant sought to acquire was ordered to be sold at public auction. All leases previously issued under such statutes were void which necessitated the same to be sold at public auction by the administrative action of the Board of Educational Lands and Funds. It was this administrative and independent action of such board which caused the accrual to be made to the school lands trust fund, and not the litigation which was incidental to the creation of the fund and in no manner augmented it. Under the circumstances the litigant is not entitled to an allowance for attorney's fees and expenses of the litigation to be paid out of the trust fund.

7. ———: ———. Where litigation is conducted solely for the benefit of a litigant and not for the benefit of the school lands trust fund and the litigant is not a beneficiary of the trust fund, such litigant is not entitled to have attorney's fees and expenses of litigation paid out of the trust fund.
8. **Attorney and Client.** It is the practice in this state to allow the recovery of attorney's fees and expenses only in such cases as are provided for by statute, or where the uniform course of procedure has been to allow such recovery.

APPEAL from the district court for Lancaster County: H. EMERSON KOKJER, JUDGE. *Reversed and remanded with directions.*

Clarence S. Beck, Attorney General, *Robert A. Nelson,* and *Richard H. Williams,* for appellants.

Davis, Healey, Davies & Wilson and *Robert A. Barlow, Jr.,* for appellee.

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

MESSMORE, J.

This appeal results from the decision of this court in State ex rel. Ebke v. Board of Educational Lands & Funds, 154 Neb. 244, 47 N. W. 2d 520, modified at 154 Neb. 596, 47 N. W. 2d 526, hereinafter referred to as the Ebke case, and involves a judgment for attorney's fee and expenses incurred in the above-mentioned litigation.

When the trial court entered judgment on the mandate in the Ebke case, leave was granted the relator and his attorney to file an application for expenses and attorney's fee which were necessitated by the Ebke litigation against the respondents constituting the Board of Educational Lands and Funds of the State of Nebraska; the State Treasurer, although a member of the Board, separately as being intrusted with the ministerial duty of keeping an accurate and correct account of the receipts, disbursements, and balances on hand in the perpetual school trust fund; and the Attorney General, also a member of the Board, separately as the legal ad-

viser of the respondents. Notice was given the Attorney General as provided by statute. The relator, Fred Ebke, and his attorney, Paul W. White, filed an application in the district court for allowance and recovery of expenses and attorney's fee. This application set forth the following: That in the second amended petition for declaratory judgment filed in the above-entitled case the relator alleged that relator was a citizen, a resident, and a taxpayer of School District No. 20 of Deuel County, Nebraska; that he was married and had been a resident of the State of Nebraska for over 30 years; that he was a taxpayer of the State of Nebraska, and a taxpayer of School District No. 20 of Deuel County, Nebraska; and that he was prosecuting the action as an individual, a taxpayer, a citizen, and on behalf of all other citizens, residents, taxpayers, and parents having children attending public schools, "and also for and on behalf of each and every public school district which is or may become a beneficiary of the perpetual school fund of the State of Nebraska." The application set forth the purpose of the litigation, the proceedings had therein, and the result obtained, asserting that an increase in the Nebraska school lands trust fund in excess of four million dollars resulted from the Ebke litigation; that further increases will occur in the future; and that during the course of this successful litigation Paul W. White acted as attorney for the relator Ebke and had received no remuneration for his services.

The respondents filed objections to the above application. The same, insofar as necessary to consider in this appeal, are as follows: The benefits which have accrued to the Nebraska school lands trust fund through the sale of leases at public auction were not the direct result of the litigation herein conducted by the relator and his attorney; and the litigation herein was conducted for the personal benefit of the relator and not for the benefit of the trust. Upon hearing held on the application and the objections thereto, the district court

entered a decree allowing the applicants' expenses in the amount of $625, and attorney's fee in the amount of $60,000 to be taxed as costs in this action, and decreeing that the custodian of the Nebraska temporary school lands fund, the defendant Treasurer of the State of Nebraska, be directed and ordered to pay said amount, together with all costs of this present action, out of the Nebraska temporary school lands fund, said amount being a legitimate and just charge against said fund.

The respondents filed a motion for new trial and an amended motion for new trial which were overruled. From the order overruling the motions for new trial, the respondents appeal.

Hereafter respondents will be referred to as appellants; the Board of Educational Lands and Funds of the State of Nebraska as the Board; the relator Ebke as appellee Ebke, or Ebke; and attorney Paul W. White as appellee White, attorney White, or Ebke's attorney, or when both appellees Ebke and White are used together, as appellees.

At the regular session of the Legislature in 1947, legislative bill No. 33 was enacted, being Laws 1947, chapter 235, page 743, relating to the leasing of public school lands of the state. Section 7 of the act, later designated as sections 72-240 and 72-240.01, R. R. S. 1943, purported to grant to existing leaseholders an absolute right to renewal of their leases provided the existing leaseholders conformed to certain standards as set forth in the act.

The record in the Ebke case shows that on December 31, 1924, the Commissioner of Public Lands and Buildings leased Section 36, Township 13, Range 44, Deuel County, Nebraska, to one W. E. Scott for a term of 25 years. On July 2, 1947, shortly after the effective date of legislative bill No. 33, Ramey C. Whitney procured an assignment of this lease for a consideration of $10,000. On July 12, 1949, approximately 6 months prior to the expiration of this lease by its terms, Fred Ebke filed an

application for a lease on this property, setting forth therein an offer to pay a bonus of $2,500 in addition to the annual rent to procure the lease, and in addition, set forth objections to the application of Whitney for a renewal of the lease. The Board overruled the objections to Whitney's application, denied Ebke's application, and granted Whitney's application for a renewal of the lease. Ebke then filed his petition in the district court for Lancaster County for a declaratory judgment, the purpose of the action being to obtain an interpretation and construction, and to test the validity of chapter 235, Laws 1947, and chapter 212, Laws 1949, enacted by the Legislature, designated as sections 72-240 and 72-240.01, R. R. S. 1943. The trial court found against Ebke and declared sections 72-240 and 72-240.01, R. R. S. 1943, to be valid and legal statutes fully in keeping and accord with the provisions of the Constitution of Nebraska, and enforceable according to their terms. Ebke then appealed to this court. This court reversed the decision of the trial court, holding that the provisions of sections 72-240 and 72-240.01, R. R. S. 1943, were violative of Article VII, section 9, of the Constitution of Nebraska which provides: "All funds belonging to the state for educational purposes, the interest and income whereof only are to be used, shall be deemed trust funds held by the state, and the state shall supply all losses thereof, that may in any manner accrue, so that the same shall remain forever inviolate and undiminished; and shall not be invested or loaned * * *." This court also held that the lease involved in the Ebke case was issued without authority of law. This holding required that the lease be sold at public auction.

Pursuant to the judgment rendered in the Ebke case, the lease as described therein was offered at public auction and a 12-year lease on the premises was sold to Whitney who paid a bonus of $10,200 for the lease. Whitney intervened in the Ebke case.

We deem it advisable at this point to relate a brief

history of the manner in which the trust fund with reference to the common schools of this state came into existence.

Nebraska came into the Union as a state by virtue of an Enabling Act of Congress approved April 19, 1864 (13 U. S. St. at Large, § 7, p. 49), which provided: "And be it further enacted, That sections numbered sixteen and thirty-six in every township, and when such sections have been sold or otherwise disposed of by any act of congress, other lands equivalent thereto, in legal subdivisions of not less than one quarter-section, and as contiguous as may be, shall be, and are hereby, granted to said state for the support of common schools."

A Constitution having been regularly approved within the territory in 1866, Nebraska was admitted into the Union on March 1, 1867. By its admission it assumed the privileges and duties of statehood, including those imposed by the congressional Enabling Act which included the acceptance of the lands and funds for the common schools of the state.

Article VII, section 1, of the Constitution of 1866 provided: "The principal of all funds arising from the sale, or other disposition of lands or other property, granted or intrusted to this state for educational and religious purposes, shall forever be preserved inviolate and undiminished; and the income arising therefrom shall be faithfully applied to the specific objects of the original grants or appropriations. The legislature shall make such provisions by taxation or otherwise, as, with the income arising from the school trust fund, will secure a thorough and efficient system of common schools throughout the state; but no religious sect or sects shall ever have any exclusive right to, or control of, any part of the school funds of this state."

The 1866 Constitution was replaced by what is commonly referred to as the 1875 Constitution. There was no substantial change made in the 1875 Constitution

affecting Article VII, section 1, of the Constitution of 1866.

In 1920, this state adopted amendments to its Constitution, commonly referred to as the Constitution of 1920. No change was made in this Constitution with reference to the school land trust fund as the same appears in the Constitution of 1866 and the Constitution of 1875. The composition of the board of commissioners has been changed, but not the function of the Board as fixed in the Constitution of 1875.

The provision of the Enabling Act making the grant, and of the Constitution of 1866 setting apart and pledging the principal and income from such grant, and the subsequent act admitting the state into the Union under such Constitution constituted a contract between the state and the national government relating to such grants. See State ex rel. Johnson v. Central Nebraska Public Power & Irr. Dist., 143 Neb. 153, 8 N. W. 2d 841.

In Propst v. Board of Educational Lands & Funds, 156 Neb. 226, 55 N. W. 2d 653, this court said: "The school lands were received and are held in trust by the State of Nebraska for educational purposes. The state as trustee of the lands and of the income therefrom is required to administer the trust estate under the rules of law applicable to trustees acting in a fiduciary capacity." The court also held: "The title to the state school lands was vested in the state upon an express trust for the support of common schools without right or power of the state to use, dispose of, or alienate the lands or any part thereof except as allowed by the Enabling Act and the Constitution."

Anyone dealing with the school lands must do so with the knowledge of and subject to the trust obligation of the state. Enabling Act of Congress, Vol. 2, p. 5, R. R. S. 1943; Art. VII, § 9, Constitution of Nebraska; State ex rel. Ebke v. Board of Educational Lands & Funds, *supra;* State v. Platte Valley Public Power & Irr. Dist., 147 Neb. 289, 23 N. W. 2d 300, 166 A. L. R. 1196; State ex rel.

Walker v. Board of Commissioners, 141 Neb. 172, 3 N. W. 2d 196; Warren v. County of Stanton, 145 Neb. 220, 15 N. W. 2d 757; Propst v. Board of Educational Lands & Funds, *supra*.

The foregoing clearly indicates the manner in which the school lands trust fund was created, how it should be supervised and managed, and the purpose for which it may be used.

The temporary school fund is the fund from which the appellees contend the attorney's fee and expenses of the Ebke case are payable. This is a fund which is paid out to the various counties pursuant to statutory formula for support of the common schools. The statute provides the method of apportionment and the manner in which the apportionment is made for the benefit of the common schools. It is unnecessary to set this section of the statute out in detail. See § 79-1302, R. R. S. 1943.

The appellants contend that the income which has accrued to the Nebraska school lands trust fund through the sale of leases at public auction was not the direct result of the litigation conducted by Ebke and his attorney and that in such a situation an attorney's fee as contended for by the appellees cannot be allowed from the school lands trust fund. The appellees contend that the effect of the decision in the Ebke case was to bring into the Nebraska school lands trust fund an amount in excess of four million dollars as bonuses due to the sale of leases at public auction held after the decision in the Ebke case, consequently, the fund was created and resulted from the Ebke litigation.

Evidence was adduced by the appellees detailing attorney White's experience as a practicing attorney and the extensive preparation and time consumed in bringing the Ebke litigation to a successful conclusion. The appellants do not question that Ebke's attorney acted in the litigation and during the course of it, ably and efficiently conducted the same for his client, and obtained

a favorable result. There is also evidence of competent attorneys who testified in behalf of the appellees to the value of the services rendered by appellee White, taking into account the necessary elements to be considered in this type of litigation.

We have heretofore given a summary of the Ebke litigation and what this court determined by its decision. It is true that the decision in the Ebke case established that sections 72-240 and 72-240.01, R. R. S. 1943, were unconstitutional, but the actual, specific result of that case established that the lease which Ebke sought to obtain could not be held valid and enforceable under the law, but that the lease must be offered at public auction where Ebke would have the opportunity to bid in competition with other prospective bidders who might desire to acquire this lease. The decision in the Ebke case did not order or direct the Board of Educational Lands and Funds to sell at public auction all of the leases which expired and would ordinarily be renewed under the law existing prior to the decision in the Ebke case. Subsequent to the decision in the Ebke case there remained many administrative acts to be performed by the Board of Educational Lands and Funds in order to build the additions to the school lands trust fund and the temporary school fund.

In this connection, it appears that prior to the decision in the Ebke case 2,313 leases had been issued under the 1947 act. On August 13, 1951, the Board requested an opinion from the Attorney General as to the status of these leases. In this opinion the Attorney General informed the Board that all leases issued pursuant to sections 72-240 and 72-240.01, R. R. S. 1943, were void; that the lessees had acquired no rights by virtue of the issuance of the same; and that the Board should take action declaring all such leases void. The lands involved should then be offered for lease at public auctions and notices of sale given by publication for 3 weeks in a legal newspaper published or of general circulation in the counties

in which such lands were located. On the same day the opinion was issued by the Attorney General, the Board adopted a motion in conformity with the opinion, vacated the proceedings under which the leases were made, and notified each leaseholder by letter that the land would be offered for lease at public auctions. The Board commenced the sale of these leases in the fore part of September 1951, and completed the sales in November 1952, with the exception of some that were involved in litigation.

The land appraiser for the Board was placed in charge of the sales of these leases. For the first 3 months it required the services of five men in addition to the appraiser to conduct the sales, then two of the men quit and three continued to work until April 1952, when another one left. The land appraiser and the other party then had charge of the sales.

It was not possible for the Board to hold an auction, as provided by law, to sell all the leases at once. The Board, by necessity, was required to classify the land and the geographical locations, and direct sales to be held of that number of leases which the representative of the Board could conveniently handle. In nearly every case many bids were made and raised. The high bid was reported to the Board for confirmation, but in many cases the Board, for various reasons, refused to confirm the sales and ordered new sales to be held. It is apparent that the Board directly controlled when or if money should come into the fund. No sale was complete until the Board, acting in a quasi-judicial capacity, confirmed the sale. It was the action of the Board which created the fund and, in so doing, the Board, in directing the sale of these leases as above set out, was not following a court order or obeying the mandate of a court. It was the independent action of the Board in what it considered to be its duty under the law.

It was stipulated that numerous actions were brought against the Board during the progress of the selling of

these leases to prevent the sales. Among the cases cited appearing in the stipulation is Propst v. Board of Educational Lands & Funds, 103 F. Supp. 457, wherein an application was made to the Supreme Court of the United States for direct appeal, which was denied. This was an action brought by William Propst, on behalf of himself and all holders of school land leases in the State of Nebraska similarly situated, to obtain an injunction to prevent the Board of Educational Lands and Funds and others from treating as void some renewal leases on state school lands theretofore issued by the Board to plaintiff and to interveners and others in the same class. The question involved was whether the action of the Board violated the Constitution of the United States as impairing the obligation of a contract and denying due process and equal protection of the laws. The court determined that the action of the Board did not violate any of the provisions of the Constitution of the United States as contended for by Propst. Later Propst brought an action in the district court for Lancaster County which was appealed to this court, Propst v. Board of Educational Lands & Funds, *supra,* involving an injunction to prevent the Board of Educational Lands and Funds from treating as void certain renewal leases of state school lands previously issued to appellants and others alleged to be in the same class.

It was further stipulated that in order to obtain possession of certain of these school lands on which the void leases had been issued it was necessary to institute seven forcible detainer actions which included the case of State v. Cooley, 156 Neb. 330, 56 N. W. 2d 129. In this connection, see, also, State v. Gardner, 156 Neb. 326, 56 N. W. 2d 135; Board of Educational Lands & Funds v. Gillett, 158 Neb. 558, 64 N. W. 2d 105; State v. Clark, 158 Neb. 570, 64 N. W. 2d 112; Todd v. Board of Educational Lands & Funds, 154 Neb. 606, 48 N. W. 2d 706, which was an action for declaratory judgment in which appellants sought to have their rights determined and

enforced relative to a school land lease; Watson Hay Co. v. Board of Educational Lands & Funds, 154 Neb. 613, 48 N. W. 2d 711, involving the assignment of a school land lease; Hanna v. Board of Educational Lands & Funds, 154 Neb. 619, 48 N. W. 2d 715, involving an assignment of a school lease; and State ex rel. Raitt v. Peterson, 156 Neb. 678, 57 N. W. 2d 280, an action in mandamus brought by the highest bidder at a public auction of school land leases to compel the Board of Educational Lands and Funds to execute and deliver to the relators a school land lease in accordance with the terms of the bid and the provisions of sections 72-233 and 72-234, R. R. S. 1943. In fact, as stipulated, there were two separate mandamus actions against the Board of Educational Lands and Funds to complete the issuance of leases that had been offered for sale at public auction but where the Board refused to accept the highest bid on the theory that it was not in the best interest of the trust.

The foregoing is in general the litigation before this court involving the Board. From the foregoing it is obvious that a considerable amount of litigation affecting the Board's action in selling the leases at public auction has been had. We can arrive at no other conclusion, from what has been previously stated, but that the fund was created by the administrative action of the Board subsequent to the Ebke decision.

The appellees contend that when a litigant at his own expense has maintained a successful suit for the preservation, protection, or increase of a common fund, or has created at his own expense a fund in which others may share, he is entitled to an allowance for an attorney's fee and reimbursement for expenses incurred in the litigation; and that the payment of an attorney's fee and expenses in a taxpayer's action is based on the general rule that such payments may be made in actions involving trust funds. The appellees cite several cases where the above rules were applied. We believe there is a clear

distinction between the cases cited by the appellees and the case at bar.

The appellees cite Allen v. City of Omaha, 136 Neb. 620, 286 N. W. 916. This action was brought by three retired policemen who were on pensions and direct beneficiaries of the police relief and pension fund of the city of Omaha under the provisions of section 14-610, Comp. St. 1929. This fund was made up of many items involving money forfeited or withheld from members of the police force for various reasons, which were required to be placed in the fund, deducting all expenses incident to the fund. Further discussion of this fund is unnecessary. This court held: "Where the board of trustees of the police relief and pension fund, created under the provisions of sections 14-610 et seq., Comp. St. 1929, fail upon demand to enforce the payment by the city of the amounts therein described, a beneficiary under the fund may properly maintain an action against the city to recover the amount due for the use and benefit of such fund." With reference to the allowance of attorney's fees, the court said: "Where the services of a litigant's attorney result in rescuing or preserving a large amount of property or funds, not only for the benefit of the particular litigant, but for the benefit of all others in the same class, and by means of these services the property or funds are conserved for the benefit of all, the cost thereof, including attorney's fees, should be borne by those benefited by it. Trustees v. Greenough, 105 U. S. 527, 27 L. Ed. 1157; Blacker v. Kitchen Bros. Hotel Co., 133 Neb. 66, 273 N. W. 836; In re Estate of Creighton, 93 Neb. 90, 139 N. W. 827. Clearly, * * * all of the beneficiaries of the police relief and pension fund were benefited by the litigation carried on by these plaintiffs."

The appellees rely upon the case of Pensioners Protective Assn. v. Davis, 112 Colo. 535, 150 P. 2d 974, in which a petition was filed for allowance of attorney's fees and costs of suit, predicated on services rendered, and relief adjudged in Davis v. Pensioners Protective Assn., 110

Colo. 380, 135 P. 2d 142, wherein attorney's fees were held not to be maintainable. This litigation was brought by a number of beneficiaries of the old age pension fund who formed an association to bring a mandamus action against the members of the State Board of Public Welfare which was the trustee of the fund. The action was first brought to compel a retransfer of money to the old age pension fund which had been diverted pursuant to statutory enactment to an emergency and contingent fund. The relief prayed for by the pensioners was granted. The Supreme Court of Colorado held that the allowance for attorney's fees should be made from the money restored to the pension fund since it was a class suit in which the plaintiffs' efforts had benefited pensioners generally. The court said: "If, in the circumstances appearing, the aggregate of the sums illegally diverted from the pension fund, and which were restored thereto by court decree in a cause prosecuted by petitioners against the State Welfare Board as trustee thereof, may be subjected to the expense involved in the accomplishment thereof, court disbursements would constitute a proper item, and counsel fees, reasonably admeasured, would enjoy like legitimacy." 14 Am. Jur., Costs, §§ 74-76, pp. 47-49, is cited therein.

The appellees concede that the petitioners involved in the above-cited cases were direct beneficiaries of the trust fund. Appellees assert that in the Ebke case the common school districts of Nebraska are the direct beneficiaries of the fund and Ebke is a beneficiary only by virtue of being a taxpayer generally and a school district taxpayer in particular.

The appellees cite Fox v. Lantrip, 169 Ky. 759, 185 S. W. 136. This was an action brought by taxpayers of Hopkins County to recover from the appellant $1,840.40 alleged to have been illegally appropriated by the fiscal court of Hopkins County and paid to the appellant for services as county school superintendent for the years 1910, 1911, 1912, and 1913. The court said: "And when,

as in this case, the public authorities whose duty it is to bring a suit to recover public funds wrongfully paid out, refuse to do so, and the duty is thus imposed on the citizen in his private capacity, he should be allowed his attorney fees if successful." The court held: "Citizens who successfully bring suit to recover back public funds wrongfully appropriated should be allowed compensation for their attorneys, payable out of this fund, when it has been collected and paid into the county treasury."

In the case of Village of Bedford v. State ex rel. Thompson, Hine & Flory, 123 Ohio St. 413, 175 N. E. 607, taxpayers of the village of Bedford brought suit against one Wright on behalf of the village and all taxpayers thereof, praying for a judgment against Wright in the sum of $12,079.45, with interest, which sum represented unauthorized payments made by the village to Wright. After failure by the village authorities, upon request, to bring action, this suit was instituted under a section of the general code. The trial court entered judgment in favor of the plaintiffs and allowed $3,400 attorney's fees for plaintiffs' attorney, and that sum was adjudged to be a lien upon the judgment entered. Wright satisfied the judgment. The village refused to pay the attorney's fees, denying the right of the court to make an allowance for attorney's fees in such a case. The court held: "Where a taxpayer, on behalf of himself and other taxpayers of a village, has successfully prosecuted an action to recover money unlawfully paid by such village, and such money has been restored to the village, such action, while for money only, possesses certain equitable characteristics, and the trial court, out of the fund so created, in the exercise of equitable powers, may allow a reasonable fee to the attorneys of the taxpayer, payable out of the fund so created." See, also, State ex rel. Bonner v. Andrews, 131 Tenn. 554, 175 S. W. 563, to like effect.

It is apparent that Fox v. Lantrip, *supra*, and Village of Bedford v. State ex rel. Thompson, Hine & Flory, *supra*, are not cases in any respect similar to the case at bar.

The appellees cite Regan v. Babcock, 196 Minn. 243, 264 N. W. 803, as being somewhat similar to the instant case. In that case taxpayers brought suit in equity to cancel contracts for the paving of state highways, entered into by the commissioner of highways, and for injunctions to restrain the contractors and commissioner from proceeding with the carrying out of such contracts, and for the purpose of recovering for the state money illegally paid out or to be paid out under such contracts. The suits were brought against the commissioner of highways, and the State of Minnesota intervened, requesting the same relief as prayed for by the taxpayers. The court decided that the contracts were void, and in each of the six cases found the reasonable value of the work done by the contractors, and that the state could pay no more than the reasonable value. This resulted in a savings to the state of $390,000. As part of the judgment voiding the contracts the trial court provided that plaintiffs and their attorneys could make application to the court after the entry of the final judgment to have determined what the actual, necessary, and reasonable disbursement of said plaintiffs and their attorneys were in connection with the conduct of the litigation, including attorneys' fees. Such application was made. The Attorney General proposed that the issues be submitted to a jury as to the actual, necessary, and reasonable disbursements of the plaintiffs and their attorneys in connection with the conduct of this litigation and the reasonable value of the services of the attorneys. The jury allowed $5,696 expenses and $60,000 attorneys' fees. On appeal, the state contended that the trial court did not have the power to exercise control over these funds for the payment to be made plaintiffs or their attorneys. The court however determined that the state had subjected itself to the jurisdiction of the court by its action. The court held that a court, in a suit in equity, under the circumstances shown, might allow the plaintiffs compensation for their expenditures, including attorney's fees, out of the funds

recovered or saved, where the suit is brought in a representative capacity for the benefit of a state, municipality, or other beneficiary. From an analysis of this case it must be concluded, from what we have stated previously with reference to the Ebke litigation, that the cited case is not applicable.

The appellees cite State ex rel. Yontz v. West, 135 Ohio St. 589, 21 N. E. 2d 987, affirming 61 Ohio App. 389, 22 N. E. 2d 649. The relator sued in the capacity of a citizen and taxpayer. The action was filed against the respondent as the registrar of motor vehicles of the State of Ohio. The primary relief asked was a writ of mandamus to compel the respondent to collect the motor vehicle license tax from owners and operators of cement-mixing motor conveyances, as required by the provisions of section 6291, General Code. The writ was allowed. Then, in conformity with the prayer of his petition, the relator further asked the court to allow a reasonable attorney's fee and his costs. There was no complaint about the allowance of the writ of mandamus nor the amount of the attorney's fee, nor the capacity of the relator to institute the action. The contention was that there was no authority for granting an attorney fee in this type of case; that the action was brought to compel a public officer to carry out a ministerial duty; and that there was no fund before the court, nor did a fund come into court for distribution, as a result of the action of the relator. The court held that the trial court was vested with the authority to award from tax funds thus realized a reasonable fee to the attorney for the taxpayer, citing Village of Bedford v. State ex rel. Thompson, Hine & Flory, *supra*. It will be observed that in the above-cited case the nature of the action is quite different from the action in the Ebke case. The cited case is not applicable.

Other cases cited by the appellees have been examined, particularly Harbage v. Tracy, 64 Ohio App. 151, 28 N. E. 2d 520, and Dickinson v. Hot Mixed Bituminous In-

dustry of Ohio (Ohio App.), 58 N. E. 2d 78. We deem it unnecessary to set out and distinguish the same. Suffice it is to say they are not applicable to the case at bar.

We are not in accord with the appellees' contention that an attorney's fee and expenses of litigation in the Ebke case may be paid out of the public school lands trust fund. The mere fact that the appellee Ebke prosecuted his action as an individual, a taxpayer, a citizen, and on behalf of all other citizens, residents, taxpayers, and parents having children attending public schools, and also for and on behalf of each and every public school district which is or may become a beneficiary of the perpetual school lands trust fund of the state, is not sufficient in and of itself to warrant an allowance of an attorney's fee to be paid out of the school lands trust fund. We find nothing in the record in the Ebke case to show that Ebke was authorized to represent any of the common school districts of this state who were the direct beneficiaries of the fund, and certainly Ebke was not a direct beneficiary of the fund. Ebke, by this litigation, did not augment the fund. What was accomplished by this litigation was purely incidental to the fund in question. The actual situation is that Ebke prevailed as an individual with respect to one specific lease which was involved in the litigation brought by him and which lease he had an opportunity to acquire at public auction as a bidder in competition with other bidders by virtue of being successful in having declared, under a declaratory judgment action, sections 72-240 and 72-240.01, R. R. S. 1943, to be unconstitutional. The additions to the temporary school fund result from the administrative and independent action of the Board of Educational Lands and Funds. The litigation herein was conducted for the personal benefit of the appellee Ebke, and not for the benefit of the school lands trust fund.

It is the practice in this state to allow the recovery of attorney's fees and expenses only in such cases as are provided for by statute, or where the uniform course

of procedure has been to allow such recovery. See, Blacker v. Kitchen Bros. Hotel Co., 133 Neb. 66, 273 N. W. 836; Higgins v. Case Threshing Machine Co., 95 Neb. 3, 144 N. W. 1037; State ex rel. Charvat v. Sagl, 119 Neb. 374, 229 N. W. 118.

We find no statute in this state that will allow or permit the recovery of attorney's fees and expenses in a case such as the Ebke case.

For the reasons given herein, the judgment of the trial court is reversed and the cause is remanded to the district court to enter judgment in conformity with this opinion disallowing the attorney's fee and expenses allowed by the district court, appellees to pay all costs.

REVERSED AND REMANDED WITH DIRECTIONS.

CHAPPELL, J., dissents.

SETH E. COLE, APPELLANT, V. CUSHMAN MOTOR WORKS, INC., A CORPORATION, ET AL., APPELLEES.
65 N. W. 2d 330

Filed July 16, 1954. No. 33534.

1. **Workmen's Compensation.** In order that a recovery may be had in an action under the workmen's compensation law it must be proved that an accident occurred arising out of and in the course of employment which accident produced injury that resulted in disability or death.
2. ———. A compensation award cannot be based on possibilities or probabilities, but must be based on sufficient evidence that the claimant incurred a disability arising out of and in the course of his employment.
3. **Workmen's Compensation: Appeal and Error.** Where the evidence is conflicting and cannot be reconciled, this court, upon a trial de novo in a workmen's compensation case, will consider the fact that the trial court observed the demeanor of witnesses and gave credence to the testimony of some rather than to the contradictory testimony of others.

APPEAL from the district court for Lancaster County: HARRY R. ANKENY, JUDGE. *Affirmed.*

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

Cline, Williams, Wright & Johnson and *Charles E. Oldfather,* for appellees.

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

WENKE, J.

This is a workmen's compensation case appealed from Lancaster County. On April 4, 1949, Seth E. Cole filed a petition in the workmen's compensation court. Therein he alleged that he had, about 11:30 p. m. on December 4, 1947, while an employee of the Cushman Motor Works, Inc., sustained personal injuries by reason of an accident which arose out of and in the course of his employment as a punch press operator that resulted in his being totally and permanently disabled. He further alleged the conditions caused by the injuries were latent and of a progressive nature and did not culminate in compensatory disability until about April 2, 1949, when, because thereof, it became impossible for him to continue working. He asked for compensation accordingly.

The original hearing on this claim was held by one of the judges of the compensation court. It resulted in the claim being dismissed because the judge who heard it found the evidence adduced did not establish the accident produced a disabling injury. Claimant asked for and had a rehearing by the full compensation court. That court found there was an irreconcilable conflict in the testimony of the medical witnesses testifying on behalf of the claimant and that the evidence adduced, as a whole, was insufficient to establish, with any degree of certainty, that the accident produced a disabling injury which would entitle claimant to the benefits of compensation. In view thereof it dismissed the claimant's petition seeking such relief. On appeal to the district court for Lancaster County the judgment of the compensation court was sustained and the appeal dis-

missed. Claimant has appealed to this court from that ruling.

On appeal to this court in a workmen's compensation case the cause will be here considered de novo upon the record. Anderson v. Cowger, 158 Neb. 772, 65 N. W. 2d 51; Gilbert v. Metropolitan Utilities Dist., 156 Neb. 750, 57 N. W. 2d 770; Beam v. Goodyear Tire & Rubber Co., 152 Neb. 663, 42 N. W. 2d 293.

It is either admitted, or established by the evidence adduced, that about 11:30 p. m. on Thursday, December 4, 1947, while employed by the Cushman Motor Works, Inc., a corporation, as a heavy punch press operator, appellant was injured in an accident arising out of and in the course of his employment by being struck on the top of his head by a turnover bar that he had placed in the crank shaft of the machine he was operating to adjust it; that the accident happened just as he started his machine; that the blow made a laceration or gash of about 2 inches in length, located to the left of the midline and in the anterior portion of the scalp, and caused severe bruising and swelling; that he received immediate treatment for the injuries at the employer's first aid station; that the employer continued to provide medical attention for the injury until it was completely healed, which was sometime in February 1948; that the appellant was off duty the following day, December 5, 1947; that he returned to work Sunday night, December 7, 1947; and that thereafter he continued to work up to and including April 1, 1949, failing to show up thereafter. It should be mentioned that during this period he was absent very few days because of sickness.

"In order that a recovery may be had in an action under the workmen's compensation law it must be proved that an accident occurred arising out of and in the course of employment which accident produced injury that resulted in disability or death." Anderson v. Cowger, *supra*.

In this respect the burden of proof is on the claimant

to prove the foregoing by a preponderance of the evidence. Anderson v. Cowger, *supra;* Beam v. Goodyear Tire & Rubber Co., *supra.*

"In considering the sufficiency of the proof it should be remembered the rule of liberal construction, as it relates to the workmen's compensation law, applies to the law and not to the evidence offered to support a claim by virtue of the law. The rule does not dispense with the necessity that claimant prove his right to compensation; that is, it does not permit a court to award compensation when the required proof is lacking." Anderson v. Cowger, *supra.* See, also, Beam v. Goodyear Tire & Rubber Co., *supra.*

"Such facts must be proved by the claimant by sufficient evidence leading to the direct conclusion, or by a legitimate legal inference therefrom, that such an accidental injury occurred and caused the disability. There must be shown a causal connection between an accident suffered by the claimant and the cause of his disability." Anderson v. Cowger, *supra.*

"'A compensation award cannot be based on possibilities or probabilities, but must be based on sufficient evidence that the claimant incurred a disability arising out of and in the course of his employment.' Hassmann v. City of Bloomfield, *supra* (146 Neb. 608, 20 N. W. 2d 592)." Beam v. Goodyear Tire & Rubber Co., *supra.* See, also, Hahl v. Heyne, 156 Neb. 599, 57 N. W. 2d 137.

Appellant would be entitled to an award 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, that resulted in disability even though a preexisting physical condition he had combined therewith to produce such 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;

Tucker v. Paxton & Gallagher Co., 153 Neb. 1, 43 N. W. 2d 522.

At the time the accident happened appellant was sitting on a stool directly in front of his machine. He testified the force of the blow pushed him down in the seat in which he was sitting and resulted in his head, neck, and spine being crushed downward; that he immediately thereafter started having severe headaches, and pains in his neck and across the base of his head; that these pains started going down his spine until, in June 1948, they reached his lower back; that he developed a nervous condition; that he started walking with a limp; that he could not walk properly, stoop, or rest at night; and that because of these conditions which had developed as a result of the accident he had to quit his work because he was not physically able to do it. He testified he has not worked since he failed to report for work on April 2, 1949.

Appellant produced the testimony of medical experts to the effect that the blow caused injuries to appellant's back that resulted in proliferative arthritis of the fifth and sixth cervical vertebrae at the anterior angles, compression of the fifth body of the lumbar vertebrae on the right side with a consequent leaning of vertebrae to the right, and a posterior cervical neuralgia or inflammation of nerves in the back of the neck, all of which caused total disability. However, these witnesses disagreed as to whether or not such disability was temporary or permanent.

Appellees offered the testimony of medical experts to the effect that the blow appellant received on his head had no effect on his back or spine; that his spine is normal and shows no effects of an accident; that he has completely recovered from the effects of the accident; and that the accident did not result in any disability. These witnesses further testified that appellant is afflicted with some chronic type of muscular rheumatism which involves his neck, shoulders, and lower back, with a min-

imal degree of arthritis in his lower lumbar area and possible residual fibrositis all resulting in a very slight disability. They also testify these conditions are quite often present in people of appellant's age, especially those doing heavy work.

One of these witnesses, who examined appellant twice, testified he thought appellant was trying to mislead him by exaggerating his pains; that he thought appellant was a malingerer; and that appellant is capable of working.

Under this situation we think the following principle is particularly applicable: Where the evidence is conflicting and cannot be reconciled, this court, upon a trial de novo in a workmen's compensation case, will consider the fact that the trial court observed the demeanor of witnesses and gave credence to the testimony of some rather than to the contradictory testimony of others. See, Cunningham v. Armour & Co., 133 Neb. 598, 276 N. W. 393; Ames v. Sanitary District, 140 Neb. 879, 2 N. W. 2d 530; Beam v. Goodyear Tire & Rubber Co., *supra*.

We find the evidence adduced fails to establish that the blow on appellant's head, from which he has completely recovered, in any way affected his back, particularly his spine, but that he is to some degree afflicted with some chronic type of rheumatism which causes whatever pain and disability he has but that such condition did not result from the injuries suffered.

In view of these findings we need not discuss appellees' contention that no claim for compensation was made within 6 months of December 4, 1947, as required by section 48-133, R. R. S. 1943, or that a petition was not filed within 1 year as section 48-137, R. R. S. 1943, provides must be done. Likewise, there is no reason for discussing appellant's contention that the conditions resulting from the injury were latent and progressive and did not result in disability until April 2, 1949, thus extending the date from which such statutory provisions run. See McCoy v. Gooch Milling & Elevator Co., 156 Neb. 95, 54 N. W. 2d 373.

In view of the foregoing we affirm the action of the district court.

AFFIRMED.

MORRIS JESSEN ET AL., APPELLEES, V. MARY BEARD BLACKARD, TRUSTEE, ET AL., APPELLANTS.
65 N. W. 2d 345

Filed July 16, 1954. No. 33566.

1. **Public Lands: Trusts.** Anyone dealing with school lands does so with knowledge of and subject to the trust obligations of the state and the legislative grant of power to the Board of Educational Lands and Funds as to the terms and conditions of the lease, and the law enters into and becomes a part of the contract.
2. **Estoppel.** No estoppel can arise where all of the parties interested have equal knowledge of the facts or where the party claiming estoppel has the same means of ascertaining or is chargeable with notice of the facts or is equally negligent or at fault.
3. **Waiver.** Waiver is a voluntary and intentional relinquishment, surrender, or abandonment by a capable person of a known existing legal right, which except for such waiver the party would have enjoyed, or such conduct as warrants an inference of the relinquishment of such right or the intentional doing of an act inconsistent with claiming it.
4. **Public Lands: Appeal and Error.** The provisions of sections 25-1901 to 25-1910, R. R. S. 1943, authorize a review in the district court by petition in error of final orders such as appraisements of improvements on school lands by county commissioners or supervisors acting as a quasi-judicial tribunal under and pursuant to section 72-240.06, R. R. S. 1943, and such provisions afford an adequate remedy.
5. ———: ———. The final action of such a tribunal created by statute, where it has jurisdiction of the subject matter and the parties, is conclusive unless reversed or modified in the mode provided by law.
6. **Conversion.** Conversion is any distinct act of dominion wrongfully exerted over another's personal property in denial of or inconsistent with his rights therein.
7. ———. An action for conversion is not maintainable unless the

plaintiff at the time of the alleged conversion is entitled to immediate possession of the property and the right to maintain the action may not be based upon the right to possession at a future time.

8. ———. A bona fide reasonable detention of property by one who has assumed some duty respecting it, for the purpose of ascertaining its true ownership, or of determining the right of the demandant to receive it, will not sustain an action for conversion, and a refusal of goods after demand is no conversion, if the circumstances show that it is caused by a reasonable apprehension of the consequences, in a doubtful matter.

9. ———. Plaintiff's failure to perform a condition precedent will defeat his action for a wrongful conversion.

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

Torgeson, Halcomb & O'Brien, for appellants.

Clarence M. Miller and *Robert A. Nelson,* for appellees.

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

CHAPPELL, J.

Plaintiffs, Morris and Ilse Jessen, brought this action against defendant Mary Beard Blackard, trustee, whose name is now Mary Beard, and others, who were dismissed out of the case before trial, seeking to recover $50,000 damages for alleged conversion of their wheat crop grown and harvested by defendant upon described school lands of which defendant was the former lessee as trustee, and plaintiffs were the new lessees. Concededly, all of the improvements on the land, including the crop involved, were appraised by the county commissioners for a net of $44,026 on June 24, 1952, and such appraisement was duly filed, but plaintiffs never paid same or prosecuted error therefrom. Plaintiffs' theory of recovery was that defendant was estopped or had waived her right to claim any value of the crop except such as it had on January 1, 1952, to wit, $7,500, and that on or about July 11, 1952, within 30 days of the

filing of the appraisement, defendant, without plaintiffs' knowledge or consent, unlawfully converted the crop, having a reasonable value of $50,000, to the use and benefit of the trust, and upon demand failed and refused to return the same. A copy of the appraisement, the trust agreement entered into by defendant, and the original lease there involved, together with assignments thereof, were attached to and made a part of plaintiffs' petition.

On the other hand, defendant filed an answer and cross-petition. Therein she denied generally but admitted that she timely and properly grew and harvested the wheat crop and conserved the same in accordance with good husbandry and agricultural practices; and alleged that she was not guilty of any conversion because plaintiffs did not and have not, as required by law and as they agreed to do, properly tendered or paid the appraised value thereof, which appraisement became final and not subject to collateral attack as attempted herein by plaintiffs. Defendant offered to account for the crop harvested, provided plaintiffs paid the appraisement, and prayed for dismissal of plaintiffs' petition together with judgment for the appraised value. Plaintiffs, for reply to defendant's answer and for answer to defendant's cross-petition, filed general denials.

At a trial, jury waived, the facts were adduced by written stipulation offered and received in evidence, which provided that the facts should be "considered by the Court the same as though they had been presented by evidence, subject, however, to the right of any party hereto to object to the competency or the materiality thereof." Numerous such objections appear in the stipulation, some of which will be later considered. The judgment of the trial court, which concededly should not be reversed unless clearly wrong, found generally in favor of plaintiffs and against defendant. It found that on or about July 11, 1952, plaintiffs were the owners and entitled to possession of the wheat crop, and that

defendant had wrongfully converted same to her own use as trustee. It found that she had converted 14,583 bushels and 20 pounds of wheat, which at the then Production Marketing Administration loan value of $2.05 per bushel, was worth $30,449.33. Therefrom the judgment deducted $4,390.60, expense of harvesting, plus $7,500, the value of the crop on January 1, 1952, and rendered judgment for plaintiffs and against defendant for $18,558.73, with interest at 6 percent from July 11, 1952, in the amount of $1,694.98, or a total of $20,253.71 and costs.

Defendant's motion for new trial was overruled and she appealed, assigning that the trial court erred: (1) In permitting an attack to be made collaterally upon the appraisement made by the county commissioners and in giving the same no force and effect, by erroneously admitting, considering, and applying incompetent and immaterial evidence of the claimed value of the crop as of January 1, 1952, over appropriate objections thereto made by defendant; (2) in determining that defendant, as a matter of law or fact, was guilty of conversion of her own crop by harvesting it at a proper time prior to payment therefor by plaintiffs; and (3) in failing to render judgment in favor of defendant upon her cross-petition for a stated amount to be determined in a particular manner, as required by the undisputed and stipulated evidence adduced and law applicable thereto. We sustain the assignments except assignment No. 3, which is disposed of in a manner contrary to defendant's contention with regard thereto.

The record discloses as follows: Defendant was the owner by assignment to her as trustee of a 25-year lease upon the land. It expired December 31, 1950, and was thereafter of no force and effect. On July 11, 1950, as trustee, she applied for a renewal, pursuant to sections 72-240 and 72-240.01, R. R. S. 1943, and thereunder a new lease was issued and delivered to her by

the State Board of Educational Lands and Funds, hereinafter called the Board, for 12 years beginning January 1, 1951. However, on April 26, 1951, this court held in State ex rel. Ebke v. Board of Educational Lands & Funds, 154 Neb. 244, 47 N. W. 2d 520, and affirmed in subsequent cases, that sections 72-240 and 72-240.01, R. R. S. 1943, were unconstitutional and that leases issued pursuant thereto were void. Therefore, in conformity with a resolution of the Board dated August 13, 1951, defendant was notified in writing on August 27, 1951, that her 12-year lease was cancelled as void, and would be subsequently offered for sale at public auction in accord with a published notice and as provided by law. The notification told her that she would be given an opportunity to bid at such a sale and if successful, a lease would be issued to her for 12 years. It then said: "Should some person other than yourself be the successful bidder, any improvements which you have upon the lands will be appraised by a majority of the members of the board of county commissioners or by three of the supervisors as the case may be. The new lessee must then pay to you the amount of such appraisal, subject to any lien which the state may have for unpaid rental. Either you or the new lessee may, if dissatisfied with the appraisal, take an appeal to the District Court."

As concluded in State v. Cooley, 156 Neb. 330, 56 N. W. 2d 129, defendant was subsequently a tenant at sufferance and not entitled to notice to terminate except the 3-day notice to vacate required by section 27-1404, R. R. S. 1943. The record does not disclose that such a notice was ever served upon defendant or when if ever she surrendered possession. In that situation, at a proper time and in a good workmanlike manner in accord with good husbandry and agricultural practices, defendant summer-fallowed the land and planted winter wheat thereon in the fall of 1951. That is the crop here involved.

Subsequently, notice was duly published on the 3rd, 10th, and 17th of April 1952, that the lease on the land would be sold at public auction on April 25, 1952, at the courthouse in Garden County, where the land is located. The sale was so held, whereat plaintiffs and another on behalf of defendant, were bidders. However, plaintiffs offered the highest bonus bid, and on April 25, 1952, submitted their written application for a lease to the Board, together with payment of the amount of the bonus bid, a lease fee, and rental for the period from January 1, 1952, to December 31, 1952. Plaintiffs' application provided in part: "I also agree to pay for the improvements upon the land as provided by law * * *." Thereafter, on April 28, 1952, relying upon plaintiffs' application, the Board issued a lease thereon to plaintiffs for a 12-year period beginning January 1, 1952.

Prior to the time of the sale, defendant had published a notice that she intended to harvest the wheat crop regardless of who might secure the lease. However, at the sale her agent delivered to a representative of the Board a written statement, which was publicly read at the sale, rescinding such notice and stating that she "would abide by the ruling of the Board of Educational Lands and Funds with reference to the compensation for improvements upon said land." At the opening of the sale, a representative of the Board conducting the same also read a written statement prepared by the Board officially outlining procedure to be followed in conducting the sale. It required the representative to first read a notice of the sale and then read the following, insofar as important here: "If some person other than the old lessee is the successful bidder he must also pay for the improvements upon the land. These improvements consist of all buildings, fencing, wells, windmills, pumps, tanks, irrigation improvements, dams, drainage ditches, plowing for future crops and for alfalfa or other crops growing thereon. If the parties are unable to agree upon the price to be paid for the im-

provements within ten days the same will be appraised by the county board and their appraisement filed with the county treasurer. The new lessee must within thirty days from the date of the filing pay the amount of the appraisement to the county treasurer, for the benefit of the old lessee, subject to any lien due the state for unpaid rental. No lease will be issued until payment for the improvements has been made to the county treasurer." In that connection, plaintiffs offered, over appropriate objections of defendant, evidence that a representative of the Board there also publicly stated that the improvements would be appraised as of January 1, 1952. In like manner plaintiffs also offered evidence that the value of the wheat crop on that date was $7,500, and argued that by reason of her conduct aforesaid, defendant was estopped or had waived her right to claim any other value thereof subsequent to January 1, 1952. With that contention we cannot agree.

In that connection, section 72-240.06, R. R. S. 1943, then applicable, provided in part: "If the lease is made to a person other than the lessee, the value of all the improvements on the land shall be appraised by a majority of the members of the board of county commissioners * * *. Improvements to be included in such appraisement shall be all buildings, fencing, wells, windmills, pumps, tanks, irrigation improvements, dams, drainage ditches, plowing for future crops and for alfalfa or other crops growing thereon. The appraisement herein provided for shall be made within thirty days after the entry of the new lease and after being signed shall be filed within five days with the county treasurer of the county in which the land is situated. The new lessee shall pay all costs of the appraisement. Either the lessee or the new lessee may, if he is dissatisfied with the appraisement, within thirty days after the filing thereof, appeal therefrom to the district court of the county in which the land is situated. The new lessee, if he be other than the former lessee, shall within thirty days

after the filing of the appraisement pay to the county treasurer the amount of the appraisement. * * * The new lease shall be revocable until the amount of the appraisement has been so paid."

It will be noted that the sale was not held until April 25, 1952, and there was no entry of the new lease until April 28, 1952, almost 4 months after January 1, 1952. We find nothing in the procedure authorized by the Board officially saying or inferring that the improvements would be appraised as of January 1, 1952, and we find no evidence in the record that defendant ever so represented or agreed thereto, or that plaintiffs ever changed their position in reliance thereon, and we find no provision in the statute requiring such an appraisal to be made as of January 1, 1952. In any event, plaintiffs had ample opportunity to have raised that question at the appraisement or subsequently by prosecuting error therefrom, which they failed to do.

In that regard, also, defendant had a right to assume that any action or ruling of the Board with reference to issuance of the lease and compensation for improvements would conform with the law and that plaintiffs had knowledge thereof and were bound thereby. In State v. Platte Valley Public Power & Irr. Dist., 147 Neb. 289, 23 N. W. 2d 300, 166 A. L. R. 1196, we held that: "Anyone dealing with the school lands does so with knowledge of and subject to the trust obligations of the state and the legislative grant of power to the board as to the terms and conditions of the lease.

"The law enters into and becomes a part of the contract."

In that regard, section 72-234, R. R. S. 1943, provides in part that: "Leases shall be for periods of twelve years *less the period intervening between the date of the execution of the lease* and December 31 of the previous year." (Italics supplied.) Also, section 72-240.06, R. R. S. 1943, requires that the appraisement of improvements "shall be made within thirty days after the entry

of the new lease" which entry in this case was on April 28, 1952, and requires that plaintiffs herein would "within thirty days after filing of the appraisement pay to the county treasurer the amount of the appraisement" unless error was prosecuted therefrom, and provides that: "The new lease shall be revocable until the amount of the appraisement has been so paid."

The general rule is that in order to create an estoppel it is essential that the party against whom the estoppel is claimed acted with knowledge of the facts and asserted particular rights inconsistent with those subsequently claimed, and that the party claiming estoppel, being without knowledge or means of knowledge of the facts, was influenced by and relied upon the conduct of the person sought to be estopped, and changed his position in reliance thereon or acted upon it to his injury or prejudice. Sedlak v. Duda, 144 Neb. 567, 13 N. W. 2d 892, 154 A. L. R. 490. See, also, Walker v. Ehresman, 79 Neb. 775, 113 N. W. 218; Peters Trust Co. v. Cranmore, 114 Neb. 491, 208 N. W. 635; State ex rel. Truax v. Burrows, 136 Neb. 691, 287 N. W. 178. Also, as held in Pickens v. Maryland Casualty Co., 141 Neb. 105, 2 N. W. 2d 593: "If any of these elements do not exist, an estoppel cannot be applied." Further, no estoppel can arise where all of the parties interested have equal knowledge of the facts or where the party claiming estoppel has the same means of ascertaining or is chargeable with notice of the facts, or is equally negligent or at fault. Scottsbluff Nat. Bank v. Blue J Feeds, Inc., 156 Neb. 65, 54 N. W. 2d 392.

Also, in Lipe v. World Insurance Co., 142 Neb. 22, 5 N. W. 2d 95, this court held: " ' "Waiver" has been defined as a voluntary and intentional relinquishment or abandonment of a known existing legal right, advantage, benefit, claim, or privilege, which except for such waiver the party would have enjoyed; the voluntary abandonment or surrender, by a capable person, of a right known by him to exist, with the intent that such right shall

be surrendered and such person forever deprived of its benefit; or such conduct as warrants an inference of the relinquishment of such right; or the intentional doing an act inconsistent with claiming it.' 67 C. J. 289."

The record before us does not support plaintiffs' contentions with reference to either estoppel or waiver. Thus, they would have no application.

On June 13, 1952, there had not yet been any appraisement of the improvements, and plaintiffs had not yet settled or paid for any part of them, so on that date defendant so notified the Board in writing, and requested that they have the county commissioners make an appraisal thereof. In response thereto, the county commissioners made an appraisement on June 24, 1952, while defendant was still in possession, and filed same with the county treasurer as required by law. Such appraisement valued the wheat crop at $53,750, upon the basis of $2.15 per bushel, for an estimated 25,000 bushels, and deducted $3,750 therefrom for cost of harvesting, leaving a net value of $50,000 for the crop. It then added $1,526, the value of all other improvements and deducted $7,500 for insurance, thus leaving a net value of $44,026 for all improvements.

Neither plaintiffs nor defendant prosecuted error therefrom to the district court as required by Jungman v. Coolidge, 157 Neb. 122, 58 N. W. 2d 828, following From v. Sutton, 156 Neb. 411, 56 N. W. 2d 441. However, plaintiffs did undertake to appeal from the appraisement, but their appeal was dismissed and such dismissal became final before this action was tried. As hereinafter observed, such appraisement was final and conclusive and not subject to collateral attack as here attempted, so that any evidence with relation to the value or the appraisement of the improvements as of January 1, 1952, would be wholly incompetent and immaterial.

In the meantime, on or about July 11, 1952, plaintiffs had not yet tendered or paid the appraisement or any part thereof, so, without their permission but in due

and proper time and in a good and workmanlike manner and according to good agricultural practices, defendant harvested and sold the wheat crop, properly attempting thereby to conserve the same and prevent a loss thereof by natural elements and plaintiffs' past and prospective failure to pay the appraisement. Concededly, notwithstanding losses by elements beyond her control, defendant obtained therefrom 14,853 bushels and 20 pounds of No. 2 wheat. The market price was then $1.89 per bushel, so it sold for $28,072.80, but after deducting $4,390.60, cost of harvesting, defendant received a net of $23,682.20 for the crop.

On or about July 17, 1952, plaintiffs, without any proper tender or payment of the appraisement, demanded of defendant in writing that she deliver free of charge to them not later than August 1, 1952, evidenced by way bill tickets at their elevator in Oshkosh, 25,000 bushels of No. 1 wheat, and give them a bill of sale to all of the improvements listed in the appraisement of the county commissioners, after which they would pay the total sum of $44,026, the net amount of the appraisement, plus the further sum of $3,750 harvesting expenses deducted from the appraised valuation of the wheat crop by the county commissioners but which defendant had paid in harvesting the crop. With such demand defendant failed and refused to conform.

Also, on August 4, 1952, in partial conformity with and recognition of the validity and binding effect of the appraisement, plaintiffs paid to the county treasurer $1,526, the appraised value of all other improvements on the land. Whether or not defendant voluntarily accepted that payment is not shown, but that would be immaterial in any event since, as hereinafter observed, the appraisement was final and her acceptance of such payment would be within the exceptions pointed out in Hoesly v. Department of Roads & Irrigation, 142 Neb. 383, 6 N. W. 2d 365.

In that situation, plaintiffs sought in this action on

the one hand to affirm the validity and finality of the appraisement and be bound thereby and benefit therefrom insofar as beneficial to them, and, on the other hand, to collaterally attack and repudiate the appraisement insofar as beneficial to defendant, upon the basis of estoppel and waiver, heretofore disposed of. In that regard, however, defendant claims that the appraisement was final and not subject to collateral attack for failure of plaintiffs to prosecute error therefrom. Defendant also claims that plaintiffs, not having paid the final appraisement, could not as a matter of law maintain conversion, and that under the stipulated undisputed facts now appearing in this record, the judgment of the trial court was clearly wrong. We sustain that contention. On the other hand, defendant also argued that under the stipulated undisputed facts now appearing in this record and the law applicable thereto, the trial court erred in refusing to render a judgment in favor of defendant on her cross-petition for $18,817.80, the difference between the total appraisement, less $1,526 already paid thereon by plaintiffs, or $42,500, and $23,682.20, the net sum received by defendant for 14,853 bushels and 20 pounds of wheat at the then market price of $1.89 per bushel after deducting $4,390.60 cost of harvesting paid by defendant. In that respect, this is a law action and defendant did not make any motion for judgment at conclusion of the evidence or file any motion for judgment in accordance with such a motion theretofore duly made. Thus this court may not order and direct a judgment for defendant as requested by her. In that connection, it is sufficient here for us to say that defendant's theory of recovery by cross-petition of the balance of the unpaid assessment is erroneous in two respects. First, before defendant is permitted to recover upon her cross-petition she must account for and credit plaintiffs with all the bushels and pounds of wheat admittedly harvested by her at the rate of $2.15 per bushel, the price fixed in the appraisement as the

basis for dollar valuation of the estimated crop, instead of $1.89 per bushel, the market price at time of harvesting; and second, therefrom she may deduct only $3,750, the cost of harvesting as fixed by the appraisement instead of $4,390.60, the amount she actually paid therefor.

With regard to finality of the appraisement, the following rules are controlling. Sections 25-1901 to 25-1910, R. R. S. 1943, authorize a review in the district court by petition in error of final orders, such as appraisements of improvements on school lands by county commissioners or supervisors acting as a quasi-judicial tribunal under and pursuant to section 72-240.06, R. R. S. 1943, and such provisions afford an adequate remedy. From v. Sutton, *supra;* Jungman v. Coolidge, *supra.* Such cases are also authority for the conclusion that appraisements of improvements on school lands under and pursuant to section 72-240.06, R. R. S. 1943, by county commissioners or supervisors from which no error has been presented, shall be given the same weight as the verdict of a jury or the findings and judgment of a court.

As recently as Scheer v. Kansas-Nebraska Natural Gas Co., 158 Neb. 668, 64 N. W. 2d 333, this court reaffirmed that: "A judgment on the merits in the trial of a civil action constitutes an effective bar and estoppel in a subsequent action upon the same claim or demand, not only as to every matter offered and received to sustain or defeat the claim or demand, but also as to any other admissible matter which might have been offered for that purpose." By analogy, of course, the same rule of res judicata also applies to appraisements by county commissioners or supervisors which have become final in proceedings relating to the appraisement of improvements on school lands, under and pursuant to section 72-240.06, R. R. S. 1943.

This court has held that: "Where a judgment is attacked in other ways than by proceedings in the original action to have it vacated or reversed or modi-

fied or by a proceeding in equity to prevent its enforcement, the attack is a collateral attack." Katz v. Swanson, 147 Neb. 791, 24 N. W. 2d 923. In that regard: "The action of a tribunal created by statute, where it has jurisdiction of the subject-matter and the parties, is conclusive unless reversed or modified in the mode provided by law." State ex rel. Sorensen v. Knudtsen, 121 Neb. 270, 236 N. W. 696. See, also, Burkley v. City of Omaha, 102 Neb. 308, 167 N. W. 72; City of Wayne v. Adams, 156 Neb. 297, 56 N. W. 2d 117; Nelson v. Nelson, 152 Neb. 741, 42 N. W. 2d 654.

The foregoing rules have application here and prevent plaintiffs from collaterally impeaching the appraisement made by the county commissioners on June 24, 1952.

We turn then to the question of plaintiffs' right to maintain conversion. As early as Holmes v. Bailey, 16 Neb. 300, 20 N. W. 304, this court held: "In an action for damages alleged to have been sustained by reason of the conversion of personal property, the plaintiff must recover, if at all, upon the strength of his own title, and not upon the weakness of the title of the defendant." Such case also concluded that in order to maintain conversion, plaintiff must have had the actual custody of or some species of property, either general or special, in the property which is the subject of the action, with an immediate right to possession of the property. See, also, Fitzsimons v. Frey, 153 Neb. 550, 45 N. W. 2d 603; Kimball v. Cooper, 134 Neb. 536, 279 N. W. 194; Burchmore v. Byllesby & Co., 140 Neb. 603, 1 N. W. 2d 327.

In Indiana Harbor Belt R. R. Co. v. Alpirn, 139 Neb. 14, 296 N. W. 158, this court held: " 'Conversion is any distinct act of dominion wrongfully exerted over another's personal property in denial of or inconsistent with his rights therein.' 26 R. C. L. 1098, sec. 3." As held in Hansen v. Village of Ralston, 147 Neb. 251, 22 N. W. 2d 719, and the same case reported at 145 Neb.

838, 18 N. W. 2d 213: "A bona fide reasonable detention of property by one who has assumed some duty respecting it, for the purpose of ascertaining its true ownership, or of determining the right of the demandant to receive it, will not sustain an action for conversion." In the latter opinion, quoting from 26 R. C. L., § 34, p. 1124, it is said: "Moreover, a refusal of goods after demand is no conversion, if the circumstances show that it is caused by a reasonable apprehension of the consequences, in a doubtful matter. In many instances, a qualified refusal to deliver the goods in question, on demand, has been held not to constitute a conversion, when such qualification is reasonable and stated in good faith." See, also, 53 Am. Jur., Trover and Conversion, §§ 45, 46, pp. 842, 843.

In Fitzsimons v. Frey, *supra,* this court said: "In 53 Am. Jur., Trover and Conversion, § 68, p. 863, it is said: 'The general rule is that an action for conversion is not maintainable unless the plaintiff, at the time of the alleged conversion, is entitled to the immediate possession of the property. An interest in the property which does not carry with it a right to possession is not sufficient; the right to maintain the action may not be based upon a right to possession at a future time.'" See, also, 53 Am. Jur., Trover and Conversion, § 87, p. 879. Further, in 65 C. J., Trover and Conversion, § 105, p. 65, it is said: "Plaintiff's failure to perform a condition precedent will defeat his action for a wrongful conversion." We conclude that, in the light of this record and the foregoing rules, plaintiffs could not maintain an action for conversion.

Other matters are argued in the briefs, but as we view it, they require no discussion in order to dispose of the merits. For reasons heretofore stated, we conclude that the judgment should be and hereby is reversed and the cause is remanded for further proceedings in accord with this opinion. All costs are taxed to plaintiffs.

REVERSED AND REMANDED.

GEORGE P. MADER ET AL., APPELLEES, V. HENRY W. METTENBRINK ET AL., APPELLANTS.
65 N. W. 2d 334

Filed July 23, 1954. No. 33513.

1. Waters. To constitute a watercourse the size of the stream is not material. It must, however, be a stream in fact, as distinguished from mere surface drainage occasioned by freshets or other extraordinary causes, but the flow of water need not be continuous.
2. ———. Surface water is that which is diffused over the surface of the ground, derived from falling rains or melting snows, and continues to be such until it reaches some well-defined channel in which it is accustomed to and does flow with other waters, whether derived from the surface or springs, and it then becomes the running water of a stream and ceases to be surface water.
3. ———. 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.
4. ———. It is the duty of those who build structures across natural drainways to provide for the natural passage through such obstructions of all waters which may be reasonably anticipated to drain there, and this is a continuing duty.
5. Trial: Appeal and Error. The trial court is required to consider any competent and relevant facts revealed by a view of the 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.
6. Waters. The term "surface water" includes such as is carried off by surface drainage, that is, drainage independent of a watercourse.
7. ———. 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.
8. Easements. A permissive use of the land of another, that is a use or license exercised in subordination to the other's claim and

ownership, is not adverse and cannot give an easement by prescription no matter how long it may be continued.

9. **Adverse Possession.** Possession by permission of the owner can never ripen into title by adverse possession until after such change of position has been brought home to the adverse party.

10. **Easements.** An easement may be abandoned by unequivocal acts showing a clear intention to abandon and terminate the right. The intention to abandon is the material question and it may be proved by an infinite variety of acts. It is a question of fact to be ascertained from all the circumstances of the case.

11. **Waters.** The flood plane of a live stream is the adjacent lands overflowed in times of high water from which floodwaters return to the channel of the stream at lower points. This plane is regarded as a part of the channel and the water flowing within the channel or its flood plane is characterized as floodwater.

12. ———. 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.

APPEAL from the district court for Hall County: WILLIAM F. SPIKES, JUDGE. *Reversed and remanded with directions.*

Harold A. Prince, for appellants.

Cunningham & Cunningham, for appellees.

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

WENKE, J.

George P. Mader and Geraldine P. Mader brought this action in the district court for Hall County against Henry W. Mettenbrink and Beulah Mettenbrink. The purpose of the action is to obtain a mandatory injunction compelling the defendants to make an opening in, or place a culvert through, their irrigation dike; to restore an alleged watercourse across their land to its former condition; and for such other and different relief as the court may deem equitable. Trial was had and the court found generally for the plaintiffs. It decreed:

"* * * that the defendants Henry W. Mettenbrink and Beulah Mettenbrink, the owners of the Southwest Quarter of Section Twenty-nine, Township Twelve, Range Nine in Hall County, Nebraska, forthwith remove that part of their irrigation dike, immediately North and opposite the culvert, which is located between the Southwest Quarter of Section Twenty-nine, and the Northwest Quarter of Section Thirty-two above described so that the water which flows through said culvert may continue in its natural course into Silver Creek or in lieu thereof that the said defendants forthwith make an opening through or place a culvert under said irrigation dike so that the water flowing through the culvert between Section Twenty-nine and Section Thirty-two, above described, may continue to flow in its regular course into Silver Creek.

"* * * that the defendants should forthwith remove from said water course, on their land, any dirt which the defendants have placed in said water course, which dirt will prevent the water flowing from the above described culvert in its regular course through the defendant's land into Silver Creek and that the defendants and each of them their agents and employees be permanently enjoined from erecting any dike or other obstruction on their land immediately North and opposite said culvert between Sections Twenty-nine and Thirty-two, which will prevent the natural flow of the water through said culvert, across the defendants land and into Silver Creek."

Defendants filed a motion for new trial and, from the overruling thereof, have perfected this appeal.

In considering the appeal the following is applicable to our consideration of the record: "It is the duty of this court in an equity case to try the issues de novo and to reach an independent decision without being influenced by the findings of the trial court except if the evidence is in irreconcilable conflict this court may consider that the trial court saw the witnesses, observed their manner

of testifying, and accepted one version of the facts rather than the opposite." Keim v. Downing, 157 Neb. 481, 59 N. W. 2d 602.

Appellees, since February 1943, have been the joint owners of the northwest quarter of Section 32, Township 12 North, Range 9 West of the 6th P. M., in Hall County, except two acres in the northwest corner thereof used for school purposes. They purchased this land from the McDonalds who were, prior thereto, and as far back as here material, the owners thereof. We shall herein refer to this quarter section as either the McDonald or Mader land, depending upon who was owner at the time. Appellants are the joint owners of the southwest quarter of Section 29, Township 12 North, Range 9 West of the 6th P. M., in Hall County. They acquired this land from appellant Henry W. Mettenbrink's father, Charles Mettenbrink, Sr., who was prior thereto, and as far back as here material, the owner thereof. The northeast quarter of Section 36, Township 12 North, Range 10 West of the 6th P. M., in Hall County, lies just west of the Mader land. It was formerly owned by George A. Mader, father of appellee George P. Mader, and is the place on which the appellees reside. There is a stream called Silver Creek flowing east and northeast across the northeast quarter of Section 36 and the southwest quarter of Section 29.

The evidence shows there is neither a Section 30 nor a Section 31 in Township 12 North, Range 9 West of the 6th P. M. This accounts for Sections 25 and 36 in Township 12 North, Range 10 West of the 6th P. M., lying adjacent to and just west of Sections 29 and 32 in Township 12 North, Range 9 West of the 6th P. M. The few acres constituting these sections have been added to and are a part of Sections 29 and 32.

Silver Creek flows generally east in the north part of the northeast quarter of Section 36. When it approaches the east section line thereof it turns north to cross the north section line of Section 36 just west of the common

corner of Sections 25, 29, 32, and 36. It then proceeds to flow north near the east line of Section 25. After doing so for a distance of about 550 feet it turns east across the township line, which is the east section line of Section 25, onto Section 29. On Section 29 it flows east and north across the southwest quarter thereof in a meandering fashion, there being about 60 acres of the south half of the southwest quarter thereof south of the creek. This 60-acre tract is the land of appellants herein involved. It will, when convenient to do so, be referred to as the Mettenbrink land.

The evidence shows that until the Fagan ditch was dug, which occurred sometime before World War I (1917), any water flowing onto or falling on the McDonald land would collect there in the low areas, which were east and south of the school located thereon, until a sufficient amount had accumulated to fill such low areas. It would then flow over the rim surrounding such low areas and flow north finding its way onto the Mettenbrink land. A 4-foot bridge had been placed by the county in the east-west section road running between these lands to accommodate this flow. This bridge, which was 2 feet in depth, was placed about 800 feet east of the intersection lying to the west. When sufficient water had collected on the Mettenbrink land to fill up the low area thereon, which was about 10 acres, it would then flow over the bank of Silver Creek and into the stream. This flow over the bank thereof occurred somewhere east and north of where later a 3-foot cut was made in the bank as an outlet for the Fagan ditch.

The low areas on these lands left wet and swampy places. The exact extent thereof in the meadow on the McDonald land is not shown. To get rid of this condition Pat Fagan, who was then managing and in charge of the McDonald land, entered into an agreement with Charles Mettenbrink, Sr. It was agreed Fagan could make a ditch across the Mettenbrink land from the

bridge located in the east-west road between the lands to Silver Creek and there make a cut in the bank thereof as an outlet, provided he would put a head bridge with an endgate control in the cut to prevent the water in Silver Creek from flowing back out of the stream onto the Mettenbrink land, would construct the ditch in such a manner that it could be crossed in farming, and would drain the 10 acres of low land on the Mettenbrink farm, which were located just west of the proposed ditch, into it. Sometime between 1911 and 1917, the exact date not being shown, Fagan dug such a ditch with a blade grader, made a 3-foot cut in the bank of Silver Creek at the place where the ditch entered it, put in a bridge with an endgate control in this cut, and drained the low area on the Mettenbrink land into this ditch. He then dug a ditch south and another southwest from the bridge. These ditches extended onto the McDonald farm for some distance in order to drain the low areas located thereon. All ditches, both north and south from the east-west section line between the McDonald and Mettenbrink lands, centered under the bridge located therein.

This ditch and control gate were kept in repair until about 1922. Thereafter the bridge in the section line was allowed to fill up and those in charge of the McDonald land paid no further attention to the ditch on the Mettenbrink land and permitted the bridge with the endgate control to get out of repair. Sometime between 1930 and 1933 the county graded this section line and covered the bridge so no water could pass through the graded road.

In August 1940, appellants put in an irrigation well just west of their farmstead, which is located south of Silver Creek and on the southeast corner of their land. With this well they intended to irrigate the land lying south of the creek. This area slopes from the east and west toward the center. Therefore, in order to irrigate the west part of the land from this well, appellants

had to get water to the west side thereof. For this purpose they built a dike along the south edge of their land. The dike was about 1,200 feet long. It extended almost to the west section line. Appellants started it in 1940. In 1941 they built it to a height of about 2 feet at the center, that being the lowest part of their land crossed by the dike. The dike was not high enough to carry water to the west side of the land. Consequently, the appellants caused the dike to be raised an additional 2 feet. This was done in July 1944. This proved to be adequate. Appellants then leveled the land to the north of the dike and thereafter irrigated it. This was accomplished by flowing water from both the east and west toward the center. They then filled in the cut in the creek bank, made when the Fagan ditch was dug, but, before doing so, put a metal tube in the cut in order to drain water that would come onto their lands from any source. However, no opening was made in the irrigation ditch. The ditch completely blocked out all water coming from the south as it was considerably higher than the graded section road to the south.

In 1945 some water collected on the Mader land. There being no opening in the road it could get no further. The county then, at appellees' request, put in a 2-foot metal culvert. It was located at the same point in the road as the former bridge. The water flowed through the culvert and into the ditch located north of the road. There being no opening in the irrigation dike it could go no further and stayed in the ditches. The water was not of sufficient quantity to do any harm to the Mader land.

Nothing further happened until 1949. Then Silver Creek overflowed onto Section 36. This, as far as the record discloses, was the first time it had done so since prior to 1918. This floodwater flowed east onto the Mader land but could get no further because appellants' irrigation dike prevented it from flowing onto the Met-

tenbrink land and then returning to Silver Creek from whence it had come.

It should here be stated that while there is a cut in the bank of Silver Creek in Section 36 caused by a cattle path, there is also a natural cut in the bank thereof caused by a natural drainage of waters into the creek and floodwaters flowing from either find their way east onto the Mader land.

Appellants were unwilling to open their irrigation ditch and let these waters through, the same covering about 20 acres of the Mader land. It destroyed the crops growing thereon. As a consequence appellees started this action on April 24, 1950, for the purposes already stated.

It should here be stated that while the allegations of the appellees' petition primarily relate to the existence of a watercourse and the trial court's decree specifically relates to the restoration thereof, the facts stated in appellees' petition are broad enough to cover all waters whether surface, flood, or those running in a watercourse. Since the findings of the trial court were generally for the appellees, we shall consider the petition accordingly.

By statute a watercourse is defined as: "Any depression or draw two feet below the surrounding lands and having a continuous outlet to a stream of water, or river or brook shall be deemed a watercourse." § 31-202, R. R. S. 1943.

In Courter v. Maloley, 152 Neb. 476, 41 N. W. 2d 732, we quoted from Pyle v. Richards, 17 Neb. 180, 22 N. W. 370, the following: "To constitute a watercourse the size of the stream is not material. It must, however, be a stream in fact, as distinguished from mere surface drainage occasioned by freshets or other extraordinary causes, but the flow of water need not be continuous." Then we went on to say: "This characterization was approved in Snyder v. Platte Valley Public Power and Irrigation District, 144 Neb. 308, 13 N. W.

2d 160, 160 A. L. R. 1154; Jack v. Teegarden, 151 Neb. 309, 37 N. W. 2d 387; Pint v. Hahn, ante p. 127, 40 N. W. 2d 328; * * *."

And in Jack v. Teegarden, 151 Neb. 309, 37 N. W. 2d 387, we said: "Surface water is that which is diffused over the surface of the ground, derived from falling rains or melting snows, and continues to be such until it reaches some well-defined channel in which it is accustomed to and does flow with other waters, whether derived from the surface or springs, and it then becomes the running water of a stream and ceases to be surface water."

"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." Ricenbaw v. Kraus, 157 Neb. 723, 61 N. W. 2d 350. See, also, Snyder v. Platte Valley Public Power & Irr. Dist., 144 Neb. 308, 13 N. W. 2d 160, 160 A. L. R. 1154; Graham v. Pantel Realty Co., 114 Neb. 397, 207 N. W. 680; Leaders v. Sarpy County, 134 Neb. 817, 279 N. W. 809; Pint v. Hahn, 152 Neb. 127, 40 N. W. 2d 328; Purdy v. County of Madison, 156 Neb. 212, 55 N. W. 2d 617.

" 'It is the duty of those who build structures across natural drainways to provide for the natural passage through such obstructions of all waters which may be reasonably anticipated to drain there, and this is a continuing duty.' Crummen v. Nemaha County, 118 Neb. 355, 224 N. W. 864." Leaders v. Sarpy County, *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 the magnitude of the damage inflicted, as the ground of affording relief." McGill v. Card-Adams Co., 154 Neb. 332, 47 N. W. 2d 912. See, also, Pospisil v. Jessen, 153 Neb. 346, 44 N. W. 2d 600.

But, as stated in Miksch v. Tassler, 108 Neb. 208, 187

N. W. 796: "* * * to constitute a watercourse the size or velocity of the stream is not material, but that it must, however, be a stream in fact as distinguished from mere temporary surface drainage occasioned by freshets or other extraordinary causes, although the flow of water need not be continuous or great in amount. Pyle v. Richards, 17 Neb. 180; Morrissey v. Chicago, B. & Q. R. Co., 38 Neb. 406; Town v. Missouri P. R. Co., 50 Neb. 768."

In Morrissey v. Chicago, B. & Q. R. R. Co., 38 Neb. 406, 56 N. W. 946, we quoted the following from Morrison v. Bucksport & B. R. R. Co., 67 Me. 353: "To constitute a water course, it must appear that the water usually flows in a particular direction; and by a regular channel, having a bed with banks and sides; and (usually) discharging itself into some other body or stream of water. It may sometimes be dry. It need not flow continuously; but it must have a well defined and substantial existence. * * * there is a broad distinction between a stream and brook, constituting a water course, and occasional and temporary outbursts of water occasioned by unusual rains or the melting of snows, flowing over the entire face of a tract of land, and filling up low and marshy places, and running over adjoining lands, and into hollows and ravines which are in ordinary seasons destitute of water and dry." See, also, Skolil v. Kokes, 151 Neb. 392, 37 N. W. 2d 616.

While the foregoing principles have often been announced by this court the fact remains that each case of this character must stand or fall upon the factual situation disclosed by the record. See Muhleisen v. Krueger, 120 Neb. 380, 232 N. W. 735.

The trial court viewed the premises. We have said: "When the trial court goes upon the premises in controversy, and makes a personal examination of the topography of all of the land and water involved, his findings in reference thereto are entitled to great weight." Independent Stock Farm v. Stevens, 128 Neb. 619, 259

N. W. 647. See, also, Whipple v. Nelson, 143 Neb. 286, 9 N. W. 2d 288; Keim v. Downing, *supra*.

But, as stated in Jack v. Teegarden, *supra*: " ' "The trial court is required to consider any competent and relevant facts revealed by a view of premises as evidence in the case, and a duty is imposed on this court on review of findings made by the trial court to give consideration to the fact that the trial court did view the premises; provided, that the record contains competent evidence to support the findings." ' Columbian Steel Tank Co. v. Vosika, 145 Neb. 541, 17 N. W. 2d 488."

The view made by the court could assist him in determining what the condition of the land was at the time he made it but could be very little help in determining what the condition thereof was prior to and at the time of the digging of the ditch by Fagan.

Here the evidence shows that occasionally outbursts of surface water, caused by heavy rains, flowed onto or collected on the Mader land, filled up the low and swampy places thereon, and then the overflow ran onto the adjoining Mettenbrink land to the north. After the section road between the lands was graded and a 4-foot bridge put in, this water would flow through the bridge. When the overflow reached the Mettenbrink land it would spread out and fill up the low areas thereon. When it had done so the surplus overflow would then flow over the south bank of Silver Creek and into the stream. We do not think this overflow from these low areas ever reached the stage where it could be said that it became part of a watercourse. The trial court was in error in this respect.

" 'The term "surface water" includes such as is carried off by surface drainage,—that is, drainage independently of a watercourse, * * *.' (Morrissey v. Chicago, B. & Q. R. R. Co., 38 Neb. 406, 56 N. W. 946.)" Courter v. Maloley, *supra*.

As to the flow of these surface waters, we have said: " 'The rule in this jurisdiction is that a proprietor may

defend himself against the encroachments of surface water by embankment or dike or otherwise and will not be liable in damages which may result from the deflection and repulsion defended against, provided that the proprietor in making defense on his own land himself exercised ordinary care and provided he so uses his own property as not to unnecessarily and negligently injure another.' Robinson v. Central Neb. Public Power & Irrigation District, 146 Neb. 534, 20 N. W. 2d 509." Skolil v. Kokes, *supra*. See, also, Muhleisen v. Krueger, *supra*; Warner v. Berggren, 122 Neb. 86, 239 N. W. 473; Robinson v. Central Nebraska Public Power & Irr. Dist., 146 Neb. 534, 20 N. W. 2d 509; Snyder v. Platte Valley Public Power & Irr. Dist., *supra*.

As stated in Bussell v. McClellan, 155 Neb. 875, 54 N. W. 2d 81: "It was also said (in Courter v. Maloley, 152 Neb. 476, 41 N. W. 2d 732): 'In this jurisdiction it is a general rule that surface waters may be controlled by the owner of the land on which they fall, or originate, or over which they flow and he may refuse to receive any that falls, or originates, or flows on or over adjoining land. His right in this respect however must be so exercised as not to unnecessarily or negligently cause injury to the rights and property of others.' "

The evidence discloses that appellants exercised ordinary care in constructing their irrigation dike and that they now use their property in a manner so as not to unnecessarily and negligently injure the appellees.

Sometime between 1911 and 1917, as has already been hereinbefore set forth, a permissive use was obtained from the owner of the Mettenbrink land to construct a ditch and make a cut in the bank of Silver Creek to flow this surplus water and drain the low swampy ground on the McDonald land. Did this permissive right to use ever develop into a prescriptive right? We do not think that it did.

"A permissive use of the land of another, that is a use or license exercised in subordination to the other's

claim and ownership, is not adverse and cannot give an easement by prescription no matter how long it may be continued." Stubblefield v. Osborn, 149 Neb. 566, 31 N. W. 2d 547.

The requirement for making a permissive use a prescriptive right is stated in Weisel v. Hobbs, 138 Neb. 656, 294 N. W. 448, as follows: "Possession by permission of the owner can never ripen into title by adverse possession until after such change of position has been brought home to the adverse party."

There is no evidence that such change of position was ever taken by the owner of appellees' land. In fact, the evidence shows the permissive use was abandoned beginning about 1922. That such may be done is fully established by opinions of this court. See, Williams v. Lantz, 123 Neb. 67, 242 N. W. 269; Lackaff v. Bogue, 158 Neb. 174, 62 N. W. 2d 889. See, also, Restatement, Property, § 504, p. 3076.

As stated in Williams v. Lantz, *supra,* quoting from 9 R. C. L., § 68, p. 812: " 'An easement may be abandoned by unequivocal acts showing a clear intention to abandon and terminate the right, or it may be done by acts in pais without deed or other writing. The intention to abandon is the material question, and it may be proved by an infinite variety of acts. It is a question of fact to be ascertained from all the circumstances of the case; and, as a rule, no one case can be authority for another. Time is not a necessary element; it is not the duration of the nonuser, but the nature of the acts done by the dominant owner, or of the adverse acts acquiesced in by him, and the intention which the one or the other indicates, that are important, and a cessation of use for a term less than the prescriptive period, accompanied by acts clearly indicating an intent to abandon the right, will work an extinguishment of the easement.' "

The permissive use having been abandoned by the McDonalds, the appellees would have no greater rights. See, Restatement, Property, § 487, p. 3034; Frye v. Sib-

bitt, 145 Neb. 600, 17 N. W. 2d 617. As stated in Restatement, Property, § 487, p. 3034: "The successor to the possession of a dominant tenement who, by succeeding to such possession, becomes entitled to the benefit of an appurtenant easement is subject to any qualifications or conditions attached to the easement. Though, as possessor, he becomes entitled to the privileges of use to which his predecessor was entitled and can do all his predecessor could, he can do no more."

Not only did the appellees make no claim to this permissive use but the evidence establishes they had no right thereto because it had been abandoned by the McDonalds. In fact, the appellees actually refused to accept an offer to renew such use, subject to the same conditions as originally attached, when made by appellants during the trial.

But let us assume, for the sake of discussion only, that a natural watercourse existed prior to the digging of the ditch, as appellees alleged and now contend it did. Even then we think appellees would have no right to now have it restored. That the right to a natural watercourse can be lost is evidenced by the holdings of this court. See, Whipple v. Nelson, *supra;* Johnk v. Union Pacific R. R. Co., 99 Neb. 763, 157 N. W. 918, L. R. A. 1916F 403; Reams v. Clopine, 87 Neb. 673, 127 N. W. 1070. As stated in Reams v. Clopine, *supra*: "The court merely modified the same by indicating that, even though the landowner had such a right, it might have been lost by the prior grant of an easement providing for the diversion of the waters, so that they drained through an artificial channel."

The evidence discloses that the water that backed up on the Mader land in June 1949 was overflow water from Silver Creek. It had flowed out of Silver Creek on Section 36. The fact that it had apparently come out of Silver Creek by flowing through a break in the bank thereof made by a cattle lane or path is not material for the evidence shows there is another break in the bank

of the creek a little to the west out of which it could and does flow when the creek overflows its banks, which break is the result of natural drainage. The topography of the land is such that these floodwaters would normally flow east over Section 36 onto the Mader land, then northeast over the Mettenbrink land, and return to Silver Creek. Appellants' dike, which was completed in 1944, completely crosses this flood plane and prevented the flow of this floodwater onto and over the Mettenbrink land. The evidence establishes the areas here involved on the Mader and Mettenbrink lands to be a part of the flood plane or channel of Silver Creek.

"The flood plane of a live stream is the adjacent lands overflowed in times of high water from which floodwaters return to the channel of the stream at lower points. This plane is regarded as a part of the channel and the water flowing within the channel or its flood plane is characterized as floodwater. Frese v. Michalec, 148 Neb. 567, 28 N. W. 2d 197; Hofeldt v. Elkhorn Valley Drainage District, 115 Neb. 539, 213 N. W. 832, 53 A. L. R. 1174; Cooper v. Sanitary District No. 1, *supra*; Stocker v. Wells, 150 Neb. 51, 33 N. W. 2d 445." Courter v. Maloley, *supra*.

"An easement by prescription can be acquired only by an adverse user for ten years, * * *." Roe v. Howard County, 75 Neb. 448, 106 N. W. 587, 5 L. R. A. N. S. 431.

"* * * in cases of this character the prescriptive right will not commence to run until some act or fact exists giving the party against whom the right is claimed a cause of action." Roe v. Howard County, *supra*. See, also, Schmutte v. State, 147 Neb. 193, 22 N. W. 2d 691.

There is no evidence of any floodwaters flowing in this part of the flood plane of Silver Creek at any time prior to 1949, except possibly on one or more occasions during the period from 1910 to 1918. The appellants had acquired no rights by prescription to obstruct these floodwaters. In the absence thereof the following principles apply:

"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." McGill v. Card-Adams Co., *supra.*

"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." McGill v. Card-Adams Co., *supra.*

"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." McGill v. Card-Adams Co., *supra.*

See, also, Ballmer v. Smith, 158 Neb. 495, 63 N. W. 2d 862.

The evidence shows the flood plane at the south edge of the Mettenbrinks' land, just north of the culvert in the east-west road, to be 1.4 feet above the bottom or flow line of the culvert. Appellants are required to make some type of opening through their irrigation dike at that level which will be reasonably adequate to permit floodwaters of Silver Creek, when flowing in this part of the flood channel thereof, to flow onto their land from the Mader land and then on into Silver Creek.

In view of the foregoing we reverse the decree of the trial court and remand the cause with directions to enter a decree in accordance herewith.

REVERSED AND REMANDED WITH DIRECTIONS.

IN RE APPLICATION OF HENRY SCHMUNK, IN RE APPLICATION OF JAMES C. AGEE, JR., DOING BUSINESS AS HIGHWAY TRANSPORTATION COMPANY. HENRY SCHMUNK ET AL., APPELLANTS, V. WEST NEBRASKA EXPRESS, INC., APPELLEE.

65 N. W. 2d 386

Filed July 23, 1954. No. 33533.

1. **Public Service Commissions: Motor Carriers.** The Nebraska State Railway Commission has jurisdiction and authority to suspend, change, or revoke a certificate of convenience and necessity in whole or in part, provided that in so doing it proceeds in conformity with section 75-238, R. R. S. 1943.
2. ———: ———. Unless an order of the railway commission is shown to be unreasonable or arbitrary, this court is not authorized to interfere with the power of the commission to regulate common carriers.
3. ———: ———. Where there is competent evidence which, if believed, is sufficient to sustain the finding of the railway commission that a willful failure to comply with any lawful order of the commission or with any lawful term, condition, or limitation of a permit or certificate of convenience and necessity issued by it had occurred, an order based on such finding is not unreasonable or arbitrary.
4. ———: ———. The term "willful failure," as used in section 75-238, R. R. S. 1943, is such behavior through acts of commission or omission which justifies a belief that there was an intent entering into and characterizing the failure complained of.
5. ———: ———. The grant or denial of a certificate of convenience and necessity by the Nebraska State Railway Commission requires the exercise of administrative and legislative functions and not of judicial powers.
6. ———: ———. The burden is on an applicant for a certificate of convenience and necessity to show that the operation under the certificate is and will be required by the present or future public convenience and necessity.
7. ———: ———. 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 manner without endangering or impairing the operations of existing carriers contrary to public interest.
8. ———: ———. The question of the adequacy of service of

existing carriers is implicit in the issue of whether or not convenience and necessity demand the service of an additional carrier in the field. Obviously the existence of an adequate and satisfactory service by motor carriers already in the area is complete negation of a public need and demand for added service by another carrier.

APPEAL from the Nebraska State Railway Commission. *Affirmed.*

W. H. Kirwin and *Sidner, Lee, Gunderson & Svoboda,* for appellants.

Russell E. Lovell, for appellee.

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

WENKE, J.

This is an appeal from the Nebraska State Railway Commission by Henry Schmunk and James C. Agee, Jr. It involves two orders of the commission: The first, revoking and cancelling the certificate of public convenience and necessity issued to and held by appellant Henry Schmunk, and the second, denying the application of appellant James C. Agee, Jr., doing business as Highway Transportation Company, Fremont, Nebraska, wherein he sought approval by the commission of his acquisition of the operating rights and authority which had been issued to appellant Schmunk in application No. M-5257. We shall herein refer to appellants as Schmunk and Agee when it is convenient to do so.

Appellants contend the commission erred in holding there was a willful violation of the Nebraska Motor Carrier Act by Schmunk. The following principles are applicable in considering this matter:

"The Nebraska State Railway Commission has jurisdiction and authority to suspend, change, or revoke a certificate of convenience and necessity in whole or in part, provided that in so doing it proceeds in conformity with section 75-238, R. R. S. 1943." In re Application of Resler, 154 Neb. 624, 48 N. W. 2d 718.

"Unless an order of the railway commission is shown to be unreasonable or arbitrary, this court is not authorized to interfere with the power of the commission to regulate common carriers." In re Application of Resler, *supra*.

"Where there is competent evidence which, if believed, is sufficient to sustain the finding of the railway commission that a willful failure to comply with any lawful order of the commission or with any lawful term, condition, or limitation of a permit or certificate of convenience and necessity issued by it had occurred, an order based on such finding is not unreasonable or arbitrary." In re Application of Resler, *supra*.

See, also, Union Transfer Co. v. Bee Line Motor Freight, 150 Neb. 280, 34 N. W. 2d 363; In re Application of Neylon, 151 Neb. 587, 38 N. W. 2d 552; Safeway Cabs, Inc. v. Honer, 155 Neb. 418, 52 N. W. 2d 266; Christensen v. Highway Motor Freight, 158 Neb. 601, 64 N. W. 2d 99.

Section 75-238, R. R. S. 1943, provides, insofar as here material, as follows: "Any such permit or certificate may, * * * upon complaint or on the commission's own initiative, after notice and hearing, be suspended, changed or revoked in whole or in part, for willful failure to comply with any of the provisions of sections 75-222 to 75-250, or with any lawful order, rule or regulation of the commission promulgated thereunder, or with any term, condition or limitation of such permit or certificate."

The commission cited Schmunk "* * * to show cause, if any there be, why said certificate of public convenience and necessity, as set forth in Appendix 'A', should not be suspended, changed or revoked for willful failure to comply with the provisions of Sections 75-222 to 75-250, R. S. Nebraska, 1943, as amended, with the lawful orders, rules and regulations of the Commission promulgated thereunder and the terms, conditions and limitations of said certificate, including the specific counts more fully set forth in Appendix 'B' hereto, * * *."

Appendix "B" charged: "Specific Count: 1. Cessation of operations and discontinuance of service contrary to General Order 81, section (9) (a)."

The authority held by Schmunk was as follows:

"SERVICE AUTHORIZED: Commodities generally, except those requiring special equipment, other than dump bodies.

"ROUTE OR TERRITORY AUTHORIZED: Irregular routes from western counties of Nebraska, to and from Grand Island, McCook, and occasionally to and from points in the state of Nebraska at large."

The commission's General Order No. 81, section (9) (a), provides: "(9) Failure of carriers to obtain Commission approval to: (a) Discontinue, either in whole or in part, service authorized under a certificate of permit."

The commission's General Order No. 82, Supplement No. 2, requires that a holder of an irregular route certificate must continuously hold out his certificated service so as to be able to answer calls and demands for this service in a reasonably adequate manner.

The commission, as disclosed by its opinion, findings, and order, found:

"* * * that definitely as of November of 1951 respondent did not own or control any truck equipment licensed with RC plates to perform transportation for hire under his certificate. It is further reflected in the record that respondent has performed no transportation under his certificate since July 1, of 1951.

"Therefore, it is apparently well established that respondent has ceased to hold out and perform service under his certificate from November 1, 1951 to January 4, 1952, the date respondent's certificate was suspended by the Commission."

Based on the record it was of the opinion that: "* * * the record of the instant proceedings sustains the conclusion that there has been a cessation of service and operations by respondent to constitute a willful failure

to comply with the rules and regulations promulgated by the Commission."

It is appellants' thought that as long as an irregular route operator holds himself out and is available for business there can be no willful failure to comply with the provisions of the act. Schmunk admits he did not solicit any business under his certificate but did carry a telephone listing as "Schmunk Truck Line." He testified he was ready, willing, and able to handle any freight and hauled whatever he was asked to haul.

We have said: "The term 'willful failure,' as used in section 75-238, R. S. 1943, is such behavior through acts of commission or omission which justifies a belief that there was an intent entering into and characterizing the failure complained of." Union Transfer Co. v. Bee Line Motor Freight, *supra*. See, also, In re Application of Resler, *supra;* Safeway Cabs, Inc. v. Honer, *supra*.

Schmunk acquired his certificate under authority of the commission dated September 12, 1938. Except for a period from August 31, 1943, to February 1, 1946, not here material, it remained in force and effect until January 4, 1952, when, at his request, it was suspended. In conjunction with his operations under this certificate Schmunk also operated as an itinerant merchant in unregulated commodities for which he had a permit. This apparently seems to be necessary for holders of irregular route certificates in order to successfully operate. In fact, Schmunk's operations under his certificate were only a small part of his trucking operations, being only about 10 percent thereof, the rest beng as an itinerant merchant.

In May 1951, Schmunk started operating a used car lot in Scottsbluff, where he lived, having had a license to do so since 1949. He devoted a good deal of his time to this business. Beginning with 1951 Schmunk seems to have decided to discontinue operations under his certificate. He only purchased one set of RC plates for 1951, being for a 1949 F-8 tractor and a 1950 Trailmo-

bile trailer referred to as a reefer. When he sold the trailer, which he did in November 1951, he was thereafter without a unit which was licensed to operate with RC plates. While he conducted a small amount of business under his authority in the first 6 months of 1951, he conducted none in the last 6 months. He permitted his public liability and property damage insurance to expire on November 24, 1951.

While Schmunk, as already indicated, testified he held himself out and was available for business at all times until January 4, 1952, when he asked for and obtained a suspension of his certificate, we do not think the facts and circumstances support such a finding. We think, at least since July 1, 1951, he ceased operating under the certificate and that the action of the commission was not unreasonable or arbitrary.

Since a certificate of convenience and necessity is in the nature of a permit or license and is not property in the ordinary sense the revocation thereof left nothing to be acquired by Agee. See, Union Transfer Co. v. Bee Line Motor Freight, *supra;* Effenberger v. Marconnit, 135 Neb. 558, 283 N. W. 223. Consequently, whether the approval of Agee's application to acquire Schmunk's authority would result in a new or different service or operation as concerns territorial scope, as the commission decided it would, becomes immaterial.

In this respect section 75-240, R. S. Supp., 1953, provides: "* * * provided further, that if the proposed merger or consolidation of the certificates or permits will permit or result in a new or different service or operation as to territorial scope than that which is or may be rendered or engaged in by the respective parties, * * * the commission may approve such an application for merger or consolidation only upon the basis of proof of and a finding that the proposed merger or consolidation is or will be required by the present and future public convenience and necessity, in the same manner as provided in section 75-230."

However, we shall assume, for the sake of discussion only, that the acts of Schmunk only caused the certificate he held to become dormant and were not sufficient to justify its revocation for willful failure to comply with the provisions of sections 75-222 to 75-250, R. R. S. 1943, or with any lawful order, rule, or regulation of the commission promulgated thereunder.

Section 75-240, R. S. Supp., 1953, provides, in this respect: "* * * Provided, that if any of the certificates or permits proposed to be merged or consolidated are dormant, the commission may approve an application for consolidation or merger only upon proof of and a finding that such merger or consolidation is or will be required by the present and future public convenience and necessity, in the same manner as provided in section 75-230; * * *."

In this respect the commission found: "* * * it is also the opinion of the Commission that the evidence does not indicate that the present or future public convenience and necessity require the service proposed in the instant application."

"The grant or denial of a certificate of convenience and necessity by the Nebraska State Railway Commission requires the exercise of administrative and legislative functions and not of judicial powers." In re Application of Petersen & Petersen, Inc., 153 Neb. 517, 45 N. W. 2d 465. See, also, In re Application of Neylon, *supra*.

"This court said in In re Application of Canada, 154 Neb. 256, 47 N. W. 2d 507: 'A provision of the statute is that as a condition precedent to the issuance of a certificate, the commission shall find that the service to be authorized is or will be required by present or future public convenience and necessity.'" Edgar v. Wheeler Transport Service, Inc., 157 Neb. 1, 58 N. W. 2d 496.

"The burden is on an applicant for a certificate of convenience and necessity to show that the operation under the certificate is and will be required by the present

or future public convenience and necessity." Christensen v. Highway Motor Freight, *supra.*

"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 manner without endangering or impairing the operations of existing carriers contrary to public interest." Christensen v. Highway Motor Freight, *supra.*

"The question of the adequacy of service of existing carriers is implicit in the issue of whether or not convenience and necessity demand the service of an additional carrier in the field. Obviously the existence of an adequate and satisfactory service by motor carriers already in the area is complete negation of a public need and demand for added service by another carrier." In re Application of Canada, 154 Neb. 256, 47 N. W. 2d 507.

In this respect the commission found: "That the present and future public convenience and necessity do not require the service proposed in Application No. M-6617, Supplement No. 3."

It is difficult to discuss this issue from a factual basis for it is apparent Agee, the holder of irregular route authority, offered no evidence to obtain the authority held by Schmunk on this theory. In fact the only evidence introduced in this regard was by the objector, West Nebraska Express, Inc., a corporation, of Scottsbluff, Nebraska, a regular and irregular route operator in intrastate commerce under authority granted it in application No. M-8349, supplement No. 3. That evidence clearly establishes the fact that public convenience and necessity, neither present nor future, require the acquisition of this authority by Agee. In fact, the record shows the service now in the field is fully adequate to satisfactorily supply the public's needs, both present and future.

What has been said here is equally applicable in case

the acquisition, if authorized, would result, as the commission found it would, in a new or different service or operation, as to territorial scope, than that which is or may be rendered or engaged in by the respective parties, for in either event it would require proof of and a finding that the proposed merger or consolidation is or will be required by the present and future public convenience and necessity. The record will support no such finding. In fact, as already stated, it establishes the contrary.

In view of the foregoing, the commission's finding "That the proposed acquisition * * * would not be consistent with the public interest," is correct and fully supports its denial of the application. See § 75-240, R. S. Supp., 1953.

In view of the foregoing, the orders of the commission are affirmed.

AFFIRMED.

MARY BROWN, APPELLEE, V. EVERETT SLACK, DOING BUSINESS AS SLACK'S GROCERY, APPELLANT.
65 N. W. 2d 382

Filed July 23, 1954. No. 33540.

1. **Negligence.** In an action for negligence the burden is on the plaintiff to show that there was a negligent act or omission by the defendant and that it was the proximate cause of plaintiff's injury or a cause which proximately contributed to it.
2. ———. A person who enters a retail store for the purpose of making a purchase is an invited guest within the legal meaning of that term.
3. ———. The customer is a business visitor thereon, unless the owner exercises reasonable care to apprise him that the area of invitation is more narrowly restricted.
4. ———. The owner of a retail store is required to maintain it in a reasonably safe condition for customers but he is not an insurer against accidents.
5. ———. What constitutes due care of an inviter is always determined by the circumstances and conditions surrounding the transaction under consideration.

6. ———. In determining whether such care has been exercised, it is proper to consider the uses and purposes for which the property in question is primarily intended.
7. ———. As a general rule a customer trading in a self-service retail store has the right to rely upon the safety of passage along passageways used by customers and by doing so is not necessarily guilty of contributory negligence as a matter of law.

APPEAL from the district court for Lincoln County: JOHN H. KUNS, JUDGE. *Affirmed.*

Baskins & Baskins, for appellant.

Maupin & Dent, for appellee.

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

WENKE, J.

Mary Brown brought this action in the district court for Lincoln County against Everett Slack, doing business as Slack's Grocery. The purpose of the action is to recover for damages she allegedly suffered from injuries which she claims she received as a result of a fall while shopping in defendant's place of business, which fall, she alleges, was caused by certain negligent acts of defendant as in her petition set forth. Trial was had on November 9, 10, and 11, 1953. At the close of all the evidence, after the parties had rested, the defendant moved for a dismissal. This motion the court sustained, giving as its reason for doing so that the plaintiff was guilty of contributory negligence which, as a matter of law, was sufficient to defeat her right to recover. Thereafter plaintiff filed a motion for new trial. This motion the court sustained. It is from the court's ruling thereon that the defendant took this appeal.

Since the record must be considered in the light of the appellant's motion for dismissal, which motion has the same legal effect as a motion for a directed verdict, the following applies:

" 'A motion for a directed verdict must, for the pur-

pose of a decision thereon, be treated as an admission of the truth of all material and relevant evidence submitted on behalf of the party against whom the motion is directed, and said party is entitled to have every controverted fact resolved in his favor, and to have the benefit of every inference that can reasonably be deduced from the facts in evidence.' Moncrief v. Interstate Transit Lines, 129 Neb. 168, 261 N. W. 163." Rankin v. J. L. Brandeis & Sons, 135 Neb. 86, 280 N. W. 260. See, also, Bowerman v. Greenberg, 142 Neb. 721, 7 N. W. 2d 711.

Appellant, at all times herein material, owned and operated a grocery store at 408 South Dewey Street in North Platte, Nebraska. It fronts east on South Dewey Street. In the northeast corner of this store, facing south, was a refrigerator display case for the self service of customers. In one end thereof appellant displayed milk and in the other end vegetables. We shall herein refer to this refrigerated display case as the refrigerator.

On the evening of Wednesday, April 23, 1952, because milk had spilled therein, appellant decided to clean this refrigerator. To accomplish that purpose he moved it about 2 feet away from the north wall against which it was standing. The refrigerator is about 8 feet long, 3½ to 4 feet wide, and slopes from the back toward the front. The top consists of two sliding glass doors with one fitting over the other. This permits customers to shove either door back and serve themselves. The height of the front or back of the refrigerator is not shown.

Appellant, his wife Dorothy Helen, his son Wesley, about 15 years of age, and his son-in-law Walter Splinter, all assisted in the cleaning. Before starting the work a "Closed" sign, 10 by 12 inches in size, was hung on the outer door but the door was not locked. All the contents of the refrigerator were taken out, including four racks used for holding milk. These racks are made of rods and heavy wire, being 33¼ inches long, 12 inches wide, and 3½ inches high.

Sometime between 7 and 8 p. m. that evening, while the work of cleaning the refrigerator was in progress, appellee, who lived east across the street at 411 South Dewey, came to the store to get some bread and milk. She testified she did not see the "Closed" sign and, finding the door unlocked, went on into the store. Appellee had been a customer of this store for some 36 years and was familiar with the arrangements of the fixtures therein. What happened after she entered the store, as hereinafter set forth, is her version thereof which, under the situation here presented, she is entitled to have considered established for the purpose of our consideration of the questions involved.

Appellee, who was 74 years of age at the time of the accident, testifies that after she entered the store she took 2 or 3 steps and then turned to the north, or her right, to go to the refrigerator to get some milk; that as she did so appellant's wife was standing near the east end and close to the refrigerator; that Wesley, the son, was standing near a cookie display rack located just south and west of the refrigerator; that she walked toward the center of the refrigerator and approached within about a foot of it; that as she did so she looked for milk; that, not observing any milk, she turned her head toward appellant's wife and asked, "Where is the milk?"; that as she did so she started toward the west to look for milk, stepping off with her left foot; that her left foot caught in the side of a milk rack which had been left lying on the floor in the aisle right close to and in front of the refrigerator; that as a result of catching her foot therein she fell; that as she fell she caught her right hand and arm in the open top of the refrigerator and arrested her fall somewhat but not completely; that her left knee hit the tray and her body hit the floor; and that she received the injuries complained of as a result thereof. After her fall appellee completed her mission and then returned to her home across the street.

We shall not discuss the injuries received, or the extent thereof, as they are not material to a discussion of the questions herein involved.

"'In an action for negligence, the burden is on the plaintiff to show that there was a negligent act or omission by the defendant and that it was the proximate cause of plaintiff's injury or a cause which proximately contributed to it.' Miller v. Abel Construction Co., 140 Neb. 482, 300 N. W. 405." Bowerman v. Greenberg, *supra*.

"A person who enters a retail store for the purpose of making a purchase is an invited guest within the legal meaning of that term." Taylor v. J. M. McDonald Co., 156 Neb. 437, 56 N. W. 2d 610.

"The term 'invitee' is more fully defined as a person who goes on the premises of another in answer to the express or implied invitation of the owner or occupant on the business of the owner or occupant or for their mutual advantage, * * *." 65 C. J. S., Negligence, § 43, p. 508.

"The customer is a business visitor thereon, unless the owner exercises reasonable care to apprise him that the area of invitation is more narrowly restricted." Malolepszy v. Central Market, 143 Neb. 356, 9 N. W. 2d 474.

The evidence shows the appellant put a "Closed" sign on the door of his store before he started cleaning the refrigerator although appellee says she did not see it. However, he did not cause the door to be locked and when appellee entered she was dealt with as a customer and was sold what she asked to buy. Under these facts we think she was, without question, a customer and an invitee for that purpose.

In this regard we have often said: "The owner of such a store is required to maintain it in a reasonably safe condition for customers. A customer is an invitee and the owner must exercise reasonable care to keep the building reasonably safe for his use, but the owner is

not an insurer against accident." Taylor v. J. M. McDonald Co., *supra.* See, also, Glenn v. Grant Co., 129 Neb. 173, 260 N. W. 811; Rankin v. J. L. Brandeis & Sons, *supra*; Rogers v. Penney Co., 127 Neb. 885, 257 N. W. 252; Bowerman v. Greenberg, *supra;* 65 C. J. S., Negligence, § 45, p. 521.

What constitutes due care of an inviter is always determined by the circumstances and conditions surrounding the transaction under consideration. Glenn v. Grant Co., *supra;* Rankin v. J. L. Brandeis & Sons, *supra.*

As stated in Lamson & Sessions Bolt Co. v. McCarty, 234 Ala. 60, 173 So. 388: "This rule, * * * includes * * * the duty to use reasonable care to have the premises to which he is invited in a reasonably safe condition for such contemplated uses, and within the contemplated invitation." It then goes on to state: "In determining whether such care has been exercised, it is proper to consider the uses and purposes for which the property in question is primarily intended."

"The rule is that, where different minds may reasonably draw different conclusions from the evidence as to whether or not they establish negligence, the issues are for the jury." Taylor v. J. M. McDonald Co., *supra.*

Where the act or omission of a storekeeper, who violates a duty to a customer, creates the dangerous condition, knowledge is not a necessary element of the negligence. Rogers v. Penney Co., *supra.*

In the instant case the condition complained of was created by appellant. The evidence in the record, if believed by a jury, establishes the existence of a dangerous condition and would justify its determining that such condition was the proximate cause of appellee's injuries. We think it presents a question for a jury.

We come then to the duty of appellee, an invitee. Appellee testified that before she started to walk west, immediately preceding her fall, she did not look to see where she was walking although she also testified she

looked to see where she was stepping and did not see any rack on the floor.

The question here presented has been answered by this court by the following from Glenn v. Grant, *supra*: "* * * the customer, invitee, in proper pursuit of his business, passes along aisles, between counters, surrounded by merchandise displayed and designed by the proprietor to attract and hold his attention. Under such surroundings, reason suggests that the proprietor's invitee might not be required to exercise the same or an equal degree of care to avoid obstacles to safety as would be required of the pedestrian upon the open street. It would seem that, under conditions in a salesroom, such as above outlined, the customer might properly assume that the floor, then open to the general public, was reasonably safe to walk upon and over, and not in a dangerous condition. At least, in so treating it, the customer would not necessarily be guilty of contributory negligence as a matter of law. Robinson v. F. W. Woolworth Co., 80 Mont. 431." See, also, Surface v. Safeway Stores, 169 F. 2d 937.

As a general proposition a customer, while trading in a self-service retail store, has the right to rely upon the safety of passage along passageways used by customers. Such is the holding of this court and of courts generally. See cases cited in 162 A. L. R. commencing at page 960 and in 26 A. L. R. 2d at page 693. As stated in the latter citation at page 693: "The contention of the storekeeper that the customer was contributorily negligent as a matter of law has been overruled in the majority of the cases dealing with projections into aisles and passageways of stores, and upheld in a few cases."

As stated in Casciaro v. Great Atlantic & Pacific Tea Co., 238 Mo. App. 361, 183 S. W. 2d 833: "Therefore, customers in searching for merchandise would necessarily be required to pay close attention to the shelves where the merchandise was displayed, and would not ordinarily be expected to watch the floor and each step

taken in the aisles furnished by the defendant for the use of its customers."

Also in Ralph v. MacMarr Stores, 103 Mont. 421, 62 P. 2d 1285: "'* * * A customer in a store is not bound to use the same degree of care to avoid obstacles to safety as is a pedestrian on a sidewalk; he is entitled to assume the premises are reasonably safe; and the question of plaintiff's due care was one for the jury.' (Robinson v. F. W. Woolworth Co., 80 Mont. 431, 261 P. 253.)"

We think the record presents a case for a jury both as to the question of appellant's negligence and appellee's contributory negligence. In view thereof the trial court was correct in granting the appellee a new trial.

AFFIRMED.

THE STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, A CORPORATION, APPELLANT, V. LORAN DRAWBAUGH, APPELLEE.
65 N. W. 2d 542

Filed July 23, 1954. No. 33547.

1. **Replevin.** The burden is on the plaintiff in a replevin action to prove by a preponderance of the evidence that at the time of the commencement of the action he was the owner of the property sought to be replevied, that he was entitled to the immediate possession of it, and that the defendant wrongfully detained it.
2. ———. The law requires that a plaintiff in a replevin case must recover on the strength of his right in or to the property and not upon any weakness of the interest of the defendant therein.
3. ———. A plaintiff in replevin must prove the title as he pleads it.
4. ———. Any fact that transpires after the date of the institution of a replevin case is immaterial in the consideration and determination of the merits of the case.
5. **Automobiles.** The purpose of the act relating to transfers and titles to motor vehicles is to provide a means of identifying motor vehicles, to ascertain the owners thereof, to prevent theft of motor vehicles, and to prevent fraud.

6. ———. A certificate of title of a motor vehicle is generally conclusive evidence in this state of the ownership of the vehicle.
7. ———. The word "owner" means one who has the legal title or rightful title, whether the possessor or not.
8. Statutes. Statutes in pari materia should be construed together, and, if possible, effect be given to all of their provisions.

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

Kirkpatrick & Dougherty, for appellant.

Tomek & Tomek, for appellee.

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

MESSMORE, J.

This is an action in replevin brought by the State Farm Mutual Automobile Insurance Company, plaintiff, against Loran Drawbaugh, defendant, in the district court for Butler County to obtain possession of a 1950 Chevrolet automobile.

The plaintiff alleged in its petition and affidavit filed on February 27, 1952, that the plaintiff had been, since the 27th day of January 1951, the owner of one 1950 Chevrolet automobile, describing it, and was entitled to immediate possession thereof. By an amended petition filed on September 6, 1952, shortly before trial, the plaintiff alleged ownership of the automobile and that it was the holder of the legal title thereto and entitled to immediate possession thereof.

The defendant's answer admitted that plaintiff was engaged in the general writing of fire and theft automobile insurance and licensed to transact business in this state; denied generally all other allegations of the plaintiff's petition, and further alleged that the defendant was the sole owner of the automobile; and prayed that the plaintiff's petition be dismissed, that the automobile be returned to the defendant, or upon failure to return it, the defendant have judgment for the value of the pos-

session of the automobile in the sum of $1,500, and for costs. The plaintiff's reply was a general denial of the affirmative allegations of the defendant's answer.

At the close of the evidence both parties made motions for directed verdict and stipulated that the court should decide the issues presented. The trial court overruled the motion of the plaintiff and sustained the motion of the defendant, and found for the defendant because the plaintiff did not sustain the burden of proving that it had ownership or title to the automobile in question on the day it filed its action in replevin, and that the plaintiff should pay to the defendant the stipulated value of the car plus legal interest from the date the car was taken under the writ of replevin. The court entered judgment in favor of the defendant and against the plaintiff in the sum of $1,250, with interest from the 28th day of February 1952, until paid, and costs of the action.

The car involved was purchased by Clarence Anderson from the Central Chevrolet Company at Grand Island. He received a manufacturer's certificate. Certificate of title was issued by the county clerk of Hall County to Clarence Anderson upon a proper application which conformed to the requirements of section 60-114, R. R. S. 1943. He had the car from June 27, 1950, to January 12, 1951. He parked the car in front of his apartment in Lincoln on the evening of January 12, 1951, and left it there. In the morning it was missing. He made a claim against the plaintiff for the loss sustained either on January 13 or 14, 1951. The plaintiff paid the loss to Anderson on the 27th of January 1951, took his release, and at the same time took an assignment of the certificate of title as appears on the reverse side thereof. The car was found in the possession of the defendant at his farm home. He claimed to be the owner of the car, and had obtained a certificate of title under date of May 16, 1951, from the county clerk of Butler County. The title was from one Lloyde G. Deppe.

There is no question but that the automibile found in

the possession of the defendant was the automobile owned by Anderson upon which the plaintiff paid the loss and received the certificate of title and the assignment of the automobile from Anderson. Nor is there any question but that this automobile was stolen.

The car was taken under a writ of replevin on February 27, 1952, and was appraised in the amount of $1,250. After the car was replevied it was sold to a dealer in Fremont and a certificate of title given for it. The record shows an application for certificate of title made by the plaintiff to the county clerk of Lancaster County on March 24, 1952, or nearly 30 days from the time the plaintiff filed the replevin action.

There are certain fundamental rules which govern actions in replevin which we deem advisable to set out at this point.

The burden is on the plaintiff in a replevin action to prove by a preponderance of the evidence that at the time of the commencement of the action he was the owner of the property sought to be replevied, that he was entitled to the immediate possession of it, and that the defendant wrongfully detained it. See, Stickell v. Haggerty, 158 Neb. 34, 62 N. W. 2d 107; Fitzsimons v. Frey, 153 Neb. 124, 43 N. W. 2d 531.

The burden is on the plaintiff in replevin to establish facts necessary for him to recover, and these must be shown to have existed at the time the action was commenced. See, Alliance Loan & Investment Co. v. Morgan, 154 Neb. 745, 49 N. W. 2d 593; Bank of Keystone v. Kayton, 155 Neb. 79, 50 N. W. 2d 511.

Any fact that transpires after the date of the institution of a replevin case is immaterial in the consideration and determination of the merits of the case. Alliance Loan & Investment Co. v. Morgan, *supra.*

The law requires that a plaintiff in a replevin case must recover on the strength of his right in or to the property and not upon any weakness of the interest of the defendant therein. See, Alliance Loan & Investment Co. v.

Morgan, *supra;* Bank of Keystone v. Kayton, *supra.*

An allegation of general ownership in an action in replevin is not supported by proof of special ownership. See Robinson v. Kilpatrick-Koch Dry Goods Co., 50 Neb. 795, 70 N. W. 378.

A plaintiff in replevin must prove the title as he pleads it. See, Suckstorf v. Butterfield, 54 Neb. 757, 74 N. W. 1076. See, also, Wilson v. City Nat. Bank, 51 Neb. 87, 70 N. W. 501.

The principal questions to be determined are: (1) Is the evidence sufficient to sustain the plaintiff's allegation of ownership as pleaded in the plaintiff's petition when the replevin action was instituted; and (2) did title to the automobile pass to the plaintiff as assignee upon the delivery of the certificate of title so assigned?

This appeal involves the act relating to title and transfers of motor vehicles which act is found in Chapter 60, article 1, R. R. S. 1943, sections 60-101 to 60-117, and also certain sections with reference to motor vehicle registration, Chapter 60, article 3, R. R. S. 1943, sections 60-301 to 60-344. Prior to our present statute with reference to the title of motor vehicles initially enacted in 1939 (Laws 1939, c. 81, p. 328), title to automobiles could be transferred between living persons only by compliance with sections 60-310 and 60-325, Comp. St. 1929, relative to such transfer. See, In re Estate of Wroth, 125 Neb. 832, 252 N. W. 322; Mackechnie v. Lyders, 134 Neb. 682, 279 N. W. 328; In re Estate of Nielsen, 135 Neb. 110, 280 N. W. 246. The 1939 act did not change section 60-310 of the Comp. St. 1929. However, by the Laws of 1947 (Laws 1947, c. 204, § 6, p. 669), it was changed to its present language which is: "Upon the transfer of ownership of any motor vehicle, its registration shall expire, and the person in whose name such vehicle is registered shall be required to observe the provisions of sections 60-101 to 60-117." Section 60-310, Comp. St. 1929, is now section 60-314, R. R. S. 1943.

Section 60-326, R. R. S. 1943, formerly section 60-325, Comp. St. 1929, provides in part: "The treasurers of the various counties shall be agents of the Department of Roads and Irrigation in such counties for the purpose of registering motor vehicles and for the granting of licenses to the applicants, subject to the requirements of sections 60-301 to 60-343, and in accordance with such rules and regulations as shall be imposed by the department, * * *."

It is apparent by the changes made in sections 60-310 and 60-325, Comp. St. 1929, it was the intention of the Legislature to make certain in the act relating to titles and transfers of motor vehicles, the only means whereby transfers and titles to motor vehicles could be made.

The pertinent sections of the statutes involved in this appeal are as follows: Section 60-104, R. R. S. 1943, provides in part: "No person, * * * shall sell or otherwise dispose of a motor vehicle, * * * without delivering to the purchaser or transferee thereof a certificate of title with such assignment thereon as may be necessary to show title in the purchaser, * * *."

Section 60-105, R. R. S. 1943, provides in part: "No person, * * * acquiring a motor vehicle, * * * from the owner thereof, * * * shall acquire any right, title, claim, or interest in or to such motor vehicle, * * * until he shall have had issued to him a certificate of title to such motor vehicle, * * * or delivered to him a manufacturer's or importer's certificate for the same; nor shall any waiver or estoppel operate in favor of such person against a person having possession of such certificate of title or manufacturer's or importer's certificate for such motor vehicle, * * * for a valuable consideration. No court in any case at law or in equity shall recognize the right, title, claim or interest of any person in or to any motor vehicle, * * * sold or disposed of, or mortgaged or encumbered, unless evidenced by a certificate of title or manufacturer's or importer's certificate duly issued, in accordance with the provisions of this act."

This section of the statutes applies only to individuals such as purchasers.

Section 60-106, R. R. S. 1943, provides: "Application for a certificate of title shall be made upon a form prescribed by section 60-114, * * *. It shall be filed with the clerk of the county in which the applicant resides if the applicant is a resident of this state, or if not such a resident, in the county in which the transaction is consummated, and shall be accompanied by the fee prescribed in this act. If a certificate of title has previously been issued for such motor vehicle in this state, it shall be accompanied by such certificate of title duly assigned, unless otherwise provided for in this act. * * * The county clerk shall retain the evidence of title presented by the applicant and on which the certificate of title is issued. The county clerk shall 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 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. In the case of the sale of a motor vehicle by a dealer to a general purchaser or user, the certificate of title shall be obtained in the name of the purchaser by the dealer upon application signed by the purchaser, and in all other cases such certificates shall be obtained by the purchasers. In all cases of transfers of motor vehicles, the application for certificates of title shall be filed within three days after the delivery of such motor vehicles; Provided, licensed dealers need not apply for certificates of title for motor vehicles in stock or acquired for stock purposes, but upon transfer of the same they shall give the transferee a reassignment of the certificate of title on such motor vehicle, or an assignment of a manufacturer's or importer's certificate."

It will be observed by this section of the statutes that only licensed dealers need not apply for certificates of title for motor vehicles in stock or acquired for stock purposes. Section 60-320, R. R. S. 1943, also applies to dealers. See Bank of Keystone v. Kayton, *supra*. Other persons such as purchasers must acquire a certificate of title to an automobile under the law.

The purpose of the act relating to transfers and titles to motor vehicles is to provide a means of identifying motor vehicles, to ascertain the owners thereof, to prevent theft of motor vehicles, and to prevent fraud. See 60 C. J. S., Motor Vehicles, § 40, p. 160.

It is a fundamental rule of statutory construction that statutes that relate to the same matter or subject should be construed together for the purpose of learning and giving effect to the legislative intention.

Statutes in pari materia must be construed together, and the legislative intention apparent from the whole body of the enactment should be carried into effect. See Dawson County v. Clark, 58 Neb. 756, 79 N. W. 822.

Statutes in pari materia should be taken together and construed as if they were one enactment, and, if possible, effect given to every provision. See McQuiston v. Griffith, 128 Neb. 260, 258 N. W. 553.

In determining this appeal we consider and construe the above sections of the statute in pari materia.

We deem it advisable to cite Loyal's Auto Exchange, Inc. v. Munch, 153 Neb. 628, 45 N. W. 2d 913. This case determined the effect of the sections of the statute herein involved and the meaning thereof as the same relate to transfers and titles of motor vehicles. This was a replevin action. The plaintiff received an assignment of a certificate of title and a certificate of title had thereafter been issued to the plaintiff. The intervener had possession of the automobile as a purchaser, but never received the assignment of the certificate of title. We there held that the plaintiff, having obtained a certificate of title by complying with the statutory require-

ments, had title and ownership superior to any right of the intervener. In the instant case the plaintiff had, when the action was brought, only the assigned certificate of title from Anderson. We said in the above-cited case: "As stated in Crawford Finance Co. v. Derby, 63 Ohio App. 50, 25 N. E. 2d 306: 'On the other hand, from the whole scheme of the Certificate of Title Act, especially the sections quoted above, it is apparent that the Legislature intended to set up one and only one method by which liens on or titles to a motor vehicle could be acquired. To a purchaser, it makes a certificate of title issued by a clerk of courts (in this state county clerks) on a proper application, accompanied by the preceding certificate, either manufacturer's or owner's, the sine qua non to any right or title therein.' "

The court further said: "A purchaser who receives possession of an automobile without obtaining the certificate of title thereto, as required by our statute, acquires no title or ownership therein."

In Snyder v. Lincoln, 156 Neb. 190, 55 N. W. 2d 614, this court held: "A certificate of title to a motor vehicle, issued pursuant to section 60-105, R. R. S. 1943, provides the exclusive method of conveying title to a motor vehicle, * * *." The court further said: "A certificate of title is essential to convey the title to an automobile, but it is not conclusive of ownership. It is simply the exclusive method provided by statute for the transfer of title to a motor vehicle."

In Garbark v. Newman, 155 Neb. 188, 51 N. W. 2d 315, we held that a certificate of title of a motor vehicle is generally conclusive evidence in this state of the ownership of the vehicle. See, also, Loyal's Auto Exchange, Inc. v. Munch, *supra*.

In Loyal's Auto Exchange, Inc. v. Munch, *supra*, we quoted from Anderson v. Arnold-Strong Motor Co., 229 Mo. App. 1170, 88 S. W. 2d 419, as follows: " 'It is well settled that unless the certificate is assigned and passed to the buyer of the motor vehicle at the time of its de-

livery, the sale is absolutely void and no title to the vehicle passes.' [State ex rel. v. Cox, 306 Mo. 537, 268 S. W. 87.]"

Suffice it is to say that the above-cited case has no application here. The Missouri statute with reference to transfers and titles to motor vehicles is not like the Nebraska act governing such subject.

The plaintiff contends it was under no obligation to obtain a certificate of title or a new title until it obtained possession of the automobile in question, or after the action to replevin it was commenced, and that it is so provided in section 60-106, R. R. S. 1943. Apparently the plaintiff refers to the language in said section as follows: "In all cases of transfers of motor vehicles, the application for certificates of title shall be filed within three days after the delivery of such motor vehicles; * * *." We find nothing in section 60-106, R. R. S. 1943, that requires delivery of a motor vehicle to a purchaser before the purchaser can acquire title thereto as provided for by sections of the statute previously set out. See Loyal's Auto Exchange, Inc. v. Munch, *supra*. We find no language within said section to the effect that the plaintiff could not acquire a certificate of title to the motor vehicle in question until the same was delivered to it. The fact that the plaintiff instituted a replevin action claiming the right of possession of the automobile did not change any rights it had under the law to procure title to the automobile.

The plaintiff alleged in its petition that at the time the replevin action was instituted it was the owner of the 1950 Chevrolet automobile in question and entitled to the immediate possession thereof. The word "owner" means one who has the legal title or rightful title, whether the possessor or not. See Webster's New International Dictionary (2d ed.), Unabridged, p. 1745.

The word "own" means to have a good legal title; to hold as property; to have a legal or rightful title to; to

have; to possess. See Black's Law Dictionary (4th ed.), p. 1259.

Considering the sections of the statute above set out in pari materia, the authorities heretofore cited, and the record, we conclude that the plaintiff was not the owner of the automobile in question at the time it instituted this replevin action, and that the plaintiff failed in its burden of proof to establish its right of possession of the automobile in question. The trial court did not err as contended for by the plaintiff.

For the reasons given herein, the judgment of the district court is affirmed, the plaintiff to pay all costs.

AFFIRMED.

CHAPPELL, J., dissents.

SIMMONS, C. J.

I dissent.

A traded his car to B, a licensed dealer. A retained possession of the car. A made an incomplete assignment of his certificate and delivered it with a power of attorney to B to complete the assignment. Apparently it was never actually done. We held in Bank of Keystone v. Kayton, 155 Neb. 79, 50 N. W. 2d 511, that title passed from A to B.

Here C assigned his certificate and delivered it to D, together with the keys to the car. The car being stolen and its whereabouts unknown, it could not be delivered. The court holds that title did not pass from C to D. The only difference between the two cases is that B was a licensed dealer, and D was an insurer paying a contract loss. The court holds that these results are in accord with the "legislative intention." I disagree. As I see it, these two decisions can only be reconciled by reading into the provision of section 60-105, R. R. S. 1943, following the words "no person" the words "except a licensed dealer," so as to make it read "no person, except a licensed dealer * * * shall acquire * * *" etc. I know of no authority for such a judicial amendment of the law. The statutes negative such a construction.

Our present statutes with reference to the title of motor vehicles was initially enacted in 1939. Laws 1939, c. 81, p. 328. I agree with the court that prior to the enactment of our present statute, title to an automobile could be transferred between living persons only by compliance with sections 60-310 and 60-325, Comp. St., 1929, relative to such a transfer. In re Estate of Wroth, 125 Neb. 832, 252 N. W. 322; Mackechnie v. Lyders, 134 Neb. 682, 279 N. W. 328; In re Estate of Nielsen, 135 Neb. 110, 280 N. W. 246. Those decisions rested on the provision in section 60-325, Comp. St., 1929, that: "* * * upon the transfer of ownership of any motor vehicle the title shall not pass until the certificate of registration properly executed, shall be filed in the Department of Public Works as required in this article." The above decisions are consistent with the above-quoted provision.

A year after the filing of the opinion in In re Estate of Nielsen, *supra*, the Legislature in the 1939 act amended section 60-325, Comp. St., 1929, by striking out the above-quoted provision that title did not pass. Laws 1939, c. 81, § 15, p. 348. The court in Loyal's Auto Exchange, Inc. v. Munch, 153 Neb. 628, 45 N. W. 2d 913, quoted the provision of section 60-325, Comp. St., 1929, in its quote from In re Estate of Wroth, *supra*. The court did not point out there that the provision quoted had been repealed. The court now quotes section 60-326, R. R. S. 1943 (formerly section 60-325, Comp. St., 1929), and does not point out the repeal of the proviso. The court does not mention the amendment of section 60-325, Comp. St., 1929, although it does state that section 60-310, Comp. St., 1929, was not amended until 1947.

The Legislature not only repealed the provision prohibiting title passing but put no comparable provision in the 1939 act.

In Hurley v. Brotherhood of R. R. Trainmen, 147 Neb. 781, 25 N. W. 2d 29, we quoted, with approval, this rule from Campbell v. Youngson, 80 Neb. 322, 114 N. W. 415: "In considering an amendatory or substituted

statute, it is proper to consider the provisions of the law which was repealed in connection with the law which takes its place, in order to ascertain the legislative intent, *and all provisions of the original statute which are not carried forward into or repeated in the new law are annulled by the repealing statute.*" (Emphasis supplied.)

The court does not explain the effect of the amendment repealing the proviso that title shall not pass, but ignores it.

Not only did the Legislature strike out the above language of the old law, but it made certain positive provisions that show a contrary intent to that which the court now announces.

It provided in section 60-104, R. R. S. 1943, that: "No person, * * * shall sell * * * a motor vehicle, * * * without delivering to the purchaser * * * a certificate of title *with such assignment* thereon as may be necessary *to show title in the purchaser,* * * *." In effect, the court construes this language to mean "as may be necessary to show a right to get a title in the purchaser." The language of the statute clearly imports title passing with the delivery of the assigned certificate, for otherwise how can the assignment show "title in the purchaser"?

Again in section 60-106, R. R. S. 1943, with reference to securing a certificate of title where, as here, a certificate had previously been issued, it provided that the assigned certificate should be presented to the county clerk. The act then requires the county clerk to be satisfied that the "applicant is the *owner* of such motor vehicle." The court, in effect, now construes this to mean that the county clerk shall be satisfied that the "applicant is entitled to become the owner of such motor vehicle." The court now says the applicant is not the "owner" at that time. It follows the county clerk cannot be "satisfied that the applicant is the owner."

The Legislature further provided in section 60-106,

R. R. S. 1943: "In all cases of transfers of motor vehicles, the application for certificates of title shall be filed within three days after the delivery of such motor vehicles; Provided, licensed dealers need not apply for certificates of title for motor vehicles in stock or acquired for stock purposes, but upon transfer of the same they shall give the transferee a reassignment of the certificate of title on such motor vehicle, or an assignment of a manufacturer's or importer's certificate."

This obviously relates to a transfer of ownership. The court now holds that ownership does not pass until a new certificate of title is had by the transferee; and that the transferor remains the owner until a new certificate of title is secured by the transferee (or for him if the transferor is a dealer), notwithstanding the fact that the transferor has delivered possession and assigned certificate of title to the transferee. The ownership is made to depend on, not what the seller does, but what the purchaser does after purchase, full payment, and delivery to him of the motor vehicle. Suppose the transferee does not apply within the three-day period, or never does apply for a new certificate of title. Under the court's holding, ownership remains in the transferor. Such the court holds to be the Legislature's intention. I would hold that the new certificate is evidence of title which the buyer had previously acquired by virtue of the assignment and transfer to him of the original certificate. The failure to apply for the new certificate within the period does not divest the rights of the purchaser. See, Crawford v. General Exchange Ins. Corporation (Mo. App.), 119 S. W. 2d 458; Wilkison v. Grugett, 223 Mo. App. 889, 20 S. W. 2d 936.

The court says that statutes in pari materia must be construed together. I agree. What statutes do the court "construe together"? Apparently reference is to the provision that licensed dealers need not apply for certificates of title for motor vehicles in stock or acquired for stock purposes (section 60-106, R. R. S. 1943); to the

provisions of section 60-320, R. R. S. 1943, to the effect that dealers "in lieu" of registering motor vehicles may, under certain circumstances, operate them under dealers' licenses; and to the provision in section 60-106, R. R. S. 1943, that: "In the case of the sale of a motor vehicle by a dealer to a general purchaser or user, the certificate of title shall be obtained in the name of the purchaser by the dealer upon application signed by the purchaser, and in all other cases such certificates shall be obtained by the purchasers." In the instant case the "in all other cases" provision is applicable.

I submit that the fact that *when selling,* the dealer must get the certificate for his buyer and, in the other instance, the buyer must get it himself "within three days" does not show a legislative intent that title passes at once in the first instance and does not pass in the second instance until a new certificate is issued in lieu of the assigned certificate. Had the Legislature so intended, it could have said so, as it did in the earlier act, which was repealed when this act was passed, as shown above. The court in effect now puts the repealed provision back into the act.

I am mindful of the provision of section 60-105, R. R. S. 1943, which provides: "No person, * * * acquiring a motor vehicle, * * * from the owner thereof, whether such owner be a manufacturer, importer, dealer or otherwise, shall acquire any right, title, claim, or interest in or to such motor vehicle, * * * until he shall have had issued to him a certificate of title to such motor vehicle, * * * or delivered to him a manufacturer's or importer's certificate for the same; nor shall any waiver or estoppel operate in favor of such person against a person having possession of such certificate of title or manufacturer's or importer's certificate for such motor vehicle, * * * for a valuable consideration. No court in any case at law or in equity shall recognize the right, title, claim or interest of any person in or to any motor vehicle, * * * sold or disposed of, or mortgaged or en-

cumbered, unless evidenced by a certificate of title or manufacturer's or importer's certificate duly issued, in accordance with the provisions of this act."

This section taken out of context and standing alone presents difficulties. When put into chronological context, and analyzed in relation to the legislative plan as evidenced by the whole act, the difficulties disappear. For the purpose of this analysis, I go to the original act, Laws 1939, c. 81, p. 328.

The act was a comprehensive one, to apply to motor vehicles required to be registered (with exceptions not important here). Section 1, page 329. By its title, it is an act relating to the ownership of motor vehicles "providing manner of *originating* title to motor vehicles by manufacturers and importers" and "prohibiting sale or transfer of motor vehicles *unless accompanied by assignment of certificate of title.*" (Emphasis supplied.) There, in the title to the act, is a legislative construction providing that on a sale or transfer, it be "accompanied by assignment of certificate of title." Nothing is said about a sale being prohibited unless and until a new certificate is issued to the purchaser.

Section 2, page 329 (now as amended section 60-103, R. R. S. 1943) required that "a new motor vehicle" delivered to a dealer for purposes of display and resale be accompanied by a manufacturer's or importer's certificate "with such assignments thereon as may be necessary to show *title in the purchaser.*" Section 3, page 329 (now as amended section 60-104, R. R. S. 1943), excepting transactions covered by section 2, provided that "no person" should sell or otherwise dispose of a motor vehicle without delivering a certificate of title with such assignments as "may be necessary to *show title in the purchaser.*" It further provided that no person should purchase, acquire, or "bring into this state" a motor vehicle "except for temporary use" unless he obtains a certificate of title as provided in the act.

The Legislature clearly provided that new motor ve-

hicles in the hands of a dealer must be accompanied by a manufacturer's certificate and other motor vehicles must be accompanied by a certificate of title issued in Nebraska. This also was necessary to make the vehicle eligible for "initial registration" in this state. See section 3, page 329 (now section 60-104, R. R. S. 1943). The Legislature required that Nebraska cars have Nebraska certificates of title. To enforce that intent and purpose, the Legislature enacted section 4, page 329 (now as amended section 60-105, R. R. S. 1943).

Consistent with that purpose, it was provided in section 5, page 330 (now section 60-106, R. R. S. 1943) that applications for a certificate of title should be accompanied (1) by a certificate of title, duly assigned, if one had previously been issued in this state; or (2) if no certificate of title had previously been issued in this state, then by a manufacturer's or importer's certificate; or (3) by a bill of sale or sworn statement of ownership; or (4) by a certificate of title or other evidence of ownership required by the state from which the motor vehicle was brought into this state. Upon any one of these four showings, the county clerk is required to find *"ownership" in the applicant.* In the same section, the Legislature further provided that a dealer selling to a general purchaser or user should obtain the certificate of title in the name of the purchaser. Why? Obviously because as to a new motor vehicle title prior thereto was not evidenced by a certificate of title but by a manufacturer's or importer's certificate. As to all cars sold by a dealer, it prevents fraud on the part of licensed dealers. In all cases the application for certificate of title was to be filed "within three days after the delivery." And by the provision of section 3, page 329 (now section 60-104, R. R. S. 1943) the purchaser (except from a dealer) is required to have had delivered to him a certificate of title with "such assignment thereon as may be necessary to show title in the purchaser." Obviously the seller (other than a dealer) of a car which

does not have a certificate of title issued in this state must first secure one in his name in order to make a sale in compliance with the act.

I would construe the provisions of section 60-105, R. R. S. 1943, to be applicable to the "initial" and originating title in Nebraska. So construed, it is consistent with other provisions of the act. As construed by the court, it puts provisions of the act in conflict and creates repugnancy.

Section 60-105, R. R. S. 1943, was the law when the court decided Bank of Keystone v. Kayton, *supra*. The court does not recede from the holding in that case that title passed, although no new certificate of title had been secured.

That section was also the law when the court decided Loyal's Auto Exchange, Inc. v. Munch, *supra*. In that case plaintiff had received an assignment of a certificate of title and a certificate of title had thereafter been issued to plaintiff. The intervener had possession without a certificate. The question here presented was not the issue in the Loyal's Auto Exchange case. However, there the court approved the following from Anderson v. Arnold-Strong Motor Co., 229 Mo. App. 1170, 88 S. W. 2d 419: "It is well settled that unless the certificate is assigned and passed to the buyer of the motor vehicle at the time of its delivery, the sale is absolutely void and no title to the vehicle passes."

Again from the decision in In re Estate of Wroth, *supra*, the court quoted as "particularly applicable" the following: "No title passes unless certificate is assigned buyer at time of delivering motor vehicle * * *." While these rules may come from other states where the legislation is not like ours, as the court now points out, the fact remains that this court quoted those rules in construing our statute.

The court refers to our decision in Snyder v. Lincoln, 156 Neb. 190, 55 N. W. 2d 614.

The court quotes: "A certificate of title is essential

to convey the title of an automobile, *but it is not conclusive of ownership.*" (Emphasis supplied.)

Not quoted by the court are these two sentences which precede the above quote. Referring to the Loyal's Auto Exchange case we said: "We did not say that the possession of a certificate of title was an absolute muniment of title. A thief with a certificate of title to a stolen automobile does not divest the owner of his right to take it wherever he can find it."

This court is committed to the doctrine that the Uniform Acts are to be construed so as to make uniform the laws of those states which have enacted similar legislation. Bainter v. Appel, 124 Neb. 40, 245 N. W. 16; Behrens v. State, 140 Neb. 671, 1 N. W. 2d 289; Krepcik v. Interstate Transit Lines, 154 Neb. 671, 48 N. W. 2d 839.

I do not contend that our act has been classified as a Uniform Act, yet the reason for the rule applies here. At least in Florida (1 Florida Statutes. 1953. § 319.22(1), p. 1198), Idaho (9 Idaho Code, § 49-404, p. 51), and Ohio (4A Page's Ohio General Code, § 6290-4, p. 590), legislation similar to our section 60-105, R. R. S. 1943, has been enacted. For all practical purposes our statutes, as far as we are concerned here, are exactly like the Code of Ohio which was passed by that state in 1937. See Laws of Ohio 1937-38, p. 373. Our act was obviously copied from the Ohio act, changed only in detail as to operation.

In testing the constitutionality of a part of this provision in the Loyal's Auto Exchange case, the court relied heavily upon decisions of the Ohio courts. In spite of the fact that the Supreme Court of Ohio has spoken on the matter, since our opinion in the Loyal's Auto Exchange case, the court again relies here on a decision of an intermediate appeals court of Ohio.

In Garlick v. McFarland, 159 Ohio St. 539, 113 N. E. 2d 92, decided June 3, 1953, the court quotes their stat-

utes at length. To copy the quote would be in effect to copy our statutes.

The court there reviewed their previous decisions. They will not be referred to or discussed here, as they are available in the cited case.

After analyzing its statutes and decisions, the Supreme Court of Ohio announced the rule: "* * * where endorsement and delivery of a certificate of title for an automobile are made, title passes even though there is a failure on the part of the recipient to secure the issuance of a new certificate in his name." See, also, Johnson v. Bennion, 70 Idaho 33, 211 P. 2d 148.

The above quote is this case. If this transaction had occurred in Ohio, plaintiff would be held to be the owner of the automobile involved here. Occurring in Nebraska under exactly the same circumstances and same statutes, plaintiff is held not to be the owner of the automobile. This is a commercial transaction. It has none of the elements of a local question where there should be a local policy. The court contributes not to uniformity, but to confusion. Consistent with my analysis of the statute; our decision in Bank of Keystone v. Kayton, *supra;* and in the interest of uniform construction of laws dealing with commercial problems, I would follow the Supreme Court of Ohio and hold that title passed here to the plaintiff and that its proof sustained its allegation of ownership. I would reverse the judgment and remand the cause with directions to enter judgment for the plaintiff.

I am authorized to say that YEAGER, J., joins in this dissent.

CHRISTINA A. BORN, APPELLANT, V. THE ESTATE OF ADOLPH MATZNER, DECEASED, APPELLEE.

65 N. W. 2d 593

Filed July 23, 1954. No. 33567.

1. **Automobiles.** A guest by the terms of section 39-740, R. R. S. 1943, is a person who accepts a ride in a motor vehicle without compensation therefor.
2. ———. The words of the statute "without giving compensation therefor" do not limit compensation to persons paying for transportation in cash or its equivalent and do not require that the compensation be exclusively from the passenger to the driver.
3. ———. A person riding in a motor vehicle is a guest if his carriage confers only a benefit upon himself and no benefit upon the owner or operator except such as is incidental to hospitality, social relations, companionship, or the like, as a mere gratuity. However, if his carriage contributes such tangible and substantial benefits as to promote the mutual benefits of both the passenger and owner or operator, or is primarily for the attainment of some tangible and substantial objective or business purpose of the owner or operator, he is not a guest.
4. ———. A benefit to the owner or operator of a motor vehicle sufficient to remove an occupant riding in it from the provisions of the guest statute must be a tangible and substantial one and a motivating influence for his furnishing the transportation.
5. ———. The owner of an automobile, pastor of a church, and the other occupants thereof, members of an organization authorized by the church known as the Women's Guild, made a trip in the automobile of the owner to attend a regional meeting of the guild without payment of money or its equivalent to the owner. He was not obligated to transport the occupants or attend the meeting and had no part or voice in its proceedings but the occupants had a duty to attend it. The relationship between the occupants and the owner of the car was one of a social nature and any benefit derived by the owner was not compensation within the guest statute.
6. ———. Appellant and the owner of an automobile traveled to a regional meeting of the Women's Guild in the motor vehicle of the owner under the circumstances stated in the opinion. The owner did not furnish the transportation in consideration of anything to be performed or furnished by appellant to him.

Any mutual benefit resulting or benefit derived from the trip by the owner was not of such a nature as to constitute appellant a passenger rather than a guest within the meaning of the guest statute.

7. ———. The transportation furnished by the owner of a motor vehicle under the circumstances stated in the opinion did not promote or benefit any mutual interest or business of the owner and appellant because the presence of the owner at the meeting was not necessary for or contributory to appellant deriving full benefit from the meeting.
8. **Automobiles: Negligence.** The violation of traffic regulations concerning stop signs, speed, the manner of operating a motor vehicle on the highway, and the like is not negligence as a matter of law of any kind or degree, but it is a fact to be considered with the other evidence in the case in deciding an issue of negligence.
9. **Highways.** A traveler may ordinarily occupy and use any part of a public highway he desires if it is not needed by another whose right thereto is superior to that of the traveler.
10. **Automobiles: Negligence.** A guest to recover damages from his host for injury received by the guest while riding in a motor vehicle operated by the host must prove by the greater weight of the evidence in the case the gross negligence of the host relied upon by the guest and that it was the proximate cause of the accident and injury.
11. **Negligence.** Gross negligence means great and excessive negligence; that is, negligence in a very high degree. It indicates the absence of slight care in the performance of a duty.

APPEAL from the district court for Cass County: JOHN M. DIERKS, JUDGE. *Affirmed.*

Hotz & Hotz, Robert M. Kane, and *J. Howard Davis,* for appellant.

Joseph H. McGroarty and *Begley & Peck,* for appellee.

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

BOSLAUGH, J.

This litigation originated with the filing by appellant of a claim in proceedings for the administration of the estate of Adolph Matzner, deceased, pending in the county court of Cass County. The basis of it was damages ap-

pellant claimed she sustained because of injuries inflicted upon her by gross negligence of the deceased in the operation of a motor vehicle owned and driven by him in which appellant was a passenger. The administrator of the estate contested the validity of it. An appeal was taken from the disposition made of the claim in that court to the district court. The motion of the representative of the estate of the deceased for an instructed verdict in favor of the estate when appellant had completed the proof made as her case-in-chief was sustained by the district court. The claim was disallowed and the proceedings dismissed. The motion of appellant for a new trial was denied. This appeal attacks the validity of the judgment and the denial of the application for a new trial.

The accident in which appellant was injured occurred October 8, 1952. She was an occupant of a Buick automobile owned and operated by Adolph Matzner, deceased, hereafter referred to as the deceased. It is necessary to the decision of the case to determine whether appellant had at the time of the accident the status of guest by invitation and not for hire or whether she was at that time being transported as a passenger "giving compensation therefor." § 39-740, R. R. S. 1943. The proof from which this must be concluded is without conflict. It was produced by appellant and she is entitled to have it and any deducible inferences therefrom considered most favorably to her. Paxton v. Nichols, 157 Neb. 152, 59 N. W. 2d 184.

The Women's Guild of St. Paul's Evangelical and Reformed Church of Plattsmouth is an organization authorized by the church. It is known as a local women's guild and is designated herein as the guild. The general or synodical women's guild has its headquarters at Dayton, Ohio. Membership in the church qualifies any woman for membership in the guild, but membership in the church is not required to make a woman eligible to become a member of the guild without regard to her

religious faith. It elects its officers, collects monthly dues from its members, selects its projects, and controls and disposes of funds received or earned by or contributed to it. It has substantial self-determination of its affairs and activities. In any event it is definitely distinguishable from the church. The objectives of the guild are not limited to the advancement of the religious endeavors of the church. It participates in local, civic, and community projects. Its endeavors are religious, charitable, and civic. They concern substantially all phases of these. The beneficiaries of these are not only the church or its congregation but persons everywhere regardless of belief or race. The social service project of the guild is charitable in character as local, national, and world-wide in its intended scope. Appellant, a member of the church and the guild, was interested in this area of the regional meeting, hereafter referred to, and it was for an exploration of this field of guild work that was the occasion of her transportation by the deceased at the time of the accident.

The deceased had been pastor of the St. Paul's Evangelical and Reformed Church of Plattsmouth for about 2 years before the events important to this case. He had during that time on various occasions used his automobile to transport women of his congregation to church meetings, church picnics, meetings of the guild, and to other activities. He received no pay for this.

The president of the guild of the Plattsmouth church was given notice of a regional meeting at Goehner on October 8, 1952. Its purpose was to familiarize department heads of the guild with activities sponsored by the general organization. Social service was to be discussed and studied at the regional meeting. The guild project in this department concerned the packaging and forwarding of clothes, food, and necessaries to less fortunate persons in all parts of the world. The head of each of the departments of the guild was expected to attend the regional meeting. They were unable to do so. The

president of the Plattsmouth guild secured four members to represent it. Appellant was authorized to act as the head of the social service department. Each of the other three women secured was asked to attend on behalf of a separate department. The deceased volunteered to use his automobile and take the four ladies referred to above to the regional meeting. The final arrangement was made with him by the president of the guild. She told the four women of this and when and from where in Plattsmouth they were to commence the trip. The women approved and accepted the arrangements for their conveyance to and from the meeting as made by the president. The deceased and the four women left Plattsmouth about 7:30 a. m. and proceeded to near the east part of Lincoln before the accident took place which is involved in this litigation. The deceased was not to be paid any amount for the trip. His offer to take the women to and return them from the meeting was unconditional.

The deceased was not a member of the guild and was not obligated to attend the meeting at Goehner or to furnish conveyance for anyone incidental to the meeting. He did attend some regional meetings of the guild. He did not attend all of them nor did the pastors of other churches of this denomination within the area of the region. The regional meeting was for the area of western Iowa and eastern Nebraska. There were 15 or more churches therein but not to exceed 6 pastors from the region attended. One was there to perform a special assignment. It is suggested, but not definitely shown, that some of the other pastors were there to deliver lectures to members of the guild. The evidence does not show nor does it make possible an inference that the deceased had been assigned or that he intended to have any part in the proceedings or activities of the regional meeting except as a gratuitous listener and observer. A conclusion that the deceased was obligated or that it was his duty as pastor of the church to trans-

port the members of the guild to and from the regional meeting is not justified. The record conduces to show that he donated his car and his operation of it as a gratuity through kindness and a desire to be helpful when other expected means of transportation for the women to and from the meeting failed. The record is barren of any basis for a finding that the deceased expected to receive or that he could have received from appellant or anyone else tangible and substantial benefit because of the conveyance of appellant on this occasion.

The relevant portion of the statute says that a guest is a person who accepts a ride in a motor vehicle without compensation therefor. § 39-740, R. R. S. 1943. Van Auker v. Steckley's Hybrid Seed Corn Co., 143 Neb. 24, 8 N. W. 2d 451, interpreted this as follows: "The phrase 'without giving compensation therefor' * * * indicates an intention not to limit compensation to persons specifically paying for transportation in cash or equivalent, or to require that it pass exclusively from the passenger to the driver. * * * A person riding in a motor vehicle is a guest if his carriage confers only a benefit upon himself and no benefit upon the owner or operator except such as is incidental to hospitality, social relations, companionship, or the like, as a mere gratuity. However, if his carriage contributes such tangible and substantial benefits as to promote the mutual interests of both the passenger and the owner or operator, or is primarily for the attainment of some tangible and substantial objective or business purpose of the owner or operator, he is not a guest." See, also, Paxton v. Nichols, *supra*.

The repetitious assertions of appellant that the status of deceased as pastor of the church made it obligatory for him to attend the regional meeting of the guild and to transport the members of the guild who were riders in his car at the time of the accident and the claim of appellant that she was making the trip solely for the benefit of the minister of the church may not be ac-

cepted. The record compels a contrary conclusion. It is shown without dispute that the four women were riding in the car of the deceased only because of the incidence of intervention of a fact that gave the son of the president of the guild paramount claim to her companionship, counsel, and assistance at Omaha at the time of the regional meeting, and except for that they would have by an arrangement previously and definitely made been conveyed to and from the regional meeting by the president of the guild in her automobile. Appellant was a long-time member of the church. She was for many years a member and president of the Ladies' Auxiliary, an organization authorized by the church and a predecessor of the guild. She became a member of it when it was formed about 14 years before the meeting at Goehner. She had been for many years active in its work. She accepted her selection as substitute for the chairman of the social service department. She was on the journey to Goehner for the obvious purpose of doing and receiving what the chairman of that department would have done and received if she had not been compelled to remain at her home because of her obligation to her small child. The motive that put appellant on the journey to the regional meeting was to obtain instruction, information, advice, and inspiration concerning the guild, its activities, and affairs. She was not a member of or active in the guild for the benefit of the pastor of the church any more than she attended church services on Sunday solely for the benefit of the preacher. She was making the trip because she wanted to be kind and helpful to others and thereby help herself. It was performance of a part of the pattern of life she had adopted. The record contains not a suggestion that she was to make the trip to compensate the deceased for her transportation. The purpose to be served by her attending the meeting and any compensation for her conveyance to and from it were wholly detached and foreign subjects. The latter was

neither proposed to nor remotely considered by appellant. She testified that she was on the trip because she had accepted the obligation to be there in place of the chairman of the department. Any benefit the deceased expected to derive from the trip and the carriage of appellant was remote, vague, and speculative. It was incidental to hospitality, social relations, and the like. It did not result from a definite relationship, was not a definite tangible or substantial benefit to him, and it was not the motivating influence for his furnishing the transportation.

Henry v. Henson (Tex. Civ. App.), 174 S. W. 2d 270, concerned an accident while plaintiff and defendant were traveling to a church society convention in the automobile of defendant resulting in injuries to plaintiff and there was no showing that defendant furnished the transportation in consideration of anything to be performed by the plaintiff. The court said: "Mrs. Henry and Mrs. Henson, the record shows, were friends and coworkers in the Women's Missionary Society of the Methodist Church. It is undisputed that each gave a great deal of her time and talents to that work. They were engaged in advancing missionary work, which is a necessary function of that great religious institution, the Methodist Church. These ladies were devoting much of their time to the spiritual uplift of their community through the channel of their society. Their work was for the church, and the benefit accruing to them was the advancement of the Christian religion through their joint efforts as delegates to this conference and the Christian education there received by each of them. But we are unable to say from the facts in this record that such mutual benefit accruing to each of them, or that the benefit to be derived from the trip by Mrs. Henry, the transporter, was of such nature 'as to change the status of plaintiff (appellee) from that of a guest.'"

In Burt v. Lochausen, 151 Tex. 289, 249 S. W. 2d

194, it is said: "We agree with the unanimous opinion of the Court of Civil Appeals, that Burt was the guest of Lochausen on the occasion in question, and was not a mere passenger in Lochausen's car, as is expressed by the court's majority opinion, as follows [244 S. W. 2d 917]: 'The rule established by the authorities everywhere seems to be, to remove a case from the provisions of such statutes a definite relationship must be established and a definite tangible benefit to the operator shown to have been the motivating influence for furnishing the transportation. * * *' "

In Klatka v. Barker, 124 Colo. 588, 239 P. 2d 607, the court said: "In an action for damages resulting from the death of plaintiffs' son in an automobile accident, it is held that, 'The benefit conferred on the owner or operator of the car must be sufficiently real, tangible and substantial to serve as an inducing cause for the transportation.' * * *"

The declaration of the meaning of the California vehicle code which defines a guest as a party who accepts a ride in a motor vehicle "without giving compensation for such ride" by the courts of that state was mentioned approvingly by this court in Van Auker v. Steckley's Hybrid Seed Corn Co., *supra,* and reference was made to Whitechat v. Guyette, 19 Cal. 2d 428, 122 P. 2d 47, in which it is said: "Where the owner of an automobile and the other occupants thereof are members of the Young Men's Institute making a trip to attend a meeting of the organization and the occupants other than the owner were officers intending to attend a business meeting, the relationship between such occupants and the car owner, aside from any promised money payment, is merely one of a social nature, and the benefit received by the owner is not compensation within the meaning of Veh. Code, § 403."

See, also, Brandis v. Goldanski, 117 Cal. App. 2d 42, 255 P. 2d 36; Druzanich v. Criley, 19 Cal. 2d 439, 122 P. 2d 53; Scotvold v. Scotvold, 68 S. D. 53, 298 N. W.

266; Master v. Horowitz, 237 App. Div. 237, 261 N. Y. S. 722, affirmed in 262 N. Y. 609, 188 N. E. 86; Rauch v. Stecklein, 142 Or. 286, 20 P. 2d 387; 4 Blashfield, Cyclopedia of Automobile Law and Practice (Perm. ed.), § 2292, p. 317; 60 C. J. S., Motor Vehicles, § 399, p. 1014.

A benefit removing an occupant riding in the motor vehicle of another from the provisions of the guest statute must be a tangible and substantial one to the owner and a motivating influence for his furnishing the transportation. A remote, vague, incidental, or speculative benefit is not sufficient to have that effect. This is the basis of the rule that the sharing of the cost of operating the car or other expenses of the trip, when the acceptance of the occupant for conveyance is not motivated by or conditioned on such contribution, is incidental, an exchange of social amenities, and does not transform the occupant into a passenger for compensation. See, Brody v. Harris, 308 Mich. 234, 13 N. W. 2d 273, 155 A. L. R. 573; McCann v. Hoffman, 9 Cal. 2d 279, 70 P. 2d 909; Brandis v. Goldanski, *supra;* Barnard v. Heather, 135 Neb. 513, 282 N. W. 534; Master v. Horowitz, *supra;* Riggs v. Roberts, 74 Idaho 473, 264 P. 2d 698; Annotation, 155 A. L. R. 575; 60 C. J. S., Motor Vehicles, § 399, p. 1015.

The transportation furnished by deceased did not promote or benefit any mutual interest or business of the host and the guest. The deceased and the guild members each had a different purpose for attending the regional meeting. The former gratuitously transported the latter motivated by a desire to be kind and helpful and to encourage the work of the guild. The presence of the deceased at the meeting was not necessary for or contributory to appellant deriving full benefit from it. The deceased had no part or voice in the program. There was no mutual interest of deceased and appellant that could have been served by their joint presence at the meeting. Druzanich v. Criley, *supra,* was an action by the occupant against the operator for damages for

personal injuries occasioned by an automobile accident. The parties were delegates to a conference of a labor union. The owner of the car was operating it as the parties traveled to the place of the conference. There was an accident and plaintiff was injured. He claimed he was a passenger and not a guest because the parties were engaged in a business venture for their mutual advantage and traveling in contemplation of their mutual business. The court rejected this claim by this language: "It is true that both parties desired or, as delegates, were required to attend the conference. It is also true that each would be benefited by individual attendance. However, the attendance of one was not necessary for the enjoyment of the benefits of attendance by the other. This being so, it becomes immaterial whether the conference was of a business or social nature. * * * In the instant case either the appellant or respondent Dorothy Criley could have enjoyed the benefits of the conference without the presence of the other. The fact that the parties were both interested in the general objective of the trip, viz., the attending of the conference, is not the controlling factor."

It is emphasized by appellant that she did not request conveyance by deceased; that she was not invited to ride in his car; and that she made no arrangement for the trip to Goehner with the deceased. This is not significant in the determination of the issue as to the status of appellant at the time of the accident. She accepted the arrangement made for her transportation and deceased concurred therein. Fairman v. Cook, 142 Neb. 893, 8 N. W. 2d 315. Appellant was at the time of the accident a guest in the motor vehicle of the deceased without compensation.

It is necessary to decide if the action of the trial court in determining as a matter of law that the evidence on the issue of gross negligence was insufficient to support a finding of the jury in favor of appellant was justified. The proof on this issue is without substantial conflict.

The deceased was the owner of a Buick automobile. He operated it at all times important to this litigation. He accepted appellant and three other women, members of the guild, as occupants of his car for a trip to Goehner to attend the regional meeting. They left Plattsmouth about 7:30 a. m., proceeded to Union on U. S. Highway No. 75, and west on U. S. Highway No. 34 toward Lincoln. Appellant was seated on the left side of the rear seat directly behind the driver. Emma Egenberger, one of the other women, occupied the front seat with the deceased and sat to his right. It was a clear, dry, pleasant morning. U. S. Highway No. 34 had a hard surface, was in good condition, dry, and clear. The paved portion of it as it approached and at the place of the accident was 30 feet wide. That portion of the highway was substantially level and without obstruction to view in any direction by a traveler thereon. The highway as it proceeded westward toward Lincoln intersected Cotner Boulevard. The paved portion of the boulevard was 30 feet wide. There was a yellow and black highway stop sign near the north edge of the pavement on U. S. Highway No. 34, 83 feet east of the center of Cotner Boulevard. U. S. Highway No. 34 continued west on O Street from the west side of Cotner Boulevard. The pavement on O Street was 30 feet from curb to curb. There was a power-line pole not more than a foot south of the south curb of O Street and 82.5 feet west of the center line of Cotner Boulevard. The intersection of U. S. Highway No. 34 and Cotner Boulevard was enlarged because of curves in the outer lines of the pavement at the intersection, and the entire intersection was paved.

There were two automobiles near each other traveling west near the north edge of the pavement on U. S. Highway No. 34 near the stop sign and as the car of the deceased approached them from the rear their speed was decreased and they came to a stop with an intervening space between them of about 3 feet. The front of the first of these was about in line with the stop sign.

Deceased turned his car to the left and was in the act of passing the two cars when they came to a stop. He passed them, entered, and crossed the intersection. The left front corner of his car went over the curb and struck the power-line pole described above. The record does not disclose any reason for the car of the deceased getting off the pavement to the south the short distance required for the left front corner to contact the pole. There was no traffic of any kind in or within sight of the intersection as the deceased was near or was passing through it except the two cars that were stopped east of the intersection. The speed of the car of the deceased as it came to and entered the intersection was estimated at from 50 to 55 miles an hour. There is no proof that deceased had been over the highway or intersection at any time previous or that he knew or saw the stop sign. Emma Egenberger, who sat to the right of the deceased in the front seat of the car, was asked if she saw the stop sign as she came down the road and her answer was "Well, we were behind the cars; we were behind those two cars." She said she knew the road and she knew that there was a stop sign east of the intersection to be observed by west-bound traffic. She was alert to how the deceased was operating the car but she made no effort to advise him of the stop sign until his car was three car lengths east of the east curb line of Cotner Boulevard. It was then a considerable distance west of the stop sign. She claims that at that place she said not in a scream or a loud voice " 'There's a stopsign coming up.' I said it very nicely." The car was then in the intersection and she said " 'Stop.' " This was all in a split second and in another split second the accident happened. She claims that about 15 miles east of the place of the accident she said to the deceased " 'We don't have to drive so rapidly' " and he said they did to be in Goehner by 9 o'clock. This is not supported by any other occupant of the car and the appellant said she heard no such a statement. There is no evidence of

the speed of the car at that time or that it was unusual or improper. The registration for the meeting commenced at 9 a. m., but the program did not open until 10 a. m. Appellant had ridden with the deceased in his car when he was operating it at different times during the 2 years he had been pastor of the church at Plattsmouth. It is not claimed that he was inexperienced, unskillful, or disposed to improper operation of his car. Appellant had an opportunity to know the manner in which he operated his car. She said he was very gracious about the use of it. She rode with him to attend different types of meetings and gatherings. The trip preceding the accident was uneventful. Appellant had no reason to complain or to have anxiety for her safety. She testified "I thought everything was going all right, to my knowledge, yes."

In her petition appellant in substance specified as gross negligence of deceased excessive speed, failure to observe the stop sign on the north of U. S. Highway No. 34 and east of the intersection, driving his automobile on the center of the highway, passing two vehicles which were stopped or were slowing down for the stop sign, driving into and through the intersection traveling toward the west, and failing to have under control the vehicle and permitting it to contact the pole. The case in this regard is somewhat limited by the statement of appellant on the submission in this court that she had established that the cause of the accident was excessive speed, failure to observe the stop sign when deceased was asked to do so, and crossing the intersection on the left side thereof without stopping before entering upon it.

The day was clear and the condition of the road was excellent. There was no traffic except the car of deceased and two vehicles preceding him. The regulation of speed was the appropriate statute fixing a 60 mile an hour maximum. There was no violation of the law as to speed. The paved portion of the road was 30 feet

wide, wider than the average 2-lane highway. The cars preceding deceased were near the north edge of the pavement and there was ample space to pass them on the left. The cars were decreasing their speed. The speed of deceased was not unusual or abnormal under the circumstances considering it is not shown that he had been over the road before or had knowledge of the stop sign and that the cars in front of him were between him and the stop sign. He passed the two cars east of the intersection. It is common knowledge and experience that speed equal to that of deceased is indulged and maintained by ordinarily prudent drivers passing vehicles on the open highway in the absence of other traffic except the car or cars being passed. In Moses v. Mitchell, 139 Neb. 606, 298 N. W. 338, the court said: "The day was clear and visibility was good. Certainly, a speed of 55 miles an hour on a state highway in open country on a clear day is not of itself negligence." The speed was not under the circumstances sufficient to make a reasonably prudent driver conscious of the particular peril, whatever it was, which is unknown, that caused the accident. If he had passed these cars at the speed he was moving a greater distance east of the intersection it probably would not have been contended that his speed could have been expected to cause the car to go out of control and that he would have been thereby charged with the realization of the imminence of probable peril. The fact that the cars overtaken were slowing for a stop sign, the existence of which he did not know, rather than for other reasons cannot make the passing speed of deceased excessive or gross negligence. It may be conceded that there are many elements that enter into a determination of whether or not speed at the rate deceased was driving is under the circumstances excessive, but the mere fact that an obscured stop sign had not been seen and observed is not, in view of the situation presented by this record, of significance. There is no causal connection in this case between the default of defend-

ant in not observing the traffic regulation and the fact that the vehicle got out of control.

All the record shows in reference to the position of the car of the deceased upon the highway at the time of passing the two cars and thereafter until immediately before the accident is that the two cars he passed were well to the north side of the road and deceased passed to the south of them. Appellant pleaded that deceased traveled in the center of the highway as he passed and continued west. The record furnishes no information of any act or omission of deceased from the time he passed the cars until the accident except he did not stop before entering the intersection and the estimated speed of his car. The record is barren of fact or inference as to any cause for the car of deceased going out of control. Any attempt to decide this must rest on speculation. There could not have been consciousness of impending peril or warning of conduct indicating lack of regard for the safety of the guests because there was no scream, exclamation, or show of emotion of anyone before the collision. Emma Egenberger said that she did not scream; that she did not use a loud voice; but that when she spoke she did so "* * * very nicely." In Cronin v. Swett, 157 Neb. 662, 61 N. W. 2d 219, an automobile owned by defendant in which plaintiff was riding as a guest traveling at a speed of about 50 miles an hour on a curve left the road, traveled across the shoulder, down a 3-foot embankment, turned over, and stopped upside down about 100 feet from the point where it left the paved surface of the highway and 50 feet west of the highway. Plaintiff was injured and sought to recover damages because of the gross negligence of the defendant. The court therein said: "While not material, in view of what we have already said, there is another serious deficiency in appellant's proof. The record does not show what caused the car to leave the highway. That appellant must do so is elementary * * *. Appellee testified the car did not skid but just shot out of the road toward

the northwest and that he was not able to control the steering thereof. * * * However, appellee further testified he did not know if he could have turned it to the right for although he supposed he made an effort to do so he could not say that he did."

The appellant places much reliance for proof of gross negligence on the fact that deceased did not see and respect the stop sign north of the highway and east of the intersection. This provokes an inquiry of what if any negligence the deceased was chargeable with because of this default, and if he was guilty of any negligence because thereof was it the proximate cause of the accident. The deceased was not aware of the stop sign. It was obscured by two cars between him and it. The passenger in the front seat was in a more favored position to see it and she testified that she could not do so. Deceased was following the two cars. They slowed down for a reason he did not know and it was a normal move that he thought he was justified in making to drive to the left sufficiently to pass them. He had no notice of the stop sign or any fact that charged him with consciousness that he was violating a traffic regulation. If he heard Emma Egenberger when his car was well past the stop sign and about three car lengths from the intersection he had for the first time information that there was a stop sign coming up. This was inaccurate because the car was then a considerable distance west of the stop sign and by the time the statement was made the car was well into the intersection. About 1 second at the estimated speed took him to the west side of Cotner Boulevard. No occupant of the car testified she heard Emma Egenberger make any statement to the deceased. Appellant testified that she did not and she was in the rear seat directly behind the driver. There is no proof that deceased heard anything his passenger said to him at that time. She states she did not speak in a loud voice. She testified that later when the car was in the intersection she said " 'Stop,' " but not in a loud voice.

In a split second thereafter the accident happened. The stop sign was 165 feet east of the pole the car struck. There was no moving traffic in, near, or approaching the intersection. The car of the deceased went out of control after it passed the other two cars, but no traffic caused or contributed to the accident. The failure to see and heed the sign was not the proximate cause of the collision of the car with the pole. It has been said by this court on many occasions that a violation of a rule of the road cannot constitute negligence unless it is the proximate cause of the accident. In Johnson v. Anoka-Butte Lumber Co., 141 Neb. 851, 5 N. W. 2d 114, it is said: "Any violation of the rules of the road back on the overpass, therefore, had no causal connection with the accident. We think this evidence is too remote to have any force in establishing negligence on the part of the operator of the oil transport." In Miller v. Abel Construction Co., 140 Neb. 482, 300 N. W. 405, it is stated: "In an action for negligence, the burden is on the plaintiff to show that there was a negligent act or omission by the defendant and that it was the proximate cause of plaintiff's injury or a cause which proximately contributed to it." To say as appellant does that if deceased had stopped at the sign the accident would not have happened is pure assumption and speculation. The car could have gone out of control between the sign and the pole. The violation of traffic regulations concerning stop signs, speed, the manner of driving on the highway, and the like, is not negligence of any kind or degree, but is only a fact to be considered with all the other evidence in deciding an issue of negligence. In Armer v. Omaha & C. B. St. Ry. Co., 151 Neb. 431, 37 N. W. 2d 607, it is said: "If it had been established that the appellant was of full age and discretion, and that her conduct was a violation of an ordinance or a statute, it would not have amounted to negligence as a matter of law. It would have been only a fact or circumstance to have been considered by the jury with all

the other evidence in the case. The violation of a safety regulation established by ordinance or statute is not negligence as a matter of law." See, also, Tempero v. Adams, 153 Neb. 331, 44 N. W. 2d 604; Kennedy v. Chicago, R. I & P. R. R. Co., 156 Neb. 345, 56 N. W. 2d 446; Cunning v. Knott, 157 Neb. 170, 59 N. W. 2d 180.

It is stressed by appellant that it was negligence for deceased to operate his car on the south part of the road in passing other cars and through and across the intersection. In the recent case of Paxton v. Nichols, *supra,* it was contended that the operator of a motor vehicle was negligent in driving on the north side of the highway while traveling east. The driver collided with an automobile whose rights were superior traveling west on his proper side of the road. The operator of the car going east was absolved of gross negligence. The court said: " 'A traveler may ordinarily occupy and use any part of a public highway he desires when not needed by another whose rights thereto are superior to his own.' " See, also, Klaus v. Soloman Valley Stage Lines Co., 130 Neb. 325, 264 N. W. 747; Kuska v. Nichols Construction Co., 154 Neb. 580, 48 N. W. 2d 682.

The fact that the car of deceased got out of his control does not establish negligence and much less gross negligence nor does it prove the proximate cause of the accident. Negligence is not presumed and cannot be inferred from the fact that there was an accident. The burden was on appellant to prove gross negligence that was the proximate cause of the damage. This could not be done by evidence from which negligence could only be surmised or conjectured. There was a serious deficiency in the proof. It does not show what caused the car to leave the highway. Bowerman v. Greenberg, 142 Neb. 721, 7 N. W. 2d 711; In re Estate of Bingaman, 155 Neb. 24, 50 N. W. 2d 523; Cronin v. Swett, *supra.* The deceased may not have done as well as some other driver would have done to control the car when the emergency developed. This was not required of him. When ap-

pellant accepted his hospitality as operator of the car she assumed whatever risk that attended the degree of proficiency of the driver and his usual habits of driving with which she was familiar. Kelly v. Gagnon, 121 Neb. 113, 236 N. W. 160; Landrum v. Roddy, 143 Neb. 934, 12 N. W. 2d 82, 149 A. L. R. 1041.

Gross negligence means great or excessive negligence; that is, negligence in a very high degree. It indicates the absence of even slight care in the performance of a duty. Paxton v. Nichols, *supra*.

Appellant earnestly implores the court to reverse the trial court because of cases decided by this court in each of which gross negligence was found to exist as a matter of law. Subsequent decisions have sufficiently characterized enough of these cases to quite plainly indicate matters that should be found to justify a conclusion of gross negligence. The first four mentioned in the classification made by appellant are discussed in Thurston v. Carrigan, 127 Neb. 625, 256 N. W. 39, as follows: "In the cases of Morris v. Erskine, *supra* (124 Neb. 754), Gilbert v. Bryant, 125 Neb. 731, Swengil v. Martin, 125 Neb. 745, and Sheehy v. Abboud, 126 Neb. 554, wherein the guest was permitted a recovery, the imminence of danger was apparent to the driver and he was cautioned by the guest, but persisted in his negligent driving. The facts in each of those cases disclose that the driver was at least heedless of the consequences which might ensue by his reckless operation of the car, which involved, not only the rate of speed, but included other conditions which enhanced the peril and which were open to the driver."

Lemon v. Hoffmark, 132 Neb. 421, 272 N. W. 214, noticed several of these cases and concluded as follows: "In the case at bar the facts disclose that the existence of danger, if any, was not apparent to the driver of the car; no protests were made to her by her guests in the manner of operation of the car; there was not a continuous course of negligent driving, nor did the driver

persist in driving negligently; the driver was not heedless of the consequences nor conscious of the peril; the speed of the car was moderate. * * * Helen Hoffmark, the driver of the car, * * * was not guilty of gross negligence, as such term has been defined by this court." See, also, Gosnell v. Montgomery, 133 Neb. 871, 277 N. W. 429.

Gummere v. Mudd, 139 Neb. 370, 297 N. W. 622, was an action by the plaintiff, a guest in the automobile of the defendant, when he was injured by the car leaving the road and overturning. There was evidence that the car had been traveling at from 60 to 80 miles an hour for 8 or 9 miles. In attempting to negotiate a curve the brake was applied, the car swerved from side to side, the front wheel went into some gravel on the north side of the highway, and the car overturned at least twice. The court reviewed many of the cases referred to by appellant and in denying the existence of gross negligence said: "Authorities relied upon by plaintiff for reversal all disclose the ever present imminence of danger visible to, known by, or made known to the driver, together with a persistence in negligence apparently heedless of the consequences thereof; evidence of negligence far in excess of any appearing in the case at bar and from which different minds might reasonably draw different conclusions as to the factual question of gross negligence." This was recently quoted with approval in Paxton v. Nichols, *supra.*

Cunning v. Knott, *supra,* was based on a charge of gross negligence of defendant causing injury and damage to plaintiff, his guest, who was riding in the car of defendant. They were on a country road traveling east at an estimated speed of 60 to 80 miles an hour. The road formed a "T" with a north-south state highway. There was a stop sign a considerable distance west of the state highway and on the south side of the country road which was to some extent obscured by weeds but was visible on the road by a traveler going east a dis-

tance of 400 feet west of it and ability to see it increased as it was approached. The country road ended in a dead end at the intersection and there was a high bank east of it. The defendant did not see or observe the stop sign. When he saw the road ended with the east side of the intersection he applied the brakes of the car. It skidded 120 feet in a straight line east, hit the bank with great force, raised up on its front and dropped back on its wheels, and was completely demolished. The plaintiff was severely injured. Defendant was over the state highway on the morning of the day of the accident but he was unfamiliar with the country road. The guest gave no warning of danger and made no objection to the manner in which the car was operated. This court found against the existence of gross negligence as a matter of law and ordered judgment for the defendant. The court said: "As we weigh this evidence, under these rules, it did not rise to the degree of gross negligence and was not sufficient to submit the issue of gross negligence to the jury. * * * The judgment is reversed and the cause remanded with directions to render judgment for the defendant."

Pavlicek v. Cacak, 155 Neb. 454, 52 N. W. 2d 310, was prosecuted by the representative of John L. Pavlicek, deceased, for damages for his wrongful death claimed to have resulted because of gross negligence of defendant while the deceased was a guest in the automobile of defendant traveling north on a maintained road approaching an intersection with an east and west road on which a traveler in a Ford coach was moving west toward the intersection. Defendant had been over the road on which he and the deceased were traveling once before and he knew he was coming to an obscured intersection because the view to the east was interfered with by trees and farm buildings. He saw a slow sign about 225 feet south of the intersection but he did not decrease his speed of 50 miles an hour. When he was 40 feet south of the intersection he could see past the

trees to the east. He looked east and saw a car approaching about the same distance from the intersection as the defendant was south of it. He was unable to apply the brakes on the car but attempted to turn to the left while he was moving about 50 miles an hour and collided in the intersection with the car traveling from the east. The deceased suffered injuries which caused his death. A judgment for plaintiff was reversed by this court and the action dismissed as to the defendant. The court said: "After a careful study of the facts, we have reached the conclusion under the guest statute the appellee did not prove facts sufficient to support a finding of gross negligence and that the motion of appellant for a judgment notwithstanding the verdict should have been sustained." See, also, Cronin v. Swett, *supra;* Montgomery v. Ross, 156 Neb. 875, 58 N. W. 2d 340; Bishop v. Schofield, 156 Neb. 830, 58 N. W. 2d 207; Munsell v. Gardner, 136 Neb. 214, 285 N. W. 555.

The record fails to show negligence of the deceased of the high degree required to constitute gross negligence. The judgment of the district court should be and it is affirmed.

AFFIRMED.

CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

SEPTEMBER TERM, 1954

GLENN M. TIMMONS, DOING BUSINESS AS TIMMONS CONSTRUCTION CO., APPELLANT, V. ANDREW C. NELSEN ET AL., APPELLEES.

66 N. W. 2d 406

Filed October 8, 1954. No. 33514.

1. **Appeal and Error.** Where the evidence on material questions of fact in an equitable case triable de novo is in irreconcilable conflict, this court will, in determining the weight of the evidence, consider the fact that the trial court observed the witnesses and their manner of testifying, and accepted one version of the facts rather than the other.
2. ———. In considering a case on appeal, this court is required to pass upon such alleged errors as are assigned and discussed.
3. **Mechanics' Liens.** A lien claimant must prove compliance with the mechanic's lien law by evidence. The notice of lien is admissible only to establish the date of filing and the necessary oath attached thereto.
4. ———. Claimed items of lien must be established by evidence that the labor or materials claimed were used on the property within the statutory period and that the charges therefore were reasonable and proper.
5. **Mechanics' Liens: Contracts.** Where an agreement for the construction of a building is entered into on a cost plus a percentage basis, the general superintending of the construction is, in the absence of a special agreement to the contrary, included in the percentage provision of the agreement.

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

Frost, Peasinger & Meyers, for appellant.

Pilcher & Haney and *Morgan & Carnazzo,* for appellees.

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

CARTER, J.

This is a suit to foreclose a mechanic's lien on a new house in the claimed amount of $8,231.17. The answer of the defendants alleges an oral contract between the parties by which plaintiff agreed to build the house for $32,075.20. Defendants paid $33,500 to the plaintiff and they claim an over-payment of $1,424.80. Defendants also filed a counterclaim for damages in the amount of $4,000 for the failure of the plaintiff to construct a driveway into the garage in accordance with the agreement. The trial court found that plaintiff had established a valid mechanic's lien in the amount of $4,315.64 and ordered a sale of the property to satisfy the lien if it was not paid within 20 days. The counterclaim was dismissed. The plaintiff appealed and the defendants have taken a cross-appeal.

For convenience, Andrew C. Nelsen will hereafter be referred to as the defendant where only one defendant is indicated.

The record discloses that plaintiff was a general contractor engaged in the building of new houses in the city of Omaha during the times herein mentioned. It appears that on or before June 1, 1950, plaintiff had constructed a house adjacent to his own, which he had for sale. Defendant and his wife became interested in this house, inspected it several times, and talked with plaintiff about its sale price. It was subsequently sold to one DeMoss for $32,500. Thereafter the defendant talked with plaintiff about building him a new house similar

to the DeMoss house. Defendant purchased a lot and commenced negotiations with the plaintiff for the construction of a new house. Defendant testified that plaintiff told him that the DeMoss house cost him $26,932 exclusive of the cost of the lot, and that he could duplicate it at $29,000 or $29,500 on any lot that defendant might select. It is the contention of the defendant that they calculated the cost of the house by using the basic cost of the DeMoss house in the amount of $26,932, and adding thereto the cost of changes to be made in the amount of $2,500 and a 10 percent profit amounting to $2,943.20. From the total cost thus calculated, amounting to $32,375.20, defendant claims a deduction of $300 arising from an alleged saving of that amount in substituting concrete floors for wood floors. Defendant asserts that plaintiff agreed to build the house for $32,075.20.

It is the contention of the plaintiff that the house was to be built in accordance with the plans of the DeMoss house, with the changes agreed upon prior to the commencement of construction and any other changes requested by the defendant in the course of construction. The evidence shows that plaintiff prepared a written contract to this effect which the defendant did not execute. The defendant gave as his reason that he desired his attorney to go over it. It appears that for one reason or another the contract was not submitted to defendants' attorney. The work proceeded without any written agreement being made and upon the oral agreements of the parties.

The trial judge found from the evidence that plaintiff had failed to establish an agreement that the house was to be built at cost plus 10 percent. The trial judge also found that there was no fixed sum agreed upon for the construction of the house, as claimed by the defendants. The court then found that the mechanic's lien was valid in the amount of $36,014.90, the amount found due for labor and materials, plus 5 percent thereof, or

$1,800.75, for services of the plaintiff in supervising the construction of the house, making a total cost of $37,815.65. Payment of $33,500 of this amount was paid by defendants, leaving a balance due of $4,315.65, which the court decreed to be a lien upon the property. Both parties filed motions for a new trial. Both motions were overruled and plaintiff appealed. The defendants cross-appealed.

The defendants contend that the description of the labor and materials used in the construction of the house was insufficient to create a lien. We shall not determine this issue on its merits. Defendants failed to set forth in their assignments of error on their cross-appeal any claim of error on the part of the trial court in ruling on this issue. Under such circumstances the error, if any existed, will be deemed to have been waived. Okuda v. Hampton, 154 Neb. 886, 50 N. W. 2d 108.

Defendants also claim that the proof was insufficient to establish that the mechanic's lien was filed within 4 months of the date of performance as required by section 52-103, R. R. S. 1943. The notice of lien shows that a number of items were furnished in March 1951. Specific days of that month were not designated as the days on which the labor and materials were furnished. The mechanic's lien was filed on June 5, 1951. Assuming that all items shown to have been furnished in March 1951 were furnished on the first day of that month, the filing of the notice of lien was well within the 4-month period required by the statute.

The contention of the defendant that an oral agreement was made to the effect that plaintiff was to build the house for $32,075.20 cannot be sustained in this court. It is true that defendant produced evidence to this effect. The evidence of the plaintiff was in direct conflict therewith. The rule in such instances is: Where, in a suit in equity on a trial de novo, the evidence is in irreconcilable conflict, this court will consider the fact

that the district court observed the conduct and demeanor of the witnesses and gave credence to the testimony of some rather than to the contradictory testimony of others. Hehnke v. Starr, 158 Neb. 575, 64 N. W. 2d 68; Lakey v. Gudgel, 158 Neb. 116, 62 N. W. 2d 525. The finding of the district court on this contention is affirmed.

The evidence shows that plaintiff commenced the construction of the house without a written agreement being executed. A written contract was prepared on a cost plus 10 percent basis. Defendant did not execute it because he desired his attorney to examine it. He knew that plaintiff understood the agreement to be on a cost basis with a 10 percent profit. He does not appear to have objected, and permitted plaintiff to proceed with the work. Monthly statements for labor and materials were submitted, containing a 10 percent charge which was designated as profit. Defendant paid $5,000 per month thereon for 6 months. He knew, or should have known, all during this period that plaintiff was charging the cost plus 10 percent. He permitted plaintiff to continue with the construction on that basis. Defendant wanted the subcontracting of special work submitted for competitive bidding. He procured one or two bids for plaintiff, a clear indication that he at that time understood that the work was proceeding on a cost plus basis. The original invoices were turned over to defendant each month and retained by him. This, also, is evidence supporting the contention of the plaintiff that the house was not being constructed for a fixed amount. We think the evidence considered as a whole sustains plaintiff's allegation that the house was being constructed on a cost plus 10 percent basis and that the trial court's finding to the contrary is not supported by the evidence.

The defendant contends that plaintiff failed to hold the cost of the construction down by failing to consider bids by subcontractors that were less than those accepted by the plaintiff. There is evidence of one or

two bids by subcontractors which were smaller than those to whom the bids were let. Plaintiff pointed out in his rebuttal evidence that those bids did not include all the work necessary to be performed and that they were in fact larger bids when the scope of the bids was considered. The defendant failed to show by a preponderance of the evidence that he suffered loss by the failure of the plaintiff to accept competitive bids.

The defendant alleges that plaintiff made a charge of $500 for cost of supervision which is claimed to be improper for the reason that costs of general supervision are included in the 10 percent allowed over and above the cost of labor and materials. The trial court properly disallowed this item. This point was recently so determined by this court in Grothe v. Erickson, 157 Neb. 248, 59 N. W. 2d 368. To hold otherwise would in effect allow a double payment for the same service.

The record shows that plaintiff employed one Fred Hintz, his brother-in-law, as a general foreman. It was his duty to see that materials and equipment were on hand, and otherwise coordinate the work on the various houses under construction by the plaintiff. He also performed some work in constructing the house, such as grading, constructing footings for the foundation, delivering materials, and hauling forms, scaffolds, and other equipment to and from the premises. The work which was supervisory in character is included in the 10 percent charged over and above the cost of labor and materials. It is work which plaintiff agreed to perform as a part of his cost plus agreement. The fact that he required assistance because of the number of projects he had under construction is the concern of the plaintiff and an item of expense which he must assume. It is not a proper charge in addition to the 10 percent that plaintiff was to receive as his profit. Grothe v. Erickson, *supra*. The work he actually performed in the construction of the house is chargeable as labor. The plaintiff charged $1,957.50 for the services rendered by Hintz.

The trial court found that the sum of $489.38 of this amount was properly chargeable to labor on the house. We find no evidence in the record to sustain this finding. In fact, there is no evidence purporting to separate the work actually performed on the premises from that which was supervisory in character. We necessarily conclude that the allowance of any part of the charges based on payments to Hintz as a part of the lien must fail for want of proof. Consequently, we disallow the $1,957.50 as a lien on the property.

There is evidence in the record that materials were hauled away from the premises by the plaintiff. Such materials were not accurately described or identified. Plaintiff states that forms, scaffolds, and equipment were moved to and from the premises throughout the construction of the house. He testified also that materials and supplies which exceeded his needs were removed from the premises and credit memoranda given therefor which were in the record. The evidence fails to show that any materials or supplies which were charged to the construction of the house were taken from the premises.

The notice of lien contains a charge of 10.5 percent for tax and insurance on labor, the amount charged being $584.24. The accountant who audited the invoices and charges computed the insurance and taxes on the following basis: Federal social security tax, 1.5 percent; state unemployment compensation, 3 percent; and workmen's compensation, property damage and public liability insurance, 6 percent. There is no issue before us as to whether or not these items are lienable. We do not, therefore, determine that question. It is contended, however, that the items were not proven. With this contention we concur. There is no evidence in this record that this $584.24 or any part of it was contracted for or paid. Assuming only for the purposes of this suit that such taxes and insurance were proper charges to be included in a mechanic's lien, the record is devoid of

the proof required to show that such amount was spent, that the charge was reasonable, and that it was spent for the sole benefit of the premises upon which the lien was claimed.

Defendant contends in his cross-appeal that the trial court erred in dismissing his counterclaim. By his counterclaim defendant contended that it was agreed that the driveway should be graded down to an elevation where automobiles could enter without great difficulty because of ice or snow; that the driveway was to be so constructed as to make it safe to drive automobiles over it at all times. Defendant alleges that the driveway was not so built and that it will be necessary to lower the driveway and garage floors 2 feet at a cost of $4,000. He claims damages for this amount.

The plans do not show the elevations of the lot or the grade upon which the house, garage, and driveway were to be built. There were no specifications accompanying the plans. We find no evidence to sustain any special agreement with reference to the grade of the driveway. There is testimony in the record that, while the grading of the lot was being performed, the defendant directed that it not be graded down any lower than as it now is. This evidence was not disputed. We point out here that changes in the plans were made before and after construction was started and that defendant directed changes at any time with which plaintiff complied. There is evidence that it is very difficult to use the driveway when it is covered by ice and snow. We find, however, that there was no agreement fixing the grade for the driveway and that defendant participated in fixing the grade of the house and garage, and necessarily that of the driveway. The trial court properly dismissed the counterclaim on the basis of the evidence before the court.

Labor and materials set forth in the notice of lien are found to be proper except as we have herein found to the contrary.

We find that the mechanic's lien has been established for the following amounts: Labor used in constructing the house, $3,606.69; materials and supplies, $31,334.59; and for supervision, profit, etc., $3,494.12. The total amount of lienable items is $38,435.40. The evidence shows that $33,500 has been paid to the plaintiff, leaving a balance of $4,935.40 for which plaintiff is entitled to a lien.

It is therefore found that plaintiff has a valid lien for $4,935.40, and in the event said sum is not paid within 30 days from the issuance of the mandate herein, plaintiff may apply to the district court for an order of sale to satisfy the lien. The $4,935.40 will bear interest at the rate of 6 percent per annum from the date of the filing of this opinion in this court. The costs in this court are taxed against the defendant. The decree of the district court is reversed and the cause remanded with directions to enter a decree in accordance with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

VELDA J. ENO, APPELLANT, V. GORDON M. ENO, APPELLEE.
66 N. W. 2d 406

Filed October 22, 1954. No. 33474.

SUPPLEMENTAL OPINION

APPEAL from the district court for Lancaster County: JOHN L. POLK, JUDGE. *Former opinion modified. Motion for rehearing overruled.*

Perry & Perry, J. Jay Marx, Davis, Healey, Davies & Wilson, and *Robert A. Barlow, Jr.,* for appellant.

Ralph W. Slocum and *Ginsburg & Ginsburg,* for appellee.

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

CARTER, J.

On June 25, 1954, this court filed its opinion in this case. Eno v. Eno, *ante* p. 1, 65 N. W. 2d 145. It is the contention of the appellant that the amount of the award of alimony allowed is inadequate under the circumstances recited in the opinion. We find the contention of the appellant is in part correct. The opinion of the court is therefore modified to provide that the alimony allowed the appellant is fixed at $32,000 payable $270 per month beginning July 1, 1954, and to continue monthly until fully paid. The remainder of the opinion is found to be in all respects correct. Subject to the foregoing modification, the opinion of the court filed June 25, 1954, is adhered to and the motion of appellant for a rehearing is overruled.

FORMER OPINION MODIFIED.

MOTION FOR REHEARING OVERRULED.

ARTHUR J. JAMESON ET AL., APPELLEES, V. L. R. GRAHAM, APPELLEE, IMPLEADED WITH C. R. BENNETT, APPELLANT.
66 N. W. 2d 417

Filed October 22, 1954. No. 33541.

1. **Limitations of Actions: Fraud.** An action for relief on the ground of fraud must be commenced within 4 years of the discovery of the facts constituting the fraud, or of facts sufficient to put a person of ordinary intelligence and prudence on an inquiry which if pursued would lead to such discovery.
2. ———: ———. When the evidence discloses facts sufficient to put a person of ordinary intelligence and prudence on an inquiry which would disclose the alleged fraud within the statutory period, the statute of limitations is a complete defense to the action.

APPEAL from the district court for Buffalo County: ELDRIDGE G. REED, JUDGE. *Reversed and remanded with directions.*

Dryden, Jensen & Dier, for appellant.

Munro & Parker, for appellees.

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

CARTER, J.

This is a suit in equity to set aside a mineral deed executed and acknowledged on July 16, 1941, for the reason that it was procured by fraud. The trial court found for the plaintiffs and entered a decree setting aside the deed and quieting the title to plaintiffs' lands as against the defendants. The defendant Bennett appeals.

The plaintiff Arthur J. Jameson was the owner of a quarter section of land in Buffalo County which was particularly described in the petition. The plaintiff Johanna Jameson was the wife of Arthur J. Jameson and the owner of Lots 25 and 26, which were accurately described in the petition. Arthur J. Jameson lived on his quarter section and his wife Johanna had lived in the city of Kearney with her daughter for many years.

On July 16, 1941, the defendant Graham called at the farm home of Arthur J. Jameson, seeking to purchase a gas and oil lease and a mineral deed to one-half of the oil, gas, and other minerals in and under his quarter section. The deal was consummated and, according to the evidence of Jameson, an oil lease and mineral deed were executed covering his quarter section only. The oil lease and mineral deed were then taken to the home of Johanna Jameson in Kearney, where she executed and acknowledged them. The mineral deed was filed for record on July 23, 1941. The plaintiff Jameson contends that Lots 25 and 26 were not included in the mineral deed when he signed it, that they were fraudulently included, and that the deed is therefore void. He testifies further that he was not permitted to read the documents at the time he signed them, that they were stacked one above the other at the time, and that he had no knowledge that he had signed

a mineral deed until 1950 and had no knowledge that Lots 25 and 26 were included in the mineral deed until November 1952. Jameson further contends that Graham was the agent of the defendant Bennett and that the fraud of Graham was that of Bennett. The plaintiff Johanna Jameson testified that she signed the papers after her husband had signed them and that her lands, Lots 25 and 26, were included in the description in the mineral deed.

The defendant Graham testifies that he called on Jameson at his farm and offered to purchase an oil lease and a mineral deed. The transaction was agreed upon and the papers typed up at the farm. He stated that Jameson gave him the legal description of his quarter section and got the description of Lots 25 and 26 from a county plat book that he had with him. He further testifies that the description of both tracts were typed in the deed at the Jameson farm home at that time. Graham testifies that the deed and lease were given to Jameson and that he supposed he read them. Jameson told him where his wife lived and that he would have to get her signature. Graham did not leave copies with Jameson, but informed him he would leave them with his wife. Jameson found copies of the instruments with his wife's papers after November 1952.

The record shows that Arthur Jameson and Johanna Jameson signed a receipt for $24 for "½ royalty sold to C. R. Bennett" on July 16, 1941, in which the real estate of both was described. A check payable to Arthur Jameson in the amount of $32 signed by Graham and bearing the date of July 16, 1941, is contained in the record. The check was cashed on July 17, 1941, and bears the notation "for oil & Gas Lease and ½ royalty." There is also a check in the record signed by Graham and payable to Johanna Jameson in the amount of $16, bearing the date of July 16, 1941. This check was paid on July 17, 1941, and bears the same notation as the check payable to Arthur Jameson. The evidence of

Graham and Bennett is to the effect that Graham was operating independently and was selling to Bennett some of the mineral deeds he acquired. The evidence does not sustain a finding that Graham was an agent of Bennett.

The defendant Bennett contends that the evidence is insufficient to sustain an action to set aside the deed on the ground of fraud more than 4 years after the alleged fraud took place. The rule is: An action for relief on the ground of fraud must be commenced within 4 years of the discovery of the facts constituting the fraud or of facts sufficient to put a person of ordinary intelligence and prudence on inquiry which if pursued would lead to such discovery. Abels v. Bennett, 158 Neb. 699, 64 N. W. 2d 481. The present suit was instituted on November 24, 1952, more than 11 years after the alleged fraud occurred. Plaintiffs contend that it was not discovered until November 1952. The question is whether plaintiffs were put on such an inquiry that they ought to have discovered the fraud within the period of the 4 year statute of limitations. § 25-207, R. R. S. 1943. The requirement is that if more than 4 years have elapsed since the alleged fraud, the victim of it must allege and prove facts as to the failure to discover it, which entitles him to maintain an action by virtue of the fraud, notwithstanding the lapse of time, and he must allege and establish diligence in this regard. Abels v. Bennett, *supra*. The mineral deed was placed on record on July 23, 1941, 7 days after it was executed and delivered. This is a circumstance to be considered along with the other circumstances of the case in determining when the fraud was discovered. Sweley v. Fox, 135 Neb. 780, 284 N. W. 318; Abels v. Bennett, *supra*.

The evidence shows that Jameson had been engaged in the sale of real estate for many years. He was familiar with leases and deeds, and understood the purposes of each. Copies of the oil lease and mineral deed were

left with his wife, Johanna, and they had remained in her possession for more than 11 years. The mineral deed plainly stated the plaintiffs had sold, conveyed, and delivered to C. R. Bennett an undivided one-half interest in and to all of the oil, gas, and other minerals in and under the lands owned by both of the plaintiffs. The receipt for the amount paid to plaintiffs for the mineral deed recited "twenty Four Dollars in full for ½ royalty. Sold to C. R. Bennett this day on my farm of 240 acres." The 240 acres included the lands of both plaintiffs. Each plaintiff received a check for his share of the royalty sold. On each check was a notation on its face "for oil & Gas Lease and ½ royalty." Each endorsed his check and it was cashed and paid. Plaintiffs were able to read and their failure to take note of the evidence in their possession is not explained.

The fraud would have been discovered if reasonable diligence had been exercised. It would have been discovered within 4 years but for the negligence of the plaintiffs. A party seeking to avoid the bar of the statute of limitations on account of fraud must allege and prove that he used due diligence and that the failure to discover it within the statutory period was not due to his own negligence. If plaintiffs had remained in ignorance of the fraud without fault of their own, lapse of time would not defeat their action. Equity aids the diligent and not the negligent. The exercise of reasonable diligence and prudence on and following July 16, 1941, would have afforded plaintiffs, from the documents in their possession, all the information they secured in November 1952. Under such circumstances they are not entitled to time beyond the statutory period to bring their action, and it is barred by the statute of limitations. Abels v. Bennett, *supra*.

The judgment is reversed and the cause remanded with directions to dismiss the action.

REVERSED AND REMANDED WITH DIRECTIONS.

EDGAR EGAN ET AL., APPELLANTS, IMPLEADED WITH JAMES P. GALYEN ET AL., APPELLEES, V. VILLAGE OF MEADOW GROVE, NEBRASKA, APPELLEE.

66 N. W. 2d 425

Filed October 22, 1954. No. 33545.

1. **Municipal Corporations.** In an action to disconnect territory from a village the burden is upon the petitioner to establish by sufficient evidence that justice and equity require that such territory be disconnected.
2. ———. It is indispensable to the maintenance of an action to detach lands from a village or city that the territory sought to be detached is within the municipality and that a substantial part of the boundary thereof is adjacent to a part of the boundary of the village. Adjacent as here used means contiguous or coexistent with.

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

Hutton & Hutton, for appellants.

Mapes & Mapes, for appellee.

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

WENKE, J.

Edgar Egan, Virgie Egan, Lawrence Motz, Jessie Motz, James P. Galyen, and Ida Mae Galyen brought this action in the district court for Madison County against the Village of Meadow Grove. The purpose of the action was to detach certain lands owned by them from the village. The original action related to several tracts consisting of about 66 acres located in the southwest corner of the incorporated village. All but two of these tracts were ordered detached: Namely, tax lot No. 7 consisting of 3.11 acres and tax lot No. 15 consisting of 3.08 acres. Thereupon the Egans and the Motzes, being the owners of the lands not ordered detached, filed a motion for new trial and have appealed from the overruling thereof. The village has neither appealed nor

cross-appealed from the order detaching the other tracts.

Section 17-414, R. R. S. 1943, provides in part as follows:. "If the court shall find in favor of the petitioners and that justice and equity require that such territory, or any part thereof, be disconnected from such city or village, it shall enter a decree accordingly."

However, as stated in Sole v. City of Geneva, 106 Neb. 879, 184 N. W. 900: "* * * the statute above referred to does not provide an exclusive remedy for disconnecting territory from a city or village. Such relief may on proper pleading and proof be granted by the district court in the exercise of the general chancery and common law powers conferred upon it by the Constitution. This power of the district court has been exercised heretofore and approved by this court. State v. Dimond, 44 Neb. 154; Village of Osmond v. Smathers, 62 Neb. 509; Village of Osmond v. Matteson, 62 Neb. 512." See, also, Kuebler v. City of Kearney, 151 Neb. 698, 39 N. W. 2d 415.

"When an action is brought, either under a statute or at common law, to remove agricultural lands from within the corporate limits of a city or village on the basis that justice and equity require that it be disconnected therefrom and appeal is taken from a final decree rendered therein, the same is reviewable under the provisions of section 25-1925, R. S. 1943, and it will be here tried de novo." Kuebler v. City of Kearney, *supra*. See, also, Runyan v. Village of Ong, 154 Neb. 127, 47 N. W. 2d 97; Swanson v. City of Fairfield, 155 Neb. 682, 53 N. W. 2d 90.

"In an action to disconnect territory from a city, the burden is upon the petitioner to establish by sufficient evidence that justice and equity require that such territory be disconnected." Lee v. City of Harvard, 146 Neb. 807, 21 N. W. 2d 696.

"Where the evidence shows that lands within the corporate limits of a city of the second class are agricultural in nature and have no unity or community of

interest with the city, and that justice and equity require that they be disconnected therefrom, a court of equity is empowered by section 17-414, R. S. Supp., 1949, to disconnect such lands from the city." Davidson v. City of Ravenna, 153 Neb. 652, 45 N. W. 2d 741.

Tax lots Nos. 7 and 15 lie just north of the Chicago and North Western Railway Company's 100-foot right-of-way. The two lots are contiguous, lot No. 7 lying east of lot No. 15. The Egans are the owners of tax lot No. 7 and that part of tax lot No. 15 lying east of Buffalo Creek. The Motzes own that part of tax lot No. 15 lying to the west of Buffalo Creek. These two tax lots form an area 990 feet long on the north side, 118 feet wide on the west side, 406.5 feet wide on the east side, and are bounded on the south by the railroad right-of-way which runs slightly northwest-southeast. The length of the south side is not shown. To the north and west of this area is unplatted land belonging to Bryan Sparr, to the east is a platted area referred to as West Meadow Grove Addition, and to the south is the 100-foot right-of-way of the railroad. All of the areas referred to as surrounding tax lots Nos. 7 and 15 are within the corporate limits of the village.

In this situation our holding in Jones v. City of Chadron, 156 Neb. 150, 55 N. W. 2d 495, is controlling. Therein we said it is indispensable to the maintenance of an action to detach lands from a village or city that the territory sought to be detached is within the municipality and that a substantial part of the boundary thereof is adjacent to a part of the boundary of the village. Adjacent as here used means contiguous or coexistent with.

In view of the foregoing we do not discuss other issues raised. The action of the district court is affirmed.

AFFIRMED.

JOHNIE TAYLOR, PLAINTIFF IN ERROR, V. STATE OF NEBRASKA, DEFENDANT IN ERROR.

66 N. W. 2d 514

Filed October 22, 1954. No. 33557.

1. **Criminal Law.** A defendant, by pleading guilty, waives all defenses other than that the information charges no offense.
2. ———. A valid plea of guilty, accepted and entered by the court, is the equivalent of a conviction, the effect of which is to authorize the imposition of the sentence prescribed by law.
3. ———. Where the punishment of an offense created by statute is left to the discretion of a court to be exercised within certain prescribed limits, a sentence imposed within such limits will not be disturbed unless there appears to be an abuse of such discretion.
4. **Criminal Law: Appeal and Error.** By the provisions of section 29-2308, R. R. S. 1943, this court has authority to reduce the sentence in a criminal case and to render such sentence as in its opinion is warranted by the evidence.
5. ———: ———. Where the record contains no bill of exceptions or the bill of exceptions has been quashed, no question will be considered, the determination of which necessarily involves an examination of the evidence adduced in the trial court. In such a situation, if the pleadings are sufficient to support the judgment, it will be affirmed.

ERROR to the district court for Adams County: FRANK J. MUNDAY, JUDGE. *Affirmed.*

J. E. Willits, for plaintiff in error.

Clarence S. Beck, Attorney General, *Clarence A. H. Meyer*, and *C. C. Sheldon*, for defendant in error.

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

CHAPPELL, J.

On September 11, 1953, a complaint was filed in the county court charging, in conformity with section 28-1212, R. R. S. 1943, that Johnie Taylor, hereinafter called defendant, willfully, unlawfully, and feloniously, with intent to defraud, did on June 20, 1953, make, draw, utter, issue, and deliver a certain described bank check

for $10 drawn upon the Hastings National Bank, then well knowing that he had no account on deposit in such bank. On September 16, 1953, defendant, then being represented by counsel and duly advised of his legal and constitutional rights, appeared in the county court, waived preliminary hearing, and was bound over to the district court for trial. Defendant furnished a required bond for appearance thereat, and after the filing of a concededly proper and sufficient information in the district court, he did on October 17, 1953, appear therein with counsel. There the information was read to defendant, and, after being again advised of his legal and constitutional rights, he pleaded guilty, which plea was accepted by the court. Thereupon, after a hearing in conformity with sections 29-2217 to 29-2219, R. R. S. 1943, the trial court placed defendant on probation for 1 year, in charge of the county sheriff. The terms and conditions of the order of probation appropriately provided, among other requirements, that defendant must not drink intoxicating liquor or become intoxicated, and that he should work at his trade or some suitable occupation, but upon violation thereof, the order of probation would be revoked and sentence would be imposed as provided by law.

Thereafter on January 8, 1954, the county attorney filed a motion and affidavit alleging that: (1) On January 5, 1954, defendant did drink intoxicating liquor, becoming intoxicated as a result thereof; and (2) that since October 17, 1953, defendant had failed and neglected without cause to obtain suitable employment, all in violation of the court's order of probation. The motion prayed that the order of probation should be revoked and sentence imposed upon defendant as provided by law. The transcript also discloses that thereafter on January 13, 1954, defendant appeared in court with counsel and a hearing was had upon such motion. Thereat defendant did not deny that he became intoxicated as charged, but did deny that he had failed and

neglected to obtain suitable employment. Thereupon the deputy county attorney in effect withdrew the latter charge. However, evidence was then adduced by the State and it rested, whereupon evidence was adduced by defendant and he rested. In the light thereof, the trial court then sustained the motion of the county attorney, authoritatively revoked its former order of probation, and defendant having given no satisfactory reason why sentence should not be imposed, sentenced him in conformity with section 28-1212, R. R. S. 1943, to serve not less than 1 year nor more than 1 year and 5 days in the State Reformatory.

On January 26, 1954, defendant filed a notice of intention to apply for a writ of error for the purpose of reviewing the proceedings and sentence rendered. He also filed an application for suspension of execution of sentence in order that he might have time to prepare and file a petition in error and bill of exceptions. The disposition of such application is not shown by this transcript. Be that as it may, petition in error was filed in this court by defendant on February 9, 1954, based entirely upon the sole allegation that: "The Court erred in imposing a harsh, excessive and improper sentence which was *not sustained by the evidence and is contrary to law.*" (Italics supplied.) Also, such language appears in defendant's brief as the sole assignment of error. In that connection, however, no bill of exceptions was ever filed in this court by defendant and we conclude that the assignment should not be sustained.

Insofar as important here, section 28-1212, R. S. Supp., 1953, provides: "Any person who, with intent to defraud, shall make or draw, utter or deliver any check * * * upon any bank * * * knowing, at the time of such making, drawing, uttering, or delivering, that the maker or drawer *has no account or deposit in such bank* * * * upon conviction thereof, shall be imprisoned in the penitentiary for *not less than one year nor more than ten years,* or imprisoned in the county jail not less than

thirty days nor more than six months, or be fined not less than fifty dollars nor more than five hundred dollars." (Italics supplied.) Prior to its amendment in 1951, such section simply provided that a defendant "upon conviction thereof, shall be punished by confinement in the penitentiary for not less than one year nor more than two years." The sufficiency of the information involved herein, to which defendant pleaded guilty, has not been questioned. Clearly, the sentence by the trial court was one supported by and well within the provisions of section 28-1212, R. R. S. 1943, as then existing.

In Duggan v. Olson, 146 Neb. 248, 19 N. W. 2d 353, certiorari denied 327 U. S. 790, 66 S. Ct. 803, 90 L. Ed. 1016, this court said: " 'A defendant, by pleading guilty, waives all defenses other than that the indictment (information) charges no offense.' 14 Am. Jur., sec. 272, p. 953. 'A plea of guilty, accepted and entered by the court, is a conviction or the equivalent of a conviction of the highest order, the effect of which is to authorize the imposition of the sentence prescribed by law on a verdict of guilty of the crime sufficiently charged in the * * * information.' 14 Am. Jur., sec. 272, p. 952." See, also, Clark v. State, 150 Neb. 494, 34 N. W. 2d 877.

Section 29-2308, R. R. S. 1943, provides in part: "In all criminal cases that now are, or may hereafter be pending in the Supreme Court on error, the court may reduce the sentence rendered by the district court against the accused, when in its opinion the sentence is excessive, and it shall be the duty of the Supreme Court to render such sentence against the accused as in its opinion *may be warranted by the evidence.*" (Italics supplied.) Cases cited in the annotation thereof are too numerous to repeat here.

However, in the absence of a bill of exceptions, there is no showing by evidence in this case either with relation to the circumstances of the acts or defaults of defendant resulting in the alleged charge against him and presented to the court at a hearing thereon or in

the proceeding with relation to defendant's admitted violation of the conditions of the order of probation. In that connection, it will be noted that section 28-1212, R. R. S. 1943, under which defendant was prosecuted, relates to those cases wherein a defendant "has no account or deposit in such bank," and gives the court a commensurate latitude or discretion within certain prescribed limits in the matter of sentence for violation thereof, dependent upon the evidence and circumstances with relation thereto. Such section contains no prescribed limits of sentence based specifically upon the amount of the check as provided in section 28-1213, R. R. S. 1943, relating to distinguishable cases wherein a defendant "has not sufficient funds in, or credit with, such bank, * * * for the payment of such check * * *."

In Bright v. State, 125 Neb. 817, 252 N. W. 386, followed with approval in Carr v. State, 152 Neb. 248, 40 N. W. 2d 677, Truman v. State, 153 Neb. 247, 44 N. W. 2d 317, and Onstott v. State, 156 Neb. 55, 54 N. W. 2d 380, this court held: "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."

In the case at bar, the question of whether or not the trial court abused its discretion in imposing the sentence here involved upon defendant must necessarily depend upon an examination of evidence adduced in the trial court which is brought to this court by a bill of exceptions. As stated in Carr v. State, *supra*, with relation to a comparable penal statute: "The circumstances of the case, the degree of blame, or the extent of the moral turpitude involved in the act in question, as nearly as ascertainable, are the guides of the court in the exercise of a legal discretion in determining the sentence in any case involving this statute. It was the duty of the court in this case to make an investiga-

tion of these matters, and it is presumed that this obligation was performed."

As a matter of course, statements of counsel appearing in briefs filed in this court and not supported by any competent evidence properly appearing in a bill of exceptions cannot be considered. Grossman v. State, 46 Neb. 21, 64 N. W. 354.

Contrary to defendant's contention, we find nothing in the record before us which could lawfully sustain a conclusion that the trial court abused its discretion and thereby imposed an excessive sentence upon defendant. In that regard, cases relied upon by defendant are generally distinguishable upon the facts and circumstances preserved by a bill of exceptions. To discuss them further herein would serve no purpose except to unduly prolong this opinion.

In Sundahl v. State, 154 Neb. 550, 48 N. W. 2d 689, citing numerous authorities, this court held: "By the provisions of section 29-2308, R. R. S. 1943, the Supreme Court has authority to reduce the sentence in a criminal case and to render such sentence as in its opinion is warranted by the evidence.

"The act of reducing the sentence and rendering a new one warranted by the evidence is in no sense a commutation or the exercise of clemency.

"In determining the question as to whether or not the sentence shall be reduced, the Supreme Court has no right to be deterred from discharging its duty through considerations of mercy or sympathy."

As recently as Lawson v. State, 154 Neb. 847, 50 N. W. 2d 99, this court reaffirmed that: "Where the record contains no bill of exceptions or the bill of exceptions has been quashed, no question will be considered, the determination of which necessarily involves an examination of the evidence adduced in the trial court. In such a situation, if the pleadings are sufficient to support the judgment, it will be affirmed."

Under the record as presented in the case at bar, we

conclude that the judgment and sentence of the trial court should be and hereby are affirmed.

AFFIRMED.

YEAGER, J., dissenting.

I cannot find myself in agreement with the majority opinion in this case.

Section 29-2308, R. R. S. 1943, as pointed out in the majority opinion, confers authority for the reduction of sentence when in the opinion of this court the sentence rendered is excessive. This section makes it the duty of this court, when in its opinion a sentence is excessive, to render such sentence as in its opinion may be warranted by the evidence.

The majority opinion appears to me to be predicated upon the proposition that there being no bill of exceptions there is no evidence upon which to base a conclusion either that the sentence imposed was excessive or as to what would be an appropriate substitute therefor.

I agree that this conclusion finds support in former opinions of this court in at least some of which I have concurred. I do not agree however that the statute contains or should be construed to contain any such circumscription.

In my opinion when the Legislature employed the term "warranted by the evidence" it had in contemplation that which was evident on the face of the record whether it appeared in a bill of exceptions or was otherwise apparent. This approach has, in my opinion, justice and reason on its side. The opposite approach, likewise in my opinion, makes this court slave to unfortunate words uttered, it is true, at a time when they were harmless.

The record in this case discloses that the plaintiff in error pleaded guilty to the charge of uttering what is commonly referred to as a no-fund check for $10. He was not sentenced but was placed on probation. The probation was conditioned, among other conditions, that

he should not drink intoxicating liquor or become intoxicated. He violated his probation by becoming intoxicated. On finding of violation the court sentenced him to serve a term of not less than 1 year nor more than 1 year and 5 days in the State Reformatory for Men.

The statutory penalties for uttering a no-fund check are not less than 1 nor more than 10 years in the penitentiary, or not less than 30 days nor more than 6 months in the county jail, or a fine of not less than $50 nor more than $500.

The penalty for intoxication, first offense, is a fine of not more than $50 or imprisonment in the county jail for not more than 30 days, and for a second offense, imprisonment in the county jail for not more than 60 days.

In the light of these things which are evident from the record and common judicial experience it appears to me that the sentence imposed was a violation of judicial discretion and grossly excessive.

It may be contended and it may be true that there were matters not appearing on the record which influenced the district court in the fixation of sentence. If however this is true they do not appear in the journal entry which contains the basis for the revocation of probation.

I think it will be agreed that nothing outside the record may be considered in exculpation of the plaintiff in error. Is it not likewise true that outside matters may not be considered or speculated upon and given weight in inculpation?

I cannot escape the conclusion that the sentence in this case is excessive and that it should be reduced by this court.

MERTON ARNOLD OLIVER, APPELLEE, V. BOB OLIVER, APPELLANT.
66 N. W. 2d 420

Filed October 22, 1954. No. 33574.

1. **Husband and Wife.** Alienation of affections and criminal conversation are separate and distinct wrongs.
2. ———. Alienation of affections is not a necessary element in criminal conversation, wrong done in former being deprivation of spouse of right to aid, comfort, assistance, and society of other spouse in family relationships, while wrong done in criminal conversation is violation of spouse's right to exclusive privilege of sexual intercourse.
3. **Trial.** It is the duty of the trial court to present to the jury those issues which are raised by the pleadings and which find support in the evidence.
4. **Trial: Appeal and Error.** In stating the issues to the jury it is error, which may be prejudicial, for the trial court to include allegations of which there is no proof.

APPEAL from the district court for Buffalo County: ELDRIDGE G. REED, JUDGE. *Reversed and remanded.*

Blackledge & Sidner, for appellant.

Dryden, Jensen & Dier, for appellee.

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

MESSMORE, J.

This is an action to recover damages for criminal conversation. Merton Arnold Oliver is the plaintiff and Bob Oliver is the defendant. The case was tried to a jury, resulting in a verdict in favor of the plaintiff. Defendant's motion for judgment notwithstanding the verdict and in the alternative motion for new trial was overruled. The defendant perfected appeal to this court. For convenience the parties will be referred to as originally designated in the district court.

The record shows that the plaintiff and his wife, Blanche Inez Oliver, were married in Yuma, Arizona, on October 15, 1942. They are the parents of four

minor children. The plaintiff and his wife, after their marriage, resided in California, and came to Nebraska in 1947, to enable the plaintiff to help his father in farming operations. They settled in the Shelton community in Buffalo County where the plaintiff was born and raised. The defendant is a resident of the Shelton community. The plaintiff and the defendant are distantly related, being either second or third cousins. Upon the return of the plaintiff to Nebraska, the plaintiff and defendant renewed their boyhood acquaintance. The plaintiff, with his wife and family, lived in a remodeled house 2 miles west and a mile north of Shelton. The defendant lived with his parents approximately a mile west of Shelton. In 1947, the plaintiff and the defendant together bought a corn sheller and a truck, and did some custom corn shelling. The plaintiff did not have a car and the defendant had a 1950 model Buick, and on occasions would take the plaintiff and his wife to social functions. Primarily such functions consisted of dances at various places. The defendant usually paid the expenses of these trips. Apparently the relationship between the plaintiff, his wife, and the defendant was on a friendly basis. In 1949 or 1950, the plaintiff and his family moved to a house a quarter of a mile south of the home of the defendant's father. The defendant made the arrangements for this move. The relations between the plaintiff, his wife, and the defendant were about the same after they moved. On occasions the defendant would visit the plaintiff's home when he was there and also during his absences. Independently of the testimony of the plaintiff's wife, there is evidence to justify the inference that the defendant had deliberately participated in the creation of opportunities to be with her during the absence of her husband.

Approximately a year and a few months after the plaintiff and his family moved, the plaintiff heard some stories and rumors that he did not like, and as a consequence, moved to another place approximately 2½

miles from where the defendant lived. The defendant helped the plaintiff move.

The first that the plaintiff knew there was anything wrong between his wife and the defendant was when his wife told him about the situation near Christmas time in 1951.

The plaintiff's wife testified that on occasions the defendant, using his car, took the plaintiff and her to social functions and would not ordinarily have a date or take a girl friend. In addition, she testified to instances and occurrences during the absence of her husband, and one in his presence, indicating that the defendant was making love to her. Further, she testified that on occasions the defendant endeavored to have her leave the plaintiff, obtain a divorce, and marry the defendant. He said that they would live where she desired to live, and he would raise and support the two minor children of the plaintiff and his wife. There are other instances which need not be enumerated. The specific instance of the alleged sexual relations between the defendant and the plaintiff's wife is in substance as follows: On October 19, 1951, she attended a PTA meeting at the school house in Shelton. The defendant knew that she was going to be there, and after the meeting his car was parked in front of the school house. He implored her to follow him, which she did. They went to a place off the highway owned by the defendant's father, a mile and a half west and south of where the plaintiff and his family lived. There was some talk between the defendant and the plaintiff's wife as to what should be done about the situation, the defendant saying that she would have to do something, that she was driving him crazy and he could not stand it. The defendant started to make love to the plaintiff's wife. She endeavored to resist, but she finally gave in and they had sexual relations. Thereafter she went home. She did not inform her husband of the facts until Christmas Eve 1951. She had requested the defendant to talk to her husband, and finally on

Christmas Eve, according to her testimony, they had a talk with her husband with reference to obtaining a divorce which she desired and which the defendant also desired. The plaintiff stated that she could have a divorce, but that the custody of the children would be determined by the court. The plaintiff's wife then left the premises with her brother who lived in Kearney. Subsequently, she went to California and by correspondence asked the plaintiff to forgive her. He finally agreed to talk the matter over and she returned. A reconciliation between the plaintiff and his wife was effected and she agreed to testify in behalf of the plaintiff in this law suit. The plaintiff had started divorce proceedings December 26, 1951, and on the same day brought this action. After the divorce proceedings were instituted, the defendant, at her request, promised to do the right thing by her and also by the children, but after consulting counsel, he would only talk to her in the presence of witnesses. After one such conversation, she never saw the defendant again. Other facts are adduced in the record which need not be enumerated.

The principal assignments of error for determination in this appeal may be summarized as follows: (1) The trial court erred in giving instruction No. 1 with its references to the allegations and claims as to alienation of affections. (2) The trial court erred in giving instruction No. 3 with its reference to instruction No. 1 which included the allegations regarding alienation of affections and informing the jury that they state briefly the issues which the jury were to consider in this case. (3) The trial court erred in giving instruction No. 9 by instructing the jury to find for the plaintiff if they found that the defendant committed the offense charged in the amended petition, thereby again referring to the allegations of alienation of affections, and again permitting the jury to consider the same.

This action was originally filed to recover damages for alleged alienation of affections and criminal con-

versation. A few weeks after the original petition was filed the plaintiff and his wife became reconciled. The plaintiff then filed an amended petition which we will subsequently refer to. During the trial of the case the plaintiff's attorney informed the court that his theory of the case was that since the reconciliation had been had between the plaintiff and his wife and they were living together, this confined the case to one of criminal conversation.

The amended petition filed by the plaintiff alleged the marriage of the plaintiff; that commencing on the first day of January 1950, and at many and divers intervals thereafter, the defendant wrongfully, willfully, wickedly, maliciously, and unjustly commenced an association with the wife of this plaintiff; that it was the intent and purpose of the defendant to seduce and to carnally know the wife of this plaintiff; and that with that object and purpose in mind the defendant did, on the first day of January 1950, and at numerous and divers intervals of time during the said year 1950, call at the home of the plaintiff and make love to the wife of the plaintiff, protesting that he loved her, wished to marry her and take her from the home of this plaintiff to California or some other state, taking with her the two smaller children of the plaintiff and his wife. The plaintiff further alleged that the defendant, with said purpose in mind, met the plaintiff's wife in Grand Island, Nebraska, went to the hospital in Kearney, Nebraska, to see her in November 1950, after she had had the youngest child of this plaintiff, and constantly sought, pleaded, and asked the wife of this plaintiff to leave this plaintiff and come with him, and that he would marry her and raise and support the two youngest children of this plaintiff and his wife. Then the plaintiff alleged that the defendant unlawfully cohabited, associated, and kept company with and carnally and criminally knew his wife, setting forth the specific act of sexual intercourse between the plaintiff's wife and the defendant on October

19, 1951. This amended petition is also to the effect that the defendant continued to meet the plaintiff's wife, meeting her in Grand Island, and thereafter induced the wife of this plaintiff to leave this plaintiff sometime in the early part of December 1951; that by virtue thereof, and the cohabitation and association of this defendant with this plaintiff's wife and his carnally and criminally knowing her, she still being the wife of this plaintiff, he had destroyed the affection of the said wife of the plaintiff for the plaintiff and had deprived the plaintiff of the comfort, fellowship, services, society, and marital relations and assistance of his wife in domestic affairs; and that the plaintiff's wife left his home, leaving him with four children resulting from said marriage, and left the plaintiff in dishonor and disgrace and caused him great mental anguish and injury to his feelings, to his damage. To this amended petition, the defendant filed a general denial.

We deem it advisable to set out in part instruction No. 1 given by the trial court, to show in what manner it compares with the amended petition. "2. Plaintiff alleges that during the year 1950, commencing on the 1st day of January, 1950, and at many and divers intervals thereafter, the defendant (naming him) wrongfully, willfully, maliciously and unjustly commenced an association with the wife of plaintiff. That it was the intent and purpose of the defendant to seduce and carnally know the wife of this plaintiff, and with said object and purpose in mind the defendant did, on the 1st day of January, 1950, and at numerous and divers intervals of time during said year of 1950 call at the home of this plaintiff and make love to the wife of this plaintiff, protesting that he loved her and wished to marry her and take her from the home of this plaintiff to California or some other state, taking with her the two smaller children of this plaintiff and his wife.

"3. Plaintiff alleges that the defendant with said purpose in mind met this plaintiff's wife in Grand Island,

Nebraska, went to the hospital in Kearney, Nebraska, to see her in November of 1950, after she had had the youngest child of this plaintiff, and constantly sought, pleaded and asked the wife of this plaintiff to leave this plaintiff and come with him, that he would marry her and raise and support the two youngest children of this plaintiff and his wife.

"4. Plaintiff further alleges that with said purpose in mind as above set forth the defendant associated and kept company with and carnally knew the wife of plaintiff, she still being the wife of plaintiff, and that defendant continued to meet plaintiff's wife, and induced her to leave this plaintiff some time in the early part of December, 1951.

"5. Plaintiff alleges that by reason of the foregoing he suffered dishonor and disgrace, great mental anguish and injury to his feelings, all to his damage * * *."

In instruction No. 3, the trial court informed the jury that instructions Nos. 1 and 2, contained the pleadings above mentioned; that the same, in substance, constituted the claims of the parties and were given the jury for the sole and only purpose of advising the jury of the respective contentions of the plaintiff and defendant; and that they must not in any manner be considered as evidence. In other words, that they stated briefly the issues which were to be considered in the case, and in considering the issues the jury must be governed by the evidence in the light of the following rules of law set forth in the instructions. Any and all allegations contained in the pleadings which were not supported by the evidence, the jury would disregard.

In instruction No. 9 defining preponderance of the evidence, the court also informed the jury: "And if the jury believe from a preponderance of the evidence that the defendant committed the offense charged in the amended petition herein * * *."

Before analyzing the effect of the instructions or the parts thereof heretofore set forth to discern whether

or not the trial court in giving such instructions committed prejudicial error, we deem it advisable to point out the difference between an action in alienation of affections and an action in criminal conversation.

"Alienation of affections" and "criminal conversation" are separate and distinct wrongs. See Bean v. McFarland, 280 Mich. 19, 273 N. W. 332.

The term "criminal conversation," in its general and comprehensive sense, is synonymous with "adultery"; but in its more limited and technical signification it may be defined as adultery in the aspect of a tort. See Turner v. Heavrin, 182 Ky. 65, 206 S. W. 23, 4 A. L. R. 562.

"Alienation of affections" is not a necessary element in criminal conversation, wrong done in former being deprivation of spouse of right to aid, comfort, assistance, and society of other spouse in family relationships, while wrong done in "criminal conversation" is violation of spouse's right to exclusive privilege of sexual intercourse. See Hargraves v. Ballou, 47 R. I. 186, 131 A. 643.

There is a distinction between an action for criminal conversation and an action for alienation of affections. It is possible for a cause of action for either to exist without the other. While an action for alienation of affections and one for criminal conversation are both founded on the injury to the right of consortium they are generally recognized as essentially different. See Darnell v. McNichols, 22 Tenn. App. 287, 122 S. W. 2d 808. See, also, 42 C. J. S., Husband and Wife, § 697, p. 352.

The recognized primary issue in the instant case was simply whether or not the defendant had adulterous relations with the plaintiff's wife. In stating the issues of fact in its charge to the jury, the court should submit to the jury only such issues as are presented by the pleadings and are in controversy, and which find some

support in the evidence. See Klinginsmith v. Allen, 155 Neb. 674, 53 N. W. 2d 77.

This court has frequently criticized the practice of copying the pleadings as a method of stating the issues to the jury and where they contain allegations not supported by evidence it may be reversible error to include such allegations in defining the issues if the reviewing court is satisfied that the jury may have been misled thereby. See, Franks v. Jirdon, 146 Neb. 585, 20 N. W. 2d 597; Hutchinson v. Western Bridge & Construction Co., 97 Neb. 439, 150 N. W. 193; McClelland v. Interstate Transit Lines, 139 Neb. 146, 296 N. W. 757.

As stated in McClelland v. Interstate Transit Lines, *supra:* "The stating of the issues by substantially copying the pleadings of the parties, almost verbatim, as was done here, has been repeatedly condemned by this court. If it results in prejudice to the complaining party, it is sufficient ground for reversal. In stating the issue to the jury, it is likewise error, which may be prejudicial, for the trial court to include allegations of which there is no proof."

Considering the instructions given in the instant case in the light of the foregoing authorities and recognizing that the sole and only issue in the instant case was that of criminal conversation as defined herein, we believe that the submission to the jury in the manner and form in which the issues were submitted by the trial court constituted prejudicial error.

There are other assignments of error made by the defendant which are without merit and unnecessary to detail in this appeal.

For the reasons given herein, the judgment entered on the verdict by the trial court is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

JOSEPHINE KNUDSEN, APPELLEE, V. PHILLIP H. MCNEELY, APPELLANT.

66 N. W. 2d 412

Filed October 22, 1954. No. 33600.

1. **Workmen's Compensation.** A compensable injury within the Workmen's Compensation Act is one caused by an accident arising out of and in the course of the employment.
2. ———. An accident within the Workmen's Compensation Act is an unexpected or unforeseen event happening suddenly and violently and producing at the time objective symptoms of injury.
3. ———. An employee claiming the benefit of the Workmen's Compensation Act must, to succeed, show by the greater weight of the evidence all the essential elements of an accident as that word is defined in the act.
4. **Workmen's Compensation: Appeal and Error.** An appeal to this court in a workmen's compensation case is considered and determined de novo.
5. **Workmen's Compensation.** Symptoms of pain and anguish such as weakness or expressions of pain clearly involuntary or any other symptoms indicating a deleterious change in bodily condition may constitute objective symptoms within the requirements of the Workmen's Compensation Act.
6. ———. An employee in a workmen's compensation action is entitled to recover an award if he establishes by the greater weight of the evidence that he sustained an injury resulting from an accident arising out of and in the course of his employment, notwithstanding a preexisting physical condition contributed to his disability.

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

J. J. Maher and *Brogan & Brogan*, for appellant.

Bernard Ptak, for appellee.

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

BOSLAUGH, J.

This proceeding is prosecuted by appellee for recovery from appellant of disability benefits provided in the

Nebraska Workmen's Compensation Act. The basis for it is that appellee says she was employed by appellant to perform labor in the cafe operated by him in the city of Norfolk for a weekly wage of $18 and two meals each day; that appellee was the victim of an accident that arose out of and in the course of her employment; and that as a result thereof she sustained an injury to her right arm that caused her temporary total disability. Appellant denied her claim. The compensation court on rehearing therein disallowed and dismissed the claim and appellee appealed to the district court. A hearing therein resulted in findings and judgment for her. This appeal is from that judgment.

Appellee suffered a fracture of the radius of her right arm at about the lower third thereof or about 4 inches above the lower end of the bone January 1, 1940. The fracture was slightly comminuted and there was displacement and overriding of the fragments of the bone. She was treated for the fracture at the Rosebud Indian Hospital at Rosebud, South Dakota. An attempt to reduce the fracture was made when she entered the hospital on the date of the accident, but it was not satisfactory or successful. A doctor described as "head doctor" was away when she entered the hospital. He returned about a month thereafter and performed an operation on her arm. The fracture of the radial shaft was immobilized by a three-hole metal bone plate and several loops of wire which encircled the plate and the shaft of the bone on either side of the fracture. An X-ray of March 2, 1940, shows that the bone was in satisfactory position. Appellee entered the hospital January 1, 1940, and was released in March 1940. Her arm was in a cast until May 19, 1940. It is shown by an X-ray of April 8, 1940, that the bone plate was in proper position, bound to the bone by screws and wire, and that the radial fragments were in practically perfect apposition. An orthopedic surgeon testified from an examination of the X-ray last referred to above that the bone was

straight; that there was no absorption or penciling down of the bone; that the radius was apparently the same length as the ulna; and that union of the bone was taking place at the date of the X-ray April 8, 1940. The situation exhibited was so satisfactory that the witness by examining the X-ray said he could "just barely see where it (the bone) is broken * * *."

Appellee was employed by appellant to work in the kitchen of his cafe in October 1944, and she worked there for him until the time she says she was injured on the morning of August 30, 1951. Her hours were from 9 in the evening to 6 in the morning each day of the week. Her compensation was $18 a week and two meals each day. Her duties were confined to the kitchen of the cafe. They consisted of preparing used and soiled dishes for the dishwashing machine, placing them in trays, moving the trays into the dishwashing machine, taking them from the machine, drying and stacking the dishes, and returning the trays to the table where the dishes were deposited as they were brought in from the serving portion of the cafe. She carried the utensils and containers such as big heavy soup pots and roasters that were too large to be put in the machine to and from the sink and washed them at the sink. She had to clean and scrub the steam table. It had six inserts which were required to be taken out and cleaned. She was required to clean and scrub the whole kitchen each night and to do any similar work in the kitchen which she was asked to do. She had no difficulty performing her duties. She made no complaints about her right arm or her ability to do the work during the long period she was employed by appellant, except in damp weather she would sometimes say her arm ached. There is no proof that she did not carry on satisfactorily or that her employer complained of the manner of her services.

The kitchen was north of the room in which patrons of the cafe were served. It was of considerable size, about 22 feet wide. The exact length of it is not shown.

The dishwashing machine was adjacent to the west wall of the kitchen. There were two metal tables, one to the south and one to the north of the dishwasher. They were about 3 feet high and each had a metal rim or edge about ¾ of an inch thick that extended about 2 inches above the floor of the table to prevent fluids or other materials from falling from them to the floor. The north end of the south table and the south end of the north table were against the dishwasher so that a tray containing dishes to be washed could be slid on the floor of the south table through a door into the machine and from it onto the floor of the north table. The soiled or used dishes were brought from the dining room and deposited on the south table. Appellee removed any materials on them and placed them in a tray in proper position to be washed. When the tray was filled she slid it into the machine and while these were washing appellee would carry a tray from the north table to the south one and stack dishes in it. She would remove the first one from the machine to the table to the north and move the second one into the machine. The dishes in the first tray were dried by appellee and stacked on a long table, the west part of which was about 2 feet east of the dishwashing machine and the two metal tables above described. She would repeat this operation until all the dishes were washed. The limited space between the tables formed an aisle in which appellee worked while moving the trays, and washing, drying, and stacking the dishes. The trays furnished to and used by appellee in these operations were about 2 feet square, and equipped with racks or dividers to support and hold the dishes in proper position for washing in the machine. Two of them were made of wood and one was metal that weighed about 10 pounds. There was an opening near the top and at the center of two sides of the trays in which the hands of the operator could be inserted when moving or lifting the trays. When transporting a tray from the north to the south table appellee lifted,

held, and carried it up to and against her chest because of the limited space in the aisle mentioned above and the size of the machine.

Appellee reported for duty at the cafe at 9 p. m., August 29, 1951. She engaged in the performance of the duties of her employment at the place of business of her employer from then until about 2 a. m., August 30, 1951, when the happening took place which is the basis of the claim of appellee. She finished drying dishes that were in the metal tray and had just been washed. The tray was wet and slippery because it had recently been in the dishwasher. It was difficult to handle. When she was in the act of picking up the tray to take it from the north to the south table she did not have hold of the handles of it but put her hands under it to bring it up to and against her chest. She rested it on its side on the ledge or edge of the table to get a firmer grip on it. The tray slipped and in attempting to control it appellee was caused to be off balance and her whole body went forward and downward. The tray went off and downward over the ledge of the table. She struck the outward part of her right arm about the place of the former fracture of the radius of her arm on the ledge of the table and her arm was injured. She immediately had a terrific pain in her arm, looked at it, and saw it was red where it had struck the table. She wrapped it in a dish towel, went to the dining room, and told a waitress who had been an employee in the cafe as long as appellee had been that she had an accident and had hurt her arm. Another waitress came and looked at the arm, applied gauze, and rebandaged it. Appellee could not do any work but she stayed until appellant came and she told him what had happened. He instructed her to consult and get the services of a doctor. The first waitress referred to above testified that appellee worked in the kitchen of the cafe the night her arm was injured doing her usual duties until the accident; that she could

not do anything after that; and the waitress and her husband finished the things, including the scrubbing of the kitchen, that appellee was supposed to do. The waitress said that appellee was in great pain and had tears in her eyes. The witness saw the arm and she said that it had an area that was red where appellee said she struck it.

The doctor she consulted at Norfolk examined her arm, found "she had movement over this area which she stated she had injured," and he suggested it might be a fracture through this site of the arm. He applied a splint and advised follow-up care for the first week or two. This was done and he eventually referred her to an orthopedic surgeon. Dr. Herman F. Johnson of Omaha examined her October 22, 1951. He operated her arm the next day. He examined the X-rays made at Rosebud, South Dakota, after the fracture of her arm January 1, 1940, the X-ray taken in Norfolk August 31, 1951, and the one taken October 22, 1951. He testified that the X-ray of April 8, 1940, showed that the radius was straight; that there was no absorption of the bone; that the radius was apparently the same length as the ulna; and that union of the bone was taking place on that date. The situation exhibited then was so satisfactory that the witness, by examining the X-ray, said he could "just barely see where it (the bone) is broken * * *." He said the X-ray of October 22, 1951, showed new bone at the place of the fracture of January 1, 1940, that was attempting to bridge the fragments of the radius and that this was confirmed by the operation of October 23, 1951. The opinion expressed by him was that appellee developed a weak union in 1940 but strong enough so that she could use her arm from the time the cast was removed May 19, 1940, until August 30, 1951. When he examined the arm in October 1951, the plate was broken and the radius completely divided. He concluded that there was a reinjury or fracture through a partially reunited old frac-

ture of the shaft of the radius of appellee.

The opinion and conclusion of Dr. Johnson were disputed by the testimony of an orthopedic surgeon examined by appellant who based his opinion entirely upon his examination and study of the X-rays in evidence in this case. He said that in his opinion there had not been any healing or union of the fracture of the radius of appellee after January 1, 1940.

Appellee has not been able to use her right arm for any useful purpose since it was injured August 30, 1951.

The issue in this case, as it is presented in this court, is whether or not there was an accident August 30, 1951, that caused appellee injury within the provisions of the Workmen's Compensation Act. A compensable injury within the provisions of the act is one caused by an accident arising out of and in the course of the employment. Seger v. Keating Implement Co., 157 Neb. 560, 60 N. W. 2d 598. An accident within the act is an unexpected or unforeseen event happening suddenly and violently and producing at the time objective symptoms of injury. § 48-151, R. R. S. 1943; Ruderman v. Forman Bros., 157 Neb. 605, 60 N. W. 2d 658. An employee claiming the benefit of the act must, to succeed, show by the greater weight of the evidence that an accident occurred. Ruderman v. Forman Bros., *supra*. An appeal to this court in a workmen's compensation case is considered and determined de novo upon the record. Myszkowski v. Wilson & Co., Inc., 155 Neb. 714, 53 N. W. 2d 203.

Appellant insists that the proof fails to show an accident within the meaning of the Workmen's Compensation Act. That there was an unexpected or unforeseen event happening suddenly and violently may not be successfully challenged. The evidence that there was is substantial and it is not disputed. There is convincing proof of objective symptoms of injury. Symptoms of pain and anguish such as weakness or expressions of pain clearly involuntary or any other symptoms in-

dicating a deleterious change in the bodily condition may constitute objective symptoms within the requirements of the statute. Manning v. Pomerene, 101 Neb. 127, 162 N. W. 492; Van Vleet v. Public Service Co., 111 Neb. 51, 195 N. W. 467; Bekelski v. Neal Co., 141 Neb. 657, 4 N. W. 2d 741; Beam v. Goodyear Tire & Rubber Co., 152 Neb. 663, 42 N. W. 2d 293.

It is certain from the proof that appellee had an imperfect and deformed right arm resulting from the accident and injury she suffered January 1, 1940, and that it was probably more susceptible to injury than a normal arm would have been, but this does not constitute a bar to her right of recovery for an accidental injury as provided in the Workmen's Compensation Act. Appellee is entitled to the recovery granted her because of the proof that she sustained an injury by an accident arising out of and in the course of her employment, notwithstanding a preexisting physical condition may have contributed to cause her disability. Tucker v. Paxton & Gallagher Co., 153 Neb. 1, 43 N. W. 2d 522.

Any injury suffered by appellee August 30, 1951, arose out of and in the course of her employment. The evidence that it did is abundant. Appellant makes no objection to the computation of benefits awarded appellee by the district court or to the amount of the judgment rendered for her.

The judgment of the district court should be and it is affirmed. Appellee should be and is allowed for her counsel for services in this court $250 to be taxed as costs in this court against appellant.

AFFIRMED.

LLOYD SALYERS, JR., ET AL., PLAINTIFFS IN ERROR, V. STATE OF NEBRASKA, DEFENDANT IN ERROR.
66 N. W. 2d 576

Filed November 5, 1954. No. 33562.

1. **Assault and Battery: Criminal Law.** Where an assault and battery is committed, he who is present when the act is done and aids and abets therein may be prosecuted and punished as if he were the principal offender.
2. **Criminal Law.** A common purpose among two or more persons to commit a crime need not be shown by positive evidence but may be inferred from the circumstances surrounding the act and from defendant's conduct subsequent thereto.
3. ———. It is only where there is a total failure of proof to establish a material allegation of the information, or the testimony is of so weak or doubtful a character that a conviction based thereon cannot be sustained, that the trial court is justified in directing a verdict for the defendant.
4. ———. 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 Antelope County: SIDNEY T. FRUM, JUDGE. *Affirmed.*

John J. Lawlor and *Eugene D. O'Sullivan, Jr.*, for plaintiffs in error.

Clarence S. Beck, Attorney General, and *Robert V. Hoagland*, for defendant in error.

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

SIMMONS, C. J.

This matter comes here by petition in error.

The three petitioners, hereinafter called defendants, were jointly charged with assault and battery upon one C. R. Swint. The defendants were tried in the county court, found guilty and sentenced to 90 days imprisonment in the county jail, and required to pay costs. Defendants appealed to the district court, where a jury

trial was had. A verdict of guilty was returned as to all defendants. A motion for a new trial was made and overruled. Defendants were sentenced to imprisonment in the county jail for 60 days and to pay the costs of prosecution.

The two defendants Salyers advance here the contention that the evidence was insufficient to warrant the submission of the issue of their guilt to the jury, and is insufficient to sustain the jury's verdict. All three defendants request a reduction in the sentence under the provisions of section 29-2308, R. R. S. 1943.

We affirm the judgment of the trial court.

The sufficiency of the evidence to sustain the conviction of the defendant Godkin is conceded. There is no evidence that the defendants Salyers, or either of them, struck the complaining witness.

The complaining witness will herein be referred to as Swint and, where necessary, the defendants Salyers by the names used at the trial, Lloyd and Vern (Wilfred), and the defendant Godkin as Godkin.

We summarize the evidence as to those matters which go to sustain the submission of the case to the jury and to sustain the jury's verdict. On many points, the State and defendants' witnesses are not in accord. For the purposes here, we need not point out the conflicts, as the credibility of the witnesses was for the jury to determine.

Swint, on the day involved, was city policeman at Neligh and was off duty at 5 p. m.

During the early evening, the defendants were in a liquor store. Swint came in. One of the three defendants was heard to say: "There is Mr. Swint * * * I wonder if he is off duty, if he is we are going to beat * * * him." (The words deleted indicated a violent physical assault.)

Also while in the store, Lloyd had been asked by Swint to remove a cattle trailer from the streets, this being pursuant to his orders as a policeman.

Also at that time, Vern insisted on buying a bottle of whiskey for Swint. Swint purchased a case of beer and went home where he had guests watching television.

Shortly thereafter, the three defendants came to the Swint home in Vern's automobile. Vern entered the home and offered whiskey to Swint's guests. Swint suggested that he and Vern leave the house, which they did. They got into Vern's car and there "we had a drink." Vern was driving. Lloyd was in the front seat with him. Godkin and Swint were in the rear seat. They drove out of town to the south where they stopped. Swint was ordered out of the car. Godkin got out and a fight followed. Swint was injured enough to be bleeding at the lips. Vern or Lloyd stopped the "scuffling." The four then started back to town.

The mayor of Neligh operated a drive-in theatre east of the city. On the way to town it was decided to take Swint to the mayor. They then drove past the theatre about a half mile. The car was again stopped. Swint was ordered out of the car. Godkin then knocked him down two or three times. Swint's face and head were cut and bruised in several places, resulting in a brain concussion.

The four men then drove to the theatre, located the mayor and after visiting with him a few minutes, the mayor testified that Vern said, "I want to show you your cop." Vern opened the car door and asked Swint to get out.

Lloyd said to the mayor, "Here is your cop." The mayor believed Swint to be drunk. He promptly discharged Swint.

The defendants then took Swint to a garage, washed the blood from his face, nose, lips, and ear, had another drink, and then took Swint home.

Section 28-201, R. R. S. 1943, provides: "Whoever aids, abets or procures another to commit any offense may be prosecuted and punished as if he were the principal offender."

The trial court instructed on the liability of one who aids, abets, solicits, or encourages another person to commit an offense. The instruction is not challenged here.

We have held in civil litigation that: "In an assault and battery, not only he who is the actor or actual perpetrator of the offense, but he also who, being present when the act is done, aids and abets therein, is a principal and liable as such at the suit of the injured party." Cooney v. Burke, 11 Neb. 258, 9 N. W. 57.

In the body of the opinion it is said that the aider and abettor "becomes a principal therein and punishable as such."

This decision was followed in Acree v. North, 110 Neb. 92, 192 N. W. 947. The rule is applicable in criminal cases. See, Mauder v. State, 97 Neb. 380, 149 N. W. 800; 5 C. J., Assault and Battery, § 260, p. 758; 6 C. J. S., Assault and Battery, § 101, p. 958.

The rules are: "A common purpose among two or more persons to commit a crime need not be shown by positive evidence but may be inferred from the circumstances surrounding the act and from defendant's conduct subsequent thereto." "* * * it is only where there is a total failure of proof to establish a material allegation of the information, or the testimony is of so weak or doubtful a character that a conviction based thereon cannot be sustained, that the trial court is justified in directing a verdict for the defendant." Callies v. State, 157 Neb. 640, 61 N. W. 2d 370.

The evidence sustains the judgment of the trial court. The assignments are without merit.

This brings us to the contention that the sentences of the court are excessive and should be reduced under the provisions of section 29-2308, R. R. S. 1943, which provides: "In all criminal cases that now are, or may hereafter be pending in the Supreme Court on error, the court may reduce the sentence rendered by the district court against the accused, when in its opinion the sentence is excessive, and it shall be the duty of the Su-

preme Court to render such sentence against the accused as in its opinion may be warranted by the evidence."

The applicable rule is: "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." Onstott v. State, 156 Neb. 55, 54 N. W. 2d 380.

Under the facts and circumstances as determined by the jury's verdict, we find no abuse of discretion in the sentences imposed.

The judgment of the trial court is affirmed.

AFFIRMED.

DOROTHY OTTERSBERG, APPELLEE, V. CHARLES HOLZ, APPELLANT.
66 N. W. 2d 571

Filed November 5, 1954. No. 33571.

1. **Negligence.** Gross negligence within the meaning of the motor vehicle guest statute means great and excessive negligence or negligence in a very high degree. It indicates the absence of slight care in the performance of a duty.
2. **Automobiles: Negligence.** A guest to recover damages from a host for injury received by the guest while riding in a motor vehicle operated by the host must prove by the greater weight of the evidence in the case the gross negligence of the host relied upon by the guest and that it was the proximate cause of the accident and injury.
3. ———: ———. Gross negligence within the meaning of the motor vehicle guest statute cannot be predicated upon momentary distraction of attention of the operator thereof by some matter of immediate concern to him.
4. **Negligence.** If the evidence in pending litigation respecting gross negligence is not in conflict the question of its existence is one of law for the court.
5. ———. When the evidence is resolved most favorably towards the existence of gross negligence, and thus the facts are determined, the question of whether or not they support a finding of gross negligence is one of law.

APPEAL from the district court for Jefferson County: CLOYDE B. ELLIS, JUDGE. *Reversed and remanded with directions.*

Chambers, Holland & Groth and *Robert V. Denney,* for appellant.

Armstrong & McKnight, Van Pelt, Marti & O'Gara, Robert D. McNutt, Bruce L. Evans, and *Samuel E. Gallamore,* for appellee.

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

BOSLAUGH, J.

The object of this action is the recovery of damages appellee says she sustained because of injuries caused her by gross negligence of appellant in the operation of a motor vehicle driven by him in which appellee was a passenger. The challenge of the appellant to the sufficiency of the evidence to justify or support a verdict for appellee by motion for a dismissal of the case or the direction by the court of a verdict for appellant made at the conclusion of the introduction of evidence and after the final rest of the parties was denied. The verdict and judgment were for appellee. The motion of appellant for a new trial or for a judgment for him notwithstanding the verdict was overruled. This appeal attacks the validity of the denial of the motion and the judgment for appellee.

The cause of action pleaded by appellee is that: July 30, 1952, she was riding as a guest in an automobile operated by appellant traveling eastward on U. S. Highway No. 3 as a part of a trip from Hebron to Johnson. The highway had a hard surface about 20 feet wide. Appellant approximately 13 miles west of Beatrice carelessly and negligently took his hands from the steering wheel of the car and permitted it to continue to operate at a speed of about 65 miles an hour without any attempt to control it. Appellant placed himself in

a position from which he had no vision of the highway or the direction the automobile proceeded and no control over it. The machine left the traveled portion of the highway, ran into a ditch, and at high speed with great force and violence struck a tree. The automobile was demolished and appellee was seriously and permanently injured and disabled. Appellant because of his acts and defaults as alleged was guilty of gross negligence which was the proximate cause of the accident, the injuries, and the disability of appellee.

Appellant admitted the occurrence of the accident, denied specifically that he was guilty of gross negligence, and traversed all other claims of appellee.

Appellee concedes that she was a guest being transported in the car operated by appellant at the time of the accident. A guest to recover damages from his host for injury received by the guest while riding in a motor vehicle operated by the host must establish by the greater weight of the evidence in the case the gross negligence of the host relied upon by the guest, and that it was the proximate cause of the accident and injury. § 39-740, R. R. S. 1943; Born v. Estate of Matzner, *ante* p. 169, 65 N. W. 2d 593. It is necessary to the decision of the case to determine if the evidence on the issue of gross negligence is sufficient to support the verdict for appellee. The proof from which this must be concluded is without conflict. It was produced by her and she is entitled to have it and any deducible inference therefrom considered most favorably to her. Born v. Estate of Matzner, *supra*.

The home of appellant and his wife was in Minnesota. Their daughter, the appellee, resided in the State of Washington. Another daughter, Mrs. Veris, had her home on a farm near Hebron, Nebraska. The parents of the husband of appellee lived in Johnson, Nebraska. Appellee in July of 1952 was visiting at her parents' home in Minnesota. Appellant, his wife, and appellee and her daughter about 1½ years of age, traveled in

the 1952 Pontiac sedan of appellant from Minnesota to the home of Mrs. Veris. Appellant, his wife, appellee, her daughter, a sister of appellee, Mrs. Hines, and her daughter, left the home of Mrs. Veris July 30 to proceed on a trip to the home of the parents of appellee's husband at Johnson. They traveled eastward on U. S. Highway No. 3. Appellant was the driver of the car. His wife was to the right of him and she had the infant daughter of Mrs. Hines in her care. Mrs. Hines was seated on the left side of the rear seat and appellee and her daughter occupied the right of that seat. It was a clear, quiet, dry, hot, summer day. Visibility was good. The surface of the highway was "blacktop" about 26 feet wide. There was, at the place of the accident, a gradual slope from the part of the road that was surfaced downward until it leveled off about 4 feet lower than the traveled portion of the road. The speed of the car immediately before the accident was estimated by appellant at about 50 miles an hour. The opinion of appellee was that the speed of it was "around 60" miles an hour. The trip from its origin to about 13 miles west of Beatrice was uneventful, and there was no objectionable act or omission in the manner of the operation of the automobile by appellant and no complaint or criticism concerning it.

At about the place west of Beatrice mentioned above the infant granddaughter being cared for by her grandmother was on her lap or partly thereon and partly on the front seat of the car. She was in some manner suddenly precipitated forward and downward onto the floor and right foot of appellant. Appellant immediately removed his hands from the steering wheel and reached down in an attempt to rescue the child. His left wrist caught on some part of the car under the instrument panel and it was held in such a way and so firmly that appellant could not relieve himself from it or get up from his then position. His left wrist was injured by the happening sufficiently that it exhibited

a scar at the place of injury at the time of the trial. Appellant from the time he reached for the child until the accident could not see the highway or the direction the car was traveling. The speed of the car was not retarded, the brakes were not applied, and appellant does not know whether or not his foot remained on the accelerator. The situation of appellant during that time was such that he could not control himself or the car. The car was "pretty well to the right shoulder" when appellant reached down to get the child. The distance from where the car left the traveled portion of the road to the tree which the car struck was 107 feet. The car came to rest 12 feet east of the tree and it was 15 feet south of the edge of the highway. The bark on the tree where the car struck it was injured for 4 or 5 feet above the ground. The car was demolished. Mrs. Holz, Mrs. Ottersberg, and her daughter were thrown clear of the car. Mrs. Holz was killed and Mrs. Ottersberg had multiple serious injuries. Appellant was pinned in the car and was removed by men who arrived after the accident. The infant child of Mrs. Hines was found after the accident under the instrument panel of the car. Mrs. Hines was in the back of the car.

The evidence in this case is free from conflict. The record exhibits only one set of facts. The question whether or not the proof sustains a finding that appellant was guilty of gross negligence that was the proximate cause of the accident complained of in this case is one of law. In Paxton v. Nichols, 157 Neb. 152, 59 N. W. 2d 184, it is said: "When evidence is resolved most favorably toward the existence of gross negligence, and thus a fixed state of facts had, the question of whether or not such facts will support a finding of the existence of gross negligence is a question of law." See, also, Cunning v. Knott, 157 Neb. 170, 59 N. W. 2d 180. Gross negligence means great or excessive negligence; that is, negligence in a very high degree. It indicates

the absence of even slight care in the performance of a duty. Born v. Estate of Matzner, *supra.*

Appellant was driving his automobile in a proper and legal manner. His wife was riding with him in the front seat of the car. His 10-month-old grandchild was with them in the care of her grandmother. The child was suddenly precipitated onto the floor of the car and the right foot of appellant. The record does not give the cause of this. Probably no one knows. The grandmother was killed in the accident immediately following this happening. The grandfather quite naturally and impulsively attempted to recover the child to protect her from danger and harm. In doing so he released his grasp of the steering mechanism of the car and reached both hands down and under the front part of the body of the car. His left wrist was caught on something in such a manner he could not get loose, control himself, recover the child, or control the car. He could not see the highway on which the car was traveling or the course it took. The brakes were not applied and the speed of the car was not decreased. When appellant was asked if he did anything to reduce the speed when he attempted to recover the child he explained "Well, I don't know how I could, I had no control." It may be added in his situation he did not have the ability to retake control of the car. Appellant could not estimate the duration of the short time between when he reached for the child and when the car struck the tree, but he did say he did not look up in the interval because "The crash was too quick." When he reached for the child the car was on the south side of the road very near to the south shoulder. It traveled 107 feet after it left the road to and struck a tree. This is what caused the damage. If the car was traveling 50 miles an hour as appellant estimated it went the distance from the road to the tree in slightly less than 1½ seconds. If the speed was 60 miles an hour as appellee thought the time for this operation was slightly more than 1 second. If there

was gross negligence that caused the accident, injuries, and damage it must be found in these undisputed facts.

Johnson v. Jastram, 155 Neb. 376, 52 N. W. 2d 245, considered the following: William Parenti who was killed in the accident involved in the case was riding as a guest in the car of Jastram, the appellant. The speed of the car was 50 to 55 miles an hour. The deceased told appellant there was a wasp or yellow jacket in the car; that it had stung the deceased; and that it was then on appellant. He removed his right hand from the steering wheel of the car he was driving, his eyes from the road, and struck at the insect. These things occurred in a very short time. While they were happening the right wheels of the car left the pavement of the road to the right about 50 feet north of a bridge as they traveled south. Appellant looked up and saw the bridge before the car struck it, but not in time to turn or stop the car. It struck the north end of the west abutment of the bridge and the deceased was killed. The judgment for the representative of the deceased was reversed and recovery denied. Therein it is said: "It is true that there was a loss of control, a failure of proper lookout, and a leaving of the hard surface of the highway, and that if there had been no failure in these respects there would have been no accident. These failures however are not sufficient upon which to base a conclusion that there was evidence upon which to submit the issue of gross negligence to a jury. * * * These failures were set in motion by the distracting remarks and actions by plaintiff's decedent. * * * This court has repeatedly held that momentary inattention such as is described in the evidence in this case does not amount to gross negligence. This is true even where the inattention is purely voluntary and is in nowise induced or contributed to by a distracting influence. * * * Therefore unless this court is prepared to depart from its previous holdings and decisions in cases bearing comparable analogies to the facts in this case it becomes necessary to

say as a matter of law that the evidence in this case was not sufficient upon which to submit the question of gross negligence within the meaning of the guest statute to a jury. We are not prepared to so depart." See, also, Lemon v. Hoffmark, 132 Neb. 421, 272 N. W. 214; Black v. Neill, 134 Neb. 764, 279 N. W. 471; Gohlinghorst v. Ruess, 146 Neb. 470, 20 N. W. 2d 381.

Copeland v. Russell, 290 Mass. 542, 195 N. E. 541, is confidently relied upon by appellee. She characterizes it as the "closest to the facts of the instant case that we have been able to find * * *." Nancy Copeland, the plaintiff in that case, was slightly more than 3 years of age. The defendant with the consent of the mother of the child took her for a ride in his automobile. While defendant was driving the car he removed his hands from the steering wheel and reached around to the back to help the plaintiff get from the back into the front seat. The next thing he knew was that he was lying in the road with the plaintiff in his arms. The car ran uncontrolled into a tree on the side of the road. The car was badly damaged and plaintiff suffered personal injuries. The trial court entered a verdict for defendant. The reviewing court sustained exceptions of plaintiff to the action of the trial court on the ground that a finding of gross negligence was warranted. There was in that case no evidence of any fact or happening constituting a distracting influence that caused or contributed to the inattention of defendant to the operation of the motor vehicle. The act of defendant complained of was voluntary and deliberate, and not occasioned by anything sudden, unusual, disturbing, or distracting. What has been said of that case is true of other cases cited by appellee on this subject. There are three additional Massachusetts cases and three cases from other jurisdictions. They are distinguishable from the case now being considered, but if it is thought that they are not it is appropriate to observe that in that view they

are contrary to the settled doctrine of this court on the subject and they cannot be controlling.

Reference is made by appellee to 4 Blashfield, Cyclopedia of Automobile Law and Practice (Perm. ed.), § 2327, p. 422. It contains the following: "Gross negligence, or reckless and heedless misconduct, cannot be predicated upon a momentary distraction of attention by some matter of direct and immediate concern to the driver."

The record convincingly shows that the accident was due to the fact that the attention of appellant was momentarily distracted from the operation of the car because of a not unnatural reaction to the plight of his infant granddaughter. The situation shown by the proof may not reasonably be held to disclose the absence of slight care in the performance of the duty of appellant to appellee. The evidence does not show that appellant was guilty of gross negligence within the meaning of the guest statute.

The judgment of the district court is reversed and the cause is remanded with directions to the district court to render and enter a judgment in favor of appellant and against appellee notwithstanding the verdict of the jury.

REVERSED AND REMANDED WITH DIRECTIONS.

IN RE APPLICATION OF C. F. FISHER, EXECUTOR OF THE ESTATE OF MARTIN SCHULZ, DECEASED, FOR LICENSE TO SELL REAL ESTATE.

C. F. FISHER, EXECUTOR, APPELLEE, V. WARD W. MINOR, GUARDIAN AD LITEM, ET AL., APPELLEES, LOUIS E. YANDA, APPELLANT.

66 N. W. 2d 557

Filed November 5, 1954. No. 33576.

1. **Executors and Administrators: Judgments.** A petition for license to sell real property for the payment of debts of an estate, filed in the court having exclusive original jurisdiction,

and which was acted upon and treated as sufficient by the court, is not, in the absence of fraud or collusion, subject to attack in a collateral proceeding.

2. **Executors and Administrators.** The authority to grant a license to sell real estate carries with it the implied power to determine the necessity for such sale and the sufficiency of the pleadings presented to the court for that purpose.
3. **Courts.** A court of record has the inherent authority to amend its records so as to make them conform to the facts. The power extends as well to the supplying of omissions as to the correcting of mistakes, and in the exercise of the power the court is not confined to an examination of the judge's minutes or other written evidence; it may proceed upon any satisfactory evidence, oral or written.
4. **Judicial Sales.** The doctrine of caveat emptor applies to all judicial sales in this state, subject to the qualification that the purchaser is entitled to relief on the ground of after-discovered mistake of material facts or fraud, where he is free from negligence. He is bound to examine the title and not rely upon statements made by the officer conducting the sale as to its condition.
5. **Executors and Administrators: Judgments.** A proceeding by an executor for the sale of real estate to pay the debts of the estate is not subject to collateral attack when the five essentials to a valid sale specified in section 30-1142, R. R. S. 1943, are shown to exist.

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

Moller R. Johnson, for appellant.

Clark J. Mingus, DeWayne Wolf, and *Barlow Nye,* for appellees.

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

CARTER, J.

This is an action growing out of the sale of real estate by an executor for the purpose of paying the debts of the decedent. After the executor's sale of the real estate had been confirmed, the purchaser refused to pay in the balance of his bid amounting to $15,074.50. The executor applied for an order requiring the pur-

chaser to pay in the amount, or, in the alternative, for a judgment for the amount. The trial court found for the executor and entered judgment against the purchaser for $15,074.50 with interest at 6 percent per annum from December 23, 1953, and the costs of suit. The purchaser appeals.

C. F. Fisher was appointed and qualified as executor of the estate of Martin Schulz, deceased. On May 6, 1952, the executor petitioned the district court for a license to sell certain described real estate to pay the debts of the estate. An order to show cause was issued on the same day and duly published in a legal newspaper. The license to sell was issued, after hearing, on June 13, 1952. Notice of sale was duly given and the land sold to Louis E. Yanda on July 28, 1952, for the sum of $20,174.50. He paid down $5,100 on the day of the sale. On September 5, 1952, the sale was confirmed by the district court.

Subsequent to the confirmation of the sale the purchaser refused to pay the balance of his bid. The executor applied for an order requiring the purchaser to pay in the balance of his bid, or for a judgment for such amount. In resisting the application, the purchaser contended (1) that the trial court had no jurisdiction to order the sale upon the petition filed, (2) that the sale was void because the executor did not take an oath or file the same as required by section 30-1122, R. R. S. 1943, (3) that the abstract of title to the real estate did not show a merchantable title, and (4) that the executor filed a motion to vacate the sale and agreed to return the cash payment of $5,100, which he failed to do. We shall dispose of these contentions in their numerical order.

Appellant contends that the district court did not have jurisdiction to order an executor's sale to pay the debts of the estate. The issue thus raised is based on a statement that the petition praying for a license to sell did not correctly recite the facts and that there was,

in fact, sufficient personal property in the estate to pay all claims allowed. The petition alleged that claims allowed against the estate amounted to $291.26, exclusive of court costs, executor's and attorney's fees. The amount alleged to be required to pay all provable debts and expenses was $3,085.26. It was also alleged that the funeral expenses in the amount of $630 were paid by the widow and that she was entitled to have it repaid to her from the assets of the estate. The executor also alleged that no personal estate came into his hands and that it was necessary to sell the described real estate to pay the debts and expenses. The trial court examined the county court files dealing with the administration of the estate and took evidence with reference thereto. A license to sell was granted, the land was sold, and the sale confirmed. No appeal was taken at any stage of the foregoing proceedings.

The evidence shows that the petition filed to obtain the license to sell did not correctly recite the facts. The executor admits that he had a $500 note and two $100 government bonds in his possession at the time the petition was filed, which were not included in his calculations. He states that he overlooked the bonds and that he did not consider the note collectible at the time he verified the petition. After the license was granted he collected $752.43 for wheat which he credited to the wife's account, she being an incompetent person and the executor being her regularly appointed guardian. He also collected the note. There is evidence in the case at bar that debts, taxes, and expenses remaining to be paid amounted to the sum of $4,236. The executor testifies that he had received total receipts in the sum of $3,997.30. He paid claims in the amount of $2,901.02 out of this amount which are not included in the $4,236 heretofore mentioned. Even if the two $100 bonds, the $500 note, and the $752.43 for wheat were added to the personal assets in the hands of the executor, debts and expenses would exceed personal assets

in the hands of the executor by more than $1,600.

The petition for the license to sell real estate for the payment of debts and expenses stated a cause of action within the exclusive jurisdiction of the district court. While it is true that there was error in the amounts therein recited, the district court held a hearing and concluded from the evidence that the land must be sold to pay debts and expenses. This is a determination of the sufficiency of the pleadings and evidence to sustain the granting of the license to sell, and is not subject to a collateral attack in the absence of fraud or collusion.

The controlling rule is set forth in Trumble v. Williams, 18 Neb. 144, 24 N. W. 716, as follows: "The petition, in our view, states sufficient to authorize the court to issue the license; but even if it did not, and the court would so hold in a direct proceeding to set it aside, yet, where it has been acted upon as sufficient by the court having exclusive original jurisdiction of the subject matter, it will be sustained in this court when collaterally attacked where there was no collusion and fraud. The authority to grant a license to sell real estate carries with it the implied power to determine the necessity for such sale, and the sufficiency of the pleadings presented to the court for that purpose, and where it has jurisdiction its orders and judgments are valid until set aside." See, also, Haight v. Hayes, 3 Neb. (Unoff.) 587, 92 N. W. 297.

We conclude that the order of the court granting a license to the executor to sell real estate is not subject to a collateral attack. The evidence in the case at bar showing that the debts and expenses exceeded the personal assets is not material in determining the jurisdiction of the court in granting the license. While collusion and fraud were not pleaded, and they are not therefore issues here, the evidence adduced dissipates any question of fraud or collusion and confirms the court's finding that it was necessary that a licene to sell real

estate for the payment of debts be granted to the executor.

It is next contended that the sale was void because the executor did not take an oath or file the same as required by section 30-1122, R. R. S. 1943. The record discloses that it was discovered after the sale was confirmed on September 5, 1952, that there was no oath of the executor in the files and the appearance docket did not indicate that one had been filed. On November 20, 1952, the executor filed a motion for an order nunc pro tunc showing that the executor did in fact take an oath and filed it in the office of the clerk of the district court on June 22, 1952. A hearing was had on the motion and evidence taken. Upon the evidence adduced, the trial court granted the order.

The evidence in support of the nunc pro tunc order is substantially as follows: The attorney for the executor testified that on June 14, 1952, the day following the granting of the license to sell, the executor signed an oath in duplicate which was sworn to before such attorney in his capacity as a notary public. He further testified that on June 22, 1952, he filed the executor's bond and oath with the clerk of the district court. The bond was actually filed on June 23, 1952, but for some reason the oath was not in the files nor shown to have been filed. The testimony of the attorney was positive that the oath was delivered to the clerk with the bond for the purpose of having it filed. This evidence is not disputed. Such evidence is sufficient to sustain a nunc pro tunc order. It is proper for a court to make an entry nunc pro tunc in order to correct its records so that they shall speak the truth. This power exists notwithstanding the fact that the rights of third persons may be affected. The power may not be used to correct errors resulting from negligence or failure to comply with procedural or jurisdictional requirements. The court may amend its records only to make them correspond with the facts. Garrison v. The People, 6 Neb.

274. The order nunc pro tunc may be supported by the judge's notes, court files, or other entries of record. It may also be based upon other evidence, oral or written, which is sufficient to satisfy the court that the order is required to make the record reflect the truth. School Dist. v. Bishop, 46 Neb. 850, 65 N. W. 902. The evidence was sufficient to sustain the finding of the court that a nunc pro tunc order was required. The trial court believed the evidence and we find no reason in the record to interfere with its finding.

It is further contended that the abstract of title to the real estate sold pursuant to the license to sell did not show a merchantable title. There is evidence in the record of a general nature that the executor through his attorney guaranteed the title at the time of the executor's sale. This evidence is positively and unequivocally disputed. If the question turned on a question of fact, we would be compelled to say that the finding of the trial court with reference thereto was sustained by competent evidence. We have many times said that this court will, in determining the weight of the evidence where it is in irreconcilable conflict on a material issue, consider the fact that the trial court observed the witnesses and their manner of testifying. In any event, the executor's sale is a judicial one. The purchaser buys at his peril insofar as the title to the real estate sold is concerned. The purchaser may insist upon a valid sale as distinguished from an irregular one. Neither the court nor the executor is authorized to guarantee a merchantable title. The doctrine of caveat emptor applies to the purchaser. This court has held: The doctrine of caveat emptor applies to all judicial sales, subject to the qualification that the purchaser is entitled to relief on the ground of after-discovered mistake of material facts or fraud, where he is free from negligence. He is bound to examine the title and not rely upon statements made by the officer conducting the sale as to its condition. If he buys without such examination he does so at his

peril, and must suffer the loss occasioned by his neglect. Norton v. Nebraska Loan & Trust Co., 35 Neb. 466, 53 N. W. 481; Prudential Ins. Co. v. Diefenbaugh, 129 Neb. 59, 260 N. W. 689; Enquist v. Enquist, 146 Neb. 708, 21 N. W. 2d 404.

It appears that the executor moved to have the sale vacated. The purchaser contends that the executor promised to return the down payment, which he refused to do. The vacation of the sale or its confirmation is a judicial matter within the sole control of the court. The executor has no authority to relieve a purchaser from a bid made at an executor's sale authorized by the court. His rights with reference thereto are legal rights which only the court has authority to adjudicate.

It appears clear to us that the executor's sale met all the requirements of section 30-1142, R. R. S. 1943, a curative statute applicable to the present proceeding. The executor was licensed to make the sale by the district court having jurisdiction. A bond was filed in the amount specified by the court. The executor took an oath and filed it as required. Proper notice was given of the time and place of sale. The premises were sold in accordance with the notice and the sale was confirmed by the court. The essential requirements of the applicable statutes have been met and the proceeding is not vulnerable to collateral attack because of irregularities. Pohlenz v. Panko, 106 Neb. 156, 182 N. W. 972; Haight v. Hayes, *supra*.

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

AFFIRMED.

LUCILLE MOREHOUSE, APPELLEE, V. CECIL B. MOREHOUSE, APPELLANT.

66 N. W. 2d 579

Filed November 5, 1954. No. 33577.

1. **Divorce.** Proceedings to modify a divorce decree with regard to the care, custody, and maintenance of minor children are special statutory proceedings and in such cases jurisdiction must be shown or affirmatively appear upon the record.
2. **Parent and Child.** A parent may not be deprived of the custody of his child by the court until it is established that the parent is unfit to perform the duties of the relationship of parent and child or has forfeited the right to the custody of the child.
3. ———. The custody of a child is to be determined by its best interests with due regard to the superior rights of fit and suitable parents.
4. ———. The natural and statutory rights of parents are of important consideration, and, in the absence of special circumstances, the child or children should be awarded to the parent or parents as against more distant relatives or third persons.
5. ———. The unfitness which deprives a parent of the right to the custody of his child must be positive, and not comparative, and the mere fact that the children would be better nurtured or cared for by a stranger is not sufficient to deprive a parent of his right to their custody.
6. ———. The rights of parents to the custody and earnings of their minor children are established by the common law and declared by our statutes. These rights cannot be taken away otherwise than upon due notice and hearing.
7. **Divorce.** Where the circumstances of the parties shall change or it shall be for the best interests of the children, having due regard for the rights of fit, proper, and suitable parents, the court may on its own motion as provided in section 42-312, R. R. S. 1943, revise or alter its former divorce decree so far as it concerns the care, custody, and maintenance of the children, but unless the parents or other parties in interest have voluntarily entered an appearance, the court has no authority or jurisdiction to do so without notice to such parties and opportunity given them to appear and be heard.

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

James W. Karlovsky and *Edward J. Baburek*, for appellant.

Ralph R. Bremers, for appellee.

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

CHAPPELL, J.

On February 10, 1953, plaintiff Lucille Morehouse was awarded an absolute divorce from defendant Cecil B. Morehouse. The decree awarded plaintiff the custody of their two children then 6 and 4 years of age, subject to the right of reasonable visitation by defendant and ordered him to pay $30 each week for their support. There never was therein or subsequently any finding or adjudication that defendant was unfit or unsuitable to have the custody of the children. Property accumulated by the joint efforts of the parties was also divided, but such portion of the decree is not involved here.

Subsequently, on December 17, 1953, the trial court on its "own motion" rendered a judgment which, after simply reciting the provisions of the decree of divorce aforesaid with relation to custody of the children and payment of child support, found that plaintiff was then mentally ill, confined in a hospital, and unable to properly care for the children. It was then ordered and adjudged that it would be for the best interests of the children to be placed in custody of the court with possession in the Catholic Charities of the Archdiocese of Omaha until further order of the court, but that defendant should be required to continue the payments of child support.

On December 22, 1953, within statutory time, defendant filed a motion to vacate the judgment and grant a new trial upon the grounds that the judgment was contrary to law and was rendered without any authority or jurisdiction because it was rendered without any legal notice to and in the absence of defendant whereby he was deprived of his legal right to be present and have a hearing upon the question of the fitness and suitability of himself or his parents to have custody and possession of the children in preference to strangers. Thereafter,

several affidavits were filed by the parties, but the trial court entered an order the effect of which was to sustain oral objections to a hearing of defendant's motion based thereon. In such situation, there is no bill of exceptions so it is elementary that the affidavits cannot be considered here. In that regard, it is generally the rule that: "A petition or motion to vacate a judgment should be verified or supported by affidavits as to the facts set forth, except where the facts necessary to support the application appear on the face of the record, or rest within the personal knowledge of the judge, where the application is made at the same term at which the judgment was rendered, and while the cause is still in fieri." 49 C. J. S., Judgments, § 295, p. 544. Also, as early as O'Brien v. O'Brien, 19 Neb. 584, 27 N. W. 640, cited with approval in Clark v. Clark, 139 Neb. 446, 297 N. W. 661, this court concluded that proceedings to modify a divorce decree were special statutory proceedings. See, also, Ripley v. Godden, 158 Neb. 246, 63 N. W. 2d 151. In such cases, jurisdiction must be shown or affirmatively appear upon the record. 31 Am. Jur., Judgments, § 420, p. 83.

On February 25, 1954, defendant's motion was overruled and he appealed, assigning as error the several contentions made in his motion for new trial. We sustain the assignments.

We call attention to the fact that defendant's contentions were a direct attack upon the judgment. In that connection, the transcript affirmatively shows that such judgment was rendered entirely upon the court's own motion without any application by either party for modification of the original decree, and the plaintiff was of necessity not personally present. Whether or not her counsel was present does not appear. The transcript does not disclose that any notice of such proceedings was ever given or served upon defendant or that he was present thereat either personally or by counsel. As a matter of fact, by analogy from the language used in de-

fendant's motion to vacate and for new trial and the overruling thereof by the trial court, it affirmatively appears that defendant was never given or served with notice and that he was not present at the hearing either personally or by counsel.

It is pertinent here to say that plaintiff's counsel appeared in the district court and objected to vacation of the modification or the granting of a new trial. Also, he filed a brief in this court urging an affirmance of the modification taking custody and possession of the children away from his client and praying for an allowance of costs to plaintiff, including attorneys' fees for services rendered for her in this court. Thus the record discloses that the substance and effect of the services rendered by plaintiff's attorney was not to defend any right claimed by plaintiff but rather to defend the rights of strangers as against any claimed by defendant. It is ordinarily within the discretion of the trial court and this court upon appeal to refuse or allow attorneys' fees together with the amount thereof. Blakely v. Blakely, 102 Neb. 164, 166 N. W. 259; Lippincott v. Lippincott, 152 Neb. 374, 41 N. W. 2d 232. We find no circumstance in this record which would justify the allowance of attorneys' fees in this court to plaintiff for services rendered herein by her attorney. Such allowance is denied. However, since the record indicates that plaintiff may have been mentally incompetent at the time, all costs are taxed to defendant.

Section 38-107, R. R. S. 1943, provides: "The father and mother are the natural guardians of their minor children and are equally entitled to their custody, services, and earnings, and to direct their education, being themselves competent to transact their own business and not otherwise unsuitable. If either dies or is disqualified for acting, or has abandoned his or her family, the guardianship devolves upon the other."

Section 42-311, R. R. S. 1943, provides: "Upon pronouncing a sentence or decree of nullity of a marriage

and also upon decreeing a divorce, whether from the bonds of matrimony or from bed and board, the court may make such further decree as it shall deem just and proper concerning the care, custody, and maintenance of the minor children of the parties, and may determine with which of the parents the children or any of them shall remain. In case no decree of divorce or nullity is granted, the court may award the custody, care and maintenance of minor children in such manner as shall seem advisable." Further, in that regard section 42-312, R. R. S. 1943, provides: "If the circumstances of the parties shall change, or it shall be to the best interests of the children, the court may afterwards from time to time on its own motion or on the petition of either parent revise or alter, to any extent, the decree so far as it concerns the care, custody and maintenance of the children or any of them."

In In re Guardianship of Peterson, 119 Neb. 511, 229 N. W. 885, this court concluded: "A decree of divorce, which awards the custody of a minor child to the mother with the privilege of visitation reserved to the father, against whom there is no finding of unfitness, does not deprive the father of the natural right to the custody of his child except as against the mother. Upon her death, his right ceases to be affected by said decree, and he is then entitled to the custody of said child against the claim of any person.

"A parent who has not voluntarily surrendered the custody and control of his child, or wilfully abandoned the same, cannot be deprived of his child in a contest with a stranger, unless unfitness is affirmatively alleged and proved."

In Bize v. Bize, 154 Neb. 520, 48 N. W. 2d 649, we reaffirmed that: "When the custody of minor children is involved their custody is to be determined by the best interests of the children with due regard for the superior rights of fit, proper, and suitable parents."

In Lakey v. Gudgel, 158 Neb. 116, 62 N. W. 2d 525,

cited with approval in Ripley v. Godden, *supra,* we held: "The courts may not properly deprive a parent of the custody of a minor child unless it is shown that such parent is unfit to perform the duties imposed by the relation or has forfeited that right." In the last-cited case, we held that: "A parent may not be deprived of the custody of his child by the court until it is established that the parent is unfit to perform the duties of the relationship of parent and child or has forfeited the right to the custody of the child.

"The custody of a child is to be determined by its best interest with due regard to the superior rights of a fit and suitable parent."

Also, as held in Hanson v. Hanson, 150 Neb. 337, 34 N. W. 2d 388: "The natural rights of the parents are of important consideration and, in the absence of special circumstances, the child or children should be awarded to the parent, or parents, as against more distant relatives or third persons."

As early as Clarke v. Lyon, 82 Neb. 625, 118 N. W. 472, 20 A. L. R. N. S. 171, this court held: "The unfitness which deprives a parent of the right to the custody of his children must be positive, and not comparative, and the mere fact that the children would be better nurtured or cared for by a stranger is not sufficient to deprive the parent of his right to their custody." It affirmatively appears from this record that the trial court rendered its decree without giving any consideration to such rules.

We are confronted then with the question of whether or not section 42-312, R. R. S. 1943, authorizes the trial court from time to time on its own motion to revise or alter to any extent the decree so far as it concerns the care, custody, and maintenance of the children without notice to the parents and opportunity for hearing by them upon the issue of whether or not they are fit and suitable parents to have the custody of their children.

We conclude that the court has no such authority or jurisdiction.

This court in In re Application of Thomsen, 1 Neb. (Unoff.) 751, 95 N. W. 805, cited with approval in Clarke v. Lyon, *supra,* said: "The rights of parents to the custody and earnings of their minor children are established by the common law and declared by our statutes. These rights cannot be taken away otherwise than upon due notice and hearing."

Miller v. Miller, 153 Neb. 890, 46 N. W. 2d 618, is directly in point. That case involved among other related issues the method and manner of notice required under comparable circumstances in order to satisfy due process. Therein, citing Droste v. Droste, 231 Iowa 216, 1 N. W. 2d 107, we said: "In a proceeding to modify a divorce decree under statutory provision authorizing subsequent changes in the divorce decree, 'due process of law' requires only that the method of service be reasonably calculated to give the person served knowledge of the proceedings and opportunity to be heard." No other comparable or controlling cases from this jurisdiction have been cited or found, but there are numerous authorities from other jurisdictions which have likewise determined such questions.

For example, in Sinquefield v. Valentine, 159 Miss. 144, 132 So. 81, 76 A. L. R. 238, under comparable statutes and circumstances, the court held: "Before a parent can be deprived of the custody of his minor child, there must be a hearing before a court of competent jurisdiction in which he has been served with process or entered an appearance, and no court has a right to deprive him of the custody or to judge him to be unfit for such custody without an opportunity for him to appear and be heard. To do so would be to deprive him of his legal rights without due process of law."

Further, in the Annotation to 76 A. L. R. at page 253, citing and reviewing authorities from some nine jurisdictions, it is said: "In proceedings for the modifica-

tion of orders, judgments, or decrees in divorce proceedings relative to the custody of minor children, it has been generally held that proper notice to the adverse party and an opportunity to be heard are required, whether provided for by statute or not." Such rules are controlling here.

We conclude that where the circumstances of the parties shall change or it shall be for the best interests of the children, having due regard for the rights of fit, proper, and suitable parents, the court may on its own motion, as provided in section 42-312, R. R. S. 1943, revise or alter its former divorce decree so far as it concerns the care, custody, and maintenance of the children, but unless the parents or other parties in interest have voluntarily entered an appearance, the court has no authority or jurisdiction to do so without notice to such parties and opportunity given them to appear and be heard.

For reasons heretofore stated, the judgment of the trial court should be and hereby is reversed. All costs are taxed to the defendant.

REVERSED.

SCHOOL DISTRICT NO. 49, IN LINCOLN COUNTY, NEBRASKA, ET AL., APPELLANTS, V. SCHOOL DISTRICT NO. 65-R, IN AND FOR LINCOLN COUNTY, NEBRASKA, ET AL., APPELLEES.
66 N. W. 2d 561

Filed November 5, 1954. No. 33583.

1. **Schools and School Districts: Estoppel.** While ordinarily a municipality may not be estopped by the unauthorized conduct, representations, promises, and pledges of its officers, it may within the limitation of its legal powers be estopped by its official acquiescence in an approval of acts originally unauthorized.
2. **Records.** Where the law requires that a record of proceedings be kept, but does not prescribe what such record shall contain, the omission from the record of such items not specifically re-

quired to be recorded is not a fatal defect.

3. **Officers.** The law presumes official acts of public officers, in a collateral attack thereon, to have been done rightly and with authority, in the absence of evidence to the contrary, and, in such a collateral attack, acts done, which presuppose the existence of other acts to make them legally effective, are presumptive proof of the existence of such other acts.
4. **Courts: Statutes.** Restraints on the legislative power of control must be found in the Constitution of the state, or they must rest alone in the legislative discretion. If the legislative action operates injuriously to the municipalities or to individuals, the remedy is not with the courts. The courts have no power to interfere, and the people must be looked to, to right through the ballot box all these wrongs.
5. **Officers.** In the absence of evidence showing misconduct or disregard of law, regularity of official acts is presumed.
6. **Elections.** Statutory provisions as to the place for holding an election and the manner of changing the voting places are mandatory upon the officers charged with that duty and will be strictly enforced in a direct action instituted before an election. However, after an election has been held such statutory requirements will be considered directory unless it appears that the failure to hold an election at such voting places resulted in fraud and prevented the electors from giving a full and free expression of their will at the election.
7. **Elections: Quo Warranto.** The statute has provided an adequate remedy for the settlement of the rights of parties in election cases by either contest or quo warranto and these remedies are exclusive.

APPEAL from the district court for Lincoln County: JOHN H. KUNS, JUDGE. *Affirmed.*

Edward E. Carr and *Hollman & McCarthy,* for appellants.

Beatty, Clarke, Murphy & Morgan, J. G. McIntosh, and *Baskins & Baskins,* for appellees.

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

WENKE, J.

This is an appeal from the district court for Lincoln County. The action was instituted in the district court

on August 20, 1953, by School District No. 49 located in Lincoln County and by individual taxpayers residing therein. It primarily involves an attack upon the legality of school district No. 65-R of Lincoln County and seeks to prevent the defendants from putting it into operation insofar as it affects school district No. 49. The defendants are School District No. 65-R and the members of its board, School District No. 65, the Lincoln County Reorganization Committee and the individual members thereof, and the following county officials of Lincoln County: Treasurer, clerk, assessor, and superintendent. The district court found generally for the defendants and entered an order dismissing the action. Plaintiffs filed a motion for new trial and have appealed from the overruling thereof.

School district No. 65-R was created under and pursuant to the provisions of the Reorganization of School Districts Act, being sections 79-426.01 to 79-426.19, R. R. S. 1943, and amendments thereof. It will herein be referred to as the Act, school district No. 65-R will herein be referred to as district 65-R, and school district No. 49, which is an elementary grade rural school district, will be herein referred to as district 49.

The attack upon the legality of district 65-R is based on numerous grounds which can best be channeled into three principal categories: First, the unconstitutionality of the Act; second, irregularities in the proceedings of the Lincoln County reorganization committee in forming the district; and third, defects occurring in connection with the election adopting the reorganization plan.

There is one further contention made by appellants in case district 65-R is found to have been legally established. In such case appellants ask that a mandatory injunction issue requiring district 65-R to perform certain conditions contained in the plan adopted by the electors as it relates to what was district 49.

Appellants contend the Act is unconstitutional because

it permits, and here permitted, gerrymandering; because it does not provide for due process within the requirements of both state and federal constitutions; because it delegates legislative powers without providing adequate limitations or standards for carrying them out; because the Act fails to provide for appeal to the courts from the action of county committees in fixing the boundaries of proposed districts; and because the Legislature may not delegate legislative functions to private individuals. All of these questions were raised and fully discussed and answered by our opinion in Nickel v. School Board of Axtell, 157 Neb. 813, 61 N. W. 2d 566. We see no need for repeating what was said therein but, by reason of what we held therein, find these contentions to be without merit.

The constitutionality of the unit system of voting, as provided for by section 79-426.15, R. S. Supp., 1951, is also inferentially questioned. This statute, insofar as here material, provides: "In such elections, all the rural territory in the proposed changes shall vote as a unit; * * *. If any existing high school district is included in the proposed district, it shall constitute a separate voting unit. Approval of the plan shall require a majority of all electors within each voting unit voting on the proposed plan."

We think the principle here controlling is announced by the following language from Hunter v. City of Pittsburgh, 207 U. S. 161, 28 S. Ct. 40, 52 L. Ed. 151, which we quoted with approval in Seward County Rural Fire Protection Dist. v. County of Seward, 156 Neb. 516, 56 N. W. 2d 700, and Nickel v. School Board of Axtell, *supra:* "Municipal corporations are political subdivisions of the State, created as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them. * * * The number, nature and duration of the powers conferred upon these corporations and the territory over which they shall be exercised rests in the absolute discretion of the State.

Neither their charters, nor any law conferring governmental powers, or vesting in them property to be used for governmental purposes, or authorizing them to hold or manage such property, or exempting them from taxation upon it, constitutes a contract with the State within the meaning of the Federal Constitution. The State, therefore, at its pleasure may modify or withdraw all such powers, may take without compensation such property, hold it itself, or vest it in other agencies, expand or contract the territorial area, unite the whole or a part of it with another municipality, repeal the charter and destroy the corporation. All this may be done, conditionally or unconditionally, with or without the consent of the citizens, or even against their protest. In all these respects the State is supreme, and its legislative body, conforming its action to the state constitution, may do as it will, unrestrained by any provision of the Constitution of the United States. Although the inhabitants and property owners may by such changes suffer inconvenience, and their property may be lessened in value by the burden of increased taxation, or for any other reason, they have no right by contract or otherwise in the unaltered or continued existence of the corporation or its powers, and there is nothing in the Federal Constitution which protects them from these injurious consequences. The power is in the State and those who legislate for the State are alone responsible for any unjust or oppressive exercise of it."

As stated in Rowe v. Ray, 120 Neb. 118, 231 N. W. 689: "It may, by law, provide that two school districts may merge and become one, upon a vote of the electors of the two districts. It may and does authorize one city to annex an adjacent suburb or village upon a majority vote of the electors thereof, and by the consent of the municipal authorities of the larger city. In all such cases the legislative function has been performed. The legislature, in those cases, has fixed the terms and conditions on which an electorate, which is definite and

certain, may determine whether the act of the legislature shall become operative."

Here the Legislature has fixed the conditions, which are definite, upon which the electorate may determine whether or not the legislative act of any county committee, taken pursuant to authority delegated to it, shall become operative. We find the Legislature had the power to do so.

We shall next consider appellants' contentions in regard to irregularities in the proceedings of the Lincoln County reorganization committee. This committee will hereinafter be referred to as the county committee. We shall first set out in general the procedure followed by the county committee in formulating and adopting its plan for district 65-R. It caused a "Notice" to be published in The Wallace Winner, a legal weekly newspaper published at Wallace in the county of Lincoln. This "Notice" was published pursuant to the requirements of section 79-426.10, R. R. S. 1943, and fixed the place of public hearing in the high school auditorium at Wallace at 8:00 p. m. on Tuesday, March 10, 1953. The meeting at Wallace was held and, after a discussion by those present of a plan for redistricting the Wallace community, the county committee approved a plan for redistricting which included district 49. These plans were then submitted to the State Committee for Reorganization of School Districts. The state committee reviewed the plans on March 27, 1953, and, by letter dated March 31, 1953, advised the county committee that it recommended that the plan proposed be submitted to the electors of the proposed district. This letter was received by the county committee on April 3, 1953. The county committee approved the action of the state committee and fixed the date of the election as June 3, 1953. Notice of the election was given as required by section 79-426.15, R. S. Supp., 1951, in the Lincoln County Tribune, a legal weekly newspaper, published at North Platte in Lincoln County. The election re-

sulted in the proposed plan of reorganization being approved by a majority of all electors voting in both the rural territory and the high school district contained in the proposed district.

The appellants contend the doctrine of estoppel has application here because of certain facts hereinafter discussed. We have said:

"Ordinarily the doctrine of equitable estoppel cannot be invoked against a municipal corporation in the exercise of governmental functions but exceptions are made where right and justice so demand, particularly where the controversy is between one class of the public as against another class." May v. City of Kearney, 145 Neb. 475, 17 N. W. 2d 448.

"While ordinarily a municipality may not be estopped by the unauthorized conduct, representations, promises and pledges of its officers, it may within the limitation of its legal powers be estopped by its official acquiescence in and approval of acts originally unauthorized." May v. City of Kearney, *supra*. See, also, State ex rel. Cox v. McIlravy, 105 Neb. 651, 181 N. W. 554.

There is evidence that at the meeting held on March 10, 1953, which was called by the county committee, maps of a proposed school district for the Wallace area were distributed which did not include district 49, although the map of the proposed area submitted by the county committee to the state committee did include it. That the question of including district 49 was fully discussed at this meeting is evidenced by the minutes thereof which sets out that "a long and heated discussion" was had on this subject. Subsequent thereto, and at the same meeting, the county committee unanimously voted to approve plans for a proposed district which included district 49. Even if the map already referred to was distributed at that meeting it is evident no one was misled thereby.

Appellants introduced the minutes of the county committee's meeting of November 21, 1950. At this meet-

ing, after discussion was had of a proposed district of the Wallace community, the county committee decided not to include district 49 therein. This action would in no way estop the county committee from again considering this matter at a subsequent meeting, such as the meeting held on March 10, 1953. The county committee had a perfect right at the meeting on March 10, 1953, to reconsider the matter and include district 49 in any proposed plan which it might then decide to approve and submit to the state committee.

Appellants also introduced evidence of a meeting held on February 2, 1953, which was called by the school board of district 65 (Wallace). This meeting was held in the high school auditorium at Wallace and appears to have been largely attended by board members and patrons of district 65 and elementary rural school districts adjacent thereto. These rural districts had been and were contracting with district 65 for school purposes. Included were all the rural school districts subsequently included in district 65-R except district 49. The latter district had been maintaining its own school.

At this meeting a motion was adopted which had the effect of recommending to the county committee that district 49 be included in any reorganization plans for the Wallace area. We see nothing wrong with this meeting, or other meetings of a similar character, and cannot see how its action can result in estoppel. The desires of the public in such matters are, and naturally should be of concern to the county committee but, of course, in no way binding on them. What plan, if any, the county committee would propose to the state committee was entirely up to the county committee.

The electors of district 49 were notified of the public hearing on March 10, 1953. The record shows they attended this meeting and fully expressed their views to the county committee on the question of whether or not their district should be included in any proposed plans for the reorganization of the Wallace community. That is

what the Act contemplates. See section 79-426.10, R. R. S. 1943. We find no merit to this contention.

Appellants complain of the failure of the minutes of the meeting held by the county committee on March 10, 1953, to show there was any discussion during that meeting with reference to the convenience and welfare of the pupils involved in the reorganization, or to the transportation problems involved, or that the county committee considered these matters in its preparation of the plan adopted.

Section 79-426.10, R. R. S. 1943, provides in part as follows: "Before any plan of reorganization is completed by the county committee, it shall hold one or more public hearings. At such hearings, it shall hear any and all persons interested with respect to (1) the merits of proposed reorganization plans, * * *. The county committee shall keep a record of all hearings in the formulation of plans for the reorganization of school districts."

Section 79-426.09, R. S. Supp., 1953, provides in part as follows: "In preparation of a plan for reorganization of school districts, the county committee shall give due consideration (1) to the educational needs of local communities, (2) to economies in transportation and administration costs, (3) to the future use of existing satisfactory school buildings, sites, and play fields, (4) to the convenience and welfare of pupils, (5) to a reduction in disparities in per-pupil valuation among school districts, (6) to the equalization of the educational opportunity of pupils, and (7) to any other matters which, in its judgment, are of importance."

We held in Hull v. City of Humboldt, 107 Neb. 326, 186 N. W. 78, to the effect that where the law requires that a record of proceedings be kept, but does not prescribe what such record shall contain, the omission from the record of such items not specifically required to be recorded is not a fatal defect.

And, as stated in Majerus v. School District, 139 Neb.

823, 299 N. W. 178: "The law presumes official acts of public officers, in a collateral attack thereon, to have been done rightly, and with authority, in the absence of evidence to the contrary, and, in such a collateral attack, acts done, which pre-suppose the existence of other acts to make them legally effective, are presumptive proof of the existence of such other acts."

In view of the foregoing we do not think the minutes of the meeting of March 10, 1953, are fatally defective.

Appellants further contend the county committee acted arbitrarily and unreasonably by including district 49 in their proposed plan of reorganization because, by doing so, they completely disregarded the convenience and welfare of the pupils therein and the transportation problems involved. In support thereof appellants cite the principle that a court of equity will interfere to control or review the acts of public officials involved with discretionary power when fraud, corruption, oppression, or gross injustice is plainly shown. See Felker v. Roth, 346 Ill. 40, 178 N. E. 381.

As stated in In re Pittsburg's Petition, 217 Pa. 227, 66 A. 348: " 'Restraints on the legislative power of control must be found in the constitution of the state, or they must rest alone in the legislative discretion. If the legislative action operates injuriously to the municipalities or to individuals, the remedy is not with the courts. The courts have no power to interfere, and the people must be looked to, to right through the ballot box all these wrongs: * * *.' "

We held in Nickel v. School Board of Axtell, *supra*, that questions of public policy, convenience, and welfare, as related to the creation of municipal corporations, such as counties, cities, villages, school districts, or other subdivisions, or any change in the boundaries thereof, are, in the first instance, of purely legislative cognizance and when such duties are delegated to the county committees and performed by them they retain such character and are not subject to judicial review. See, also,

Leeman v. Vocelka, 149 Neb. 702, 32 N. W. 2d 274.

As to this issue there is a further answer. As stated in Hahn System v. Stroud, 109 Neb. 181, 190 N. W. 572: " 'A suit in equity will not lie when the plaintiff has a plain, adequate and speedy remedy at law.' Western Union Telegraph Co. v. Douglas County, 76 Neb. 666."

In Nickel v. School Board of Axtell, *supra,* we held that if any action taken by the county committee was appealable sections 25-1901 and 25-1911, R. R. S. 1943, fully met the requirements of Article I, section 24, of the Constitution of the State of Nebraska.

What is factually contended for by appellants as supporting this contention is answered by the following principle quoted with approval in Nickel v. School Board of Axtell, *supra:* " 'In general, a school district or other local school organization must be so formed or laid out as to afford to all the children within its boundaries an opportunity to enjoy with reasonable facility the benefits of the school; but every reasonable presumption is to be indulged in favor of a district as created and laid out, and equal convenience to all the children is not essential, since it is impossible to prevent varying degrees of convenience or inconvenience to children living in different parts of any district.' 78 C. J. S., Schools and School Districts, § 31, p. 686."

Even if the matters complained of were properly here for our consideration, we can find nothing in the record which would support this contention as the county committee's action in the matter seems reasonable and proper.

We come next to the appellants' claimed defects in connection with the special election held at which the proposed plans were approved.

First appellants contend the following requirements of section 79-426.15, R. S. Supp., 1951, were not complied with: "Not less than sixty nor more than one hundred twenty days after receipt by the county committee of the action of the state committee, the proposition of adoption or rejection of the proposed plan of reorganization

shall be submitted at a special election to all the electors of districts within the county whose boundaries are in any manner changed by the plan of reorganization."

The record shows the state committee acted on the proposed plan for reorganization on March 27, 1953; that by letter dated March 31, 1953, it advised the county committee of its action, which letter the county committee received on April 3, 1953; that on April 23, 1953, the county committee approved the action of the state committee and fixed the date for an election thereon as June 3, 1953; and that on June 3, 1953, such election was held. We find this meets the requirements of the act relating thereto.

Because of the provisions of section 79-426.09, R. S. Supp., 1953, appellants contend district 49 should have been organized into a voting unit by itself and that it would have required at least 55 percent of the voters of the district to be in favor of being annexed to district 65-R before it could be included therein. In support of this contention they offered to produce as witnesses more than half of the voters of district 49 who they stated would testify they had voted "No" on the question of reorganization at the election held on June 3, 1953. Objection to this offer was sustained.

This section of the statute, insofar as here material, provides: "When the county committee at any time determines that some reorganization of districts is desirable, it shall proceed to prepare a plan or plans, showing which specific changes are recommended; Provided, that no district or districts where the major portion of such district or districts is a distance greater than halfway to the next Class II, III, IV, V, or VI school district may be included in the voting unless the separate area is more than a distance halfway from the nearest corporate limits of the city or village in which the schools are operated to the nearest corporate limits of the city or village of the next Class II, III, IV, V, or VI school district shall be organized into a voting unit

by itself, with the requirement that at least fifty-five per cent of the voters are in favor of being annexed in the new school district or to remain in their former rural districts and subject to future inclusion in the already established school district closer to it."

As written the foregoing language is ambiguous as to its exact meaning in regard to the following: First, nothing is therein indicated as to how such "distance" shall be determined. We shall assume it means the distance along section lines as that is the ordinary place where roads are established for the public's use. Second, it leaves some doubt as to whether "distance" relates to boundaries of the school districts therein referred to or to the corporate limits of any city or village located therein in which the school is operated. We think the distance requirement relates to the nearest corporate limits of the city or village in which the school is being operated and not to the boundaries of the school district itself.

While there is evidence in the record to the effect that the major portion of district 49 is closer to Grainton than to Wallace, the map of this area does not disclose such to be a fact. The map discloses that Wallace lies about 6½ miles north of the northeast corner of district 49 whereas Grainton lies 2 miles west and about 5½ miles north of the northwest corner of district 49. Thus it becomes evident that the major portion of district 49 is closer to Wallace than Grainton. It is therefore apparent that this evidence was properly excluded as district 49 could be and properly was included with all the other rural districts for voting purposes.

Section 79-426.14, R. R. S. 1943, provides in part as follows: "The proposed plan, as finally adopted by the county committee, shall be submitted at a special election called and held as provided in section 79-426.15."

Section 79-426.15, R. S. Supp., 1951, as to the election, provides in part as follows: "* * * the proposition of adoption or rejection of the proposed plan of reorganiza-

tion shall be submitted at a special election to all the electors of districts within the county whose boundaries are in any manner changed by the plan of reorganization." And, "Such election shall be held and conducted by election officers charged with the duties of holding general elections."

While most of the proposed district lies in Wallace precinct parts thereof do lie in Hooker, Dickens, and Willow precincts. The place of election, as evidenced by the notice thereof, was fixed as the Village Hall in Wallace, which is in Wallace precinct. Appellants contend that a voting place should have been established in each precinct in which part of the proposed district was located because the general statutes so provide. It will be observed the Act does not provide where the election shall be held but does provide it shall be submitted at a special election and who is to hold and conduct it. In such a situation we think any convenient place in the proposed district could have been designated for that purpose by the county committee.

As already stated the foregoing language provides who shall hold and conduct such election. At its meeting on April 23, 1953, the county committee directed that the county clerk be placed in charge of the election and notified of that fact. There is no evidence in the record as to who actually did perform these services. In the absence thereof the following holding has application: "In absence of evidence showing misconduct or disregard of law, regularity of official acts is presumed." Campbell Co. v. City of Harvard, 123 Neb. 539, 243 N. W. 653.

There is no evidence that any voters, including those from school district 49, were inconvenienced or prevented from voting by having the voting place in Wallace. In this situation we think the following applies: "The statutory provisions as to the place of holding the election and the manner of changing the voting places are mandatory upon the officers charged with that duty, and

will be strictly enforced in a direct action instituted before an election, but after an election such statutory requirements are directory, unless it appears that the failure to hold elections at the place resulted in fraud and prevented the electors from giving a full and free expression of their will at the election, * * *." Semke v. Wiles, 101 Okla. 105, 224 P. 312. See, also, State ex rel. Marlow v. Himmelberger-Harrison Lumber Co.. 332 Mo. 379, 58 S. W. 2d 750; 29 C. J. S., Elections, § 78, p. 104, § 199, p. 284.

There is another principle here applicable as to all questions raised in regard to the election. It is stated by this court in State ex rel. Hunt v. Mayor and City Council of Kearney, 28 Neb. 103, 44 N. W. 90, as follows: "The statute has provided an adequate remedy, either by contest or quo warranto, for the settlement of the rights of parties in election cases, and those remedies are exclusive."

Having come to the conclusion that district 65-R was legally established, the only question remaining is appellants' request that certain conditions contained in the plan submitted to the electors of the district, and approved by them, be specifically performed. In the published notice this condition appeared in the following language: "The Lincoln County Reorganization Committee and the Nebraska State Reorganization Committee have recommended that a school be maintained in District No. 49, at the present site, until approved transportation can be provided to all families with children."

Appellants offered evidence to the effect that such transportation was not possible in view of the conditions of the roads in district 49. This cause was tried on January 25 and 26, 1954. The evidence shows that district 65-R had not, since the opening of school in the fall of 1953, maintained a school in what was district 49. It has, however, at all times when school was being held in Wallace, maintained an adequate and satisfactory bus service for all pupils in district 49 whose parents

desired their children to attend school in Wallace. By doing so district 65-R has fully met the requirements of the conditions imposed upon it by this language and to now force it to maintain a school in district 49 would defeat the very purpose of the reorganization.

In view of the foregoing we find the decision rendered by the trial court to be correct. It is therefore affirmed.

AFFIRMED.

JAMES M. JENSEN ET AL., APPELLANTS, V. OMAHA PUBLIC POWER DISTRICT, A PUBLIC CORPORATION, APPELLEE.
66 N. W. 2d 591

Filed November 5, 1954. No. 33603.

1. **Eminent Domain.** Condemnation proceedings commenced in a county court contemplate an informal hearing by the appraisers, a view of the lands, no record of testimony, and a report of damages assessed to be filed subject only to the right of appeal.
2. **Eminent Domain: Appeal and Error.** An appeal in a condemnation proceeding under the provisions of section 76-717, R. S. Supp., 1953, contemplates the filing of pleadings and a framing of issues in a judicial proceeding in the district court.
3. **Courts: Pleading.** Where a discretionary duty is imposed upon a district court to determine whether or not good cause has been shown for the failure of a party to plead within the time required, and after the court has heard the reasons of the party in default for his failure to timely plead, and in the exercise of a legal discretion has decided that no sufficient cause has been shown, this court will not ordinarily disturb the decision of the district court.
4. ———: ———. On motion to strike from the files and objection to the introduction of affidavits into evidence with reference to damages to land taken by eminent domain, where the same were filed in a proceeding to set aside a nonsuit for failure to show good cause why petition should be filed instanter in the district court and the same were not presented to be considered on the hearing on the merits on the showing of good cause, the district court did not commit error in exercising its judicial discretion in striking the affidavits from the files and not permitting the same to be introduced into evidence.

5. **Estoppel.** Estoppel will not lie where the position first assumed was taken as a result of ignorance or mistake, or through the act or fault of party claiming the estoppel.
6. ———. A party is not estopped from setting up a defense where the necessity for the claim of estoppel in order to prevail arises from errors of judgment of law on the part of one seeking to claim the benefit of estoppel.
7. **Statutes.** A statute may adopt a part or all of another statute by a specific and descriptive reference thereto, and the effect is the same as if the statute or part thereof adopted had been written into the adopting statute.
8. **Constitutional Law: Statutes.** Where a statute is susceptible of two constructions, one of which will render it constitutional and the other unconstitutional, it is the duty of a court to adopt the construction which, without doing violence to the fair meaning of the statute, will render it valid.
9. ———: ———. That portion of Article III, section 14, of the Constitution, relating to amendments has no application to an act complete in itself and not in effect amendatory, even though it may modify or destroy the effect of previous legislation.

APPEAL from the district court for Sarpy County: JOHN M. DIERKS, JUDGE. *Affirmed.*

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

Fraser, Connolly, Crofoot & Wenstrand, and *Thomas Marshall,* for appellee.

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

MESSMORE, J.

The Omaha Public Power District, a public corporation organized under sections 70-601 to 70-672, R. R. S. 1943, and pursuant to section 70-670, R. S. Supp., 1953, instituted proceedings in the county court of Sarpy County to condemn by eminent domain a power-line easement over the lands of James M. Jensen and Marie Jensen located in Sarpy County. These proceedings were brought in accordance with sections 76-701 to 76-724, R. S. Supp., 1953. The Omaha Public Power District will hereafter be referred to as condemner and James M. Jensen and Marie Jensen as condemnees.

The condemner filed its petition in the county court of Sarpy County on August 14, 1953. Thereafter, and in conformity to law, the county judge appointed appraisers. They qualified and, on September 15, 1953, viewed the lands of the condemnees, heard evidence of interested parties, and filed their report awarding damages to the condemnees in the amount of $900.

On September 8, 1953, before the report of the appraisers was filed, the condemnees filed a motion in the county court to strike a part of paragraph No. 6 and all of paragraph No. 8 of the condemner's petition. This motion was made a part of the transcript on appeal to the district court by the condemnees. The transcript on appeal was filed in the district court September 30, 1953. Notice of appeal to the district court was filed on September 21, 1953. On October 23, 1953, argument on the motion was set for hearing in the district court on November 6, 1953, on which date argument on the motion was had. The trial court took the matter under advisement.

The condemner's petition filed in the county court alleged, among other things: "Your petitioner agrees that it will pay to the owners and tenants, as their respective interests may appear, any damages to crops or fences cause by entry upon said premises for the erection operation, and maintenance and repair of said transmission line in the future, if and when such damages occur." On November 20, 1953, the trial court sustained the condemnees' motion, the effect of which was to eliminate the above allegation from the condemner's petition filed in the county court. Whether or not this ruling conformed to Little v. Loup River Public Power Dist., 150 Neb. 864, 36 N. W. 2d 261, 7 A. L. R. 2d 355, and the cases cited therein to the effect that a landowner is assured by the Constitution of the state recovery in one action of the whole damage sustained by him because of the taking of his property by

the power of eminent domain need not be discussed or determined in this appeal.

On February 10, 1954, the condemnees obtained leave of the trial court to file their petition on appeal instanter. It appears the request was made when the trial judge was engaged in the trial of a case and during the course of a recess. Being pressed for time, he made notes with reference to the request. On February 11, 1954, the condemnees filed their petition in the district court. The sole issue raised therein was the amount of damages, $900, allowed by the appraisers, which award was alleged to be inadequate and unjust, and constituted a taking without due process of law or just compensation for such easement.

On February 19, 1954, the condemner filed a motion in the district court to vacate and set aside its order of February 10, 1954, granting the condemnees the right to file their petition on appeal out of time, to strike the condemnees' petition as untimely filed, and to dismiss and enter a judgment of nonsuit against the condemnees in this appeal to the district court. On March 19, 1954, the district court heard the motion of condemner and sustained it in its entirety. On March 27, 1954, the condemnees filed a motion to vacate, set aside, and hold for naught the trial court's decision and order of March 19, 1954. On March 29, 1954, judgment was entered vacating the order of the district court dated February 10, 1954, granting the condemnees leave to file a petition in this cause instanter, and striking from the files the petition filed by the condemnees February 11, 1954, dismissing the cause with prejudice, and entering nonsuit against the condemnees.

The principal assignments of error may be summarized as follows: (1) The trial court committed prejudicial error in making and entering its order of March 19, 1954, sustaining the condemner's motion filed February 19, 1954, to strike condemnees' petition filed in the district court and to enter nonsuit against them and

dismiss their appeal. (2) The trial court committed prejudicial error in striking the affidavits of Tom Dooley and Erle B. Brown by sustaining condemner's motion and objections thereto. (3) The trial court committed prejudicial error in overruling the condemnees' motion for vacation of previous orders and for further hearing.

We cite the following as being pertinent to a determination of this appeal: Laws 1951, c. 101, p. 451, an act relating to the acquisition of property through the exercise of eminent domain and to provide a uniform procedure for the condemnation of property for public use; and article 7, Eminent Domain, sections 76-701 to 76-724, R. S. Supp., 1953.

In addition, section 70-670, R. S. Supp., 1953, appearing under article 6, R. S. Supp., 1953, provides in part: "In addition to any other rights and powers hereinabove conferred upon any district organized under sections 70-601 to 70-672, such district shall have and exercise the power of eminent domain * * *. The procedure to condemn property shall be exercised in the manner set forth in sections 76-704 to 76-724."

The following sections of the statutes are also pertinent in this appeal. Section 76-715, R. S. Supp., 1953: "Either condemner or condemnee may appeal from the assessment of damages by the appraisers to the district court of the county where the petition to initiate proceedings was filed. Such appeal shall be taken by filing a notice of appeal with the county judge within thirty days from the date of filing of the report of appraisers as provided in section 76-710." The condemnees properly perfected their appeal from the county court to the district court.

Section 76-717, R. S. Supp., 1953, provides in part: "After docketing of the appeal, the issues shall be made up and tried in the district court in the same manner as an appeal from the county court to the district court in a civil action."

Section 27-1305, R. R. S. 1943, provides that after the

transcript has been filed in the district court: "The plaintiff in the court below shall be the plaintiff in the district court; and the parties shall proceed, in all respects, in the same manner as though the action had been originally instituted in such court."

Section 27-1306, R. R. S. 1943, provides: "In all cases of appeal from the county court or a justice of the peace, the plaintiff in the court below shall, within fifty days from and after the date of the rendition of the judgment in the court below, file his petition as required in civil cases in the district court, and the answer shall be filed and issue joined as in cases commenced in such appellate court."

In City of Seward v. Gruntorad, 158 Neb. 143, 62 N. W. 2d 537, filed February 5, 1954, the foregoing statutes were reviewed, and it was pointed out in the opinion that those statutes provide that the party first appealing to the district court in eminent domain proceedings has the following periods of time to take the following required steps, upon which appeal he becomes the plaintiff in the district court: (a) Within 30 days from the date of the filing of the report of the appraisers, file notice of appeal in the county court; (b) within 30 days from the date of the filing of the notice of appeal, file the county court transcript with the clerk of the district court; and (c) within 50 days from the date of the filing of the notice of appeal, file as plaintiff the petition in the district court. With reference to section 27-1306, R. R. S. 1943, quoted above, the court said: "The 50-day provision applies." The court further said: "Accordingly, we hold that the 50-day period for the filing of a petition in the district court on appeal in eminent domain proceedings under Chapter 76, article 7, R. S. Supp., 1953, begins to run with the date of the filing of notice of appeal in the county court."

Section 27-1307, R. R. S. 1943, provides in part: "If the plaintiff in the action before the justice shall appeal from any judgment rendered against such plaintiff, and

after having filed his transcript and caused such appeal to be docketed according to the provisions of this article, shall fail to file his petition within fifty days from the date of the rendition of such judgment by the justice, unless the court, on good cause shown, shall otherwise order, or otherwise neglect to prosecute to final judgment, the plaintiff shall become nonsuited; * * *."

It is well established, in an action of this kind, the function of the county court is as described in Higgins v. Loup River Public Power Dist., 157 Neb. 652, 61 N. W. 2d 213, as follows: "The procedure in the county court contemplates an informal hearing by the appraisers, a view of the lands, no record of the testimony, and a report of damages assessed to be filed subject only to the right of appeal, not to confirmation by the appointing court. * * * On appeal to the district court from the appraisement of damages, if other issues than the question of damages are involved, they must be presented by proper pleadings." See, also, Scheer v. Kansas-Nebraska Natural Gas Co., 158 Neb. 668, 64 N. W. 2d 333.

The securing of an appraisal of damages by appraisers appointed by the county judge is an administrative act as distinguished from a judicial proceeding. The method of appeal is procedural only and contemplates a complete new trial upon pleadings to be filed as in the case of an appeal from the county court. The present appeal statute contemplates the filing of pleadings and the framing of issues for the first time in the judicial proceedings in the district court. See Scheer v. Kansas-Nebraska Natural Gas Co., *supra*.

The motion of the condemnees filed in the county court was, under the authorities above cited, an improper pleading in the district court. It was merely a part of the administrative proceedings in the county court. The eminent domain act and its procedure contain no requirement that the condemner, who was not the first party appealing, file any pleading to the merits before the appealing condemnees file their petition in the district

court. The condemner, by its motion to strike the petition of the condemnees, dismiss the appeal, and nonsuit them, required the condemnees to show good cause why they should have been permitted, upon request, to file a petition out of time.

Apparently the condemnees' counsel became aware of this court's opinion in the case of City of Seward v. Gruntorad, *supra,* and sought to follow the procedure set forth therein applying to eminent domain. The condemnees' counsel takes the position that where damages constitute the only issue in a condemnation proceeding no petition need be filed in the district court. Cases are cited to sustain the condemnees' position in such respect. However, the cited cases are prior to our decision in City of Seward v. Gruntorad, *supra,* and the condemnees' position is in direct conflict with what this court said in City of Seward v. Gruntorad, *supra,* on procedure in eminent domain cases.

The condemnees quote from Scheer v. Kansas-Nebraska Natural Gas Co., *supra,* as follows: "It is a fundamental rule in this state that if new issues other than the assessment of damages are to be raised on appeal in a condemnation proceeding, they must be pleaded." The quotation simply says in effect that if the appealing party wishes to raise new issues in the district court, he must incorporate the new issues in his district court petition along with, and in addition to, the issues of the assessment of damages contained in his petition, and it does not say that no petition at all need be filed to raise the damage issue. In addition, it was stipulated in that case that it would be tried on the pleadings filed in the county court. This case does not support the condemnees' contention.

The showing of good cause made by the condemnees consists of testimony given by their counsel, together with an affidavit to the effect that by virtue of advanced age condemnees' counsel and his wife suffered from certain physical infirmities; and that their counsel had

handled this type of cases for a number of years and was of the opinion that the law did not require the filing of a petition in the district court when the only issue on appeal was that of damages. The testimony is to the effect that condemnees' counsel was engaged in numerous legal matters and too busy to file this petition; and that he had never filed such a petition.

Between the date of the judgment nonsuiting the condemnees and the date of the hearing of condemnees' motion to vacate that judgment, the condemnees filed the affidavits of Tom Dooley and Erle B. Brown, fixing the amount of damages to the condemnees' land by virtue of condemner's acquiring an easement thereof, in the amounts of $8,500 and $8,700, respectively. These affidavits were filed on March 31, 1954, and April 1, 1954. The trial court sustained a motion of the condemner to strike the affidavits from the files and objection to the introduction of the same into evidence. The condemnees predicate error upon the part of the trial court in sustaining the condemner's motion.

These affidavits were not a part of the hearing held to determine whether or not good cause was shown on the part of the condemnees to file their petition instanter, therefore they were not considered with reference to the merits at that hearing. The legal propriety of considering the affidavits was a matter within the discretion of the trial court, and its refusal to consider them as proper matters of evidence in the cause was a proper exercise of its discretion. We conclude that the condemnees' assignment of error is without merit.

In City of Seward v. Gruntorad, *supra*, we referred to In re Estate of Myers, 152 Neb. 165, 40 N. W. 2d 536, where we held: "A discretionary duty is imposed upon a district court to determine whether or not good cause has been shown for the failure of a party to plead within the time required, and after the court has heard the reasons of the party in default for his failure to timely plead, and in the exercise of a legal discretion has de-

cided that no sufficient cause has been shown, this court will not ordinarily disturb the decision of the district court." See, also, In re Estate of Lindekugel, 148 Neb. 271, 27 N. W. 2d 169.

It appears from the record that the trial court gave the condemnees further opportunity to present any reason or cause why their petition was filed out of time, and to show why it was necessary to delay 93 days after the 50-day period before attempting to file their petition if they so desired, which the condemnees declined to take. The trial court declared that the reasons shown by the condemnees for failure to file their petition in time were identical with the case of City of Seward v. Gruntorad, *supra*, and that under the precedent of such case confusion, doubt, uncertainty, or contrary opinion of counsel as to the legal procedural requirements were not sufficient to permit the filing of a petition out of time.

The law governing procedure in cases of eminent domain became effective May 21, 1951. Counsel for the condemnees should at least be required to take cognizance of the procedure as set forth therein and not ignore it. The mere fact that this court determined the matter of procedure in eminent domain cases in City of Seward v. Gruntorad, *supra*, which opinion was released on February 5, 1954, does not constitute a legal excuse or reason for failure of condemnees' counsel to follow the law relating to procedure in eminent domain cases.

In furtherance of the contention of the condemnees that good cause was shown, condemnees assert that the condemner participated in the argument in the district court on the motion heretofore mentioned, and, having sat by and seen such motion considered and taken under advisement by the trial court, the trial court deeming the same of sufficient importance to take the matter under advisement, and the condemner making no objection that the motion had been filed in the county court, the defect, if any, had been waived, and the condemner was

estopped to assume any inconsistent position with that taken by it in the district court on the hearing on the motion.

We have examined the cases cited by the condemnees on this proposition, such as Neitzel v. Lyons, 48 Neb. 892, 67 N. W. 867, wherein this court held: "Where a stranger filed a motion in a pending case in the district court showing that he was directly interested in the subject-matter of the litigation, and a hearing of this motion was had without any objection that such motion was not presented by a party to the action, held, on error proceedings to review the ruling made on such motion, that the parties who resisted the motion solely on its merits thereby waived all rights of objection to such motion not being originally presented by a proper party."

Also, the case of Peterson v. Strayer, 121 Neb. 587, 237 N. W. 667, wherein this court held: "'A party who has, with knowledge of the facts, assumed a particular position in judicial proceedings, and has succeeded in maintaining that position, is estopped to assume a position inconsistent therewith to the prejudice of the adverse party.'" See, also, 31 C. J. S., Estoppel, § 117, p. 372; 60 C. J. S., Motions and Orders, § 12, p. 15.

The rule seems to be: "Subject to modifications and limitations which will appear, it is a well established principle that a party who has knowingly and deliberately assumed a particular position in judicial proceedings is estopped to assume a position inconsistent therewith to the prejudice of the adverse party. Estoppel on this ground cannot be invoked, however, where the position first assumed was taken as a result of ignorance or mistake, or through the act or fault of the party claiming the estoppel; and, clearly, it cannot be invoked where the position complained of is not inconsistent with a former position. Ordinarily, a change of position with respect to a pure matter of law does not work an estoppel, particularly where the earlier position has been found unsound or untenable." 31 C. J. S., Estoppel, § 117,

p. 372. See, also, Hamilton Web Co. v. Page, 8 F. Supp. 626, which held that a party is not estopped from setting up a defense where the necessity for the claim of estoppel in order to prevail arises from errors of judgment of law on the part of one seeking to claim the benefit of estoppel.

Peterson v. Strayer, *supra,* is not factually in point. It involved an independent lawsuit having been brought after an earlier action had been tried and appealed to the Supreme Court, the earlier and later action having been based upon the same general transaction. The case considers the right of a party to an earlier action taking a position on the merits in the later action inconsistent with the position he took in the earlier case. Conceding the correctness of the rule stated in Peterson v. Strayer, *supra,* it is not applicable to the case at bar.

It will be observed that the estoppel claimed by the condemnees arises from errors of judgment of law on their part, that is, the condemnees misjudged the proper procedure in cases of eminent domain with reference to filing the petition in the district court as heretofore set out. The condemner did not assume two different positions in this case, nor did the condemner succeed in maintaining a particular position in another judicial proceeding involving the condemnees and the merits of their claims. Nor did the condemner succeed in maintaining any position taken on the merits before its motion for nonsuit. The condemner in the instant case never successfully assailed any proceeding in the district court as being unauthorized by law and wholly void, and then in turn asserted that such proceedings were in any respect valid. We conclude that the condemnees' contention cannot be sustained.

The condemnees also take the position that good cause was shown by the very fact that they were given leave to file the petition instanter in the district court. Myers v. Hall County, 130 Neb. 13, 263 N. W. 486, is cited. In that case the plaintiff filed a claim against the county

for damages. The county board disallowed the claim. The plaintiff appealed to the district court and recovered a judgment. The county appealed to the Supreme Court and contended the district court erred in overruling the motion of the county to strike the petition from the files, and in failing to enter a nonsuit for the reason that the record did not disclose good cause for the failure of the plaintiff to file its petition within the statutory period. The Supreme Court affirmed the judgment of the district court, holding: "Where the district court, on appeal by plaintiff from the county board, overrules a motion by defendant to strike the petition on appeal from the record and to enter a nonsuit, because the petition was not filed within the statutory period of 50 days, nor good cause for the delay shown, it will be presumed on appeal to the supreme court that good cause was shown, in absence of a record disclosing the contrary." The record contained no bill of exceptions showing proceedings had upon the hearing to strike the petition of plaintiff from the files and enter a nonsuit. The case is clearly distinguishable from the case at bar in which there is a record of the proceedings with reference to whether or not good cause was shown by the condemnees to file their petition instanter. This record discloses that at the time the request was made by the condemnees to file their petition instanter, there was no attempt whatever to show any cause to the trial court as to why the petition should be filed out of time, nor was there any attempt made to notify opposing counsel that such a request was being made. So, there was no hearing on the matter of good cause to present and file a petition out of time. The hearing was not had until such time as the condemner filed its motion to strike the petition and nonsuit the condemnees. It is obvious that Myers v. Hall County, *supra,* is not applicable to the case at bar. We conclude that the trial court did not abuse its sound judicial discretion in sustaining the condemner's

motion to strike the petition of the condemnees, dismiss their appeal, and nonsuit them.

The condemnees contend that section 76-717, R. S. Supp., 1953, insofar as it provides: "The proceeding shall be docketed in the district court, showing the party first appealing as the plaintiff and the other party as the defendant" is unconstitutional and void.

Article III, section 14, of the Constitution of Nebraska, provides in part: "And no law shall be amended unless the new act contain the section or sections as amended and the section or sections so amended shall be repealed."

Section 25-101, R. R. S. 1943, provides: "The distinctions between actions at law and suits in equity, and the form of all such actions and suits heretofore existing, are abolished; and in their place there shall be hereafter but one form of action, which shall be called a 'civil action.'"

Section 25-102, R. R. S. 1943, provides: "In all civil actions, the complaining party shall be known as the plaintiff and the adverse party as the defendant."

The condemnees contend that a condemnation proceeding is a civil action within the concept of section 25-101, R. R. S. 1943; that section 76-717, R. S. Supp., 1953, says in substance that the appeal should be docketed showing the first party appealing as the plaintiff, whereas section 25-102, R. R. S. 1943, states that the complaining party shall be known as the plaintiff; that in the instant case the condemnees were not suing to have their property condemned by the condemner, therefore, the condemner is the party complaining; and that this is true because the condemnees cannot agree with the condemner as alleged in paragraph No. 4 of the condemner's petition filed in the county court. See, also, section 76-704, R. S. Supp., 1953, to the effect that if any condemnee shall fail to agree with the condemner with respect to the acquisition of property sought by the condemner, a petition to condemn the property may

be filed by the condemner in the county court of the county where the property or some part thereof is situated.

We are not in accord with the condemnees' contention that section 76-717, R. S. Supp., 1953, by its terms amends statutes setting forth the pre-existing procedure controlling appeals to the district court from the county court and justice court. The act sets up a complete, independent, uniform eminent domain procedure. After designating the party first appealing as plaintiff in eminent domain appeals, the act then adopts justice court appellate procedure. A statute may adopt the provisions of another without being an amendment thereof and without, therefore, having to comply with the provisions of Article III, section 14, of the Constitution relating to amendments. See, Adams v. State, 138 Neb. 613, 294 N. W. 396; In re Estate of Mathews, 125 Neb. 737, 252 N. W. 210.

In Beisner v. Cochran, 138 Neb. 445, 293 N. W. 289, this court said: "An act complete in itself which covers the whole subject to which it relates may properly modify, change or destroy the effect of other statutes without contravening the provisions of the Constitution. Van Horn v. State, 46 Neb. 62, 64 N. W. 365; Mehrens v. Bauman, 120 Neb. 110, 231 N. W. 701; State v. Hevelone, 92 Neb. 748, 139 N. W. 636; Scott v. Dohrse, 130 Neb. 847, 266 N. W. 709." The court further held: "Where a statute is susceptible of two constructions, one of which will render it constitutional and the other unconstitutional, it is the duty of a court to adopt the construction which, without doing violence to the fair meaning of the statute, will render it valid."

We conclude that the condemnees' position that section 76-717, R. S. Supp., 1953, is unconstitutional and void cannot be sustained.

The principal assignments of error contended for by the condemnees have been determined. Other assign-

ments of error, in view of our conclusions, need not be determined.

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

AFFIRMED.

HELEN R. ROGERS, ADMINISTRATRIX OF THE ESTATE OF HENRY E. ROGERS, DECEASED, APPELLEE AND CROSS-APPELLANT, V. KEITH SHEPHERD, APPELLANT AND CROSS-APPELLEE.
66 N. W. 2d 815

Filed November 12, 1954. No. 33549.

1. **Trial.** In case of a challenge to the sufficiency of evidence to sustain a verdict by motion of defendant for a directed verdict, the plaintiff is entitled to have every fact controverted by evidence resolved in his favor and is entitled to have resolved in his favor the benefit of every inference which can be reasonably deduced from the evidence.
2. **Negligence.** In an action based on negligence to which the comparative negligence rule has application wherein the evidence shows beyond reasonable dispute that the plaintiff's negligence was more than slight in comparison with that of the defendant the action should be dismissed or verdict directed.
3. ———. A failure to look and to see that which is in plain sight and in the exercise of ordinary care should have been seen, which if seen would avoid an accident, is as a matter of law more than slight negligence.

APPEAL from the district court for Johnson County: STANLEY BARTOS, JUDGE. *Reversed and dismissed.*

Jean B. Cain, for appellant.

C. Russell Mattson and *Donald R. Kanzler,* for appellee.

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

YEAGER, J.

This is an action for damages by Helen R. Rogers,

administratrix of the estate of Henry E. Rogers, deceased, plaintiff and appellee, and cross-appellant, who will hereinafter be referred to as plaintiff, against Keith Shepherd, defendant and appellant, who will be hereinafter referred to as defendant. The action is in four causes of action. The first is for damages to an automobile which had been the property of plaintiff's decedent, the second is for medical service rendered to plaintiff's decedent and for his pain and suffering, the third is for funeral expense of plaintiff's decedent, and the fourth is for wrongful death of plaintiff's decedent.

The action was tried to a jury and a demurrer to the evidence was sustained as to the first cause of action and of course it was not submitted to the jury for consideration. A verdict was returned in favor of plaintiff on the second cause of action for $506, on the third for $679, and on the fourth for $5,000. Judgment was rendered on the verdict. Motions for new trial were filed by both parties. These were duly overruled. From the judgment and the order overruling his motion for new trial the defendant has appealed and the plaintiff has cross-appealed.

The action is predicated on alleged negligence of the defendant in the operation of his automobile on a public highway in Johnson County, Nebraska, on January 5, 1951, at about 9:30 a. m. The point where it is claimed that the negligence occurred is on a north and south highway about 1 mile east and 4 miles south of Sterling, Nebraska. At this location an automobile owned and operated by plaintiff's decedent and one owned and operated by the defendant came into collision. Plaintiff's decedent was traveling in a northerly direction and defendant was traveling in a southerly direction. The collision was by contact of the front ends of the two automobiles.

In the petition, to the extent necessary to state herein, it was charged substantially that defendant was negligent in that he drove his automobile at a speed of 40

miles an hour which was in excess of what was reasonable and proper; that he failed to keep his automobile under reasonable control; that he failed to keep his automobile on the right side and to yield the right half of the roadway in approaching plaintiff's decedent; that he drove on the left side in approaching and passing over the crest of a grade when the view ahead was obstructed; that he failed to operate his automobile in such manner as to avoid striking the automobile of plaintiff's decedent after it came into the range of his vision; that he failed to keep a proper lookout; that he failed to timely apply his brakes; that he failed under the known conditions to equip his automobile with chains; that he failed to sound his horn; and that after discovering the position of peril of plaintiff's decedent and with a last clear chance to avoid accident he failed to do so.

By answer the defendant denied the charges of negligence against him contained in the petition. In the answer the defendant charged that the collision was caused by the negligence of plaintiff's decedent. The specifications are in substance the same as those made by plaintiff against the defendant. They therefore will not be repeated here.

The defendant presents two assignments of error as grounds for reversal and the plaintiff five. The one requiring first consideration here is the first one made by defendant as follows: "The court erred in overruling defendant's motion for directed verdict at the close of plaintiff's evidence and again when all evidence had been submitted."

By this assignment the sufficiency of the evidence to sustain a finding of negligence under the issues pleaded is challenged. This challenge requires an examination of the evidence. In such examination the plaintiff is entitled to have treated as true all competent evidence submitted on her behalf, is entitled to have every fact controverted by evidence resolved in her favor, and is entitled to have resolved in her favor the benefit of every

inference which can reasonably be deduced from the evidence. Davis v. Spindler, 156 Neb. 276, 56 N. W. 2d 107.

There is little difference in the direct evidence adduced on behalf of plaintiff and of defendant.

All of the direct evidence of the plaintiff as to how the collision occurred came from the defendant. It came about as follows: After the occurrence defendant was interviewed as to it and the interview taken down and transcribed by a court reporter. This interview was adduced and admitted into evidence on behalf of plaintiff as admission against interest made by defendant. Whether or not it was thus properly admissible we do not determine since the question is not raised on this appeal. A portion of another interview was in like manner adduced.

In addition to this direct evidence there was evidence as to the character and condition of the highway, and the location and condition of the two automobiles after the collision. Photographs were taken of the highway in the immediate location and of the automobiles in their condition and position after the collision, which were adduced in evidence. There was evidence that the usable portion of the highway was about 20 feet in width.

The plaintiff's evidence, other than the photographs, as to the cause of the collision, which as already pointed out appeared in the admissions which plaintiff adduced, was substantially that this road was covered with snow and ice; that there was one traveled way down the middle of the road; that defendant was driving in this traveled way at from 30 to 40 miles an hour; that he was probably using the overdrive; that as he came to about the top of a hill he saw plaintiff's decedent coming from the opposite direction and about 100 feet away and ascending the hill also driving in the traveled way at the middle of the road; that when he saw plaintiff's decedent he attempted to apply his brakes lightly so as to stop his car and attempted to turn right out of the trav-

eled way; and that the automobiles collided while both were in the traveled way.

The photographs show the two automobiles standing apart with the rear end of defendant's automobile about the middle of the road with the right front wheel at about the center, and with the right front wheel of the automobile of plaintiff's decedent near the center and with the rear end well over to its left side of the road. The indication is that this automobile moved backward and downhill the distance it was from defendant's automobile. These photographs show badly damaged front ends of both automobiles extending all the way across each. Considerable debris appears at and under the front end of defendant's automobile.

This we think is a substantial and fair résumé of the evidence relating to the question of negligence at the close of plaintiff's evidence and at the time when defendant first moved for a directed verdict.

The motion was overruled and thereafter the defendant testified in his own behalf. His testimony was not materially different from the statements in that part of plaintiff's evidence contained in the admissions against interest except that in his testimony estimate of his speed as he approached the scene of the collision was 35 miles an hour.

In addition there was evidence that the front ends of the automobiles were separated by a distance of 12 feet and that as he was driving along plaintiff's decedent was occupying the middle of the road. There is no evidence as to the rate of speed at which plaintiff's decedent was traveling.

As is observable from what has been said with reference to pleadings the question of negligence of plaintiff's decedent as well as that of defendant was issuable in the case. If there was evidence of negligence on the part of defendant and also on the part of plaintiff's decedent it became necessary in the district court and it becomes necessary here to apply the comparative negli-

gence rule as declared and defined by statute. § 25-1151, R. R. S. 1943.

By the terms of this statute a plaintiff may recover on account of the negligence of a defendant even though guilty of negligence himself provided that the defendant's negligence is gross and his own is slight by comparison. Also by the terms of this statute questions of negligence and contributory negligence are for the jury.

In a long line of cases however this court has held that where the evidence shows beyond reasonable doubt that plaintiff's negligence was more than slight in comparison with that of the defendant the action should be dismissed or verdict directed. One of the earlier cases is Dodds v. Omaha & C. B. St. Ry. Co., 104 Neb. 692, 178 N. W. 258. Some later cases are Pierson v. Jensen, 150 Neb. 86, 33 N. W. 2d 462; Krepcik v. Interstate Transit Lines, 152 Neb. 39, 40 N. W. 2d 252; and Bishop v. Schofield, 156 Neb. 830, 58 N. W. 2d 207.

Passing over a determination of the question of whether or not the evidence is sufficient to sustain a finding that the defendant was guilty of negligence in the operation of his automobile and assuming that he was guilty, which we deem proper in the light of the record and the manner in which the appeal has been presented, we turn to the question of whether or not under the evidence the question of the contributory negligence of plaintiff's decedent was one for the court or the jury.

If the testimony coming from the witnesses of plaintiff is to be accepted and on it the defendant may be said to have been guilty of negligence it appears unreasonable to say that on this same evidence plaintiff's decedent was not guilty of negligence. The only substantial differences as to the two with regard to causation appear in the following: The defendant was traveling south at from 30 to 40 miles an hour without chains and saw the other car about 100 feet ahead; he made some effort to stop but was unable to do so; he tried unsuccessfully to turn aside; and after going over the

crest of the hill he was going downhill; whereas plaintiff's decedent was traveling north and uphill with chains; there is no evidence as to his speed, none as to whether or not he attempted to stop or turn aside, and none as to whether or not he ever saw defendant. However his view was unobstructed and he could have observed the situation as soon as defendant could.

As to the question of whether or not plaintiff's decedent saw defendant's automobile, no benefit could flow from a failure to see that which was in plain view. A failure to look and to see that which if seen would avoid an accident is as a matter of law more than slight negligence. Evans v. Messick, 158 Neb. 485, 63 N. W. 2d 491.

As pointed out nothing additional appears in the testimony of defendant's witnesses to support the position of plaintiff.

From this analysis, the only permissible conclusion is that this evidence shows beyond reasonable dispute that the negligence of plaintiff's decedent was more than slight in comparison with that of the defendant.

The only other evidence in the record bearing on this question is that which appears upon and may be deduced from the photographs appearing in evidence. These, as pointed out, show the location and condition of the automobiles after the accident. The only explanation as to how they got in that condition is that contained in the evidence already reviewed herein. No contrary purport or inference reasonably flows from the photographs.

From all of the evidence, it is shown beyond reasonable dispute that plaintiff's decedent was guilty of negligence more than slight and that the court erred in refusing to sustain defendant's motion for a directed verdict. This conclusion renders unnecessary a consideration of other questions involved in the appeal.

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

REVERSED AND DISMISSED.

WENKE, J., dissenting.

I dissent from the majority's holding that the only permissible conclusion to be drawn from the evidence is that plaintiff's decedent was guilty of such negligence as to defeat plaintiff's right to recover.

The rule applicable in that regard is stated in Bishop v. Schofield, 156 Neb. 830, 58 N. W. 2d 207, as follows: "If the evidence is undisputed, or such that minds of men could not reasonably arrive at any other conclusion, the question is one for decision by the court as a matter of law; otherwise, it is a question for the jury to decide as other issuable facts in the case."

In considering the record the majority opinion correctly states the rule applicable as follows: "In such examination the plaintiff is entitled to have treated as true all competent evidence submitted on her behalf, is entitled to have every fact controverted by evidence resolved in her favor, and is entitled to have resolved in her favor the benefit of every inference which can reasonably be deduced from the evidence."

From the evidence adduced I think a jury could find as follows: That the road where the accident took place was graded and had a traveling surface which was about 20 feet in width; that on the day of the accident it was covered with packed snow, which was slick, thus making the surface very slippery; that generally travel had been in the center of the graded surface, although the full width thereof could be used for that purpose; that plaintiff's decedent was traveling north toward the crest of a hill; that he was traveling in the center portion of the road; that the defendant was traveling south on this same road and also occupying the center portion thereof; that defendant observed decedent's car when he came over the crest of the hill; that decedent's car was then about 100 feet away; that defendant was traveling at a speed somewhere between 35 and 40 miles an hour; that he did not have chains on his car; that his car was in overdrive; that as defendant's car came over

the hill decedent, who had chains on his car, turned his car to the right or east portion of the traveled surface of the road; that he did so after defendant's car had come over the crest of the hill and started down the south side; that after coming over the crest of the hill and seeing decedent's car defendant applied his brakes but was unable to stop his car; that defendant also tried to turn his car to the right, or onto the west side of the traveled portion of the road, but was unable to do so; that just before defendant's car reached decedent's car the defendant's car slid or skidded to the left or east portion of the road; that as a result of doing so it crashed head-on into the front end of decedent's car; and that the collision took place east of the center of the traveled portion of the road and some 40 to 50 feet south of the crest of the hill.

As a result of the collision the defendant's car came to an abrupt stop but decedent's car was driven back to the southwest some 25 to 30 feet. How the cars traveled, immediately before and after the accident, and the direction they took is fully evidenced by the tracks of their tires in the snow, which are shown by pictures introduced which show their position immediately following the collision, and by witnesses who testified in regard thereto. Where the collision took place is further evidenced by where the debris from the cars laid on the highway and where the antifreeze spilled out and stained the snow.

I have not overlooked the fact that defendant testified the collision occurred in the center of the road and that this fact is corroborated by another witness. If that is true then I would agree that plaintiff should not recover as decedent would then have been guilty of such negligence as to defeat his right to recover. On the other hand, if decedent turned his car to the right and onto the east half of the road I cannot see how he could then be guilty of such negligence as to defeat plaintiff's right to recover for that is certainly all that any ordi-

narily prudent man could or should be expected to do. It certainly was not his duty to anticipate that defendant would not be able to control his car. To me the record presents a question of fact for the jury and not one of law for the court. In my judgment the trial court was correct in submitting it to the jury.

CHAPPELL, J., joins in this dissent.

WILLIAM NIKLAUS, FOR THE BENEFIT AND ON THE BEHALF OF THE CITY OF LINCOLN, NEBRASKA, A BODY POLITIC AND THE TAXPAYERS AND RESIDENTS OF SAID CITY, APPELLANT, V. FRANK J. MILLER, TREASURER OF THE CITY OF LINCOLN, APPELLEE.

66 N. W. 2d 824

Filed November 12, 1954. No. 33563.

1. **Taxation.** A resident taxpayer, as such, and without proof of peculiar interest or injury to himself, may enjoin the illegal expenditure of money by a public board or officer.
2. **Municipal Corporations.** Tribunals having charge of the letting of contracts for public works, in passing upon the question of the responsibility of bidders as determined from all the elements entering into that question, do not act ministerially only but exercise an official discretion. The action of the board in that respect is judicial in its nature, and the exercise of that discretion is vested in the board and not in the courts.
3. ———. Where there is a showing that the administrative body, in exercising its judgment, acted upon honest convictions, based upon facts, and as it believed for the best interests of its municipality, and where there is no showing that the body acted arbitrarily, or from favoritism, ill will, fraud, collusion, or other such motives, it is not the province of the court to interfere and substitute its judgment for that of the administrative body.
4. ———. It is presumed that a public administrative body acts in good faith, with honest motives, and for the purpose of promoting the public good and protecting the public interest.
5. **Constitutional Law: Municipal Corporations.** Under our Constitution a home rule charter must be consistent with and subject to the Constitution and laws of this state. This means that a provision of a city home rule charter takes precedence over

state statutes only in instances where the subject matter is of strictly local municipal concern. As to all subjects of strictly local municipal concern such charter cities operate free and independent of state legislation.

6. **Contracts.** It is well established that the law of the state in which a contract is made and is to be performed is considered as written into and becomes a part of and governs the contract.

APPEAL from the district court for Lancaster County: PAUL W. WHITE, JUDGE. *Affirmed.*

Herbert W. Baird, for appellant.

John H. Comstock and *Jack M. Pace,* for appellee.

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

WENKE, J.

This is an appeal from the district court for Lancaster County. William Niklaus, as a resident, citizen, and taxpayer of the city of Lincoln brought the action against the city's treasurer, Frank J. Miller. The purpose of the action is to enjoin the treasurer of the city from making payments to anyone under and by virtue of a contract entered into by the city with Dobson Brothers Construction Company. Trial was had which resulted in the action being dismissed. Plaintiff thereupon filed a motion for new trial and has perfected this appeal from the overruling thereof.

This action relates to a written contract entered into on October 21, 1953, by the City of Lincoln with Dobson Brothers Construction Company whereby the latter agreed to construct a 5,000,000 gallon reservoir at the city's Fifty-first Street pumping station at a cost to the city of $246,746. The city engineer's estimate of the cost of the work was $313,200.

The first question raised is, can appellant, solely as a citizen, resident, and taxpayer of the city of Lincoln, maintain this action? The contract involved created a general obligation on the part of the city in the sum

of $246,746 which amount it agreed it would pay in cash to Dobson Brothers Construction Company upon their completion and the city's acceptance of the work, payment to be made in accordance with the provisions of the contract.

We have often held that: "* * * in this jurisdiction the law has long been settled beyond debate that a resident taxpayer, as such, and without proof of peculiar interest or injury to himself, may enjoin the illegal expenditure of money by a public board or officer." Woodruff v. Welton, 70 Neb. 665, 97 N. W. 1037. See, also, Martin v. City of Lincoln, 155 Neb. 845, 53 N. W. 2d 923; Fischer v. Marsh, 113 Neb. 153, 202 N. W. 422; Tukey v. City of Omaha, 54 Neb. 370, 74 N. W. 613, 69 Am. S. R. 711; McElhinney v. City of Superior, 32 Neb. 744, 49 N. W. 705.

These cases rest on the sound principle that each taxpayer has such an individual and common interest in public funds as to entitle him to maintain an action to prevent their unauthorized appropriation. We find appellant can maintain the action.

In his petition appellant alleged Clark Jeary, Mayor of the city of Lincoln at the time the contract was entered into, had such an interest in the Universal Surety Company as a director, stockholder, and employee thereof, and in the Dobson Brothers Construction Company as a regular employee thereof, that his interest in the contract was a violation of Article VII, section 3, of the Home Rule Charter of the city of Lincoln. It should here be stated that the Universal Surety Company furnished the "Performance Bond" for the Dobson Brothers Construction Company as required by the city's "Instructions to Bidders."

Article VII, section 3, of the city's Home Rule Charter provides, insofar as here material, as follows: "No officer of the city shall be interested directly or indirectly in any contract to which the city or anyone for its benefit is a party; and such interest in any con-

tract shall avoid the obligation thereof on the part of the city."

This issue seems to have been abandoned on appeal. However, in fairness to the mayor and the other members of the city council, we think it only right to state the appellant produced no evidence to sustain this charge. It is entirely without merit.

Should the specifications for competitive bidding have specified the time within which the work must be completed, since time was of vital importance? In this respect the Instructions to Bidders provided: *"TIME OF COMPLETION.* The time of completion of the work is a basic consideration of the contract and the construction period named in the proposal will be taken into consideration in making the award of contract."

Nothing is pointed out in the provisions of the city's charter which would specifically so require and, in the absence thereof, the following, quoted from Best v. City of Omaha, 138 Neb. 325, 293 N. W. 116, would seem to be controlling: "The city council may, therefore, determine which course is for the best interest of its municipality, and, if it so desires, permit bids to be proposed in which the bidder fixes the time for completion. This permits the city council to consider the time of completion in conjunction with and as a part of the other elements that enter into the determination of who is the lowest responsible bidder."

Appellant contends the contract was not let to either the "lowest responsible bidder" or the "lowest and best bid" for the work.

Nine bids were received, all of which were below the city engineer's estimate of $313,200. The lowest bid was that of Roberts Construction Company of $242,469 with completion in 270 days or late in August 1954. The next lowest bid was that of Dobson Brothers Construction Company of $246,746 with completion in 200 days or the early part of June 1954.

Because Dobson Brothers Construction Company had

their equipment and men available for immediate use, because their foreman was experienced in this exact type of work, and because their completion date would make the reservoir available for use during the peak period of the 1954 summer season, the city council, by resolution No. A-37247 adopted on October 21, 1953, accepted the proposed bid of Dobson Brothers Construction Company and authorized the mayor to enter into a contract in accordance therewith. The mayor did and it is the contract herein involved.

Article IV, section 19, of the city's Home Rule Charter provides, in part, as follows: "Before the city council shall enter into any contract or authorize any expenditures involving over $500.00, they shall cause to be made and filed an estimate of the total cost thereof, together with detailed plans and specifications, which, if approved by the city council, shall be kept subject to public inspection and the work or improvement shall be done substantially in accordance therewith. No contract shall be entered for a price exceeding such estimate, and the city council shall, except in cases of emergency, advertise for bids and cause the amount of such estimate to be published therein."

A fair construction of this provision would impose a duty upon the council to accept the lowest bid in the absence of facts which, in the honest exercise of its discretion, would cause it to conclude that a contrary course would be in the best interests of the city.

As stated in State ex rel. Nebraska B. & I. Co. v. Board of Commissioners, 105 Neb. 570, 181 N. W. 530: "The tribunals having charge of the letting of these contracts for public work in passing upon the question of the responsibility of bidders, as determined from all those elements entering into that question, do not act ministerially only, but exercise an offical discretion. The action of the board in that respect is judicial in its nature, and the exercise of that discretion is vested in the board, and not in the courts." See, also, State ex

rel. Union Fuel Co. v. City of Lincoln, 68 Neb. 597, 94 N. W. 719.

The following principles in this regard were laid down in Best v. City of Omaha, *supra:*

"Public administrative bodies possess a discretionary power in awarding contracts, in considering the responsibility of bidders, and in determining questions of public advantage and welfare.

"Where there is a showing that the administrative body, in exercising its judgment, acts from honest convictions, based upon facts, and as it believes for the best interests of its municipality, and where there is no showing that the body acts arbitrarily, or from favoritism, ill will, fraud, collusion, or other such motives, it is not the province of a court to interfere and substitute its judgment for that of the administrative body.

"It is presumed that a public administrative body acts in good faith, with honest motives, and for the purpose of promoting the public good and protecting the public interest.

"It is not the policy of the law to prevent a public administrative body from properly exercising its discretion in administering the affairs committed to its charge for the best interests of the municipality that it represents.

"In the absence of controlling legislative or judicial direction, when acting within the limits of the general powers which it possesses, a public administrative body has the power to determine questions of public policy that concern primarily its municipality."

There was a further question as to the propriety of the council considering the bid of Roberts Construction Company. Roberts Construction Company had interlocking ownership and management with the Olson Construction Company, who had also bid and was third low. It appears the Olson Construction Company had the right to dictate to the Roberts Construction Company the amount of its bid.

In its Instruction to Bidders the city provided as follows: "*ONLY ONE PROPOSAL.* No bidder may submit more than one (1) proposal. Two proposals under different names will not be received from one firm or association."

The record shows the council, in exercising its judgment in regard to the bids made, acted upon honest convictions, based upon the facts which were before it. It believed the action it took was for the best interests of the city. There is no showing that the council acted arbitrarily, or from favoritism, ill will, fraud, collusion, or any other such motives. In this situation it is not the province of this court to interfere and substitute its judgment for that of the council.

Appellant further raises the following questions: Do the provisions of sections 73-101 to 73-105, R. R. S. 1943, apply to contracts for the construction of public improvements entered into by the city of Lincoln? If they do, are such provisions directory or mandatory? If mandatory, is the contract entered into by the city in violation thereof void?

These questions were not raised by appellant's pleadings filed in the district court. They were, however, orally raised by appellant at the opening of the trial and passed on by the trial court. In view thereof we shall consider them to be here for our determination.

Section 73-102, R. R. S. 1943, insofar as here material, provides: "All governing authorities of the State of Nebraska, and governmental subdivisions thereof, * * * shall, in awarding contracts for public works, require all contractors bidding on public works to file with such authority a statement that he is complying with, and will continue to comply with, fair labor standards in the pursuit of his business and in the execution of the contract on which he is bidding. The governing authorities shall also require to be written into each and every contract for public works, in addition to such other provisions as are necessary and prescribed by law, a provision

that in the execution of such contract fair labor standards shall be maintained; * * *."

Section 73-104, R. R. S. 1943, provides: " 'Fair labor standards,' as used in sections 73-102 and 73-103 shall be construed to mean such a scale of wages and conditions of employment as are paid and maintained by at least fifty per cent of the contractors in the same business or field of endeavor as the contractor filing such statement."

Section 73-105, R. R. S. 1943, provides, insofar as here material, that: "Any person violating any of the provisions of sections 73-101 to 73-104 shall likewise be subject to a fine of not less than twenty-five dollars nor more than two hundred and fifty dollars."

The statute, taken as a whole, is on its face, a general law and of state-wide application. It is the appellant's thought, because of the penalty provided therein for any violation of the provisions thereof, that a contract founded on such violation is void even though the act does not pronounce it to be such. He cites Berka v. Woodward, 125 Cal. 119, 57 P. 777, 73 Am. S. R. 31, 45 L. R. A. 420, and Ferle v. City of Lansing, 189 Mich. 501, 155 N. W. 591, in support thereof.

The city of Lincoln is a city of the primary class operating under a home rule charter adopted pursuant to the powers granted it by the Nebraska Constitution. Under our Constitution a home rule charter must be consistent with and subject to the Constitution and laws of this state. This means that a provision of a city home rule charter takes precedence over state statutes only in instances where the subject matter is of strictly local municipal concern. As to all subjects of strictly local municipal concern such charter cities operate free and independent of state legislation. See, Axberg v. City of Lincoln, 141 Neb. 55, 2 N. W. 2d 613, 141 A. L. R. 894; Carlberg v. Metcalfe, 120 Neb. 481, 234 N. W. 87; Salsbury v. City of Lincoln, 117 Neb. 465, 220 N. W. 827;

Consumers Coal Co. v. City of Lincoln, 109 Neb. 51, 189 N. W. 643.

As stated in Axberg v. City of Lincoln, *supra:* "The purpose of the home rule charter provision of the Constitution was to render the cities adopting such charter provisions as nearly independent of state legislation as was possible. Under it a city may provide for the exercise of every power connected with the proper and efficient government of the municipality where the legislature has not entered the field. Where the legislature has enacted a law affecting municipal affairs, but which is also of state concern, the law takes precedence over any municipal action taken under the home rule charter. But where the legislative act deals with a strictly local municipal concern, it can have no application to a city which has adopted a home rule charter. Whether or not an act of the legislature pertains to a matter of local or state-wide concern becomes a question for the courts when a conflict of authority arises."

We said, and correctly, in Pester v. City of Lincoln, 127 Neb. 440, 255 N. W. 923, that: "The extension of the water main * * * were matters of local and municipal concern. Consequently the home rule charter prevails over the statute applying to cities and villages generally. Consumers Coal Co. v. City of Lincoln, 109 Neb. 51; Sandell v. City of Omaha, 115 Neb. 861; State v. Johnson, 117 Neb. 301; Salsbury v. City of Lincoln, 117 Neb. 465." The same would be true here where the construction of a reservoir is involved. The statute as to "Fair Labor Standards" has no application to the subject matter herein involved.

But even assuming, for the purpose of discussion, that the statutory provisions have application, we do not think appellant's contentions should be sustained. The statute, section 73-102, R. R. S. 1943, makes two requirements: (a) That when a contractor bids on public works the governmental subdivision shall, before awarding a contract therefor, require him to file with it a state-

ment to the effect that he is complying with, and will continue to comply with, fair labor standards in the pursuit of his business and in the execution of the contract on which he is bidding; and (b) that such governing authorities shall also require to be written into each and every contract for public works a provision that in the execution of such contract fair labor standards shall be maintained.

The burden of proof was on the appellant to establish the statute had not been complied with. He offered no proof that the first requirement was not complied with. In the absence of such proof it must be presumed the public officials performed their duty. As stated in Campbell Co. v. City of Harvard, 123 Neb. 539, 243 N. W. 653: "In absence of evidence showing misconduct or disregard of law, regularity of official acts is presumed."

As to the second requirement no such express language is found in the contract. However, we have often said: "It is well established that the law of the state in which a contract is made and is to be performed is considered as written into and becomes a part of and governs the contract; * * *." Watts v. Long, 116 Neb. 656, 218 N. W. 410, 59 A. L. R. 728. See McWilliams v. Griffin, 132 Neb. 753, 273 N. W. 209, 110 A. L. R. 1039.

Not only does the law so provide but the contract contains the following: *"LAWS AND ORDINANCES.* The contractor shall keep himself full informed of all existing and current regulations of the Owner, and County, State, and National Laws which in any way limit or control the actions or operations of those engaged upon the work, or affecting the materials supplied to or by them. He shall at all times observe and comply with all ordinances, laws, and regulations, and shall protect and indemnify the Owner and the Owner's officers and agents against any claims or liability arising from or based on any violation of the same."

By this provision the city has guaranteed the fulfill-

ment of both the spirit and the letter of every statute affecting the contract as effectually as it would have been done had the provision of the statute been expressly followed. Under the circumstances here presented, this being in the nature of a collateral attack, we do not find the contract to be void.

There are other issues raised in regard to this last question which are not entirely without merit but, in view of our holdings, need not be determined. We find the action of the trial court dismissing the action to be correct. It is therefore affirmed.

AFFIRMED.

IN RE APPEAL OF WATSON INDUSTRIES, INCORPORATED, FROM THE DODGE COUNTY BOARD OF EQUALIZATION.
WATSON INDUSTRIES, INCORPORATED, APPELLEE, V. COUNTY OF DODGE ET AL., APPELLANTS.
IN RE APPEAL OF THE CHRISTENSEN LUMBER AND COAL COMPANY, ALFRED F. CHRISTENSEN, SOLE OWNER, FROM THE DODGE COUNTY BOARD OF EQUALIZATION.
THE CHRISTENSEN LUMBER AND COAL COMPANY, APPELLEE, V. COUNTY OF DODGE ET AL., APPELLANTS.
66 N. W. 2d 589

Filed November 12, 1954. Nos. 33569, 33570.

1. **Taxation.** The presumption obtains that a board of equalization has faithfully performed its official duties, and that in making an assessment it acted upon sufficient competent evidence to justify its action.
2. **Taxation: Appeal and Error.** In case of an appeal by a taxpayer from the action of the board of equalization in fixing the value of property for taxation, the burden is upon the appellant to show that the action of the board is erroneous.
3. ———: ———. The presumption that a board of equalization in making an assessment acted upon sufficient competent evidence to justify its action disappears when there is competent evidence on appeal to the contrary, and from that point on the reasonableness of the valuation fixed by the board becomes one

of fact based upon evidence, unaided by presumption, with the burden of showing such value to be unreasonable resting upon the appellant.

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

Forrest A. Johnson, for appellants.

Richards, Yost & Schafersman, for appellee.

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

YEAGER, J.

Here are two appeals from judgments of the district court entered after trial in review of the action of the Dodge County board of equalization in fixing the valuation of properties of the appellees respectively herein. The two cases were tried together in the district court and presented together in this court and they will be disposed of here in a single opinion. The appellants here are Dodge County and the Dodge County board of equalization. They will hereinafter be referred to as the county. The appellees are Watson Industries, Incorporated, and The Christensen Lumber and Coal Company, Alfred F. Christensen, sole owner. They will be hereinafter referred to respectively as Watson and Christensen.

The sequence of events necessary to be related here leading to the review in this court are that the Dodge County board of equalization duly fixed the value of certain personal property of Watson for the year 1953 at $62,000. It also fixed the value of certain personal property of Christensen at $45,710.

From this action of the board Watson and Christensen appealed to the district court. After trial the district court adjudicated the value of the Watson property to be $24,101, 50 percent thereof being $12,050.50, and the value of the Christensen property to be $12,031, 50 percent thereof being $6,015.50.

The county has brought these cases to this court for review on appeal. It contends that the district court erred in reducing the valuations and in failing to sustain those fixed by the Dodge County board of equalization.

On the trial in the district court Watson and Christensen produced two witnesses who gave competent evidence of probative value as to the value of the properties which were the subject of the assessment. The county adduced no evidence whatever the effect of which was to competently evaluate these properties.

Three rules for the guidance of the court when the valuation of the county board of equalization is put in issue on appeal, all contained in Weller v. Valley County, 141 Neb. 69, 2 N. W. 2d 606, are the following:

"The presumption obtains that a board of equalization has faithfully performed its official duties, and that in making an assessment it acted upon sufficient competent evidence to justify its action."

"In case of an appeal by a taxpayer from the action of the board of equalization in fixing the value of property for taxation, the burden is upon the appellant to show that the action of the board is erroneous."

"The presumption that a board of equalization in making an assessment acted upon sufficient competent evidence to justify its action disappears when there is competent evidence on appeal to the contrary, and from that point on the reasonableness of the valuation fixed by the board becomes one of fact based upon evidence, unaided by presumption, with the burden of showing such value to be unreasonable resting upon the appellant."

The evidence of Watson and Christensen was clearly sufficient to overcome the presumption that the board of equalization in making the assessments acted upon sufficient competent evidence to justify its action.

In this light resort may be had only to the evidence

of Watson and Christensen to determine the proper value of the properties in question.

The properties were buildings and equipment upon real estate belonging to the Union Pacific Railroad. The leases contained provision for their termination by either party on 30 days' notice. There was no evidence of prospect of early exercise of the right to terminate the leases or either of them.

In view of the provision for termination in the leases the witnesses for Watson and Christensen gave evidence of two values to the property of Watson and also to the property of Christensen. They testified that the reasonable value of the Watson properties on owned land was $47,073, but under the lease with the termination provision it was $24,101, and that the reasonable value of the Christensen properties on owned land was $24,061, but under the lease was $12,031.

The trial court accepted the latter or lower valuations and adjudicated accordingly. In this we think the court was correct. In the light of the legal rules cited and the fact, as pointed out, that no evidence was offered by the county in refutation of the evidence of appellees, their evidence must be accepted as controlling. There was no presumption and no other evidence to which the district court could have resorted for a basis for its finding and judgment.

The decrees of the district court are accordingly affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLANT, V. FRANK P. ALLEN, APPELLEE.
66 N. W. 2d 830

Filed November 12, 1954. No. 33579.

1. **Trial: Appeal and Error.** Exhibits which are introduced in evidence in a case, or excluded therefrom, must be brought before

the reviewing court in the record if the action of the lower court is to be reviewed.

2. ———: ———. Affidavits used on the hearing cannot be considered in the appellate court unless preserved by a bill of exceptions.
3. **Appeal and Error.** On appeal, error will not be presumed, but must affirmatively appear in the record.
4. ———. In the absence of a bill of exceptions it will be presumed that issues of fact presented by the pleadings were established by the evidence, and were correctly decided, and in such situation the only issue on appeal is the sufficiency of the pleadings to support the judgment.
5. **Criminal Law: Courts.** Property seized in enforcing a criminal law is in the custody of the court, and proper procedure for the return of the property taken in a criminal case is to apply to the court for its return, especially if the property has been offered in evidence.
6. **Courts.** A court which has in its possession and control property involved in litigation may exercise exclusive jurisdiction over such property to determine the right of possession thereto.
7. **Courts: Evidence.** The trial court is vested with legal discretion in the matter of disposing of property claimed as evidence, and this discretion extends even to the manner of proceeding in the event the accused claims it was wrongfully taken from him.
8. ———: ———. Property introduced in evidence is in custodia legis, and while it is in custodia legis it is not subject to garnishment or other civil process.

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

James F. Brogan, for appellant.

Deutsch & Jewell, for appellee.

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

MESSMORE, J.

This cause arose in the county court of Madison County. An amended complaint was filed therein on January 24, 1952. The amended complaint charged the defendant, Frank P. Allen, in 15 counts with the unlawful possession on November 7, 1951, of game birds, namely, pheasants, and also with the unlawful transportation

of the same on November 7, 1951. To the amended complaint the defendant entered a plea of not guilty. The case proceeded to trial on January 24, 1952. The State introduced evidence and rested; the defendant introduced no evidence. At the conclusion of the State's evidence, the defendant moved for a dismissal of all the counts of the amended complaint. The county court sustained this motion.

On or about May 5, 1952, the defendant filed an application in the county court alleging in substance as follows: (1) That on November 7, 1951, peace officers of the state unlawfully took from the possession of the defendant 15 pheasants and other food items while the same were in transit in the care of a common carrier at the incidence of the defendant; that the pheasants were actually taken and killed in the State of South Dakota; and that the State of Nebraska at no time ever had jurisdiction over the same. (2) That at the trial held January 24, 1952, said peace officers and the State produced the pheasants and other food items, identified them as exhibits, and offered the same into evidence, the result being that the same came into the possession, control, and keeping of the court. (3) That the pheasants were used as evidence upon the trial. (4) That solely because of the unlawful acts of the peace officers of the state the pheasants were taken from the possession of the defendant on November 7, 1951. (5) That the defendant was entitled to the immediate possession of the pheasants and the food items so taken by the peace officers of the state.

To the above application of the defendant the State, by the deputy county attorney of Madison County, filed objections, the material allegations of which are in substance as follows: (1) That under the provisions of sections 37-606, 37-607, and 37-608, R. R. S. 1943, all items requested to be returned to the defendant were either contraband or subject to seizure as being part of a contraband shipment, and were contraband because

the same were introduced into evidence and each and every one of the pheasants showed visible shot marks. (2) Counts 16 to 30 of the amended complaint dealing with unlawful possession of pheasants were dismissed by the county court on the theory that the court had no jurisidiction over the pheasants because they were taken in South Dakota. (3) That there was no evidence that the same were taken in South Dakota, except for the markings on cartons and tags used in the attempted shipment of the pheasants. (4) That sections 37-213, 37-303, and 37-304, R. R. S. 1943, clearly apply to game birds such as pheasants. (5) That the amended complaint was dismissed at the conclusion of the State's evidence, the defendant not introducing evidence to show that the pheasants were lawfully taken in this state or any other state. (6) That the defendant could, by means of an independent proceeding, apply for the possession of the pheasants, the remedy of replevin being available. (7) That the county court erred in dismissing counts 16 to 30 of the amended complaint after all of the 15 pheasants bearing shot marks had been exhibited to the court and the presumption obtained that the pheasants had been unlawfully taken in Nebraska, and the burden to prove otherwise then was on the defendant.

On June 28, 1952, the county court entered an order in substance as follows: (1) That the defendant was entitled to the possession of the pheasants and other food items taken by the peace officers. (2) That at the conclusion of the trial the deputy county attorney, an officer of the court, removed the pheasants and other food items from the physical presence of the court for the sole purpose of placing them in refrigeration to prevent deterioration by reason of which fact it was physically impossible for the court at that time to deliver the pheasants and other food items to the defendant. (3) That it was necessary that the deputy county attorney first return the pheasants and other food items to the physical custody of the court in the county court room

in the court house at Madison in as good condition as when removed, as far as humanly possible; that he do so within a reasonable time; and that 20 days constituted a reasonable time, which would be not later than July 18, 1952. It was ordered that, in compliance with this order, the pheasants and other food items be delivered to the defendant.

On July 8, 1952, the State filed a petition in error in the district court. The principal allegations were in substance as follows: That in a proceeding before the county judge of Madison County 15 pheasants were offered in evidence, together with other food items in the case of State v. Allen; and on June 28, 1952, an order was made by the county court to deliver to the defendant the pheasants so taken as above set forth. A transcript of the proceedings of the county court was attached to the petition in error, marked as an exhibit, and made a part thereof. The State set forth that error intervened in the proceedings as appears on the face of the record in the following particulars: (1) That subsequent to the judgment of dismissal, the county judge erroneously ordered the 15 pheasants and other food items, offered in evidence by the plaintiff in error, delivered to the defendant. (2) That said order was erroneous for the reason that the pheasants were contraband within the meaning of sections 37-606, 37-607, and 37-608, R. R. S. 1943, and could only be disposed of according to the provisions of section 37-608, R. R. S. 1943. (3) That other food items, except the pheasants, were subject to confiscation under section 37-607, R. R. S. 1943. (4) That the 15 pheasants here involved were contraband for the reason that each and every one of them bore visible shot marks. (5) That the defendant in such a case has a clear and adequate remedy at law to determine his property rights in the property so taken.

On July 14, 1952, the defendant filed an answer to the State's petition in error in substance as follows: (1) That the plaintiff's petition in error failed to state facts

sufficient to justify a modification or reversal of the order of the county court. (2) The petition in error demonstrated on its face that the 15 pheasants and other food items were offered in evidence in the county court and thereby came into possession of the court, and the State had no substantial interest in the disposition of the same. (3) That the pheasants referred to were taken in South Dakota in accordance with the laws of that state, and that the State of Nebraska had no jurisdiction over game taken in a foreign state. (4) That at the trial in the county court the State offered evidence to show that the pheasants were taken in South Dakota. (5) That at the trial of the cause in which such pheasants were offered in evidence, the State of Nebraska proceeded on the theory that the pheasants were the property of the defendant in error, and was estopped to contend otherwise. (6) That after the pheasants were introduced in evidence by the State and after they had thereby come in custodia legis, the same were entrusted to the deputy county attorney of Madison County for safekeeping in a public frozen-food locker plant, and the said deputy county attorney was then an officer of the county court and had no authority to make any other or different disposition thereof. Defendant in error prayed that the plaintiff's petition in error be dismissed.

The plaintiff in error, in a reply, denied generally the allegations of the defendant in error's answer.

On December 4, 1953, the district court for Madison County entered findings and judgment as follows: (1) The order of the county court of June 28, 1952, was affirmed. (2) That the items described in the order were offered in evidence upon a trial in the above entitled cause and thereby went into the possession and custody of the county court, were thereby in custodia legis, and the county court had sole and exclusive jurisdiction to order disposition of the said property. (3) That prior to the introduction of the said property into

evidence, the same was in the custody of the enforcement officers and was being preserved in a refrigerated locker plant at Madison, and that during the course of the trial in the county court and at the termination thereof the county court directed the deputy county attorney to preserve the property so taken by the peace officers of the state for the court and entered judgment accordingly, and directed that the deputy county attorney deliver the property to the county court for disposition in accordance with the order of June 28, 1952.

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

The State's assignments of error are as follows: The trial court erred in affirming the decision of the county court; and the trial court's decision is contrary to law.

The principal question for determination before this court is the propriety of the order of the county court in directing that the game birds, pheasants, be given to the custody of the defendant on the application filed by him.

The State contends that the county court is without authority in a criminal case to order contraband offered in evidence delivered to the defendant after the complaint against the defendant is dismissed. The State relies on certain sections of Chapter 37, R. R. S. 1943, entitled Game and Fish. We set forth in part such sections of the act deemed pertinent to the State's contention.

Pheasants are game birds within the concept of section 37-101, R. R. S. 1943.

Section 37-301, R. R. S. 1943, authorizes and empowers the Game, Forestation and Parks Commission to fix, prescribe, and publish regulations as to open seasons and closed seasons and bag limits for game birds as described in section 37-101, R. R. S. 1943.

Section 37-303, R. R. S. 1943, provides that it shall be unlawful for any person in any one day to kill, catch, take, or, save as therein excepted, to have in his pos-

session at any time a greater number of game birds, game animals, or game fish, of any one kind than as fixed by the commission.

Section 37-305, R. R. S. 1943, provides that no game protected by this act may be placed in cold storage except by the lawful owner of such game in his or her own name, and the same should be tagged as the commission by rule may require. Game legally taken and tagged in states other than Nebraska may be stored within the State of Nebraska as provided for in the game regulations of the commission. Every cold storage plant owner or operator in whose plant game protected by this act is held after the prescribed storage season, as established by the regulations of the Game, Forestation and Parks Commission, and following the close of the season thereon, and every person having in cold storage any game after such time shall be guilty of a misdemeanor.

The rules of the commission for the years of 1951-1952, established the open season for pheasants as October 26, 1951, to November 25, 1951, inclusive, and established the bag and possession limits as five cock pheasants. The same regulation provided as follows: "It is unlawful to place any game birds or game animals in any commercial refrigeration plant except by the lawful owner in his or her own name. All game placed in cold storage must be tagged and identified. It is unlawful to possess any game bird or game animal or the flesh of any game bird or game animal at any time except during the legal open season thereon and for 90 days thereafter * * *."

Section 37-606, R. R. S. 1943, provides that all game killed, taken or caught, and all game bought, sold or bartered, shipped or had in possession contrary to the provisions thereof shall be and the same are declared contraband, and subject to seizure and confiscation by any warden, sheriff or constable, or commissioner, or employee of the commission.

The State asserts that the record shows an express shipment of 15 pheasants was intercepted at Omaha. The defendant was charged with shipping and possessing them contrary to law; therefore, the following sections of the game law are also applicable: Sections 37-506, 37-519, 37-213, 37-303, and 37-308, R. R. S. 1943.

Section 37-506, R. R. S. 1943, relates to the duties of common carriers in transporting wild game birds enumerated in the act, and provides a penalty for violation of the same. This section also sets forth the obligation of the shipper when game birds are tagged as provided for by the regulations of the Game, Forestation and Parks Commission.

Section 37-308, R. R. S. 1943, provides that no person shall at any time, except during open season ordered by the commission, have in his or her possession any game birds as defined in the game law, and fixes the penalties for such offenses.

In addition, the State makes reference to section 37-607, R. R. S. 1943, which provides that possession within this state of the carcass of any bird which has shot marks upon it shall be evidence that the same was taken in this state, and the burden of proving otherwise shall be upon the party in whose possession it is found. In addition, said section provides that whenever the contents of any box, barrel, package, or receptacle consist partly of contraband and partly of legal game, the entire contents of such box, barrel, package, or other receptacle shall be subject to confiscation. As to the last-cited section, the question of whether or not the county court erred with reference to the burden of proof as therein contained is not for determination in this appeal as will appear by authorities subsequently cited.

Exhibits and an affidavit appear in the transcript which apparently were introduced in evidence and not preserved in the bill of exceptions in the criminal trial. The following authorities are applicable: As stated in Dolen v. Dolen, 155 Neb. 347, 51 N. W. 2d 734: "Ex-

hibits which are introduced in evidence in the case, or excluded therefrom, must be brought before the reviewing court in the record if the action of the lower court is to be reviewed." See, also, 3 Am. Jur., Appeal and Error, § 591, p. 223; Darlington v. State, 153 Neb. 274, 44 N. W. 2d 468; 4 C. J. S., Appeal and Error, § 738, p. 1216.

Affidavits used on the hearing cannot be considered in the appellate court unless preserved by a bill of exceptions. Freeman v. City of Neligh, 155 Neb. 651, 53 N. W. 2d 67.

In the instant case there was no bill of exceptions preserved on the trial of the criminal case in the county court. If there was any evidence taken on the application filed by the defendant in the county court for the return of the property it was not preserved in the bill of exceptions. A bill of exceptions may be preserved from the county court. See § 25-1140.08, R. R. S. 1943. There was no bill of exceptions of the evidence preserved on the proceedings in error in the district court.

The following authorities are also applicable. On appeal, error will not be presumed, but must affirmatively appear in the record. If there is no bill of exceptions, questions which require an examination of the evidence cannot be determined on appeal. See, Buck v. Zimmerman, 144 Neb. 719, 14 N. W. 2d 335; First Nat. Bank v. Stockham, 59 Neb. 304, 80 N. W. 899.

In the absence of a bill of exceptions it will be presumed that issues of fact presented by the pleadings were established by the evidence, that they were correctly decided, and in such situation the only issue on appeal is the sufficiency of the pleadings to support the judgment. See, Goger v. Voecks, 156 Neb. 696, 57 N. W. 2d 621; Jones v. City of Chadron, 156 Neb. 150, 55 N. W. 2d 495.

There is nothing in the game law of this state that prohibits the possession and transportation of game birds such as pheasants lawfully taken in another state. There

are certain statutory provisions and rules and regulations of the Game, Forestation and Parks Commission, as previously indicated, affecting the possession and transportation of the same after they are brought into this state. Cases that indicate the purpose of the game laws in protecting game, and limitations placed thereon, to the effect that the State can exercise no extra-territorial jurisdiction are exemplified in the following cases which are cited for the principle stated therein.

In the case of In re Davenport, 102 F. 540, the petitioner kept a restaurant in the city of Spokane, Washington. He was arrested and imprisoned for having in his possession and offering for sale quail which he purchased in the State of Missouri. The statute upon which the prosecution was founded declared it to be a misdemeanor to offer for sale quail or other game therein described. The petitioner was discharged in habeas corpus proceedings, the court saying: "I fully assent to the doctrine of these decisions, holding that it is competent for state legislatures to enact laws for the protection of game, and I do not question the decision of the supreme court of the United States in the case last cited (Geer v. Connecticut, 161 U. S. 519, 16 S. Ct. 600, 40 L. Ed. 793), holding that the legislature of a state has the constitutional power to entirely prohibit the killing of game within the state for the purpose of conveying the same beyond the limits of the state; for it is true, and it is an elementary principle, that the wild game within a state belongs to the people in their collective sovereign capacity. Game is not the subject of private ownership, except in so far as the people may elect to make it so; and they may, if they see fit, absolutely prohibit the taking of it, or traffic or commerce in it. But the power of a legislature in this regard only applies to game within the state which is the property of the people of the state, and no such power to interfere with the private affairs of individuals can affect the right of a citizen to sell or dispose of as he pleases game which

has become a subject of private ownership by a lawful purchase in another state."

In the case of Commonwealth v. Wilkinson, 139 Pa. St. 298, 21 A. 14, the defendant was charged with the possession for sale and exposing for sale of quail. The statute under which he was prosecuted provided: "No person shall kill or expose for sale, or have in his or her possession after the same has been killed, any quail or Virginia partridge, between the fifteenth day of December in any year and the first day of November next following, * * *." Then a penalty was fixed. By the thirty-third section of the act it was provided: "In all cases of arrests made for the violation of each or any of the foregoing sections of this act, the possession of the game, fishes, birds, * * *, shall be prima facie evidence of the violation of said act." The court said: "The manifest object of this act was the preservation of game within this commonwealth. We cannot assume that it was intended to preserve game elsewhere, * * *. The meaning of the act, as we view it, is that no quail shall be killed, in this state, between the dates specified, and no person shall have in his possession or offer for sale any quail so killed in this state." See, also, People v. O'Neil, 71 Mich. 325, 39 N. W. 1; State v. McGuire, 24 Or. 366, 33 P. 666, 21 L. R. A. 478; Commonwealth v. Hall, 128 Mass. 410, 35 Am. R. 387; People v. Bisbee, 181 App. Div. 40, 168 N. Y. S. 203, affirmed 224 N. Y. 579, 120 N. E. 871; Phoenix Hotel Co. v. Commonwealth, 153 Ky. 507, 156 S. W. 117; State v. Bucknam, 88 Me. 385, 34 A. 170, 51 Am. S. R. 406; Dickhaut v. State, 85 Md. 451, 37 A. 21, 60 Am. S. R. 332, 36 L. R. A. 765.

It is the State's contention that the pheasants in question were contraband, that is, prohibited by law from being imported into this state illegally or transported from the state illegally. In view of the record and the authorities heretofore cited, this contention cannot be sustained.

Coming to the principal question raised in this case,

that of the propriety of the order of the county court in directing the game birds, pheasants, to be given to the custody of the defendant on the application filed by him in the county court, we believe the following authorities are applicable and pertinent to a determination of this question.

"A court which has in its possession, control, or equivalent dominion, property or funds involved in litigation may exercise exclusive jurisdiction over such property or funds to determine the rights therein, such as questions respecting the title, possession, control, management, and disposition thereof; * * *." 21 C. J. S., Courts, § 495, p. 755.

In the case of State v. George, 116 W. Va. 465, 181 S. E. 713, it is said: "The Criminal Court * * * in the first instance, has sole control of its own process and of the conduct of its own officers thereunder." The court further said that the criminal court, the functions of which were invoked in the trial of the accused, must be able to control the actions of those acting as its officers and to judge whether they have the lawful right to take property from persons arrested. The criminal courts must have the power to decide whether those officers have acted wrongfully, and if so, to correct the mistake. All the court need do is to restore the status quo by ordering the return of the property to the person from whom it was wrongfully taken. It may well be said that the trial court is vested with considerable discretion in the matter of disposing of property claimed as evidence, and that this discretion extends even to the manner of proceeding in the event that the accused claims it was wrongfully taken from him. The weight of authority and the better-reasoned cases are to the effect that property introduced in evidence is in custodia legis, and that while it is in custodia legis it is not subject to garnishment, attachment, or other civil processes.

In Outerbridge Horsey Co. v. Martin, 142 Md. 52, 120

A. 235, it is said that when money is lawfully taken from a prisoner by the sheriff at the time of his arrest, it is in custodia legis, and subject to the order of the court having criminal jurisdiction of the offense, and neither by attachment proceeding nor by injunction should the criminal court's power of disposition of the money be taken away or interfered with. This rule applies to other personal property in addition to money. When a court acquires jurisdiction of goods, chattels, or money, in one case, the orderly process of the court requires that it shall be permitted to determine the rights of the parties in that case without the interference or interruption of a conflicting jurisdiction or of a separate and distinct action or proceeding. The doctrine of non-interference, to prevent conflict of authority of jurisdiction, which is established in cases of civil practice, is also applicable to criminal cases, and the procedure thereunder.

In Riggs v. State, 84 Neb. 335, 121 N. W. 588, in a prosecution for keeping intoxicating liquors for the purpose of sale in violation of law, liquors of the value of $2,000 were seized. They were in various types of containers. The jury found the defendant guilty as charged in one count of the information, and the court ordered certain liquor returned to the defendant. This court said: "If the verdict, however, either by specific description or words of exclusion, establishes that some of the liquors were not unlawfully held by defendant at the time the warrant was served, then as a matter of course defendant would be entitled to an order directing that such liquors be turned over to him." This is the order the district court made, and to that extent it is in point with the order of the county court made in the instant case.

The State contends that the effect of the county court's order of June 28, 1952, ordering the return of the property in question to the defendant would place the defendant in the position of a law violator by having il-

legal possession of the pheasants out of season or 90 days after the close of the season. In the light of the foregoing authorities, we are not in accord with the State's contention. The defendant was found not guilty of illegally possessing the pheasants on November 7, 1951, or illegally transporting them. From and after that period the pheasants were in custodia legis under the control of the court and the court made a judicial determination of the right of possession of the pheasants in the defendant. The State's contention is without merit.

We conclude that the trial court did not err in sustaining the order of the county court granting the right of possession of the pheasants and other food items in question to the defendant.

AFFIRMED.

WILLIAM A. EHLERS, APPELLANT, V. LEVINA CAMPBELL, ALSO KNOWN AS ALVINA CAMPBELL, ET AL., APPELLEES.
66 N. W. 2d 585

Filed November 12, 1954. No. 33613.

1. **Homesteads.** Where a homestead vests in a survivor for life under the provisions of section 40-117, R. R. S. 1943, and the survivor contracts a debt which is not within the exceptions of section 40-103, R. R. S. 1943, and such debt is reduced to judgment, the homestead is exempt from such judgment lien and from execution or forced sale to the extent provided in section 40-101, R. R. S. 1943.
2. **Attorney and Client.** A litigant may not have an allowance of an attorney fee by the court unless it is authorized by statute or a uniform course of procedure.
3. **Costs.** Costs in a trial are allowable, of course, to a plaintiff upon a judgment in his favor in actions for the recovery of money only, or for the recovery of specific real or personal property.
4. ———. In other actions, the court may award and tax costs and apportion them between the parties on the same or adverse sides as in its discretion it may think right and equitable.

APPEAL from the district court for Hamilton County: ERNEST G. KROGER, JUDGE. *Affirmed in part, and in part reversed and remanded with directions.*

William A. Ehlers, pro se, for appellant.

Edgerton & Powell, for appellees.

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

SIMMONS, C. J.

This is an action denominated by the plaintiff as one in equity to determine lien and for foreclosure. Plaintiff, a judgment creditor, sought by the action to have his judgment declared a lien on the property involved and to secure a sale.

The defendants are Lavina Campbell, a widow, and three others, whose interest in the property will be stated later herein. The property involved is three lots and a residence thereon in Hordville, Nebraska. Issues were made and trial had resulting in a judgment for the defendants.

Plaintiff appeals. He assigns error in the trial court's holding that two of the lots were exempt as a homestead to the defendant Campbell, in denying him an attorney's fee, and in taxing all costs to him.

Defendants cross-appeal, alleging error in the court's holding that the whole of the third lot was subject to the lien of plaintiff's judgment.

We affirm the judgment of the trial court as to the questions raised by plaintiff on his appeal. We reverse and remand with directions as to the cross-appeal of defendants.

The matter comes here on the findings of fact made by the trial court. The questions presented are questions of law.

The property involved is Lots 10, 11, and 12 in Block 12, village of Hordville.

In 1912, it was conveyed to defendant Campbell and

her husband as tenants in common. That year the Campbells built a house on Lots 11 and 12, and thereafter occupied the same as their home and it was in fact their homestead. The husband died in 1921.

The undivided half interest of the husband in the fee of the premises was disposed of by will, the defendant Campbell receiving a life estate and the remainder over to named devisees.

The property remained, and now is, the homestead of the defendant Campbell.

In 1933, the plaintiff recovered a judgment against the defendant Campbell in the sum of $97.00 and costs, on a debt contracted after the death of her husband, for necessaries of life. This judgment is now in full force and effect.

Lots 11 and 12 at all times since the entry of plaintiff's judgment had a value of less than $2,000.

In 1946, the defendant Campbell conveyed her interest in the premises to the other three named defendants. This action was filed in 1948 and brought to trial in 1954.

The trial court found that plaintiff's judgment was a lien on Lot 10; and that the judgment was not and had at no time been a lien on Lots 11 and 12 because of the homestead character of the premises. The court further found that the 1946 conveyance to the other three defendants was not in fraud of creditors for the reason that the property conveyed was exempt from the lien of plaintiff's judgment. It decreed accordingly, denied attorney's fees, and taxed costs to the plaintiff.

The homestead question here presented concerns Lots 11 and 12, because of the provisions of section 40-101, R. R. S. 1943, that a homestead not exceeding in value $2,000 and not exceeding two lots within any incorporated city or village "shall be exempt from judgment liens, and from execution or forced sale, except as provided in sections 40-101 to 40-117."

Section 40-103, R. R. S. 1943, provides in part that

the homestead is subject to execution or forced sale in satisfaction of judgments obtained on debts secured by mechanics', laborers', or vendors' liens. The judgment here involved is not in that classification.

Section 40-102, R. R. S. 1943, provides that the homestead may be selected from the separate property of the husband, or with the consent of the wife from her separate property. Here the homestead was selected from the property of the husband and wife which they owned as tenants in common, the court specifically finding that the one-half interest of the defendant Campbell was a part of the homestead. That finding is not challenged here.

Upon the death of Mr. Campbell, Mrs. Campbell was the owner of an undivided one-half interest in the property in fee, and by his will became the owner of a life estate in the other undivided one-half interest. She was possessed of a homestead right in all of the property.

Section 40-117, R. R. S. 1943, provides in part: "In all other cases, the homestead vests on the death of the person from whose property it was selected, in the survivor for life, and afterwards in decedent's heirs forever, subject to the power of the decedent to dispose of the same, except the life estate of the survivor, by will."

Section 40-117, R. R. S. 1943, also provides: "In either case it is not subject to the payment of any debt or liability contracted by or existing against the husband and wife, or either of them, previous to or at the time of the death of such husband and wife, * * *" with exceptions not here important.

The words "in either case" refer to the selection of the homestead from the property of the husband or wife. First National Bank of Greenwood v. Reece, 64 Neb. 292, 89 N. W. 804.

Plaintiff argues that upon the death of Mr. Campbell, defendant Campbell became a single person and that the exemption above, last quoted, does not apply to debts

contracted after her husband's death.

Plaintiff relies upon Lewis v. McAdams, 130 Neb. 62, 263 N. W. 480, and Brusha v. Phipps, 86 Neb. 822, 126 N. W. 856. In the Lewis v. McAdams case, both the husband and wife were dead. The question was as to the liability of the estate of the survivor as to debts incurred by the wife after the husband's death. That question is not presented here as the wife is living and occupying the homestead premises. In Brusha v. Phipps, *supra,* the question was whether the property involved was the homestead of the deceased. It was held that it was not. Obviously, that is not this case.

In Lewis v. McAdams, *supra,* it was held that the words "such husband or wife" at the end of the last quote, refer to the title-owning spouse, whether husband or wife. Clearly the language was intended to assure that the homestead vested in the surviving spouse, free from debts of either the husband or wife contracted prior to the death of the title-holding spouse. Defendant Campbell, then, at the time of her husband's death held a fee simple title to a half interest of the property which she owned and to which the homestead right had attached, and a life estate in the other half interest to which the homestead right had attached, and which passed to and vested in her as survivor, not subject to the debts mentioned in the act. See Shearon v. Goff, 95 Neb. 417, 145 N. W. 855.

In short, defendant Campbell had a homestead right as surviving spouse in the entire property which under the provisions of section 40-101, R. R. S. 1943, was "exempt from judgment liens, and from execution or forced sale" for a debt such as is involved here.

Such a conclusion is in accord with our decisions. For instance, in Lewis v. McAdams, *supra,* we said: "It was clearly the intention of the legislature in enacting the homestead law to protect the home of the survivor during his or her lifetime." Plaintiff would have us now construe the law so as to deny that protection.

Palmer v. Sawyer, 74 Neb. 108, 103 N. W. 1088, was a case where the homestead was selected from the property belonging to a widower, the head of the family. At the time of the judgment, he was living alone in the property. It was concluded in the opinion that there is no provision in our statute for the termination of the homestead right when once acquired, except by death or voluntary action of the party acquiring it.

Accordingly, we hold that where a homestead vests in a survivor for life under the provisions of section 40-117, R. R. S. 1943, and the survivor contracts a debt which is not within the exception of section 40-103, R. R. S. 1943, and such debt is reduced to judgment, the homestead is exempt from such judgment lien and from execution or forced sale to the extent provided in section 40-101, R. R. S. 1943.

The assignment of error is not sustained.

Plaintiff next claims error in the refusal of the trial court to grant attorney's fees which he claims under the provisions of section 25-1801, R. R. S. 1943.

Plaintiff pleads that he secured a judgment for "$12.80 court costs and attorney's fees." The trial court found the amount due on the judgment as of March 1, 1954, to be $334.47, and determined it to be a first lien on Lot 10. It decreed that "plaintiff has a judgment on which there is due * * *." We need examine this contention only to point out that plaintiff did not here secure a judgment on a "claim," nor did he "recover judgment" on appeal. He secured in this action a finding of the amount due on a judgment which had already been secured in the prior action.

The rule is: "A litigant may not have an allowance of an attorney fee by the court unless it is authorized by statute or a uniform course of procedure." Borden v. General Insurance Co., 157 Neb. 98, 59 N. W. 2d 141.

Obviously, an attorney's fee is not authorized here either by statute or a uniform course of procedure.

Plaintiff further assigns error because the trial court

taxed all costs to him. He relies upon section 25-1708, R. R. S. 1943.

Generally, costs in the trial courts are allowable, of course, to a plaintiff upon a judgment in his favor in actions for the recovery of money only, or for the recovery of specific real or personal property. § 25-1708, R. R. S. 1943.

In other actions, the court may award and tax costs and apportion them between the parties on the same or adverse sides as in its discretion it may think right and equitable. § 25-1711, R. R. S. 1943.

The instant case is governed by the provisions of section 25-1711, R. R. S. 1943. We find no abuse of discretion in the taxing of costs. The error assigned is not sustained.

This brings us to defendants' cross-appeal. The trial court found that defendant Campbell was the owner in fee of an undivided one-half interest in Lot 10. Also under the finding of the court, defendant Campbell was the owner of a life estate in the remaining one-half interest in Lot 10. The trial court decreed that the judgment of plaintiff was a first lien on Lot 10. This provision of the decree is a patent error. The judgment of the district court is reversed as to that one matter and the cause remanded with directions to find that plaintiff's judgment is a lien upon the fee interest of defendant Campbell in an undivided one-half interest in Lot 10 and upon the life estate of defendant Campbell in the remaining one-half interest.

Otherwise, the judgment of the district court is affirmed.

All costs in this court are taxed to the plaintiff.

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

IN RE ESTATE OF HENRY RUBECK, DECEASED. EMIL HARRY LUND, APPELLEE, V. FLOYD RUBECK ET AL., APPELLANTS.

66 N. W. 2d 809

Filed November 19, 1954. No. 33580.

1. **Wills: Executors and Administrators.** Where property is devised to the widow of testator for her life, and at her death to his children, the children, during the life of the widow, cannot except to an allowance to the executor on behalf of, and affecting alone, the life interest.
2. **Wills: Trusts.** Where during the existence of the widow's life interest the property is held by a testamentary trustee under specified conditions, the remaindermen may not object to the trustee's report in the absence of a claimed breach of trust by the trustee affecting the beneficial interest of such remaindermen.

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

Leamer & Graham and *Norris W. Leamer,* for appellants.

Harry N. Larson and *John E. Newton,* 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 Dixon County dismissing the objections of the appellants to the executor's final report in the estate of Henry Rubeck, deceased.

Henry Rubeck died on April 15, 1937, leaving a will which was admitted to probate on May 24, 1937. Letters testamentary were issued to Emil Lund as executor of the estate. He continued to act as executor until he resigned on September 4, 1953. He filed his final report, and objections thereto were filed by the appellants. It was approved by the county court, and an appeal was taken to the district court by the appellants. The executor filed his petition in the district court praying for the approval of his final account, the allowance

of executor's fees, and a reasonable allowance for the attorney for the estate. Appellants filed objections to the account of the executor and to the allowance of any fees to the executor and the attorney for the estate. The executor moved to dismiss the answer of the appellants for the reason that they were not real parties in interest. The motion was sustained and the answer was dismissed. The appellants bring the case to this court for review.

The deceased, Henry Rubeck, left surviving as his heirs at law, his wife, five daughters, four sons, and the daughter of a deceased son. The appellants are two sons, two daughters, and the daughter of the deceased son.

The body of the will of Henry Rubeck was in four paragraphs which provided in substance as follows: 1. He gave to his wife all his household furniture and all the rest of his personal property. 2. He devised to his wife, during her life, the use of his residence in Wakefield, Nebraska. 3. He gave his wife all the income, after taxes, insurance and ordinary expenses for upkeep of the improvements have been paid, from 200 acres of farm land described in the will. 4. He devised and bequeathed to his children all of his property, real, personal or mixed and directed his executor and trustee to sell the same after the death of his wife, at public or private sale, the proceeds to be divided between his children living at his wife's death and the heirs of deceased children surviving at her death.

Administration proceedings to settle the estate of a decedent are proceedings in rem, and every person interested in such settlement is a party thereto whether he is named or not. Any person, whether he be a devisee, legatee, creditor, or the owner of a contingent interest, may appear for the purpose of protecting his rights. It follows that any person beneficially interested in the estate embraced in an executor's final account may file objections thereto. In re Estate of Statz, 144

Neb. 154, 12 N. W. 2d 829. The beneficiaries of testamentary trusts may likewise file objections when their interests are involved. But unless a person has a beneficial interest in the final account he has no right to appear as an objector.

The objectors in the present proceeding are remaindermen under the will of Henry Rubeck. The will gave the widow all of his personal property, a life estate in the residence in Wakefield, and all the income from the 200-acre farm after the payment of taxes, insurance, and the ordinary expenses for upkeep of the improvements. It provides for the sale of the property and the distribution of the proceeds after the widow's death by the executor and trustee. The objections do not point out where the objectors are interested in the approval or disapproval of the final account. It is not asserted that the executor and trustee has failed to pay the taxes, insurance, and the ordinary expenses for the upkeep of the improvements. In fact, the chief objection seems to be to the expenditure of funds for new buildings and in rehabilitating old ones on the farm. This inures to the benefit of the remaindermen and does not constitute an injury to their beneficial interest. The cost is charged to income belonging to the widow, who appeared and asked for the approval of the executor's final account. There is no claim that the land has been improperly farmed, or that waste has been committed detrimental to the interests of these remaindermen. No contention is advanced, by pleading or otherwise, that funds of the estate are not available for the payment of attorney's and executor's fees or that the estate of the remaindermen is in any manner liable for their payment. Under such circumstances we fail to find any beneficial interest of these remaindermen which would be adversely affected by the approval of the executor's final report.

It is fundamental, we think, that where property is devised to the widow of testator for her life, and at her

death to his children, the children, during the life of the widow, cannot except to an allowance to the executor on behalf of and affecting alone the life interest. Where during the existence of the widow's life interest the property is held by a testamentary trustee under certain specified conditions, the remaindermen may not object to the trustee's report in the absence of an allegation of a breach of trust on his part affecting the beneficial interest of such remaindermen. An application of the foregoing rules required a dismissal of the objections of the appellants in the trial court.

AFFIRMED.

WENKE, J., dissenting.

I dissent from the majority opinion of the court for the reasons hereinafter set forth.

Henry Rubeck, a resident of Dixon County, died on April 15, 1937, leaving a last will and testament. The petition for the probate of his will shows he left as heirs at law the following: Hattie Rubeck, widow; Florence Lund, daughter; Ruth Rubeck, granddaughter; Alvin Rubeck, son; Pearl Ring, daughter; Silvia Adamson, daughter; Wesley Rubeck, son; Marie Long, daughter; Paul Rubeck, son; Floyd Rubeck, son; and Ruby Hansen, daughter.

The county court of Dixon County admitted and allowed his will to probate. Emil Harry Lund, one of the persons nominated in the will to serve as an executor and trustee of the estate, qualified as such on May 24, 1937. The will, insofar as here material, provides:

"I give and bequeath to my Wife Hattie all my household furniture, and all the rest of my personal property.

"I bequeath to my wife Hattie, during her life, the use of my Resident (residence) located on Lot Number One, and North half of Lot Number Two, Block Number Eighteen, South Addition to the City of Wakefield, Dixon County, Nebraska.

"I give and bequeath to my wife Hattie all income 'after taxes Insurance and ordinary expenses for up-

keep of the improvement have been paid' The Southeast Quarter (SE-¼) and the East 40 acres of the Southwest Quarter (40, a, SW-¼) all in Section Eleven (11) Township Twenty-six, (26) Range Four, (4) East of the 6th P. M. Wayne County, State of Nebraska. After the death of my wife Hattie

"I give, devise and bequeath to my children, Florence Henrietta: Harvey Ritchard: Alvin Rudolph: Sylvia Ruth: Pearl Olive: Henry Wesley: Paul Adolph: Hattie Marie: Floyd Lawrence: Ruby Levarn: all my property real personal or mixed 'Real Estate abovestated' and I hereby direct and empower my executor's (executors) and trustees hereinafter named, 'of my estate' to sell and despose (dispose) of my property, as soon as practicable after the death of my wife Hattie, and to sell my real estate at auction or private, as it may in their judgment seem most advantageios (advantageous), or for the interest of my said devisees, after the expenses have been paid, the proseed (proceeds) of the sale be devided (divided) between my children living at my Wife's death, and the issue then living of such of them as shall be then dead leaving issue living at her death, and their respective heirs and assigns, as tenants in common, in equal shares as between brothers and sisters, but so that the issue of any child so dying shall take between them only the share their parents would have taken if living."

Emil Harry Lund, whom I shall hereinafter refer to as executor-trustee, filed an application in the county court of Dixon County on June 27, 1953, asking for a full, complete, and final settlement of his account as such, for a reasonable allowance to him for his services as executor-trustee, for a reasonable allowance to his attorney for services rendered to him, and for his discharge. Thereupon the county court, as required by section 30-1415, R. R. S. 1943, gave notice to all persons interested in the estate thereof and fixed the time for hearing thereon at 10 a. m. on July 31, 1953. To

this final account Floyd Rubeck, Pearl Ring, Ruby Hansen, Ruth Paul, and Wesley Rubeck, who were heirs at law of decedent and also beneficiaries named in his will, filed objections. These objectors therein alleged the executor-trustee had failed to account for a fair and reasonable rental of the real estate and had wrongfully expended funds on improvements. They also objected to his request for an allowance of fees to himself and his attorney. To these objections the executor-trustee filed an answer claiming that the objectors, who he admitted were devisees under the will and owners of remainder interests in the estate, had no such interest in the final account that it could be said they were real parties in interest in the matter.

The county court approved the final account, with the sole exception of one item of $177.77 covering corn shelling costs, and allowed as fees for the services of the executor-trustee the sum of $1,828.40 and for the services of his attorney the sum of $480.70.

From this order the objectors appealed to the district court where the same issues were raised. The district court, after a hearing, sustained the executor-trustee's motion to dismiss the appeal based on the ground that the objectors were not real parties in interest. It is from this order that the objectors appealed, their motion for new trial having been overruled.

At the hearing in the district court evidence was introduced, or stipulations entered into, which show the deceased died seized of a 200-acre farm in Wayne County, a residence located in that part of Wakefield that is in Dixon County, and personal property of the value of $2,666.35, all of which remain as assets of the estate although the executor-trustee has converted part of the personal property to cash.

"Administration proceedings to settle the estate of a decedent are proceedings in rem, and every person interested in such settlement is a party in the county court whether he is named or not. He may appear for

the purpose of protecting his interests in the county court, and an appeal to the district court removes the whole case to the district court." In re Estate of Statz, 144 Neb. 154, 12 N. W. 2d 829. See, also, In re Estate of Marsh, 145 Neb. 559, 17 N. W. 2d 471.

"The general rule is that any person beneficially interested in the estate embraced in an administration account may cite the executor or administrator to file an account, object, or file objections to the terms or matters contained in the account, * * *." In re Estate of Statz, *supra.*

Such objections should be disposed of in a legal manner and not be summarily dismissed on the assumption, without proof, that the objectors are not heirs, legatees, or distributees. See In re Estate of Statz, *supra.*

County courts have exclusive original jurisdiction of all matters relating to the settlement of the estates of deceased persons and the only jurisdiction thereof which the district court can acquire is by appellate procedure. However, an appeal from the county court, when perfected, confers upon the district court in the matter appealed the same power possessed by the county court. See Egan v. Bunner, 155 Neb. 611, 52 N. W. 2d 820.

"Within this jurisdiction it has power over all proceedings before it, including the right to dismiss. In exercising this power it is the duty of the court to protect all parties to the proceeding, whether before the court in person or not, and any failure to do so is subject to review." In re Estate of Marsh, *supra.*

That parties interested in an estate may contest the right of the court to allow fees to the representative of an estate and for the services of his attorney, and the amount thereof, has often been determined by this court. In re Estate of Herman, 138 Neb. 430, 293 N. W. 353; In re Estate of Wilson, 97 Neb. 780, 151 N. W. 316; In re Estate of Wilson, 86 Neb. 175, 125 N. W. 158; In re Estate of Wilson, 83 Neb. 252, 119 N. W. 522.

As stated in 34 C. J. S., Executors and Administrators,

§ 880, p. 1056: "Persons affected by an allowance of compensation may appear and object thereto."

As to the question of the amount of rentals collected from the farm, together with the use thereof for the purposes of repairing the improvements thereon and erecting new buildings, I fully agree with the majority opinion that the objectors have no such interest therein that they can object thereto. That was a question solely for the widow and the record shows she fully approved the acts of the executor-trustee in that regard. But in regard to the allowance of fees to the executor-trustee and to his attorney, an entirely different situation exists. These fees are charges against the estate and payable from the assets thereof. Objectors, as beneficiaries named in the will, have an interest in the assets of the estate and, as such, can, under the factual situation here disclosed, properly question both the right of the executor-trustee and his attorney to fees, and, if allowable, the amount thereof. For the latter reason I think the dismissal of the appeal by the district court was in error. In my opinion it should have retained the cause for the purpose of determining these questions.

YEAGER and CHAPPELL, JJ., join in this dissent.

SIDNEY C. HUTTON ET AL., APPELLANTS, V. VILLAGE OF CAIRO, A MUNICIPAL CORPORATION, IN HALL COUNTY, NEBRASKA, ET AL., APPELLEES.

66 N. W. 2d 820

Filed November 19, 1954. No. 33581.

1 **Municipal Corporations: Taxation.** Section 17-914, R. R. S. 1943, gives the right to owners of property to make objections to a proposed improvement where their property might become subject to assessment for the contemplated improvement.

2. ———: ———. The right to object is one which is attached to the ownership of property which might become subject to assessment.

3. ———: ———. The right to object is not one which continues after the property owner interest is no longer involved.
4. ———: ———. Section 17-914, R. R. S. 1943, contemplates and authorizes amendments to the resolution of necessity.
5. ———: ———. Section 17-913, R. R. S. 1943, provides that the resolution shall state the outer boundaries of the district or districts in which it is proposed to make special assessments.
6. ———: ———. Section 17-918, R. R. S. 1943, requires the published notice to contractors to state the amount of the engineer's estimate of the cost of the improvements.

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

Cunningham & Cunningham, for appellants.

Louis A. Holmes, Cline, Williams, Wright & Johnson, and *Richard M. Duxbury,* for appellees.

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

SIMMONS, C. J.

This is an action brought to enjoin the defendants from entering into a contract for the installation of a sewer system and from continuing the installation of the proposed system.

The plaintiffs are property owners in the village of Cairo. The defendants are the village, the chairman of the village board, and its clerk. Originally the engineers were named defendants, but they were dismissed from the action and are not parties to this appeal.

Issues were made and trial had, resulting in a denial of the injunction and dismissal of plaintiffs' petition. Plaintiffs appeal. They assign here error in the decree, asserting that the defendants have not complied with the laws in the establishment of the system and generally reach the conclusion that the action of the defendants has been arbitrary and unreasonable.

We affirm the decision of the trial court.

It appears that the defendant village board reached a conclusion favorable to the construction of a sewer

system. They employed an engineer, and after study and consultation on June 23, 1953, passed a resolution of necessity, as required by section 17-913, R. R. S. 1943. Protests by property owners were filed. Some property owners objected to the entire project; others desired that the sewer lines be constructed in the alleys rather than in the streets; and others objected to what is called farm lands being included.

The board met and considered the protests and on July 29, 1953, amended the resolution of necessity and proposed to proceed on that basis.

However, they were advised that some property owners might want to object to alley locations as well as streets, so the board decided to repeal original resolution of necessity, "and make a new one." "We did not go very far with the first one * * *."

On August 18, 1953, the resolution of necessity of July 29, 1953, was repealed. Later on the same day a new resolution of necessity was passed. This was amended on September 15, 1953, as a result of protests.

The village then was proceeding with the project when this action was filed on October 5, 1953.

The first contention of plaintiffs, advanced in argument, is that by changing the boundaries of the district and eliminating substantial parts of the first proposed district, property owners who protested the original plan were thereby disfranchised from their right to protest.

Section 17-914, R. R. S. 1943, gives the right to owners of property to make objections to a proposed improvement where their property might become subject to assessment for the contemplated improvement.

By adopting the new resolution of necessity and the elimination of property from the proposed district, the village disfranchised no one. The right to object is one which is attached to the ownership of property which might become subject to assessment. The right to

object is not one which continues after the property owner interest is no longer involved.

We find here no attempt "to circumvent the intent of the law" but rather what was done was in compliance with the intent of the law. It was not an arbitrary or unreasonable exercise of municipal power.

We see no merit in the contention.

The second resolution of necessity was amended so as to strike certain lateral sewers from the proposed improvement "for the reason that objections have been filed by property owners having a front footage * * *." These deletions are laterals Nos. 4, 5, 16, and 17. The finding in each instance shows that owners of 50 percent or more of "the total front footage" were objecting. The resolution of necessity had set up a description of the "sewer system" consisting of "main and lateral sewers" and the "location, terminal points and size of sewers constituting said system." The location and size of the lateral sewers were set out in 18 numbered descriptions. All were components of the one system. The laterals deleted were short branches delivering to a stem of the sewer system. The plan followed was one which enabled the village board to act favorably upon the objections of the owners of particular areas without destroying the efficiency of the system. The argument here is that the finding of necessity related to the system before deletion of the laterals and hence the amended resolution of necessity was inconsistent with the original one. Section 17-914, R. R. S. 1943, contemplates and authorizes amendments to the resolution of necessity. The argument has no merit.

It is next argued that the boundaries of the areas to be served by the "main sewers" and "lateral sewers" are not shown and that the outer boundaries of any proposed district are not shown on the original or revised plats. The attempt here is to qualify each main and lateral description as a "district."

Section 17-913, R. R. S. 1943, provides that the reso-

lution shall state the outer boundaries of the district or districts in which it is proposed to make special assessments. Section 4 of the resolution begins: "There is hereby created in said Village a sewer district to be known as 'Sanitary Sewer District No. 1', the outer boundaries of which are as follows: * * *." This is followed by a detailed description of the outer boundaries. It meets the requirements of the statute. The argument has no merit.

In the notice to contractors of July 29, 1953, and September 18, 1953, it is stated that the engineer's estimate of cost is $85,000. Section 17-918, R. R. S. 1943, requires the published notice to contractors to state "the amount of the engineer's estimate of the cost of the said improvements." Concededly, material changes were made in the project which, of course, affected the costs of particular items in this project. Plaintiffs point out the difference in the costs and argue that the same total estimate in each instance shows noncompliance with the statute. The breakdown of the estimate of the engineer for the system studied in June shows a total of $84,929.95. The July revised estimate shows $86,017.40 in totals and "FOR ENGINEER'S ESTIMATE USE $85,000.00." The September calculation (which was after the second resolution of necessity was passed) is $80,093.90 for a long list of specific items. It contains no specific engineer's estimate as did the July estimate. The contract was let for $73,113. Whether the last estimate should have been for less than $85,000 need not be decided. No prejudice is shown to property owners.

Finally, it is argued that there is no way at the present time for the plaintiffs to protect themselves against excessive assessments levied against their property or against the general taxpayers. This argument is predicated on the assertion that more than half of the residential and business lots are vacant, which in turn rests on figures contained in a summary found in the engineer's initial report to the village board dated June 12, 1953.

These figures, together with the next statement quoted, appear in a larger exhibit and, as we read the record, were not offered or received in evidence. In any event the figures relate to the situation as it initially existed and not after the deletions of various parts of the project nor as it existed under the second resolution of necessity as amended. The figures were produced under a discussion of several suggested methods of financing the cost of the improvement. In that discussion it is stated: "The worst possible situation as regard bond issue would be where no front footage assessments were made and Village levied a general assessment to pay entire cost of Project." This statement relates to what the cost would be to the village in a bond issue without special assessment "revenues" being considered. Obviously the argument has no fact foundation in this record.

We find no merit in the contentions advanced in this appeal.

The judgment of the trial court is affirmed.

AFFIRMED.

DOROTHY D. ARENT, APPELLEE, V. FRED ARENT, APPELLANT.
66 N. W. 2d 813

Filed November 19, 1954. No. 33588.

Divorce. Pursuant to the provisions of section 42-340, R. R. S. 1943, on motion made within 6 months of the rendition of decree, the district court may, in the exercise of a sound discretion, vacate or modify the decree.

APPEAL from the district court for Frontier County: VICTOR WESTERMARK, JUDGE. *Affirmed.*

Edward E. Carr, for appellant.

Schroeder & Schroeder, for appellee.

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

YEAGER, J.

The matter before this court is a review of the refusal of the district court to set aside a decree of divorce within 6 months of the rendition thereof permissible under section 42-340, R. R. S. 1943.

In the action for divorce Dorothy D. Arent was plaintiff and Fred Arent was defendant. Issue was joined and a trial was had on the merits after which decree was duly rendered. The decree was rendered, according to the transcript, on September 21, 1953. No motion for new trial was thereafter filed. On February 25, 1954, the defendant filed a motion in which he prayed for an order vacating the decree, for permission to adduce further evidence, and for dismissal on the evidence adduced at the trial and such further evidence as might be adduced at the hearing on the motion. This motion was supported by the affidavit of the defendant.

A hearing was had on the motion and evidence taken. The only evidence adduced at this hearing was a transcript of the evidence adduced on the trial culminating in the divorce and the affidavit in support of the motion.

The district court denied the motion and from the order of denial the defendant has appealed.

From an examination of the motion it becomes apparent that the defendant sought only to have the court re-examine the evidence adduced at the trial and arrive at a conclusion opposite and contrary to that contained in the decree. The examination is thus limited since neither the motion which is in the transcript nor the affidavit supporting it which is in the bill of exceptions contains anything to indicate that the proposed additional evidence would be in substance different from that which was adduced on the trial.

It is true that under the terms of section 42-340, R. R. S. 1943, on motion made within 6 months of the rendition of decree, the court may, in the exercise of a sound discretion, vacate or modify the decree. Dudgeon v. Dudgeon, 142 Neb. 82, 5 N. W. 2d 133; Shinn v. Shinn,

148 Neb. 832, 29 N. W. 2d 629, 174 A. L. R. 510; Pittman v. Pittman, 148 Neb. 864, 29 N. W. 2d 790; Roberts v. Roberts, 157 Neb. 163, 59 N. W. 2d 175.

As pointed out in the cited cases the power of the court, pursuant to statute, to set aside or modify a decree of divorce depends upon the exercise of a sound discretion.

This being true it must also be true that on application to have a decree set aside pursuant to the power conferred by the statute, it must be made to appear that a refusal of the application would be an abuse of discretion.

It becomes apparent from the cases cited that many matters may, and of course do, become appropriate for consideration in the exercise of the discretion granted to courts by this statute. Among them, however, is not the right to review the evidence after expiration of the time for taking an appeal to this court, and on the basis of such a review vacate the decree and grant a new trial.

It being apparent that the motion called only for an exercise of discretion which would depend alone upon a review of the evidence taken at the trial, the district court did not err in overruling it.

The order of the district court is affirmed.

AFFIRMED.

CARL BURNELL, PLAINTIFF IN ERROR, V. STATE OF NEBRASKA, DEFENDANT IN ERROR.
66 N. W. 2d 838

Filed November 19, 1954. No. 33598.

1. **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.

2. **Criminal Law: Witnesses.** The credibility of witnesses and the weight of the evidence are for the jury to determine in a criminal case in which the evidence presents an issue of fact as to the guilt or innocence of the accused and the conclusion of the jury may not be disturbed by this court unless it is clearly wrong.

ERROR to the district court for Douglas County: L. ROSS NEWKIRK, JUDGE. *Affirmed.*

William N. Jamieson, for plaintiff in error.

Clarence S. Beck, Attorney General, and *Richard H. Williams,* for defendant in error.

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

BOSLAUGH, J.

The plaintiff in error was convicted of the crime of burglary and was adjudged to be confined in the Nebraska State Reformatory. He seeks escape from the effect of the conviction and sentence by these proceedings. The charge made in the information is that Carl Burnell, designated herein defendant, willfully, maliciously, and forcibly August 31, 1953, in Douglas County, broke into and entered a building leased and occupied by Safeway Stores, a corporation, with intent to steal property of value contrary to the laws of Nebraska.

There is evidence of the following matters: The defendant and his wife were in the Sam Flax Bar in Omaha near Twenty-fourth and Hamilton Streets on the evening of August 31, 1953. It was a place where persons of the nationality of defendant and his wife congregated in the evening and indulged in drinking beer. It was patronized to capacity. There were about 50 persons there at the time. Defendant and his wife had been there approximately half an hour when Arthur Germaine, also known as "Stoop Down" and herein

designated Germaine, and Oscar Howard, who is hereafter identified as Howard, arrived at the Sam Flax Bar. It was then about 10 p. m. Defendant had known Germaine and Howard for approximately 2 months and he met and talked with them there that night. The duration of their conversation was about 3 minutes. The substance of it was that Germaine asked defendant if he would go with him and Howard to South Omaha to get some fish sandwiches at the place of Joe Tess at Twenty-fourth and U Streets and to "pick up some money" that was there for Germaine. Germaine had a panel truck and he told defendant that he did not know how to operate it; that Howard was too drunk to drive; and that they wanted defendant to go with them to drive the truck. There was no mention by either of them to the defendant or in his presence of anything concerning the breaking into or robbing the Safeway Store on Twenty-fourth Street in South Omaha. The inducement offered defendant to make the trip and operate the truck was that Germaine and Howard would "buy something to drink," get an order of fish at Joe Tess' fish house for the wife of defendant, and they would bring him back to Omaha. The defendant left his wife at the Sam Flax Bar and told her he would return in about half an hour.

Germaine, Howard, and defendant traveled in the truck driven by him from the bar where they first met to Twenty-fourth and Cuming Streets. A bottle of wine was purchased there. They then proceeded to South Omaha and when they were in front of the police station, less than a block from the Safeway Store, Howard told defendant "to pull up by the Safeway and we would take a drink." The defendant drove there and stopped the truck in front of the store. This was at Twenty-fourth and P Streets. The Joe Tess fish house was at Twenty-fourth and U Streets. Defendant did not drive or go to the fish store at any time that night. He did not get out of the truck for a time after it was stopped

at the store. He remained in the truck in the driver's seat behind the steering wheel. Germaine and Howard left the truck and proceeded to the front of the store. Howard cut the glass in the window to the right of the store door. Germaine broke out the glass with his foot and entered the store through the hole made in the glass. He was putting cartons of cigarettes in a box when he looked up and saw the police coming to the store. It was then about 10:45 p. m. The police found Germaine in the store, Howard outside the building near its southeast corner, and defendant in front of the truck near the right front fender. The three men were arrested and they and the merchandise Germaine had secured from the store were taken to the police station in South Omaha. The defendant stayed in the truck in front of the store, saw the glass cut by Howard and kicked out by Germaine, and saw him enter the store without making inquiry, protest, or objection. As the police were coming to the store the defendant jumped from the truck and "headed across the street to catch the bus to come over here (to Omaha)." When he got to the corner he was apprehended by the police and detained.

The issue in the case is the sufficiency of the evidence to sustain the verdict. The charge made against the defendant is that he willfully, maliciously, and forcibly broke into and entered a building leased and occupied by Safeway Stores with intent to steal property of value. § 28-532, R. R. S. 1943. There is no proof that defendant broke into or entered the building described for any purpose. Such proof is not necessary. There is evidence tending to establish he aided and abetted others to break into and enter the building in which the store was conducted with intent to steal property of value contained therein. This is sufficient. The rule is stated in Smith v. State, 153 Neb. 308, 44 N. W. 2d 497: "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."

The guilt or innocence of the defendant of the charge made against him was, under the circumstances of this case, a matter for the jury to decide. It was a question of fact and not of law. The credibility of the witnesses and the weight of the evidence were for the jury to consider and determine and its conclusion may not be disturbed by this court unless clearly wrong. Sall v. State, 157 Neb. 688, 61 N. W. 2d 256. It cannot be said that the verdict in this case was clearly wrong.

The sentence and judgment of the district court should be and they are affirmed.

AFFIRMED.

IN RE APPLICATION OF WEST NEBRASKA EXPRESS, INC. WEST NEBRASKA EXPRESS, INC., APPELLEE, V. GEORGE PIRNIE ET AL., APPELLANTS.
67 N. W. 2d 342

Filed November 26, 1954. No. 33575.

1. **Public Service Commissions: Motor Carriers.** The essential issue presented by an application of a common carrier by motor vehicle for authority to operate over an alternate route is whether the applicant is engaged in the transfer of traffic in substantial volume between the termini of the proposed route and is currently in a position effectually to compete with other carriers for such traffic, or whether the new route will enable applicant to institute a new service not before conducted or to engage in a service so different from that previously rendered as to materially alter the competitive situation of existing carriers.
2. ———: ———. Public convenience and necessity may be found in operating economies and those things which contribute to expedition, public safety, efficiency, and convenience in operation.
3. ———: ———. The term public interest as used in the Motor Carrier Act of this state has direct relation to adequacy of transportation service, to its essential conditions of economy and

efficiency, and to appropriate provision for and the best use of transportation facilities.

4. **Public Service Commissions: Appeal and Error.** The matter for decision in an appeal from an order of the Nebraska State Railway Commission, acting within its jurisdiction, is that the order is or is not unreasonable or arbitrary.

5. ———: ———. An order of the Nebraska State Railway Commission, acting within its jurisdiction, which has competent evidence to support it is not unreasonable or arbitrary.

APPEAL from the Nebraska State Railway Commission. *Affirmed.*

J. Max Harding, for appellants.

Russell E. Lovell, for appellee.

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

BOSLAUGH, J.

Appellee is a motor carrier of property over regular and irregular routes in Nebraska by authority granted it by the Nebraska State Railway Commission, designated herein commission. It made application to the commission for permission to use State Highway No. 2 from its junction with U. S. Highway No. 30 at Grand Island to Alliance for operating convenience only without change or increase of the points served or the character of the service rendered by it. George Pirnie and James Pirnie, doing business as Arrow Freight Lines of Broken Bow, appeared as interveners in opposition to the application of appellee not by pleading but by participation in the hearing before the commission.

Appellee was issued on March 23, 1951, a consolidated certificate of convenience and necessity by the commission to transport commodities, except those requiring special equipment other than refrigeration, in intrastate commerce by regular route operations. Regular route No. 1 was between Henry and Omaha over U. S. Highway No. 26 to its junction with State Highway No. 19, thence by that highway to Sidney, thence by U. S.

Highway No. 30 to Fremont, and thence by U. S. Highway No. 275 to Omaha. Intermediate points, 12 in number, were permitted to be served. Alliance was an off-route point authorized to be served.

Regular route No. 2 was between Sidney and Scottsbluff by way of U. S. Highway No. 30 to Kimball, and thence by State Highway No. 29 to Scottsbluff. Service was permitted to all intermediate points and to the Sioux Ordnance Depot as an off-route point.

Alternate routes for operating convenience only were between the junction of State Highway No. 19 and U. S. Highway No. 26 and Ogallala over U. S. Highway No. 26, and between the junction of U. S. Highway No. 30 and U. S. Highway No. 30A and Omaha by way of U. S. Highway No. 30A.

Irregular route operations were permitted from points within a 25-mile radius of Morrill on the one hand, and on the other hand, to and from Omaha and points generally in the state on a statewide basis.

Appellee operated in accordance with the authority granted by its certificate with one exception, hereinafter mentioned, until the order of the commission, the basis of this appeal, was made. Until about December 15, 1952, appellee served Alliance from Omaha by using the highways designated in regular route No. 1 of its certificate. A cargo destined for Alliance was usually transported to Scottsbluff and peddled therefrom to Alliance or interlined with Live Wire Transfer of Alliance for delivery to that city. Live Wire Transfer of Alliance had authority from the commission to transport commodities, except those requiring special equipment by regular routes between Alliance and Crawford, between Alliance and Morrill, and to specified intermediate and off-route points. Appellee by this method of operation transported a shipment from Omaha loaded there early in the evening to and delivered it in Alliance the next afternoon. In December 1952, the schedule and routing of shipments from Omaha to Alliance were

changed by appellee, and its trucks from Omaha were routed direct to Alliance over highway 275 to its junction with highway 30, thence over that highway to its junction with highway 2, and thence over that highway to Alliance. Appellee by this procedure furnished next morning delivery at Alliance on freight from Omaha. The commission January 30, 1953, objected to the regular route operations of appellee over highway 2 and it was ordered to cease them. It thereafter routed its Omaha freight shipments to Alliance in accordance with route No. 1, as stated in its certificate, except it occasionally moved a shipment by truck to Alliance by highway 2 by virtue of its irregular route authority, but it continued to maintain the same schedule of operation, and thereby it gave next morning service on shipments from Omaha to Alliance. The arrival time of the trucks of appellee in Alliance from Omaha under the method of operating them as described above was between 7 and 7:30 the next morning, and delivery of shipments was made to consignees in Alliance when their places of business opened between 8:30 and 9 in the morning.

The use of highway 2 in moving shipments from Omaha to Alliance would be a mileage saving to appellee of about 39 miles each trip. The overall operating expense of appellee in 1951 was shown to have been about 51 cents a mile. On this basis appellee would save approximately $40 each day in operating one truck daily in and out of Alliance if it were permitted the alternate route it requests. Highway 2 carries a lighter load of traffic than highway 30. This is especially true in summer months during tourist travel. There are fewer towns on the former highway than there are on the latter and the towns have less population.

Appellee February 19, 1953, filed an application with the commission for authority to conduct operations as a common carrier by motor vehicle in intrastate commerce of commodities not requiring special equipment

between the junction of highway 19 and highway 26N north of Northport and the junction of highway 2 and highway 30 by way of highway 19 to its junction with highway 2, thence by that highway to its junction with highway 30 for operating convenience only, the operations to be conducted in either direction and serving no intermediate point. What the applicant seeks is permission to use highway 2 from its junction in Grand Island with highway 30 to Alliance without serving any intermediate point, without enlarging its service, or improving its competitive situation. The commission on November 10, 1953, granted the application of appellee and issued the authority therein sought. This appeal is by the persons doing business as Arrow Freight Lines of Broken Bow. It has intrastate operating rights to serve Alliance similar to those sought by appellee. The certificate of Arrow Freight Lines authorizes transportation of commodities, except those requiring special equipment, between Omaha and Alliance by way of highways 275, 30, and 2, serving all intermediate points west of Fremont.

The permission to appellee to use the alternate route would result in these advantages: A decrease of miles traveled to serve Alliance by a more direct route, and a shorter period of time for the trucks to be upon the highway; definite, substantial operating economies; more efficient transportation between Omaha and Alliance over a more convenient and safer route; and the transfer of the vehicles of appellee for a part of the distance from a congested highway to another that carries much less traffic. The use of the alternate route of appellee in moving a shipment from Omaha to Alliance would advance arrival time about 2 hours but this would not change the unloading time of the shipment to the consignee because the places of business in Alliance would be opened at the same time as if there was no saving in time required to make the trip. The service to the consignees at Alliance would be the same. Decreasing the

time required for a trip from Omaha to Alliance would conserve fuel, lessen depreciation, and reduce operating expenses of all kinds. Appellee has terminal facilities and makes delivery or deliveries in Alliance each day.

The commission found that the grant of authority asked by the carrier would permit a more economical operation by appellee, a saving of about $1,200 a month; that it would allow the use of a shorter route and a less congested and more convenient highway; that it would not result in appellee serving any new point or changing its service; and that the present and future public convenience and necessity required the grant of the alternate route authority applied for by appellee.

The position of appellants is that the alternate route authority given appellee has introduced a new and important competitive element in the motor vehicle transportation situation to their prejudice; that the order of the commission is without support of competent evidence; and that the order rests upon findings without integrity in the evidence. The specific unsoundness of the order of the commission, as appellants believe, is that there is no proof that common carrier transportation service of present certificated carriers was or would be inadequate to serve the public need in the area affected.

A certificate of convenience and necessity may not be granted and issued for original motor transportation service unless required by public need, and a certificate for another or enlarged motor transportation service will not be granted unless it is shown that the existing service is or will be insufficient. In re Application of Moritz, 153 Neb. 206, 43 N. W. 2d 603. The cases decided by this court concerning the subject of certificates of convenience and necessity have involved applications for service to new or additional points. The matter of granting alternate route authority to a certificated carrier has not previously engaged the consideration and conclusion of this court. The application, the subject of this proceeding, seeks only authority to im-

prove an existing service. It is not to provide shippers with a type of service essentially different from and superior to that which appellee was able to render over its authorized routes.

The commission is authorized to regulate the service of and to exercise general control over common carriers. In it is lodged great discretionary powers. The policy of the state as to motor carriers in intrastate commerce has been summarized by the Legislature to: "* * * regulate transportation by motor carriers in intrastate commerce upon the public highways of Nebraska in such manner as to recognize and preserve the inherent advantages of, and foster sound economic conditions in, such transportation and among such carriers, in the public interest; * * * promote adequate, economical and efficient service by motor carriers, * * * without unjust discrimination, undue preferences or advantages, and unfair or destructive competitive practices * * * cooperate with the Interstate Commerce Commission in the administration and enforcement of the federal 'Motor Carrier Act, 1935,' * * *." § 75-222, R. R. S. 1943.

It is a mandate of the Legislature that a common carrier shall obtain a certificate of convenience and necessity as a condition of its right to operate over the highways of the state. A prerequisite to the issuance of such a certificate is that it be shown "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 * * *." § 75-230, R. R. S. 1943. An identical provision is contained in the Federal Motor Carrier Act. 49 U. S. C. A., § 307, p. 96. It has on numerous occasions been interpreted and applied in cases involving applications for alternate route authority by the Interstate Commerce Commission and the federal courts.

In East Tex. Motor Freight Lines v. United States, 96 F. Supp. 424, the court said: "It must be borne in mind that this is an application for an alternative route.

The Congressional authority given to the Interstate Commerce Commission, 49 U. S. C. A., § 1, provides, among other things, for the impartial regulation of all modes of transportation, which are subject to the Act, to be so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical and efficient service, and foster sound economic conditions in transportation among the several carriers. * * * It also must be borne in mind that public convenience and necessity may be found in operating economies and those things which contribute to expedition, public safety, and, efficiency in operation, because, while they benefit the carrier first, they indirectly contribute to the public safety and more reliable and expeditious and cheaper transportation. Such are safe foundations for a finding of public convenience and necessity."

In Aero Mayflower Transfer Co. v. United States, 95 F. Supp. 258, decided by a special federal court sitting in Omaha, it is said: "The Commission has often held that public convenience and necessity may be found in operating economies, Dixie Ohio Exp.—Extension of Operations, 30 M. C. C. 291; Schultz Common Carrier Application, 34 M. C. C. 629, and it is clear that such economies make available to the public cheaper and more reliable and expeditious transportation."

Clarke v. United States, 101 F. Supp. 587, quotes with approval the following from Cooper's Express, Inc., Extension—Alternate Route, 51 M. C. C. 411: "In determining these so-called alternate route applications, the essential issue presented is whether applicant is actually engaged in the transportation of traffic, in substantial volume, between the termini of the proposed alternate or direct route and is at present in a position effectively to compete with other carriers for such traffic, or whether the new route will enable applicant either to institute a new service not theretofore conducted, or to institute a service so different from that theretofore

provided as materially to alter the competitive situation to the injury of existing carriers. In the case of the former, we are justified in granting the authority sought solely upon proof that the proposed operation would result in operating economies, which, although primarily a benefit to the applicant, result in an indirect benefit to the public through the medium of more efficient service." It is also said in that case: "The second basic principle involved in this controversy is that if economies in operation are possible the public interest requires such economies. The public interest is not only in efficient service but is also in reasonable rates for that service. So, if the carrier is operating over an established route, but it appears that it can render the same service or a better service by a shorter or cheaper route, the public interest requires the more economical operation."

See, also, Interstate Common Carrier Council v. United States, 84 F. Supp. 414, affirmed, 338 U. S. 843, 70 S. Ct. 91, 94 L. Ed. 516; Dohrn Transfer Co. v. United States, 102 F. Supp. 169.

The view of the commission that the allowance of the alternate route to appellee was on the facts in this case in the public interest has the support of distinguished authority. In New York Central Securities Corp. v. United States, 287 U. S. 12, 53 S. Ct. 45, 77 L. Ed. 138, it is said: "The provisions now before us were among the additions made by Transportation Act, 1920, and the term 'public interest' as thus used is not a concept without ascertainable criteria, but has direct relation to adequacy of transportation service, to its essential conditions of economy and efficiency, and to appropriate provision and best use of transportation facilities, * * *." See, also, Texas v. United States, 292 U. S. 522, 54 S. Ct. 819, 78 L. Ed. 1402.

The order presented to this court for review was made by the commission in the exercise of its administrative and legislative authority. The function of this

court is to determine if there is proof to support it. Schmunk v. West Nebraska Express, Inc., *ante* p. 134, 65 N. W. 2d 386. The findings and order of the commission are sustained by substantial evidence. The order granting appellee alternate route authority is not arbitrary.

The order of the commission, the subject of this appeal, should be and it is affirmed.

AFFIRMED.

IN RE ESTATE OF ELLIS WHITESIDE, DECEASED. ELBERT WHITESIDE ET AL., APPELLEES, V. MABEL MAE WHITESIDE, ADMINISTRATRIX OF THE ESTATE OF ELLIS WHITESIDE, DECEASED, ET AL., APPELLANTS.
67 N. W. 2d 141

Filed November 26, 1954. No. 33584.

1. **Executors and Administrators.** Orders of the county court ex parte adjusting or correcting accounts of an executor or administrator made while he is acting in such capacity are interlocutory and not final until his discharge as administrator and final settlement of his accounts upon such discharge.
2. **Joint Tenancy: Tenancy in Common.** The law permits either a joint tenancy or a tenancy in common to exist with relation to personal property, and either of such relationships may be created by act of the parties contractually or by conveyance, grant, or devise, although a tenancy in common may, under proper circumstances, be the product of error, failure, or mistake in an attempt to create a joint tenancy.
3. **Joint Tenancy.** A joint tenancy may be created only by act of the parties and a joint tenancy in personal property may be created by oral agreement if it is established by a preponderance of evidence, the quality of which is clear, satisfactory, and convincing in character.
4. **Tenancy in Common.** A tenancy in common is characterized by a single essential unity of possession or the right to possession of common property and generally exists whenever property is owned concurrently by two or more persons under a conveyance or under circumstances which do not either expressly or by necessary implication call for some other form of cotenancy.

5. ———. Generally one claiming a part interest in property as a tenant in common has the burden of alleging and proving such matter by a preponderance of the evidence, but if a transfer or conveyance of property has been made to two or more individuals, a tenancy in common ordinarily is presumed unless a contrary intent is clearly manifested by language of the conveyance or acts of the parties.
6. **Joint Tenancy.** The creation as well as the continued existence of a joint tenancy under the common law which is allowed to exist in this jurisdiction requires a unity of possession, a unity of interest, a unity of time, and a unity of title in all holding an interest in such estate.
7. ———. Any act of a joint tenant which destroys one or more of its necessarily coexistent unities operates as a severance of the joint tenancy and extinguishes the right of survivorship.
8. **Banks and Banking: Joint Tenancy.** When a joint bank account has been established in conformity with section 8-167, R. R. S. 1943, and one joint tenant with knowledge and consent of the other, actual or implied, withdraws the whole or any part of such fund and invests same for his own purposes or benefit and the character of the fund is thus changed, then with regard to that portion so withdrawn there has been a severance of joint tenancy with extinguishment of right of survivorship.

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

Guy Laverty, Keith J. Kovanda, and Davis & Vogeltanz, for appellants.

Manasil & Erickson, for appellees.

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

CHAPPELL, J.

Three heirs at law of Ellis Whiteside, deceased, filed objections in the county court to the final and supplemental report and account with petition for settlement and distribution filed therein by Mabel Mae Whiteside, administratrix of decedent's estate.

Hereinafter Mabel Mae Whiteside will be designated as plaintiff-administratrix, or as plaintiff, dependent upon the capacity in which she claimed rights as administra-

trix or for herself individually. The heirs at law will be designated as defendants, and Ellis Whiteside, who died intestate October 12, 1952, will be designated by name or as decedent.

In their objections, so far as important here, defendants alleged substantially that plaintiff-administratrix failed and neglected to account for and credit the estate with: (1) A described number of cattle and livestock; (2) described and enumerated ranch machinery and other equipment; and (3) a one-half interest in the proceeds from a sale of the Whiteside and Bredthauer partnership personal property, all belonging to the estate. Further, defendants objected to the allowance of $129.52 paid by plaintiff on March 5, 1953, for 1952 real estate taxes, and the allowance of other items which require no discussion.

After a hearing, the county court rendered a decree which in effect overruled and denied defendants' objections to items (1) and (2) aforesaid upon the ground as claimed by plaintiff that such property was not a part of the estate because owned by plaintiff and decedent as joint tenants with right of survivorship. However, such decree sustained defendants' objections to item (3) aforesaid upon the ground that Ellis Whiteside and Dale Bredthauer as partners each owned a one-half interest in such property and that a one-half interest therein was thus a part of the estate because not owned by plaintiff and decedent as joint tenants with right of survivorship as claimed by plaintiff. Further, the decree sustained defendants' objections to and disallowed the payment of $129.52 for taxes upon real estate, concededly owned by plaintiff and decedent as joint tenants with right of survivorship and not a part of the estate. Judgment was rendered accordingly. Therefrom defendants appealed, and plaintiff, both as administratrix and for herself individually, cross-appealed to the district court where voluminous pleadings were filed which need not be summarized here.

Therein, after trial upon the merits, a decree was rendered, the effect of which was to determine heirship about which there is no question, and to find and adjudge that all of defendants' objections should be sustained. In the light thereof such decree made an accounting of all cash receipts, including proceeds from a sale of the partnership property and some livestock, less scheduled disbursements, which left a cash balance of $3,765.32 on hand for distribution as property of the estate. In addition, it found and adjudged that plaintiff had on March 6, 1953, converted to her own use and benefit all of the cattle, livestock, machinery, and equipment belonging to the estate, the value of which was then $27,794. In that connection, it was stipulated by the parties herein at the trial that: "* * * if it is finally found that Ellis Whiteside was the sole owner of the livestock and farm machinery at the time of his death, that in such event, the value of said livestock on March 6, 1953, was $26,549.00, and the value of the farm machinery on the ranch was $1245.00, and that said property in that event was converted by Mabel Mae Whiteside to her own use on March 6, 1953; and in that event there would be no additional charge for the cattle staying on the premises of Mabel Mae Whiteside." In conformity with such stipulated values plus the cash on hand aforesaid, it was found and adjudged that there was due the estate from plaintiff personally and as administratrix the sum of $31,559.32, which should draw interest at 6 percent per annum from March 6, 1953; that all expenses in connection with said estate which were allowed in the schedule identified as "disbursements" should be approved along with any unpaid probate costs and inheritance taxes due, which should be chargeable to the estate. It was therefore ordered, adjudged, and decreed that judgment be rendered accordingly against plaintiff personally and as administratrix. Costs of the action were taxed to plaintiff personally and not against the estate.

Motion for new trial filed by plaintiff as administratrix and in her individual behalf was overruled, from which an appeal was taken to this court, assigning substantially that the judgment was not sustained by the evidence but was contrary thereto and contrary to law. We conclude that the assignments should not be sustained.

At the outset there are three matters which may be first disposed of. On March 5, 1953, plaintiff paid $129.52 for the 1952 real estate taxes upon real estate which was concededly owned by plaintiff and decedent as joint tenants with right of survivorship. Decedent died October 12, 1952, and as provided by section 77-203, R. R. S. 1943, such tax was not due and payable and did not become a lien or encumbrance on the property until January 1, 1953, next following the levy thereof, long after plaintiff had become the sole owner of the real estate which was never any part of the estate. Thus credit for the allowance of such item was properly refused. See, also, County of Madison v. School District No. 2, 148 Neb. 218, 27 N. W. 2d 172.

Plaintiff, without citing any authority, also questioned the right of the district court upon appeal to render a conversion money judgment with interest from date of conversion against plaintiff personally or as administratrix in this proceeding. Such contention has no merit. It is answered conclusively in Egan v. Bunner, 155 Neb. 611, 52 N. W. 2d 820, and authorities cited therein. Further discussion is not required.

On March 6, 1953, plaintiff filed an application in the county court requesting it to transfer the cattle and other livestock, machinery, and equipment to her personally for the alleged reason that it was owned by plaintiff and decedent as joint tenants with right of survivorship. Thereafter, on the very next day, without any notice to or opportunity to be heard by defendants or other parties in interest, the county court entered a purported order sustaining the request and transfer-

ring all such property to plaintiff personally. Plaintiff here contends, as she did in the district court, that such order, unappealed from, was final and conclusive. Such contention has no merit. In that connection, such an order could not be final and conclusive because it was purely interlocutory in character.

In Bachelor v. Schmela, 49 Neb. 37, 68 N. W. 378, this court held: "The law recognizes a substantial difference between the final settlement of the accounts of an executor or administrator and those made annually or at stated periods during the course of the administration. A final settlement made pursuant to notice to persons interested in the estate is in the nature of a judgment and conclusive as to all matters included therein until reversed or set aside by means of a direct proceeding, or impeached on account of fraud, while an interlocutory ex parte accounting is but prima facie correct and subject to re-examination so long as the administration account remains unsettled."

In In re Estate of Wilson, 97 Neb. 780, 151 N. W. 316, it was held: "Orders of the probate court adjusting or correcting accounts of an administrator, made while he is acting as such administrator, are interlocutory and not final until his discharge as administrator and final settlement of his accounts upon such discharge." See, also, In re Estate of Hansen, 117 Neb. 551, 221 N. W. 694.

The primary issue here is whether the trial court erred in concluding that all of the personal property involved belonged to the estate, contrary to plaintiff's contentions that it was owned by plaintiff and decedent as joint tenants with right of survivorship or as tenants in common, or that in any event plaintiff owned a one-half interest therein contractually or upon equitable grounds. We conclude that the trial court did not err in so concluding.

Peterson v. Massey, 155 Neb. 829, 53 N. W. 2d 912, was factually comparable in material respects with the case at bar. Such case adversely disposes of plaintiff's contention herein that contractually or upon equitable

grounds she at all times owned a one-half interest in the personal property here involved. Therein as here plaintiff, who had the burden of proof, failed to establish such contention by relevant competent evidence. To discuss such contention further herein except by reference to facts subsequently recited would serve no purpose except to unduly prolong this opinion.

On the other hand, concededly the law permits either a joint tenancy or a tenancy in common to exist with relation to personal property. Further, either of such relationships may be created by act of the parties contractually or by conveyance, grant, or devise, although a tenancy in common may, under proper circumstances, be the product of an error, failure, or mistake in an attempt to create a joint tenancy. See, Anson v. Murphy, 149 Neb. 716, 32 N. W. 2d 271; 14 Am. Jur., Cotenancy, § 20, p. 90.

However, it is generally held that a joint tenancy can be created only by act of the parties. Buford v. Dahlke, 158 Neb. 39, 62 N. W. 2d 252; 14 Am. Jur., Cotenancy, § 11, p. 82. In that regard, a joint tenancy in personal property may be created by oral agreement, if it is established by a preponderance of evidence, the quality of which is clear, satisfactory, and convincing in character. 48 C. J. S., Joint Tenancy, § 3, p. 914. As stated in 48 C. J. S., Joint Tenancy, § 3, p. 917: "The intent of the parties is controlling as to whether or not a joint tenancy is created, but such a construction will be avoided unless the intention to create a joint tenancy is clearly manifested." On the other hand, as stated in 86 C. J. S., Tenancy in Common, § 7, p. 364: "In general, a tenancy in common springs up or exists whenever property is owned concurrently by two or more persons under a conveyance or under circumstances which do not either expressly or by necessary implication call for some other form of cotenancy." See, also, 86 C. J. S., Tenancy in Common, § 11, p. 373, where it is said: "One claiming a part interest in property as a

tenant in common has the burden of alleging and proving such matter by a preponderance of the evidence; but where a transfer has been made to two or more individuals a tenancy in common ordinarily is presumed."

As recently as Buford v. Dahlke, *supra,* this court held: "The creation as well as the continued existence of an estate in joint tenancy under the common law, which is allowed to exist in this jurisdiction, requires a unity of possession, a unity of interest, a unity of time, and a unity of title in all holding an interest in such estate.

"Any act of a joint tenant which destroys one or more of its necessarily coexistent unities operates as a severance of the joint tenancy and extinguishes the right of survivorship."

Further, as stated in 14 Am. Jur., Cotenancy, § 16, p. 87: "Unlike the joint tenancy, the tenancy in common is characterized by a single essential unity—that of possession, or of the right to possession, of the common property. If such unity exists, there is a tenancy in common irrespective of any other unities; and if it does not exist the estate is not a tenancy in common." See, also, 86 C. J. S., Tenancy in Common, § 7, p. 364.

Section 8-167, R. R. S. 1943, provides: "When a deposit in any bank in this state is made in the name of two or more persons, deliverable or payable to either or to their survivor or survivors, such deposit, or any part thereof, or increase thereof, may be delivered or paid to either of said persons or to the survivor or survivors in due course of business." By analogy therefrom, together with reasoning and language appearing in Crowell v. Milligan, 157 Neb. 127, 59 N. W. 2d 346, it is clear that when there is such an account in existence and one joint tenant with knowledge and consent of the other, actual or implied, withdraws the whole or any part of such fund and invests same for his own purposes or benefit, and the character of the fund is thus changed, then with regard to that portion so withdrawn

there has been a severance of the joint tenancy with extinguishment of the right of survivorship.

In the light of the rules and authorities heretofore cited and the fact that this cause is concededly for trial de novo, we have examined the record. It discloses that plaintiff and decedent were married July 4, 1920. Decedent died intestate October 12, 1952. They had no children. At the time of the marriage, decedent owned a few head of cattle which were sold, and they moved to the home of decedent's father until fall, when they left for Missouri. There decedent worked as a garage mechanic until the following summer. They then moved to Louisville, Nebraska, where for about a year and one-half decedent worked on a railroad and at odd jobs for his uncle. Having then accumulated four horses, one cow, and $71, they rented and moved to a farm northwest of Burwell. During several years they were tenants on different farms in that community. Plaintiff always kept house and helped decedent raise or care for the livestock and do the farm work. Decedent also did some trucking of hay and grain, and they gradually accumulated cattle, other livestock, farm machinery, and equipment. In 1940 or 1941 they moved to the sizeable Furnow ranch. There they farmed and raised chickens, turkeys, cattle, and other livestock. On October 8, 1943, they contracted to purchase 1,240 acres of such ranch for $12,400. A warranty deed thereto, signed by grantor January 24, 1944, and acknowledged February 21, 1944, was filed of record November 10, 1950. Plaintiff and decedent were grantees therein as joint tenants with right of survivorship. On that land they continued to raise chickens, turkeys, and cattle, together with other ranch products, sold same, and applied the proceeds upon the purchase of ranch equipment, the purchase price of the ranch, and the construction of a new home thereon, together with other substantial improvements. After February 9, 1948, payments therefor

were made out of their joint bank account hereinafter discussed.

The cattle on the ranch were all branded with a brand recorded in the name of decedent in the office of the Secretary of State, as provided by section 54-104, R. R. S. 1943, and at the time of decedent's death such cattle unsold were so branded. They were also then insured against loss from fire and lightning by a policy in decedent's name, with any loss thereunder payable to him or his legal representatives. After decedent's death such brand was renewed and recorded in plaintiff's name at her instance and request.

As provided by section 54-109, R. R. S. 1943: "In all suits at law or in equity, or in any criminal proceedings, wherein the title to animals is an issue, the certified copy provided for in section 54-108 shall be prima facie evidence of the ownership of such animal by the person whose brand or mark it may be." Bendfeldt v. Lewis, 149 Neb. 107, 30 N. W. 2d 293, discussed such section and held that: "A brand on livestock is only prima facie evidence of ownership which may be rebutted." However, such presumption was never rebutted by any relevant competent evidence in the case at bar.

At the time of decedent's death, the title to the family car was recorded and held in joint tenancy with right of survivorship, but the title to a truck and a jeep listed in the inventory filed herein was recorded and held in the name of decedent only.

On February 9, 1948, plaintiff and decedent established a joint bank account in the Bank of Burwell, in which they deposited money received from the sale of cattle and other products of the ranch, and decedent's salary or other profits from the partnership hereinafter referred to. From that period on, all of their debts and expenses of every kind were generally paid therefrom with checks drawn by plaintiff or decedent or both, as they concededly had a right to do.

Thereafter, on April 17, 1948, plaintiff and decedent

purchased a plot of ground in Burwell for $500. The title thereto was taken by plaintiff and decedent as joint tenants with right of survivorship. Thereon they constructed a new home where they subsequently resided, employing others to generally operate the ranch. Such property was paid for out of their joint bank account.

Late in 1948 or the first part of 1949, decedent tired of idleness and sought some work to do. One Dale Bredthauer then owned the John Deere implements, parts, and feed business in Burwell. Decedent had been helping the John Deere dealers with machinery or implements and seemed interested in such work, so Bredthauer proposed that decedent buy part of the business upon a 50-50 Whiteside and Bredthauer partnership basis of operation. Decedent was also to receive a salary of $250 a month for operating the business as well as his one-half share of the net profits. The proposal was accepted by decedent and subsequently his salary as well as profits were deposited in plaintiff's and decedent's joint bank account. Plaintiff was present when the proposal was made and explained. She had full knowledge of the entire transaction, talked the whole matter over several times with her husband, and knew that the consideration of $4,478.18 for purchase of a one-half interest by decedent in the partnership business would be and was paid for by decedent's check out of their joint bank account. With that knowledge also plaintiff subsequently assisted in operation of the business upon several occasions. In that connection, decedent subsequently made out and returned a "U. S. Partnership Return of Income" for 1951, reporting that Ellis Whiteside and Dale Bredthauer were each entitled to and did receive one-half the net income from the partnership. Also, plaintiff and decedent made out and reported a joint U. S. income tax return as husband and wife reflecting the same condition and result. Likewise, for 1952 plaintiff made and separately reported a partnership income tax return, as well as one for herself, de-

cedent, and the estate of decedent jointly, with three claimed exemptions. After decedent's death his one-half interest in the partnership was sold by plaintiff, acting both as administratrix and for herself individually, receiving therefor some $13,300, all of which she subsequently claimed as a joint tenant with right of survivorship.

Again on November 6, 1950, plaintiff and decedent, for a consideration of $8,250, paid out of their joint bank account, purchased 640 more acres of ranch land. The warranty deed therefor, however, conveyed such property to them as joint tenants with right of survivorship. The only encumbrance remaining against any of the real estate heretofore discussed at the time of decedent's death was about $1,250 with interest. Directly then we have in question only the remaining cattle and livestock, together with the machinery and partnership property proceeds, which all clearly belong to the estate.

Several witnesses called by plaintiff simply testified substantially that decedent had told them upon different occasions that he and plaintiff had both worked hard, owned their property jointly, and he had it arranged so that whoever died first the other would get all the property. To some of plaintiff's witnesses he simply said that he wanted it fixed so that such would occur. As a matter of fact, that was concededly done, except with relation to that part of the personal property here involved.

Pleadings filed by plaintiff as administratrix and in her own behalf in the county court indicate clearly that she so understood the situation. Her petition for administration admitted that decedent died intestate, "possessed of * * * personal property of a value unknown to your petitioner." Both her inventory and final report filed in the county court materially verified that fact in one form or another, contrary to present contentions. Her request to sell the described interest in the Whiteside and Bredthauer partnership property, which was granted,

clearly indicated that she made no claim to own the same as joint tenant with right of survivorship. Her request to sell certain cattle, which was granted, stated "That the cattle belonging to said estate is a one-half interest therein and a one-half interest belongs to your petitioner individually."

We find no competent evidence in this record which would upon any theory justify a conclusion that plaintiff and decedent ever contractually or by conveyance, grant, or devise owned the personal property here involved as joint tenants with right of survivorship or as tenants in common. Likewise, plaintiff failed to establish that she owned a one-half interest therein either contractually or upon any equitable theory. Other questions are argued but they require no discussion.

For reasons heretofore stated, the judgment of the trial court should be and hereby is affirmed. All costs of this action are taxed to plaintiff personally and not against the estate.

AFFIRMED.

VICTORIA DANIELSEN, AN INFANT, BY LAVONNE REDMAYNE, HER MOTHER AND NEXT FRIEND, ET AL., APPELLEES, V. FRED EICKHOFF ET AL., APPELLANTS.
66 N. W. 2d 913

Filed November 26, 1954. No. 33589.

1. **Negligence.** When separate, independent acts of negligence combine to produce a single injury, each defendant involved therein is responsible for the entire result, even though the negligent act of any one of the defendants alone might not have caused the injury.
2. ———. In an action to recover damages caused by alleged negligence, plaintiff must prove both negligence of defendant and that such negligence was the proximate cause of the injury complained of.
3. ———. Proximate cause, as used in the law of negligence, is that cause which in a natural and continuous sequence, unbroken

by an efficient intervening cause, produces the injury, and without which the injury would not have occurred.

4. ———. Proximate cause is a legal concept with a particular meaning in the law. It does not fall in that class of words or phrases where the meaning is commonly known and understood by the lay public.

5. **Negligence: Trial.** An instruction defining the term proximate cause becomes requisite where some real problem of immediacy of causation is raised in the case.

6. ———: ———. The definition has no materiality where, under the facts of the case, the legal causation is clear, obvious, and unmistakable.

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

Luebs & Elson, for appellants.

Lloyd E. Chapman, for appellees.

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

SIMMONS, C. J.

This is an action for damages resulting from an intersection collision between two automobiles. Issues were made and trial had resulting in a verdict for defendants. Plaintiffs filed a motion for judgment notwithstanding the verdict or in the alternative for a new trial. The trial court set the verdict aside and ordered a new trial. In the journal entry, the court states: "* * * the judgment was vacated for the reason that the verdict was contrary to the weight of the evidence, * * *." Defendants appeal.

We affirm the judgment of the trial court.

Victoria Danielsen, a minor 9 years of age, was riding as a guest in one of the two cars, which will be hereinafter referred to as the Wiltsie car. Two causes of action are joined. One is by Victoria Danielsen, by her mother and next friend, to recover for damages suffered by her. The second is by the mother of Victoria Danielsen for damages by reason of medical expense, and loss of earning power and services of the daughter.

Defendants are the owners of the second car involved in the accident, which at the time was being driven by the defendant Dorothy Eickhoff.

Plaintiffs alleged negligence of the defendants, and that it was the direct and proximate cause of the injuries to the child.

Defendants alleged careful and prudent operation of their car, denied negligence, and denied that any act or omission of theirs was the proximate cause of the injury. Defendants further alleged that any damage or injury sustained by the plaintiffs was because of the sole proximate negligence of the driver of the Wiltsie car. The reply was a denial and a further fact plea.

In accord with the rule stated in Greenberg v. Fireman's Fund Ins. Co., 150 Neb. 695, 35 N. W. 2d 772, the defendants challenge here the sufficiency of the reason given by the trial court for sustaining the motion. They argue that the reason must be tested by section 25-1142 (6), R. R. S. 1943, "that the verdict, * * * is not sustained by sufficient evidence, * * *." They contend that the evidence meets that test. Plaintiffs here join issue on that contention and argue that the evidence sustains the action of the trial court in granting plaintiffs a new trial.

Plaintiffs, in accord with the rule in the Greenberg case, *supra,* submit as an additional reason to sustain the trial court's judgment, the failure of the court to define the term "proximate cause" in its instructions to the jury.

We take up the latter question first.

The question of whether or not the drivers of the two cars were negligent, or which of them was negligent, if either, and whether that negligence was "a" or "the" proximate cause of the accident, were questions put in issue by the pleadings and evidence.

The issue of the proximate cause was a direct and possibly a controlling issue.

The rules are: "When separate, independent acts

of negligence combine to produce a single injury, each defendant involved therein is responsible for the entire result, even though the negligent act of any one of the defendants alone might not have caused the injury." Zielinski v. Dolan, 127 Neb. 153, 254 N. W. 695.

"In an action to recover damages caused by alleged negligence, plaintiff must prove both negligence of defendant and that such negligence was the proximate cause of the injury complained of." Sippel v. Missouri Pacific Ry. Co., 102 Neb. 597, 168 N. W. 356.

Under the issues as made here as to proximate cause, it is sufficient to sustain a verdict for plaintiffs that the negligence of the defendants be a proximate cause, but to sustain a verdict for the defendants, avoiding the negligence of the defendants, if any, the negligence of the driver of the Wiltsie car must be found to be the proximate cause.

"Proximate cause, as used in the law of negligence, is that cause which in a natural and continuous sequence, unbroken by an efficient intervening cause, produces the injury, and without which the injury would not have occurred." Shupe v. County of Antelope, 157 Neb. 374, 59 N. W. 2d 710.

The trial court recognized these rules of law. Throughout the instructions are such phrases as "a" or "the proximate cause," "the proximate result," "sole proximate cause," "proximately caused," and "direct and proximate result."

The trial court defined negligence but did not define proximate cause. Proximate cause is a legal concept with a particular meaning in the law. It does not fall in that class of words or phrases where the meaning is commonly known and understood by the lay public. The purpose of the definition of the term is to keep jurors within correct legal bounds.

Specifically, the plaintiffs here rely upon our holding in Wagner v. Watson Bros. Transfer Co., 128 Neb. 535, 259 N. W. 373.

In that case, the trial court failed to define proximate cause in its instructions. We held: "The trial court, not having defined proximate cause, deprived the jury of an opportunity of considering that doctrine as one of the material issues of fact."

The conclusion was that the trial court did not instruct on the law of the case and that the failure was error. We reversed.

Defendants challenge the applicability of that case, pointing out that there the verdict was for the plaintiff, while here it was for the defendants. They contend that it was error without prejudice to the plaintiffs inasmuch as proximate cause is a limiting factor of benefit to the defendants.

Specifically, the court instructed here that the plaintiffs must prove four things to recover: (1) The defendants' negligence; (2) that it was a proximate cause; (3) that plaintiffs were damaged by reason thereof; and (4) the amount of damages. The fault with defendants' reasoning here is that the verdict being a general one, there is no way of determining whether the verdict rested on a finding that defendants were not negligent, or a finding of negligence that was not a proximate cause. If the latter, then the failure to define the term cannot be held to be error without prejudice, for the jury was called upon to pass upon the question of "a proximate cause" without any guide to the particular meaning of that term in the law. See Tighe v. Interstate Transit Lines, 127 Neb. 633, 256 N. W. 319.

This distinction is emphasized in the light of the concluding clause of instruction No. 17 that: "* * * if you find that the defendant driver was not negligent or that the sole proximate cause of the plaintiff's injuries was the negligence of the driver of the car in which she was riding, then your verdict would be for the defendants."

The giving of this instruction caused the plaintiffs to carry a burden that was not defined.

Defendants rely on Triplett v. Lundeen, 132 Neb. 434, 272 N. W. 307. That case is not this case. There the court correctly defined the meaning of proximate cause, but did not thereafter use it in the instructions. We held: "* * * it is not indispensable that the term 'proximate cause' should be used. It is sufficient if it appears that defendants' negligence was the sole cause, or the efficient cause, or was the direct cause." We there analyzed the instructions and held them sufficient. Here the modifying term "proximate" is used throughout. The equivalent of that term is not used or defined.

Defendants also rely on Shiman Bros. & Co. v. Nebraska Nat. Hotel Co., 146 Neb. 47, 18 N. W. 2d 551. There, as here, there was a failure of the court to define proximate cause. There we found that there was no question of a remote or intervening cause and disposed of the assignment by quoting from Oliver v. Nelson, 128 Neb. 160, 258 N. W. 69, as follows: "In an action for damages for negligence, an instruction that plaintiff must establish by the greater weight of the evidence that the negligence of the defendant caused the accident and the damage is sufficient relative to proximate cause, where there is no question of a remote or intervening cause."

Here the questions of remote and intervening causes were issues submitted to the jury.

The answer to this question is found in Kielley v. McCauley, 139 Neb. 60, 296 N. W. 437. We there held: "An instruction defining the term 'proximate cause' becomes requisite only where some real problem of immediacy of causation is raised in the case. That is to say, the definition has no materiality and no place in the trial judge's instructions where, under the facts of the case, the legal causation is clear, obvious and unmistakable." Here a real problem of immediacy of causation was raised, and controverted by evidence at the trial. The definition of the term was a requisite in the instructions. The failure of the court to give it may have entered into

and affected the finding of nonliability of the defendants.

We do not deem it necessary to determine the question of the correctness of the trial court granting a new trial for the reason that the verdict was contrary to the weight of the evidence.

For the reasons given herein, the judgment of the court in granting a new trial is affirmed.

AFFIRMED.

CORNELIUS F. CONNOLLY, APPELLANT, V. CITY OF OMAHA, APPELLEE.

66 N. W. 2d 916

Filed November 26, 1954. No. 33604.

1. **Municipal Corporations.** The duty of a city to keep its sidewalks in a reasonable condition for travel by the public is owed to the general public in the city's corporate capacity.
2. ———. At common law no duty devolved upon an abutting owner to keep the sidewalks adjacent to his property in a safe condition for travel.
3. ———. The fee of the street is in the city, and the sidewalk is part of the street. It is the duty of the city to keep its sidewalks in repair and in a safe condition for public use.
4. ———. The liability for failure to perform such duties arises by necessary implication from the privilege of control over the streets granted and is therefore a liability statutory in its nature.
5. ———. Ownership of adjacent property does not enter into the basis of the liability.
6. ———. An accumulation of ice and snow on a sidewalk is a defect and the statute requiring notice applies.
7. ———. Where the injuries in suit were caused by a defect in or obstruction of a public sidewalk created by the positive misfeasance of the city, the giving of notice to it of the defect or obstruction as prescribed by statute and charter of the city is not a prerequisite to maintaining an action therefor.
8. ———. Where the injuries in suit were a consequence of a defect in a public sidewalk not caused by any positive negligent act of the city either in its construction or maintenance, the city may not be subjected to liability if the requirement of the

statute and charter of the city as to notice of defect before the occurrence complained of has not been complied with.

APPEAL from the district court for Douglas County: L. ROSS NEWKIRK, JUDGE. *Affirmed.*

Fraser, Connolly, Crofoot & Wenstrand, for appellant.

Edward F. Fogarty, Herbert M. Fitle, Bernard E. Vinardi, and *Neal H. Hilmes,* for appellee.

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

SIMMONS, C. J.

This is a damage action for personal injury resulting from a fall on a sidewalk. Defendant demurred on the ground that the petition did not state facts sufficient to constitute a cause of action. The ground of the demurrer was failure to allege the giving of notice as required by section 14-802, R. R. S. 1943. The trial court sustained the demurrer. The plaintiff elected to stand upon his petition. The trial court dismissed the action. Plaintiff appeals. We affirm the judgment of the trial court.

Plaintiff alleged that defendant is a city of the metropolitan class and the owner of real estate acquired for the purpose of erecting a city auditorium; and that a residential building and garage were located on said premises which it rented on a month-to-month basis to private individuals. He alleged the existence of a public sidewalk along the east side of said premises and that defendant had a duty to maintain the sidewalk in a proper manner for the safety of pedestrians.

Plaintiff alleged that he slipped and fell on an icy area of said walk causing severe personal injuries. He described the condition of the walk at the point where he fell as sloping to the east and having a cement surface that was uneven and covered by an accumulation of ice 4 to 6 inches thick, which resulted from defendant's failure to remove snow and caused the sidewalk

to be rough, slippery, and dangerous to all foot travel; that the ice was overlaid by snow, making it impossible for pedestrians to see and observe its dangerous condition; that the "defective" condition had existed for some time; that defendant had failed, neglected, and refused to remove the same; and that defendant either knew or should have known of the dangerous condition "or defect."

He alleged negligence in permitting the accumulation of ice; in failing to remove the ice; in failing to remove the snow so that the ice could be seen by pedestrians; in failing to require tenant to remove the ice and snow therefrom; and in failing to block off the icy portion and post warning signs. He pleads the giving of notice of the accident "as required by law." While not stated, we assume this refers to the requirements of section 14-801, R. R. S. 1943.

Plaintiff argues that his action is not one against the city for failure to maintain a public walk, but is an action against the city, as a property owner, for permitting an accumulation of ice and snow on its own sidewalk.

In taking that position, plaintiff brings himself fairly within the scope of our decision in Hanley v. Fireproof Building Co., 107 Neb. 544, 186 N. W. 534, 24 A. L. R. 382. In that case the adjacent property owner was held not liable for damages resulting to a pedestrian for failure of the owner to remove snow and ice as required by law but that the action, if any, must lie against the city. That decision was bottomed on the propositions that the duty of the city to keep its sidewalks in a reasonable condition for travel by the public is owed to the general public in the city's corporate capacity, and that at common law no duty devolved upon an abutting owner to keep the sidewalks adjacent to his property in a safe condition for travel. See, 25 Am. Jur., Highways, § 522, p. 803; 40 C. J. S., Highways, § 258, p. 304.

Plaintiff, however, relies on the rule of law last stated in Andresen v. Burbank, 157 Neb. 909, 62 N. W. 2d 135,

wherein we held: "The fee of the street is in the city, and the sidewalk is part of the street. It is the duty of the city to keep its sidewalks in repair and in a safe condition for public use."

As pointed out in Hanley v. Fireproof Building Co., *supra,* that duty is one which the city owes in its corporate capacity. See, also, Tewksbury v. City of Lincoln, 84 Neb. 571, 121 N. W. 994, 23 L. R. A. N. S. 282; Gilbert v. Welch Restaurant Co., 122 Neb. 312, 240 N. W. 313. In Chaney v. Village of Riverton, 104 Neb. 189, 177 N. W. 845, 10 A. L. R. 244, we said: "The liability for failure to perform such duties arises by necessary implication from the privilege of control over the streets granted, and is therefore a liability statutory in its nature." Ownership of adjacent property does not enter into the basis of the liability.

This brings us then to the question of the applicability of section 14-802, R. R. S. 1943, which is as follows: "Cities of the metropolitan class shall be absolutely exempt from liability for damages or injuries suffered or sustained by reason of defective public ways or the sidewalks thereof, within such cities unless actual notice in writing describing with particularity the place and nature of the defect shall have been filed with the city clerk at least five days before the occurrence of such injury or damage."

Plaintiff states here that this "is not a defective sidewalk case at all." We note that in pleading his cause plaintiff refers to "such defective condition of the sidewalk" as a "condition or defect" that was extremely dangerous. We do not rest the decision on those statements.

Plaintiff argues that the statute relates to "defective" sidewalks and that the statute should not be construed so as to make an accumulation of ice and snow thereon into a defect thereon. However, in effect, it has been so construed. Section 14-801, R. R. S. 1943, relates to damages arising from defective streets and requiring a no-

tice, among other things, "describing the defects causing the injury." The statute in McCollum v. City of South Omaha, 84 Neb. 413, 121 N. W. 438, was the same as section 14-801, R. R. S. 1943, save as to contents of the notice. It related to "defective * * * sidewalks * * *."

We there held that an accumulation of ice and snow on a sidewalk is a defect and the statute requiring notice applies.

We had a comparable statute before us for construction in Anthony v. City of Lincoln, 152 Neb. 320, 41 N. W. 2d 147. Plaintiff relies on the rule stated that: "Where the injuries in suit were caused by a defect in or obstruction of a public sidewalk created by the positive misfeasance of the city, the giving of notice to it of the defect or obstruction as prescribed by statute and charter of the city is not a prerequisite to maintaining an action therefor."

The first rule stated in that opinion is: "Where the injuries in suit were a consequence of a defect in a public sidewalk not caused by any positive negligent act of the city either in its construction or maintenance, the city may not be subjected to liability if the requirement of the statute and charter of the city as to notice of defect before the occurrence complained of has not been complied with."

No "positive negligent" act of the city is here alleged nor inferable. The city did not create the condition, nor cause it. It was created by the elements.

As held in Woods v. City of Lincoln, 104 Neb. 449, 177 N. W. 792, so we hold here: "In its final analysis, therefore, the petition sets up nothing more than a defect arising from natural causes, without the interposition of any affirmative act of negligence on the part of the city to bring it about or to aggravate it. In such a case we are convinced that the statute requiring five days' prior notice to the city applies, and that, in the absence of any allegation of compliance therewith, the demurrer to the petition was properly sustained."

The judgment of the trial court is affirmed.

AFFIRMED.

ROBERT R. RAUNER, APPELLANT, V. M. CARL JONES ET AL., APPELLEES.

67 N. W. 2d 347

Filed November 26, 1954. No. 33610.

1. **Mines and Minerals.** In the absence of an express agreement or controlling valid governmental regulations the owner of the mineral interests under a portion of land subject to an oil and gas lease is entitled to all of the rents and royalties accruing from the production of oil or gas from that land even though the lease may cover other tracts.
2. ———. By the terms of an entirety clause, such as is here contained in the gas and oil lease, the parties thereto agree that in the event the mineral interests under the leased premises become separately owned that the royalties shall nevertheless be treated as an entirety, the separate owners to participate pro rata.
3. ———. This voluntary provision in a lease has the effect of placing a restriction upon the power of the lessor to alienate his mineral interests therein contrary thereto as long as the lease containing this clause remains in force and effect.

APPEAL from the district court for Cheyenne County: JOHN H. KUNS, JUDGE. *Affirmed.*

L. M. Clinton, for appellant.

Martin, Davis & Mattoon, Robert M. Evans, and *J. W. Gee,* for appellees.

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

WENKE, J.

This is an appeal from the district court for Cheyenne County. It involves the construction and legal effect of certain provisions contained in an oil and gas lease and a mineral deed.

Robert R. Rauner, appellant here and plaintiff below, was the owner of two noncontiguous tracts of land in Cheyenne County consisting of 400 acres. These two tracts are described as the southwest quarter of Section 30, Township 15 North, Range 48 West, and the east half of the southwest quarter and the southeast quarter of Section 10, Township 15 North, Range 49 West. On May 14, 1948, appellant entered into what is admitted to be a valid and existing oil and gas lease on these premises. It was entered into with The Ohio Oil Company, an Ohio corporation. Therein the lessee, among other things, agreed to pay the lessor one-eighth of all the oil and gas produced and sold from the leased premises at the prevailing market price therefor at the wells. There was contained in the lease the following provision, which has become known and referred to in the oil industry as an entirety clause: "(7) If the leased premises shall hereafter be owned in severalty or in separate tracts, the premises, nevertheless, shall be developed and operated as one lease and all rents and royalties accruing hereunder shall be treated as an entirety and shall be divided among and paid to the separate owners in the proportion that the acreage owned by each such separate owner bears to the entire leased acreage. There shall be no obligation on the part of the lessee to offset wells on separate tracts into which the land covered by this lease may be hereafter divided by conveyance, devise, or otherwise, or to furnish separate measuring or receiving tanks. It is agreed that in the event this lease shall be assigned as to a part or parts of the above described lands and default shall be made in the payment of the proportionate part of the rent due upon any such part, such default shall not operate to defeat or affect this lease insofar as it covers a part or parts of said land upon which due payments of said rentals shall be made."

On August 10, 1949, appellant, by mineral deed, did "grant, bargain, sell, convey, transfer, assign and de-

liver unto M. Carl Jones and H. E. Linam, residents of Shreveport, Louisiana, hereinafter called Grantee (whether one or more) an undivided One-Fourth (¼) interest in and to all of the oil, gas, and other minerals in and under and that may be produced from the following described lands situated in Cheyenne County, State of Nebraska, to-wit: The Southeast Quarter (SE¼) and the East Half of the Southwest Quarter (E½SW¼) of Section Ten (10) Twonship (Township) Fifteen (15) North, Range Forty-nine (49) West of the 6th P. M. * * * containing 240 acres, more or less, * * *."

The deed went on to state: "(It is the intention of the Grantors to sell and the Grantees to purchase Sixty (60) mineral acres)."

To complete the conveyance of the 60 mineral acres, in view of the lease already referred to, the mineral deed contained the following: "This sale is made subject to any rights now existing to any lessee or assigns under any valid and subsisting oil and gas lease of record heretofore executed; it being understood and agreed that said Grantee shall have, receive, and enjoy the herein granted undivided interest in and to all bonuses, rents, royalties and other benefits which may accrue under the terms of said lease insofar as it covers the above described land from and after the date hereof, precisely as if the Grantee herein had been at the date of the making of said lease the owner of a similar undivided interest in and to the lands described and Grantee one of the lessors therein."

On September 20, 1949, M. Carl Jones and H. E. Linam sold and conveyed to Carl W. Jones and James M. Jones an undivided one-third of the interest they had obtained from the appellant.

On or about July 30, 1952, The Ohio Oil Company brought in on the southwest quarter of Section 30 what is currently a producing oil well. It subsequently, about July 6, 1953, brought in on this same tract a second pro-

ducing oil well. No wells have been brought in on the other tract of 240 acres in Section 10.

Appellant, on October 22, 1953, brought this action to have the mineral deed to M. Carl Jones and H. E. Linam so construed that the grantees therein named obtained thereby a one-fourth interest in and to any and all royalties accruing from oil or gas produced from the 240 acres and none from that produced from the 160 acres. Trial was had. The district court held that the mineral deed to M. Carl Jones and H. E. Linam conveyed a three-twentieths interest in and to all royalties accruing under the terms of the gas and oil lease with The Ohio Oil Company by reason of any oil and gas produced on the 400 acres. From the overruling of his motion for new trial, Rauner perfected this appeal.

The Ohio Oil Company filed an answer stating it was in doubt as to who was entitled to receive the three-twentieths of the royalty, which it had been withholding since June 1, 1953, but which it was ready and willing to pay to whomever the court found entitled thereto. It thus became, in fact, a stakeholder.

The parties stipulated the only question involved is the proper division of oil and gas royalties that have and will accrue under the terms of the lease. Appellant contends that defendants M. Carl Jones and H. E. Linam, and their grantees, became entitled to share only in royalties accruing from production of oil or gas on the 240 acres in Section 10, whereas defendants M. Carl Jones and H. E. Linam, and their grantees, all of whom are appellees, contend they are entitled to share from that produced on the entire 400 acres.

The mineral deed of August 10, 1949, was clearly intended to convey all rights of the grantors in and to 60 mineral acres in the 240 acres of land therein described. In order to determine what effect that will have on the grantees' rights to royalties accruing under and by reason of the gas and oil lease of appellant with The Ohio Oil Company it is necessary to look at the

history relating to entirety clauses in gas and oil leases and the reason for their being placed therein.

The majority of the courts hold, in the absence of an express agreement or controlling valid governmental regulations, that the owners of mineral interests under a portion of land subject to an oil and gas lease are entitled to all of the rents and royalties accruing from the production of oil or gas from that land even though the lease may cover other tracts.

As stated in Osborn v. Arkansas Territorial Oil & Gas Co., 103 Ark. 175, 146 S. W. 122: "Because the lease covered the entire tract, this did not make the lease an entirety as to the several parts of the land that were thereafter purchased and acquired by different owners. Each purchaser from the lessor obtained and owned the gas in that part of the land bought by him, and was entitled to the rentals arising therefrom and none other. The respective parties have no special equities in these rentals springing from the fact that the lease covered the entire tract."

And in Northwestern Ohio Natural Gas Co. v. Ullery, 68 Ohio St. 259, 67 N. E. 494: "It, therefore, irresistibly follows that the oil or gas taken from a well on a particular tract of land belongs to the owner of that tract even though the contract under which the well was drilled included other tracts of land."

And in Central Pipe Line Co. v. Hutson, 401 Ill. 447, 82 N. E. 2d 624: "* * * in the absence of agreement to the contrary, the lessor owner of the tract of land conveys the oil or gas thereunder when he conveys his land. His grantee succeeds to the title to all, i.e., land, oil and gas."

See, also, Japhet v. McRae (Tex. Comm. App.), 276 S. W. 669; Carlock v. Krug, 151 Kan. 407, 99 P. 2d 858; Boren v. Burgess, 97 F. Supp. 1019; Republic Natural Gas Co. v. Baker, 197 F. 2d 647.

The resulting hardship which often arose from the application of this majority rule prompted an entirety

clause to be put in many gas and oil leases. By the terms of an entirety clause, such as here, the parties thereto agree that in the event the mineral interests under the leased premises shall become separately owned the royalties shall nevertheless be treated as an entirety, the separate owners participating pro rata. See, Republic Natural Gas Co. v. Baker, *supra;* Carlock v. Krug, *supra.*

As stated in Boren v. Burgess, *supra*: "To eliminate controversies and alleviate hardships resulting from situations similar to the instant case, parties to modern leases have inserted in most instances what has been termed the 'entirety clause'. This clause specifically provides for the apportionment of all royalty if the leased premises are thereafter owned in severalty or in separate tracts. Oklahoma courts have given this clause a reasonable interpretation and allowed pro rata sharing of the royalty among the owners of the subdivision of a tract under a single lease regardless of the location of the producing wells. Eason v. Rosamond, 173 Okl. 10, 46 P. 2d 471; Gypsey (Gypsy) Oil Co. v. Schonwald, 107 Okl. 253, 231 P. 864."

The question then arises, what is the legal effect of this clause upon the lessor? While the courts are not entirely in accord the majority hold this voluntary provision in a lease has the effect of placing a restriction upon the power of the lessor to alienate his mineral interests therein contrary thereto as long as the lease containing such clause remains in force and effect. We think this principle to be sound.

As stated in Gypsy Oil Co. v. Schonwald, 107 Okl. 253, 231 P. 864: "* * * Clark in executing the lease placed a restriction upon his power to alienate any part of his estate in the land covered by the lease, with a right on the part of the subsequent grantee of such fractional interest to participate in the royalty, except in accordance with the said lease provision itself."

The court therein went on to say: "He had the right to limit his sale thereof or manner of the use thereof

as to its entirety or any acreage within the whole, or any estate arising from any part thereof. What he did, in fact, was in the nature of a covenant which burden his remainder to the extent that one purchasing subsequent to said lease contract and subject to it acquired an interest in the royalty on the whole acreage, prorated as the fraction thereof purchased bore to the entire tract. We think it is well recognized that the whole estate in the mineral may be, as to sale thereof, separated from the other estates of the fee. When so done, interests therein are subject to contract. The clause here in question was, as to subsequent agreements of sale, tantamount to a severance of the owner's estate in the oil and gas mineral from the estate in the land itself, and covenanting that owners of a fraction of the whole estate in either should share in the oil and gas as per the pro rata clause thereof. If the purchaser succeeds by contract to the west 80 or a fraction thereof as to fee or mineral right, he takes same burdened with that agreement in the lease, and as the contract affects the mineral rights, it goes to all underneath the acreage covered by the lease."

In Harley v. Magnolia Petroleum Co., 378 Ill. 19, 37 N. E. 2d 760, 137 A. L. R. 900, which is a case in which identical language was used in the deed, the court said: "It is claimed by appellees, however, that the intention of the parties was to convey the undivided interest specified, in all the gas and oil that came from the 20-acre tract, without regard to the pro rata provision of the lease."

The court then goes on to say: "The lease, however, to which the deeds were made subject, requires the lessee to make distribution of one-eighth of the oil produced from any and all wells drilled on the 90 acres described in the lease, in proportion that the acreage owned by each separate owner bears to the entire leased acreage regardless of the location of the wells. It is apparent that notwithstanding the deeds be so reformed as to

show a transfer by the appellant of all her interest in any oil which might be produced in the 20-acre tract, the lessee, unless the terms of the lease were altered, would still be bound to make distribution in accordance with the terms of the lease, which, appellees have stipulated, is a valid and subsisting lease."

See, also, Schrader v. Gypsy Oil Co., 38 N. M. 124, 28 P. 2d 885; Eason v. Rosamond, 173 Okl. 10, 46 P. 2d 471; Carter Oil Co. v. Crude Oil Co., 201 F. 2d 547; Thomas Gilcrease Foundation v. Stanolind Oil & Gas Co. (Tex.), 266 S. W. 2d 850. It will be observed that in both Schrader v. Gypsy Oil Co., *supra,* and Carter Oil Co. v. Crude Oil Co., *supra,* several noncontiguous tracts were involved. The fact that the tracts are noncontiguous and in separate geological structures would have no bearing upon the legal effect of the language used in the lease.

We recognize there is authority to the contrary. See, Coyne v. Simrall Corp., 140 F. 2d 574; Shell Petroleum Corp. v. Carter, 187 La. 382, 175 So. 1; Iskian v. Consolidated Gas Utilities Corp., 207 Okl. 615, 251 P. 2d 1073. It should, however, be stated that the courts in Shell Petroleum Corp. v. Carter, *supra,* and Iskian v. Consolidated Gas Utilities Corp., *supra,* were, as set forth in the opinions, dealing only with assignments of royalties and not with mineral deeds.

Many other questions are raised and discussed in the briefs. However, in view of our holding herein, they become immaterial; consequently we will not consider them. We find the decree rendered by the trial court to be correct and that it should be affirmed. We affirm the decree of the trial court.

AFFIRMED.

CLARENCE QUIST, APPELLEE, V. WALTER DUDA ET AL., APPELLANTS, IMPLEADED WITH EASY PARKING COMPANY, A CORPORATION, APPELLEE.

67 N. W. 2d 481

Filed December 10, 1954. No. 33535.

1. **Landlord and Tenant.** In the absence of an express covenant or stipulation a lessor is not bound to make repairs to leased property.
2. ———. The word repair means to restore to a sound or good state after decay, injury, dilapidation, or partial destruction.
3. ———. Improvements is a much broader term than repair and includes the making of substantial additions or changes in existing buildings.
4. ———. A covenant in a lease, obligating the lessor to keep the premises in good repair, does not impose upon the lessor a duty to make improvements or betterments.
5. ———. A covenant to keep leased premises in repair imposes the obligation to keep the premises in as good repair as when the agreement was made.
6. ———. Covenants to keep premises in repair and to keep in as good repair as they now are amount to the same thing in law.
7. **Master and Servant.** Such words as employments and places of employment, all persons employed, commissions composed of employees, employers and such other persons, and any employer or employee who uses or operates, are words which ordinarily refer to the relation of master and servant.
8. **Landlord and Tenant.** An occupant is one who occupies, an inhabitant; especially one in actual possession, as a tenant, who has actual possession in distinction from the landlord, who has legal or constructive possession.
9. ———. The word operator generally refers to the person actively and directly engaged in an operation.
10. **Master and Servant.** The amendments to Chapter 67, Laws 1911, page 299, and Chapter 103, Laws 1913, page 258, contained in Chapter 190, title IV, article 4, Laws 1919 (as amended now sections 48-401 to 48-411 and sections 48-417 to 48-424, R. R. S. 1943), removed the landlord who is not occupant or operator from the class upon whom the statute placed the duty of complying with the safety regulations set out in the act.

APPEAL from the district court for Douglas County: L. ROSS NEWKIRK, JUDGE. *Reversed and remanded with directions.*

Gross, Welch, Vinardi & Kauffman and *Swarr, May, Royce, Smith & Story,* for appellants.

Robinson, Hruska, Crawford, Garvey & Nye, for appellee.

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

SIMMONS, C. J.

This is an action in which plaintiff, an employee of a tenant, seeks to recover from the landlord damages in tort for injuries received in a man-lift in a garage. The tenant was made a party defendant for the purposes of subrogation because of workmen's compensation that had been paid. Issues were made and trial had. At the close of plaintiff's case-in-chief, the landlord defendants made a motion for a directed verdict or a dismissal. The trial court sustained the motion and dismissed the cause.

Plaintiff and defendants' tenant moved for a new trial. The trial court sustained the motion. The landlord defendants appeal.

We reverse the judgment of the trial court and remand the cause with directions to reinstate the judgment of dismissal.

The action is one essentially between the plaintiff and the defendants Duda, the owners of the property. We will hereinafter refer to defendants, meaning the property owners.

The defendants became the owners of the property involved on September 1, 1943, and continued to be the owners thereof until the date of this accident on October 25, 1948. Apparently the tenant was then in the building and continued to occupy the property under succeeding leases.

The building involved is a combination office and garage building. The garage, used in large part for storage and parking of automobiles, occupied parts of

the first six floors. Serving these six floors, was a man-lift or elevator consisting of an endless belt upon which steps were placed which enabled persons to ride up to or down to any of the six floors in question.

The construction of the building was completed before 1930. The date of the installation of the man-lift is not shown, but it is inferable that it was installed about the time of the construction of the building.

The belt operated over large drums or pulleys at the top and bottom. The man-lift operated by an electric motor which was mounted on the ceiling of the sixth floor.

Attached to the mechanism on the sixth floor was a rod extending downward into the fifth floor area where a rope was attached which then followed around the belt on all floors. Going up, a pull on this rod or rope would stop the man-lift; going down, a pull down would stop it. The rod controlled the switch.

On the sixth floor level, built into the mechanism of the man-lift, was a safety device that would stop the man-lift at any time a person was standing on a man-lift step when it reached that floor. When this device was installed is not shown. It was made to connect with the rod above mentioned. This floor device had been disconnected so that it no longer functioned. The parts were attached, but it was not used as a safety device. When it was disconnected does not appear, but it "hadn't been used for a long time." No witness testified to any time when it was so used. The reason it was disconnected is not shown. However, it does appear that the tenant, for efficiency reasons, desired continuous operation of the man-lift and there was less wear and tear by constant operation than if shut off and turned on every time a man used it.

There was another safety device built and attached to the rod above described. This, although called a "U" shaped device, actually is in the shape of three sides of a rectangle. It was built of iron pipe and

placed near the ceiling of the sixth floor, and parallel with the floor. It was large enough to permit the steps to go through it. It was connected at one side to the rod, above described, and the other side had a down rod that floated in a sleeve. This U device was designed to throw the switch and stop the man-lift when pressure upwards was exerted on it.

So far as this device is concerned, it is shown to have served the purpose intended. There is, however, the testimony of an employee of the tenant who, a year and a half before the accident, tested the U device and found that when pushing up on the end that floated, it would not stop the man-lift. He never tested it again and did not report it to anyone. He continued to use the man-lift. When this U-shaped device was installed is not shown.

Plaintiff went to work for the tenant about 16 months before the accident. His duties were largely to drive cars to and from the various floors. He was shown how to ride the man-lift. He would be on the man-lift as many as 200 times a day. He knew about the rope and rod and that he could start and stop the man-lift with it. He had done it many times. He had been to the sixth floor on the morning of the accident, had gotten off each time, and the man-lift was working smoothly. About noon of the day of the accident, he rode the man-lift to the sixth floor. He did not get off. He rode the man-lift two or three feet above the sixth floor when the U device hit him behind the shoulder. A part of his body was in the loop. He tried to jump, but was caught. He testified that the belt did not stop. At another place, he testified that the mechanism did not stop.

From the testimony of other witnesses, it appears that the drum kept turning but the belt stopped with a step holding plaintiff against the ceiling. The pulley was burning the belt.

The defendants maintained a full-time engineer on the premises. It is shown that he inspected the man-

lift daily and thoroughly once a week. He knew about the safety devices above set out. It also appears that whenever repairs were needed, and they were called to the attention of the defendants' employees, that the work was promptly done. It does not appear that at any time were they requested to make any changes in the devices herein described.

That the plaintiff suffered serious injuries is not questioned. The question presented here is that of the liability of the landlord to the employee of the tenant.

We are urged to state a common-law rule holding that where a landlord contracts to keep leased premises in repair, a legal duty to perform the contract arises, and that a negligent performance of that duty, resulting in injuries to a person lawfully on the premises, renders the landlord liable to respond in damages. Plaintiff asserts that we adopted that rule in Fried v. Buhrmann, 128 Neb. 590, 259 N. W. 512. That case had in it, and turned on, the element of a warranty as to safety and fitness.

Defendants contend that the rule is a minority rule and should not be followed since one should not be subjected to a liability for a tort by reason of a breach of contract.

The opposing rules are discussed in Van Avery v. Platte Valley Land & Investment Co., 133 Neb. 314, 275 N. W. 288. The decision ultimately turned on the failure of the plaintiff to plead and prove the facts which conditioned the applicability of the rule urged. We did not there decide which of the two rules would be followed.

The rule urged here by plaintiff is bottomed on the existence of a contract to repair. The contract defines the extent of the duty. We have held: "In the absence of an express covenant or stipulation a lessor is not bound to make repairs to leased property." Bartholomew v. Skelly Oil Co., 144 Neb. 51, 12 N. W. 2d 122.

Our first inquiry, then, is: What was the contract of the defendants?

The lease, under which the tenant was holding at the time of this accident, was made July 1, 1948. It provided: "That the Lessee, as part of this leasing, and for the consideration herein expressed, shall have the use of all the equipment now being used in the operation of said garage; and fire and theft insurance shall be carried thereon for benefit of Lessor, and Lessee shall be liable for damage and injury to same and for losses of same, reasonable wear and tear excepted." (Exhibit 1, par. 9(F).)

"That it will surrender the premises at the expiration of the term of this lease, or at the end of such term to which the lease may be extended, in like order and condition as when taking possession thereof, ordinary wear and tear and casualties by fire, the elements, act of God, or the public enemies or from other causes beyond its control excepted; and shall fix and repair any and all damages and injury caused by its removal." (Exhibit 1, par. 5.)

"That the Lessee * * * shall make no alterations, additions or improvements without the written consent of the Lessor * * *." (Exhibit 1, par. 8.)

"That the Lessor will keep the building in good repair and condition, including, but not by way of limitation, sidewalks, driveways, etc., and shall also keep in repair the heating and plumbing plants and equipments in said demised premises, and that the Lessee shall make only such repairs as are made necessary by the regular operation of its business as distinguished from repairs that are made necessary by reason of damage by the elements, deterioration from age, or from ordinary wear and tear, and Lessee shall fix up and repair all damages and injuries caused by it, its business and its imployees (sic)." (Exhibit 1, par. 9(C).)

"That the Lessor or its representatives may enter said premises at any reasonable hour to make necessary re-

pairs upon said premises, and to protect the same against the elements, or accidents, or to make any inspections or examinations which it may desire to make." (Exhibit 1, par. 7.)

The man-lift may properly be considered as an equipment "now being used in the operation of said garage," which the tenant agreed to surrender at the end of the term "in like order and condition as when taking possession thereof" (subject to the exceptions above stated), and that the tenant was to make "no alterations, additions or improvements" thereto without the written consent of the defendants.

The man-lift was also equipment which the defendants covenanted to "keep in repair," subject again to the conditions stated. To enable the defendants to comply therewith, they had the right to "enter said premises at any reasonable hour to make necessary repairs."

What, then, is included in defendants' covenant to "keep in repair"?

In Brown County v. Keya Paha County, 88 Neb. 117, 129 N. W. 250, Ann. Cas. 1912B 790, we held: "The word 'repair' means to restore to a sound or good state after decay, injury, dilapidation, or partial destruction." This was followed in Olson v. County of Wayne, 157 Neb. 213, 59 N. W. 2d 400.

In Neumann v. Knox, 115 Neb. 679, 214 N. W. 290, we held that the altering and remodeling of an electric light plant was an improvement. In Watson Bros. Realty Co. v. County of Douglas, 149 Neb. 799, 32 N. W. 2d 763, we accepted a definition of improvements which included "the making of substantial additions or changes in existing buildings."

This distinction is well pointed out in Garland v. Samson, 237 F. 31, wherein it was held that the term "improvement" is a much broader one than that of "repair"; that the construction of new fire protection is not included in the term "repairs," but if such protection is permanently added to the real estate it is an im-

provement. In Columbus Gas & Fuel Co. v. City of Columbus, 17 F. 2d 630, it was held that collar leak clamps put on gas mains were an improvement and betterment and not a repair.

In Kingsted v. Wright County Co-op. Co., 116 Minn. 131, 133 N. W. 399, it was held that a covenant in a lease, obligating the lessor to keep the premises in good repair, did not impose upon the lessor a duty to make improvements or betterments.

In St. Joseph & St. L. R. R. Co. v. St. Louis I. M. & S. Ry. Co., 135 Mo. 173, 36 S. W. 602, 33 L. R. A. 607, it was held that a covenant to keep leased premises in repair imposes the obligation to keep the premises in as good repair as when the agreement was made. Covenants to keep premises in repair and to keep in as good repair as they now are amount to the same thing in law. In Taylor v. Gunn, 190 Tenn. 45, 227 S. W. 2d 52, it was held that a covenant to keep in repair imposes an obligation merely to keep the premises in as good repair as they were when the agreement was made.

Heretofore, we have set out the evidence as to the safety devices on the man-lift.

As to the matters hereinbefore discussed, the negligence charged to the defendants was in permitting the man-lift to be used when they knew or should have known that the safety devices were not in operation and were in a dangerous condition; in having the U device on the sixth floor in such a position that by the time it was realized it was not in operation it was too late to avoid injury; in using a guard gate (the U device) which would permit the passage of a man's body without tripping the automatic shut-off device; and in failing to have a device on the man-lift that would automatically apply a positive brake in case an employee failed to alight at the sixth floor. These do not fall in the classification of "repairs that are made necessary by reason of damage by the elements, deterioration from age, or from ordinary wear and tear." It is clear that the plain-

tiff seeks here to hold defendants, not for failure to make repairs, but for failure to make betterments and improvements on the demised premises. The defendants did not covenant to make such betterments.

Plaintiff also charged negligence, and argues here that the defendants were negligent in that they failed to have the floors, through which the man-lift passed, numbered as a warning of approach to the sixth or top floor; failed to have any conspicuous signs or signal warnings on the sixth floor; and failed to post conspicuous signs carrying instructions on the use of the man-lift. It is quite apparent from what has been said above that there was no covenant on the part of the defendants to do these things. They are charges of failure to make improvements rather than repairs.

It is also charged that the defendants were negligent in not giving proper instructions to persons using the man-lift. No obligation of the defendants is shown to do that insofar as the tenant's employees are concerned.

Testing the allegations of negligence, so far as a common-law liability is concerned, we conclude that they do not fall within the contract duty of the defendants to repair. We need not and do not determine whether or not the so-called majority or minority rule is applicable in this state.

Plaintiff alleged negligence of the defendants in that they failed to observe the statutes as to safety and the safety code for elevators and man-lifts of the Nebraska Department of Labor. He urges here three acts of negligence which he contends fall within that classification. They are that defendants failed to have any conspicuous signs or sound signals warning of reaching the sixth floor landing; failed to have a device which would automatically apply a positive brake in case an employee failed to alight at the top landing; and failed to post conspicuous signs carrying instructions in use of the man-lift.

Plaintiff offered in evidence provisions of the safety

code which he alleges were "enacted" by the Department of Labor pursuant to section 48-412, R. R. S. 1943.

For reasons hereinafter appearing, we do not deem it necessary to determine whether or not the safety code was adopted within the scope of delegated powers as set out in Lennox v. Housing Authority of City of Omaha, 137 Neb. 582, 290 N. W. 451; nor do we deem it necessary to decide whether or not the determination of a class upon whom the code shall operate can be delegated to an administrative body. We are cited to no provision of the safety code that undertakes to define to whom it applies. The provisions relied on here are directed to duties to be performed.

The controlling question here is whether or not the safety code and the statutes regarding safety regulations apply to these defendants, landlords.

The act authorizing the Department of Labor to adopt codes relating to safety appliances was enacted in 1929 as an amendment to section 7693, Comp. St. 1922, which then read: "All safety appliances prescribed by this article shall be subject to the approval of the department of labor." Laws 1929, c. 138, § 1, p. 492. That language was not changed—the amendments were added as sub-paragraphs to the existing statute.

The 1929 act refers to "all employments and places of employment" and the "safety of all persons employed therein and frequenting the same, as the nature of the employment will reasonably permit." It provided for "commissions composed of employers, employees, and such other persons as the Department may designate, * * *." It refers to the duty of the department to make periodic inspections of all places of employment, and to "any employer or employee who uses or operates, * * *." Laws 1929, c. 138, § 1, pp. 492, 493. These are words which ordinarily refer to the relation of master and servant. That relationship does not exist here between the plaintiff and these defendants.

Section 7693, Comp. St. 1922, was enacted as a part of

the civil administrative code in 1919 under the general title of Health and Safety Regulations. See Laws 1919, c. 190, tit. IV, art. 4, p. 558. As amended the 1919 act now appears as sections 48-401 to 48-411 and sections 48-417 to 48-424, R. R. S. 1943. The 1929 act now appears as sections 48-412 to 48-416, R. R. S. 1943.

The prior safety act was contained in Rev. St. 1913, at sections 3588 to 3601, and was originally enacted in Laws 1911, c. 67, p. 299, and Laws 1913, c. 103, p. 258. Those provisions were repealed when the 1919 code was enacted. Laws 1919, c. 190, p. 862.

The 1919 enactment was in effect a re-adoption of the 1911 act with amendments. Where reference is hereafter made to sections in the 1919 act, it applies to the sections in title IV, article 4, thereof dealing with health and safety regulations.

We are concerned with those amendments, for the answer to our problem is found there.

Section 2 of the 1911 act, now section 48-402, R. R. S. 1943, provides for the furnishing of dressing rooms. This section contained a provision which by the 1943 revision was made applicable to sections 48-401 to 48-424. It is: "It shall be the duty of every occupant, whether owner or lessee * * * to make all the changes and additions thereto." In case changes were made on order of the department, it purported to give the lessee a cause of action against "any person, corporation or partnership having an interest" in the premises to recover such proportion of the expenses of making the charge as are adjudged to be fair and equitable.

Prior to the enactment of these provisions we had accepted the following as a definition of the word occupant: "One who occupies; an inhabitant; especially, one in actual possession, as a tenant, who has actual possession, in distinction from the landlord, who has legal or constructive possession." Parsons v. Prudential Real Estate Co., 86 Neb. 271, 125 N. W. 521, 44 L. R. A. N. S. 666.

Section 5 of the 1911 act became section 5 of the 1919 act and, so far as this reference is concerned, is now section 48-405, R. R. S. 1943. It begins: "All persons, companies or corporations operating any factory or workshop * * *." That language was not changed.

Section 7 of the 1911 act began: "It shall be the duty of any person, * * * operating any such factory or workshop * * *." This language was deleted in the 1919 act, section 7, and is not in the present act. (See § 48-407, R. S. 1943.)

Section 9 of the 1911 act began: "It shall be the duty of any person, * * * operating * * *." This was changed in section 9 of the 1919 act to: "Every person operating * * *" and as such remains in section 48-409, R. R. S. 1943.

The word operator generally relates to the person actively and directly engaged in an operation. Deep Vein Coal Co. v. Rainey, 62 Ind. App. 608, 112 N. E. 392; Flynn v. Pan American Hotel Co. (Tex. Civ. App.), 179 S. W. 2d 849, and same case 143 Tex. 219, 183 S. W. 2d 446.

Section 10 of the 1911 act began: "It shall be the duty of the owners or superintendents of all factories, workshops, * * * to report * * *" all fatal accidents and serious injuries. This was changed in the 1919 act, section 17, to: "Every person operating a plant * * *" and as such is now section 48-421, R. R. S. 1943.

Section 12 of the 1911 act provided a right of action to an injured party or his heirs for damages occasioned by any violations. It further provided: "The fact that any employe, servant or other person shall continue to work during the time such owner has failed to comply with the provisions of this act shall not be considered as an assumption of the risk of such employment by such employe, servant or other person and shall not in any case bar recovery of damages for the failure of such owner to comply with the provisions of this act. In all actions brought to recover damages for injuries caused by failure to comply with the terms and provi-

sions of this act the owner, shall in all cases be liable in damages for all injuries caused through a failure to comply with this act. The owner shall in all cases be held liable for the failure or neglect of any superintendent, foreman, or other agent, employed by them, or either of them, to comply with the provisions of this act."

That section was repealed in 1919, and in section 18 of the 1919 act it was provided that: "Every person operating a plant where machinery is used * * *" shall be liable in damages for violations of any provision of the act. This is now section 48-422, R. R. S. 1943.

Section 19 of the 1919 act provided that: "The continuance by any person in the employ of any such operator shall not be deemed an assumption of the risk of such employment." This is now section 48-423, R. R. S. 1943.

It will be noted that the 1919 act specifically repealed and did not re-enact the provisions of the 1911 act which undertook to make the owner liable and by other amendments clearly limited the applicability of the act to "occupants" and "operators."

Two other changes in the 1911 act should be noted which relate to the above conclusion. Section 13 of the 1911 act provided for prosecution for failure to comply with the act and for warrants directed "to the owner, manager or director, in such factory or workshop, * * *," and section 14 of the 1911 act began: "Any owner, lessee, * * *" in the penalty provision of the act. These two provisions were repealed and section 20 of the 1919 act provided for penalties against "Every person who shall violate any of the provisions of this article * * *." This is now section 48-424, R. R. S. 1943.

It is quite apparent that the Legislature specifically intended to relieve the landlord, who was not occupant or operator, from the class upon whom the Legislature placed the duty of complying with the safety regulations set out in the act.

This conclusion is fortified by our decision involving Chapter 65, Laws 1911. That act in section 10 contained a provision for prosecution, and section 11 contained a right-of-action clause, a nonassumption-of-risk clause, and again three references to the "owner." Those provisions were likewise repealed and a short violation clause was enacted (Laws 1919, c. 190, tit. IV, art. 4, §§ 30, 31, p. 566), which is now section 48-434, R. R. S. 1943, and a nonassumption-of-risk provision was enacted which is now section 48-435, R. R. S. 1943. We had Chapter 65, Laws 1911, before us for construction in Butera v. Mardis Co., 99 Neb. 815, 157 N. W. 1024, decided in May 1916. That was an action against an owner of a lot and a building contractor. The action involved an employee of the contractor. We held that the act was constitutional insofar as it made liable the owner of the lot on which the building was being erected. We were also urged to construe the word "owner" as to apply to the building contractor and not the owner of the real estate. We held that the owner of the real estate was included in the clauses involved. The amendments to which we refer obviously nullified the statutory foundation of the holding in the Butera case.

Tralle v. Hartman Furniture & Carpet Co., 116 Neb. 418, 217 N. W. 952, is not controlling here. It involved a one-sentence ordinance where the persons liable for nonperformance were not defined. There the landlord undertook to escape liability by contending that he was an employer under the compensation act. The questions here determined were not presented there.

It necessarily follows that there is neither statutory nor common-law liability shown against these defendants. The judgment of dismissal was correct. The judgment granting a new trial was error.

This conclusion makes unnecessary a determination of the presented questions of negligence, proximate cause, and contributory negligence.

The judgment of the district court is reversed and the

cause remanded with directions to set aside the order granting a new trial and to reinstate the judgment of dismissal.

REVERSED AND REMANDED WITH DIRECTIONS.

BARKALOW BROS. COMPANY, A CORPORATION, APPELLEE, V. JACK J. ENGLISH, APPELLANT, IMPLEADED WITH MICHAEL A. ENGLISH, APPELLEE.

BARKALOW BROS. COMPANY, A CORPORATION, APPELLANT, V. JACK J. ENGLISH ET AL., APPELLEES.

67 N. W. 2d 336

Filed December 10, 1954. Nos. 33537, 33538.

1. **Contracts: Evidence.** In the absence of fraud, mistake, or ambiguity a written agreement is not only the best evidence but the only competent evidence as to what is the contract of the parties.
2. **Pleading: Evidence.** The allegations of a pleading are always in evidence for all purposes of the trial. They are before the court and jury and may be used for any legitimate purpose.
3. ———: ———. A party may at any and all times invoke the language of the pleading of his adversary on which the case is tried, on a particular issue, as rendering certain facts indisputable; and in doing this he is neither required nor permitted to offer the pleading in evidence.
4. ———: ———. Admission made in a pleading on which the trial is had is more than an ordinary admission. It is a judicial admission. It is not a means of evidence, but a waiver of all controversy, so far as the adverse party desires to take advantage of it, and is therefore a limitation of the issues.
5. **Appeal and Error: Pleading.** The power of this court to permit a pleading to be amended is ordinarily exercised to sustain a judgment and not to reverse it, unless the refusal to allow the amendment would permit a miscarriage of justice.

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

Van Pelt, Marti & O'Gara and *Warren K. Dalton*, for appellant Barkalow Bros. Company.

Joseph J. Cariotto, for appellee Jack J. English.

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

BOSLAUGH, J.

This litigation concerns a claim of Barkalow Bros. Company against Jack J. English for the purchase price of merchandise allegedly sold and delivered by the former to the latter by virtue of a written contract of the parties, and a claim of Jack J. English that he was not indebted to Barkalow Bros. Company for any amount on any account but that it was indebted to him for wages earned while he was employed by it as a salesman. The trial of the dispute resulted in a verdict and judgment for Jack J. English against Barkalow Bros. Company. Its motion for new trial was denied as to its claim as pleaded in its petition and it was sustained as to the matters presented by the counterclaim of Jack J. English. His appeal from the part of the ruling on the motion for new trial adverse to him is case No. 33537. The appeal of Barkalow Bros. Company from the part of the ruling on the motion adverse to it is case No. 33538. The cases were consolidated for hearing and determination in this court. The contesting parties are Barkalow Bros. Co., hereinafter called appellant, and Jack J. English, designated as appellee. Michael A. English, the surety on a bond given to appellant to guarantee the performance by appellee of his obligations because of the contract between him and appellant, was a defendant in the district court, but he did not appeal and has not appeared in either case in this court.

The cause of action alleged by appellant is: That it is a domestic corporation; that on or about July 17, 1950, it and appellee made a written contract, a copy of which was made a part of the petition; that on or about that date appellee and Michael A. English executed a bond for the benefit of appellant, named therein as obligee, to protect and save it harmless from any loss occasioned

by or resulting from the contract, and a copy of the bond was made a part of the petition; that appellee became and was indebted to appellant for an amount stated; and that demand of payment had been made of appellee and Michael A. English but no part thereof had been paid to appellant.

An answer was filed by appellee 1 year and 7 days after appellant filed its petition in which appellee admitted the execution of the contract made a part of the petition, and he alleged that he obtained goods from appellant, sold large quantities of said goods, returned all unsold goods to appellant, and turned over to it all cash and checks received from customers; that appellant made calculation of the accounts and from time to time paid to appellee what it represented was due him as his share of the transactions; that the payments received by appellee from appellant were an average of about $50 a week; and that the payments so made and received were an agreed settlement of all sums owing to and receivable "by both parties in full of account." Appellee denied other matters alleged in the petition.

The contents of the pleading of appellee, except the admission of the execution of the contract, were denied by appellant.

Appellee more than 7 months after he made answer to the petition filed a pleading designated cross-petition in which it is asserted: He "incorporates herein by reference the allegations of his answer." When he was employed by appellant he was told he would receive in excess of $100 a week as his pay. He relied upon this representation and "went to work for said plaintiff." Shortly thereafter appellee "asked for his said earnings" but appellant refused to honor his demand. Before January 11 appellee offered to quit if he could not collect his wages and appellant told him to stay on the job "because he would get his said wages paid to him" and appellee continued to work for appellant until about January 11, 1951. Appellee used his automobile at the

request of appellant in its business for 60 days, traveled an average of 150 miles each day, and that a fair and reasonable charge therefor was 6 cents a mile. Appellee prayed for the amount he claimed was due him from appellant.

It was stipulated at the trial that it should be considered that appellant had denied the statements of the last pleading of appellee.

The contract between appellant and appellee is dated July 17, 1950. It provides that appellee in his relations with appellant should be an independent contractor; that appellant would sell and deliver to appellee merchandise of the character described for prices determined as mentioned in the agreement to be paid by appellee as specifically set forth in the writing; that appellee knew the territorial limits of the franchise lines of appellant, would respect them, and take no action or make any sale that would infringe upon any territory not franchised to appellant by the manufacturer; that appellee would offer for sale the merchandise sold him by appellant to customers at the places specifically named in the contract; that appellee would devote his entire time to punctual and regular calls on the customers in that territory; and that the contract could be terminated by either party by giving to the other 30 days' notice in writing of the election to end it. The bond has the same date as the contract. It describes appellee as an independent route salesman and it guarantees the payment of all money due appellant, the obligee named therein, from appellee, to make good any losses sustained by appellant on account of the operations of appellee as such independent route salesman, and to save and keep harmless and indemnify appellant from any loss, costs, or expenses arising therefrom. The contract and bond were each executed, delivered, and made fully effective on or about the date exhibited by them.

Appellee talked with the Lincoln manager of appellant before he entered into any arrangement with it.

He had not had experience in this kind of engagement. The manager described the territory that was open, the number of trips required to make the territory, and the facts generally important to such an undertaking. He explained something of the volume of sales made by and profit of the last route salesman in the territory. Appellee claimed the manager said that appellee "* * * should earn at least $100.00 a week. That's what the man previously had been earning on that territory." Appellee was told in that conversation he would have to sign a contract and furnish a bond "for the merchandise and money I was to turn in." A copy of the form of contract and of the bond required were given to appellee. He took them with him, and read them fully and carefully. He said he became fully conversant with the contract. He took the contract and bond to his lawyer to be examined. His counsel suggested some changes in the contract. These were indicated on the form by the lawyer. The lawyer talked on the telephone concerning these with the Lincoln manager of appellant. Appellee took the form of contract back and gave it to the manager. The contract was completed, the changes offered by counsel for appellee were made, and the contract and bond were each executed, unconditionally delivered, and made fully effective. The parties thereto operated under the contract from July 17 to December 23, 1950.

Appellee seeks to avoid the clear terms and obvious effect of his written contract by pleading and attempting to establish that in his first negotiations with appellant he was told that he would receive "in excess of $100.00 per week as his pay"; that he relied upon "said representations"; and that thereafter he sometimes inquired when he was to be paid. Appellee offered his version of conversations. The first was during the initial negotiations. He testified the Lincoln manager during their talk said that "* * * I should earn at least $100.00 a week. That's what the man previously had been earning on that territory." That was before the written contract was made.

Later at a time not made definite or approximate appellee said he asked when he would start receiving "this $100.00 a week" and the answer of the manager was for appellee "to continue on, and it will work out and level itself off after a period of time." During another conversation appellee claims he complained he was not making enough money and he said the manager told him "'* * * 'Well, you just hang on. We'll get it straightened out, and then we'll find another man to take over.'" Appellee claims similar statements were made to him at frequent intervals.

Appellee related that he was advised by appellant the most convenient and expeditious manner of approaching and canvassing the territory in which he was intending to offer merchandise for sale, and the names of dealers who had purchased the character of merchandise appellee would have to offer. Appellant furnished a man who was familiar with the territory and who had been a route salesman to accompany appellee on his first trips in the territory. Information of calls to the office of appellant from dealers in the territory concerning merchandise wanted by them were noted and the memorandum of them were given to appellee when he returned to the office from his territory. He testified that he was requested by the Lincoln manager of appellant to make delivery of requested merchandise to customers and that he did so on various occasions; that each of these deliveries required a special trip after his usual working hours; and that he at the suggestion of the manager attended and sold merchandise at a church bazaar at David City during one day.

It is contended by appellee that the conversations and things mentioned in the foregoing were sufficient to sustain a finding that he was an employee of appellant; that his relationship with appellant was not that of an independent contractor; and that his agreed compensation was $100 a week. The execution of the contract and its delivery in the sense it was to be effective with-

out condition or qualification is established. The contract or its meaning has not been assailed on any ground. There was no attempt to reform, rescind, or modify it. There were no negotiations concerning another agreement to supersede the written contract. It must be accepted and enforced as written. The contract contains nothing to support the claim that appellee was an employee of appellant for a fixed compensation. Appellant did not hire the time and efforts of appellee. It obligated itself to sell appellee merchandise upon certain terms and conditions. Appellee understood the contract and correctly stated in his testimony the only way he could profit from it. He read and discussed the contract with his counsel. He knew its contents. He testified that he did not find any provision in the contract for the payment of any amount by appellant to him and because of this he "couldn't see why the contract was necessary"; and that the only way he could make money under the provisions of the contract was for him to sell the merchandise he bought from appellant.

It has long been the law of this state that if persons to a transaction have put their engagement in writing in such terms as import a legal obligation without uncertainty of the object or extent of the engagement, it is conclusively presumed that the entire engagement of the parties and the extent and manner of their undertaking have been reduced to writing, and any parol agreement is merged in the written contract and testimony of prior or contemporaneous conversations is incompetent. In Securities Acceptance Corp. v. Blake, 157 Neb. 848, 62 N. W. 2d 132, it is said: "In the absence of fraud, mistake, or ambiguity a written agreement is not only the best evidence but the only competent evidence as to what was the contract of the parties."

The claim of appellee for compensation for the use of his automobile by him in the business of appellant is not supported by the record. The obligation of appellee to furnish transportation to permit him to perform his

contract is clear. He rented a truck from appellant for a fixed amount of more than $65 a month. Appellee was obligated for repairs, replacements, and everything required to keep the truck in proper operating condition at his expense. It was damaged while being operated by him and thereby rendered unfit for use. If appellant defaulted in any way in the performance of the lease of its truck to appellee, a fact the record does not show, his remedy was damages for the breach, and the measure thereof would not be the reasonable charge for the use of an automobile for the time and in the manner appellee says he used his vehicle.

It was alleged by appellee in his answer more than a year after the petition of appellant was filed in the litigation that for a valuable consideration and by agreement of the parties a settlement in full was made of all sums owing to or receivable by the parties now contesting in this case. He not only declared this by allegation but swore to it positively as a fact. Several months later he again presumedly advisedly asserted it as a part of his cross-petition. He continued to maintain by his pleadings upon which the case was tried that this was a fact to and during the trial and as long as the case was pending in the district court. He made no effort to change his position in reference to this or to claim or offer to show any reason why he should change it. These allegations are entirely inconsistent and in irreconcilable conflict with the other matters set forth in his cross-petition. Appellant was entitled at all times as against appellee to the advantage of the allegations that there had been a full and complete settlement, satisfaction, and discharge of any indebtedness of appellant to appellee. This was a complete defense to the claims made by the cross-petition. The syllabus of Bonacci v. Cerra, 134 Neb. 476, 279 N. W. 173, asserts: "A party may at any and all times invoke the language of his opponent's pleading, on which a case is being tried, on a particular issue, as rendering certain facts in-

disputable; and in doing this he is neither required nor allowed to offer such pleading in evidence in the ordinary manner." The statement in the opinion upon which the quoted headnote is based is a quotation from 2 Wigmore, Evidence (2d ed.), § 1064, p. 536: "The pleadings in a cause are, for the purposes of use in that suit, not mere ordinary admissions, * * * but judicial admissions * * * i. e., they are not a means of evidence, but a waiver of all controversy (so far as the opponent may desire to take advantage of them) and therefore a limitation of the issues. Neither party may dispute beyond these limits. Thus, any reference that may be made to them, where the one party desires to avail himself of the other's pleading, is not a process of using evidence, but an invocation of the right to confine the issues and to insist on treating as established the facts admitted in the pleadings. * * * This much being generally conceded, it follows that a *party may* at any and all times *invoke the language of his opponent's pleading on that particular issue* as rendering certain facts *indisputable;* and that, in doing this, he is on the one hand neither required nor allowed to *offer the pleading in evidence* in the ordinary manner, nor on the other hand forbidden to comment in argument without having made a formal offer; for he is merely advocating a construction of the *infra*-judicial act of waiver of proof."

It is said in Kuhlman v. Farmers Union Co-Operative Assn., 152 Neb. 597, 42 N. W. 2d 182: "Where, in an action to recover a money judgment, the answer of the defendant admits the right of the plaintiff to judgment for any sum, the defendant cannot give evidence contradicting the admission of his answer, nor can the plaintiff introduce the answer in evidence; and it is the duty of the court, regardless of an adverse verdict, to render judgment for the plaintiff for that sum, without evidence." See, also, Barry v. Barry, 147 Neb. 1067, 26 N. W. 2d 1; In re Estate of McCleneghan, 145 Neb. 707,

17 N. W. 2d 923; Provident Savings & Loan Assn. v. Booth, 138 Neb. 424, 293 N. W. 293.

The fact that appellant denied the allegations of settlement made in the answer and cross-petition of appellee does not render inoperative this doctrine. In each of the last two cases on this subject decided by this court the allegations of the answer were denied by the plaintiff. In the first of the two cases the court said that the allegations in the answer had the effect of setting a limit upon the contentions of the pleader and establishing a point beyond which he could not go so far as the issues between the parties were concerned. The last of the two cases determined that defendant was concluded by his answer and notwithstanding the fact that the particular allegation in the answer was denied the issues were limited to conform to the admissions of defendant. Bonacci v. Cerra, *supra;* Kuhlman v. Farmers Union Co-Operative Assn., *supra.*

It is said by appellee that he should be given leave to amend his answer by removing from it the plea of settlement, discharge, and satisfaction of all claims of each of the parties against the other. The statutory authority to amend is limited to "* * * when the amendment does not change substantially the claim or defense * * *." § 25-852, R. R. S. 1943. The withdrawal of the part of the answer desired by appellee would substantially change the issues of the case. This court is reluctant to permit a party to amend his pleading when to do so would result in the reversal of a judgment. Pitman v. Henkens, 125 Neb. 621, 251 N. W. 282. The order granting a new trial of the matters presented in the cross-petition was based on the allegations of the answer which appellee would on leave withdraw. The refusal to grant a right of amendment in this case has no relation to a miscarriage of justice because as herein discussed and concluded the claims of the cross-petition are without proof adequate to sustain a verdict.

The recovery permitted appellee herein based upon

his cross-petition is without support of evidence and is contrary to law. Appellant produced substantial evidence that appellee was indebted to it in some amount. There is no material contradiction of the proof made by appellant. In fact appellee stated that appellant did all the bookkeeping and that he did not claim that he was entitled to any credit which he had not received on the amount appellant claimed was due from appellee. Specifically he testified "To my knowledge I have no credits coming to that amount." "That amount" referred to the sum appellant claimed. The verdict in this case is clearly wrong. The motion for a new trial should have been in all respects sustained.

The judgment should be and it is reversed and the cause is remanded to the district court for Lancaster County for further proceedings in harmony with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

C. A. GAMBONI ET AL., APPELLEES, V. COUNTY OF OTOE IN THE STATE OF NEBRASKA ET AL., APPELLANTS.
67 N. W. 2d 489

Filed December 10, 1954. No. 33592.

1. **Counties: Officers.** Unless prohibited by statute, a county board may adopt such means to assist county officers to properly discharge the duties of their offices as in its judgment it shall deem necessary.
2. **Equity.** A suit in equity will not lie when the plaintiff has a plain, adequate, and speedy remedy at law.
3. ———. An adequate remedy at law means a remedy which is plain and complete and as practical and efficient to the ends of justice and its prompt administration as the remedy in equity.
4. **Taxation.** If a tax or assessment is levied without authority of law, it is void.
5. ———. When taxes are levied on property without authority of law a court of equity may enjoin collection thereof.
6. ———. The provision of section 77-1315, R. R. S. 1943, re-

quiring notice to the landowner of any increase in assessed value of his realty over the last previous assessment is mandatory. A tax levied on such increase, made without notice to the owner, is void.

7. ———. What has been said of the notice required by section 77-1315, R. R. S. 1943, being mandatory is equally applicable to what the Legislature has said shall be contained therein.

8. ———. The notice to an owner of property, provided for in section 77-1315, R. R. S. 1943, is not required in cases where real estate is assessed under the provisions of section 77-1306, R. R. S. 1943.

9. ———. The valuation of property made by the proper assessing officer is presumed to be correct.

10. ———. The presumption is that, when an officer or assessing body values property for assessment purposes, he acts fairly and impartially in fixing such valuation.

11. ———. Where the assessor does not make a personal inspection of the properties, either by himself or a deputy, but accepts the valuations thereof fixed by a professional appraiser the presumption in favor of the assessment does not obtain. However, the burden in such case is still upon the protesting party to prove the assessment is excessive.

12. ———. The presumption obtains that a board of equalization has faithfully performed its official duties, and that in making an assessment it acted upon sufficient competent evidence to justify its action.

13. **Taxation: Appeal and Error.** The statute affords a plain, adequate, and speedy remedy to one whose property has been excessively valued for taxation and in cases in which the county board of equalization has committed prejudicial errors or irregularities in procedure.

14. **Attorney and Client.** It is the practice in this state to allow the recovery of attorney's fees and expenses only in such cases as are provided for by statute, or where the uniform course of procedure has been to allow such recovery.

15. **Costs: Attorney and Client.** Where one has gone into a court of equity, and, taking the risk of litigation on himself, has created or preserved or protected a fund in which others are entitled to share, such others will be required to contribute their share to the reasonable costs and expenses of the litigation, including reasonable fees to the litigant's counsel.

16. ———: ———. This rule is based on the theory that all in a class benefited should contribute to the expense, their share thus being necessarily entirely dependent upon the success of the litigation.

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

Clarence S. Beck, Attorney General, *Chauncey C. Sheldon, Otto H. Wellensiek,* and *Robert L. Morrissey,* for appellants.

Betty Peterson Sharp, Moran & James, Tyler & Frerichs, T. Simpson Morton, and *John L. Mattox,* for appellees.

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

WENKE, J.

This is an appeal from the district court for Otoe County. The action was brought by five named plaintiffs, each the owner of real estate situated in one of the two cities located in Otoe County, Nebraska. It was brought by them on their own behalf and on behalf of all other real property owners in the cities and villages located in Otoe County who are similarly situated. The basis of their complaint is that the officials of Otoe County increased the assessed value of their properties in 1952 over what it was in 1951 without complying with the statutory and constitutional requirements authorizing them to do so. The purpose of the action is to enjoin, for the year 1952, the assessment of plaintiffs' real properties and the real properties of all other parties similarly situated to the extent the assessed values thereof were increased over the 1951 assessed valuations; to enjoin the levy of taxes on said properties to the extent that the same are based on such increases; and to enjoin the collection of taxes thereon to the extent such taxes are based upon such increases. Actions of this character are authorized by section 25-319, R. R. S. 1943.

The trial court enjoined the collection of any taxes on any real estate of the plaintiffs, or of other real property owners similarly situated, for the year 1952 that was

occasioned by any increase in the assessed valuation of their properties over what it had been for the preceding year except such increases as were occasioned by the assessment of new improvements not previously assessed. This was done on the basis that the increased assessments were void.

Previous to trial, and while the action was pending, the following order was entered on November 24, 1952: "* * * Henry E. Schemmel, County Treasurer of Otoe County, Nebraska, is hereby directed and commanded to separately audit the payments of taxes made by the plaintiffs and other persons similarly situated so as to reflect the amount of taxes occasioned by any increase in valuation subsequent to the year of 1951, and the said County Treasurer, defendant, is hereby further ordered and commanded to record all of said tax payments as being made under protest, and to separately deposit and hold any such increased amount in trust and to maintain a trust account thereof, not to be distributed, until the final order, judgment and decree entered herein."

The county treasurer kept the money held by him pursuant to this order in a separate fund. The court ordered the county treasurer to deduct from this fund any amounts paid and placed therein that resulted from increased assessments based on new improvements not previously assessed. From the balance of the fund the court ordered the county treasurer to pay plaintiffs' attorneys the sum of $7,500, which amount it allowed them for services herein. It then directed the balance of the fund to be distributed to the respective taxpayers from whom it was collected in proportion to their respective interests therein. Motion for new trial having been made and overruled, this appeal was taken by the defendants.

The general background out of which this litigation had its inception is as follows: In the forepart of 1951 the board of county commissioners of Otoe County, hereinafter referred to as the county board, established a

real estate classification and reappraisal committee. Authority for the county board to establish such a committee is provided by section 77-1301, R. R. S. 1943. On June 14, 1951, this committee reported to the county board that on May 1, 1951, it had received bids on the reappraisal work of the county and recommended the county board approve the bid it had received from the J. M. Cleminshaw Appraisal Company so the committee could enter into a contract with the bidder for the immediate appraisal of town properties. This bid contained an option giving the company the right to appraise the rural property in the following fiscal year for an amount therein stated. On the same day the county board rejected these recommendations and discontinued the committee. The committee members were not notified of this action, and of the fact that they had been relieved of further duty, until June 21, 1951. In the meantime, on June 16, 1951, they filed a report with the county board to the effect: "Your committee has examined the valuation placed on various real estate in the county for the purpose of taxation. Your committee has further viewed the real estate and the improvements thereon to determine whether or not these various tracts are valued on an equitable basis. We find from our examination great inequality and inequities in the valuation placed on the various tracts. In many instances property of equal value is assessed unequally and in other instances property which varies greatly in value is assessed as having the same value for tax purposes. Therefore, many taxpayers are paying more taxes than they should and others are not paying as much. In view of this fact we feel that the lands and town lots of the county should be reappraised."

Thereafter, on July 17, 1951, the county board took the following action: "* * * the recommendation of the Otoe County Reappraisal Committee employ the J. M. Cleminshaw Co., of Cleveland, Ohio to reappraise the lots and buildings in the towns and cities of Otoe County

be accepted. The County Clerk is instructed to contact the J M. Cleminshaw Co at once so that the work can be started on the reappraisal. Also it is the ententions (intention) of the County Board that a reappraisal of farm lands be undertaken in the future."

Pursuant to the foregoing the county board, on August 11, 1951, took the following action: "* * * that the J. M. Cleminshaw Co. be employed to make a reappraisal of all town and city property in Otoe County, Nebraska, for the sum of $15,500.00. This company was recommended by the Otoe County Reappraisal Board."

The contract entered into pursuant thereto provided: "The J. M. Cleminshaw Company, a Partnership, hereby proposes by way of assistance to the Assessor to make a complete revaluation of all taxable real property within the corporate limits of the City of Nebraska City and all cities and villages of Otoe County including Burr, Douglas, Dunbar, Lorton, Otoe, Palmyra, Syracuse, Talmage and Unadilla Nebraska according to the following specifications. This is to include business properties in County."

This contract set out in detail the manner in which the revaluation should be made. It would serve no useful purpose to herein set out these specifications. That the county board had authority to hire assistance to help the county assessor is established by our opinion in Speer v. Kratzenstein, on rehearing, 143 Neb. 310, 12 N. W. 2d 360. Therein we said: "* * * unless prohibited by statute, a county board may adopt such means as in its judgment shall be necessary in assisting county officers properly to discharge the duties of their offices."

The J. M. Cleminshaw Company, whom we shall hereinafter refer to as the company, thereupon appraised and revalued all the taxable real properties within the corporate limits of all the cities and villages of Otoe County and in addition thereto all business properties located in rural areas of the county. The number of such business properties located in rural areas was very lim-

ited. The classification of these properties was into two categories, that is, business and residential. The total number of properties appraised in all the cities and villages of the county totaled 3,861. The company placed all of the data which it used in arriving at values on filing cards. It also placed thereon the value it arrived at for both the real estate and the improvements. The cards were of two colors, one to indicate residential property and the other business property. These cards, when completed, were turned over to the county assessor and are still in his possession. The county assessor checked all of these cards for possible mathematical errors or other mistakes. He then studied the values placed thereon to see if any properties were out of line and, in all cases where he thought they might be, he checked the property personally. This checking resulted in some changes being made but generally the assessor used the figures given him by the company in arriving at the assessed value of these properties for 1952, at first using 47 percent thereof for that purpose. This resulted in the assessed value of 2,304 properties being raised and 1,557 being lowered. He thereupon notified the owners of the 2,304 properties of the fact that the assessed valuation of their property had been raised for 1952, using post cards for that purpose. Subsequently, about May 10, 1952, he lowered the 1952 assessed valuation of these 3,861 properties by using 43 percent of the company's figures. This was done after the post card notices had been sent out. The 43 percent is the assessed valuation which he finally submitted to the county board of equalization.

The county board of equalization, after making some adjustments, did, on June 25, 1952, accept the assessor's assessed valuations and taxes were subsequently assessed and levied on these accepted values. The increased taxes on these properties resulting from the increased values are the cause of this action.

The first question that arises is the right of appellees

to maintain this type of action, that is, injunction.

In Western Union Telegraph Co. v. Douglas County, 76 Neb. 666, 107 N. W. 985, we said: "A suit in equity will not lie when the plaintiff has a plain, adequate and speedy remedy at law."

However, in Hemple v. City of Hastings, 79 Neb. 723, 113 N. W. 187, we said: "* * * where a tax is void, i.e., where there is no tax which the plaintiff is in equity bound to pay, he may invoke the aid of a court of equity to protect his rights by injunction, notwithstanding such provision."

As stated in Peterson v. Hancock, 155 Neb. 801, 54 N. W. 2d 85: "It is elementary, of course, that when taxes are levied on property without authority of law a court of equity may enjoin collection thereof."

And in Brown v. Douglas County, 98 Neb. 299, 152 N. W. 545, we held: "So much of the taxes as are levied upon the valuation above that fixed by the county assessor is void, and its collection may be enjoined." See, also, Philadelphia Mortgage & Trust Co. v. City of Omaha, 65 Neb. 93, 90 N. W. 1005; Crane Co. v. Douglas County, 112 Neb. 365, 199 N. W. 791.

Insofar as the restraining order entered November 24, 1952, is concerned sections 77-1728 to 77-1736, R. R. S. 1943, would ordinarily provide a remedy at law for the refund of taxes if the individual taxpayers are entitled to a return thereof. See, Bellevue Improvement Co. v. Village of Bellevue, 39 Neb. 876, 58 N. W. 446.

However, we said in Best & Co., Inc. v. City of Omaha, 149 Neb. 868, 33 N. W. 2d 150, by quoting from Golden v. Bartholomew, 140 Neb. 65, 299 N. W. 356: "'"An adequate remedy at law means a remedy which is plain and complete and as practical and efficient to the ends of justice and its prompt administration as the remedy in equity." Standard Oil Co. v. O'Hare, 122 Neb. 89, 239 N. W. 467.'"

We think the following language from 51 Am. Jur., Taxation, § 1227, p. 1047, has particular application to

this restraining order: "The necessity of resorting to a multiciplicity of actions for redress against an unlawful tax negatives the existence of an adequate remedy at law and sustains the remedy by injunction." See, also, Pomeroy's Equity Jurisprudence (5th ed.), § 260, p. 526; Pierce v. Green, 229 Iowa 22, 294 N. W. 237, 131 A. L. R. 335.

As to the 2,304 properties that the assessor raised in value, section 77-1315, R. R. S. 1943, provides in part: "In years in which real estate is assessed for taxation purposes, it shall be the duty of the county assessor, to notify the record owner of every piece of real estate which has been valued at a higher figure than at the last previous assessment. Such notice may be given by post card, addressed to said owner's last-known address. It shall describe said real estate, and state the old and new valuation thereof and the date of the convening of the board of equalization."

In compliance therewith the assessor sent a post card to all the owners whose real estate had been valued higher for 1952 than it had been in 1951. Each post card contained a description of the owner's property, the old (1951) valuation, and the new (1952) valuation, but did not set out the date on which the county board of equalization would convene. The latter is fixed by statute and was then the first Monday in May or May 5, 1952. See § 77-1502, R. R. S. 1943.

We said in Power v. Jones, 126 Neb. 529, 253 N. W. 867: "If a tax or assessment is levied without authority of law, it is, of course, void. This sometimes arises when the levy is made without a compliance with the jurisdictional requirements."

We held in Rosenbery v. Douglas County, 123 Neb. 803, 244 N. W. 398: "The provision of section 77-1612, Comp. St. 1929 (now section 77-1315, R. R. S. 1943), requiring notice to the landowner of any increase in assessed value of his realty over the last previous assessment is mandatory. A tax levied on such increase, made

without notice to the owner, is void, and its collection may be enjoined."

We have held the same in regard to the notice that is required by section 77-1504, R. R. S. 1943, to be given an owner by the board of equalization of any raise it intends to make of the owner's property. See, Brown v. Douglas County, *supra;* Crane Co. v. Douglas County, *supra.* As said in Crane Co. v. Douglas County, *supra:* "A county board of equalization is without jurisdiction to raise the assessment of any person until it has first complied with the provisions of section 5972, Comp. St. 1922 (now section 77-1504, R. R. S. 1943), which are pertinent to such proceedings."

What has been said of the notice itself being mandatory we think is equally applicable to what the Legislature has said shall be contained therein. What was said in Rosenbery v. Douglas County, *supra,* has application here. Therein we said: "The legislature no doubt intended that the owner of realty might rely upon the last previous assessed valuation of his real estate as being that at which it would be returned again, unless he received notice of increase and was afforded an opportunity to appear before the board of equalization and contest such increase in value, if he felt that the increase was unwarranted."

We find the failure to set out in the notices the date when the board of equalization would convene was such a defect as to make the notices given without force and effect and left the assessor without authority to make the raises. In view thereof all raises based on these notices, except as hereinafter set forth, are void and any tax levied thereon is likewise void and the collection thereof may be enjoined.

The record establishes that most, but not all, of the real property owners whose property was raised in value also filed personal tax schedules for 1952 and in doing so were either given an original and a copy or just a copy thereof. These personal tax schedules, the rec-

ord shows, were filed a month or more before May 5, 1952. On the back of these schedules appears the following language: "The County Board of Equalization, which is composed of the County Board, the County Assessor, and the County Clerk, meets on the first Monday in May and continues in session not more than fifty days, or less than three days." We do not think, because most of these property owners received the information in this manner, that it fulfills the requirements of the statute. The statute contemplates the information required to be given shall all be contained in the notice given. Subject to the same reasoning is the following notice published by the county board of equalization in the Nebraska City News-Press dated May 27, 1952:

"The last day for filing protests on real estate valuations for 1952 is noon on May 31, 1952.

"A written protest must be filed, either on a blank which may be secured at the County Assessor's office, or in a letter to the Board of Equalization. Reasons for the protest must be given."

We find the statute requires the notice must be given by the assessor and that it must specifically contain all the information the statute requires shall be set forth therein.

There are a small number of property owners whose assessed valuations were increased because of new improvements that had not been assessed prior to 1952. It was the duty of the assessor to add these to the tax rolls. See § 77-1306, R. R. S. 1943. This statute provides in part: "Each county assessor * * * shall annually * * * take a list of * * * all buildings and all other improvements of any kind, if over one hundred dollars in value, which shall not have been previously included in the value of the land and lots on which such improvements have been made. In the return he shall give a description of the tract of land or lot upon which the improvements have been made, the kind of improvements so

made, and the true value added to such parcel of land or lots by such improvements."

We said in Watson Bros. Realty Co. v. County of Douglas, 149 Neb. 799, 32 N. W. 2d 763: "The notice to an owner of property, provided for in section 77-1315, R. S. 1943, is not required in cases where real estate is assessed under the provisions of section 77-1306, R. S. 1943."

The record also shows that of the 2,304 tracts of real property in the cities and villages of Otoe County, the assessed value of which property the assessor raised in 1952 over what it had been in 1951, some 501 written protests were filed in regard thereto with the county board of equalization. By doing so such protestants waived the jurisdictional defect in the notice. Nor would the fact that some withdrew their protests affect this waiver.

As stated in Bankers Life Ins. Co. v. County Board of Equalization, 89 Neb. 469, 131 N. W. 1034: "We are therefore of opinion that the act of the assessor in adding the amount of the capital stock and surplus of the insurance company to its schedule, as returned by the proper officer, was void; and, if the company had filed no complaint and made no appearance before the board of equalization, it could have successfully resisted the payment of any tax levied upon the increased valuation of which it complains."

We held therein: "It appears, however, that the company in some way became aware of the change in its schedule, filed its complaint before the county board of equalization, and thereby gave the board jurisdiction to determine the matters complained of." See, also, Minneapolis Dredging Co. v. Reikat, 141 Neb. 475, 3 N. W. 2d 887.

There are two additional questions presented in relation to the increased assessments but in view of what we have hereinbefore said they relate only to the prop-

erty owners who filed written protests with the board of equalization.

The first of these questions relates to the assessor's duties in regard to assessing these properties for 1952 and the performance thereof. The statute then in force provided: "All property in this state, not expressly exempt therefrom, shall be subject to taxation, and shall be valued and assessed at its actual value." § 77-201, R. R. S. 1943.

Actual value means its value in the market in the ordinary course of trade. See, Chicago, R. I. & P. Ry. Co. v. State, 111 Neb. 362, 197 N. W. 114; Schulz v. Dixon County, 134 Neb. 549, 279 N. W. 179, 119 A. L. R. 1294; Laflin v. State Board of Equalization & Assessment, 156 Neb. 427, 56 N. W. 2d 469.

As already stated, the company was employed to assist the assessor in making a revaluation of all taxable real property in the cities and villages of the county, including such business properties as were located in rural areas.

The company valued the lots in Nebraska City primarily by their distance and direction from a selected point, that is, Eighth Street and Central Avenue. This point was considered the most valuable in the city. How they were determined in Syracuse and the eight villages is not clearly shown although apparently by location.

The value of the improvements on these lots was determined primarily by considering the size and type of construction of each improvement and applying thereto the 1941 cost of construction per square foot, which cost of construction was based on the company's price list book, and then depreciating that figure in accordance with the age and present condition of the improvement. Included in the data used for determining construction costs were many factors such as heating, plumbing, lighting, insulation, tiling on floors, use, occupancy, rentals, and many others. These are fully set out on the cards that the company used and on which,

after it had determined the value of both the real estate and improvements, it placed such values and then delivered them to the assessor.

As has already been stated herein, when the company delivered these cards to the assessor he first checked all of them for possible mathematical errors or other mistakes. He then studied the company's values placed on each property to see if he thought the values placed on any of them were out of line as to the actual value thereof and, in all cases where he thought they might be, he checked the property personally. As a result of this checking and as a result of complaints he received from individual property owners, the assessor made some changes in values but generally speaking the figures given him by the company were used in arriving at the assessed values he used for 1952. He ultimately arrived at the assessed values for 1952 by taking 43 percent of the figures given him by the company except in the few instances where he had made changes.

The company, under its contract, did not and could not have put a binding value on any of the properties. It merely furnished to the assessor the values it arrived at and the evidence of how it arrived at those figures. The assessor, whose duty it was to assess these properties at their actual value, did not delegate this duty to the company which the county board had hired to assist him. It is true that he generally accepted its valuations and used a percent thereof for the assessed values he used but this did not have the effect of delegating his authority to the company as he could change any and all values it had placed thereon. After the assessor placed his value thereon it was still a question of fact whether or not the assessed values he placed thereon were the actual values of the individual properties. The latter was a question for the board of equalization to determine. § 77-1504, R. R. S. 1943.

Section 77-1853, R. R. S. 1943, provides: "Irregularities in making * * * shall not * * * in any manner in-

validate the tax levied on any property or charged against any person."

Ordinarily, "The valuation of property made by the proper assessing officer is presumed to be correct, * * *." Brown v. Douglas County, *supra*.

And in State ex rel. Bee Building Co. v. Savage, 65 Neb. 714, 91 N. W. 716, we said: "The presumption is that, when an officer or assessing body values property for assessment purposes, he acts fairly and impartially in fixing such valuation."

We think the effect of what the assessor here did is properly decided in the following two cases from Iowa: Clark v. Lucas Co. Board of Review, 242 Iowa 80, 44 N. W. 2d 748; Haubrich v. Johnson, 242 Iowa 1236, 50 N. W. 2d 19.

In Clark v. Lucas Co. Board of Review, *supra*, the court said:

"Although the evidence shows that the assessor did not follow the Wilkins valuation blindly, but made independent investigation of his own and weighed all of the various factors required by statute, section 441.4, Code of 1946 (441.13, Code of 1950) in making his valuations, we are persuaded to the conclusion that he gave much weight to the Wilkins appraisals. For that reason we have disregarded the usual presumption in favor of the assessor's valuations in passing upon this appeal.

"Even though the complaining taxpayer be relieved from the burden of overcoming the presumption that the assessor's valuation is correct, he nevertheless has the statutory burden of proof in establishing his contention that the valuation is excessive, inadequate, or inequitable."

And in Haubrich v. Johnson, *supra*, the court said: "* * * where the assessor did not make a personal inspection of the properties, either by himself or a deputy, but accepted the valuations fixed by a professional appraiser, the presumption in favor of the assessment does not obtain. * * * But the burden was still upon the

plaintiffs to prove that the assessments were excessive."

If what the assessor did resulted in any one or all of the properties of those who protested being assessed too high such owners should have introduced evidence before the board of equalization to that effect in support of their protests and then, if no relief was obtained, they should have appealed therefrom to the district court. See section 77-1510, R. R. S. 1943, which provides for such appeal.

As said in Power v. Jones, *supra:* "I have been unable to find a decision in Nebraska holding that if an assessment was too high the tax would be absolutely void. In cases where property is assessed at a higher proportion of its actual value than other property similarly located, the taxpayer should first apply to the board of equalization to correct any errors therein. This appears to be a prerequisite to bringing legal action."

As further stated in Power v. Jones, *supra:*

"Where the claim is made that real property is assessed too high, the taxpayer should first apply for relief to the board of equalization, as provided in section 77-1702, Comp. St. 1929, and if relief is there denied, he should appeal to the courts.

"The claim that real property is assessed too high cannot be made for the first time in a collateral attack against the collection of the tax."

As stated in Bellevue Improvement Co. v. Village of Bellevue, *supra:* "It does, however, appear, without substantial contradiction, that the assessors for the different precincts of the county at their meeting determined arbitrarily that such lots should be uniformly assessed at $10 each, and that the assessment was so made in the case of the plaintiffs' lots because of such resolution and without any exercise of judgment upon the part of the assessor or his deputy, without a view of the property, and wholly regardless of the actual value of the different lots. It also appears that the valuation placed upon these lots was greatly in excess of the

assessed valuation upon much other property in the vicinity apparently of as great actual value. But this feature is not important, because the remedy for a disproportionate valuation would be before the board of equalization."

We find, for the reasons stated, that the usual presumption that the valuations placed on these properties by the assessor were correct does not obtain but we do not think, because thereof, that they are void. The burden is still on the property owner protesting to a board of equalization to prove that the assessment made of his property is in excess of the actual value in order to obtain any relief. If relief is there denied there is an adequate remedy at law provided by statute which permits an appeal therefrom to the district court. The claim that real property is assessed too high cannot be made for the first time in a collateral attack against the collection of the tax.

A further question is presented to the effect that the assessments, as made, resulted in a lack of uniformity between the properties raised by the revaluation and other properties in the county and thus the assessment is in conflict with the constitutional requirement as to uniformity. In this respect our Constitution provides: "* * * taxes shall be levied by valuation uniformly and proportionately upon all tangible property * * *." Art. VIII, § 1, Constitution of Nebraska. The rule of uniformity applies to both the rate of taxation and valuation of property for tax raising purposes. See State ex rel. Morton v. Back, 72 Neb. 402, 100 N. W. 952, 69 L. R. A. 447.

Appellees contend that inequalities and want of uniformity in the assessment of real properties existed throughout the county, that is, in the cities, villages, and rural areas. They say this is evidenced by the report of the county real estate classification and reappraisal committee and by the action of the county board in relation to its having the J. M. Cleminshaw Company

revalue all taxable real estate in the county, including that in the rural areas as well as in the cities and villages. A contract to revalue the rural properties was entered into with the company on September 5, 1952. The appellees further contend the fact that all taxable real properties in the rural areas were not revalued for assessment purposes in 1952, while those in the cities and villages were, and the fact that of the ten school districts in the county, each of which contains one of the cities or villages therein and all of which school districts are larger in area than the corporate limits of the village or city contained therein, no revaluation was had of the rural properties located therein, and the fact that in the two cities the revaluation resulted in a total increase of the assessed valuation of the real property while in the eight villages it resulted in a decrease, is evidence that a lack of uniformity in the assessment of real property in the county exists and a consequent disproportionate levy of taxes on parts thereof results therefrom. This situation, if it actually brought about the condition complained of, the board of equalization apparently made no effort to correct.

"The presumption obtains that a board of equalization has faithfully performed its official duties, and that in making an assessment it acted upon sufficient competent evidence to justify its action." Watson Industries v. County of Dodge, *ante* p. 311, 66 N. W. 2d 589.

The record shows no action by the board of equalization to equalize valuations as between real properties in the cities and villages and that in rural areas after the revaluation of the former. Nor was any action taken by it in this regard between rural areas in school districts containing a city or village and the real property in such city or village. Whether or not the increase in the total value of all real properties in the two cities and lowering thereof in the eight villages by reason of the revaluation resulted in any lack of uniformity of the assessments of the properties in the county or in a disproportionate bur-

den of taxes thereon it is not necessary for us to decide.

We said in State ex rel. Morton v. Back, *supra:* "In all schemes of taxation there are generally recognized elements of inequality and the probability of erroneous valuations in the assessment of property by whatever mode the assessment may be made. The evil is usually remedied by the exercise of the authority of a board created for that purpose, whereby the assessment of different properties is brought to a common standard of value."

We then went on to say therein: "The inequalities in values thus returned, if any there be, is a proper subject for consideration by a body or tribunal authorized to discharge the functions of a board of equalization."

Such authority was lodged in the county board of equalization both as to individuals and taxing district. See §§ 77-1504 and 77-1505, R. R. S. 1943.

We went on in State ex rel. Morton v. Back, *supra*, to say that: " 'Whatever directions the law may give to the assessor in valuing the property in the first instance, and whatever result these directions may produce in the assessment of franchises or other property of the taxpayer, the work of the board of equalization is to equalize the valuations made, so that every one, as nearly as that may be attained, shall stand upon an equal footing, and pay an equal proportion of the tax laid, according to the real value of his property. * * * In this way, equality is attained and every interest protected.' (State v. Fleming, 70 Neb. 523, 97 N. W. 1063.) * * * 'And this rule of uniformity applies not only to the rate of taxation but as well to the valuation of property for the purpose of raising revenue. The constitution forbids any discrimination whatever among taxpayers, thus, if the property of one citizen is valued for taxation at one-fourth its value, others within the taxing district have the right to demand that their property be assessed on the same basis.' (State v. Osborn, 60 Neb. 415, 83 N. W. 357.)"

As stated in Western Union Telegraph Co. v. Douglas County, *supra:* "The statute affords a plain adequate and speedy remedy to one whose property has been excessively valued for taxation and in cases in which the county board of equalization has committed prejudicial errors or irregularities in procedure."

As to the property owners who filed protests they were obligated to raise any question covering unequal assessment between individuals or taxing districts before the county board of equalization, who had authority to deal therewith. If no relief on this basis could be obtained they then could have appealed therefrom to the district court. The law gave them a full and adequate remedy and this type of action is therefore not available to them.

Assessments on property are not void merely because some properties are assessed higher than others. That fact, when properly presented and established, is basis for adjustment by the tribunal having authority for that purpose.

Appellants contend this is not a case in which the allowance of an attorney's fee is authorized. We have often held, as most recently stated in State ex rel. Ebke v. Board of Educational Lands & Funds, *ante* p. 79, 65 N. W. 2d 392: "It is the practice in this state to allow the recovery of attorney's fees and expenses only in such cases as are provided for by statute, or where the uniform course of procedure has been to allow such recovery." See, also, Blacker v. Kitchen Bros. Hotel Co., 133 Neb. 66, 273 N. W. 836.

We have uniformly allowed the recovery of attorney's fees in actions to which the following has application: "* * * where the services of a litigant's attorney result in rescuing or preserving a large amount of property or funds, not only for the benefit of the particular litigant, but for the benefit of all others in the same class, and by means of these services the property or funds are conserved for the benefit of all, nothing is plainer than

that the cost should be borne by those benefited by it." Blacker v. Kitchen Bros. Hotel Co., *supra.*

The court therein went on to quote the following from Buell v. Kanawha Lumber Corp., 201 F. 762: " 'The general equitable principle on which American courts act in allowing counsel fees from a fund in court for distribution is that where one has gone into a court of equity, and, taking the risk of litigation on himself, has created or preserved or protected a fund in which others are entitled to share, such others will be required to contribute their share to the reasonable costs and expenses of the litigation, including reasonable fees to complainant's counsel; but, to warrant such allowance, the fund so created or preserved must be one applicable to the claims of the complainant and those interested with him, * * *.' " See, also, Allen v. City of Omaha, 136 Neb. 620, 286 N. W. 916.

This rule is based on the theory that all in a class benefited should contribute to the expense, their share thus being necessarily entirely dependent upon the success of the litigation. We think this applies to all those who contributed to the fund now held by the treasurer and who, under the holdings herein, are entitled to have their proportionate share of that fund returned. We think, however, that the sum of $7,500 allowed by the trial court to be sufficient for services rendered both in that court and this.

In view of the foregoing we hold that all the owners of real property in the two cities and eight villages of Otoe County, together with the owners of business properties located in rural areas, the assessed valuation of whose property for 1952 was increased over what it was for 1951, are entitled to the relief they prayed for except in cases where the increase resulted from new improvements which had not previously been assessed or where such owners filed a written protest with the county board of equalization in regard thereto. This requires enjoining the collection of any tax based on

such increase with directions that the proper county officers remove it from their records. However, in cases where it has been paid, and is being held by the county treasurer pursuant to order of the district court, it should be refunded to each taxpayer entitled thereto but only in proportion to his share after the attorney's fee herein approved has been deducted therefrom as directed.

As to the fund held by the county treasurer he should first deduct therefrom any sum held because of any increase in taxes resulting from new improvements not assessed prior to 1951 and for any taxes paid by property owners who filed written protest with the board of equalization in regard to the 1952 assessment of their real property. The funds so deducted should be distributed as all other taxes. Out of the balance he should first pay the attorneys the fee they have been allowed and the remainder should then be distributed proportionately to those who it has been herein determined are entitled to the refund thereof. We reverse the action of the trial court with directions to enter a decree in accordance herewith. All costs are taxed to the county.

REVERSED AND REMANDED WITH DIRECTIONS.

IN RE APPLICATION OF CHARLES D. DOHER, DOING BUSINESS AS DOHER TRANSPORT COMPANY.

CHARLES D. DOHER, DOING BUSINESS AS DOHER TRANSPORT COMPANY, APPELLANT, V. MABEL C. HERMAN, DOING BUSINESS AS HERMAN OIL TRANSPORT CO., ET AL., APPELLEES.

67 N. W. 2d 421

Filed December 10, 1954. No. 33609.

1. **Public Service Commissions: Appeal and Error.** The appeal sections of Chapter 75, R. R. S. 1943, are special and control general statutory provisions.
2. ———: ———. The procedure to be followed in perfecting

an appeal directly to this court from the Nebraska State Railway Commission under the provisions of sections 75-405 and 75-406, R. R. S. 1943, is governed by the same provisions in force with reference to appeals from the district courts, except as otherwise specifically provided.

3. ———: ———. Any order of the Nebraska State Railway Commission is reviewable which meets the conditions set forth in such sections and which involves a justiciable issue that is decisive of some subject matter of which the commission has jurisdiction and the power to enforce against any party to the proceeding.

4. ———: ———. Any action by or order of the Nebraska State Railway Commission which is merely procedural or interlocutory in character is not the kind and type of order contemplated by the provisions of sections 75-405 and 75-406, R. R. S. 1943, from which an appeal can be taken directly to this court.

APPEAL from the Nebraska State Railway Commission. *Affirmed.*

Swenson, Viren & Emmert, for appellant.

Jack W. Marer, Robert S. Stauffer, and *R. E. Powell,* for appellees.

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

CHAPPELL, J.

Charles D. Doher, doing business as Doher Transport Company, hereinafter called applicant, filed an application with the Nebraska State Railway Commission, hereinafter called commission, seeking either an extension or interpretation and clarification of two certificates of convenience and necessity theretofore issued to him, authorizing the transportation of petroleum products as an intrastate motor vehicle common carrier for hire. Thereafter a public hearing was held before an examiner who subsequently filed a report with recommendations. Exceptions thereto were argued to the commission en banc. On November 24, 1953, the commission met in a so-called executive session with all commissioners present, whereat minutes of their transactions and proceed-

ings were kept by the secretary of the commission as required by section 75-106, R. R. S. 1943. On November 27, 1953, a letter, signed by the secretary, was mailed by him to applicant, intervener-protestants, and their respective attorneys, reciting therein a copy of the minute entry here involved. Insofar as important here, the letter read: "On the 24th day of November, 1953, the following action was taken by the Nebraska State Railway Commission:

" 'Commissioner Brown moved exceptions to Examiner's report in M-8851, Supplement No. 3, Charles D. Doher, dba Doher Transport Co., Nelson, Nebr. be sustained, Examiner's report overruled, application granted in part and certificate interpreted. Voting: Chairman Larson yes; Vice-Chairman Palmer—no; Commissioner Brown—yes. Motion carried.'

"A copy of the formal order will be forwarded to you."

Thereafter, on February 9, 1954, a certified copy of an affirmative written decision or order of the commission made, adopted, and entered by it, entitled "OPINION, FINDING AND ORDER" signed "NEBRASKA STATE RAILWAY COMMISSION /s/ Richard H. Larson Chairman ATTEST: /s/ Marcus L. Poteet Secretary COMMISSIONERS CONCURRING: /s/ Richard H. Larson /s/ Joseph J. Brown * * * PALMER, VICE CHAIRMAN, DISSENTING:" with his signed dissenting opinion attached thereto, was mailed "to the persons affected." Such "Opinion, Finding, and Order" insofar as important here, first specifically recited the provisions of two certificates of convenience and necessity theretofore issued to applicant as well as the authority sought by him in his pending application. It then cited purported applicable precedent and said: "Upon consideration of the application, the files, the record, Examiner's report and recommendation, exceptions thereto, the oral argument of counsel, and being fully advised in the premises, the Commission is of the opinion and finds:

"1. That exceptions to the Examiner's report and recommendation should be sustained.

"2. That the Examiner's report and recommendation should be overruled.

"3. That the authority now held by applicant in M-8851 and M-8851, Supp. #2, should be interpreted and clarified.

"4. That the authority presently outstanding in M-8851 should be revoked and cancelled as it duplicates the authority granted in M-8851, Supp. #2, which authority was issued as a result of a 'grandfather' application.

"5. That the authority issued in M-8851, Supp. #2, should be interpreted and clarified to provide the following service to-wit:" as hereinafter set forth in the order.

The "Order" of the commission then specifically provided: "IT IS THEREFORE ORDERED by the Nebraska State Railway Commission that the exceptions to the Examiner's report in M-8851, Supp. #2, be and the same are hereby sustained; that the Examiner's report and recommendation be and the same is hereby overruled; that the certificate issued in M-8851 be and the same is hereby revoked and cancelled; that the certificate issued in M-8851, Supp. #2, be interpreted and clarified to authorize Charles D. Doher, d/b/a Doher Transport Co., Nelson, Nebraska, to perform the following described service, to-wit:

"SERVICE AUTHORIZED:

"Crude petroleum and all its refined products in bulk in tank trucks.

"ROUTE OR TERRITORY AUTHORIZED:

"From all producing, refining, distributing and loading points in Nebraska, as points of origin, on the one hand, and, on the other hand, all points and places within the State of Nebraska, as points of destination and return of rejected shipments, over irregular routes.

"IT IS FURTHER ORDERED that operations pursuant

to this order shall be subject to such terms, conditions and limitations as have been or may hereafter be prescribed by the Commission.

"MADE AND ENTERED at Lincoln, Nebraska, this 24th day of November, 1953." In that connection, however, concededly no "copy of such order by the commission" was ever mailed "to the persons affected" as required by section 75-406, R. R. S. 1943, until February 9, 1954. Further, it will be noted that the authority sought by applicant, and which the commission found he was entitled to have, as well as that actually authorized by the order of the commission mailed to the persons affected on February 9, 1954, were all identical. Thus such order of the commission actually granted authority broader in scope than contemplated by the minute entry of November 24, 1953.

On February 13, 1954, after receiving a certified copy of such opinion, finding, and order, protestants filed motion for rehearing upon numerous specific grounds which need not be recited here. The motion was subsequently sustained by the commission and applicant appealed to this court, assigning as error solely that the commission was without jurisdiction to enter an order on the motion for rehearing filed by protestants because it was not timely filed as required by section 75-406, R. R. S. 1943. We conclude that the assignment should not be sustained.

In that regard, applicant's contention is that the reviewable order was the minute entry of November 24, 1953, kept by the secretary of the commission and mailed by him on November 27, 1953, from which protestants could allegedly have appealed within 1 month thereafter as provided by section 75-405, R. R. S. 1943, or in the alternative protestants could have filed a motion for rehearing within 10 days after November 27, 1954, as provided by section 75-406, R. R. S. 1943, but having done neither such entry became final and the commission was without jurisdiction to enter any order upon

protestants' motion for rehearing. On the other hand, protestants contend that the minute entry of November 24, 1953, was simply procedural or interlocutory in character and not the kind of order required by sections 75-405 and 75-406, R. R. S. 1943; that the opinion, finding, and order made "by the commission" a copy of which was not mailed "to the persons affected" as required by section 75-406, R. R. S. 1943, until February 9, 1954, was the only proper reviewable decision or order, thus the motion for rehearing was timely filed. We sustain protestants' contention.

In that connection, section 75-405, R. R. S. 1943, provides: "If any railway company, common carrier, or person affected thereby, shall be dissatisfied with the decision of the State Railway Commission affirming, revising, annulling, or modifying any rate or rates complained of in the original schedule, or any subsequent schedule, which may be the subject of investigation, or with *the decision of the commission with reference to any* rate, classification, rule, charge, *order*, act, or regulation *made or adopted by them* upon which there has been a hearing before the commission, except as otherwise expressly provided for herein, such dissatisfied railway company, common carrier, or person affected may institute proceedings in the Supreme Court of Nebraska to reverse, vacate, or modify the order complained of; Provided, the time for appeal from the *orders and rulings of the commission* to the Supreme Court shall be limited to one month from the date of the *entry of the order or ruling* to which complaint is made." (Italics supplied.) However, a procedural companion, section 75-406, R. R. S. 1943, provides: "The procedure to obtain such reversal, modification, or vacation of any *such order* or regulation made and adopted, upon which a hearing has been had before the State Railway Commission, shall be governed by the provisions in force with reference to appeals from the district courts to the Supreme Court of Nebraska; Provided, no motion for a

new trial shall be required to be filed, but instead a motion for rehearing shall be filed *within ten days after the mailing of a copy of such order by the commission to the persons affected, and the time for appeal shall run in case such motion is filed from the date of the ruling of the commission on the motion for rehearing.*" (Italics supplied.)

In re Application of Airline Ground Service, Inc., 151 Neb. 837, 39 N. W. 2d 809, involved and permitted the review of a so-called temporary or interim cease and desist order of the commission upon the ground that it was not procedural or interlocutory. In such respect, however, the case is distinguishable from that at bar. In that opinion, so far as important here, we said: "The procedure to be followed in perfecting an appeal under the provisions of section 75-405 is governed by the same provisions in force with reference to appeals from the district court except as otherwise specifically provided. § 75-406, R. S. 1943. It is the contention of the respondents that this section of the statutes provides the manner of perfecting an appeal but does not control the effect of section 75-405 as to the kind of an order from which an appeal can be taken. * * *

"It is fundamental of course that the form of an order or the label placed upon it does not determine its character. It is the *substance of the order* which is controlling in determining its nature. In Columbia Broadcasting System v. United States of America, 316 U. S. 407, 62 S. Ct. 1194, 86 L. Ed. 1563, the court held: *'The ultimate test of reviewability is not to be found in an overrefined technique,* but *in the need of the review to protect from the irreparable injury threatened in the exceptional case by administrative rulings which attach legal consequences to action taken in advance of other hearings and adjudications that may follow, * * *.'*

"Whether the order before us is reviewable must be determined from Chapter 75, R. S. 1943. The appeal sections of the act are special and control general statu-

tory provisions. The language of section 75-405 to the effect that the decision of the commission with reference to any order made or adopted by them upon which there has been a hearing before the commission is that which affords the right of appeal in the instant case *if such right does in fact exist.*

"Complainant contends that the words 'any rate, classification, rule, charge, order, act or regulation' contained in section 75-405, should be interpreted to mean only final orders. The Legislature clearly did not limit the right of review to final orders but has conferred the right and limited its exercise to any order upon which there has been a hearing before the commission for the purpose of securing the reversal, vacation, or modification thereof. That the Legislature may properly provide for the review of any order in setting up a special appellate proceeding must be conceded. To fail to give effect to the plain legislative intent would constitute an amendment of the act by the judicial rather than the legislative process.

"This does not mean that a procedural or interlocutory order is reviewable. It simply means that any order meeting the conditions set forth in section 75-405 is reviewable, which involves a justiciable issue that is decisive of some subject matter of which the commission has jurisdiction and the power to enforce against any party to the proceeding." (Italics supplied.)

By analogy, the minute entry here involved was simply interlocutory or procedural in character and thus not reviewable. See, also, In re Application of Neylon, 151 Neb. 587, 38 N. W. 2d 552. It is patent that the minute entry of November 24, 1953, did not meet the requirements of the statute as the entry of an order of the commission. In fact, the letter of transmittal clearly indicates that it was not an order of or by the commission upon any view of the matter. It was simply a voluntary procedural step to ascertain the ultimate type of order which individual members of the commission

would approve or disapprove if subsequently made and entered by the commission. Such minute entry could not upon any theory be construed to be a certificate of convenience and necessity. § 75-231, R. R. S. 1943. Further, applicant's old certificates were at all times in full force and effect until terminated by an order of the commission. § 75-238, R. R. S. 1943. The minute entry did not in any manner deny or grant applicant a certificate or interpret and clarify or terminate his old certificates.

The general rule in comparable cases is that transactions and proceedings of the commission before a certificate of convenience and necessity is duly and regularly denied or is issued and becomes effective by ultimate decision and order of the commission, are essentially procedural or interlocutory in character. Smith Bros. Revocation of Certificate, 33 M. C. C. 465; Manhattan Coach Lines, Inc. v. Adirondack Transit Lines, 42 M. C. C. 123; Lincoln Tunnel Applications, 44 M. C. C. 665; Interstate Motor Transit Co. v. Public Utilities Commission, 119 Ohio St. 264, 163 N. E. 713.

In Rochester Telephone Corp. v. United States, 307 U. S. 125, 59 S. Ct. 754, 83 L. Ed. 1147, involving statutes comparable in principle, the court listed several types of interstate commerce actions in which judicial review should be denied. The type primarily in point here is stated as: "Where the action sought to be reviewed may have the effect of forbidding or compelling conduct on the part of the person seeking to review it, *but only if some further action is taken by the Commission.*" (Italics supplied.) Likewise, as stated in United States v. Los Angeles & Salt Lake R. R. Co., 273 U. S. 299, 47 S. Ct. 413, 71 L. Ed. 651, denying a right of review: "The so-called order here complained of is one which does not command the carrier to do, or to refrain from doing, any thing; which does not grant or withhold any authority, privilege or license; which does not extend or abridge any power or facility; which does not sub-

ject the carrier to any liability, civil or criminal; which does not change the carrier's existing or future status or condition; which does not determine any right or obligation." See, also, John J. Casale, Inc. v. United States, 52 F. Supp. 1005.

We find that the minute entry of November 24, 1953, kept by the secretary of the commission and mailed to the parties in interest by him on November 27, 1953, was, under the circumstances, only procedural or interlocutory in character. It was simply a step taken voluntarily without statutory recognition in an incomplete process of legislative or administrative action incident to the subsequent decisive course of the proceeding. It was not the written entry of an order by the commission decisive of the subject matter but required further action by the commission in order to grant or forbid any authority, and thus change applicant's existing status or enforce his future status.

Applicant relied primarily upon Sloan v. Gibson, 156 Neb. 625, 57 N. W. 2d 167, a law action, but such case, in the light of different applicable general statutes, is entirely distinguishable and not controlling here.

We conclude that the reviewable order was the written opinion, finding, and order "of the commission," made and entered "by the commission" a copy of which was mailed "to the persons affected" on February 9, 1954. Therefore, protestants' motion for rehearing was timely filed on February 13, 1954, and action of the commission sustaining the same was not void for want of jurisdiction to act thereon. Since such jurisdictional question was the sole issue presented, the action of the commission should be and hereby is affirmed.

AFFIRMED.