REPORTS OF CASES

DECIDED BETWEEN
FEBRUARY 19, 1955 AND JULY 15, 1955

IN THE

Supreme Court of Nebraska

JANUARY TERM 1955

VOLUME CLX

WALTER D. JAMES
OFFICIAL REPORTER

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SUPREME COURT

DURING THE PERIOD OF THESE REPORTS

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FREDERICK W. MESSMORE, Associate Justice
JOHN W. YEAGER, Associate Justice
ELLWOOD B. CHAPPELL, Associate Justice
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Second	Cass, Otoe, and Sarpy.	John M. Dierks	Neb. City
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		Harry Ankeny	Lincoln
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		William A. Day	Omaha
		James T. English	Omaha
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Fifth	Butler, Hamilton, Polk, Saunders, Seward, and York.	H. Emerson Kokjer	Wahoo
		Harry D. Landis	Seward
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Seventh	Fillmore, Nuckolls, Saline, and Thayer.	Stanley Bartos	Wilber
Eighth	Cedar, Dakota, Dixon, and Thurston.	Alfred D. Raun	Walthill
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		Edmund P. Nuss	Hastings
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		William F. Spikes	St. Paul
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Thirteenth	Arthur, Banner, Cheyenne, Dawson, Deuel, Keith, Kimball, Lincoln, and McPherson.	Isaac J. Nisley	North Platte
		John H. Kuns	Kimball
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Sixteenth	Box Butte, Cherry, Dawes, Sheridan, and Sioux.	Earl L. Meyer	Alliance
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TABLE OF CASES REPORTED

CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

JANUARY TERM, 1955

TONIE I. STATLER, APPELLEE, V. EDWIN L. WATSON ET AL., APPELLEES, IMPLEADED WITH IVO KLEINSCHMIT, APPELLANT.
68 N. W. 2d 604

Filed February 25, 1955. No. 33669.

1. **Tenancy in Common.** A right of possession of the common property by each cotenant is an essential characteristic of a tenancy in common.
2. **Estates.** A remainderman does not have the right of possession of real estate during the existence of a life tenancy therein.
3. ———. The contract of a life tenant purporting to include the entire property affected by his life estate extends to and is effective as to all his interest in the property.
4. ———. A tenant in remainder may sell, convey, encumber, or contract in reference to his interest in the real estate during the continuance of a life estate therein.
5. **Landlord and Tenant: Estates.** If the interest of a lessor in real estate is only a life tenancy his death during the term of a lease between him and his lessee terminates the lease. If the lessee thereafter remains in possession of the property he becomes a tenant by sufferance.
6. ———: ———. A lease made by a lessor, the owner of a life tenancy in a parcel of real estate and an undivided part of the remainder in fee, is not terminated by the death of the lessor during the term of the lease as to the fee interest of the lessor in the real estate.
7. **Landlord and Tenant: Crops.** A lessee of a life tenant has a right to enter the premises after termination of the lease to care for, harvest, and remove any crop planted during the life of the lessor, and to enter the premises and remove within a

reasonable time after the termination of the lease any personal property thereon belonging to him.

APPEAL from the district court for Stanton County: FAY H. POLLOCK, JUDGE. *Affirmed in part, and in part reversed and remanded with directions.*

T. L. Grady, for appellant.

Robert J. Swanson, for appellee.

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

BOSLAUGH, J.

Matilda E. Watson was the owner of a life estate in the northwest quarter of Section 15, Township 23 North, Range 3 East of the 6th P. M., in Stanton County, Nebraska, and she was the owner of an undivided one-fourth thereof subject to her life estate therein. Tonie I. Statler, named appellee herein, was the owner of an undivided three-fourths of the described land subject to the life estate of her mother Matilda E. Watson.

Matilda E. Watson, hereinafter designated deceased, entered into a written lease with Ivo Kleinschmit, herein identified as appellant, by the terms of which the land was leased to him for a term of 11 years commencing March 1, 1948, and continuing to March 1, 1959. He went into possession of the land at the commencement of the term, and maintained his possession until after the death of the lessor.

The deceased died testate a resident of Antelope County, January 21, 1954. Her will was probated February 16, 1954. It devised the undivided one-fourth of the land owned by the deceased at the time of her death to appellee, Gilbert H. Watson, and Edwin L. Watson in equal shares. Appellee deprived appellant of the possession of the land February 15, 1954, and she has since maintained and had exclusive possession thereof.

Appellee commenced an action February 19, 1954, to partition the land. She was then the owner of an un-

divided five-sixths of it and the other devisees of the deceased were each the owners of an undivided one-twelfth thereof subject to any existing rights of appellant because of the lease on the land. Appellee alleged in the partition case that appellant was before the death of deceased the tenant in possession of the land; that his tenancy terminated on the death of deceased; and that he claimed some interest in the land but that he had no interest therein. Appellant pleaded the facts concerning the lease of the land to him by deceased for a term of 11 years commencing March 1, 1948; that he was forcibly and wrongfully dispossessed of the land; that he was entitled to the possession of the land by virtue of the lease; and he asked the court to restore him to the possession thereof. Appellee denied the new matter in the pleading of appellant.

There is no conflict in the proof as to any material matter. The existence of the lease and the performance of the requirements of it by the parties thereto until the time of the death of the lessor were conceded. Appellant planted a part of the land to wheat in the fall of 1953 and it produced a crop of wheat in 1954. He constructed and repaired fences on the land and the lease assured him a right to remove any "fence posts and wire installed" thereon. Appellant was deprived of possession of the land as above stated herein. Appellee by the operation of a disk injured or destroyed a part of the growing wheat on the land that was planted by the appellant in the fall of 1953.

The trial court determined that appellant was entitled to reenter the land for the purpose of harvesting the wheat planted by him on a part of the land in the fall of 1953, for the purpose of removing from the land his hay in stack thereon, and for the purpose of removing all fence posts and wire placed by him on the leased premises; that he had no other right to the possession of the land and no interest therein; that appellee damaged or destroyed a part of the growing wheat on

the land that was planted by appellant in the fall of 1953 and appellee was liable for the amount of the damages caused thereby; and that the court should retain jurisdiction of the cause to determine and adjudicate such damages.

Appellant argues that tenants in common have an equal right to the possession of the property owned by them and one tenant may not dispossess a lessee of another tenant who is in the exclusive and peaceful possession of the property. This is not pertinent to or important in this litigation. The deceased and appellee were not tenants in common of the land involved at the time the lease was made or so far as the record shows at any time. The former was a life tenant of all the real estate and the owner of one-fourth of the remainder. The interest in the land of the latter was that of owner of three-fourths of the remainder subject to the life estate of her mother. The mother and daughter were tenants in remainder, but they were not tenants in common because of the absence of the indispensable unity of possession or right of possession of the land required for a tenancy in common. A tenancy in common is characterized by the essential unity of possession or right of possession of the common property. If such unity exists there is a tenancy in common without regard to any other unities and if it is not present the estate is not a tenancy in common. In Hay v. Crawford, 159 Kan. 723, 158 P. 2d 463, 159 A. L. R. 388, it is said: "A primary and essential characteristic of a tenancy in common is the right of possession by each of the cotenants." See, also, American Bank & Trust Co. v. Continental Inv. Corp., 202 Okl. 341, 213 P. 2d 861; In re Appeal of Delashmutt, 234 Iowa 1255, 15 N. W. 2d 619; Zolezzi v. Michelis, 86 Cal. App. 2d 827, 195 P. 2d 835; State v. Hoskins, 357 Mo. 377, 208 S. W. 2d 221; 14 Am. Jur., Cotenancy, § 16, p. 87; 86 C. J. S., Tenancy in Common, §§ 1, 2, and 5, pp. 361, 364; 2 Tiffany, Real Property (3d ed.), § 426, p. 212; Freeman on Cotenancy and

Partition, § 86, p. 144. A remainderman does not have the right of possession of the real estate during the existence of a life tenancy therein. In re Appeal of Delashmutt, *supra;* 33 Am. Jur., Life Estates, Remainders, Etc., § 219, p. 703.

The deceased was authorized to lease the subject of her tenancy for life and her interest in the fee of the land in question. The contract of a life tenant purporting to include the entire property affected by the life estate extends to and is effective as to all the interest therein of the person who is the life tenant. In Moffitt v. Reed, 124 Neb. 410, 246 N. W. 853, it is said: "The conveyance of a certain tract of land by the life tenant conveys to the grantee such estate as the life tenant holds * * *." See, also, LeVee v. LeVee, on rehearing, 93 Or. 379, 183 P. 773; 2 Tiffany, Real Property (3d ed.), § 426, p. 212. A remainderman may sell and convey or contract in reference to a remainder estate. Shearon v. Goff, 95 Neb. 417, 145 N. W. 855; Schuyler v. Hanna, 31 Neb. 307, 47 N. W. 932, 11 L. R. A. 321; 31 C. J. S., Estates, § 88, p. 100.

It is true that the death of a life tenant during the term terminates a lease existing between him and his lessee if the lease is confined to the life tenancy. If the lessee remains in possession of the property thereafter he becomes a tenant by sufferance. Guthmann v. Vallery, 51 Neb. 824, 71 N. W. 734, 66 Am. S. R. 475; Edghill v. Mankey, 79 Neb. 347, 112 N. W. 570, 11 L. R. A. N. S. 688; Annotation, 6 A. L. R. 1506. The deceased, the owner of one-fourth of the land in fee subject to her life estate, had the capacity and right to sell, convey, encumber, lease, or contract in reference to it as she desired. Her death did not terminate the lease given by her to appellant as to that interest. The lease was and is valid as to her remainder interest in the land.

Appellant was entitled after the death of deceased to go upon and remove from the land the wheat planted thereon in the fall of 1953, and to take the hay in stack belonging to him from the premises. Edghill v. Mankey,

supra; In re Estate of Mischke, 136 Neb. 875, 287 N. W. 760, 125 A. L. R. 277; Annotation, 6 A. L. R. 1506. Appellant may by virtue of the terms of the lease remove from the land "fence posts and wire installed" thereon by him. Appellee is liable to appellant for the damage done to the wheat on the land by operating a disk through the wheat field, and the amount of the damage should be determined by the district court and appellee should be ordered to pay it to appellant. The lease made to appellant by deceased is valid and existing as to the undivided one-fourth of the land owned by her. In the event the land is ordered sold in this case to accomplish a partition of it the value of the leasehold of appellant should be determined by the district court as of the date of the sale, and the amount thereof should be paid to appellant from the proceeds of the sale of the part of the land owned in fee by deceased at the time of her death.

The judgment granting appellant the right to enter the land, harvest and remove from it the wheat planted thereon in the fall of 1953, to remove and take from the land the hay in stack belonging to appellant, and to remove and take from the land the fence posts, wire, and fencing installed by him thereon by virtue of the terms of the lease should be and it is affirmed. The judgment in all other respects should be and it is reversed and the cause is remanded to the district court for Stanton County for further proceedings in harmony with this opinion.

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

LELA M. ASBRA ET AL., APPELLANTS, V. EVA DEAN ET AL., APPELLEES, PHILLIP F. VERZANI, INTERVENER-APPELLEE.
68 N. W. 2d 696

Filed February 25, 1955. No. 33679.

1. **Appeal and Error.** The provisions of a mandate of this court

should be considered as a whole in determining what was decided on appeal.

2. ———. When a mandate of the Supreme Court makes the opinion of the court a part thereof by reference, the opinion should be examined in conjunction with the mandate to determine the nature and terms of the judgment to be entered or the action to be taken thereon.

3. ———. When a mandate is in the same general language of the opinion in its directions to the lower court, reference may be made solely to the opinion to determine whether the lower court's decree is in accordance with the mandate.

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

Leamer & Graham, for appellants.

Mark J. Ryan, for intervener-appellee.

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

CARTER, J.

This is a suit by Lela M. Asbra and others to quiet their title to certain accretive lands in Dakota County. The appellee Verzani is an intervener in the action who claimed the title to a portion of the lands claimed by the plaintiffs. The trial court found for the intervener and plaintiffs appeal.

Various phases of this case have been before the court previously. See, Conkey v. Knudsen, 135 Neb. 890, 284 N. W. 737; State ex rel. Conkey v. Ryan, 136 Neb. 334, 285 N. W. 923; Conkey v. Knudsen, 141 Neb. 517, 4 N. W. 2d 290; Conkey v. Knudsen, 143 Neb. 5, 8 N. W. 2d 538. The present issue involves an interpretation of the opinion and mandate in the case last cited. The plaintiffs are the successors in title to Henry Francisco. The intervener is the successor in title to James P. Goodfellow.

It is the contention of the plaintiffs that they were awarded title to the tract in dispute by certain language in the mandate issued in Conkey v. Knudsen, 143 Neb.

5, 8 N. W. 2d 538. The language in the mandate relied upon by plaintiffs is as follows: "It is therefore considered, ordered and adjudged that the opinion of this court filed herein on May 29, 1942 and the judgment entered thereon be vacated and set aside and the district court be, and it hereby is directed to modify its judgment to provide that the title to the accretive land shown on exhibit 105 as parts of sections 12, 8 and 9 and lying east of the first chute and west of the Missouri river, above described, be vested in Henry Francisco and in all other respects said judgment of the district court is affirmed." Exhibit 105 was attached to and made a part of the decree of the district court.

The intervener relies upon the opinion of this court in Conkey v. Knudsen, 143 Neb. 5, 8 N. W. 2d 538, and an additional provision contained in the mandate issued in that case. That part of the foregoing opinion relied upon is as follows: "The trial court made no disposition of the accretive lands shown on the map as lying east of the first chute and west of the Missouri river, excluding that part awarded to James P. Goodfellow, or any lands south or east of it. We think the title to this land, shown on the map as parts of sections 12, 8 and 9, is in Henry Francisco by virtue of his adverse possession for the statutory period, and under the record in this case the decree should have so provided. We therefore direct the trial court to enter a supplemental decree awarding the title to these lands to the appellant Henry Francisco." The additional provision of the mandate relied upon by the intervener states: "* * * the court finds no error in that part of the judgment of said district court wherein division is made of the accretion land involved herein among the high bank owners nor in that part of said judgment determining claims of title by adverse possession in the respective parties, but does find that the title to the accretive land shown on exhibit 105 as parts of sections 12, 8, and 9 and lying east of the first chute and west of the Missouri river

excluding that part awarded to James P. Goodfellow or any lands south or east of it, is in Henry Francisco by virtue of his adverse possession thereof."

The mandate provided that "a certified copy of the opinion of the Court being hereto attached and made a part hereof, the following judgment was rendered: * * *." We have held where a mandate incorporates the opinion of the court by reference, they shall be construed together in determining the meaning of the mandate. In State ex rel. Johnson v. Hash, 145 Neb. 405, 16 N. W. 2d 734, we said: "It will be noted that the mandate makes the opinion of the court a part thereof by reference. Under such circumstances, the opinion of the court can properly be examined in determining the nature and terms of the judgment to be entered or action to be taken. This seems to be the rule where the opinion is made a part of the mandate or where the remand is with directions to enter a decree in conformity with the views 'herein expressed' or 'in accordance with the opinion.'" See, also, Master Laboratories, Inc. v. Chesnut, 157 Neb. 317, 59 N. W. 2d 571; Elliott v. Gooch Feed Mill Co., 147 Neb. 612, 24 N. W. 2d 561; Glissmann v. Bauermeister, 146 Neb. 197, 19 N. W. 2d 43.

An examination of the mandate sustains the position of the intervener. The mandate states that Francisco is the title owner of the accretive land shown on exhibit 105 as parts of Sections 12, 8, and 9 lying east of the first chute and west of the Missouri River, excluding the part awarded to James P. Goodfellow and all lands lying south and east of the Goodfellow lands. Consequently the triangular tract described in intervener's petition of intervention belongs to intervener and is expressly excluded from the tract now claimed by the heirs of Francisco. The contention of the plaintiffs, based on a subsequent provision of the mandate, overlooks the fact that although the words "excluding that part awarded to James P. Goodfellow" are not specifically used, the meaning is the same as if they had been in-

serted because of the use of the words "above described," such latter language referring to the description in which the exclusionary provision was inserted.

But even if it could be said that ambiguity existed in the language of the mandate, the opinion of the court clearly states that the described tract claimed by the heirs of Francisco does not include that awarded to Goodfellow. The applicable rule is: Where a mandate is in the same general language of the opinion in its directions to the lower court, reference may be made solely to the opinion to determine whether the lower court's decree is in accordance with the mandate. 5 C. J. S., Appeal and Error, § 1963, p. 1494; Muhlke v. Muhlke, 285 Ill. 325, 120 N. E. 770. The opinion clearly sustains the construction we have heretofore given the mandate. We necessarily conclude that the position of the intervener is the correct one and that the trial court was right in so holding.

AFFIRMED.

DONALD GRANGER, BY CHARLES E. GRANGER, HIS FATHER AND NEXT FRIEND, APPELLANT, V. TOM BYRNE ET AL., APPELLEES.

69 N. W. 2d 293

Filed March 4, 1955. No. 33617.

1. **Negligence: Trial.** When the evidence with relation to negligence is conflicting or such that minds may reasonably reach different conclusions therefrom with regard to its existence, the issue should be submitted to the jury for its determination.
2. **Trial.** In determining the sufficiency of evidence to sustain a verdict it must be considered most favorably to the successful party, any controverted fact resolved in his favor, and he must have the benefit of inferences reasonably deducible from it.
3. **Trial: Appeal and Error.** The verdict of a jury, based on conflicting evidence, will not be disturbed unless clearly wrong.
4. **Continuances.** When a party learns that an important witness is absent but nevertheless proceeds with the trial and takes

the chance of a verdict without seeking a continuance or delay, he is not entitled to new trial upon the ground of accident or surprise.

5. **Trial.** One may not complain of alleged misconduct of adverse counsel if, with knowledge of such alleged misconduct, he does not ask for a mistrial but consents to take the chances of a favorable verdict.
6. **Automobiles.** Testimony in the alternative that a motor vehicle was traveling at a speed of 45 or 50 miles per hour is only evidence that such vehicle was traveling not to exceed 45 miles per hour.
7. ———. Under the laws of this state the lawfulness of the speed of a motor vehicle, within the limits fixed by law, is determined by the further test of whether the speed was greater than was reasonable and prudent under the conditions then existing.
8. **Trial: Appeal and Error.** Instructions are to be considered together, to the end that they may be properly understood, and, if as a whole they fairly state the law applicable to the evidence when so construed, error cannot be predicated on the giving thereof.

APPEAL from the district court for Douglas County: L. ROSS NEWKIRK, JUDGE. *Affirmed.*

Mecham, Stoehr, Mecham & Hills, for appellant.

Gross, Welch, Vinardi & Kauffman, for appellees.

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

CHAPPELL, J.

Plaintiff Donald Granger, a minor, by Charles E. Granger, his father and next friend, brought this action against defendants Tom Byrne and John P. Byrne, seeking in two causes of action to recover damages for personal injuries sustained in a collision of automobiles. The accident occurred on October 15, 1952, about 8:30 p. m. at the intersection of Seventy-second and Dodge Streets, west of Omaha. At that time, Donald Granger, 15 years of age, hereinafter called plaintiff, was a guest passenger in a 1932 or 1934 Plymouth coupé, hereinafter designated as the Clark car, driven by James W.

Clark, 16 years old, hereinafter called plaintiff's driver. At the same time Tom Byrne, 19 years of age, hereinafter called defendant, was driving a 1942 Ford coupé, a family car belonging to his father, defendant John P. Byrne. After trial upon and submission of the issues of alleged negligence and damages to a jury, it returned separate verdicts finding for defendants, and judgment was rendered thereon.

Plaintiff's motion for new trial was overruled and he appealed, assigning and arguing in substance: (1) That the verdicts were not sustained by the evidence; (2) that the trial court erred in failing to admit evidence offered by plaintiff which prevented him from having a fair trial; and (3) that the trial court erred in failing to instruct the jury upon plaintiff's theory of the case and in giving instruction No. 10. We conclude that the assignments should not be sustained.

At point of accident Dodge Street, a paved, almost level, four-lane highway, 42 feet wide, extends east and west to and from Omaha. It has two lanes south of the center line for eastbound traffic, and two lanes north of the center line for westbound traffic. Two outside lanes are each made of concrete, 11 feet wide. Two inside or passing lanes are each 10 feet wide and made of brick. There is a marked center street line between them. At point of accident, Seventy-second Street, a paved, concrete, almost level two-lane street, 18 feet wide with a marked center line, extends north and south intersecting Dodge Street. Each corner of the intersection has a 50-foot radius curve. It was stipulated in the presence and hearing of the jury that east of the center line of Seventy-second Street was within the city of Omaha, and that west of the center line of Seventy-second Street was outside the city but in Douglas County. It was likewise stipulated in the presence and hearing of the jury: "* * * that the legal speed limit on Dodge Street east of the center of 72nd is 35 miles per hour, and that the legal speed limit on Dodge Street

west of the center of 72nd is 45 miles per hour." Concededly, the collision occurred west of the center line of Seventy-second Street, outside the city limits. Therefore, by analogy from Tempero v. Adams, 153 Neb. 331, 44 N. W. 2d 604, the maximum legal speed limit at point of accident was 45 miles per hour.

Traffic at the intersection was controlled by automatic traffic lights. There were filling stations on the northeast, southeast, and southwest corners, but there was nothing except a traffic signal light on the northwest corner. The intersection was well lighted, and the view of those approaching from the east and west was unobstructed. Lights of both cars were turned on.

There is competent evidence from which it could have been reasonably concluded that plaintiff's driver approached the intersection from the west on a green light while driving in his own north lane for eastbound traffic nearest the center of Dodge Street; that some distance, 100 to 200 feet from and up to the intersection, plaintiff's driver made a proper hand signal for a left-hand turn north into Seventy-second Street; that during the last 5 or 10 feet he slowed up, angled slightly northeast, and stopped south of the center line of Dodge Street and about 4 feet west of the center line of Seventy-second Street; that defendant approached from the east, driving a distance of about 150 feet from the intersection in plaintiff's lane, south of the center line of Dodge Street, without keeping a proper lookout, at a speed of 45 miles an hour; and that just before the collision he swerved to the right, but the left front fender of defendant's car struck the right front fender of Clark's car, turning it around and throwing plaintiff out upon the pavement, from which he suffered personal injuries and damages.

On the other hand, it could have been reasonably concluded, which the jury evidently did, that just prior to the accident, as defendant approached the intersection from the east on a green light, at about 30 miles an

hour, driving in his own south lane north of the center line of Dodge Street, he noticed the Clark car driving toward the east but south of the center line of Dodge Street in his own north lane for eastbound traffic. Defendant heard no horn signal, and looked but saw no hand signal given by plaintiff's driver or flash of blinker lights indicating that he was going to turn left. Defendant took his foot off the accelerator and slowed up a little as he came into the intersection, but just before he approached the Clark car west of the center line of Seventy-second Street, it turned suddenly into the path of defendant's car, whereupon defendant swerved to the right to avoid collision, but the left front fender of his car and the right front fender of the Clark car collided in defendant's driving lane at a point 3 or 4 feet west of the center line of Seventy-second Street and north of the center line of Dodge Street. The impact forced Clark's car around in a northwesterly direction so that after the accident it stopped, headed in a northerly direction, cross-wise of Dodge Street, with a little more than half of it north of the center line thereof, and with all of it several feet west of the center line of Seventy-second Street.

After the impact defendant's car proceeded to the northwest corner of the intersection and stopped at the curb. There were visible skid marks on the pavement extending toward the northwest from point of impact directly up to within a few feet of the rear tires on defendant's car. The skid marks on the left side were much heavier and more clearly visible. Oral evidence, supported by photographs, taken by police officers a short time after the accident, before either car was moved, demonstrated the skid marks and the respective positions of the cars after the accident.

It is elementary that when evidence with relation to negligence is conflicting or such that minds may reasonably reach different conclusions therefrom with regard to its existence, the issue should be submitted

to the jury for its determination. Further, as held in Bolio v. Scholting, 152 Neb. 588, 41 N. W. 2d 913: "In determining the sufficiency of evidence to sustain a verdict it must be considered most favorably to the successful party, any controverted fact resolved in his favor, and he must have the benefit of inferences reasonably deducible from it.

"The verdict of a jury, based on conflicting evidence, will not be disturbed unless clearly wrong." In the light of such rules and the evidence heretofore set forth, we conclude that the issues of negligence were questions for the jury and that the verdicts of the jury were amply supported by competent evidence. Therefore, the first assignment has no merit.

After the accident, a young lawyer associated in the same firm with plaintiff's counsel, was employed to investigate the accident. In such capacity, while he was accompanied by an official court reporter, defendant Tom Byrne made a statement with relation to the circumstances of the accident which was transcribed by the reporter. At the trial, the reporter was ill and could not be present. In that connection, plaintiff argued that he was surprised and could not lay a foundation for admission of the statement, thus he did not have a fair trial. The record discloses, however, that plaintiff proceeded with the trial without making any application for a continuance or delay of the trial, and as a matter of fact, he never even offered the statement itself in evidence. As early as Goracke v. Hintz, 13 Neb. 390, 14 N. W. 379, this court concluded that when a party learns that an important witness is absent but nevertheless he proceeds with the trial and takes the chance of a verdict without seeking a continuance or delay, he is not entitled to new trial upon the ground of accident or surprise. The record also discloses that plaintiff was given ample opportunity to cross-examine defendant, and also called as his own witness the young lawyer who was present when defendant's statement was taken.

Such witness was permitted by the trial court to testify at length that relevant admissions were made in his presence by defendant. Plaintiff's contention has no merit.

Plaintiff also argued that in connection with the examination of such witness, defendant's counsel was guilty of misconduct prejudicial to plaintiff's rights by the use of improper language in the making of objections. The record discloses that plaintiff's counsel did not ask for a mistrial at the time of such alleged misconduct or thereafter during the trial, but took the chances of a favorable verdict. He cannot now complain. The applicable and controlling rule is that one may not complain of alleged misconduct of adverse counsel if, with knowledge of such alleged misconduct, he does not ask for a mistrial but consents to take the chances of a favorable verdict. Triplett v. Lundeen, 132 Neb. 434, 272 N. W. 307; Long v. Crystal Refrigerator Co., 134 Neb. 44, 277 N. W. 830; Dunn v. Omaha & C. B. St. Ry. Co., 139 Neb. 765, 298 N. W. 741; In re Estate of House, 145 Neb. 670, 17 N. W. 2d 883. The second assignment should not be sustained.

Plaintiff's petition alleged that defendant Tom Byrne was negligent, to wit: (a) In failing to keep a proper lookout; (b) in failing to accord the car in which plaintiff was a passenger one-half of the useable portion of the highway; (c) in driving said car upon the wrong or left side of the highway; (d) in driving said car at a high and unlawful rate of speed, to wit: 45 miles per hour, contrary to the statutes of the State of Nebraska; and (e), (f), and (g), in failing to slow, swerve, or stop said car and thus avoid colliding with the car in which plaintiff was riding. Instruction No. 1 given by the trial court submitted all of such allegations. However, with reference to plaintiff's allegation (d) it simply said: "In driving said Ford car at a high and unlawful rate of speed" without specifically including the words "to-wit: 45 miles per hour, contrary to the Statutes of the

State of Nebraska," which had been stipulated as the legal speed limit at point of accident.

In that connection, the only evidence directly adduced by plaintiff with regard to defendant's speed was that he was driving "at 45 or 50 miles per hour" as he came towards plaintiff immediately prior to the accident. That testimony is only evidence that defendant's motor vehicle was traveling not to exceed 45 miles per hour. Rich v. Eldredge, 106 N. J. Law 181, 147 A. 384.

Instructions Nos. 4 and 5, given by the trial court, properly defined preponderance of evidence, proximate cause, negligence, ordinary care, and intersection. Instruction No. 8, correctly and favorably to plaintiff, instructed upon the question of imputed negligence. It then properly stated and applied rules of law with relation to concurring negligence and proximate cause applicable in guest cases.

Instruction No. 9 given by the trial court then properly set forth that it was: "* * * the general duty of the driver of an automobile that he should keep a reasonably careful lookout and have his car under such reasonable control as will enable him to avoid collision with other vehicles, assuming that the drivers thereof will exercise due care.

"Reasonable control by drivers of motor vehicles is such as will enable them to avoid collision with other vehicles operated without negligence in streets or intersections."

Instruction No. 10 then said: "To assist you in determining the issue of negligence in this case, the applicable Statutes of the State of Nebraska provide, in substance, as follows:

"No person shall operate a motor vehicle on any highway outside of a city or village at a rate of speed greater than is reasonable and proper, having regard for the traffic and use of the road and the condition of the road, nor at a rate of speed such as to endanger the life or limb of any person.

"In crossing an intersection of highways, the driver of a vehicle shall at all times cause such vehicle to travel on the right half of the highway unless such right half is obstructed or impassable.

"Drivers of vehicles proceeding in opposite directions shall pass each other to the right, each giving to the other at least one half of the main traveled portion of the roadway as nearly as possible.

"The driver of a vehicle when intending to turn to the left at an intersection shall approach such intersection in the lane for traffic to the right of and nearest to the center line of the highway, and in turning shall pass beyond the center of the intersection, passing as closely as practicable to the right thereof before turning such vehicle to the left. The center of the intersection means the meeting point of the medial lines of the highways intersecting one another.

"The driver of any vehicle traveling at an unlawful speed shall forfeit any right of way which he might otherwise lawfully have. The driver of a vehicle approaching but not having entered an intersection shall yield the right of way to a vehicle within such intersection and turning therein to the left across the line of travel of such first mentioned vehicle, provided the driver of the vehicle turning left has given a plainly visible signal of intention to turn.

"You are instructed that the violation of any of said Statutes is not in and of itself negligence as a matter of law, but the violation thereof is evidence of negligence which you should consider together with all the other evidence in the case to determine whether or not negligence has been proven."

It thus appears without question that plaintiff's theory of the case was fully and fairly presented to the jury by appropriate instructions, unless, as argued by plaintiff, the first paragraph of instruction No. 10 did not do so.

In that connection, plaintiff argued that such first

paragraph of instruction No. 10 erroneously failed to include applicable and material statutory limitations and qualifications contained in section 39-7,108, R. R. S. 1943. He cites and relies upon Hamblen v. Steckley, 148 Neb. 283, 27 N. W. 2d 178, and Harding v. Hoffman, 158 Neb. 86, 62 N. W. 2d 333. However, we believe that such cases are entirely distinguishable from that at bar. It will be recalled plaintiff alleged that defendant was driving "45 miles per hour, contrary to the Statutes of the State of Nebraska." Plaintiff did not allege that defendant had violated any speed ordinance of the city of Omaha. Plaintiff stipulated in the presence and hearing of the jury that 45 miles per hour was the legal speed limit. Further, he adduced no evidence of speed except that defendant was driving 45 miles per hour. The accident concededly happened outside the city limits, so that no city ordinance had any application. In any event, plaintiff tendered no instruction covering the subject matter about which he now complains.

In Krepcik v. Interstate Transit Lines, 154 Neb. 671, 48 N. W. 2d 839, this court said: "The provision in section 39-7,108, R. S. Supp., 1949, that 'No person shall drive a vehicle on a highway at a speed greater than is reasonable and prudent under the conditions then existing' is the basic speed rule. Other provisions following in the section are specific speed restrictions based on the existence of the fact situation or situations mentioned in the act. Folken v. Petersen, 140 Neb. 800, 1 N. W. 2d 916; Tews v. Bamrick, 148 Neb. 59, 26 N. W. 2d 499; Hamblen v. Steckley, 148 Neb. 283, 27 N. W. 2d 178." Clearly, the first paragraph of instruction No. 10 gave the basic speed rule and even more.

In Hamilton v. Omaha & C. B. St. Ry. Co., 152 Neb. 328, 41 N. W. 2d 139, this court said: "The next assignment (No. 24) charges that the court erred in refusing to give a tendered instruction embodying parts of section 39-7,108, R. S. Supp., 1949. The following from the

instruction was proper on the record and should have been given: No person shall drive a vehicle on a highway at a speed greater than is reasonable and prudent under the conditions then existing. Thurow v. Schaeffer, 151 Neb. 651, 38 N. W. 2d 732.

"The remainder of the instruction relates to the rate of speed of an automobile in a residence district of a city. The statute provides that the rate shall be 25 miles an hour unless a higher rate is specifically permitted by ordinance of a city or village. No information was given on the trial as to whether or not the statutory rate or one fixed by ordinance of the city of Omaha was applicable, hence it was not error to refuse to give this part of the instruction." Also, in Tews v. Bamrick, 148 Neb. 59, 26 N. W. 2d 499, this court held: "Under the laws of this state the lawfulness of the speed of a motor vehicle, within the limits fixed by law, is determined by the further test of whether the speed was greater than was reasonable and prudent under the conditions then existing." The trial court complied with the foregoing rules in the case at bar.

In Thurow v. Schaeffer, 151 Neb. 651, 38 N. W. 2d 732, this court held: "The trial court has the duty to instruct the jury on issues presented by the pleadings and evidence, whether requested to do so or not, and a failure so to do constitutes prejudicial error.

"Where the charge to a jury in a particular respect contains a correct general statement of the law error cannot be predicated on a failure to give a more specific instruction in the absence of a request therefor." See, also, Plumb v. Burnham, 151 Neb. 129, 36 N. W. 2d 612.

As recently as Peake v. Omaha Cold Storage Co., 158 Neb. 676, 64 N. W. 2d 470, this court reaffirmed that: "Instructions are to be considered together, to the end that they may be properly understood, and, if as a whole they fairly state the law applicable to the evidence when so construed, error cannot be predicated on the giving thereof."

In the light of the foregoing rules and the evidence, facts, and circumstances presented in this case we conclude that instruction No. 10 was not prejudicially erroneous. We are convinced that the jury could not have been confused or misled in any manner with regard to issues as presented to them for their determination. The third assignment should not be sustained.

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

AFFIRMED.

GERTRUDE POWELL, APPELLEE, V. A. VAN DONSELAAR, APPELLANT.

68 N. W. 2d 894

Filed March 4, 1955. No. 33634.

1. **Trial: Appeal and Error.** An affidavit used on the hearing of an issue of fact must be offered in evidence in the trial court and preserved in and presented by a bill of exceptions to be available for consideration in this court.
2. **New Trial.** The requisites of a motion for a new trial are specified by statute. The causes for a new trial may be stated in a motion therefor in the language of the statute without other particularity.
3. ———. The words unavoidably prevented in section 25-1143, R. R. S. 1943, signify something that was beyond the ability of the person affected to have avoided. An event or a result is unavoidable which human prudence, foresight, and sagacity cannot prevent.
4. **New Trial: Appeal and Error.** A motion for a new trial not filed within the time specified by statute is a nullity and does not enlarge the time within which a notice of appeal must be filed after the rendition of judgment in a cause.
5. **Appeal and Error.** This court cannot have jurisdiction of an appeal from the district court, unless as required by section 25-1912, R. R. S. 1943, a notice of appeal is filed in the office of the clerk of the district court, and the docket fee is deposited with the clerk within 1 month after rendition of the judgment or within 1 month from the denial of a motion for a new trial timely filed in the cause.

6. ———. This court takes judicial notice of the mandatory requirements of the statute as to the necessity and time of filing a notice of appeal, and the effect of failure to comply with them.

APPEAL from the district court for Dakota County: SIDNEY T. FRUM and LYLE E. JACKSON, JUDGES. *Appeal dismissed.*

D. Van Donselaar and *Paul W. Deck*, for appellant.

Leamer & Graham, for appellee.

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

BOSLAUGH, J.

The matters related by appellee as a basis for the relief she asks are that she was the owner and in possession of Lot 37, Martin's Subdivision, as platted, in South Sioux City; that there was a fence along the east line thereof; that appellant without the knowledge or consent of appellee tore down and removed the fence and refused to restore it; that appellant had trespassed upon the property of appellee and that he would continue to do so; that appellant had commenced the construction of a fence upon the lot of appellee; that he refused to remove it; and that unless appellant was enjoined he would complete the fence upon the property of appellee to her irreparable damage. She asked the court to enjoin the appellant from trespassing upon her lot; that appellant be compelled to replace on the east line of the lot of appellee the fence he destroyed in the condition it was before it was displaced; and that if he did not do so she recover judgment against him for $250 damages.

The claims of appellee were denied by appellant and he alleged: That he took possession of Lot 36 of the subdivision which adjoins Lot 37 thereof on the east of it under claim of title based upon a quitclaim deed about December 12, 1948; that he received a deed to Lot 36 from the county treasurer about July 2, 1952,

which he recorded in the records of the county February 3, 1953; that for more than 10 years immediately prior to the commencement of this action he and his grantors had been in the open, exclusive, notorious, and adverse possession of the lot; that for more than 15 years there was a fence between Lot 36 and Lot 37, and the owner of the latter had until about March 1949, occupied, used, and claimed the ground as owner eastward to the fence; that all persons in possession and occupancy of Lot 36 had claimed it as far westward as the fence and it was and remained the division line; that about March 1, 1948, the fence was removed by Dean Cornell and he erected a fence across Lot 36 about 10 feet east of the location of the original fence; that about June 1952, appellant removed the fence constructed by Dean Cornell and he offered, has been, and is now willing to rebuild the fence on the location of the original fence; that appellant is the owner of Lot 36 of the subdivision and it extends westward to the line where the original fence was located; that he and his grantors have had open, exclusive, notorious, and adverse possession of the lot; and that appellee is estopped to claim the right of possession of any land east of the location of the original fence or to claim that the location of the original fence was not the east "perimeter" of Lot 37.

The district court found generally for appellee; that appellant without reason or authority removed the fence appellee had installed along the east line of Lot 37, Martin's Subdivision of South Sioux City; that appellee was the owner of the lot as originally laid out and platted; that she had a tax deed to the lot which had been recorded in the public records of the county for more than 5 years and it vested absolute title thereto in her; and that appellee was entitled to have an order requiring appellant within 60 days to replace the fence on the east line as shown and described in a survey of the property introduced in evidence during the trial in

the same condition as the fence was at the time it was removed by appellant, and if he failed to do so appellee should have judgment against appellant for $75, the value of the fence. Judgment was rendered and entered in harmony with the findings.

The judgment was rendered and entered April 7, 1954. The motion for new trial made by appellant was filed 14 days after the judgment was rendered. The procedure for obtaining a new trial of a cause is statutory. The requirement of the statute is that application for a new trial must be made within 10 days after the decision is rendered except where unavoidably prevented or for the cause of newly discovered material evidence. § 25-1143, R. R. S. 1943.

A cause for a new trial stated in the motion was that appellant had since the trial discovered evidence material to his defense which he could not with reasonable diligence have discovered and produced at the trial. The proof intended to establish this specification of the motion was an affidavit of appellant and a verified pleading entitled "AMENDMENT TO DEFENDANT'S MOTION FOR NEW TRIAL." The affidavit and the pleading appear in the transcript. The record does not show that either of them was presented to the trial court, or offered or introduced in evidence. The affidavit or the pleading was not made a part of and does not appear in the bill of exceptions. An affidavit attached to and filed with a motion for a new trial and exhibited by the transcript but not offered or put in evidence in the district court and included in and presented by a bill of exceptions may not be examined or considered by this court. Such affidavit to be available for use on appeal to this court must be offered or received in evidence and made a part of the bill of exceptions.

In Mulder v. State, 152 Neb. 795, 42 N. W. 2d 858, it is said: "On the other hand, as shown by the transcript, both such matters of alleged misconduct were factually urged by affidavit filed in support of defend-

ant's motion for new trial. However, such affidavit was never offered in evidence and does not appear in the bill of exceptions. * * * it is of no avail to attach the affidavits to a motion for a new trial made a part of the transcript. They must be offered and received in evidence to support the contention, and as such made a part of the bill of exceptions." In Darlington v. State, 153 Neb. 274, 44 N. W. 2d 468, it is said: "It has long been a mandatory requirement in this jurisdiction * * * that affidavits used as evidence on the hearing or trial of any issue of fact must have been, as a prerequisite to examination of them in this court, identified and offered in evidence in the trial court and embodied in a bill of exceptions." See, also, State ex rel. Nebraska State Bar Assn. v. Pinkett, 157 Neb. 509, 60 N. W. 2d 641; Higgins v. Loup River Public Power Dist., 157 Neb. 652, 61 N. W. 2d 213.

The statute provides that when a motion for new trial contains a claim of newly discovered evidence as a cause for a new trial the truth of it must be sustained by affidavit. § 25-1144, R. R. S. 1943. The factual showing required can only be considered in this court when it is put in evidence in the district court and preserved in and presented by a bill of exceptions. The claim of appellant in the motion for a new trial of newly discovered evidence is of no significance and did not extend the time beyond the 10-day limitation of the statute within which to file a motion for a new trial in this case.

It is stated in the motion for a new trial that appellant was unavoidably prevented from making the motion within 10 days after the decision of the case because of the illness and disability of his counsel from April 5 to April 17, 1954. This was attempted to be established in part by the statement of the appellant in his affidavit above referred to that his attorney was ill from April 5 to April 17, 1954, and unable to prepare and file the motion sooner. This may not be considered on this

appeal for the reasons above recited. There was admitted in evidence and placed in the bill of exceptions an affidavit of a doctor the substance of which is that the counsel of appellant was at the office of the doctor in Sioux City, Iowa, April 6, 1954, and complained of a soreness in his abdominal region and of a nervous condition; that the doctor examined him, and advised that he discontinue work, requiring mental or physical strain, for 3 weeks and asked him to call on the doctor again if he was not improved at the end of that time; and that the attorney was at the doctor's office after 3 weeks and said he was greatly improved.

The record is insufficient to show that appellant was unavoidably prevented from timely filing a motion for a new trial in this case. There is no evidence of total disability of the counsel or what activity he was capable of performing from 1 day before the rendition of the decision until "after three weeks" later, except he filed a motion for a new trial 14 days after the decision. This is an equity case. A motion for a new trial was not indispensable to an appeal from the district court to this court and a trial de novo on its merits. Molczyk v. Molczyk, 154 Neb. 163, 47 N. W. 2d 405. Jurisdiction could have been conferred on this court by the filing of a notice of appeal and deposit of the docket fee within 1 month after the judgment was rendered. The requisites of a motion for a new trial are statutory. Greenberg v. Fireman's Fund Ins. Co., 150 Neb. 695, 35 N. W. 2d 772. The causes for a new trial may be stated in a motion therefor in the language of the statute without further or other particularity. State v. Kubik, 159 Neb. 509, 67 N. W. 2d 755. The preparation of such a motion or of a notice of appeal would not have required or produced either "mental or physical strain." Counsel for appellant consulted the doctor, was advised to refrain during 3 weeks from activity that would cause "mental or physical strain," and to see the doctor again at the end of that time if the attorney had not

improved. There is no information in the showing that he had the services of the doctor again. It only states that he was at the office of the doctor after the 3 weeks. The doctor in his affidavit tells nothing about what was the cause of any indisposition that afflicted the attorney of appellant. He did not even assert as a conclusion that anything prevented action of the attorney such as preparing and filing or having prepared and filed for him a motion for a new trial or a notice of appeal in the case during the whole or in fact any part of the 3 weeks mentioned therein. As to being "unavoidably prevented" there is no pretense of it on the basis of what the affidavit of the doctor sets forth. Appellant did not attempt to justify his default by a claim that other counsel could not have been procured to have prepared and filed a motion for a new trial or a notice of appeal.

An event or a result is unavoidable which human prudence, foresight, and sagacity cannot prevent. The words of the statute "unavoidably prevented" signify something that was beyond the ability of the person affected to have avoided. Fernwood Mining Co. v. Pluna, 138 Ark. 193, 211 S. W. 159; Commonwealth v. Fidelity & Columbia T. Co., 185 Ky. 300, 215 S. W. 42; Crystal Spring Distillery Co. v. Cox, 49 F. 555; E. P. Barnes & Brother v. Eastin, 190 Ky. 392, 227 S. W. 578; 3 Bouvier's Law Dictionary (3d Rev.), p. 3350; 65 C. J., Unavoidable, § 1, p. 1194.

The case of In re MacLauchlan, 9 F. 2d 534, discussed the words unavoidably prevented as they appeared in a section of the bankruptcy act as follows: " 'If it shall be made to appear to the judge that the bankrupt was unavoidably prevented from filing it (i.e., his petition for discharge) within such time (i.e., said "next twelve months"), it may be filed within, but not after, the expiration of the next six months.' " In that case it is said: "A result that is 'unavoidable' need not be absolutely inescapable; yet it is a very strong word, and such

limitations as Maule, J., suggested for the possibility of retrieving a shilling from the Thames are about all that can be suggested. Result is that there must be a most compelling outside force, precluding a man by hypothesis honest and diligent from filing his petition, before any bankrupt can assert that he was 'unavoidably prevented'; and we take judicial notice of the fact that drafting and filing a petition for discharge is a simple, short, and inexpensive affair."

The proof offered by appellant and available for consideration on this appeal did not establish that he was unavoidably prevented from filing a motion for a new trial within 10 days after the decision was rendered. A motion for a new trial not filed within the time specified by the statute is a nullity and does not affect or enlarge the time within which a notice of appeal must be filed after the rendition of the judgment in the cause to confer jurisdiction on this court of an appeal in the case. Frenchman-Cambridge Irr. Dist. v. Ferguson, 154 Neb. 20, 46 N. W. 2d 692; Molczyk v. Molczyk, *supra*.

The notice of appeal was filed June 5, 1954. This was 59 days after decision was rendered. A notice of appeal must be filed in the office of the clerk of the district court in which the judgment is rendered within 1 month after the judgment is rendered or the denial of a motion for a new trial timely filed to confer jurisdiction on this court of an appeal in the cause. § 25-1912, R. R. S. 1943. In Sloan v. Gibson, 156 Neb. 625, 57 N. W. 2d 167, it is said: "The notice of appeal must be filed in the office of the clerk of the district court and the docket fee must be deposited with the clerk within 1 month after the rendition of the judgment, if there is no motion for a new trial, or within 1 month from the overruling of a motion for a new trial timely filed in the cause or there can be no appeal from the district court to this court. * * * This is a fundamental and mandatory rule. This court must take judicial notice of its application in a case in which it has not acquired jur-

isdiction." See, also, Molczyk v. Molczyk, *supra*.

There has been conferred upon this court no jurisdiction of this appeal. It has no authority to hear and determine the matters attempted to be presented.

This appeal should be and it is dismissed and the costs should be taxed to appellant.

APPEAL DISMISSED.

MAUD HOPKINS, APPELLANT, V. WILLIAM HILL, APPELLEE.
68 N. W. 2d 678

Filed March 4, 1955. No. 33635.

1. **Easements: Adverse Possession.** Where a claimant has shown open, visible, continuous, and unmolested use of land for a period of time sufficient to acquire an easement by adverse user, the use will be presumed to be under a claim of right. The owner of the servient estate, in order to avoid acquisition of easement by prescription, has the burden of rebutting the prescription by showing the use to be permissive.
2. ———: ———. Acquiescence on the part of the owner which is necessary to acquisition of a prescriptive easement means passive assent or submission, quiescence, consent by silence.
3. ———: ———. If the use of an easement has been open, adverse, notorious, peaceable, and uninterrupted, the owner of the servient tenement is charged with knowledge of such use, and acquiescence in it is implied.
4. ———: ———. The extent and nature of an easement is determined from the use actually made of the property during the running of the prescriptive period.
5. ———: ———. The term "exclusive use" does not mean that no one has used the roadway except the claimant of the easement. It simply means that his right to do so does not depend upon a similar right in others.

APPEAL from the district court for Frontier County: VICTOR WESTERMARK, JUDGE. *Affirmed.*

Schroeder & Schroeder, for appellant.

William S. Padley, for appellee.

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

MESSMORE, J.

The plaintiff Maud Hopkins brought this action in the district court for Frontier County against William Hill, defendant, to enjoin the defendant from going on or over a strip of ground in the southeast quarter of Section 24, Township 7 North, Range 26 West of the 6th P. M., in Frontier County, owned by the plaintiff. The trial court rendered judgment in favor of the defendant and dismissed the plaintiff's petition. The plaintiff filed a motion for new trial which was overruled. From the overruling of the motion for new trial, the plaintiff perfected appeal to this court.

We will hereinafter refer to the parties as they were designated in the district court.

The record discloses that prior to 1906 Heber Boyle became the owner of the north half of the southwest quarter of Section 24, Township 7 North, Range 26 West of the 6th P. M., in Frontier County. In 1906 he moved to Farnam, Nebraska, and rented this land. About January 1, 1919, Heber Boyle and his brother George Boyle purchased the west half of the east half, and the east half of the west half, of Section 25, Township 7 North, Range 26 West, in Frontier County, Nebraska. Heber Boyle married Stella Boyle in 1918, and they lived in Farnam until 1947 when they moved to Gothenburg. Heber Boyle died in 1948, and Stella Boyle, his widow, became a life tenant of the land in Section 24 as above described. George Boyle died prior to 1942 and left the land in Section 25 as above described to his heirs who sold it to Stella Boyle on February 24, 1943. At the time of the commencement of this action she was the life tenant of all this land, having conveyed certain parts thereof to her children Harold, Dale, and Maxine, reserving a life estate to herself.

The record also discloses that Maud Hopkins is the owner and in possession of the southeast quarter of Section 24, Township 7 North, Range 26, and the west half of the west half of Section 19, Township 7 North, Range

25, and has been since September 18, 1947; that her husband, William Hopkins, was the owner and in possession of said southeast quarter of Section 24 from December 7, 1915 to September 18, 1947, the date of his death, and of the said west half of the west half of Section 19 from May 3, 1918 to September 18, 1947; that Maud Hopkins is the owner of the east half of the east half of Section 25, Township 7 North, Range 26, and that this property was conveyed to her husband, William Hopkins, on February 24, 1915, by warranty deed; that the tenants on the Boyle land lived on the improvements on the north half of Section 24, and in farming land in Section 25 the tenants moved their machinery and crops along the west side of a fence running north and south about 579 feet west of the east line of Section 24 to the south line of said Section 24 whereupon they went over a strip along the immediate south side of said section a distance of approximately 605 feet to the northeast corner of the Boyle land in Section 25; and that said roadway was approximately 15 feet in width. When the Hopkins purchased this land the roadway was in existence, they knew of its existence, and they continued to know of its existence and its use by the tenants of the Boyle property at all times thereafter.

From an analysis of the record, there are no other roads or means for transporting farm machinery of different types to the Boyle land in Section 25. The record shows that it would be impracticable and impossible to transport farm machinery by any other road, and the strip of road in question is the only means of ingress and egress to and from Section 24 to the Boyle land in Section 25. The evidence also discloses that from at least 1932 to the time of trial the strip of land in question had been substantially in the same condition and the same width; that it was kept up by Maud Hopkins and her sons Clifford and Leland and not by any other party or parties; that prior to 1952 there were dikes built up to the fence along this strip of land; and that in 1952 ter-

races about 18 inches in height were built up to the fence along the said strip of land by the Hopkins. The record discloses further that the tenants on the Boyle land have used this means of transporting farm machinery of various types from Section 24 to Section 25 over this strip of land. There were no conversations with the Hopkins with reference to moving such machinery over this strip of land, and no asking of permission to do so. Apparently, such machinery and equipment have been moved over this strip of land for a period of 20 years.

The management of the Boyle land has been taken care of by Stella Boyle since 1940. Prior to the death of Heber Boyle and George Boyle they supervised the management of this land. Stella Boyle has not lived on Section 24 except during the period of the lease of William Hill. This written lease is from March 1, 1953 to March 1, 1956.

It appears from the record that the tenant Charlie Johnson lived on the Boyle land and farmed Section 25 from 1924 to 1933. He was succeeded by the tenant Milo Nickerson who farmed this land until about 1936 when Charlie Johnson returned and again became the tenant on the land from 1936 to 1942. He was succeeded by his nephew Clarence Johnson who farmed the Boyle land from 1943 until he moved off in March 1953.

Prior to 1943, Clarence Johnson lived north of the Boyle land for a period of 3 years. He testified that he had been acquainted with the roadway in question since 1938 or 1939. During the period of time that he was a tenant on the Boyle land he moved equipment such as haying equipment, drills, tractors, and a combine from Section 24 to Section 25 to attend to the farming operations in Section 25. No one ever interferred with his use of this roadway during that period of time. He did ask the consent of Hopkins to use the roadway to harvest his crop. This was after his tenancy had expired and "No Trespassing" signs were placed in the

roadway entrance. He obtained consent to do so. It is apparent that no one interferred with any other tenants' use of the road.

Phillip Johnson, the father of Clarence Johnson, testified that he had worked for Charlie Johnson at intervals from 1936 to 1942, and that he had driven farm machinery over this road without interference from any person. He further testified that the road was a well-defined road; that he could see the tracks; and that he was able to get a combine over the road without difficulty except for the dams (dikes) which he had to cross. He also assisted Clarence Johnson from 1947 to 1952 in doing farm chores. He noticed the turnrows used by the Hopkins on this road, and also the fact that terracing had been done by Leland Hopkins and was supervised by Dale Banzhaf who was in the business of terracing farm land.

Henry Derra testified that in 1947 he was a farmer and lived 6 or 8 miles distant from the Boyle land. He was a road overseer for 7 or 8 years. During that time he was in and around the Hopkins and Boyle lands. He moved into that vicinity in 1932, went across the road in question to the Boyle land, and followed this road at all times that he lived there. He went through the Boyle land to the south to a regular highway designated as the route he took to go to Stockville, Bartley, Indianola, McCook, and Curtis. This road was open at all times and was well traveled. He further testified that his neighbors who lived north, east, and west used this road; that he knew that the tenants of Boyles, Nickerson and Charlie Johnson, used the road in their farming operations; and that none of the Hopkins ever talked to him, nor were any complaints made to him in regard to using the road, and no signs prohibiting the use of the road were ever put up. From the looks of the road it was well maintained. In 1932 it was used for transportation. At that time he noticed no turnrows or dikes on the Hopkins land.

Leo Mowrey testified that he had been acquainted in the vicinity of the Boyle lands since 1938, and that he worked for Charlie Johnson in 1938 and 1939 doing chores in the winter. Charlie Johnson farmed Section 25, and he helped haul feed over the road to some cattle in Section 25. The road was in the same condition as when he worked for Charlie Johnson, the only difference being that the terraces were a little higher. Prior to that he crossed the dikes to go over the road. He had no conversation with any of the Hopkins family with reference to whether or not he could use the road as an employee of Johnson. The road was used regularly to go to Section 25 for the purpose of shucking corn, and they had cattle there and took wagons over this road. In August 1953, he took a hay baler over the road in question. At that time he was employed by William Hill, the present tenant. In doing so, he did not ask for permission. The road was in the same location as it was in 1938. He further testified that there was a turnrow on this road.

Louis Kline testified that he previously lived in the northeast quarter of Section 23 of the Boyle land where the buildings are located and had resided there from 1932 to 1948. In 1934 he tended some corn for George Boyle on Section 25. He helped thresh on occasions between such dates. He first went across the strip of land in question in 1932 when the land was broken out. The road was in the same location and condition when he went over it "last fall" as it was in 1932. He never obtained permission from the Hopkins, and no one told him that he did not have a right to go through there.

Clifford McMichael, a neighbor of the Hopkins and Boyles who lives just east of the Boyle and Hopkins' lands, examined exhibit No. 1. He testified that he had lived in the vicinity for 64 years and had known the road in question since he was 12 years of age. As far as he knew, the road had always been in the same location. He had not been over it since Nickerson was a tenant

in 1932 or 1933. He had gone over the road to do some work on a tractor for Nickerson in 1932 when he was breaking the ground in Section 25, and did not obtain permission from anyone to do so.

William Hill, the defendant, testified that the farmstead on which he lives is in the northeast half of Section 24, at the north end thereof. This is part of the Boyle land. He further testified that he took farm equipment down the road in question to Section 25, and did not ask permission to do so from any person. In August 1953, Clifford Hopkins told him to find another means of getting into Section 25, to which he replied that he had no other way to get into Section 25, and that he would continue to use this road and has continued to do so since. While it is true that Stella Boyle made a statement that consent was asked for the defendant to use the road to move his hayrack over it, this was done after this litigation was instituted. William Hill further testified that neither the terraces nor a turnrow in the road have obstructed his use of the road. He did nothing to maintain this road. He further testified that it would be impossible to get equipment from the north half of Section 24 through the southwest quarter of Section 24 into Section 25 on account of gullies and crevices which run up to the fence; that there are deep canyons and wash-outs which could not be filled in with the use of scrapers; that the hills are too steep to get farm machinery up and over them; that there is no other method by which he could get from the north half of section 24 to the farm land in Section 25 other than the road as heretofore described; and that he cannot go along the south side of Section 25 to get to his land because the road south has been closed and the bridges washed out for many years, and there has not been any travel through there.

Stella Boyle, the widow of Heber Boyle and the life tenant of the Boyle land, testified to the different tenants who occupied this land and the manner in which

she acquired it; that the roadway in question was there when the land was purchased by the Boyles in 1919 and has been there ever since; that due to the disability of her husband she had managed the land since 1940 and endeavored to get down to it at least once a year; that the tenants used the road in question to move farm machinery from Section 24 to Section 25; that she never had a conversation with the owners of the southeast quarter of Section 24 since she had anything to do with the Boyle land concerning the use of the roadway, and no agreement was made with reference thereto; that her tenants continued to use this roadway during the period of time that she was acquainted with the Boyle land; that the fact that there was a turnrow there or that terraces were there was not such as would obstruct the travel on the roadway in question; and that any of her tenants would be willing to cooperate with any of the neighbors to keep this road in condition.

Maxine Hill, the daughter of Stella Boyle and the wife of William Hill, testified that she lived with her parents in Farnam until 1938; that she had been on the Boyle land; that she and her brother had driven her father and uncle George over the road in question during the time they supervised the land, observed it at that time, and from her observation it was now in the same location that it was in 1938. She testified as to the roadway, to the effect that it would be impossible to use any other means of ingress or egress from Section 24 to Section 25; that tenants moved machinery over this road to get to Section 25; and that it had been used since the terraces had been placed across it. She also testified that due to the terraces which were about 18 inches in height the muffler of their car had been knocked off on several occasions and had to be repaired. There was a number of years that she was unacquainted with this land because of her husband's different positions at other places.

Clifford Hopkins testified for the plaintiff as to the ownership of the land in his parents and with reference

to the road in question which had been there since he could remember, he being 43 years of age; that the Hopkins maintained this road; and that the terraces were put in in 1952. He described the premises in detail and stated that on or about August 1, 1953, he met the defendant William Hill on Section 25, and told him it would be better if he could find another road to get down to Section 25, that he could not put up with the destruction which had been going on which tore down the terraces and destroyed the wheat where it was driven over. He further testified that he lived on Section 19 which is east of Section 24 and northeast of Section 25, and uses this road to get down to the Hopkins land in Section 25. In addition he described the road in question. While there is testimony by this witness that there is a road that is open by which the defendant could reach Section 25, this road, according to this witness, is not maintained.

Leland Hopkins testified that he helped farm the land with his brother Clifford; the manner in which they entered the field and how they got to Section 25 with their farming equipment from Section 19; that there was a turnrow in this road; and that the road in question is a well-defined passageway for vehicles and you can see that it has been used.

From a review of all the testimony it is apparent that there is no other means by which the defendant can get into Section 25 from his land in Section 24.

The plaintiff assigns as error that the trial court erred in rendering judgment because the same is not sustained by sufficient evidence and is contrary to law.

The plaintiff contends that a tenant may not establish an easement for his landlord without an actual entry by the landlord on the easement claim. In support of this contention the plaintiff asserts that the defendant claims the easement arose in 1932; that at no time since 1906 has a person seized in fee simple title lived on the Boyle land and the tenant occupying the land from

1932 and the tenants thereafter occupying said land had no right to start the easement running in behalf of the landlord; and that if the landlord hopes to receive the benefit of his easement he must at least have started the use of the easement himself.

The case of Deregibus v. Silberman Furniture Co. Inc., 121 Conn. 633, 186 A. 553, 105 A. L. R. 1183, is cited. The factual situation in that case is dissimilar to that of the case at bar. However, the principle announced therein lends support to the plaintiff's contention. There are cases from other jurisdictions to the same effect.

The plaintiff also cites and relies on the cases of Omaha & Florence Land & Trust Co. v. Parker, 33 Neb. 775, 51 N. W. 139, 29 Am. S. R. 506, and Cassens v. Wisner, 122 Neb. 408, 240 N. W. 526. The last-cited cases do not support the plaintiff's contention as will be shown later in the opinion.

We are not in accord with the plaintiff's contention above stated.

In the case of Dormer v. Dreith, 145 Neb. 742, 18 N. W. 2d 94, which was an action to prevent the plaintiffs from crossing a road and to quiet title in the plaintiffs to a strip of land 25 feet wide across the defendants' land, the defendants claimed that the use of a way across real estate while in possession of a lessee cannot be tacked to the use thereof while in the possession of the owner to make up the period necessary to acquire the right to the use thereof by prescription. This court held that possession of a tract of land by an agent or tenant under adverse holding inures to the benefit of the adverse holder; and that personal occupation in such a case is unnecessary, citing Lantry v. Parker, 37 Neb. 353, 55 N. W. 962. Cases from other jurisdictions were cited to the effect that on the issue of adverse possession through a tenant it is immaterial whether the leases were written or verbal. Possession through a tenant or agent is of course sufficient actual possession to support the claim of adverse possession. Tiedeman, Real

Property (3d ed.), § 493, was cited. Also cited was Cassens v. Wisner, *supra,* wherein it was said: "Appellants also cite the case of the Omaha & Florence L. & T. Co. v. Parker, 33 Neb. 775, which holds: 'To entitle a party to claim by adverse possession, he must have made an actual entry upon the land and occupied the same as owner. This occupancy, however, may be continued by his agents.' The evidence discloses that in that case the parties claiming the land actually took possession of the land themselves and then placed tenants in possession, and we do not understand that the supreme court held in that case that it would be impossible to take possession of the land in the first place by and through a tenant. * * * We hold that the weight of authority supports the doctrine that the possession of a tenant, who entered by express right of a person who claimed to be the owner of the land, is the entry and possession of such owner."

The plaintiff contends that the defendant is guilty of a trespass upon the plaintiff's land and should be enjoined from further trespass, while the defendant contends that an easement has been acquired by prescription over the road in question. The plaintiff, in support of her contention, cites Romans v. Nadler, 217 Minn. 174, 14 N. W. 2d 482; Walsh v. Walsh, 156 Neb. 867, 58 N. W. 2d 337; and Stubblefield v. Osborn, 149 Neb. 566, 31 N. W. 2d 547, to the effect that there are five essentials to adverse possession. It must be hostile and under claim of right, actual, open, continuous, and exclusive.

The plaintiff relies on evidence to the effect that the defendant and other tenants of the landlord have not used this road exclusively for the reason that there is testimony that the Hopkins used the passageway for a turnrow, had placed terraces and dikes thereon, and maintained the roadway without permission of any other person or persons; that it was not until August 1953, that the plaintiff was informed that the defendant claimed the passageway as his own or through his land-

lord; and that at no time did the plaintiff acquiesce, but brought this action to have the defendant enjoined from trespassing.

In determining a prescriptive use of a roadway, the following is applicable. In Jurgensen v. Ainscow, 155 Neb. 701, 53 N. W. 2d 196, this court said: "The use must be adverse, under a claim of right, continuous and uninterrupted, open and notorious, exclusive, with the knowledge and acquiescence of the owner of the servient tenement, and must continue for the full prescriptive period."

Where a claimant has shown open, visible, continuous, and unmolested use of land for a period of time sufficient to acquire an easement by adverse user, the use will be presumed to be under a claim of right. The owner of the servient estate, in order to avoid the acquisition of the easement by prescription, has the burden of rebutting the prescription by showing the use to be permissive. See, 17 Am. Jur., Easements, § 72, p. 981, and cases cited under note 12. See, also, Majerus v. Barton, 92 Neb. 685, 139 N. W. 208; Moll v. Hagerbaumer, 98 Neb. 555, 153 N. W. 560; Dormer v. Dreith, *supra;* Stubblefield v. Osborn, *supra;* Jurgensen v. Ainscow, *supra.*

In the instant case there is no evidence in the record with reference to the creation of this easement rebutting the presumption of a claim of right. In fact, the evidence of the plaintiff herein is to the effect that there was no permission asked, and no conversations were had at any time by either the plaintiff, her husband, or her sons who testified in her behalf, with reference to a permissive right or with reference to the use of the road in question with the owners of the Boyle land or any of the tenants of such land. In other words, there is no competent evidence appearing in the record to show the defendant's use of the claimed easement was by permission of the owners of the servient estate.

It is presumed, however, that every man knows the

condition and status of his land; and if anyone enters into open and notorious possession of an easement therein under a claim of right, the owner is charged with knowledge thereof. See 17 Am. Jur., Easements, § 65, p. 976.

Aquiescence on the part of the owner which is necessary to acquisition of a prescriptive easement means passive assent or submission, quiescence, consent by silence. See, Dartnell v. Bidwell, 115 Me. 227, 98 A. 743, 5 A. L. R. 1320; Davis v. Wilkinson, 140 Va. 672, 125 S. E. 700; Jurgensen v. Ainscow, *supra.*

If such user has been for the requisite time open, notorious, visible, uninterrupted, and undisputed under claim of right adverse to such owner, he is charged with knowledge of such user and his acquiescence in it is implied. See, 2 Thompson Real Property (Perm. Ed.), § 512, p. 94, cases under note 18, also § 510, p. 89; Hester v. Sawyers, 41 N. M. 497, 71 P. 2d 646, 112 A. L. R. 536.

The extent of an easement, however, is determined from the use actually made of the property during the running of the prescriptive period. It in fact determines the nature of the easement acquired. A trial court may determine the extent of an easement arising by prescription in an injunction action and restrain interference with rights found to exist by virtue of the finding so made. The servient owner of land subject to an easement may make such use of it as he sees fit, subject only to the right of the dominant owner of the easement to use it for the purposes out of which the right arose. See, Paloucek v. Adams, 153 Neb. 744, 45 N. W. 2d 895. See, also, 17 Am. Jur., Easements, § 59, p. 971; Dunbar v. O'Brien, 117 Neb. 245, 220 N. W. 278, 58 A. L. R. 1033.

With reference to exclusive use as referred to by the plaintiff to the effect that the defendant did not have exclusive use, it is said in Jurgensen v. Ainscow, *supra*: "The term 'exclusive use,' however, does not mean

that no one has used the driveway except the claimant of the easement. It simply means that his right to do so does not depend upon a similar right in others. See, 17 Am. Jur., Easements, § 64, p. 976; Thompson v. Bowes, 115 Me. 6, 97 A. 1, 1 A. L. R. 1365; Annotation, 111 A. L. R. pp. 223, 224."

As we view the record in the instant case, it is evident that in the matter of a claim of a prescriptive easement that there was no intention on the part of the person claiming such an easement to deprive the owner of the land of the use thereof except to the extent that the claimant maintained his right to use for the purpose of his easement. In the instant case the only time the roadway was used by the defendant or was used by his predecessors as tenants was at the time of moving machinery and equipment into Section 25 to the south of the land of the plaintiff for the purpose of planting, harvesting, and caring for crops, and then the use of said roadway for the purpose of the removal of such machinery and for the removal of crops from Section 25 south of the land of the plaintiff. This is a continuous use in that it was used every year for the same purposes, not necessarily at the identical time. The fact that the plaintiff used this road for a turnrow and the fact that she erected terraces across the roadway were not such interference as to prohibit the use on the part of the defendant or the tenants who preceded him.

In spite of the fact that the plaintiff had a turnrow on this road, it was still subject to the use of the defendant in carrying on his farming operations as hereinbefore indicated. See Cassens v. Wisner, *supra*.

The roadway in question was used openly, continuously, and actually by the defendant William Hill and by tenants prior to his tenancy for far more than the statutory period of time with the complete knowledge and acquiescence of the plaintiff, her husband, and her sons, without protest. In addition, it was used by others than the tenants of Section 24.

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

From an analysis of the evidence and the authorities herein cited, we conclude that the judgment of the trial court should be, and is hereby, affirmed.

AFFIRMED.

MISS CATHERINE M. SCHUMACHER, APPELLEE, V. NELS A. LANG ET AL., APPELLANTS.
68 N. W. 2d 892

Filed March 4, 1955. No. 33645.

1. **Trial: Juries.** An affidavit of a juror as to what items the jury allowed or disallowed in computing the amount due, or what the jury believed it had a right to do under the instructions is incompetent. Such matters are commonly held to inhere in the verdict.
2. **Damages.** When the amount of the damages allowed by a jury is clearly inadequate under the evidence in the case, it is error for the trial court to refuse to set aside such verdict.

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

Ralph R. Bremers, for appellants.

Charles E. Kirchner, for appellee.

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

SIMMONS, C. J.

This is an action for damages for personal injuries. Plaintiff was a passenger in an automobile that was involved in an intersection collision with an automobile driven by defendant Duane Lang. The car was owned by defendant Nels A. Lang, father of Duane Lang. The father was made a defendant under the family purpose rule.

Issues were made and trial was had resulting in a verdict in the sum of $400 for plaintiff.

A motion for a new trial was made by plaintiff, and was sustained. A new trial was had, resulting in a verdict for plaintiff in the sum of $500 against both defendants. Plaintiff made a motion for a new trial. A new trial was granted. Defendants appeal from the order granting a new trial.

We affirm the judgment of the trial court.

At the close of the trial the court instructed on the issues of negligence, proximate cause, family purpose, and damages. The court specifically instructed the jury that it could not compare the negligence of the defendants, if any, with the negligence, if any, of the driver of the car in which plaintiff was riding and that as a matter of law plaintiff was guilty of no negligence which contributed to the cause of the injuries. These instructions are not assailed here. The jury resolved questions of negligence, proximate cause, and family purpose in favor of plaintiff. Those findings are not assailed here.

The question here is the adequacy of the verdict. At the hearing on the motion for a new trial, both parties offered affidavits of jurors as to the matters considered and discussed in the jury room. These affidavits go to the questions of the construction of the instructions; credibility of witnesses; how the accident happened; which of the drivers was at fault; and the reasoning and items that entered into the verdict that was rendered.

That part, if not all, of these affidavits were received in evidence is clear from the record. It does not affirmatively appear that the trial court considered them in granting a new trial.

The established rule is: "An affidavit of a juror as to what items the jury allowed or disallowed in computing the amount due, or what the jury believed they had a right to do under the instructions, is incompetent. Such matters are commonly held to inhere in the verdict." Preliminary to that statement we reaffirmed

this holding: "No affidavit, deposition, or other sworn statement of a juror will be received to impeach the verdict, to explain it, to show on what grounds it was rendered, or to show a mistake in it; or that they misunderstood the charge of the court; or that they otherwise mistook the law; or the result of their finding." Spreitzer v. State, 155 Neb. 70, 50 N. W. 2d 516.

The admission of the affidavits was error. That error, however, is not determinative of this appeal. The question remains as to whether the amount of the verdict was so plainly inadequate as to justify the granting of a new trial.

It is undisputed that as a result of this accident plaintiff received a comminuted fracture of the right elbow. She was hospitalized from July 4 to July 15, 1952. Her arm was in a cast until August 5. During the first 2 days and nights her arm was kept in suspension. Sedatives were necessary to ease the pain. She suffered pain throughout and, in degree, pain is expected in the future.

The injury to her arm is permanent. It is described in varying ways: The loss "of two-thirds of the use of the right upper extremity" based upon an almost complete loss of the use of the elbow; limited motion of the use of the elbow joint, being a loss of 120 degrees motion of the right arm; a 30 degree motion in the elbow remains, with a loss of power to turn the hand up or down; and some loss of "the carrying angle in the elbow." There is no dispute as to this condition.

Plaintiff is an elderly lady with a life expectancy of over 10 years. Prior to the accident, she earned her living doing housework for others. In addition to board and room, she earned at times $1.50 a day. Just prior to the accident she was so employed and was being paid $3 a week, in addition to board and room and some clothing. Her ability to work and earn has been materially lessened as a result of these injuries.

Plaintiff's out-of-pocket expenses in connection with

this accident were a total of $301.95, including $8 for ambulance costs, hospital bills totalling $131.45, and physician and surgeon bill, $162.50. These expense items were admitted in evidence without objection and were established as the reasonable value thereof as to the doctor's item, and that value was not questioned as to the other items. This leaves an award of $198.05 to compensate for pain and suffering, permanent disability, wages lost, and impaired earning capacity.

We are quite reluctant to set aside a jury's verdict covering elements of damage that are not subject to exact mathematical calculation. Here the inadequacy of the amount recovered for damages is quite definite and demonstrable. The trial court instructed the jury that in computing damages they could consider the nature and extent of the injuries received; pain and suffering, past and future; the loss of time and the reasonable value thereof; the reasonable value of medical service and hospital care; and the loss of earning capacity and the facts and circumstances bearing on such loss. There is evidence that sustains these elements of recovery. As we said in Dolen v. Beatrice Restaurant Co., 137 Neb. 247, 289 N. W. 336, these instructions did not permit the jury to award a recovery of a clearly inadequate sum.

For many years, the Code of Civil Procedure carried a provision as follows: "A new trial shall not be granted on account of the smallness of damages in an action for an injury to the person or reputation, nor any other action where the damages shall equal the actual pecuniary injury sustained." G. S. 1873, c. 57, tit. IX, § 315, p. 578. This provision was repealed in 1911. See Laws 1911, c. 169, § 1, p. 547.

Prior to the repeal of this provision, we had adopted "a reasonable, humane and liberal interpretation" of this provision. See, Ellsworth v. City of Fairbury, 41 Neb. 881, 60 N. W. 336; Carpenter v. City of Red Cloud, 64 Neb. 126, 89 N. W. 637.

We have now definitely established the rule that: "When the amount of the damages allowed by a jury is clearly inadequate under the evidence in the case, it is error for the trial court to refuse to set aside such verdict." Ambrozi v. Fry, 158 Neb. 18, 62 N. W. 2d 259.

As this record stands, it would have been an abuse of discretion for the trial court to have refused to set aside the verdict and grant a new trial.

For cases with somewhat similar factual situations where the courts came to a like conclusion, see, Goss v. Fanoe, 114 Cal. App. 2d 819, 251 P. 2d 337; Richardson v. Missouri Fire Brick Co., 122 Mo. App. 529, 99 S. W. 778; Jensen v. City of Chicago, 306 Ill. App. 265, 28 N. E. 2d 311; Schacht v. Elliott, 332 Ill. App. 557, 76 N. E. 2d 233; Miller v. Chicago Transit Authority, 3 Ill. App. 2d 223, 121 N. E. 2d 348.

The judgment of the district court is affirmed.

AFFIRMED.

MERRIL R. RELLER, APPELLANT, V. HARRY R. ANKENY, APPELLEE.

68 N. W. 2d 686

Filed March 4, 1955. No. 33652.

1. **Pleading.** The forms of pleading in civil actions in courts of record and the rules by which their sufficiency may be determined are those prescribed by the civil code.
2. **Statutes.** The civil code as a statute complete in all its parts should be so construed as to make all of its parts harmonize with each other and render them consistent with its general scope and object.
3. **Appeal and Error.** It is a mandatory rule of appellate procedure that any question, except jurisdiction of the court, must be presented to or passed on by the trial court to be available for consideration and determination in this court.
4. ———. If the adjudication of a cause by the district court is the only one that is permitted by the record the judgment will not be disturbed because of an error of that court.
5. **Libel and Slander: Pleading.** A demurrer to a petition which

alleges that certain statements published by defendant concerning plaintiff were false and maliciously made admits the falsity of the statements and that they were motivated by malice.

6. **Libel and Slander: Limitations of Actions.** An action for libel must be commenced within 1 year of the publication of the defamatory matter, the basis of the action.

7. **Pleading.** An exhibit incorporated in a pleading is a part of it for all purposes in the case and it may be considered in deciding if the pleading states a cause of action or a defense.

8. **Libel and Slander: Judges.** A judge performing a judicial function is absolutely privileged to publish false and defamatory matter in the performance of such function if the publication has some relation to the matter before him.

9. ———: ———. It is not necessary to the privilege that the defamatory matter be relevant or pertinent to an issue before the court in a judicial proceeding. It is only required that it have some reference to the judicial function which the judge is performing, and the protection is not lost by the mere fact that the defamatory publication is an indiscretion or a display of personal antagonism on the part of the judge or that it is not pertinent to the subject of the inquiry if it is not altogether disconnected therefrom.

APPEAL from the district court for Lancaster County: HARRY A. SPENCER, JUDGE. *Affirmed.*

John McArthur, for appellant.

Clarence S. Beck, Attorney General, and *Homer L. Kyle*, for appellee.

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

BOSLAUGH, J.

This litigation concerns damages alleged to have been caused appellant on account of the malicious composition and publication of defamatory and libelous statements by appellee of and concerning appellant.

The charges made in the petition are: That appellant has resided in Lancaster County during the years of his life, has a large acquaintance therein, is licensed to practice law in Nebraska, is actively engaged in the

practice of his profession, and the greater part of his professional business is in the district court for the Third Judicial District of Nebraska, the area of which is the territory of Lancaster County; that appellee resides in Lincoln and is a judge of said district court; that on or about April 23, 1954, appellee maliciously composed and published of and concerning appellant scandalous, defamatory, and libelous statements contained in a writing, a copy of which is made a part of the petition as Exhibit A; that a writing referred to as Exhibit 10 in the writing identified as Exhibit A and made a part of the petition is another false and defamatory publication made by appellee of and concerning appellant July 20, 1950, a copy of which is made a part of the petition as Exhibit B; that the statements were false and the effect of them, if true, would be to cause the disbarment of appellant and subject him to severe penalties provided by law, including fines and imprisonment; and that appellant had been damaged by the statements contained in Exhibit A in a stated amount. The statements made a part of the petition are lengthy and only parts of them will be recited to the extent proper in the discussion of the matters presented for decision.

Appellee interposed a motion for an order dismissing the petition of appellant because the facts stated in it were not sufficient in law to state a cause of action against appellee, it being apparent, as alleged in the motion, from facts stated in the petition that the alleged libelous matter therein referred to was privileged. The motion was sustained and a judgment of dismissal rendered. This appeal contests the legality of the action of the district court.

Appellant insists that there is no procedure in this state that permits a motion to dismiss a petition to be employed to test its sufficiency to state a cause of action, and that a litigant does not have an option to question the sufficiency of a pleading to state a cause of action by either a motion to dismiss or a general demurrer. In

State ex rel. Thompson v. Donahue, 91 Neb. 311, 135 N. W. 1030, Ann. Cas. 1913D 18, a ruling of the district court on a pleading designated a motion to quash was sustained by this court because no objection to it was made and counsel for the parties and the court treated the motion as a general demurrer. The opinion in that case says: "A motion was filed by the respondent which was treated by the counsel and the court as a general demurrer to the information. This motion was overruled, and the respondent now contends that this ruling was wrong and that the information fails to state any cause of action against the respondent." In State ex rel. Johnson v. Consumers Public Power Dist., 142 Neb. 114, 5 N. W. 2d 202, it was concluded that a motion to dismiss could not, over an objection of the adverse party, be employed to test the sufficiency of the pleading to state a cause of action; that such a motion and a general demurrer were not interchangeable; and that a timely objection to a motion for such a purpose was not a captious objection but was substantial and meritorious because the results of the two procedures involved fundamental differences. The sustaining of a demurrer does not end the case in the court in which it is pending. The statute assures the adverse litigant the right to amend his pleading, a refusal of which presents a question for judicial review. If a motion to dismiss is granted the case is ended. Any amendment thereafter is a judicial grace and not a right. It is said in that case: "The forms of pleading in civil actions in courts of record and the rules by which their sufficiency may be determined are those prescribed by our Civil Code. * * * Our Civil Code as a statute complete in all its parts should be so construed as to make all of its parts harmonize with each other and render them consistent with its general scope and object."

The postulate of appellee that a motion to dismiss a petition on the ground that it does not state a cause of action is authorized by the procedure of this state may

not be accepted. The five decisions of this court relied upon to sustain this argument contain nothing to support it. They are properly characterized in Feight v. Mathers, 153 Neb. 839, 46 N. W. 2d 492: "But in the foregoing cases either the litigant elected to stand on the pleadings at which the order was directed, continued to file pleadings that were subject to the same criticism, or filed pleadings which sought to circumvent the effect of the court's order." State ex rel. Johnson v. Consumers Public Power Dist., *supra,* repudiates the argument of of appellee on this subject. A motion to dismiss may not be employed, when opposed by proper and timely objection, to perform the function of a demurrer.

In the pending case appellant made no objection to or assault upon the motion to dismiss filed by appellee or to the use of it to test the sufficiency of the petition in the case to state a cause of action. Appellant rather acquiesced in and consented that it should be employed for the purpose intended by appellee and the district court by its action approved of that procedure. The record recites that this cause came on to be heard upon motion of appellee to dismiss the petition of appellant, and by agreement of appellant and the attorney for appellee it was submitted to a judge of the district court; and that briefs were filed, and on due consideration the court sustained the motion and dismissed the case. A litigant may not effectively complain of a course of action he induced or in which he concurred. Appellant did not seek the right to amend his petition in that court. His complaint that the motion to dismiss the petition was an improper and unauthorized pleading and that it should have been a demurrer comes too late. It was necessary for him to make that objection in a proper manner in the trial court to have it considered in this court. It is a rule of practice that any question, except jurisdiction of the court, must be presented to or passed on by the trial court to be available for consideration and determination in this court. Badura v. Lyons, 147

Neb. 442, 23 N. W. 2d 678; Dodge v. Galusha, 151 Neb. 753, 39 N. W. 2d 539. If the conclusion of the district court that the petition did not and could not be made to state a cause of action was correct the appellant was not prejudiced by the order sustaining the motion or the judgment of that court. A case will not be reversed for an error of the trial court if the complaining party is not entitled to succeed in any event. James v. Hogan, 154 Neb. 306, 47 N. W. 2d 847.

The pleading of appellee to the petition of appellant was an admission that the statements and insinuations shown by Exhibits A and B of and concerning appellant of which he complains in the petition were false and that they were actuated by malice. Shumway v. Warrick, 108 Neb. 652, 189 N. W. 301. The position of appellee in this litigation is that though the language used concerning appellant is libelous appellee, because of the office he occupies and the circumstances and occasion of the publication, is insulated by the rule of absolute privilege from an action for damages.

The cause of action intended to be stated by appellant was not contributed to by anything contained in Exhibit B. Appellant does not allege that he was damaged thereby. His petition asserts that he was damaged only "by said malicious, false, and defamatory statements" made in Exhibit A. The writing, Exhibit B, contains proof that it was composed and published July 20, 1950. It bears that date and it contains the statement "Copies of this opinion are this day sent to counsel, Merril R. Reller * * *. Original thereof is entered herein." An allegation of appellant in his petition is that it was "made and published * * * on the 20th day of July, 1950 * * *." This case was commenced April 29, 1954. Any cause of action because of anything expressed in Exhibit B was barred before this case was commenced. An action for libel, slander, or assault and battery may only be brought within 1 year from its accrual. § 25-208, R. R. S. 1943; Markel v. Glassmeyer, 137 Neb. 243, 288 N. W. 821. The

contents of Exhibit B are of no importance in the consideration and decision of this appeal.

The view of appellant that there are false statements in the writing, Exhibit A, maliciously made by appellee of and concerning appellant which are inherently libelous may be accepted for the purpose of deciding if the petition states a cause of action that may be maintained against appellee, a judge of the district court at the time they were made and published. The exhibit was made a part of the petition for all purposes and as completely as though it had been entirely set out in the pleading. An exhibit made a part of a pleading by direct allegation to that effect is a part thereof and it may be thus considered in deciding if the pleading states a cause of action or a defense. The contents of such an exhibit prevail over any allegation of the pleading that is inconsistent therewith and such an exhibit may be considered by the court without reference to the legal effect thereof as alleged in the pleading. American Surety Co. v. School District, 117 Neb. 6, 219 N. W. 583; Department of Banking v. Flotree, 135 Neb. 416, 281 N. W. 857; Gibson v. Koutsky-Brennan-Vana Co., 143 Neb. 326, 9 N. W. 2d 298; School District v. Wood, 144 Neb. 241, 13 N. W. 2d 153.

The exhibit made a part of the petition has a caption as follows:

"IN THE DISTRICT COURT OF LANCASTER COUNTY, NEBRASKA

THE STATE OF NEBRASKA in the Interest of MICHAEL ALLEN GODDEN, etc.	:	Juvenile Department Docket 18, Page 252 An Observation and Comment by the Court in connection with the proceeding to Disqualify the Judge of the Juvenile Court."

The exhibit speaks of the filing of a motion to disqualify appellee from hearing further proceedings therein. It relates to a limited extent the discussions of two inter-

views, in one of which appellant participated, concerning such a procedure before it was resorted to; it comments on what is described as "* * * Affidavit of Merril R. Reller filed in support of motion"; it recites that on the basis of the interviews and the observations concerning inaccuracies and untrue statements made in the affidavit of appellant his true intent in this proceeding (case concerning Michael Allen Godden) is apparent; and that appellant has repeatedly failed to discharge his obligations as a member of the Bar and as an officer of the court of which appellee was a judge in connection with the administration of justice. The exhibit recites that the "Original thereof is filed of record herein." It was signed "Harry R. Ankeny, Judge of the District Court, Juvenile Division." The record does not disclose the status of the proceeding identified by the caption shown on the exhibit at the time it was composed and published or if the motion to disqualify appellee from acting in the proceeding was then pending and undecided. There is no allegation in the petition that appellee was not acting in his judicial capacity as a judge of the court with complete jurisdiction in reference to a pending matter involving the person named as Michael Allen Godden. It does not allege that appellee was acting in a private capacity in the composition and publication of the matters shown by the exhibit. There was such a case. It was appealed in 1953 from the district court for Lancaster County to this court, and reversed and remanded to the district court. It concerned Michael Allen Godden, Merril R. Reller was counsel therein, and appellee had heard the case as judge of the district court. It had the same docket number and page as appear in the caption as a part of Exhibit A. The mandate of this court was issued to the district court March 19, 1954. Ripley v. Godden, 158 Neb. 246, 63 N. W. 2d 151. The district court, at all times important to this case, was authorized to entertain and conduct proceedings by virtue of the Juvenile Court Act involving a

neglected, dependent, or delinquent child. §§ 43-201 to 43-227, R. R. S. 1943. It is proper to conclude from what has been recited in reference to the petition of which the exhibit is a part that at the time the statements shown by it were written and published by appellee there was a matter in the district court over which it had jurisdiction; that appellee as a judge of the court was acting and speaking in reference thereto; that he was not acting in a private capacity when he wrote and published the matter of which complaint is made herein; and that he was then within the immunity from liability created by law for the protection of judges when acting within the scope of their official functions and duties.

In Restatement, Torts, § 585, p. 225, it is said: "A judge or other officer performing a judicial function is absolutely privileged to publish false and defamatory matter in the performance of such function if the publication has some relation to the matter before him." In the comment appears the following: "a. The privilege of a judge engaged in the performance of his judicial function is absolute. Therefore, the personal ill will of the judge is immaterial. So too, it is immaterial that he knows the defamatory matter to be false. * * * Abuse of his official position by a judicial officer may subject him to impeachment, recall or removal, but it will not subject him to a civil action for defamation. * * *

"d. The judicial function is usually exercised in the course of judicial proceedings, that is, after the commencement or institution of such proceedings and before the termination thereof. * * * It is immaterial whether the judicial proceedings are ex parte or inter partes or whether they are preliminary, interlocutory, or final in character. It is not necessary, however, that the judge be engaged in the conduct of a trial or that he be participating in a judicial proceeding at the time of the defamatory publication. It is necessary only that he be engaged in the performance of a judicial function. He may be so

engaged before the commencement of or after the termination of judicial proceedings or while in his judicial capacity he is discussing with counsel for prospective litigants judicial proceedings which, while then contemplated, are in fact never instituted.

"e. Relation of statement to proceedings. It is not necessary that the defamatory matter be relevant or pertinent to any issue before the court in a judicial proceeding. It is necessary only that it have some reference to the judicial function which the judge is performing. * * * However, the protection is not lost by the mere fact that the defamatory publication is an indiscretion or a display of personal antagonism on the part of the judge or that it is not pertinent to the subject of the inquiry if it is not altogether disconnected therefrom."

In Bradley v. Fisher, 13 Wall. 335, 20 L. Ed. 646, the court said: "In other words, if (the plea) sets up that the order for the entry of which the suit is brought, was a judicial act, done by the defendant as the presiding justice of a court of general criminal jurisdiction. If such were the character of the act, and the jurisdiction of the court, the defendant cannot be subjected to responsibility for it in a civil action, however erroneous the act may have been, and however injurious in its consequences it may have proved to the plaintiff. * * * The principle, therefore, which exempts judges of courts of superior or general authority from liability in a civil action for acts done by them in the exercise of their judicial functions, obtains in all countries where there is any well-ordered system of jurisprudence. It has been the settled doctrine of the English courts for many centuries, and has never been denied, that we are aware of, in the courts of this country. It has, as Chancellor Kent observes, 'a deep root in the common law.' * * * Nor can this exemption of the judges from civil liability be affected by the motives with which their judicial acts are performed. The purity of their motives can-

not in this way be the subject of judicial inquiry." It is further said therein: "* * * judges of courts of superior or general jurisdiction are not liable to civil actions for their judicial acts, even when such acts are in excess of their jurisdiction, and are alleged to have been done maliciously or corruptly. A distinction must be here observed between excess of jurisdiction and the clear absence of all jurisdiction over the subject-matter. Where there is clearly no jurisdiction over the subject-matter any authority exercised is a usurped authority * * *. But where jurisdiction over the subject-matter is invested by law in the judge, or in the court which he holds, the manner and extent in which the jurisdiction shall be exercised are generally as much questions for his determination as any other questions involved in the case * * *." See, also, Spalding v. Vilas, 161 U. S. 483, 16 S. Ct. 631, 40 L. Ed. 780; Mundy v. McDonald, 216 Mich. 444, 185 N. W. 877, 20 A. L. R. 398; Nadeau v. Texas Co., 104 Mont. 558, 69 P. 2d 593, 111 A. L. R. 874; Annotations, 20 A. L. R. 407, 146 A. L. R. 913; 53 C. J. S., Libel and Slander, § 104, p. 177.

The judgment of the district court should be and it is affirmed.

AFFIRMED.

WILLARD RICHARDS ET AL., APPELLEES, V. VEARL MCBRIDE ET AL., OFFICERS OF SCHOOL DISTRICT NO. 54, HITCHCOCK COUNTY, NEBRASKA, APPELLANTS.

68 N. W. 2d 692

Filed March 4, 1955. No. 33672.

1. **Schools and School Districts.** One who was actually present at an annual meeting of a rural school district and entitled to vote on the designation of a schoolhouse site but who did not vote must, under the provisions of section 79-504, R. R. S. 1943, be counted as present in order to compute the requisite majority on that matter.

2. **Equity.** Laches, in its legal significance, is not mere delay. It must be shown in addition to delay that substantial injury has resulted therefrom.
3. **Schools and School Districts: Equity.** One who contends that there are defects in the election by which a schoolhouse site is designated, and who desires to question the validity of the election in court, is required to act promptly. He may be barred by laches if he waits until the school district has expended substantial sums in good faith and the rights of third persons have intervened in reliance on the validity of the election.
4. ———: ———. Where there is no evidence of acquiescence, estoppel, or undue delay on the part of the person questioning the validity of an election to fix a schoolhouse site, equity will not entertain the defense of laches or estoppel in a suit to test the validity of such election.

APPEAL from the district court for Hitchcock County: VICTOR WESTERMARK, JUDGE. *Affirmed.*

Charles M. Bosley, for appellants.

Russell & Colfer, for appellees.

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

CARTER, J.

Plaintiffs brought this suit to enjoin the officers of School District No. 54, Hitchcock County, Nebraska, from proceeding with the construction of an addition to the schoolhouse located on the northeast corner of Section 17 within the district. Upon a trial of the case the defendant officers were enjoined from proceeding with the construction of an addition to the schoolhouse. The defendants appeal.

The facts are not in dispute. In the spring of 1954 four rural school districts petitioned to be attached to School District No. 54. The merger of the four districts with School District No. 54 was completed on May 4, 1954, in full compliance with applicable statutes as a Class I school district. A notice of a meeting of the electors of School District No. 54 was thereupon given,

the purpose of which was to select a school site for the merged districts. At the meeting a motion was made to locate the schoolhouse on the northeast corner of Section 17, which was the site of the District No. 54 schoolhouse before the merger. It was agreed that the vote should be taken by secret ballot. The result of the vote was 43 for, 34 against, and 2 votes rejected. The chairman of the meeting declared the motion carried. Whether or not the motion carried by a sufficient percentage of the electors present is one of the main issues in the case.

The applicable portion of the controlling statute provides as follows: "The qualified voters in a school district of the first or second class, when lawfully assembled, shall have power * * * to designate a site for a schoolhouse by a vote of fifty-five per cent of those present, and to change the same by a similar vote at any annual or special meeting; * * *. A schoolhouse site shall not be changed more than once in any one school year." § 79-504, R. R. S. 1943.

It is clear that if the two persons casting the rejected ballots were not present within the meaning of the foregoing statute, the vote for the motion was in excess of the necessary 55 percent. If such two persons were present within the meaning of the statute, the motion did not carry by the required 55 percent.

The evidence shows that the two persons who cast the rejected ballots signed their names on the ballots and failed to designate whether they were voting for or against the motion. We think the case of Cunningham v. Ilg, 118 Neb. 682, 226 N. W. 333, is in point and controls the result. The holding of that case is summarized in the syllabus as follows: "One who was actually present at an annual meeting of a rural school district and entitled to vote on a change of schoolhouse site but who did not vote must, under section 6275, Comp. St. 1922 (now section 79-504, R. R. S. 1943), be counted as present in order to compute the requisite majority on that

matter." See, also, McLain v. Maricle, 60 Neb. 353, 83 N. W. 85. The two electors who were present and cast the two rejected ballots should have been counted as present within the meaning of the statute. We conclude that the motion fixing the site for the schoolhouse failed to carry by the requisite 55 percent. Consequently the site for the schoolhouse has not been fixed as required by the statute.

Appellants cite several cases which hold that in determining the ballots cast at an election, only ballots entitled by law to be counted are to be considered. But the present statute is in different language. It requires that 55 percent of the electors present must vote for the proposition in order to designate a site for a schoolhouse. An examination of the cases cited by the appellants shows that they are not based on statutory language requiring a fixed percentage of the electors present to carry the election. See Miller v. Mersch, 152 Neb. 746, 42 N. W. 2d 652; Greathouse v. Dix Rural High School Dist., 155 Neb. 883, 54 N. W. 2d 58. It is the different language in the statutes being considered that brings about a different result.

Appellants assert that even if this court should hold that the electors failed to fix the site of the schoolhouse by the required 55 percent of the electors present, appellees cannot maintain this action because of laches. The situation with respect thereto was as follows: Immediately following the meeting of May 14, 1954, at which the vote on the schoolhouse site was taken, the appellants gave notice of a meeting of the electors of the district to be held on May 21, 1954, to consider the transfer of funds from the general to the building fund for the purpose of building the addition to the schoolhouse. About an hour before the meeting appellee Willard Richards delivered to the secretary of the school district a request for a meeting of the electors of the district for the purpose of fixing the site for the schoolhouse. Appellants never called such a meeting, although the re-

quest was signed by nine electors of the district and conformed with section 79-502, R. R. S. 1943. At the meeting of the electors of the district held on May 21, 1954, a motion to transfer $12,000 from the general fund to the building fund was made. The motion prevailed with 52 electors voting "for" and no electors voting "against." The evidence is that the work was delayed until the opinion of the Attorney General could be obtained concerning the legality of the actions that had been taken. On June 17, 1954, the secretary of the district talked with appellee Willard Richards. He told him that the school board was going to proceed to build the addition to the schoolhouse and that a well would probably be drilled the following week. On June 22, 1954, all members of the school board again talked to appellee Willard Richards and advised him that an engineer had been hired, and that when the plans were drawn they were going to proceed to build the addition to the schoolhouse as directed by the electors of the district. They also advised him that they considered his request for an electors meeting illegal and that if he wanted to stop the school board from proceeding, it would take an injunction to do so. About May 22, 1954, the school board employed an engineer. The school board caused a well to be drilled and paid $598.50 therefor on June 16, 1954. The engineer was paid $200 for preparing the plans. The board contracted for the addition to the schoolhouse in the amount of $9,996. Contracts were made for a furnace in the amount of $850 and for a sewer and septic tank in the amount of $450. Other expenses were incurred in the amount of $300. Three acres of land were acquired for school purposes. The basement was staked out on July 6, 1954. The basement was thereafter partially excavated. The injunction stopping the work was filed on July 9, 1954. It is contended that appellees were fully informed of the work being done and the actions being taken by the school board, and that they stood by and did nothing about it.

This is the basis for appellants' claim that appellees were guilty of such laches as to bar the bringing of the injunction suit.

The term "laches" in its legal significance implies something more than the passage of time; it is delay that works to the disadvantage of another. The delay required necessarily varies with the nature of the situation to which it is sought to be applied. It is in the nature of an estoppel by conduct. One in full possession of the facts may not ordinarily acquiesce therein until there has been a change in circumstances made in good faith and then contest the validity of the actions taken where success would cause substantial damage to the other party. It is here contended that appellees unduly delayed in questioning the result of the election called to fix the site of the schoolhouse. With respect to this point, the Kansas court summarized the rule in the syllabus in the case of Drenning v. The Board of Commissioners of the City of Topeka, 148 Kan. 366, 81 P. 2d 720, 117 A. L. R. 884, as follows: "One who contends that there are defects in the election by which a public improvement is authorized, and who desires to question the election in court, should act promptly. He may be barred by laches if he waits until the city has expended substantial sums on the improvement and the rights of third parties have intervened, and he may be estopped by his conduct from being heard in a court of equity on his objection to the election."

We do not think the rule has any application to the present case. The election was held on May 14, 1954. On May 21, 1954, seven days later, the appellee Willard Richards presented a written petition to the secretary of the school board requesting that a meeting of the electors of the school district be called to fix the site of the schoolhouse. This was notice that the election of May 14, 1954, was being questioned. On June 17, 1954, the secretary of the school board talked with appellee Willard Richards and advised him of the inten-

tion of the school board to go ahead with the construction. On June 22, 1954, the three members of the school board called on Richards and advised him of their intention to proceed with the construction and that it would take court action to stop them. Richards' response was that he thought an election fixing the site for the schoolhouse should be held. He did not acquiesce with the intention of the school board to proceed. A letter from the Attorney General came into the hands of the parties at about this stage in the proceedings in which it was stated: "Apparently, from the facts stated therein (the letter of inquiry) that at the meeting which was held on May 14, 1954, the motion for the location of the school site did not carry by the vote required by statute of '55 per cent of those present.'" There is no evidence in the record that appellee Willard Richards acquiesced with the school board's plan to proceed; nor is there any evidence in the record that appellee Willard Richards knew that the well had been drilled, or an engineer employed. He observed that excavation was commenced on July 8, 1954, and this suit was commenced on the following day.

We point out that the evidence shows no acquiescence, estoppel, or laches on the part of Willard Richards. The record is void of any evidence whatsoever concerning any knowledge of the other appellees and, consequently, there could be no acquiescence, estoppel, or laches as to them. The good faith of the appellants, as that term is legally used, could well be questioned in view of the Attorney General's letter which came into their possession. With knowledge that the Attorney General deemed the election fixing the schoolhouse site as a nullity, the school board elected to proceed. We cannot say, under the circumstances here recited, that appellees acquiesced in the announced result of the election or in the construction of the addition to the school building before that was done. There is no evidence to sustain an estoppel or that appellees were guilty of

laches. While the actions of the school board members were undoubtedly motivated by a desire to have the schoolhouse ready for use at the beginning of the next school term, we cannot say that they proceeded with the good faith demanded of one who asserts acquiescence, estoppel, or laches as a defense to his illegal action.

The trial court came to the same conclusion. It was correct in so doing.

AFFIRMED.

BOSLAUGH, J., participating on briefs.

DONALD SEGEBART, BY HIS GUARDIAN AND NEXT FRIEND, LOUIS SEGEBART, APPELLANT, V. ODDIE GREGORY, APPELLEE.
69 N. W. 2d 315

Filed March 11, 1955. No. 33626.

1. **Trial: Appeal and Error.** It is not error to refuse to give a requested instruction containing abstract principles of law where no effort is made in the instruction requested to apply the rule to the particular evidence and issues of the case to which it is claimed it is applicable.
2. ———: ———. It is not error to fail to instruct relative to the purchasing power of money. It is not a proper subject for an instruction.
3. ———: ———. Error cannot be predicated upon the giving of an instruction substantially similar to one requested by the party seeking to reverse the judgment.
4. **Trial.** In the framing of an instruction, it is not necessary that a trial court follow the exact language used by this court in stating a rule of law.
5. **Appeal and Error.** It is a fundamental rule applicable to all appellate proceedings that the record of a court where a matter originated or was tried when properly authenticated imports absolute verity and cannot be contradicted, varied, or changed by oral testimony or any extrinsic evidence.
6. **Trial: Appeal and Error.** A party is not permitted to proceed with the trial without objection and speculate on the outcome of the jury's verdict, and, if unfavorable, contend that a mis-

trial should have been declared, when he did not ask for the same at the time.

7. **Negligence: Damages.** If the jury finds the defendant in a personal injury action is not chargeable with negligence an error relating to the subject of damages is necessarily harmless.

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

Ernest A. Raun, Alfred D. Raun, Ronald K. Samuelson, and *Charles A. Fisher,* for appellant.

Stubbs & Metz and *A. W. Crites,* for appellee.

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

SIMMONS, C. J.

This is an action to recover damages for personal injuries arising out of the collision of two automobiles on a highway at night. We had the case here in Segebart v. Gregory, 156 Neb. 261, 55 N. W. 2d 678, following the sustaining of a motion for a directed verdict for the defendant. The cause was remanded for a new trial. The matter was tried to a jury resulting in a verdict and judgment for defendant. Plaintiff appeals, assigning and arguing error here in several particulars.

We affirm the judgment of the trial court.

The general factual picture is set out in our former opinion. In summary, a car in which plaintiff was riding proceeded east along a poorly maintained highway on a rainy, dark night, turned to avoid a chuck hole in the pavement, and ran into the car of the defendant, resulting in severe personal injuries to the plaintiff.

At this trial, the evidence is positive that defendant's car was not in motion and was headed west with two wheels off the black-top pavement on the north side of the road. It had been so located for several minutes. The black-top pavement was 20 to 22 feet wide at that point. The evidence is also positive that the car in which plaintiff was riding moved from the south half of the

road over into the north half and ran head-on into defendant's car, striking defendant's car in front, but to the south half thereof. The evidence as to lights on defendant's car is in dispute. Plaintiff's witnesses testified that they saw no lights. Defendant's witnesses testified that the front parking lights of his car were on and operating.

Plaintiff requested an instruction to the effect that if the jury found that defendant parked or operated his car on the paved portion of the highway without lights or other warning on a dark night when it was raining, that it would constitute gross negligence. The trial court refused the request.

Plaintiff assigns and argues that the refusal to give the instruction was error.

Plaintiff relies upon the language quoted in our former opinion, to wit: "This court has said that it is gross negligence to leave an unlighted motor vehicle upon the highway on a dark night without warning to protect approaching travelers." Segebart v. Gregory, *supra*. We were there determining whether the evidence was sufficient to present a jury question under a rule which required that all facts be resolved in favor of the plaintiff. There was no conflict in the evidence at that time as to defendant's lights. The evidence was that there were no lights on the car. Here there is a conflict in the evidence as to that question.

The statement appears to have originated in Giles v. Welsh, 122 Neb. 164, 239 N. W. 813, and thereafter in Monasmith v. Cosden Oil Co., 124 Neb. 327, 246 N. W. 623, and subsequent cases dealing generally with what constituted gross negligence under the comparative negligence statute. The correct construction of the statement is suggested in Anderson v. Robbins Incubator Co., 143 Neb. 40, 8 N. W. 2d 446, wherein we said that in the two cases above cited we held: " * * * that leaving a truck on the highway without any flares or lights whatsoever was sufficient to permit recovery against the operator thereof for gross negligence."

The rule relied upon is one which relates to the comparison of different acts of negligence under the comparative negligence statute. That statute is not involved here.

The trial court properly refused to give the requested instruction.

Plaintiff next assigns as error the refusal of the trial court to give a requested instruction as follows: "You are instructed that a traveler on a public highway or roadway may ordinarily occupy and use any part of said highway or roadway he desires when not needed by another whose rights thereto are superior to his own. The rights of another to the superior use of a highway are determined by whether or not he has a legal right to the use thereof as he is then using it."

The first sentence is an abstract statement of law which appears in several of our opinions. The rule is one which has been applied here in determining the sufficiency of the evidence to go to the jury or to sustain a verdict. It first is so stated and used in the syllabus of Klaus v. Soloman Valley Stage Lines, 130 Neb. 325, 264 N. W. 747. Likewise it was so used in Kuska v. Nichols Construction Co., 154 Neb. 580, 48 N. W. 2d 682, again in Paxton v. Nichols, 157 Neb. 152, 59 N. W. 2d 184, and later in Born v. Estate of Matzner, 159 Neb. 169, 65 N. W. 2d 593. No authority is cited to support the second sentence. Just what was intended by the requested instruction and to whom and to what facts it was intended to apply is not clear. It is the rule that it is not error to refuse to give a requested instruction containing abstract principles of law where no effort is made in the instruction requested to apply the rule to the particular evidence and issues of the case to which it is claimed it is applicable. See, 53 Am. Jur., Trial, § 573, p. 451; 64 C. J., Trial, § 646, p. 736; 88 C. J. S., Trial, § 379, p. 962.

The trial court instructed the jury as to the statutory provision (§ 39-746, R. R. S. 1943) as to driving on

the right half of the highway unless impracticable and except when overtaking and passing another vehicle.

The instruction as to that matter would seem to be sufficient. We find no error in the refusal to give the tendered instruction.

Plaintiff requested an instruction as to the elements to be considered in measuring the damages that plaintiff suffered, including "the decreased purchasing power of money with respect to the commodities that are in use by the public generally and that may reasonable (sic) be said to constitute the necessaries of life, * * *."

Error is claimed because of the refusal of the court to so instruct.

We put aside consideration of the impact on the question of the fact that the jury denied damages in any amount. Juries have the right to take into consideration the purchasing power of money with respect to commodities that are in use by the public generally and may reasonably be said to constitute the necessaries of life. Dunn v. Safeway Cabs, Inc., 156 Neb. 554, 57 N. W. 2d 75; Dailey v. Sovereign Camp, W.O.W., 106 Neb. 767, 184 N. W. 920; Johnson v. Schrepf, 154 Neb. 317, 47 N. W. 2d 853. From that it does not follow that a court is required to instruct on that subject matter. The value of money is a representative one. It is fixed by the value of the thing or things for which it can be exchanged. Whether that value has depreciated or appreciated with reference to some other period is not material. The value of money, i.e. its purchasing power, is elemental within the knowledge and experience of men generally. It is one of the facts of life which jurors are presumed to know. It is not error for failure to instruct relative to the purchasing power of money. It is not a proper subject for an instruction. Rebholz v. Wettengel, 211 Wis. 285, 248 N. W. 109.

The court instructed the jury that the owner or operator of a motor vehicle was not liable to a guest passenger unless the driver was under the influence of intoxi-

cating liquor or was guilty of gross negligence, and that plaintiff was a guest of Sandoz. There was evidence of the presence of beer in the Sandoz car, although the drinking of intoxicants was denied by all the occupants appearing as plaintiff's witnesses. This instruction relates to the nonliability of Sandoz to the plaintiff. The plaintiff requested an instruction containing the element of Sandoz' nonliability because of the guest statute. The materiality of the instruction is not demonstrated. Prejudice to the plaintiff does not appear. If error, it was one invited by the plaintiff. The rule is: "Error cannot be predicated upon the giving of an instruction substantially similar to one requested by the party seeking to reverse the judgment." Jonasen v. Kennedy, 39 Neb. 313, 58 N. W. 122. See, also, Mullally v. Haslam, 106 Neb. 860, 184 N. W. 910; Tighe v. Interstate Transit Lines, 127 Neb. 633, 256 N. W. 319; Fonda v. Northwestern Public Service Co., 138 Neb. 262, 292 N. W. 712.

Sandoz was the driver of the car in which plaintiff was riding. In the decision of the case on its first appearance here, we held: "* * * if there was evidence that the defendant was guilty of negligence which caused the collision or if he was guilty of negligence which combined with negligence of Sandoz proximately contributed thereto then the court erred in not submitting the case to a jury." The syllabus states the rule as follows: "Where a plaintiff is free from negligence or contributory negligence and two or more parties are guilty of negligence in the operation of automobiles causing or proximately contributing to an accident and injury and damage to the plaintiff, and one being the host of the plaintiff and being free from liability because of the guest statute and the other or others not, the one or ones not being host may be held liable for the entire damage." Segebart v. Gregory, *supra*. Defendant assigns error in that the court did not instruct as set out in the previous opinion.

In the framing of an instruction, it is not necessary that

a trial court follow the exact language used by this court in stating a rule of law. A material variance is not claimed. We do not see error there.

The trial court instructed the jury as to the defendant's answer and set out seven alleged acts of negligence of Sandoz, together with the statement that defendant claimed that the negligence of Sandoz was the proximate and sole cause of the collision. Plaintiff assigns this as error, contending here that the instruction should have been limited to a statement that defendant had denied generally. Whether or not the negligence of Sandoz, if any, was the sole proximate cause of the collision was an issue. The court properly instructed on the claimed negligence of Sandoz. As above stated, the court specifically told the jury that the negligence of Sandoz, if any, could not be imputed to the plaintiff. Contributory negligence of plaintiff, if any, was not submitted to the jury. We find no error in the instruction.

Plaintiff next assigns error contending that the trial court submitted an instruction involving a special finding "after the jury had arrived at a verdict," and that in doing so the judge "must have told the jury something about this special finding" orally in violation of section 25-1115, R. R. S. 1943.

The first difficulty with this contention is that it finds no support in the transcript.

The transcript contains instructions given by the court, 18 in number, and each signed "Given:" by the trial judge in accord with the provisions of section 25-1113, R. R. S. 1943.

Following the 18 signed instructions, appears this: "Instruction No. — If you find for the defendant you will also answer the following Question: Do you find from the evidence that at the time of the accident the defendant had his parking lights burning? You will indicate by an X after the answer which represents your findings. Yes X No."

That is followed by a filing date which is the only one on all of the instructions. Section 25-1114, R. R. S. 1943, requires that instructions be filed before being read to the jury.

The journal entry signed by the trial court recites that the cause was submitted to the jury on "instructions of the Court"; that the jury retired, and on the same day returned into court their verdict in writing, finding for the defendant; and that the verdict was received and ordered filed "all of which is done instanter." No mention is made of the special finding in the journal entry. Plaintiff did not attempt to have this record changed so as to reflect the facts as he claims them to be.

The plaintiff relies on statements made by the trial court in a memorandum on the motion for a new trial in which the trial court recites that when the jury reported with a verdict, and before it was received, he submitted the interrogatory, and that the jury retired and returned with the verdict and answer to the question. These statements were made over 13 months after the events recorded in the journal as certified here. The plaintiff then is attempting to impeach the certified record of the proceedings, made at the time, by statements made by the court later. The statements are not in complete accord with the fact contention now advanced by the plaintiff. In any event the rule is: "It is a fundamental rule applicable to all appellate proceedings that the record of a court where a matter originated or was tried when properly authenticated imports absolute verity and cannot be contradicted, varied, or changed by oral testimony or any extrinsic evidence." In re Estate of Bednar, 151 Neb. 242, 37 N. W. 2d 195.

The assignment is not sustained.

The plaintiff, conceding that the trial court instructed that the negligence of Sandoz would not be imputed to the plaintiff, complains that it was not given in a separate instruction and was given only once. It appears

in an instruction of two sentences and where it was directly pertinent. We know of no rule, and are cited none, that requires that such an instruction be given separately and more than once.

The plaintiff next complains that the trial court did not, on its own motion, instruct as to the rules of the road involved in sections 39-757, 39-778, and 39-780, R. R. S. 1943. These sections relate to parking under particular conditions, and to particular requirements as to lights. We find nothing in the pleadings nor evidence that required the court to instruct as to those matters. The trial court did instruct as to the provisions of section 39-7,112, R. R. S. 1943, insofar as it relates to the issues and evidence present here as to parking and lights. The sufficiency of the instruction is not challenged here.

The plaintiff complains that there is a conflict between the instruction which dealt with the subject of proximate cause, whether the negligence of defendant alone or the combined negligence of defendant and Sandoz, and instructions dealing with the duty of a driver of a motor vehicle. Sandoz was the driver of one of the cars involved in this accident. Whether or not his negligence was the sole proximate cause was an issue. We find no conflict in the instruction. Contrary to plaintiff's contentions, these instructions do not impute Sandoz' negligence to the plaintiff. Contrary to plaintiff's contention, it was the court's duty to instruct as to the duties of Sandoz. The instructions relate not to imputed negligence but to the question of the negligence of Sandoz, if any, as "a" or "the" proximate cause. This disposes of plaintiff's contention that the trial court erred in giving defendant's requested instructions going to the duties of a driver.

A witness for the defendant was asked who, of the parties involved, were at the hospital after this accident. She named three, including Sandoz, and then volunteered "I know it was Sandoz, he came up and told what company he was insured by and gave it to the nurse." The

plaintiff promptly moved to strike. The court ruled: "It must be stricken and completely ignored by the jury." Plaintiff contends that the trial court erred in not declaring a mistrial.

It will be seen that the trial court ruled entirely as requested by the plaintiff and the court on its own motion directed that the statement be completely ignored by the jury. It does not appear that plaintiff objected in any wise to that disposition of the question, but rather accepted it and proceeded with the trial.

Paraphrasing what we said in Triplett v. Lundeen, 132 Neb. 434, 272 N. W. 307, if plaintiff was not satisfied that the jury would give him a fair trial, he had the opportunity of asking for a mistrial, but elected to proceed and take the chances of a favorable verdict. As we said in Long v. Crystal Refrigerator Co., 134 Neb. 44, 277 N. W. 830, it was incumbent upon plaintiff to make such objection and motion at that time. We there held that: "A party is not permitted to proceed with the trial without objection and speculate on the outcome of the jury's verdict, and, if unfavorable, contend that a mistrial should have been declared, when he did not ask for the same at the time." See, also, Millslagle v. State, 138 Neb. 778, 295 N. W. 394; Dunn v. Omaha & C. B. St. Ry. Co., 139 Neb. 765, 298 N. W. 741; In re Estate of House, 145 Neb. 670, 17 N. W. 2d 883.

Plaintiff's final assignment of error arises as a result of this situation. Medical and hospital bills were stipulated as to amount. On direct and cross-examination, plaintiff testified that he received $250 to apply on these bills. The source of the payment is not disclosed. The trial court in its instructions limited the recovery, if any, for those items to the sum of $180.75. The plaintiff tells us that this is the difference between the total of the stipulated expenses and the $250. Here as elsewhere in his brief, plaintiff has not complied with rule 8a 2(6) of the Supreme Court of the State of Nebraska, which is: "The statement of facts shall be made in

narrative form and shall consist of the substance of so much of the record, with appropriate reference, as is necessary to present the case."

We are unable to reconcile the figures, which we find on independent research, with those which plaintiff uses. So far as is required here, we accept plaintiff's figures. It is to be remembered that the jury's verdict was for the defendant. Without determining the error, if any, we follow the established rule which is: "If the jury finds the defendant in a personal injury action is not chargeable with negligence an error relating to the subject of damages is necessarily harmless." Perrine v. Hokser, 158 Neb. 190, 62 N. W. 2d 677.

Having found no prejudicial error in the assignments argued here, the judgment of the trial court is affirmed.

AFFIRMED.

BILLIE COWAN, APPELLANT, V. LEWIS H. COWAN, APPELLEE.
69 N.W. 2d 300

Filed March 11, 1955. No. 33631.

1. **Divorce.** Condonation may be applied to acts of cruelty, but it stands upon a somewhat different basis than cohabitation after knowledge of adultery, for cruelty as a ground of divorce is a continuing course of conduct which grievously wounds the mental feelings and destroys the peace of mind so that it nullifies the legitimate ends of matrimony. The effort to endure unkind treatment as long as possible is commendable, but the repetition of the same cruel and harsh conduct, showing a resumption of the former course of conduct, thereby revokes condonation, and the original cause of divorce is revived.
2. ———. In awarding the custody of minor children, the court is to consider the best interests of the child, with due regard for the superior rights of fit, proper, and suitable parents. Children of tender age are usually awarded to the mother unless it is shown that she is unsuitable or unfit to have such custody, or through some peculiar circumstance is unable to furnish a proper home.
3. ———. The amount of alimony to be granted a wife is not to be determined alone from the property possessed by the hus-

band. 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 Scotts Bluff County: CLAIBOURNE G. PERRY, JUDGE. *Reversed and remanded with directions.*

Heaton & Heaton, for appellant.

Neighbors & Danielson, for appellee.

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

SIMMONS, C. J.

This is an action for divorce brought by the plaintiff wife on the grounds of cruelty, including repeated physical abuse. Defendant resisted plaintiff's petition and by cross-petition sought a divorce on the grounds of cruelty, including physical abuse, abandonment, and failure to properly maintain the home.

Trial was had resulting in a denial of a divorce on the petition of the plaintiff, the granting of a divorce on the cross-petition of defendant, the award of custody of children to the defendant, and an award of alimony.

Plaintiff appeals, asserting error in denying the divorce on her petition and in granting it on defendant's petition, in awarding the custody of the children to the defendant, and in granting insufficient alimony.

Defendant controverts those assignments of error and by cross-appeal alleges error in that the decree does not award permanent and exclusive custody of the children to him, and contending that the permanent alimony awarded is excessive.

We reverse the judgment of the trial court and remand with directions.

The cause is here for trial de novo on the record.

The parties hereto met in May of 1948, and were married July 18, 1948. Plaintiff was at that time a high school graduate, an experienced secretary, and

was 24 years of age. Defendant was at that time a physician and surgeon, 31 years of age. He completed some of his training after the marriage. A girl and a boy were born to the union within 2 years after the marriage.

During the period involved, the parties lived at Bayard in Morrill County, at Pueblo, Colorado, and later at Scottsbluff, where the defendant practiced his profession and homes were maintained.

The trial was a long and contentious one. The record is littered with testimony as to trivial and inconsequential matters. There is much evidence on both sides that does not meet the requirements of section 42-335, R. R. S. 1943, as to corroboration.

There is conflicting evidence as to quality of language used by the plaintiff to which we will refer later herein.

There is evidence on both sides as to conditions in the home as to cleanliness and uncleanliness, neatness and lack of neatness, efficiency in use of time and lack of it, and orderliness in the doing of work and lack of it. Some of the witnesses give details, others content themselves with conclusions. This may be explained in part by a lack of a common standard by which the witnesses judged the situations to which they referred. There was an apparent conflict between the meticulous standards of cleanliness, neatness, and orderliness of the physician and surgeon with those of a housewife largely doing all of the home work, caring for two babies in the diaper stage, and attempting to meet the social requirements of a wife of a professional man.

There is evidence as to neglect of feeding habits, clothing, and cleanliness of the children. It is noted that all the evidence found in the record shows they are normally healthy children.

There is evidence of the use of intoxicants socially by both parties and the results that followed.

There is evidence of suspicions of the plaintiff directed at the defendant because of his presence on occasion in eating places and elsewhere with ladies with whom he worked professionally. The unfavorable inferences which plaintiff drew from these occurrences disappeared with the evidence which was produced at the trial.

There is evidence of an indiscretion of the plaintiff at a dinner dance in November 1951, which caused the defendant to leave the party and go home alone, and required the plaintiff to be taken home by others at the dinner party. The unfavorable inferences which defendant drew from that occurrence likewise disappear in the light of the evidence received. The facts of that matter were readily available to the defendant at that time and since. Nevertheless the parties agree that thereafter sexual relations between them ceased. Defendant rejected plaintiff's desires to renew that relationship. Defendant produced evidence that he sought a solution of the difficulties of the parties, and yet it appears that he was unwilling to renew that relationship with the element of forgiving and forgetting that it would have involved.

It is noted that many of the matters about which defendant complains arose in the home under living and working conditions which he provided; or occurred at times and places where defendant escorted plaintiff, among people with whom he caused her to associate, and under contributing factors in which he shared.

We pass a detailed discussion of these matters because of evidence of physical cruelty of the defendant applied to the person of the plaintiff which, as to two events, is amply corroborated by witnesses for both parties and largely admitted by the defendant.

The first of these batteries occurred about November 1950. The initial cause seems to have been the physical method used by plaintiff in disciplining one of the children. The result was a beating of the plaintiff by the

defendant. Only the extent of the battery is in dispute. Defendant explains this by the statement that he "inhibited" the plaintiff, later explaining that he meant by that term the use of physical means to make her treat the child in a different fashion; that he threatened to "impede her physically" so that she would not touch the child again; that "I would use physical means to make her leave" the child alone; that "I would protect that child from physical violence inflicted by his mother"; and protect it from "onslaughts" and keep her away from the child.

The other battery occurred the evening before Thanksgiving 1952. An argument started over what should be purchased for a Christmas present for defendant's office nurse. Defendant says he objected to disciplinary methods used by the plaintiff at mealtime with the boy. Defendant interfered. Defendant asserts plaintiff hit him over the head with a skillet containing food. Plaintiff says she hit him with a plate after he choked her. Defendant received head wounds. Defendant administered a battery to the plaintiff resulting in black eyes, and other visible bruises. It was a brutal beating. The next day defendant insisted that plaintiff bake a pie and attend a Thanksgiving dinner given by professional associates and their families. She did so, with her bruises visible for all to see. The same evening they attended a card party with his professional associates.

Thereafter, following family discussions, on December 8, 1952, plaintiff took the children and went to her father's home in Georgia. Plaintiff says she went to spend the Christmas Holidays. Defendant says she left, stating that she would never return. However it is noted in a letter which defendant wrote to plaintiff in Georgia, defendant says "We were both in complete and full agreement that any separation should be at least two or three months in duration." In any event defendant furnished the means for her to go and took

plaintiff and the children to the train when they left.

While plaintiff and the children were absent, defendant, on contract, purchased and moved the home into a commodious country house. He did not advise plaintiff of that fact.

On March 28, 1953, plaintiff and the children, uninvited and unannounced, returned to Scottsbluff. Defendant accepted the children and gave them a home in the new residence. He denied the plaintiff admission to the home. This action then followed.

In Wetenkamp v. Wetenkamp, 140 Neb. 392, 299 N. W. 491, we held: "Condonation may be applied to acts of cruelty, but it stands upon a somewhat different basis than cohabitation after knowledge of adultery, for cruelty as a ground of divorce is a continuing course of conduct which grievously wounds the mental feelings and destroys the peace of mind so that it nullifies the legitimate ends of matrimony. The effort to endure unkind treatment as long as possible is commendable, but the repetition of the same cruel and harsh conduct, showing a resumption of the former course of conduct, thereby revokes condonation, and the original cause of divorce is revived." This was approved in Hodges v. Hodges, 154 Neb. 178, 47 N. W. 2d 361.

This physical abuse and cruelty by the defendant of the plaintiff transcends and outweighs the other alleged acts of the parties. It justifies an award of a divorce to plaintiff rather than to the defendant. The trial court erred in denying a divorce to the plaintiff.

The judgment of the trial court is reversed as to that question and the cause remanded with directions to enter a decree granting a divorce to the plaintiff and denying it to the defendant.

The next question is that of the custody of the two children.

Plaintiff alleged that she was a fit, proper, and suitable person to have the care, custody, and control of the two children. This was put in issue by defendant's gen-

eral denial. Although praying for permanent and exclusive custody of the children, defendant in his cross-petition made no allegations as to his own fitness to have the care, custody, and control of the children.

The trial court found generally for the defendant and against the plaintiff. The court further found that it would be for the best interests of the children if defendant were granted their custody and that the defendant is a fit and proper person to have their custody. There was no finding that plaintiff was not a fit and proper person to have their custody, save such as is involved in the general finding for defendant. However, any inferences against the plaintiff from that general finding are negatived by the fact that the trial court awarded plaintiff custody of the children on Saturdays from 9 a. m. to 7 p. m. and during the month of June of each year.

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

The power granted by section 42-311, R. R. S. 1943, is subject to the continuing power of the court over that subject matter as set out in section 42-312, R. R. S. 1943.

The rule is that in awarding the custody of minor children, the court is to consider the best interests of the child, with due regard for the superior rights of fit, proper, and suitable parents. Children of tender age are usually awarded to the mother unless it is shown that she is unsuitable or unfit to have such custody, or through some peculiar circumstance is unable to furnish a proper home. See, Bath v. Bath, 150 Neb. 591, 35 N.

W. 2d 509; Hodges v. Hodges, *supra;* Campbell v. Campbell, 156 Neb. 155, 55 N. W. 2d 347; Killip v. Killip, 156 Neb. 573, 57 N. W. 2d 147; Wakefield v. Wakefield, 157 Neb. 611, 61 N. W. 2d 208. In Lichtenberg v. Lichtenberg, 154 Neb. 278, 47 N. W. 2d 575, we held: "The care, custody, and control of a child of tender years is almost uniformly awarded to the mother if she is a fit and suitable person to have its custody."

A reason for the rule awarding the custody of young children to the mother is well illustrated by the situation shown in this case from the routine established after the defendant secured custody of the children and prior to the trial.

Defendant is a busy practitioner of his profession. He is up early in the morning. After a breakfast with the children, he is away from the home; he may or may not be home for the noon meal; and he is home for the evening meal and quite often again absent in the early evening on professional duties. He is with the children on Sunday mornings, takes them to Sunday School, and spends time with them on that day. He is an outdoor man and spends time hunting with adult companions. The meals are prepared by a housekeeper. She supervises the children, their clothes, their play, recreation, and rest periods, and, if need be, corrects their conduct and exercises discipline. Although this decree places the legal care, custody, and control in the defendant, subject to plaintiff's custody as above set out, the fact remains that the actual care, custody, and control, hour by hour and day by day, is largely in the housekeeper selected by defendant. In the less than 9-month period between the separation and the trial, there were two different salaried housekeepers in the home caring for these children. The result is that the children are denied the loving care and affection of a mother that our rule contemplates shall be preserved for them if it may properly be done.

There is evidence here that plaintiff is "high strung"

and emotionally unstable. It is argued that because of that she is not fit to care for the children. It appears by defendant's witnesses that the children are normal youngsters with the exception that the girl evidenced shyness when with adults with whom she was not well acquainted. We take it that that is not an unusual characteristic for a child.

There is credible evidence that on one occasion in midyear 1952 the plaintiff attempted suicide. That event, as well as most of the other emotionally disturbed events, occurred when there was dissention between the plaintiff and the defendant and the home was being pushed apart. A considerate understanding of the factual situation concurring with those events should be had.

There is credible evidence that plaintiff at times used improper language in the presence of the children and others, and that the children had used similar language on occasion. However, defendant's witness, a doctor, testified that when plaintiff "had a few drinks" her inhibitions disappeared and that plaintiff's use of questionable language usually occurred during the time that she had been drinking intoxicants. There is also evidence of the defendant's witness that on occasion when defendant told plaintiff to cease drinking that she did so. It is to be noted that substantially all the times when these matters occurred, plaintiff had been drinking intoxicants either with the defendant alone or with the defendant and others with whom he caused her to associate.

There is little evidence of emotional disturbance in the months that intervened between the separation and the trial. For aught that appears in the record, plaintiff lived an exemplary life after she was relieved of the stress and the association of living with the defendant. It affirmatively appears that plaintiff on Wednesday evenings and Sundays, since the separation, has attended religious services at the church of her choice. There is also evidence during the stay in Georgia in 1952-1953

that plaintiff and the children attended Sunday School and plaintiff taught a Sunday School class and sang in the choir.

Defendant relies on our decision in Swanson v. Swanson, 137 Neb. 699, 290 N. W. 908. It is obvious that the factual situation there and here is in some respects comparable. There are also differences. There it was determined that the defendant was entitled to the divorce. Here it is determined that the plaintiff is entitled to a divorce. There two of the children were much older than the children involved here. There the emotional instability of the plaintiff appears to have been somewhat permanent and much greater in degree than here. There the emotional instability did not improve with medical treatment; here that instability disappeared in large part when the contributing factors were removed. There the unfavorable "attitude" of the mother was beginning to show in the lives of the children. Here such a conclusion is not justified. There is evidence as to the use of language by the children on two or three occasions comparable to some shown to have been used by the plaintiff. No other source of the language appears. In the light of the record hereinbefore summarized, we do not deem that fact a sufficient reason to deny the mother of the care and custody of these children. Problems of child custody are always difficult. Each case must be decided on its own facts and circumstances and the weighing and balancing of conflicting factors. The ideal solution is seldom found. We do not consider the Swanson case controlling here.

We conclude that the care, custody, and control of these children should be awarded to the plaintiff in accord with the rule hereinbefore stated. The judgment of the trial court as to that question is reversed and remanded with directions to enter a decree awarding the custody of the children to the plaintiff with rights of visitation and custody in the defendant comparable to those awarded the plaintiff by the trial court.

In determining times of visitation and temporary custody of the defendant, due regard should be given to the time and times available to the defendant because of his professional duties. If the parties cannot agree on that matter, the trial court should take evidence and determine it. The decree in respect to custody is to be subject, of course, to the continuing revisory power of the court.

We come next to the question of child support and alimony.

The evidence shows that defendant is paying a housekeeper $150 a month and furnishing food and quarters to her and a minor son. The housekeeper's duties are in a large part connected with the children. In addition to the above amount, defendant has been furnishing food, clothing, etc. for the children. Defendant has set the standard of living he desires for his children. His income, referred to later herein, appears to justify it. Accordingly, we find there should be awarded to the plaintiff the sum of $150 a month for the support of the two children of the parties, payable monthly, said payments to continue until the children reach legal age, marry, or are no longer in the legal custody of the plaintiff. The trial court is directed to make such an award to the plaintiff. This award is subject, of course, to the power of the court to revise or alter the same as provided by section 42-312, R. R. S. 1943.

The trial court awarded all property, real and personal, to the defendant, including all household furnishings, equipment, and personal belongings. As to that the decree is to be modified so as to award to the plaintiff a suitable amount of household furnishings, including furniture, rugs, electrical appliances, and other proper items to enable her to establish a suitable home for the care and custody of the children. The personal effects of the children, including clothing, playthings, etc. are likewise to be awarded to the plaintiff. If the parties cannot agree on these matters, then the court should take

evidence and make an award requiring delivery of such properties to the plaintiff.

The trial court awarded plaintiff permanent alimony in the sum of $15,000 payable at the rate of $150 a month.

Plaintiff here asserts that the award is too little, while defendant by cross-appeal asserts it is too much.

The amount and value of the property is generally stated but the parties disagree as to what the record shows as to total value.

This much is clear. When the parties were married, neither had anything of material wealth save an automobile owned by the defendant. They acquired from defendant's professional earnings a quite adequate amount of household goods. Defendant has his guns, his dogs, and his boat for recreational purposes. In addition, the defendant has a substantial investment in professional equipment. There is reference to some savings and life insurance. In addition, there is a substantial equity in the home purchased at a price of $21,000. It becomes important to point out that all of the property was accumulated during the marriage relationship.

We find no basis for establishing a relationship between the values of property enumerated and the alimony award made by the court.

The parties stipulated that for the year 1950 defendant's gross income was $9,610.16 with a net subject to income tax of $1,755.68, and a net after income tax payment of $1,688.68. For 1951, the gross was $8,475, the net subject to income tax was $3,265.91, and a net after income tax payment of $2,909.91. For 1952, the gross was $22,931.90, the net subject to income tax was $12,882.02, and a net after income tax payment of $10,580.24. There is also a stipulated net income of $11,506.24 for the first 11½ months of 1953.

It is obvious that any substantial award of child support and alimony must be paid in large part from future earnings of the defendant.

We were presented with a similar situation in Prosser v. Prosser, 156 Neb. 629, 57 N. W. 2d 173. There the wife was awarded substantial parts of the accumulated property. Here the wife was awarded no part of such property. There the wife by her earnings had contributed materially to the education and established earning capacity of the husband. Here the wife contributed nothing in dollars but did contribute her work and services in maintaining the home and raising the children during the period of quite limited income of the defendant and during the period of his internship and advanced professional training in Colorado after the marriage. There, as here, after the husband had secured his education and established a substantial income in the work for which he was trained, the wife was put aside. There, as here, the wife had a right to expect that in the years to come she would share in the benefits derived from the training and ability which she helped to bring about. There, as here, that sharing is denied. There we stated this rule which we follow here: "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."

Weighing these things in the light of the contribution and conduct of the parties during the marriage, we conclude that the award of permanent alimony should be $28,800 instead of the $15,000 fixed by the trial court, payable at the rate of $150 a month in the time and manner fixed in the decree, delinquent payments, if any, to bear interest at the legal rate. The decree to be entered here on remand shall so provide.

An award of $750 to be taxed as costs is made as attorneys' fees to the plaintiff, to be in addition to attorneys' fees and allowances heretofore granted. All costs here and in the trial court are taxed to the defendant.

The judgment of the trial court is reversed and the cause is remanded with directions to enter a decree in accord with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

LOLA WELSTEAD, APPELLANT, V. JIM RYAN CONSTRUCTION CO., A CORPORATION, ET AL., APPELLEES.
69 N. W. 2d 308

Filed March 11, 1955. No. 33641.

1. **Negligence: Trial.** When evidence with relation to negligence is conflicting or such that minds may reasonably reach different conclusions therefrom with regard to its existence, the issue should be submitted to the jury for its determination.
2. **Trial: Appeal and Error.** In determining the sufficiency of evidence to sustain a verdict it must be considered most favorably to the successful party, any controverted fact resolved in his favor, and he must have the benefit of inferences reasonably deducible from it.
3. ———: ———. The verdict of a jury, based on conflicting evidence, will not be disturbed unless clearly wrong.
4. **Appeal and Error.** Errors assigned but not discussed will not ordinarily be considered by this court.
5. **Damages.** Damages for permanent injuries cannot be based upon mere speculation, probability, or uncertainty, but must be based upon competent evidence that permanent damages, clearly shown, are reasonably certain as a proximate result of the injury.
6. **Evidence.** Life tables of expectancy may be properly received in evidence only when there is competent evidence that the claimed injuries are permanent.
7. **Trial: Appeal and Error.** The trial court has the duty to instruct the jury on issues presented by the pleadings and evidence, whether requested to do so or not, and a failure so to do constitutes prejudicial error.
8. ———: ———. It is error to submit issues upon which there is no evidence to sustain an affirmative finding.
9. **Negligence: Trial.** Where it is claimed that the conduct of others not parties to the suit was the sole proximate cause of an accident, such defense is not an affirmative plea in avoidance of plaintiff's cause of action, and imposes no burden of proof upon defendant with relation thereto, but is one entirely con-

sistent with and provable under the general issue. However, some place in the instructions the jury should be advised that if it should find the sole proximate cause of the accident in which plaintiff was injured was the negligence of others, then its verdict should be for defendant.

10. **Negligence.** When separate and independent acts of negligence by different persons combine to produce a single injury, each participant is liable for the resulting damages, though one of them alone would not have caused the result.

APPEAL from the district court for Douglas County: JAMES M. FITZGERALD, *Judge*. *Reversed and remanded.*

Webb, Kelley, Green & Byam, for appellant.

Fraser, Connolly, Crofoot & Wenstrand, for appellees.

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

CHAPPELL, J.

Plaintiff Lola Welstead brought this action against defendants Jim Ryan Construction Co., a corporation, and James G. Ryan, seeking to recover damages for personal injuries allegedly caused by a collision of motor vehicles which occurred at about 9:15 a. m. on August 10, 1951, near the intersection of Forty-ninth and Dodge Streets in Omaha. Upon trial to a jury, it returned a verdict for defendants, and judgment was rendered thereon. Plaintiff's motion for new trial was overruled and she appealed, assigning in substance that: (1) The verdict and judgment were not sustained by the evidence; (2) the trial court erred in the admission and exclusion of certain evidence; and (3) the trial court erred in the giving and failing to give appropriate required instructions. We sustain the last assignment.

The following is admitted by the pleadings and evidence, to wit: At time of accident plaintiff was a guest passenger riding in the front seat of a 1946 Ford two-door sedan owned and driven by her husband. It will be designated as the Welstead car. Also at time of accident defendant James G. Ryan owned a 1950 GMC

three-quarter-ton truck driven with his consent by an employee of defendant Jim Ryan Construction Co., also owned and operated by defendant James G. Ryan. Such company will be designated as defendant corporation. Defendant James G. Ryan will be designated as defendant Ryan, and his truck will be designated as defendants' truck. Dodge Street is a four-lane street extending east and west to and from Omaha. It is intersected by Forty-ninth Street. Plaintiff's driver approached the intersection from the west while driving about 20 miles an hour in the outside or south lane of Dodge Street. The red traffic signal light at Forty-ninth Street appeared and he stopped his car about half a car length behind the last of several others waiting for the signal to change. His brakes were on and his car was in low gear with the clutch depressed.

Also there is evidence in the record from which it could be reasonably concluded as follows: That a 1948 Chevrolet car hereinafter called the Kemmy car, driven by a Mrs. J. F. Kemmy, had previously followed the Welstead car 15 or 20 feet to the rear thereof, and stopped from 3 to 5 feet behind it. At that time the only eastbound traffic was all in the south or outside lane, and the rest of the street, including a passing lane on the left and also a parking lane on the right, was clear for eastbound traffic. Nevertheless, while the Welstead car and the Kemmy car were stopped as aforesaid, the Ryan truck, while operated in high gear, crashed into the rear of the Kemmy car, knocking it forward with force and violence into the rear of the Welstead car, which caused plaintiff's injuries.

On the other hand, there is evidence from which it could be reasonably concluded as follows: That plaintiff's driver stopped his car suddenly behind several cars ahead of it, without making any hand and arm signal that he intended to do so. Also that defendant's employee was driving defendant's truck about 15 miles

an hour one-half car length behind the Kemmy car, when it stopped quickly or suddenly right in front of him, and his front bumper collided lightly with the rear bumper of the Kemmy car after there had been a collision between the Kemmy car and the Welstead car.

Evidence with regard to damages sustained by the respective vehicles was substantially as follows: That the transmission gears and the trunk lid, bumper, bumper brackets, and gravel guards on the rear of the Welstead car were damaged. That the windshield of the Kemmy car was shattered on the right side where Mrs. Kemmy's little boy struck it with his head. Also, the center grille and "T" bar on the grille, at the front of the Kemmy car, were damaged and had to be replaced. The grille had been punctured by a trailer hitch on the rear of the Welstead car. The damage to the rear of the Kemmy car was a dent in the taller center bumper guard, which after the accident was left askew. The damage to the front of defendants' truck was a dent in its bumper. However, such damage was claimed by defendants to have been caused by a prior accident.

It is elementary that when evidence with relation to negligence is conflicting or such that minds may reasonably reach different conclusions therefrom with regard to its existence, the issue should be submitted to the jury for its determination. Further, as held in Bolio v. Scholting, 152 Neb. 588, 41 N. W. 2d 913: "In determining the sufficiency of evidence to sustain a verdict it must be considered most favorably to the successful party, any controverted fact resolved in his favor, and he must have the benefit of inference reasonably deducible from it.

"The verdict of a jury, based on conflicting evidence, will not be disturbed unless clearly wrong."

In the light of such rules and the evidence heretofore set forth, we conclude that the issues of negligence were questions for the jury and that the verdict of the jury

was supported by competent evidence. Therefore, the first assignment has no merit.

Plaintiff contended that the trial court erred prejudicially in excluding most of her medical testimony that plaintiff's injuries were caused by the accident. In that regard, plaintiff's physician testified that she had a lumbosacral sprain. When asked whether in his opinion such disability was the result of the accident involved, plaintiff's physician answered: "I most certainly think so." Thus, if any error were theretofore committed, it was cured by the answer thus given. Plaintiff's contention has no merit.

One of plaintiff's contentions specifically assigned that the court erred in permitting defendants' employee to speculate that there was a collision between the Welstead car and the Kemmy car before his truck collided with it. That alleged error was not argued in plaintiff's brief and will not be further considered here because this court has consistently held that: "Errors assigned but not discussed will not ordinarily be considered by this court." Umberger v. Sankey, 151 Neb. 488, 38 N. W. 2d 21.

Plaintiff argued that the court erred in excluding evidence that her injuries were permanent, and erred in excluding the life tables of expectancy offered by her. However, instruction No. 1, which summarized the allegations of plaintiff's petition, did recite her age and alleged expectancy. Further, when plaintiff's physician was asked whether plaintiff would require further medical attention, he answered in part: "Medically, as far as we are concerned the duration is too indefinite to know. I don't think any doctor would put a time limit on these things. It is one of those things that is hard to prognose, because they are such aggravating things." He was then asked whether plaintiff's injuries and disability were permanent, whereupon objection thereto was sustained upon the ground that it had already been asked and answered. We conclude that such

ruling was correct, because the applicable and controlling rule is that: "Damages for permanent injuries cannot be based upon mere speculation, probability, or uncertainty, but must be based upon competent evidence that permanent damages, clearly shown, are reasonably certain as a proximate result of the injury." Borcherding v. Eklund, 156 Neb. 196, 55 N. W. 2d 643. See, also, Schwarting v. Ogram, 123 Neb. 76, 242 N. W. 273, 81 A. L. R. 769. Further, life tables of expectancy may be properly received in evidence only when there is competent evidence that the claimed injuries are permanent. Lyons v. Joseph, 124 Neb. 442, 246 N. W. 859. Plaintiff's contention has no merit.

In Thurow v. Schaeffer, 151 Neb. 651, 38 N. W. 2d 732, this court held: "The trial court has the duty to instruct the jury on issues presented by the pleadings and evidence, whether requested to do so or not, and a failure so to do constitutes prejudicial error." In that regard, plaintiff argued that the trial court failed to properly instruct upon the question of deviation from the course of his employment by defendants' employee, which was alleged as a defense. Instruction No. 2 submitted such pleaded defense to the jury as an issue, and second instruction No. 6 submitted that issue to the jury by an abstract statement of a rule of law which had no application to the evidence adduced.

In Dafoe v. Grantski, 143 Neb. 344, 9 N. W. 2d 488, this court held: "Where, in driving an automobile, the deviation by a servant from the direct route to a destination is slight and not unusual the court may, as a matter of law, determine that the servant was still executing his master's business; where the deviation is very marked and unusual, the court may determine, as a matter of law, that the servant was not on the master's business; cases falling between these extremes will be regarded as involving a question of fact, to be left to the jury."

This record discloses that defendant Ryan instructed

defendants' driver to go from defendant corporation's yard at Sixty-fifth and Sprague Streets to Twenty-second and L Streets in South Omaha to pick up a harrow and deliver same to one of their other construction jobs at Eighty-sixth and Pacific Streets. He was on such mission at the time of the accident. There is no evidence that defendant Ryan ever instructed defendants' driver in so doing "to drive said automobile truck south from Ames Avenue on 72nd Street to 'L' Street, and then east to 22nd Street," as alleged in defendants' amended answer and submitted to the jury by instructions Nos. 2 and 6, as a pleaded issue supported by evidence. The evidence simply was that defendants' driver could have gone south on Seventy-second Street, crossing Dodge to L Street, thence east to Twenty-second Street, or he could have taken equally direct routes to the same destination by turning east on Dodge Street at Seventy-second or Fiftieth Streets, as he did, thence east across Forty-ninth Street, where the accident occurred, to either Forty-second or Twenty-fourth Streets, and turned south on either of such streets to L, thence east to Twenty-second Street. Under such circumstances, the mere fact that defendants' driver said he intended to or did subsequently drive on down beyond Forty-ninth Street to the police station to dispose of a traffic ticket would not change the situation.

In Styskal v. Brickey, 158 Neb. 208, 62 N. W. 2d 854, this court held: "It is error to submit issues upon which there is no evidence to sustain an affirmative finding." In that opinion we said: " ' "This court has often pointed out that it is error to submit issues upon which there is no evidence to sustain an affirmative finding. It is the duty of trial courts to determine the issues upon which there is competent evidence and submit them, and them only, to the jury. The submission of issues upon which the evidence is insufficient to sustain an affirmative finding is generally very prejudicial and invariably results in a second trial." (Johnson v. Anoka-Butte Lum-

ber Co., 141 Neb. 851, 5 N. W. 2d 114.)' Simcho v. Omaha & C. B. St. Ry. Co., 150 Neb. 634, 35 N. W. 2d 501."

As we view it, there was no evidence to sustain any issue of deviation as pleaded by defendants and submitted by the court. That question was a matter of law for the court. The issue of deviation should not have been submitted to the jury as an issue for its determination, and such action was erroneous.

Plaintiff argued that instruction No. 2, which summarized the allegations of defendants' answer, was also prejudicially erroneous because it in effect factually told the jury that the Kemmy car collided with the Welstead car before defendants' truck arrived at the scene. An examination of the instruction discloses that its language could not be so construed upon any logical theory. The contention has no merit.

The trial court, in instruction No. 5 and first instruction No. 6, defined preponderance of evidence, negligence, ordinary care, and proximate cause. The only other instruction given with relation to negligence of the parties was No. 4, which plaintiff argued was prejudicially erroneous in several particulars. We sustain such contention.

In that regard, plaintiff's petition alleged in substance that defendants' driver was guilty of negligence in failing to keep a proper lookout and in failing to have defendants' truck under proper control; that as a direct and proximate result of such alleged negligence, the accident occurred; and that plaintiff sustained personal injuries. It should be noted that the trial court gave no instruction whatever defining the duty of drivers of motor vehicles to keep a proper lookout or to have their vehicles under reasonable control.

In their answer, defendants denied generally and expressly denied that their driver was guilty of any negligence which in any way proximately caused or contributed to cause the accident and plaintiff's injuries.

They further alleged that the collision between the Welstead and Kemmy cars occurred prior to the arrival of their truck, and if plaintiff sustained any injuries they were caused by that collision without any negligence of any kind by defendants' driver. Plaintiff's reply denied generally.

In the light of the foregoing, defendants attempted to establish by evidence that plaintiff's driver made an abrupt stop without giving any hand signal of his intention to stop behind the other several cars ahead of him; that the Kemmy car stopped quickly or suddenly, crashing into the rear of the Welstead car; and that thereafter defendants' driver only lightly struck the rear of the Kemmy car. The effect thereof was to claim that negligence of the drivers of the Welstead or Kemmy cars or both of them was the sole proximate cause of the accident and that no negligence of defendants' driver proximately caused or contributed to the accident and plaintiff's injuries.

In that connection, contrary to defendants' contention, we have held that such a defense was one entirely consistent with and provable under the general issue. As held in Styskal v. Brickey, *supra:* "Where it is claimed that the conduct of another, not a party to the suit, was the sole proximate cause of the accident such defense is not an affirmative plea in avoidance of plaintiff's cause of action and imposes no burden of proof upon defendant with relation thereto but is one entirely consistent with and provable under the general issue. However, some place in the instructions the jury should be advised that if it should find the sole proximate cause of the accident in which plaintiff was injured was the negligence of the other then its verdict should be for the defendant."

We have also held that: "When separate and independent acts of negligence by different persons combine to produce a single injury, each participant is liable for the resulting damages, though one of them alone

would not have caused the result." Umberger v. Sankey, *supra.*

In the light of the foregoing situation we have examined instruction No. 4. It told the jury in substance that before plaintiff could recover from defendants, the burden was upon her to prove by a preponderance of the evidence: (1) That defendants' driver was guilty of negligence in the operation of defendants' truck, without adding thereto the words "in one or more particulars as alleged by plaintiff"; (However, such erroneous omission was favorable to plaintiff.) (2) that his negligence was the proximate cause of the collision between the Welstead and the Kemmy cars; (3) that the collision of defendants' truck with the Kemmy car was the proximate cause of the Kemmy car colliding with the car in which plaintiff was riding; and (4) that plaintiff's injuries were caused by the collision between the car in which she was riding and the Kemmy car. The instruction then said: "If you find that plaintiff has proved by a preponderance of the evidence that the defendants' driver was guilty of negligence in the operation of defendants' truck, and that the negligence of defendants' driver caused the collision and injury to plaintiff, then your verdict will be in favor of the plaintiff in whatever sum you may find she has been damaged, but if plaintiff has failed to prove *any one of the features stated above,* then your verdict will be in favor of the defendants." (Italics supplied.)

As we view it, the effect of such instruction was to clearly tell the jury that plaintiff could not recover unless she proved by a preponderance of the evidence that negligence of defendants' driver was the sole proximate cause of the accident and plaintiff's injuries. Thus, the instruction was prejudicially erroneous. It placed too great a burden upon plaintiff, because in order to recover under the pleadings and evidence, any negligence of her driver was not imputed to her and she was only required to prove by a preponderance of evidence that

defendants' driver was negligent in some manner as alleged, and that such negligence was a proximate cause of the accident and plaintiff's injuries.

In Danielsen v. Eickhoff, 159 Neb. 374, 66 N. W. 2d 913, this court recently said: "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. * * *

"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." Substitute the Welstead or Kemmy cars or both of them for the Wiltsie car and we have a parallel situation in the case at bar.

For reasons heretofore stated, the judgment of the trial court should be and hereby is reversed and the cause is remanded for further proceedings in conformity with this opinion.

REVERSED AND REMANDED.

WILLIAM R. MILLER, APPELLANT, V. JOHN W. AITKEN ET AL., APPELLEES.
69 N. W. 2d 290

Filed March 11, 1955. No. 33671.

1. **Trial: Judgments.** In order to obtain a summary judgment the movant must show, first, that there is no genuine issue as to any material fact in the case, and second, that he is entitled to a judgment as a matter of law.
2. ———: ———. In considering such motion the court should

consider the evidence in the light most favorable to the party against whom it is directed.

3. ———: ———. Summary judgment is effective and serves a separate useful purpose only when it can be used to pierce the allegations of the pleadings and show conclusively that the controlling facts are otherwise than as alleged.

4. **Negligence: Trial.** Where the undisputed facts conclusively establish in an action for negligence that plaintiff was guilty of contributory negligence more than slight when compared with the negligence of the defendant as a matter of law, a motion for summary judgment for the defendant may properly be sustained.

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

Sackett, Brewster & Sackett and *Robert S. Finn,* for appellant.

Jean B. Cain and *Raymond B. Morrissey,* for appellees.

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

CARTER, J.

This is an action for personal injuries and property damage sustained by the plaintiff resulting from the alleged negligence of defendants, arising out of an automobile accident. A motion by the defendants for a summary judgment was sustained by the trial court and the plaintiff appeals.

The evidence in support of the motion consists of the deposition of the plaintiff and an affidavit of the defendant John W. Aitken with a photograph of each of the two automobiles involved taken after the accident.

Plaintiff's petition alleged that he was driving north on a graded dirt road about 1 mile east and 5 miles south of Sterling, Nebraska, on September 2, 1953, at or about 6:30 p. m. It alleged that plaintiff approached the intersection from the south in a careful and prudent manner, and at a reasonable speed which did not exceed 25 to 30 miles per hour. Defendant John W. Aitken ap-

proached the intersection from the east and it is alleged that he negligently drove his automobile into the intersection while it was lawfully occupied by plaintiff's car, causing the personal injuries and property damage here complained of. It is alleged also that trees, bushes, and weeds obscured the vision of plaintiff to the east and that of the defendant John Aitken to the south. It is alleged further that plaintiff slowed his automobile down to 20 or 25 miles per hour, and after looking to the east and west he proceeded into the intersection where he was hit by defendants' car being carelessly, negligently, and unlawfully driven at a dangerous rate of speed in excess of 60 miles per hour. The petition alleges that defendant John W. Aitken failed to keep a proper lookout, that he drove at excessive speed, that he failed to yield the right-of-way, that he failed to apply his brakes, and that he failed to drive at such a rate of speed as to avoid hitting plaintiff's car in the intersection.

Defendant John W. Aitken alleges in his answer that as he approached from the east he had the right-of-way, that he was traveling on the right-hand side of the road, and that plaintiff carelessly and recklessly drove his automobile into the intersection and struck the car driven by the defendant John W. Aitken.

Plaintiff alleges in his reply that defendants' car did not enter the intersection prior to the time plaintiff's car proceeded into it and reasserts the negligence of the defendant John W. Aitken as the proximate cause of the accident.

Defendants thereafter took the deposition of the plaintiff and, on the basis of the evidence contained therein, moved for a summary judgment. Defendants also offered the affidavit of John W. Aitken to which was attached two photographs. One was a picture of plaintiff's car showing that it was damaged at the front. The other picture shows that defendants' car was hit in the area of the left rear wheel.

The uncontradicted evidence offered in support of the

motion for a summary judgment is as follows: The plaintiff says in his deposition that he approached the intersection from the south at a speed of 35 or 40 miles per hour. He slowed down for the intersection, to a speed of about 30 miles per hour. He had traveled the road many times and knew the intersection was dangerous. His vision to the east was obscured by trees, a hedge, and growing weeds. He could not see anyone approaching from his right until he was north of the south line of the intersection. He says that his view from the right was absolutely obscured. He states that he looked both east and west, but that he saw no car approaching from the east because of the trees, hedge, and growing weeds. He gave no signal as he entered the intersection and specifically states that he did not sound his horn. He did not apply his brakes because he did not have time. He did not see the Aitken car until he was across the center of the intersection. The collision occurred in the northeast quadrant of the intersection. It is not disputed that the front of plaintiff's car struck the left rear wheel of the Aitken car as shown by the pictures received in evidence. The day was clear and the roads dry. The intersection was level. Neither road was favored over the other. Plaintiff says he did not see the Aitken car until just before the impact. He does not know the speed of the Aitken car. It was upon this evidence that the trial court sustained defendants' motion for a summary judgment.

A motion for a summary judgment is authorized by section 25-1332, R. S. Supp., 1953. In order to obtain a summary judgment movant must show, first, that there is no genuine issue as to any material fact in the case, and second, that he is entitled to a judgment as a matter of law. The second provision is met if movant would be entitled to a directed verdict on the basis of the undisputed facts if the case were being tried to a jury. In considering the motion the court should view the evidence in the light most favorable to the party against

whom it is directed. This means that a summary judgment will be granted where the allegations of the pleadings have been pierced by the movant and the resistance to the motion fails to show that a genuine issue of fact exists. It should be granted when it is made abundantly clear that a formal trial could serve no useful purpose and could only result in a judgment as a matter of law. It is not the purpose of the rule, and it must not be so construed, to deprive a litigant of a formal trial where there is a genuine issue of fact to be determined. The motion for a summary judgment is not a substitute for a motion to dismiss, a demurrer, or a judgment on the pleadings. It is only where a situation exists that the terms of the statute imply and entitle the movant to judgment as a matter of law that it may be used to avoid an unnecessary trial. The cases sustaining the foregoing statements have been collected in Healy v. Metropolitan Utilities Dist., 158 Neb. 151, 62 N. W. 2d 543.

The deposition of the plaintiff and the affidavit of the defendant John W. Aitken stand undisputed in this proceeding. If the evidence shows that plaintiff was guilty of contributory negligence more than slight, as a matter of law, there is no genuine issue of fact to be tried. A conclusive finding to that effect completely disposes of plaintiff's right to a judgment as a matter of law.

We think that the plaintiff as a matter of law, under his own statement of the facts as contained in his deposition, is not entitled to a judgment in his favor. It is clear that plaintiff knew the involved intersection was a hazardous one. His vision to the right was completely blocked, but nevertheless he proceeded into the intersection without regard to possible traffic coming from the east. He gave no warning and failed to see the Aitken car until just before he struck it. There is no evidence in the record of negligence on the part of the driver of the Aitken car. According to the record before us the

plaintiff drove into the intersection without looking for traffic from the east at a place where he could see. He was taking dangerous chances in disregard for his own safety which, as a matter of law, amount to more than slight negligence when compared with the negligence of the defendants. See Roby v. Auker, 151 Neb. 421, 37 N. W. 2d 799.

When a driver of an automobile enters an intersection of two highways he is obligated to look for approaching cars and to see those within that radius which denote the limit of danger. Evans v. Messick, 158 Neb. 485, 63 N. W. 2d 491. Looking at a point from which one cannot see such approaching vehicles is not a compliance with this rule, and constitutes negligence more than slight as a matter of law. It amounts to a disregard for one's own safety that will not ordinarily permit a recovery. This is particularly true where one fails to look to his right for vehicles approaching at approximately the same time, the right-of-way in such instances being in the one approaching from the right.

The plaintiff did not offer counter-affidavits or other form of evidence to refute the evidence tendered in support of the motion. The evidence of the defendants in support of the motion stands uncontradicted. Whether or not such evidence requires a judgment for the defendants presents a question of law for the court. The trial court found that the undisputed evidence shows as a matter of law that plaintiff was guilty of negligence more than slight when compared with the negligence of the defendants as shown by the record. The trial court was correct in so holding.

AFFIRMED.

ALVIN BEHRENS, APPELLANT, V. ROBERT GOTTULA, APPELLEE.
69 N. W. 2d 384

Filed March 11, 1955. No. 33677.

1. **Trial.** A motion for a directed verdict or its equivalent 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. **Negligence: Trial.** Where a petition charges specific grounds of negligence as a basis for recovery, and also contains a general allegation of negligence on the part of the defendant in causing the damage, and where no motion for a more specific statement is filed, it is competent under the general allegation of negligence to offer evidence of any fact which contributed to the injury.
3. **Fires: Negligence.** It is sufficient if all the facts and circumstances in evidence fairly warrant the conclusion that the fire did not originate from some other cause, and the origin of a fire has generally been held sufficiently established by inferences drawn from circumstantial evidence.
4. **Trial.** In a jury case where different minds may draw different conclusions or inferences from the adduced evidence, or if there is a conflict in the evidence, the matter at issue must be submitted to the jury.

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

John E. Mekota, for appellant.

Sackett, Brewster & Sackett, for appellee.

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

MESSMORE, J.

The plaintiff, Alvin Behrens, brought this action at law in the district court for Gage County against defendant, Robert Gottula, to recover damages for destruction of the plaintiff's property by fire alleged to have been caused by the defendant's negligent opera-

tion of a defective motor while shelling corn for the plaintiff. At the conclusion of all of the evidence offered by the plaintiff, the defendant moved the court for a directed verdict or, in the alternative, that the jury be dismissed and the court render judgment in favor of the defendant. The court dismissed the jury and rendered judgment in favor of the defendant. The plaintiff filed a motion for new trial. From the overruling of this motion, the plaintiff perfected appeal to this court.

For convenience we will hereafter refer to the parties as they were designated in the district court.

The plaintiff's petition alleged in substance that on October 22, 1952, the plaintiff employed the defendant to shell corn for the plaintiff. On the same day the defendant drove his truck onto the farm occupied by the plaintiff in Gage County. The defendant used the motor of his truck as motive power for a corn sheller mounted thereon. The truck had a cracked manifold and an exhaust pipe which was broken off about 3 feet from the motor, which facts were known to the defendant. The plaintiff further alleged that the defendant negligently carried insufficient water in the radiator of the truck, causing the same to heat unduly and emit sparks from the cracked manifold and from the exhaust pipe; and that notwithstanding that the defendant was aware of the defective and dangerous condition of the motor, he negligently operated the same on the premises causing corn husks and plaintiff's personal property to catch fire from the unduly heated motor and the sparks emanating from the exhaust pipe and the manifold. The fire burned personal property belonging to the plaintiff for which loss he prayed damages.

The defendant's answer was a general denial of the allegations set forth in the plaintiff's petition; specifically denied that the defendant operated the motor of the truck or the corn sheller attached thereto in any careless or negligent manner whatever; further spe-

cifically denied that the operation of the truck, its motor, or the corn sheller attached thereto in any way caused or contributed to causing the fire complained of in the plaintiff's petition; and alleged that if the plaintiff sustained any loss or damage as alleged in his petition the same resulted from causes and conditions independent of any act or omission on the part of the defendant. Defendant prayed that the plaintiff's cause of action be dismissed.

Before setting forth the evidence, we deem the following to be pertinent: A motion for a directed verdict or its equivalent 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. See Peake v. Omaha Cold Storage Co., 158 Neb. 676, 64 N. W. 2d 470.

The defendant, called as a witness for the plaintiff, testified that he owned a 1939 International truck with a corn sheller mounted on the truck and used the motor of the truck to operate the corn sheller. The manifold was attached to the motor on the right side, and the exhaust pipe came out of the manifold about 7 feet 4 inches where it turned up. The exhaust pipe was disconnected and had been disconnected for about a year. There was a crack about 2½ inches long running around the middle of the manifold, and this crack was less than ⅛ of an inch wide and was barely noticeable. It was not possible to see through this crack.

The brother of the plaintiff testified that he examined the manifold on the truck about a week after the fire and saw a crack in it approximately a quarter of an inch wide which ran crosswise, and was just to the rear of the center of the exhaust manifold.

A general repair mechanic of tractors and trucks testified that a muffler on a truck or a motor vehicle

serves many purposes; and that it is used to muffle the sound, to create a vacuum to draw the burned gases out, and to cool the gases before they go out into the open air. As to the effect of escaping gases if the muffler was disconnected as in the instant case and the gases were permitted to escape without going through the muffler, he testified that without hitting the muffler the burning gases would be exposed. In other words, it would be more like a torch at the end of the exhaust pipe. This would not be visible in the daytime, but would be visible at night. He further testified that he was familiar with the 1939 International truck upon which there is a manifold. As to the manifold, he testified that it is a housing or a funnel to funnel the burning gases from the motor through the pipe out into the open air. He was asked: "Q. Assuming in the manifold on this 1939 International motor truck you had a crack extending around the manifold in about the center or a little to the rear of the center, a crack about a quarter of an inch wide, do you know what effect that would have on the escaping gases? A. Well, it would probably, sparks would come out of that crack. Q. What kind of sparks? A. They are red hot carbon."

The wife of the plaintiff testified that the corn shelling started about 1:30 p. m., and about a quarter to 4 p. m., she took a lunch out to the men. The house was 150 feet northeast of the corncrib, and the barn was straight south of the corncrib. The garage was north of the barn. The corn sheller was between the corncrib and the barn, headed south. When she took the lunch out the men assembled, and the defendant was the last to come for the lunch. The men had taken their sandwiches and she was pouring coffee when she looked up and saw a fire underneath the cab of the truck. The truck was burning, as were corn husks under the truck. The motor of the truck had been shut off a minute or two before she noticed the

fire. When she noticed the fire, she said to the defendant: "Bob, your truck is afire." She testified that they tried to put the fire out, and endeavored to get the truck moved out first. She left to telephone for the fire department. When she returned, the barn, garage, chicken house, hay, and corn were on fire.

The defendant testified that the water in the radiator was not low at the time of the fire. After the fire the water was low because the radiator hose had a hole burned in it. When they moved the truck the right front tire was on fire.

The plaintiff testified that he was a tenant on a farm located northeast of Adams. He located the buildings on the farm in close proximity to the place where the shelling operation was being carried on which was between the corncrib and the barn. He further testified that on October 22, 1952, the defendant, employed by him, was carrying on the corn-shelling operation. The plaintiff and Clink Shoemaker, who came with the defendant, were in the corncrib. There was a hole in the corncrib into which the defendant placed the feeder of the sheller. Corn was fed into the feeder by shovel. The feeder had a drag chain which dragged the corn into the sheller, then from the sheller the shelled corn was put into a steel bin through a pipe. He further testified that his father and John Brinkman were also there, and that Brinkman left prior to the fire. There is evidence that while some of the men smoked, there was no smoking by any of the men prior to or at the time of the fire. It was a nice, bright, sunshiny, and clear day, and there had been no rain for some time. The wind was blowing a little from the southwest. It was not what is called a "stiff" wind. The blower on the corn sheller was directed to the west but not against the wind. When this witness noticed the fire he was 15 feet from the truck on the west side of the corncrib with his lunch, and all of the men were pretty close together. When he first noticed the fire, husks were burning

underneath the cab of the truck. He had no occasion to look to see how many husks were under the truck. He did not notice anything unusual about the operation of the sheller. He supposed the truck motor was shut off. The motor was not running at that time. He did not know who turned the motor of the truck off. He also saw smoke coming from underneath the hood of the truck, and he noticed after they pulled the truck away that the tire on the right front side had caught fire. At that time the defendant poured water onto the motor. The hood of the truck was up. This witness then described the loss occasioned by the fire.

The plaintiff assigns as error that the trial court erred in sustaining a motion for a directed verdict or in the alternative to dismiss the plaintiff's cause of action, and in rendering judgment in favor of the defendant and against the plaintiff.

The defendant relies on the case of Ellis v. Union P. R. R. Co., 148 Neb. 515, 27 N. W. 2d 921, and other cases claiming that it is well settled that a plaintiff is only entitled to recover, in an action for damages predicated on negligence, by proof of one or more of the specific acts of negligence alleged in his complaint, and that a failure to make such proof will defeat his right of action, no matter what other acts of negligence are disclosed by the evidence.

In the instant case, as we view the plaintiff's petition, we deem the following to be applicable. In Pulliam v. Miller, 108 Neb. 442, 187 N. W. 925, it is said: "Where a petition charges specific grounds of negligence as a basis for recovery, and also contains a general allegation of negligence on the part of the defendant in causing the damage, and where no motion for a more specific statement is filed, it is competent under the general allegation of negligence to offer evidence of any fact which contributed to the injury." See, also, Omaha & R. V. Ry. Co. v. Wright, 49 Neb. 456, 68 N. W. 618; Omaha & R. V. Ry. Co. v. Crow, 54 Neb. 747, 74 N. W.

1066, 69 Am. S. R. 741; Union P. Ry. Co. v. Vincent, 58 Neb. 171, 78 N. W. 457; Chicago, R. I. & P. Ry. Co. v. O'Donnell, 72 Neb. 900, 101 N. W. 1009.

No motion was made to make the petition more definite and certain, and a general allegation of negligence must be held sufficient. Union P. Ry. Co. v. Vincent, *supra.*

A general averment of negligence is sufficient unless attacked by motion, and an issue framed by a traverse of such averment may be proved by evidence of any act within the general averment. See Omaha & R. V. Ry. Co. v. Crow, *supra.*

We conclude that the contention of the defendant cannot be sustained.

Negligence in starting a fire and the origin of the fire may be proved by circumstantial evidence. In Kearney County v. Chicago, B. & Q. Ry. Co., 76 Neb. 861, 108 N. W. 131, it was held, in an action for damages for negligently setting out a fire, the origin of the fire may be proved by circumstantial evidence. See, also, Union P. Ry. Co. v. Keller, 36 Neb. 189, 54 N. W. 420; Friederich v. Klise, 95 Neb. 244, 145 N. W. 353.

In Finkelston v. Chicago, M. & St. P. Ry. Co., 94 Wis. 270, 68 N. W. 1005, the court said that obviously it was no objection that the origin of the fire was not established by direct evidence, and if such an occurrence was within reason, then it was a question for the jury to say whether the fire was so caused or not.

It is sufficient if all the facts and circumstances in evidence fairly warrant the conclusion that the fire did not originate from some other cause, and the origin of a fire has generally been held sufficiently established by inferences drawn from circumstantial evidence. See 22 Am. Jur., Fires, § 87, p. 653.

In the instant case there is no other theory offered by the defendant as to how the fire started. No other fire was known to be near the place where the corn-shelling operation was being carried on. We think there

were sufficient facts proved to carry the case to the jury both on the defendant's knowledge of the defective condition of his motor and truck, and also his negligence in the operation thereof. In this connection, the following is applicable.

In a jury case where different minds may draw different conclusions or inferences from the adduced evidence, or if there is a conflict in the evidence, the matter at issue must be submitted to the jury. See, Clouse v. St. Paul Fire & Marine Ins. Co., 152 Neb. 230, 40 N. W. 2d 820, 15 A. L. R. 2d 1008; Snyder v. Farmers Irr. Dist., 157 Neb. 771, 61 N. W. 2d 557.

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

REVERSED AND REMANDED.

TERRY BROS. & MEVES, A PARTNERSHIP, APPELLEE, V. NATIONAL AUTO INSURANCE COMPANY, A CORPORATION, APPELLEE, GIBREAL AUTO SALES, INC., A CORPORATION, INTERVENER-APPELLANT.
69 N. W. 2d 361

Filed March 18, 1955. No. 33644.

1. **Automobiles.** A certificate of title of a motor vehicle is generally conclusive evidence in this state of the ownership of the vehicle.
2. **Sales.** An innocent purchaser is one who buys property for a present valuable consideration without knowledge sufficient to charge him in law with notice of any infirmity in the title of the seller.
3. **Estoppel.** The general rule is that where one of two innocent persons must suffer by the acts of a third, he whose conduct, act, or omission enabled such third person to occasion the loss must sustain it if the other party acted in good faith, without knowledge of the facts, and altered his position to his detriment.
4. **Trial: Appeal and Error.** In a law action findings of fact made by the court have the same force and effect as the verdict of

a jury, and if there is competent evidence to support them, such findings will not be disturbed on appeal.

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

Floersch & Floersch, for appellant.

Walter P. Lauritsen and *Hyman Polsky,* for appellees.

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

MESSMORE, J.

This is an action in replevin brought by Terry Bros. & Meves, a partnership, as plaintiff, against the National Auto Insurance Company, a corporation, as defendant, to secure possession of a 1948 Mercury convertible coupé. Gibreal Auto Sales, Inc., a corporation, by leave of court, was granted a right to intervene and filed a petition in intervention claiming the ownership of said automobile. A jury was impaneled and the cause proceeded to trial. During the progress thereof, by agreement of the parties, the jury was dismissed and the cause proceeded to trial before the trial judge. The trial judge rendered judgment in favor of the plaintiff and against the defendant and the intervener, finding that the plaintiff was the owner of the automobile in question and entitled to possession of it. The trial judge rendered judgment in favor of the plaintiff and against the defendant for damages in the amount of one dollar for illegal detention of the automobile, and costs of the action. The intervener filed a motion for new trial which was overruled. From this order, the intervener appealed.

The plaintiff filed a petition in which it alleged in substance that it was a partnership; that it was the owner of and entitled to the immediate possession of a 1948 Mercury convertible coupé; and prayed judgment against the defendant for the return of the automobile or the value of the same if not returned, and for dam-

ages and costs. The plaintiff also filed an affidavit of replevin in due form. Possession of the automobile was delivered to the plaintiff and a replevin bond was filed by the plaintiff after an appraisal of the automobile was made in the amount of $925.

The defendant's answer to the plaintiff's petition was a general denial of the allegations contained therein.

By leave of court, the intervener filed a petition in which it claimed that it was the owner of the automobile in question and entitled to the possession of the same or its value in the event the same was not returned. This petition detailed certain facts and alleged the same constituted a fraud perpetrated on it by Bethke, the purchaser of the automobile from the intervener.

The answer of the plaintiff to the intervener's petition was in effect a general denial of a fraud as pleaded therein, and an affirmative allegation that the fraud or false representations made by the intervener's vendee were made possible by the actions of the intervener, and further denied generally the allegations contained in the intervener's petition.

The reply of the intervener to the answer of the plaintiff was in the form of a general denial.

The record discloses that on January 4, 1950, Gilbert Gibreal, president of the intervener corporation and hereafter referred to as Gibreal, through the intervener sold a 1948 Mercury convertible coupé to Roy Bethke under a conditional sales contract for $1,150, the purchaser to pay $50 down, which he failed to do. The possession of the car was turned over to Bethke, but the title to it was not given to him. On January 24, 1950, Bethke told Gibreal that he was stopped by a policeman for not having proper license plates and the car was impounded. He requested the certificate of title to enable him to buy his license and get the car from the police station because he was required to have a license before it would be surrendered to him. Gibreal transferred the certificate of title to Bethke. Bethke called

Gibreal from the courthouse and informed him that he had to pay last year's taxes on the car before he could obtain the certificate of title and needed $35 for that purpose. Gibreal did not advance this money, but asked Bethke if he had the certificate of title, which he had. Gibreal then asked Bethke to return the title immediately. He did not do so. Gibreal looked for Bethke, and the next morning found him and Orville Bilyeu and two other men walking toward the police station with license plates. Gibreal asked for the title to the car. Bethke said it was at home, and Gibreal told him it would be impossible to get the car unless he had the title. Gibreal said he wanted it right away. Bethke and Bilyeu left to get the title and said they would return in half an hour, but they failed to do so. Gibreal went to the police station and informed the police what happened and was permitted to take possession of the car. Bethke called Gibreal by telephone and told him he would have the title, that he had borrowed the money to pay the taxes from Orville Bilyeu, and would have to pay back the money before he could get the title. He did not advise Gibreal that he had transferred the title to Bilyeu. Gibreal further testified that he did not learn of this fact until he saw a photostatic copy of the certificate of title later. It appears that Gibreal was informed that Bethke owed Bilyeu a gambling debt and Bilyeu refused to surrender the title to the car. Gibreal sold the car to Larry Slayman on February 20, 1950, advising Slayman that he was having difficulty with the certificate of title. The car was sold under a conditional sales contract which in turn was sold by Gibreal to the Live Stock National Bank. Fire, theft, and collision insurance was written for Slayman on this car by the defendant. Gibreal did not start any court action against either Bethke or Bilyeu to secure the return of the title to the car.

Larry Slayman testified that he took possession of the Mercury automobile on February 20, 1950. The

license plates were not transferred. He placed license plates from another car on the Mercury. On March 13, 1950, the Mercury was in his possession. He drove the car home and into the garage. He locked the car and closed the garage doors. The next morning the garage was open and the car was missing. He called the police department, the defendant, and the intervener. Later he made a claim for insurance and was advised there would be a waiting period of 30 days to permit the insurance carrier to endeavor to find the car. He settled his difficulties with the intervener by taking another car in place of the Mercury and transferring whatever interest he had in the Mercury to the intervener.

Irvin Meves, a partner of Terry Bros. & Meves, testified that the partnership is located in Grand Island and engaged in the business of buying and selling cars. On March 13, 1950, Roy Bethke and Orville Bilyeu came to the plaintiff's place of business about 9 a. m., with a 1948 Mercury convertible which they wanted to sell. After looking at the car, the plaintiff offered $750 for it, which offer was accepted. A check was given to Bilyeu for the purchase price, and the plaintiff received a Nebraska certificate of title by an assignment by Bilyeu to it. The title was acquired by Roy Bethke January 25, 1950, from the Gibreal Auto Sales, Inc. The Mercury car had Douglas County license plates on it, which Bilyeu and Bethke took with them. On March 20, 1950, this car was sold to Edward and/or Jerry L. Guzinski and title to the car obtained by them. It was sold to the father for the use of the son who was under age.

It appears that the insurance carrier that issued the policy to Slayman contacted Guzinski who had possession of the Mercury, obtained permission to take it, and drove it back to Lincoln on May 3, 1950. The plaintiff contacted the defendant with reference to the Mercury to obtain possession of it, which was refused. After possession of the Mercury was taken by the in-

surance carrier, Guzinski contacted the plaintiff and a deal was made whereby Guzinski assigned the title to the Mercury to the plaintiff who started an action to replevin the car from the defendant on May 17, 1950.

On cross-examination Meves testified that Bethke originally lived in Grand Island and was a mechanic. The plaintiff had sold him a car on one occasion, and that was all the plaintiff knew about him. Bethke's father, who was employed in Grand Island, bought several cars from the plaintiff.

There is no dispute between the parties or conflict in the evidence relative to the chain of title. It appears from the record that the intervener had owned the Mercury previously, and had re-acquired title from one Kennelly for $1,000 in December 1949. Kennelly's assigned title was reassigned by the intervener to Bethke on January 24, 1950, and on the next day Bethke secured a Nebraska title in his name. The same day Bethke assigned his title to Bilyeu, and on January 26, 1950, Bilyeu secured a new title in his name. When the car was purchased by the plaintiff, Bilyeu assigned the title to the plaintiff, and upon sale by the plaintiff, title was reassigned to Edward and/or Jerry L. Guzinski, who secured a new title. After the defendant insurance company seized the car as an allegedly stolen car, the Guzinski title was assigned to the plaintiff, and the plaintiff became the owner of and in possession of title when this action was started.

It also appears from the evidence that the intervener sold the Mercury car to Slayman under a conditional sales contract and delivered possession of it to him after the intervener had turned over the title to this car to Bethke and after Bethke had transferred the title of the same to Bilyeu.

The intervener, hereinafter referred to as the appellant, assigns error on the part of the trial court in the following respects: (1) That the judgment rendered by the trial court is contrary to the evidence and the

law; (2) that the trial court erred in failing to find the certificate of title to the Mercury automobile was secured by a criminal act; (3) that the trial court erred in finding that the plaintiff, hereinafter referred to as the appellee, received title to the Mercury automobile as an innocent purchaser for value; and (4) that the trial court erred in finding in effect that the appellant intended to transfer the title to the Mercury automobile to Roy Bethke for any other purpose than to enable him to secure license plates for it.

The appellant cites Snyder v. Lincoln, 150 Neb. 580, 35 N. W. 2d 483, and Snyder v. Lincoln, 153 Neb. 611, 45 N. W. 2d 749. In the former case, it is said: "Where the owner of personal property is induced by fraud to part with its possession without intending also to part with the title, the transaction is larceny if the person so receiving the possession without the title has at the time a secret intention of converting it permanently to his own use and does so without the consent of the owner. * * * It was the larceny, and not a sale by or any negligent act of plaintiff, which was the proximate and effective cause of injury to the parties. The general rule is 'where one of two innocent persons must suffer by the acts of a third, he whose conduct, act, or omission enables such third person to occasion the loss must sustain it if the other party acted in good faith, without knowledge of the facts, and altered his position to his detriment.' 31 C. J. S., Estoppel, § 103, p. 325. However, the foregoing 'rule does not apply in cases where the wrong was accomplished through the instrumentality of a criminal act, it being held that in such cases the crime, and not the negligent act, is the proximate cause of the injury.' 31 C. J. S., Estoppel, § 103, p. 330. See, also, 21 C. J., Estoppel, § 176, p. 1172; Schumann v. Bank of California, N. A., 114 Or. 336, 233 P. 860, 37 A. L. R. 1531."

The appellant contends that in the light of the above-cited authorities and under the facts in the instant case

the certificate of title to the automobile was secured from the appellant for a single purpose, that is, to secure license plates for the automobile; that there was no intention on the part of the appellant to give the certificate of title to Bethke; that the action of Bethke indicates that he had the intention of converting it to his own use without the consent of the appellant; and that Bethke thereby committed the crime of larceny.

The appellant also contends that the following is applicable: It is generally held that before the owner will be estopped to claim his property from an innocent purchaser for value, the owner must have voluntarily placed the third person in possession of both the indicia of title and the possession of the property. Reference is made to Snyder v. Lincoln, 156 Neb. 190, 55 N. W. 2d 614, wherein we said: "In Loyal's Auto Exchange, Inc. v. Munch, supra (153 Neb. 628, 45 N. W. 2d 913), we said, in effect, that a purchaser who receives possession of an automobile without obtaining a certificate of title thereto, in accordance with the statute, acquires no title or ownership therein. 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. 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. It conveys no greater interest than the grantor actually possesses."

In the case at bar the facts and circumstances are such that the above-cited authorities are not applicable in the manner contended for by the appellant as will appear later in the opinion.

Section 60-105, R. R. S. 1943, provides in part: "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."

The possession by Bilyeu of a Nebraska certificate of title was evidence of ownership of the automobile. The certificate was in his name and conclusive of his ownership under the circumstances of the instant case, and appellee was justified, under the circumstances, in treating him as the owner thereof. See, Garbark v. Newman, 155 Neb. 188, 51 N. W. 2d 315; Loyal's Auto Exchange, Inc. v. Munch, 153 Neb. 628, 45 N. W. 2d 913; State Farm Mutual Auto Ins. Co. v. Drawbaugh, 159 Neb. 149, 65 N. W. 2d 542.

In the light of the facts as shown by the record, the following is applicable: When personal property is obtained from its owner by a sale induced by the fraud of the buyer, and as a result thereof title passes to the party guilty of the fraud, an innocent purchaser of the property from the fraudulent buyer or from one to whom he has surrendered it, for value and without knowledge of the fraud, takes the title thereto free from the equity of the original seller to rescind the sale and reclaim the property. In other words, if after seller delivers possession to the buyer pursuant to a sale induced by the buyer's fraud the property has passed into the hands of a bona fide purchaser for value, the right of the original seller to recover the property is lost. See, Snyder v. Lincoln, 153 Neb. 611, 45 N. W. 2d 749; Snyder v. Lincoln, 150 Neb. 580, 35 N. W. 2d 483; Uniform Sales Act, § 69-424, R. R. S. 1943; 46 Am. Jur., Sales, § 471, p. 635.

An innocent purchaser is one who buys property for a present valuable consideration without knowledge sufficient to charge him in law with notice of any infirmity in the title of the seller. See, Wallich v. Sandlovich, 111 Neb. 318, 196 N. W. 317; Justice v. Shaw, 103 Neb. 423, 172 N. W. 253; Annotation, 107 A. L. R. 502; 46 Am. Jur., Sales, § 465, p. 630. See, also, Mingus v.

Bell, 148 Neb. 735, 29 N. W. 2d 332; Snyder v. Lincoln, 153 Neb. 611, 45 N. W. 2d 749.

The appellee was not in a position to know or have knowledge of an alleged fraud, nor was the appellee in a position to know or have knowledge that any person claimed ownership or a lien on the automobile for the reason that the certificate of title disclosed the seller to be the owner of the automobile. The certificate showed that Bilyeu acquired the title from Bethke who was present at the time the appellee purchased the automobile.

While the appellant claims the purchase price of the automobile was not for value, the evidence clearly discloses that it was. It appears that on December 12, 1949, 3 months prior to the acquisition of title to the automobile by the appellee, the appellant purchased this automobile for $1,000. While some contention is made that the appellee did not consult the N.A.D.A. book, alleged to govern prices of used automobiles and the value of the same, from the record it is apparent that the appellee gave a sufficient amount for the automobile in keeping with its business and for resale value.

It is a general rule that where one of two innocent persons must suffer by the acts of a third, he whose conduct, acts or omissions enables the third person to occasion loss must sustain it if the other party acted in good faith, without knowledge of the facts, and altered his position to his detriment. This rule has heretofore been cited in connection with the appellant's contention as to its inapplicability to the facts in the instant case. However, we deem it applicable when applied to the appellee's contention.

In a law action findings of fact made by the court have the same force and effect as the verdict of a jury, and if there is competent evidence to support them, such findings will not be disturbed on appeal. See, Faught v. Dawson County Irr. Co., 146 Neb. 274, 19 N. W. 2d

358; Linch v. Thorpe, 140 Neb. 478, 300 N. W. 383; Moore v. Schank, 148 Neb. 228, 27 N. W. 2d 165.

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

AFFIRMED.

DOROTHY SMITH, APPELLANT, V. CHARLES H. SMITH, APPELLEE.

69 N. W. 2d 321

Filed March 18, 1955. No. 33646.

1. **Divorce.** Any unjustifiable conduct on the part of either the husband or wife, which so grievously wounds the mental feelings of the other, or so utterly destroys the peace of mind of the other, as to seriously impair the bodily health and endanger the life of the other, or such as utterly destroys the legitimate ends and objects of matrimony, constitutes "extreme cruelty" as defined in section 42-302, R. R. S. 1943, although no physical or personal violence may be inflicted, or even threatened.
2. ———. A decree of divorce from the bonds of matrimony should only be granted when the evidence brings the case within the definition of the statute providing for such relief.
3. ———. Section 42-335, R. R. S. 1943, means that corroborative evidence is required of the acts or conduct asserted as grounds for a divorce.

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

John McArthur, for appellant.

Johnston & Grossman, for appellee.

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

WENKE, J.

This is a divorce action appealed to this court by Dorothy Smith, plaintiff below, from an order of the district court for Lancaster County dismissing her case. The trial court based its order of dismissal on a finding

that the evidence adduced was not sufficient to sustain the ground for divorce asserted by appellant, which was extreme cruelty.

Section 42-302, R. R. S. 1943, provides, insofar as here material, as follows: "A divorce from the bonds of matrimony, or from bed and board, may be decreed for the cause of extreme cruelty, whether practiced by using personal violence, or by other means; * * *."

We have held that: "Any unjustifiable conduct on the part of either the husband or wife which so grievously wounds the mental feelings of the other or so utterly destroys the peace of mind of the other as to seriously impair the bodily health and endanger the life of the other, or such as utterly destroys the legitimate ends and objects of matrimony, constitutes 'extreme cruelty' as defined in section 42-302, R. S. 1943, although no physical or personal violence may be inflicted or even threatened." Oertle v. Oertle, 146 Neb. 746, 21 N. W. 2d 447.

In an appeal to this court in a divorce action the cause is tried de novo. Pestel v. Pestel, 158 Neb. 611, 64 N. W. 2d 299. The burden of proof is upon the party who seeks the divorce. Loomer v. Loomer, 73 Neb. 359, 102 N. W. 759.

A decree of divorce from the bonds of matrimony should only be granted when the evidence brings the case within the definition of the statute providing for such relief. Oertle v. Oertle, *supra;* Brown v. Brown, 130 Neb. 487, 265 N. W. 556.

Whether or not extreme cruelty has been established is a question of fact to be determined from the evidence adduced. However, in view of the nature of the record, the following principle has application: "* * * where the evidence is in irreconcilable conflict, this court will, in determining the weight of the evidence, consider the fact that the trial court saw and heard the witnesses and accepted one version of the facts over the other." Pestel v. Pestel, *supra.*

Appellant and Charles H. Smith, appellee here and defendant below, were married on August 1, 1924. Four children were born to this marriage. Three of these children are mature, married, and self-supporting. The fourth, son Franklin D., was at the time of trial on May 3, 1954, living at home with appellant and attending school. He was at that time 15 years of age. The Smiths had, for about 17 years prior to the commencement of this action on February 17, 1954, been living in Lincoln. Their home, which they own and which is presently occupied by appellant and the minor son, is located at 901 South Thirty-first Street. Appellee has worked for the Burlington railroad for at least 34 years, presently holding a position of yard clerk.

It would serve no useful purpose for us to set out in detail the family difficulties about which appellant and appellee testified. Our conclusions in this regard will suffice. The evidence shows appellant lost her love for appellee many years ago and, for about 2 years before doing so, had contemplated filing an action for divorce. In fact the Smiths had frequently discussed her doing so. But it is elementary that a divorce cannot be granted solely on the basis of the parties agreeing thereto.

That the Smiths had become incompatible is evident. Appellee did not have too high an income and, considering the amount of sickness each of them unfortunately suffered in recent years, the payment of their bills became a real problem. It is apparent they frequently quarreled about bills. They also disagreed and quarreled about the proper raising of their children. It seems they would get into an argument about something every time they discussed anything. But, as her daughter-in-law stated on one occasion, "She was calm and it (the quarreling) didn't really upset her." As stated in Brown v. Brown, *supra*: "* * * mere incompatibility of temper is not a ground for divorce in this state." Nor does the fact that appellant stated she can-

not and will not live with appellee entitle her to a divorce.

There is still another reason why appellant is not entitled to the relief she here seeks. Section 42-335, R. R. S. 1943, provides: "No decree of divorce and of the nullity of a marriage shall be made solely on the declaration, confessions or admissions of the parties, but the court shall, in all cases, require other satisfactory evidence of the facts alleged in the petition for that purpose."

We have held this statute to mean: "It is provided by section 42-335, R. R. S. 1943, that no decree of divorce and of the nullity of a marriage shall be made solely on the declarations, confessions, or admissions of the parties, but the court shall, in all cases, require other satisfactory evidence of the facts alleged in the petition for that purpose. This statute means that corroborative evidence is required of the acts or conduct asserted as grounds for a divorce." Pestel v. Pestel, *supra*.

In this regard we said in Pestel v. Pestel, *supra*: "'It is impossible to lay down any general rule as to the degree of corroboration required in a divorce action, as each case must be decided on its own facts and circumstances.' Schlueter v. Schlueter, supra (158 Neb. 233, 62 N. W. 2d 871)." See, also, Hines v. Hines, 157 Neb. 20, 58 N. W. 2d 505.

The only corroboration adduced by appellant relates to the fact that the Smiths frequently quarreled and were incompatible. As already stated, we think both parties were guilty of causing this relationship to develop between them. Since mere incompatibility is not a ground for divorce in this state the corroboration of that fact does not assist the appellant.

We have come to the conclusion that the evidence adduced does not establish extreme cruelty within the contemplation of our statute. Consequently the trial court was correct in denying the divorce appellant prayed for.

The trial court directed each party to pay his or her own costs. We think the costs, both in this court and the district court, should be taxed to the appellee. In this regard appellant has requested she be allowed an attorney's fee for the services of her attorney in both this and the district court. Considering all of the facts and circumstances of this case we have come to the conclusion this application should be denied.

In view of the foregoing we affirm the action of the district court in denying the appellant a divorce but tax all costs to the appellee.

AFFIRMED AS MODIFIED.

FRED EGGER SONS, A COPARTNERSHIP, APPELLEE, V. JOHN A. WELSH ET AL., APPELLANTS.
69 N. W. 2d 366

Filed March 18, 1955. No. 33647.

Appeal and Error. In a case where there is no bill of exceptions and no facts for review the only question presented is that of whether or not the pleadings support the decree or judgment.

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

Raymond P. Medlin and *Lightner & Johnson*, for *appellants.*

Wagner, Wagner & Robak, for appellee.

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

YEAGER, J.

This is an action by Fred Egger Sons, a copartnership, plaintiff and appellee, against John A. Welsh and Meta M. Welsh, defendants and appellants, to reform a deed to certain real estate in Platte County, Nebraska, on the ground that the deed contained a mutually mis-

taken description of the land intended to be conveyed. The defendants were grantors and the plaintiff was grantee in the deed. John A. Welsh died and the action was revived in the name of Meta M. Welsh.

The case was tried to the court after which a decree was rendered in favor of plaintiff for reformation but not to the extent prayed. The plaintiff however has not cross-appealed and does not complain about the failure of the court to grant it all of the relief to which it contends that it is entitled. From the decree the defendants appealed.

Pertinent facts are that on January 10, 1953, an option to purchase the land in question was exercised by plaintiff and on January 12, 1953, the defendants executed and delivered a deed. The deed described an area 100 feet north and south by 119.9 feet east and west. The south line bordered on what is known as U. S. Highway No. 30. It is inferable from the record that the highway is 66 feet in width. It is also asserted in the brief of appellants that this is the width and to this no exception is taken. The plaintiff substantially contends that when the deed was executed it was the intention of the parties that the deed should embrace an area extending northward 100 feet from the north side of the highway or 133 feet from the center thereof and that the failure of the deed to make this clear was a mutual mistake.

The defendants on the other hand contend that there was no mutual mistake and that the conveyance was of 100 feet from the center of the highway.

Title was quieted in plaintiff by the decree apparently to an area extending 128 feet from the center of the highway or 95 feet from the north edge thereof, although this is none too clear. This is the way the matter was treated on appeal without any exception being taken thereto. The theory of the court in so decreeing is not apparent.

The pleadings are sufficient to sustain a decree quieting title to 133 feet from the center or 100 feet from

the north edge. As already pointed out the plaintiff does not complain of this here. No complaint concerning it is available to the defendants that title was quieted to 128 feet instead of 133 feet.

In this case the bill of exceptions was quashed, therefore, we may not review the evidence to see whether or not it sustains the decree. The only question is that of whether or not the pleadings support the decree. Gaines v. Warrick, 113 Neb. 235, 202 N. W. 866; Joyce v. Tobin, 126 Neb. 373, 253 N. W. 413.

As has already been pointed out the pleadings upon which the decree is based are sufficient to support the decree. Accordingly it is affirmed.

AFFIRMED.

GERTRUDE SHEPARDSON ET AL., APPELLEES, V. CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, A CORPORATION, APPELLANT.
69 N. W. 2d 376

Filed March 25, 1955. No. 33573.

1. **Pleading.** The rule is inflexible that allegations and proof must agree.
2. **Injunction.** A litigant who asks an injunction must establish by proof the controverted facts necessary to entitle him to relief. An injunction will not be granted unless the right is clear, the damage irreparable, and the remedy at law is inadequate to prevent a failure of justice.
3. **Appeal and Error.** An equity case will not be reversed and the cause remanded by this court to the district court because inadmissible evidence was admitted over objection on the trial of the case. This court disregards such evidence in the trial de novo on the record.
4. **Waters.** A riparian owner upon a stream may construct necessary embankments, dikes, or other structures to maintain his bank of the stream in its original place and condition, or to restore it to that condition, and to bring the stream back to its normal course, when it has encroached upon his land. If he does no more other riparian owners cannot recover damages for the injury his action causes them.

APPEAL from the district court for Dakota County: LYLE E. JACKSON, JUDGE. *Reversed and remanded with directions.*

Mark J. Ryan, William G. Ashford, J. W. Weingarten, and *Walter P. Loomis,* for appellant.

Sherman W. McKinley and *Sifford & Wadden,* for appellees.

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

BOSLAUGH, J.

Appellees seek an injunction to compel appellant to restore the waters of Omaha Creek to their natural flow; to prevent appellants from interfering with the

natural flow of waters of Omaha Creek; and to recover damages from appellant alleged to have been caused to the property of appellees by the interference of appellant with the natural flow of waters of the creek. The district court found the facts in favor of appellees, decreed them the relief they sought, and denied the motion of appellant for a new trial. This appeal challenges the correctness of the findings and judgment.

The cause of action alleged by appellees is as follows: Appellees are the owners as joint tenants of Lots 1 to 6, inclusive, of Block 1, Smith's Addition to Homer, subject to an exception not material to this litigation, upon which are a dwelling house and other structures. Appellant constructed a railroad at its present location along the east bank of Omaha Creek and it maintains and operates it. Appellant constructed a rock riprap upon the east bank and into the bed of Omaha Creek between its railroad and the creek, placed rock at the base thereof, and has maintained it, except it has permitted rock to fall therefrom into the bed of the creek along the base of the riprap. It is opposite the premises of appellees which now abut upon the western bank of Omaha Creek. The riprap as constructed caused the natural course of the waters of Omaha Creek to change so that they were thrown against the western bank thereof, and they cut away the bank until in 1951 the waters cut in and upon the premises of appellees and they will continue to do so unless they are arrested and controlled. Appellant has been negligent in the construction and operation of the riprap in the following matters: It has failed to use ordinary care in its construction to prevent the waters of Omaha Creek from changing their natural course and cutting in and upon the premises of appellees; it has constructed the riprap without regard to the effect of its construction upon the waters of Omaha Creek; it has diverted the waters of Omaha Creek from their natural flow by such construc-

tion in and upon the premises of appellees; it has failed to use the engineering skill and knowledge ordinarily practiced at the time in the construction of the riprap because it failed to erect it within the boundary of the natural bank of Omaha Creek which it replaced and thereby maintain the natural course of the waters therein; it failed to use ordinary engineering skill and knowledge in that it did not put the riprap within the natural bank it replaced, but did replace the earthen bank with an impervious stone wall and extended the riprap into the bed of the stream and did not maintain the natural course of Omaha Creek; and appellant has not used ordinary care to maintain the riprap but has permitted rock and stone to accumulate at the base thereof and in the bed of the stream. The property of appellees has been damaged in a definite stated amount.

Appellant by its answer denied all matters asserted by appellees except it admitted it owns, maintains, and operates a line of railroad through Homer on the east side of Omaha Creek in the vicinity of the premises described in the petition of appellees. Appellant alleged that the drainage of Omaha Creek upstream, south and southwest of the premises of appellees, was about 117 square miles from which there was rapid run-off after storms; that the channel of the creek frequently overflowed; that the property of appellees on the west bank of the creek was in the flood plane of the stream subject to overflow, and was in the Omadi Drainage District of Dakota County, which was organized about the year 1925; that it constructed and improved an outlet for Omaha Creek between Homer and the Missouri River; that since then the creek had deepened its channel along and in the vicinity of the property of appellees; that the deepening of the channel, the ground water, and wet seasons have made the banks of the stream unstable so that they cave, slide, and break off in Homer and the vicinity thereof; that thereby encroachment of

the creek on adjacent property has resulted; that the injury of which appellees complain resulted directly therefrom; that in 1945 part of the east bank of Omaha Creek adjacent to the railroad of appellant extending from about a point opposite the north line of the property of appellees slipped off into the stream channel because of its deepening; that additional portions of the bank would have broken off if the bank had not been supported and protected; that appellant to prevent further destruction of the bank due to undermining and loss of its track replaced the bank of the creek with rock or stone riprap; that it increased the capacity for passage of waters of the stream; that the riprap does not deflect or interfere with the course or direction of the waters of the stream; that it was downstream from the property of appellees; and it has not caused any injury or damage to the property of appellees.

Appellees denied the new matter in the answer.

The petition of appellees definitely and explicitly complains of only two things as a basis of relief, the construction of the riprap by appellant on the east side of Omaha Creek in 1946 adjacent to its railroad track, and the maintenance of it thereafter. There is no allegation of or any reference to any other construction, stone, rock, act, or default of appellant. The grant of any relief to appellees depends upon proof that the riprap was improperly constructed or that it has not been properly maintained or both improper construction and maintenance, and if either or both are established then proof of damage caused thereby and the amount of the damage. The only cause of action presented in this litigation is that definite and precise. As early as Chicago, B. & Q. R. R. Co. v. Grablin, 38 Neb. 90, 56 N. W. 796, the court said: "The rule everywhere is that the pleadings and proof must agree. * * * The neglect or failure of the engineer to keep a proper lookout ahead is not alleged in the petition as one of these acts or omissions

of negligence. * * * The admission then of the evidence tending to show that the engineer could, by the exercise of a careful and vigilant lookout, have seen the boy in time to have saved him, was error." The constancy of this rule of practice in this jurisdiction is indicated by the repetition of it as late as Benson v. Walker, 157 Neb. 436, 59 N. W. 2d 739, in these words: "The rule of law is inflexible that the allegations and the proof * * * must agree."

The burden was with appellees to prove by competent and relevant evidence the cause of action as alleged. Gering Irrigation Dist. v. Mitchell Irrigation Dist., 141 Neb. 344, 3 N. W. 2d 566, states the rule: "* * * one who seeks an injunction must establish by competent evidence every controverted fact necessary to entitle him to relief, and that injunction will not lie unless the right is clear, the damage irreparable and the remedy at law is inadequate to prevent failure of justice." See, also, Faught v. Platte Valley Public Power & Irr. Dist., 147 Neb. 1032, 25 N. W. 2d 889; Hanson v. City of Omaha, 157 Neb. 403, 59 N. W. 2d 622.

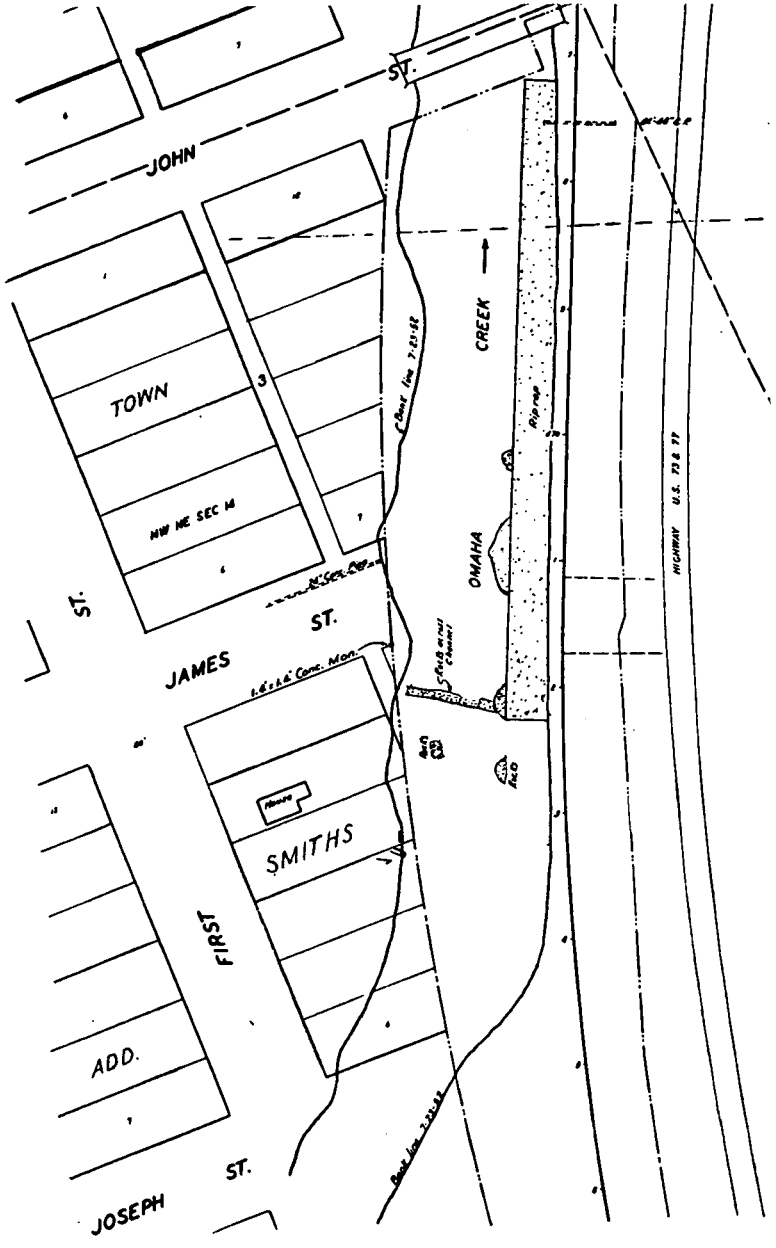
This case was permitted over proper objections to take a wide range and there is much incompetent and irrelevant evidence foreign to anything involved in the case as made by the pleadings. Appellant has assigned error and contends that the trial court was prejudicially wrong in admitting over objections this character of evidence. This is an equity case. It is for trial in this court de novo upon the record. The presumption is that the trial court in deciding the case considered only evidence that was competent and relevant to the issues made by the pleadings, that is, that the trial court wholly excluded for all purposes the evidence that was not of that character. An equity case will not be reversed and the cause remanded to the district court because improper evidence was admitted on the trial of the case. Rohn v. Kelley, 156 Neb. 463, 56 N. W. 2d 711. The

litigant who offers incompetent and irrelevant evidence in the trial of a case, which is admitted over proper objection of the adverse party, may not have any benefit or advantage because of its reception. This court disregards such evidence in the trial de novo of a case.

The manner of the consideration of an equity case in this court has often been stated. It is the duty of the court to try the cause de novo upon the record, and to reach an independent conclusion not influenced by what was done in the trial court except to the extent that there is irreconcilable conflict in the evidence and as to it the court may consider that the trial court saw the witnesses and accepted one version of the facts. Likewise this court will give proper consideration to the fact that the trial court inspected the premises and that its examination constituted evidence because the facts observed necessarily affected the mind of the trial court and tended to induce belief or unbelief on the matters at issue in the case, if there is other competent evidence in the record to sustain the findings. Keim v. Downing, 157 Neb. 481, 59 N. W. 2d 602.

The property of appellees in the town of Homer involved in this litigation is south of James Street, east of First Street, north of Joseph Street, and the principal part of it is adjacent to and west of the west right-of-way line of appellant. The south part of the property is in Omaha Creek, hereafter referred to as the creek. The creek crosses the property from the southwest and curves slightly to the west opposite the property and proceeds in a northeasterly direction through and beyond Homer. The railroad line of appellant is near the top line of the east bank of the creek and nearly parallel with it from the south half of the property of the appellees extending northeasterly through Homer.

A copy of a part of a drawing received in evidence is inserted here. The part shown is Joseph Street to John Street.


JOHN
ST.
TOWN
3
NW NE SEC 14
ST.
JAMES
ST.
CREEK
OMAHA
HIGHWAY U.S. 73 & 77
SMITHS
FIRST
ADD.
ST.
JOSEPH

The drawing shows the property of appellees and the streets in Homer above named. John Street in the town is 1 block north of the property of appellees and the bridge across the creek is located therein. First Street extends north and south. The boundaries of the right-of-way of appellant are indicated by lines consisting of long dash lines with two dots between the dashes. The track of appellant is represented by a heavy continuous line along which are numerals indicating station locations. The channel of the creek is identified by unbroken lines along each of which appears "Bank line 7-23-52." The riprap on the east bank of the creek is represented by the shaded portion about the center of which is the word "Riprap." The shaded portions extending from the base of the riprap represent rock. The two shaded areas near which is the word "Rocks" show the location of some rock in the bed of the stream.

The principal part of what is known as Omaha Creek originates about one-half mile north of the town of Rosalie. There are other drains from the south of Homer that converge with Omaha Creek. The area drained above Homer by the creek is in excess of 170 square miles. The flow of water in the creek is to the northeast and it empties into the Missouri River. The area of Homer inclusive of the property of appellees is in the flood plane of the creek. This entire territory was inundated by floods in 1920 and in 1940. A part of the town of Homer is within an organized drainage district known as the Omadi Drainage District. Appellees are within it and they have paid assessments made by the district for benefits. The district was improved in 1925 by the construction of an outlet for the creek from north of Homer to the Missouri River. It consisted of a pilot ditch, 20 feet wide at the bottom and 10 to 17 feet deep, from the original channel of the creek one-half mile north of Homer due east about 2 miles to the Missouri River. The channel of the creek prior to that construction extended irregularly northerly and northwesterly on the

west side of the railroad about 1½ miles, turned east, passed under the right-of-way of the railroad, and continued to the river. The ditch constructed by the district had a subgrade or a V-shaped bottom 2 feet below where the ditch was 20 feet wide. This design was used so the water passing through the ditch would scour, widen, and deepen it. The ditch had a fall of 8 feet to the mile. The intended result was realized and the channel of the creek became deeper and wider from the east to the railroad and into and upstream through Homer and beyond. As the channel of the creek became deeper it became wider. The channel 1 block north of the property of appellees deepened 8.2 feet from June 1921 to May 1953, and in the period of September 1932, the first measurement made after the new outlet was constructed, until May 1953, it had deepened 8.7 feet. Since the riprap was placed on the east bank of the channel in the year 1946 the channel has become in that location materially deeper. The proof is that when a channel of the kind and in the situation of this creek becomes deeper the banks crack at the top and slide downward; that the widening of the channel is the result of it becoming deeper; that this process produces vertical banks which sooner or later slough off and cause a recession in the banks; and that Omaha Creek has become deeper and this has caused the banks to recede and widen the channel upstream through and beyond Homer.

The occasion of the placing of riprap on the east bank of the creek was a cave or slide of the bank in 1945 for a distance of about 150 feet, about 75 feet on either side of the center of the riprap, measuring from north to south, that is, the south end of the cave-in was about 225 feet north of the south end of the riprap. The bank at the top receded eastward to and in some places beyond the west end of the ties of the railroad track. The track was made unsafe and unusable and it was moved to the east until the condition created by the

failure of the bank could be repaired. The bank of the creek evidenced further probable break in it and as a temporary support appellant dumped stone along and against the bank. Later this stone was all removed and the dirt that had moved down in the channel of the creek was taken out, and it and the stone were placed east of the track. The bank where the riprap was placed was graded to a slope from the bottom to the top of "one and a half to one." A trench was excavated at the toe of the bank 4 feet deep and filled with rock as a base for the riprap, and rock was laid by hand on the slope of the bank to a depth of 30 inches. The construction was done so that it did not diminish the water-carrying capacity of the channel of the creek but it did enlarge it. The bank at the top was several feet farther east than it was before the bank caved. When the work was finished there were no rocks or any obstruction left in the channel of the creek by appellant. The riprap was completed and the track of appellant was moved back to its former location in October 1946. The proof is that the riprap was properly constructed with approved engineering skill and knowledge, and that it did not obstruct or change but it did facilitate the flow of the waters of the creek. The claims of appellees that the riprap was not placed within the boundary of the east bank of Omaha Creek which it replaced; that it extended into the bed of the stream; and that it changed or interfered with the flow of the waters of the creek were not established. There was a failure of proof of improper construction of the riprap.

Appellant was a riparian owner and in the circumstances of this case it was within its rights in making the construction it did to protect the railroad owned and operated by it. In Gulf, C. & S. F. Ry. Co. v. Clark, 101 F. 678, the court said: "A riparian owner upon a stream may construct necessary embankments, dikes, or other structures to maintain his bank of the stream in its original place and condition, or to restore it to

that condition, and to bring the stream back to its natural course, when it has encroached upon his land; and, if he does no more, other riparian owners cannot recover damages for the injury his action causes them." See, also, Sinclair Prairie Oil Co. v. Fleming, 203 Okl. 600, 225 P. 2d 348, 23 A. L. R. 2d 741; Pechacek v. Hightower, — Okl. —, 269 P. 2d 342; Johnk v. Union Pacific R. R. Co., 99 Neb. 763, 157 N. W. 918, L. R. A. 1916F 403; Whipple v. Nelson, 143 Neb. 286, 9 N. W. 2d 288; Stolting v. Everett, 155 Neb. 292, 51 N. W. 2d 603; Archer v. City of Los Angeles, 19 Cal. 2d 19, 119 P. 2d 1; Annotation, § 2, 23 A. L. R. 2d 756. The effect of the improvement made by appellant along the east bank of the channel in 1946 was to improve it and to influence water therein to flow in a direct downstream course. The use of riprap to support and protect an unstable bank of a stream is appropriate and if reasonably uniform creates a direct flow of the stream. It contributes to regularity of the flow as opposed to a turbulent condition which pertains to irregularity in the channel when the water is above low-water stages. The riprap in this instance reduced cutting in the bed and banks of the stream. The riprap was constructed in a proper manner and with engineering skill.

Appellees claim that appellant has been negligent in the maintenance of the riprap because it has permitted rock to fall therefrom, to accumulate at the base of the riprap and in the bed of the stream, and that thereby the waters of the creek have been thrown against the western bank and cut in and upon the premises of appellees. The riprap wall is in the location where it was constructed. It has not settled or in any other manner moved into or interfered with the channel of the stream. The rocks along the base of the riprap and in the stream north from the south end of the riprap which are visible at low water in the channel, and the rock west of the south part of the riprap that inclines to the northwest and toward the west bank of the chan-

nel and that is also exposed to view when the water is low, are shown on the drawing exhibited above. The two places marked on the drawing "Rocks" are about 50 feet south of the south end of the riprap. This is upstream from the end of the riprap and there is no proof of any fact or condition that explains or from which it may reasonably be inferred that rock from the riprap could or that it did travel southerly upstream the distances the rocks are southwesterly from the nearest point of the riprap. There is evidence that this rock was not a part of that placed in the riprap in 1946.

Appellees complain primarily of the recession of the west bank of the channel westerly in two locations. The one farthest downstream is on the south part of the east end of Lot 2 but a part of it extends into the east end of Lot 3. The distance along the bank is estimated at about 70 feet. The other is on the east end of Lot 3 and a part of Lot 4 and is estimated to be about 50 feet along the bank of the channel. The rocks in the bed of the creek from near the south end of the riprap inclining to the northwest and identified on the drawing by the words "Rocks across channel" are substantially opposite the south line or the southeast corner of Lot 1, downstream from the damage to the west bank first above described, and a considerable distance downstream from the failure of the bank that affects Lots 3 and 4. The evidence is that when the water in the stream is not sufficient to cover the rocks therein no injury is done to either bank or to the bed of the stream. That is its usual condition, but during periods of run-off of water from the drainage area there is successive rising and falling of water within the channel of the creek. This contributes to the cutting and caving of the banks. When the water of the stream increases until it is sufficient to more than cover the rocks in the channel the course or flow of water therein is not controlled or influenced in any manner or to any extent by the presence of the rocks.

The greater part of the area drained by the creek is south and west of Homer. The wide part of the valley of the creek is on its west side through the town. The valley widens on the east side of the creek north of John Street which is 1 block north of the north line of the property of appellees. The west bank of the creek along the property of appellees about opposite the house thereon and at the south part of the property has been affected by seepage water. Water was observed coming out of the west bank of the creek at the south limits of Homer, a short time before the trial of this case in July 1954. Seepage was noticeable in January and June of the year before the trial and during the preceding year at the southwest corner of the intersection of Joseph and First Streets where there was erosion, bank caving, and slides. This was near the south part of the property of appellees. Seepage was present along the banks at John Street and about 1½ blocks north thereof. A witness testified he observed seepage in the west bank of the creek all along the property of appellees at times during the years 1950 to 1953, inclusive. The year 1951 was a wet year in the vicinity of Homer. It requires a considerable period for ground water to travel through the soil and to appear as seepage water along the bank of a watercourse. An engineer who was a witness for appellees and who examined the bank of the creek along the south part of the property of appellees shortly before he appeared at the trial when asked if the bank was wet from seepage stated: "When you see a wet bank like I looked at the other day, it is pretty difficult to separate that into seepage from ground water, or whatever you want to call it or where the facts are that you have a natural wetness around a stream, drawn there. * * *" He did not know of any high water in the creek that could have caused the bank to be wet.

The west bank of the creek across Lots 5 and 6 of the property of appellees has caved and receded to the west.

Trees along that location have slid off with the bank into the creek. The west bank line of the creek was in the intersection of First and Joseph Streets. A cement sidewalk along the west side of First Street and the south side of Joseph Street had intersected about a year before the trial but the bank eroded under the sidewalk and a part thereof had fallen in the creek at that intersection. The creek bank there is vertical for about 10 feet below the top and then slopes gradually down to the water line of the creek.

The south part of the property of appellees is on the inside of a slight curve in the creek. The west bank of the creek has receded to the west until the larger part of Lot 6 has been destroyed and a considerable part of Lots 4 and 5 has been lost. It is not claimed that there are any rocks or structures in the channel opposite, near to, or upstream from this erosion and damage to the west bank at that location.

The banks of the creek, both east and west, about 1½ blocks north of John Street have eroded, caved off, and washed away. There are no rocks or obstructions in the channel where that has occurred, but the banks there have been subject to seepage. There is no distinction between the erosion, sliding, or caving of the bank along the south part of the property of appellees and across Joseph Street, and that of the west bank along Lots 2, 3, and 4 of the property of appellees. The west bank line of the creek in that area had receded to the west about 10 feet before there was any riprap on the east bank, and that was before it is claimed there was a change in the course of the water in the creek at that place. This could not have been caused by the riprap or any rock therefrom. The character of the soil of the area involved is homogeneous. The banks are in alluvial formation such as there are in the entire vicinity. The banks are inherently unstable. Their instability has been intensified by seepage and the deepening of the channel. The evidence is convincing and it must be and is

concluded that the construction of the riprap by appellant in 1946, or the maintenance of it since, has not caused or contributed to the erosion or cave-in of the west bank of the creek along the property of appellees.

The judgment should be and it is reversed and the cause is remanded to the district court for Dakota County with directions to dismiss the case.

REVERSED AND REMANDED WITH DIRECTIONS.

HARRIETTE FUSS, APPELLEE, V. GENE WILLIAMSON, APPELLANT.
69 N. W. 2d 539

Filed April 8, 1955. No. 33530.

SUPPLEMENTAL OPINION

APPEAL from the district court for Lancaster County: HARRY A. SPENCER, JUDGE. On oral argument on motion for rehearing. See Fuss v. Williamson, 159 Neb. 525, 68 N. W. 2d 139, for original opinion. *Motion for rehearing overruled.*

Baylor, Evnen & Baylor, for appellant.

Edwin F. Dosek and *Davis, Healey, Davies & Wilson,* for appellee.

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

WENKE, J.

In his motion for rehearing appellant calls our attention to the fact that in the court below he obtained a verdict and therefore, as far as any issue of contributory negligence is concerned, is entitled to have the evidence adduced considered by this court in the following manner: " 'In testing the sufficiency of evidence to support a verdict it must be considered in the light most favorable to the successful party, that is, every

controverted fact must be resolved in his favor and he should have the benefit of every inference that can reasonably be deduced therefrom.' (Remmenga v. Selk, 150 Neb. 401, 34 N. W. 2d 757.)" Simcho v. Omaha & C. B. St. Ry. Co., 150 Neb. 634, 35 N. W. 2d 501. With this we agree.

In view of the foregoing he then contends we were in error in our former opinion in holding as follows: "In 'i' of instruction No. 1, the court instructed the jury as follows: 'She failed to give any warning that the right of way would not be yielded to the defendant or of her intention to drive into the path of and against the automobile of the defendant.'

"It is the contention of the plaintiff that she was under no duty to give a warning to the defendant that she was not yielding the right-of-way to him or that she was intending to drive south on Eleventh Street, for the reason that she was driving in a direct course south thereon, or was in such a position as to negotiate the turn to the south on Eleventh Street when the defendant first saw her when he stopped at the north side of the intersection of Eleventh and O Streets. She had no duty to observe to her rear that the defendant was crossing the intersection. The defendant was behind her, and she would be to the right of the defendant in the favored position. The plaintiff's car was not proceeding at such a speed that would require her to forfeit the right-of-way. We believe the giving of the above constituted prejudicial error."

On cross-examination appellee testified that when she stopped her car in the intersection, because of pedestrians passing over Eleventh Street on the cross walk, that her car had not entered the west traveling lane of Eleventh Street but had stopped short thereof, and that when the lights turned green so she could turn right onto Eleventh Street, she did so and entered into the west driving lane of Eleventh Street without looking to the north or left. She admits that if she had looked to the north she would

have seen appellant's car and would have waited for it to go by. She says she did not look to her left, or north, because a policeman directing traffic at the intersection motioned her to go ahead and, when he did so, she relied entirely on his directions and did not either look or give any signal when she started ahead and entered the west lane for traffic on Eleventh Street.

Appellant testified he stopped north of O Street to wait for the signal to turn green so he could go ahead; that his car was in the west or outer lane for traffic and the second car in that lane; that there were also cars stopped in the inner lane; that when the signal changed to green the cars in both lanes started ahead and he followed the car immediately ahead of him; that the cars in both lanes traveled south on Eleventh Street across the intersection; that he saw appellee's car stopped in the intersection; that it was stopped so the front had not entered the west traveling lane of Eleventh Street; that the car ahead of him proceeded south in the west traveling lane, passing in front of appellee's car; that he did the same, appellee not having started to drive her car forward as he proceeded past it; and that after he had passed it she started it forward and drove it into the rear of his car.

Appellant also produced competent and relevant evidence to the effect that there was no policeman on duty directing traffic at the time the accident occurred.

Under this situation of fact a jury could find appellee drove forward into the west traffic lane of Eleventh Street without looking for approaching traffic from the left or signaling any cars approaching from that direction of her intention to do so, and that her failure to do so was not because of any direction from a policeman directing traffic.

To this factual situation the following principles have application:

"A motor vehicle having started to cross an intersecting street in accordance with the signal light is ordi-

narily entitled to complete the crossing notwithstanding a change in lights." Laurinat v. Giery, 157 Neb. 681, 61 N. W. 2d 251. See, also, Styskal v. Brickey, 158 Neb. 208, 62 N. W. 2d 854.

"The proper rule is that when a person enters an intersection of two streets or highways he is obligated to look for approaching cars and to see those within that radius which denotes the limit of danger." Whitaker v. Keogh, 144 Neb. 790, 14 N. W. 2d 596.

"A person entering a street intersection with a traffic light in his favor is under an obligation to use due care * * *." Laurinat v. Giery, *supra*.

"It should be understood that even though the driver of a motor vehicle has the right-of-way he must always use ordinary care and prudence to avoid an accident. Caryl v. Baltimore Transit Co., 190 Md. 162, 58 A. 2d 239; Byrne v. Schultz, 306 Pa. 427, 160 A. 125. In regard to this it is stated in Byrne v. Schultz, supra: 'The signal to cross is not a "command to go, but a qualified permission," and the qualification is "to proceed lawfully and carefully," as a prudent man would under the circumstances, which certainly requires looking to the right and left before entering upon the intersecting street.'" Styskal v. Brickey, *supra*.

While appellant was under a duty to let both cars and pedestrians, rightfully in the intersection, get clear thereof before he proceeded into and across it on the green light, however, appellee was also under a duty not to enter a lane of traffic on Eleventh Street without looking to see if it was safe for her to do so and then, if she thought she could safely do so, give a signal to that effect to approaching cars, if any, in that lane.

We were in error in saying the evidence did not justify the court's submission of specification "i", or that appellee was, under the foregoing situation, not required to maintain a lookout.

However, in view of our discussion in the opinion of specification "a" and, under the evidence adduced, the

erroneous submission of other charges of contributory negligence, including "b", "d", and "f", we conclude the trial court was not in error in granting appellee a new trial. Therefore our affirmance of its action in doing so is adhered to and appellant's motion for rehearing is accordingly denied.

MOTION FOR REHEARING OVERRULED.

FRANK G. DAFOE AND ALBERT N. DAFOE, ALSO KNOWN AS AL N. DAFOE, AN INCOMPETENT PERSON, THROUGH AND BY FRANK G. DAFOE, HIS SON AND NEXT FRIEND, APPELLANTS, v. WILLIAM R. DAFOE ET AL., APPELLEES.

69 N.W. 2d 700

Filed April 8, 1955. No. 33676.

1. **Parties.** The real party in interest is the party entitled to the avails of the suit.
2. ———. For a standing as party plaintiff it is necesary, not only that plaintiff have a legal entity or existence and that he be possessed of legal capacity to sue, but also that such party have, in the cause of action asserted, a remedial interest which the law of the forum can recognize and enforce.
3. **Descent and Distribution.** Any prospective interest, or right to inherit, as an heir, is a mere expectancy or possibility, a mere hope or anticipation, and an expectant heir cannot merely on the basis of his expectancy maintain an action during the life of his ancestor to cancel a transfer made by his ancestor.
4. **Insane Persons: Parties.** In order to sue as next friend, where the alleged incompetent controverts or repudiates the right of a next friend to act in his behalf, the plaintiff must plead and prove by a preponderance of evidence that at time of bringing the suit, and maintaining the same, the person in whose behalf he sues: (1) Does not reasonably understand the nature and purpose of the suit; (2) does not reasonably understand the effect of his acts with reference to the suit; and (3) does not have the will to decide for himself whether or not the suit should be brought and prosecuted.

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

Ernest F. Armstrong, Dwight Griffiths, and *Robert S. Finn,* for appellants.

John H. Binning, Flansburg & Flansburg, Max Kier, Raymond B. Morrissey, Otto Kotouc, Jr., and *Beghtol, Mason & Anderson,* for appellees.

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

CHAPPELL, J.

On April 18, 1953, a petition was filed in the district court for Johnson County designating "FRANK G. DAFOE and ALBERT N. DAFOE, also known as AL N. DAFOE, an incompetent person, through and by FRANK G. DAFOE, his son and next friend," as plaintiffs, and designating William R. Dafoe, Virginia B. Dafoe, and others as defendants. Frank G. Dafoe will be hereinafter generally designated as Frank, William R. Dafoe as William, Virginia B. Dafoe as Virginia, and Albert N. or Al N. Dafoe, as Albert. The action, insofar as important here, was in equity seeking to cancel and set aside certain deeds and conveyances of real and personal property executed and delivered by Albert to his son, defendant William, and defendant Virginia, his wife, on July 15, 1952, as consideration for a written agreement executed by them and him to support Albert, the father, for the balance of his life, or executed by way of gift by Albert to them; to obtain an accounting and restitution, or in the alternative to impose a trust upon the property and money involved, and preserve same until a guardian could be appointed for Albert; and for general equitable relief. Such relief was sought upon the ground that Albert was 82 years of age, "in poor physical health, mentally ill and for a period exceeding 3 years has been mentally incompetent and incapable of conducting his own affairs and managing his properties and that said Albert N. Dafoe was physically and mentally incompetent at all times mentioned hereinafter." It was sub-

sequently alleged that Albert was mentally incompetent to execute the instruments involved on July 15, 1952, and that they were the result of undue influence and duress, exercised by defendants William and Virginia, who allegedly dissipated the property conveyed, and breached the agreement given as consideration therefor.

On May 22, 1953, an amended petition was filed containing two separate causes of action with comparable material allegations made and comparable relief sought. Thereafter, on May 23, 1953, Albert filed a special appearance, "for the sole and only purpose of objecting to the jurisdiction of said court over his person * * * for one or more of the following reasons, to-wit: 1. That said Albert N. Dafoe did not consent to the bringing of said action. 2. That in truth and in fact the interests of said plaintiff Frank G. Dafoe and Albert N. Dafoe are adverse in said action. 3. That no proper and sufficient service of summons has been had upon said Albert N. Dafoe."

On November 25, 1953, such special appearance, together with special appearances of William and Virginia, which do not appear in the record, were submitted and overruled by the trial court and said parties were given 2 weeks to plead further or answer.

Thereafter, on December 7, 1953, defendants William and Virginia filed a demurrer upon the grounds that: "1. The Court has no jurisdiction of the persons of these defendants. 2. The Court has no jurisdiction over the subject matter of this action. 3. The plaintiffs have not legal capacity to sue. 4. There is a defect of parties plaintiff. 5. The petition does not state facts sufficient to constitute a cause of action in favor of the plaintiffs and against these defendants." On December 28, 1953, such demurrer was submitted and overruled, and defendants were given 2 weeks within which to answer.

On January 11, 1953, Albert and defendants William and Virginia filed separate identical answers respectively admitting that in consideration of the agreements

made by William and Virginia, said Albert transferred the property described in plaintiffs' petition to William and Virginia. They then respectively denied "all and singular the allegations of the plaintiffs' petition not specifically admitted herein." Other named defendants also filed separate answers, the substance of which is unimportant here. After trial on April 13 to 16, 1954, inclusive, whereat voluminous oral evidence was adduced and numerous exhibits were offered and received in evidence, the trial court rendered a judgment finding and adjudging the issues generally in favor of all defendants and dismissing the action, with all costs taxed to plaintiff Frank G. Dafoe. Plaintiffs' motion for new trial was overruled, and an appeal was taken to this court. It is conceded, however, in this court, that the evidence warranted the finding and judgment of the trial court in favor of all defendants except defendants William and Virginia. Thus this appeal will be considered as involving only that part of the judgment in favor of them.

Some 19 alleged errors are assigned in brief of plaintiffs' counsel, but they may be summarized as contending that the trial court's judgment was not sustained by sufficient evidence but was contrary thereto and contrary to law and the principles of equity. Upon trial de novo under elementary rules with relation thereto, we conclude that the assignments should not be sustained, and as hereinafter set forth, state and discuss specific reasons for such conclusion.

The record discloses that Frank, the alleged next friend of Albert, is his son, whose mother was Albert's deceased first wife. That son is 53 years of age and lives with his wife Georgie on his farm near Tecumseh. He has been deaf since birth but has learned to speak. However, at time of trial he had no false teeth which fit him and could not be well understood without them, so by stipulation he testified by written questions and answers. He was called as a witness by plaintiffs' coun-

sel but gave no testimony which could in the slightest support or sustain any material allegations of plaintiffs' petition. There is no evidence in this record specifically detailing how much property or money Albert had given to his son Frank during his lifetime and prior to filing of the instant case. Adequate records thereof were concededly at hand but were never produced by plaintiffs' counsel. In such connection, it is conceded that on April 7, 1953, 11 days before this action was filed and 9 months after July 15, 1952, when the instruments involved were executed, Frank, then owing his father Albert $6,338, settled with his father in full for $3,000. Further, the record discloses that the father had already given him a farm and a lot of property and money. In any event, in the light of the allegations of plaintiffs' petition and the evidence in this record, Frank had no right or interest in the propery involved except a prospective interest or right to inherit as an heir, if any of such property or money was restored and remained after the death of his father. This is not a guardianship proceeding as in Cass v. Pense, 155 Neb. 792, 54 N. W. 2d 68, and Frank had a mere expectancy or possibility, a mere hope or anticipation that he would then receive some of such property. In that situation, we are first confronted with the question of whether or not Frank as an individual in his own behalf had any right or interest for the protection or vindication of which he could invoke the jurisdiction of the court in this case. We conclude that he did not have any such right or interest. Contrary to plaintiffs' contention, the transcript and evidence disclose that such question was appropriately raised in the proceedings and directly disposed of by the trial court.

Section 25-301, R. R. S. 1943, provides: "Every action must be prosecuted in the name of the real party in interest, except as otherwise provided in section 25-304." The exceptions contained in the latter section have no application here.

As early as Kinsella v. Sharp, 47 Neb. 664, 66 N. W. 634, reaffirmed as late as Gregory v. Pribbeno, 143 Neb. 379, 9 N. W. 2d 485, we construed and applied section 25-301, R. R. S. 1943, as meaning that: "The real party in interest is the person entitled to the avails of the suit." Plaintiff Frank G. Dafoe individually was clearly not entitled to any avails of the suit at bar.

In Davies v. De Lair, 148 Neb. 395, 27 N. W. 2d 628, we said: "As stated in 47 C. J., Parties, § 30, p. 21: 'For a standing as party plaintiff it is necessary, not only that plaintiff have a legal entity or existence, and that he be possessed of legal capacity to sue, but also that this person have, in the cause of action asserted, a remedial interest which the law of the forum can recognize and enforce. It is a rule of universal acceptation that to entitle any person to maintain an action in court it must be shown that he has a justiciable interest in the subject matter in litigation, either in his own right or in a representative capacity.'

"And in 39 Am. Jur., Parties, § 9, p. 858: 'Assuming the legal existence of the proposed plaintiff and his legal capacity to sue, the next question is whether he possesses any right for the protection or vindication of which he may invoke the jurisdiction of the court. As a general rule, one having no right or interest to protect cannot invoke the jurisdiction of the court as a party plaintiff in an action.'

" 'Equity will not interfere with a judgment, on a mere showing of a nominal or technical violation of the plaintiff's rights; substantial injury must be shown.' Van Every v. Sanders, 68 Neb. 509, 95 N. W. 870.

"For as stated in 39 Am. Jur., Parties, § 10, p. 859: '* * * courts are instituted to afford relief to persons whose rights have been invaded, or are threatened with invasion, by the defendant's acts or conduct, and to give relief at the instance of such persons; a court may and properly should refuse to entertain an action at the

instance of one whose rights have not been invaded or infringed, * * *.'"

Further, as stated in 26 C. J. S., Descent and Distribution, § 61, p. 1085, citing numerous authorities: "Any prospective interest, or right to inherit, as an heir is a mere expectancy or possibility, a mere hope or anticipation. An expectant heir cannot on the basis of his expectancy maintain an action during the life of his ancestor to cancel a transfer made by such ancestor." The foregoing rules are applicable and controlling here. Therefore, we conclude that Frank G. Dafoe could not individually maintain this action as plaintiff in his own behalf. Defendants William and Virginia, and Albert as well, also presented and argued other reasons in their briefs why Frank could not do so, but they require no discussion.

This is not a case where the grantor or his duly qualified representative brought the action alleging mental incompetency, undue influence, or breach of agreement to support, as in cases relied upon by plaintiffs' counsel. This was an action brought by Frank as next friend of Albert, allegedly incompetent, wherein Albert at all times, in the district court and this court, ratified and confirmed that the instruments involved were validly executed; denied that he was incompetent; alleged that he did not consent to the bringing of the action; and denied or repudiated the right of Frank to bring, control, and maintain the action as his next friend, as did also defendants William and Virginia. Contrary to plaintiffs' contention, the question is also presented then of whether or not, in the light of the pleadings and evidence, this action could be so controlled and maintained by Frank as next friend. We conclude that it could not.

In Stephan v. Prairie Life Ins. Co., 113 Neb. 469, 203 N. W. 626, this court said: "It is a general rule that, where a person is actually insane, but has not been judicially so declared, both actions at law and suits in equity may be maintained on his behalf by his next

friend. The authorities are also harmonious in holding that, in all cases where a person is not actually insane, but is incapable, through age or weakness of mind, to conduct his own affairs, suits may be maintained on his behalf by his next friend. But it has been held that it is in the discretion of the court to allow an action so instituted to proceed or not, and it may order a stay of proceedings to await the due appointment of a general guardian, or order the same to be discontinued, as it may be advised. 14 R. C. L. 611, sec. 63." See, also, Wager v. Wagoner, 53 Neb. 511, 73 N. W. 937.

In 44 C. J. S., Insane Persons, § 144, p. 311, citing numerous authorities, it is said: "In the absence of anything to the contrary, the consent of an insane person to his representation by next friend will be presumed. Since the right of a next friend to prosecute a suit is limited, the person sought to be represented has a right to repudiate the interference. The jurisdiction of the trial court to entertain the suit by next friend, however, is not ousted by the objection of the person represented. In such case, the court should inquire into the mental condition of the person in order to determine the propriety of allowing the next friend, rather than the person he assumes to represent, to control the proceeding." Here, Albert and defendants William and Virginia repudiated Frank G. Dafoe's interference, and Albert's consent would not be presumed.

Rather, in such cases the presumption is otherwise. As stated in Howard v. Howard, 87 Ky. 616, 9 S. W. 411, 1 L. R. A. 610: "The law presumes all persons to be of sound mind, and if adults, capable of managing their own affairs; and the mere fact that it is alleged by a person styling himself next friend, that a particular individual, who is an adult, is of weak or unsound mind, and not capable of taking care of his own affairs, does not destroy that presumption." See, also, Cort v. Benson, 159 Iowa 218, 140 N. W. 419.

The applicable and controlling rule here is that in

order to sue as a next friend, where the alleged incompetent controverts the right of the next friend to act in his behalf, the plaintiff must plead and prove by a preponderance of evidence that at the time of bringing the suit, the person on whose behalf he sues: (1) Does not reasonably understand the nature and purpose of the suit; (2) does not reasonably understand the effect of his acts with reference to the suit; and (3) does not have the will to decide for himself whether or not the suit should be brought and prosecuted. Upon failure to establish such criteria, a next friend cannot maintain an action. In Simmons v. Kelsey, 76 Neb. 124, 107 N. W. 122, this court said: "It is urged that the suit should have been abated because the plaintiff lacked sufficient mental capacity to maintain it. The evidence shows that the plaintiff is a woman about 80 years of age. It is not at all surprising that, when her mental capacity is called in question, there should be abundant evidence showing that she lacked the intellectual strength and vigor that she once possessed. But that falls far short of proving that she is mentally incompetent to maintain this suit. As was said in English v. Porter, 109 Ill. 291: 'Although the mind of a person may be to some extent impaired by age or disease, still, if he be capable of transacting his ordinary business—if he understands the nature of the business in which he is engaged, and the effect of what he is doing, and can exercise his will with reference thereto—his acts will be valid and binding.' See Emerick v. Emerick, 83 Ia. 411, 13 L. R. A. 757, and notes. The evidence satisfies us that the plaintiff reasonably understood the nature and purpose of her suit, the effect of her acts with reference thereto, and had the will to decide for herself whether or not it should be brought and prosecuted. That, we think, is sufficient mental capacity to maintain the action." See, also, Stephens v. Stephens, 143 Neb. 711, 10 N. W. 2d 620.

Further, in In re Estate of Isaac, 108 Neb. 662, 189 N.

W. 297, which involved the appointment of a guardian ad litem for an alleged incompetent, this court said: "To justify such an appointment, which may have the effect to deprive a person of the control of litigation in which his interests may be largely involved, the fact of incompetency should be specifically alleged, and the court should be satisfied from the proofs that the status of incompetency actually exists at the time the appointment is made. A finding of incompetency should be made. Patton v. Furthmier, 16 Kan. 29; Spencer v. Popham, 5 Redf. Sur. (N. Y.) 425; Patton v. Taylor, 144 Ark. 254; Ex parte Trice, 53 Ala. 546. The court did not find that Lucy Isaac was incompetent, but merely found that a petition had previously been filed in that court for the appointment of a general guardian for her, on the ground of mental incompetency. This was insufficient ground for the appointment. * * * A great deal of testimony was taken in the district court in the case at bar, as to whether she was ever in fact incompetent. That court found that she was sane, and the evidence, though in sharp conflict, is sufficient to support the finding."

Contrary to the contentions of Albert and defendants William and Virginia, we conclude that the allegations of plaintiffs' petition with regard to incompetency of Albert at the time of bringing the action and theretofore were sufficient, although not so specific as to be designated a perfect plea. Bearing that in mind, together with the rules heretofore set forth, we have examined the record. Insofar as important here, it discloses as follows: Albert was a man 82 years of age, who had for many years been a lawyer and also engaged in the real estate, insurance, and banking business at Tecumseh. On July 15, 1952, he owned certain described real and personal property, including 121.79 shares of stock in the Johnson County Bank of Tecumseh.

William is also Albert's son, whose mother was Albert's deceased second wife. He was 32 years of age

at the time of trial. He was married and had two young children. He had been interested in biochemistry, genetics, and other related sciences, as well as the general advertising and publishing business, and did not want to be a lawyer. Nevertheless, his father urged him to become a lawyer, so, after attending Nebraska Wesleyan University, he attended the universities of Michigan and Nebraska. He was graduated in law at the latter institution in 1950. In the meantime he served 9 months in the army and worked 3 months on a surveying crew. He and his family lived in Ann Arbor, Michigan, from 1944 to 1948. During that period the necessaries for himself and wife were furnished by himself, his wife who was employed for about 2 years, and by Albert his father. He was not there employed but had collected a personal injury judgment for $7,650, and his wife earned more than $4,000. They used these sums and his father made up the difference required for their support. They lived at Norfolk for a short time in 1949.

After William's graduation in 1950 he wanted to go to New York, Philadelphia, Chicago, or some other large city, but his father insisted, as did his half brother Frank, that he was obligated to return to Tecumseh and be with his father. He did so, where he and his family lived with his father in a residence owned by the father and he and his father became associated together as lawyers in the firm of Dafoe and Dafoe, with offices located in his father's building. By agreement, their offices were renovated and improved at Albert's expense. The father's home was improved and they bought a few pieces of furniture, including a television set, at Albert's expense, and Albert generally furnished the money necessary for groceries, household, and other expenses. William obtained a little law practice, and collected a few legal fees. At the request of Albert, he ran for county attorney, at his father's expense, but was not successful. He never represented his father as

a lawyer. His father took care of his own business, but once in a while he would ask William about business matters. In April 1952 William, his wife Virginia, and their two children, together with Albert, moved to Lincoln, where, except for a short time, they all lived together at 1944 South Cotner Boulevard.

Plaintiffs' counsel has laid great stress upon the total amount of money received by William and Virginia, or expended by the father in their behalf over the years. In that connection, Albert kept a daybook in his own handwriting, recording and reciting therein his daily financial transactions. He included among such transactions money paid to or for William or Virginia and to or by the firm of Dafoe and Dafoe. In that connection, plaintiffs' counsel offered in evidence one such daybook covering entries from January 1, 1949, to March 29, 1952, which was received in evidence after proof by plaintiffs' own witness that it correctly reflected the facts. Such evidence is important here in the light of plaintiffs' petition filed April 18, 1953, which alleged that Albert was "mentally ill and for a period exceeding 3 years has been mentally incompetent and incapable of conducting his own affairs and managing his properties." In other words, such evidence was and is competent to be considered by the court as a refutation of such allegations.

Georgie Dafoe, the wife of Frank, was called as a witness by plaintiffs' counsel. She testified that in 1951 she had several conversations with Albert and he had trouble remembering things. He sold some land which he owned in Nemaha County, and the next day inquired about how much had been sold, where it was located, and the price received; and later seemed confused about where or how he was to get to Hitchcock County where some of his other land was to be sold. The day after the sale he told the witness and her husband that he was afraid he was going to have trouble with William and Virginia; they were not satisfied, and

she was cruel to him. In January 1952 he said that William had struck him, and he was not going to stand for such treatment. However, on cross-examination Georgie testified that Albert always knew that he had two sons; that he always knew the extent of his farms, bank stock, and other property, and that he knew how property was transferred, by deed, court sale, or lease. She also testified that he had given them an equity in a farm and money on several occasions, and said that they had kept complete book and check records of all of it, which she would attempt to disclose the next morning, but she did not do so.

Plaintiffs' counsel called several lay witnesses who knew Albert at Tecumseh. One of them, a retail clothing merchant, testified he noticed that Albert had a tendency to be forgetful. In the late fall of 1951 he bought two pair of rubbers the same day, paying cash therefor. They were next door neighbors and discussed the boundaries of their property, which Albert knew about. They never did discuss Albert's sons or the nature and extent of his property or about the usual manner of transferring property.

A farmer testified that on March 1, 1950, he wanted to renew a mortgage on his farm, but Albert seemed forgetful and neglected to take care of it, so with the assistance of another attorney it was negotiated with the then holder of the mortgage. In January 1950 Albert sold him an insurance policy on his property for a term of 3 years. In January 1951 Albert thought it had lapsed and wanted to renew it. In the summer of 1951, the witness had a $10 loss which was unpaid until January 1954, although Albert said he had sent the claim in. Other transactions with Albert were not unusual, and the witness had no knowledge whether or not Albert knew the objects of his bounty, the extent of his property, or the manner of transferring property.

A clothes cleaner sold Albert two suits of clothes in 1949 and one in 1950. He kept them cleaned for Al-

bert. Early in 1950, the suit worn by Albert was unfit for further service, and he had forgotten that the other two suits were hanging in a closet at home. They never discussed Albert's two sons, the nature and extent of his property, except a small part which the witness wanted to buy, or the manner in which property was transferred.

A retail lumber man bought a lot from Albert on April 27, 1950. He traded him one lot for another and paid the difference in cash. It was handled by Albert's lawyer, and afterward Albert was confused about which lot was which, until they visited the lots. As a lumber customer, Albert sometimes misplaced the statements sent to him. However, the witness testified that Albert was at all times perfectly able to transact business and perfectly able to transfer property when his lawyer was with him.

A grocer testified that Albert did business with him and had a charge account the past several years before moving to Lincoln. About 3 months before that time, Albert telephoned an order, then forgot and telephoned the same order several times again. Sometimes over the years Albert paid his bill, and forgetting, offered to pay it again. In August or September 1951, Albert renewed a policy of insurance on a warehouse belonging to the witness who wanted the policy changed in some respects. Albert noted the changes but did not make them, having misplaced the memorandum, so the next day the witness went to Albert's office where the transaction was completed. The witness did not know whether or not Albert always remembered his sons or knew the nature and extent of his property or knew how property was transferred, and he did know what Albert's mental condition was on July 15, 1952.

A farm manager served several years with Albert as officers of a cemetery association. In February 1951 they had a business meeting to determine the manner of reinvestment of cemetery funds. Albert wanted them invested in farm mortgages, but the board decided to put

the money in a building and loan after which Albert seemed confused about the purpose of the meeting. However, after explanations by the secretary, everything was all right. In 1950 Albert temporarily misplaced some cemetery bonds that were in his possession, but Albert's secretary found them in his office. The witness never had any business transaction with Albert and expressed no opinion with regard to his incompetency then or thereafter.

A garage owner testified that Albert had been his customer since 1941 when he bought his 1941 Plymouth car and drove the same car from that time until he left for Lincoln in 1952. Albert wrote their annual bond for a motor vehicle dealer's license until 1949, when he neglected to furnish it, so it was obtained elsewhere. During the last 3 or 4 years, upon several occasions Albert misplaced or could not find his car keys, so they would order another set. The witness believed that Albert knew at all times that he had two sons. However, he did not know whether or not Albert knew the nature or extent of his property or about transferring property, and the witness had no idea what Albert's condition was on July 15, 1952.

A life insurance man, who formerly traveled for an equipment company, sold Albert a steel crib delivered September 25, 1948. When the bill was presented for payment October 1, 1948, Albert denied that he had ordered it. However, after contacting his tenant, Albert paid for the equipment. That was the only transaction with Albert the witness ever had. He did not know whether or not Albert knew that he had two sons, or knew the nature and extent of his property, or knew how to transfer property, by deed or otherwise, and he had no idea what Albert's condition was in 1952.

An implement man testified that once in 1950, Albert's car had collided with a car and asked if it was one belonging to the witness or to one of his sons. An inquiry developed that the car belonged to another man. That

was explained to Albert and he left, but returned several times making the same inquiry. About a month later, Albert came to the implement house looking for a man who had been working there. He was told that the man was working at another building, but afterward Albert came back several times making the same inquiries. The witness had not talked with Albert since the spring of 1950, and he would have no way of knowing his condition on July 15, 1952, or at the time of the trial.

A witness who once farmed land managed by Albert testified that every fall he paid Albert the cash rent. Once he paid him $80. It was laid on the corner of Albert's desk, and he got it confused with $40 or $50 lying on another corner of his desk, and said the witness had not paid him enough. Once in 1950 he settled with Albert, who paid him $15, and thereafter three or four times attempted to pay it again. The witness also said that he saw Albert out at his farm in the fall of 1952, which evidently was not true, and contrary to his testimony that Albert did not manage the farm in 1952. Further, the witness did not know whether the previously recited events took place in 1949, 1950, or 1951.

A man engaged in the poultry and feed business in the building next door to the Dafoe and Dafoe law office building testified that in the summer of 1951, Albert came in wanting him to check the roof on his buildings. That was done and Albert was told the condition, but he came back two or three times to inquire again about what their actual condition was. In 1951 Albert had three or four bunches of keys on chains. He sometimes tried to lock or unlock the door east of his own office, and sometimes could not find the right key to his car. Once when his ignition keys had been misplaced, they were found by the witness in Albert's office. In the summer of 1951, Albert would sometimes ask what date it was and upon being told would later return to verify it. He usually parked his car in front of his office and would have difficulty backing out of the narrow drive-

way. The witness testified that he did not know whether or not Albert realized that he had two sons, or knew the nature and extent of his property, or knew how property was transferred, and that he had no way of knowing Albert's condition on July 15, 1952.

A farmer testified that Albert was agent for his landlord until the spring of 1951. In April 1951, Albert talked with him about sealing some corn, and Albert wrote on a piece of paper the amount of corn, together with the location and description of the land. In doing so, Albert wrote northwest quarter of section 28, and the witness corrected that part to read northeast quarter of section 28. Albert also wrote white corn, and the witness corrected it to read yellow corn. Albert then left, but, having misplaced the piece of paper, drove back and made a new memorandum. Afterward, Albert called the witness several times about the transaction. In the spring of 1949, the witness called at Albert's home where he was confined by an accident. He was doing his office work at home and the dining room table was littered with papers and a government check for about $2,000 had fallen to the floor. The last time the witness ever saw Albert was in the summer of 1951. He testified that he had no way of knowing whether or not Albert knew the nature and extent of his property, but he always did know that he had two sons and always knew how to transfer property, by will or deed or something like that.

A garage mechanic testified that in early winter or late fall of 1951 he was sent up to Albert's house to start his car. Albert said that he had lost his ignition key and was trying to start the car with one which did not fit. The witness found the proper key on Albert's key ring and started the car. The witness testified that on about three occasions Albert forgot where he had parked his car. However, the last time the witness ever saw Albert was in the early winter of 1951 and he never discussed his family, his property, or the manner or

means of transferring property, and knew nothing about Albert's condition on July 15, 1952.

A deputy county clerk testified that for 3 or 4 months prior to moving to Lincoln, Albert came to his office almost every day and checked the chattel mortgage and real estate records for a half hour or more, without first looking at the indexes. Also, sometimes Albert did not put some of the records back in their right numerical order. Once he started to walk out with another man's hat, but was called back to find his own on the counter. Sometimes he said "I wonder what I came over for?" It was brought out, however, that such records were kept in chronological order and could be readily checked daily without first going to their index, and it was not unusual for people to misplace numerical books after using them. The witness knew nothing about the condition of Albert on July 15, 1952, and expressed no opinion with regard to his mental competency at any time.

A physician engaged in the general practice of medicine at Tecumseh was called as a witness by plaintiffs' counsel. He first examined Albert on September 21, 1950. He diagnosed and thereafter treated Albert upon several occasions for an irregular heart until in January 1952. In February 1952 he referred Albert to a Lincoln physician for examination, after which time until March 28, 1952, Albert was treated by the witness for arteriosclerosis or hardening of the arteries involving the brain, which caused Albert to be confused and unable to remember recent events clearly. The treatment for such disease was said to be largely prophylactic, although vasodilating drugs are used to increase the blood supply, and such cases are usually referred to a psychiatrist for treatment. The witness testified he knew that such condition existed as early as April 1950 by observation in a business transaction in which the physician then purchased a lot from Albert. At that time, however, he felt that Albert was competent to transact business after things were thoroughly explained to him

and cleared by counsel. However, he testified that the disease was progressive in character, thus Albert's memory of recent events was shorter when he was last seen by the witness on March 28, 1952, and he testified that on July 15, 1952, he was of the opinion that Albert would not have been mentally capable of transacting business. His opinion was based upon the criteria that in order to have the mental capacity to transact business, Albert would be required to have good or sound business judgment, good insight, be able to know and remember his physical assets and their value, have mental clarity, ability to think properly, and have a keen insight not ravaged by any disease processes. However, the witness testified that he knew Albert never forgot that he had two sons. The witness and Albert never discussed the manner in which property was conveyed, except with regard to his own transaction in April 1950. After that time, however, the witness did discuss with Albert the nature and extent of some of his property, and "he knew what they were."

A Lincoln lawyer who was a friend of the Dafoe family was called by plaintiffs' counsel as a witness. He had represented William in an automobile accident case and obtained a judgment in his favor for damages, which was paid to and used by William as heretofore mentioned. On February 9, 1952, at which time the witness represented Frank, a nurse at St. Elizabeth Hospital in Lincoln called the witness, saying that Albert wanted him to come and see him. In the afternoon he and another member of his firm went out there. Neither of such lawyers at that time or since ever represented Albert as his lawyer. Albert had recently been taken to the hospital and treated there because he had received several broken ribs in an accident. He did not look well and the witness had no knowledge with regard to the medication which Albert had been receiving. However, Albert recognized the witness, knew that he was a lawyer, and said that William was trying to get his property. He wondered

why he was being kept in a hospital, said he thought Virginia was responsible for it, and spoke disrespectfully of her. Also, in the course of the conversation he wanted to know what hotel he was in and talked about being in Omaha, whereupon his whereabouts were explained. He said that he had prepared a will or had one prepared by a lawyer, and was confused about whether or not he had one. Albert was told by the witness that if he ever wanted him to just call his law office and if he was not there to ask for some other named member of the firm, whereupon Albert replied, "Sure I remember them now." In November 1951 the witness had received a letter from Albert saying in substance that he was going to fix it so that Frank and William got an equal share of his property and wishing that he would be employed by Frank to help look after Frank's interest in the estate. The witness expressed no opinion whether or not Albert was mentally competent at any time.

Another Lincoln lawyer who represented Albert in the transactions here involved but withdrew as an attorney for Albert before the trial was called as a witness by defendants. He was first consulted by Albert at Albert's office in Tecumseh during the latter part of March 1952, with regard to disposition of his property. The lawyer pointed out to him the advantages of a trust, and advised him to so dispose of it, but Albert said that it was not what he wanted to do; and that he and William had been very close, and having reached a point in life where he did not want to be bothered with looking after his property which he described, he knew William would look after it, and he wanted to transfer his property to William who would agree to support him and care for him the rest of his life. The lawyer then suggested that Albert write him a letter telling him what he wanted to do. Thereafter, on April 12, 1952, Albert wrote the lawyer a 10-page letter, all written and signed in his own handwriting. Appearing in the evidence it de-

clared that he was in good physical condition and entirely competent in every way to take care of his affairs, although getting forgetful in small matters, and reaffirmed his former position that he did not want a trust agreement or conservator, or any outsider handling his property, but wanted to transfer all of it to William and have William agree to take care of him the rest of his life. The letter generally described all of Albert's property and the location thereof, recited some of his monetary obligations, declaring how he wanted them paid. It recited in detail and exactly what disposition he wanted to make of all his property, and called attention to his lack of confidence in his son Frank, who was, he believed, easily influenced and would not properly care for him. It recited that he had already provided for Frank by setting him up in farming and giving him help in many other ways. Later, the lawyer had several conversations with Albert in his office in Lincoln, and talked with him a few times over the telephone about minor matters. As a result, and at Albert's direction, the instruments here involved were prepared. On July 15, 1952, in the offices of the witness, they were read and explained to Albert in the presence of a psychiatrist and a physician in Lincoln, who had theretofore examined him to test previous threats made by Frank and others to contest his mental competency. The witness testified that Albert was then capable of transacting business, knew the objects of his bounty, the nature and extent of his property, the manner in which property is transferred, and the nature and effect of the instruments which were then and there voluntarily signed, acknowledged, witnessed, and delivered.

The psychiatrist testified as a witness for defendants. His educational qualifications and extensive training as an expert with many years of experience in the fields of psychiatry and neurology were not disputed. He first examined Albert in his office in Lincoln on April 7, 1952. Albert was then given a physical, psychiatric,

and neurological examination. He was cheerful and cooperative. He said he had been sleeping well and had a good appetite. He did complain that his chest hurt at times, admitted some difficulty with his memory, and that he was becoming hard of hearing. He said that he was born November 23, 1871, came to Nebraska in 1879; that his father was a doctor; and that the famous Doctor Dafoe in Canada was his second cousin. He stated that he was admitted to the bar in 1902, but had done little trial work, mostly partition suits and sold real estate and insurance. He described generally the property owned by him, together with the location thereof, and stated the approximate value of his bank stock. He stated that his son Frank was a son of his first wife, deceased, and William was a son of his second wife, deceased. He also said "I have already given Frank a farm * * * I want to give Bill a deed giving him the balance of the estate provided he takes care of me the rest of my life. I have given Frank a lot already." The physical examination disclosed that Albert had an impairment of hearing, arteriosclerotic changes of the aortic vessels, with an extra heart beat every fourth beat; a blood pressure of 150 over 75; pulse rate of 64; and no loss of coordination. There was also some evidence of moderate aortic changes in the cerebral vessels, which might affect recent memory. Otherwise, for a man his age, Albert's physical condition was good, quite satisfactory. The psychiatrist also again saw Albert in his office on July 14, 1952, and in the lawyer's office on July 15, 1952. The psychiatric examination disclosed that Albert was oriented for time, place, and person, but was unable to recall some recent tests, names, and events. He did not show any abnormal emotional state or evidence any feeling of persecution or delusions. He was a fairly settled, rigid type of individual, without any emotional instability, and a person who could not be easily influenced. He had a simple senility with no evidence of senile dementia or cere-

bral sclerosis or phychosis from cerebral arteriosclerosis. He knew and named his two sons, described his property, knowing the location, nature, and extent of it, and again said, " 'I want all of my property to go to William, then he will take care of me during my lifetime.' " The witness testified that Albert then had sufficient mental capacity to convey property. On July 15, 1952, the witness asked Albert if he understood what he was doing, and he said, "yes, he was making out or entering into a contract, he was making deeds to carry it out." When asked again what he desired to do with his property, he said "he wanted to leave it to William." He was asked the extent of his property, and again generally described and located it correctly. He again also said that he had "two sons, Frank and Bill." Again the psychiatrist gave an opinion that Albert was mentally competent to convey property and understood the nature and effect of the documents signed by him on July 15, 1952. The witness testified that arteriosclerosis was progressive and not regenerative, but that its degree and development depended upon the individual case. Further, he testified that the process may be delayed and mental competency improved by better nutrition, dilation of the blood vessels by medication, and stimulation of brain function, by giving recent newly discovered chemicals in connection therewith.

In the light of the foregoing rules and evidence, we do not find in the record sufficient competent evidence to sustain a conclusion that Albert was at any time mentally incompetent to bring, control, and maintain this suit. Therefore, we also conclude that Frank had no right to bring, control, and maintain this action as next friend of Albert. In the light of such conclusions, it becomes unnecessary to discuss or decide the issues of alleged undue influence or breach of the agreement by William and Virginia.

For reasons heretofore stated, we conclude that the

judgment of the trial court should be and hereby is affirmed. All costs are taxed to Frank G. Dafoe.

AFFIRMED.

IN RE APPLICATION OF CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY FOR AUTHORITY TO DISCONTINUE CUSTODIAN AT BOSTWICK, NEBRASKA.
CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, APPELLANT, V. OSWIN KEIFER ET AL., APPELLEES.
69 N. W. 2d 541

Filed April 8, 1955. No. 33681.

1. **Railroads.** A carrier is not required to make expenditure of earnings, from a particular community in the community where earned, in excess of the requirements of reasonable service.
2. ———. The services and facilities to be furnished by a railroad company at any station need only be just, reasonable, and adequate to the requirements of the station, and should in a measure be commensurate with the patronage and receipts from that portion of the public to whom such service is rendered.
3. **Railroads: Public Service Commissions.** In the final analysis, when an application is made for additional service or to discontinue an existing service, the question to be determined is the public need or lack of need therefor. The carrier is not required to maintain standby station agency service not comprehensively used by the public, or to be used only when other established carriers fail to meet the need.
4. ———: ———. It is the duty of a carrier to seek, and of regulatory agencies to permit, the elimination of those services and facilities that are no longer needed or used by the public to any substantial extent.
5. **Railroads.** Ordinarily a carrier by rail is not obligated to furnish substantially door-to-door delivery of commodities which are shipped over its lines.
6. **Public Service Commissions: Judgments.** The ruling of the Nebraska State Railway Commission or of this court on the question of discontinuance of an agency at any given time does not amount to an adjudication for the future. It is only a judgment on the condition presented by the application and relates only to the time and conditions presented.
7. **Appeal and Error: Public Service Commissions.** On appeal to the Supreme Court from an order of the Nebraska State

Railway Commission, while acting within its jurisdiction, the question for determination is the sufficiency of the evidence to prove that the order is not unreasonable or arbitrary.

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

J. W. Weingarten and *W. P. Loomis,* for appellant.

Robert H. Downing, for appellees.

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

SIMMONS, C. J.

The Chicago, Burlington & Quincy Railroad Company made application to the Nebraska State Railway Commission to discontinue the services of a custodian at its Bostwick station. A protest was filed and hearing was had. The commission denied the request. The applicant appealed here. We reverse the order of the commission.

The applicant will be herein referred to as the carrier, and the protestants by that designation.

Bostwick is on the carrier's line between Guide Rock and Superior. It is 6½ miles by rail and 10 miles by graveled highway from Guide Rock, and 6 miles by rail and 7 miles by graveled highway from Superior. The carrier has at the station an industry or side track, and a shelter shed.

It appears that Bostwick was once a thriving business center. Over the years its business establishments have been reduced to an elevator, a one-man repair shop, and the post office. There are from 30 to 35 residents within a radius of half a mile of the shelter shed. Bostwick is now an unincorporated community. Agriculture is the only industry in the surrounding territory.

The carrier maintains normal full-time agencies at Superior and Guide Rock. Agency service was discontinued at Bostwick in 1932. For the period covered by the record here, the carrier had had custodial service

only, at this station for 1¾ hours a day. This was divided between periods when the trains arrive. The custodian unlocks the shelter house at train time and, when required, maintains a fire for warmth there. The postmaster uses the shelter house on occasion when waiting for the mail trains. No one else is shown to have used it. On occasions, the custodian gets train information for the postmaster by carrier telephone so that he may return to the post office, 3 blocks away, if the train is late. Custodial service is a convenience to the postmaster in that regard. The custodian has no duties with reference to the mail.

The custodian has the duty of loading and unloading cream cans if cream is shipped as baggage. For 32 months prior to the hearing, no cream was shipped nor empties returned at this station. If there should be such business in the future and if the custodian is removed, this service would be rendered by train crews.

It is not clear what the custodian has to do with less-than-carload shipments of freight forwarded from this station. The paucity of the record in that regard is probably explained by the fact that in the 32-month period prior to the hearing there was one shipment of 30 pounds in that classification.

The custodian receives and delivers less-than-carload shipments of freight received at the station. The deliveries are made when he is on duty, or at other times for accommodation to consignees. In the 32-month period mentioned, there were 65 shipments received. During the last 8 months there were 3 months in which no shipments were received, and a total of 9 such shipments were received in that 8-month period.

If the custodian is removed, service on this class of freight will be available at either Guide Rock or at Superior. It can be delivered at Bostwick and placed in the shelter shed by train crews at consignee's risk if so desired.

Apparently the express business at the station is

handled for the express company by the custodian. The amount of such business, in number of shipments handled, is not shown. However, for the 32-month period the carrier's revenue from that source at the station was $131.51. For comparison, the less-than-carload freight revenue allocated on the basis of 50 percent to the originating and delivering station was $77.05. It appears that express service is available at Guide Rock and Superior the same as for freight.

The cost of the custodial service at the station is shown to be $1,168.94 for the 32-month period.

There were four witnesses for the protestants. One was the postmaster who desired the convenience of the shelter house and the train information. That is not shown to be revenue-producing business for the carrier.

Two protestants were nearby farm residents who desired the convenience of available less-than-carload freight service, but neither appears to have used it to any extent of late years. The principal protestant, a nearby farmer, appears to have been the principal user of less-than-carload shipments. He desired that it be kept available for the limited use that he makes of it, and to prevent a further dissolution of the business community. These protestants show that their business centers are now either Guide Rock or Superior. The business community as such has all but disappeared. The principal protestant seeks to avoid this one further removal of a business activity.

The protestants likewise present the fact that surrounding farm lands are now being developed by irrigation. They anticipate increased business from that source for the carrier.

We do not deem it necessary to recite the showing made as to carload shipments or passenger service. It is shown that it will not be affected by either the retention or removal of the custodian. In Thomson v. Nebraska State Railway Commission, 142 Neb. 477, 6 N. W. 2d 607, we said: "* * * assuming that the station is

highly profitable to the carrier we know of no rule of law or reason which requires the expenditure of earnings from a particular community in that community contrary to the requirements of reasonable service. We, however, do not so assume and we cannot so conclude from the evidence adduced."

We have heretofore stated the rules of law applicable to the situation presented by this record: "The services and facilities to be furnished by a railroad company at any station need only be just, reasonable, and adequate to the requirements of the station, and should in a measure be commensurate with the patronage and receipts from that portion of the public to whom such service is rendered. * * *" In re Application of Union P. R. R. Co., 149 Neb. 575, 31 N. W. 2d 552. "In the final analysis, when an application is made for additional service or to discontinue an existing service, the question to be determined is the public need or lack of need therefor. * * * the carrier is not required to maintain standby station agency service not comprehensively used by the public, or to be used only when other established carriers fail to meet the need." Chicago, B. & Q. R. R. Co. v. Order of Railroad Telegraphers, 155 Neb. 387, 52 N. W. 2d 238. "It is the duty of a carrier to seek, and of regulatory agencies to permit, the elimination of those services and facilities that are no longer needed or used by the public to any substantial extent." Chicago & N. W. Ry. Co. v. City of Norfolk, 157 Neb. 594, 60 N. W. 2d 662.

It is patent that the services performed by a custodian at this station are no longer needed or used by the public to any substantial extent. The record indicates that the discontinuance of custodial service may cause inconvenience to one consignee of less-than-carload freight. However, his evidence shows that the service at Superior and Guide Rock is adequate and available without undue expense of time or money. A carrier by rail, under these circumstances, is not obligated to furnish sub-

stantially door-to-door delivery of commodities which are shipped over its lines.

There remains the contention that irrigation development will bring additional transportation requirements. Whether it does or not is purely speculative. Likewise, it is speculative whether it will require the increase of facilities or services at Bostwick or follow existing trade practices and be made upon facilities at Guide Rock and Superior.

As to that question, the rule is: "The ruling of the railway commission or of this court on the question of discontinuance of an agency at any given time does not amount to an adjudication for the future. It is only a judgment on the condition presented by the application and relates only to the time and conditions presented." Thomson v. Nebraska State Railway Commission, *supra*.

Finally, the rule is: "On appeal to the Supreme Court from an order of the Nebraska State Railway Commission, while acting within its jurisdiction, the question for determination is the sufficiency of the evidence to prove that the order is not unreasonable or arbitrary." Chicago & N. W. Ry Co. v. City of Norfolk, *supra*.

This record presents the almost irreducible minimum of the use of custodial service by the public at Bostwick. The order denying the application was arbitrary, unreasonable, and contrary to the established law of this state. Clearly the application should have been granted.

The order of the Nebraska State Railway Commission is accordingly reversed.

REVERSED.

GRACE SEWELL, APPELLEE, V. WARREN SEWELL, APPELLANT.
69 N. W. 2d 549

Filed April 8, 1955. No. 33688.

1. **Divorce.** A rule by which to measure the exact amount or degree of corroboration required in a divorce case has not been formulated. The sufficiency or insufficiency of corrobora-

tion must be determined from the facts and circumstances of each case.

2. ———. Condonation is forgiveness for the past upon condition that the wrong will not be repeated.
3. ———. Condonation is complete if there is a voluntary resumption of marital relations after violation of marital duty.
4. ———. The absence of a plea of condonation does not bar its consideration and application by the court if the proof affords a proper basis for it.
5. **Divorce: Appeal and Error.** In an action for divorce if the evidence is principally oral and irreconcilably conflicting, and the determination of the issues depends upon the reliability of the witnesses, the conclusion of the trial court will be carefully regarded by this court.
6. **Divorce.** The court may, in the exercise of its discretion, allow compensation for the services of counsel for the wife in a divorce case in which a claim by the husband for a divorce is presented by cross-petition and a divorce is denied him.
7. **Divorce: Witnesses.** The voluntary testimony of an alleged paramour that he had intimate relations with a wife whose husband is seeking a divorce on the ground of adultery should be received with caution and carefully scrutinized.

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

Hutton & Hutton, for appellant.

Deutsch & Jewell, for appellee.

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

BOSLAUGH, J.

This is an action for a divorce. Appellee alleged that the parties were married December 5, 1946; that they had since been residents of Madison County; that there was no issue of the marriage; that appellee had performed her marital obligations and had been a faithful and loyal wife; that appellant had without cause failed to support her; that he had struck, beat, and abused appellee, and had requested her to seek a divorce from him; that appellee had property of the value of $8,000 at the time of the marriage; that it was sold for that

amount and the proceeds, except $300, were used for her support since the marriage; that appellant had property and funds of the net value of about $25,000; and that appellee was without means for support or to defray expenses of the suit.

Appellant denied the wrongs charged against him by appellee and in a cross-petition asserted that he had been a faithful and considerate husband; that he had not given appellee cause for her conduct of publicly and falsely accusing appellant of nonsupport and extreme cruelty, and of leaving the family home on numerous occasions with the motive of injuring the reputation of appellant, humiliating, and embarrassing him; and that appellee committed adultery during the marriage of the parties, specifically in the month of November 1953, with a named male person, on January 5, 1954, between 2 a. m. and 2:45 a. m. with a man whose name was not known to appellant, and January 14, 1954, at about 1:30 a. m. with a person whose name was unknown.

The trial of the case resulted in findings for appellant and against appellee on the petition; for her and against appellant on his cross-petition; that the petition and cross-petition should each be dismissed; and that appellant should forthwith pay the temporary allowances previously made in the case and the costs thereof. A judgment was rendered in harmony with the findings. That adjudication is the cause of this appeal.

The ages of appellant and appellee at the time of the trial were 49 and 47 respectively. Their first attempt to marry was June 7, 1944, at Reno, Nevada. They lived together as husband and wife thereafter at Norfolk until October 1946. Appellee had been previously married and divorced, and appellant had been twice married and divorced from his second wife only about 2 months before the attempted marriage of the parties at Reno, Nevada. Appellee sometime thereafter learned the fact that appellant was a married man, that their attempted marriage was void, and she desired another

marriage ceremony performed. Appellant refused her request. This disagreement resulted, as appellee testified, in appellant in October 1946, striking, choking, and beating her. She left the place where they were living in Norfolk and moved to a hotel. The parties were separated until December 4, 1946. They became reconciled, went to Kansas, and were married December 5, 1946. They lived together thereafter as husband and wife, except during at least 4 other separations resulting from unpleasant marital experiences, until September 10, 1953. Their residence was at all these times in Norfolk. Appellee said that in 1948 appellant came home intoxicated, threw her out of bed on her head, and because thereof and other abuses inflicted upon her by him, she separated from him, went to Omaha, and instituted a suit for divorce. During the more than 4 years from June 7, 1944, to October 1948, appellee said appellant struck and injured her about every 2 weeks. She claimed that about the time she recovered from one black eye appellant would strike her and she would have another. Appellant went to Omaha, saw and talked with his wife, promised to treat her properly, they became reconciled, the divorce case was dismissed, and they returned to Norfolk about October 1948. Appellee testified that thereafter appellant on various occasions severely struck, beat, and injured her; that he choked her; that he struck her so that her eyes became black; and that on one occasion he struck her on the side of her head and injured her ear so that she could not hear with it for a considerable time. She gave the places and times of many of these occurrences. She said that appellant assaulted and kicked her out of bed on the nights of September 8 and 9, 1953. Appellee testified at length and quite in detail to the matters she claimed demonstrated the truth of her charge of nonsupport. They separated September 10, 1953, and this case was commenced on that date.

Appellee owned and operated a bar and a tavern in

Norfolk. A former employee of appellee testified that she was a bar maid therein in 1945 and until the sale of the bar and tavern in March 1946; that appellant and appellee lived in the second story of the building in which the bar and tavern were conducted in the first or ground story; that at different times when she came to work she observed that appellee had black eyes and bruises on her body; that the bruises were black and blue marks and appeared like somebody had hit her; that appellant frequently came into the place of business of appellee, created scenes, and applied vulgar epithets to his wife; and that on one occasion appellee and her husband had an argument, appellant grabbed appellee by one of her arms, and dragged her into the kitchen of the tavern.

A brother of appellee was a witness and he said that the day after Christmas in 1952 at his apartment in Omaha, he saw appellant strike appellee for no reason other than she wanted to stay in Omaha and do some shopping, and appellant wanted to go back to Norfolk; that the witness restrained appellant and insisted that he desist; and that the witness had seen appellee with black eyes and injuries to other portions of her body. He saw his sister quite frequently and almost each time she would have some bruises on her body. The last time he saw her in this condition was in the year 1953.

The corroboration of the testimony of the appellee was the evidence of the former employee, that of the brother of appellee, inferences claimed to be deducible from the incomplete records of the appellant produced at the trial, and a claimed presumption arising from his failure to produce his records as required and demanded by appellee. Appellant denied in detail all the testimony of his wife concerning his conduct in reference to her, except he admitted that he did once in 1946 strike her. He gave no explanation, justification, or reason for his act. The corroboration of the evidence of

the appellee is tenuous. Recognition of this is reasonably implicit in the comment of appellee that "Admittedly, the corroboration of the evidence on extreme cruelty was not too strong and the court considered it insufficient * * *." A decree of divorce may not be granted on the uncorroborated declarations, confessions, or admissions of the parties to the case. A general rule by which to measure the exact amount or degree of corroboration required cannot be formulated and each case must be decided upon its facts and circumstances. Peterson v. Peterson, 153 Neb. 727, 46 N. W. 2d 126; Spray v. Spray, 156 Neb. 774, 57 N. W. 2d 926; Roberts v. Roberts, 157 Neb. 163, 59 N. W. 2d 175. The matters offered by appellee as corroboration were not under the circumstances of this case sufficient.

The parties to this case voluntarily lived in an apartment in Norfolk for about 3 years preceding their separation September 10, 1953. They lived as man and wife, occupied a common bed, and had intimate relations during that time and until their separation. Appellee performed the household duties the morning of the day of the separation. She made breakfast for herself and her husband and prepared a lunch for appellant who was not intending to return at midday. She took care of the clothes of appellant and prepared an evening meal for him before she left the apartment. The parties have been in this contest since and have had no contacts or relations. An obstacle to the success of the case of appellee is condonation by her as a result of the foregoing recited facts of any and all breaches of marital duties by appellant to the time of their separation on the day of the institution of this case. Condonation is forgiveness for the past upon the condition that the wrong will not be repeated. Condonation is complete if there is a resumption of marital relations after the breach of marital duty. It is true that condonation is not asserted as a defense in this case, but the absence of a plea of condonation does not bar its consideration and applica-

tion by the court if the proof affords a proper basis for it. Wright v. Wright, 153 Neb. 18, 43 N. W. 2d 424; Hodges v. Hodges, 154 Neb. 178, 47 N. W. 2d 361; Pestel v. Pestel, 158 Neb. 611, 64 N. W. 2d 299, on rehearing, 159 Neb. 56, 65 N. W. 2d 233.

Appellant relies on charges of adultery by his wife to support his application for a divorce from her. A pick-up truck driver for Omaha Cold Storage Company was a witness for appellant. The truck driver said that November 18, 1953, he left Norfolk very early in the morning for a trip to Dimock, South Dakota, for a load of turkeys at a Mennonite Colony; that he had seen appellee a few times before; and that she was north of her apartment on North Third Street in Norfolk about 2:30 a. m. when he picked her up for the truck trip to South Dakota to get turkeys. The witness did not know where she was while the turkeys were loaded at the colony. They left there on the return trip about 10 a. m. and reached Norfolk about 2 p. m. that day. A Mennonite from the colony rode in the truck on the return trip. When they were a few miles north of Norfolk they passed appellant in a car and appellee "ducked down" in the seat to avoid being seen. Appellee left the truck when they got to the cold storage plant. The witness did not claim there was any improper conduct or relations on the trip. He said he had met appellee a few times at Shady Inn, a tavern out some distance from Norfolk; that he was running around with her in November 1953; that she bought him drinks; that she always had money; and that he had intimate relations with her twice during "the first several weeks of November * * *." He could not tell the place or places of these claimed indulgences "right offhand." Later he said "I imagine north part of Norfolk; north of Norfolk," but not necessarily "Along the roadside." He could not give the date of either of these events. He was not sure where he met appellee on either of these

occasions but he made the guess that he "Probably picked her up at Shady Inn."

The Mennonite who said he rode in the truck loaded with turkeys testified that the driver of the truck was accompanied by a woman; that she left the truck at the cold storage plant; and that the witness had never seen her before and did not see her again until at the trial of the case. He was not introduced to her and did not hear her name mentioned. He said appellant came to see him and told him he had to come down and identify the lady that was with them. He testified that the woman on the trip was the one who testified in the case as Mrs. Sewell.

Appellant testified that he was on the highway north of Norfolk accompanied by a lady friend of his November 18, 1953, and a poultry truck went by him and he saw appellee therein as she "ducked down." He said he saw her and the man who drove the truck at Shady Inn about 12:30 a. m. the night before; that he saw them November 24, 1953, at 2:30 a. m. enter the Perry Cafe; and November 29, 1953, they were together at the Legion Club. The wife of the truck driver was present at the trial and heard her husband testify. She was also a witness for appellant. She said she saw her husband, appellee, and another woman in the front seat of an automobile the last of November.

Appellee denied all the matters detailed in the foregoing. She said she went to Omaha to the home of her brother and his family the last part of October 1953, probably on the 29th day of that month; that she was there until November 30, 1953, and returned to Norfolk that night; that she went and stayed in Omaha because her brother was in poor health; and that she lived with her brother at 1954 Jones Street where he had a small apartment until November 25, 1953. She took a room at the Hotel Castle in Omaha that day because the apartment of her brother was small, his infant child had become ill, and they were crowded; and that she spent

Thanksgiving Day with her brother and family, and in fact prepared the Thanksgiving Day dinner. A statement of the Hotel Castle in Omaha is in evidence. It shows that appellee was there as a guest commencing with November 25, 1953, and each day thereafter through November 29, 1953. Her brother testified and specifically and definitely corroborated the testimony of appellee in all its details in this regard.

The truck driver in the presence of his wife related voluntarily, brazenly, and so far as the record indicates, without a blush of humility or emotional hesitation his alleged sexual performances with appellee. This was not done impulsively but deliberately. He proclaimed in his testimony that he intended to lie for appellee but upon further consideration "* * * I decided she had tramped around so much that it wasn't worth lying." He elected not to remain silent, as it had been carefully explained to him the law privileged him to do, but rather to do whatever further injury he could to the woman he claimed to have debauched and disgraced by relating the alleged facts which, if true, branded him as a criminal and publicly condemned his wife to the status of companion of a self-confessed adulterer. He thus retired as a gigolo and by self-appointment became a cad. Conduct not wholly dissimilar to this has been the subject of judicial comment. In Letts v. Letts, 79 N. J. Eq. 630, 82 A. 845, Ann. Cas. 1913A 1236, the writer of the opinion expressed the sentiment of the court in this language: "I doubt if there can be found in the history of the divorce court anywhere * * * a male co-respondent, who had voluntarily come forward in aid of an injured husband suing for a divorce; who had sunk his manhood, his morals and his honor so low as to go voluntarily upon the witness stand and with brazen impunity proclaimed his triumph over his victim, to irretrievably disgrace and ruin her. The experience of mankind has been to the contrary, and, therefore, when a case arises which is contrary to this experience, it is

such an aberration from the normal trend of human action that it requires convincing proof to confirm it."

The testimony of the truck driver that he had intimate relations with appellee was given voluntarily and was not corroborated. The witness was an alleged paramour. In 17 Am. Jur., Divorce and Separation, § 396, p. 343, it is said: "Though in an action for divorce on the ground of adultery the alleged paramour may testify that he has committed adultery with the defendant, his testimony should be received with caution. It should be given less weight when he testifies voluntarily than when he testifies under compulsion. All the cases recognize that the testimony of the paramour given voluntarily is entitled to but little credit." See, also, DeDonis v. DeDonis, 1 N. J. 43, 61 A. 2d 729; Annotation, Ann. Cas. 1913A 1240.

Appellant produced testimony tending to show that on the evening of January 4, 1954, appellee was in the company of Les Goodman at Shady Inn; that about 12:30 a. m., January 5, appellee was in his car near this tavern; that she and Les Goodman had a conversation and she drove away in his car; that at the request of Les Goodman appellant and his lady friend, who were at Shady Inn, went to the Perry Hotel in Norfolk in the car of appellant and had lunch there; that when Les Goodman left he was watched and he was seen to go into the apartment building where appellee was living; that this was about 2 a. m., January 5, 1954; and he stayed in the building about 45 minutes. Appellant made no effort to present Les Goodman as a witness.

The foregoing was denied by appellee in all its parts. She testified she moved to the south side of the apartment building on South Third Street Sunday, January 3, 1954. She left Norfolk January 4, 1954, on the 4 p. m. bus for Omaha. She said she was not in Norfolk on January 4 after the bus left for Omaha or on January 5, 1954. She on that date wrote a postcard in Omaha and mailed it there to Mrs. Helen Brueggeman. She

afterwards saw the card in the possession of the addressee when she returned to Norfolk. Appellee denied that Les Goodman was ever in any place occupied by her or that she had ever had any contact or association with him. Mrs. Helen Brueggeman testified she lived in a house back of the apartment building in which appellee lived. She helped appellee move in there on the Sunday following the first of the year 1954 which was the Friday preceding. She remembered the place was being redecorated and it was finished so that appellee could move in on Sunday instead of the following Monday. The witness said she helped appellee pack her baggage and she carried it out to the cab for appellee the next day, January 4, 1954, and that appellee left in the cab to take the 4 p. m. bus from Norfolk to Omaha. The witness received a card from appellee on January 6, 1954, that was postmarked at Omaha the preceding day. Appellee was not to the knowledge of the witness in her apartment on the night of January 4 or any time January 5, 1954.

Appellant testified that January 14, 1954, he saw appellee in a reclining position in the front seat of a Chevrolet automobile near the Shady Inn. The lights of his car were turned on the Chevrolet. The Chevrolet car was driven away and out to the highway. The witness followed it about 10 miles when it entered a side road on the west side of U. S. Highway No. 81, stopped, and the lights of the car were turned off. The witness left his car and went to the Chevrolet. He said he found appellee and a man sitting in the car in a loving embrace. The man was named by appellant as Bob Pruden. Appellant produced no supporting evidence of this alleged escapade.

Appellee denied the testimony concerning her being in the company of the man named as Bob Pruden. She said she had no acquaintance with or knowledge of such a person, and that she did not have any experiences

such as appellant described concerning her and some man.

Appellant in his original pleading in the case alleged as a ground of divorce that his wife on numerous occasions left the family home in anger without cause and falsely accused him of nonsupport and extreme cruelty for the purpose only of injuring his reputation, and humiliating and embarrassing him. In his amended pleading made about 5 months later he added the charges of adultery by his wife between the hours of 2 a. m. and 2:45 a. m., January 5, 1954, with a man whose name was not known to him, and January 14, 1954, at about 1:30 a. m., with some person whose name was unknown. This he verified by his oath. He testified at the trial that the man his wife improperly associated with in the early hours of January 5, 1954, was Les Goodman; that appellant had that night befriended Les Goodman; and that he, his lady friend, and Les Goodman had eaten lunch together at the Perry Hotel about an hour and a half before appellant claims Les Goodman had committed adultery with the wife of appellant. He testified that he and his lady friend had followed Les Goodman and had seen him go to the apartment of his wife about 2 a. m. and that they and the sister of the appellant had seen him leave about 45 minutes later. Likewise appellant in his pleading alleged and gave his oath that he did not know the man who immorally and criminally associated with his wife about 1:30 a. m., on January 14, 1954. He testified at the trial he saw and talked with the man guilty of the misconduct complained of at the place of the act, and the man was to his personal knowledge Bob Pruden. If his testimony in this regard at the trial was truth he was an eye witness on both occasions and knew the facts that he said in his amended pleading he did not know. It is inescapable that he misrepresented to the court on one or the other of the times he spoke in this case on the subject.

Mrs. Gladys McKay was employed at the cafe at the

Livestock Sales Barn in Norfolk from April to October 1951. Appellant was dealing in livestock. He ate meals at the cafe. Mrs. Gladys McKay said she was introduced to appellant in October 1953. About that time they were at the Colony Club in Norfolk. She did not ask him if he was a married man but she soon learned the fact because he solicited her to help him trail his wife. She accepted. He then asked her to go with him to bars, dances, and other places because he did not want to go alone. She accepted this invitation also. She said that they were together from then on every night and sometimes through the day. The record by other proof shows this to be remarkably true. Appellant testified that she was a great help to him in this case. The record attests that she was a willing and persistent though not necessarily a disinterested helper. Her devotion and efforts were such as to suggest that she considered her reward was more immediate than only a prospective contingency. She was with appellant the day he said a truck passed him and he saw his wife attempting to conceal her presence while riding in a truck loaded with turkeys. She was present and claimed to have witnessed all that appellant related concerning Les Goodman and appellee. She was asked if she was appellant's date that night and her answer was that she was not, that she got home at 3:15 a. m. The references in the record are numerous of frequent and habitual visits of appellant and his lady friend at the taverns, including Shady Inn out on the highway, and like night spots in and around Norfolk. Invariably the record proclaims where appellant was there his helpful companion was also. The fact that she was his constant and agreeable companion may furnish the reason appellant promptly and willingly granted Les Goodman the accommodation he requested of transportation from Shady Inn to the city of Norfolk immediately after appellee, as appellant testified, drove away from Shady Inn in the car of Les Goodman, and he had addressed appellee by an endearing

term in the presence of appellant; likewise it may explain the lunch of appellant and his companion with Les Goodman soon after they had returned to Norfolk from Shady Inn, and the reason appellant exhibited no resentment or remorse but on the contrary appellant evidenced delight when he learned, as he claims, of the unfaithfulness of his wife by her association and relations with the most brazen of her alleged paramours.

The testimony is irreconcilably conflicting. Appellant disputed in much detail substantially all the testimony of appellee and she reciprocated with respect to the testimony of appellant. The additional evidence is not less inharmonious. The evidence was substantially oral. The district court observed and heard the witnesses. It was in a favored situation to consider and estimate the merit or lack of merit of the conflicting claims of the parties. Hence the rule in this class of cases stated in Hodges v. Hodges, *supra:* "In an action for divorce if the evidence is principally oral and is in irreconcilable conflict, and the determination of the issues depends upon the reliability of the respective witnesses, the conclusion of the trial court as to such reliability will be carefully regarded by this court on review." See, also, Killip v. Killip, 156 Neb. 573, 57 N. W. 2d 147. The characteristics of this case make it appropriate to accord it the proper impact of this rule of practice. In James v. James, 29 Neb. 533, 45 N. W. 777, this court said: "The charge of adultery is a serious one, and it should be clearly established by competent testimony before a decree of divorce should be granted on that ground." This is a trial de novo on the record. It does not justify the granting of a divorce to the appellee or to the appellant.

An allowance for compensation to counsel for appellee for services performed by him in this court additional to the allowance made to him for services in the district court should be made. Pestel v. Pestel, *supra.*

The judgment of the district court should be and it is

affirmed. There should be and there is hereby awarded to counsel for appellee additional to the allowance made him in the district court the sum of $300 for services in this court on her behalf. The costs including the allowance of compensation to the counsel of appellee should be and they are taxed to appellant.

AFFIRMED.

RALPH CACEK ET AL., APPELLANTS, V. H. W. MUNSON ET AL., APPELLEES.
69 N. W. 2d 692

Filed April 8, 1955. No. 33690.

1. **Pleading: Appeal and Error.** When, without timely and proper objection made in the district court, a motion to dismiss is treated by the parties as the equivalent of a general demurrer, it will be so treated on appeal to this court.
2. **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.
3. ———. In passing on a demurrer to a petition, the court will 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. **Judgments.** If an action or proceeding has an independent purpose and contemplates some other relief or result, although the overturning of the judgment may be important or even necessary to its success, then the attack on the judgment is collateral.
5. **Schools and School Districts.** When petitions are filed with the county superintendent of schools requesting a change of boundaries of school districts under the provisions of section 79-402, R. S. Supp., 1953, it is his duty to give proper notice of and hold a hearing thereon and at or after such hearing to factually determine whether or not 55 percent of the legal voters affected have lawfully petitioned the same, and such action is judicial in nature.
6. ———. Where the record of proceedings before a county superintendent of schools in a proper hearing upon petitions

filed under section 79-402, R. S. Supp., 1953, discloses that 55 percent or more of the legal voters of each school district affected have signed and filed petitions requesting a change of boundaries, the county superintendent has the jurisdiction and mandatory duty to order the boundary changes requested by such petitions.

7. **Schools and School Districts: Judgments.** Where the record of the proceedings and final order affirmatively disclose that the county superintendent of schools has mandatory authority and jurisdiction to enter an order changing the boundaries of school districts under section 79-402, R. S. Supp., 1953, such order may not, unless fraud is alleged, be collaterally attacked, but may be reviewed by proceedings in error which provide an adequate remedy.

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

Dryden, Jensen & Dier, for appellants.

Vasey & Rist, for appellees.

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

CHAPPELL, J.

Plaintiffs, as residents, taxpayers, and members of the school board of School District No. 78 in Gage County, brought this injunction suit against defendants, county superintendent and county treasurer of Gage County, together with the respective school boards of several hereinafter enumerated school districts in Gage County. Plaintiffs' original petition was filed May 21, 1954, in the district court for Gage County. Thereafter, on July 2, 1954, they filed an amended petition which alleged, insofar as important here, that defendant district No. 74 of Gage County is a Class II school which operates a high school at Odell; that under the provisions of section 79-402, R. S. Supp., 1953, such district and all other defendant districts involved, together with district No. 78, filed petitions with defendant county superintendent praying that each and all of their boundaries should be changed so that they would be added

to and made a part of district No. 74; and that if said petitions were correct, the county superintendent would be required by statute to include school district No. 78, which would cause such district to lose its identity, dominion, and control over its school activities, and require its residents to thereafter pay taxes for the support of consolidated school district No. 74, which taxes when levied and to be collected by defendant county treasurer would be and become a lien upon the property owned by them. They alleged that the petition filed with the county superintendent, purporting to have been signed by 55 percent or more of the legal voters of district No. 78, did not factually represent 55 percent or more of such legal voters, because one signer, although a resident of district No. 78, was not a qualified legal voter and should not have been so counted by the county superintendent. Therefore, "That said action on the part of H. W. Munson in including said School District #78 in a merger plan, is and should be decalred (sic) null and void, in that he declared that School District #78 be included in said merger above described, as shown in his 'Findings and Order,' dated May 20, 1953, a certified copy of which is attached hereto, marked Exhibit A, and by reference made a part hereof."

Plaintiffs' prayer was that the "Court issue a permanent injunction against the defendants and each of them, restraining them from taking any action, either individually or in concert, from asserting any dominion, control, taxation, or attempting to assert dominion, control or taxation over said District #78, and from interferring (sic) or in any way affecting the rights of the parties plaintiff in their official duties as board members of School District #78 in the discharge of their duties therein, and for such other and further relief as the Court may find just and equitable."

On July 15, 1954, defendants filed a motion to dismiss plaintiffs' amended petition for the reason that the

trial court was without jurisdiction to hear and determine in this action the matters set forth therein. After hearing thereon, such motion was sustained and plaintiffs' amended petition was dismissed substantially upon the ground that the county superintendent had jurisdiction to hear and determine the matters about which plaintiffs complained, and having duly considered and determined them by the order rendered May 20, 1953, and made a part of plaintiffs' petition, such order was final and reviewable only by error proceedings as provided by law. Therefore, injunction could not be maintained by plaintiffs. Plaintiffs' motion for new trial was overruled, and they appealed, assigning that the trial court erred in finding that plaintiffs' action was a collateral attack, and in dismissing plaintiffs' amended petition for want of jurisdiction to hear the action. We conclude that the assignments should not be sustained.

As in Reller v. Ankeny, *ante* p. 47, 68 N. W. 2d 686, since the parties herein without timely and proper objection made in the district court, treated defendants' motion to dismiss as the equivalent of a general demurrer in order to test the sufficiency of plaintiffs' amended petition to state a cause of action, it will be so treated on appeal to this court. In Valentine Oil Co. v. Powers, 157 Neb. 71, 59 N. W. 2d 150, we held: "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.

"In passing on a demurrer to a petition, the court will 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." See, also, Reller v. Ankeny, *supra.*

Insofar as important here, the finding and order of the county superintendent, a copy of which was marked Exhibit A and made a part of plaintiffs' amended pe-

tition, reads as follows: "On this 20th day of May, 1953, at ten o'clock a. m., I, the undersigned, County Superintendent of Schools of Gage County, Nebraska, proceeded to conduct a hearing on the separate petitions of legal school voters of Gage County School Districts numbered 86, 134, 87, 118, 130, 94, 88, 154, 112, 78 and 98 and the petition of the Board of Education of School District number 74, Gage County, Nebraska, for a change of boundaries of each of said numbered districts by adding each of said districts * * * (hereinafter sometimes referred to as rural districts), to said School District number 74.

"I find from an examination of the proof of service of notice of said hearing heretofore directed to be given by me, and now on file in my office, that notice of said hearing has been duly given as ordered, and hearing being convened at the time and place stated in the notice, I then announced that I had the jurisdiction and authority to proceed with hearing. I announced the purpose of the hearing, and thereupon proceeded with such hearing, and herewith make the following special findings.

"I find that the petitions of each of said rural school districts request and petition me as County Superintendent of Schools of Gage County, Nebraska, to change the boundaries of each such district by adding each of said rural districts to said School District number 74, * * *.

"I further find that the petition of said School District number 74 petitions and requests me as said County Superintendent of Schools to change the boundaries of said District number 74 by the addition of said numbered rural districts, or such of them as may be so lawfully added, * * *.

"I thereupon separately examined and considered the petitions of each of said rural districts, to determine whether 55% of the legal voters in each district had petitioned for the addition of such district to said School

District number 74, and as to each rural district I find as follows: * * *

"j. With respect to said School District number 78 I find that said School District has 43 legal school voters, included among whom is one Velda Cacek, whose name did not appear on the list of voters certified on the original petition requesting said change of boundaries, but who was determined to be a legal school voter of said School District number 78 during said hearing. I further find that of said number of legal school voters 28 have legally signed said original petition requesting said change. I find, however, that of the voters who signed said original petition 10 thereof subsequently signed and filed with me a petition requesting that their names be withdrawn from said original petition. I further find that of those legal voters requesting that their names be withdrawn from said original petition, 6 of said legal voters filed their petitions requesting that their names be not withdrawn from said original petition but remain thereon, and said petitioners requested said change and joined with the petitioners on said original petition requesting said change so that I find that of the 43 legal school voters in said School District number 78 24 have legally petitioned for said change, and accordingly, 55% thereof have requested said change. * * *

"I thereupon examined the petition of the Board of Education of said School District number 74 requesting said change of boundaries and * * * find that said Board of Education of said School District Number 74 is authorized to file said petition.

"I certify that during the conduct of said hearing, while the same was in session, and before its adjournment, I separately read the original petition of each of said numbered school districts, including the list of voters certified as such in each district, and the names of the persons appearing as signers on said petition in each district requesting said addition, and considered

separately each of said petitions, and granted to each and every person present the right to challenge the correctness of the list of legal school voters as the same appears on each of said petitions and the genuineness of the signatures of the persons signing each of said petitions, and their right as legal school voters to sign the same, and I granted to legal school voters in each of said districts who were present at said hearing the right to add their names to said petition for said addition of their district, and the right to file supplemental petitions requesting said addition, and the right of any person who had already signed petitions to withdraw his name from said petitions, and the further right to retract withdrawals and permit their signatures to remain on the original petitions requesting change of boundaries, and I further certify that the foregoing record truly, correctly and fully reflects all of the acts and things considered and done at said hearing.

"I there fore find that 55% or more of the legal voters in each of said School Districts numbered 86, 134, 87, 118, 94, 88, 154, 112, 78 and 98 have lawfully petitioned to add all of their respective school districts to School District number 74 in Gage County, Nebraska. * * *

"IT IS, THEREFORE, BY ME, ORDERED AND DIRECTED that the whole of the following numbered school districts in Gage County, Nebraska, as now constituted, including all real estate within the boundaries of the same, to-wit: 86, 87, 118, 134, 94, 88, 154, 112, 78 and 98 be added to School District Number 74 in Gage County, Nebraska, and that the School District boundaries of said School District number 74 be enlarged to include all of said numbered districts and all of the territory embraced therein, * * *.

"H. W. Munson
County Superintendent of Schools,
Gage County, Nebraska"

In 49 C. J. S., Judgments, § 408, p. 809, citing numerous cases including In re Estate of Ramp, 113 Neb. 3,

201 N. W. 676, In re Guardianship of Warner, 137 Neb. 25, 288 N. W. 39, and County of Douglas v. Feenan, 146 Neb. 156, 18 N. W. 2d 740, 159 A. L. R. 569, it is said: "A collateral attack is an attempt to impeach the judgment by matters dehors the record, before a court other than the one in which it was rendered, in an action other than that in which it was rendered; an attempt to avoid, defeat, or evade it, or deny its force and effect, in some incidental proceeding not provided by law for the express purpose of attacking it; any proceeding which is not instituted for the express purpose of annulling, correcting, or modifying such decree; an objection, incidentally raised in the course of the proceeding, which presents an issue collateral to the issues made by the pleadings.

"In other words, if the action or proceeding has an independent purpose and contemplates some other relief or result, although the overturning of the judgment may be important or even necessary to its success, then the attack on the judgment is collateral. This is the case where the proceeding is founded directly on the judgment in question, or on any of its incidents or consequences as a judgment, or where the judgment forms a part of plaintiff's title or of the evidence by which his claim is supported." See, also, 34 C. J., Judgments, § 827, p. 520; 31 Am. Jur., Judgments, § 611, p. 204. Such rules are controlling here, and we conclude that plaintiffs' action was a collateral attack.

We are then confronted with the question of whether or not, in the light of the record, the order of the county superintendent was subject to collateral attack. We conclude that it was not.

This court has concluded that when petitions are filed with the county superintendent of schools requesting a change of boundaries of school districts under the provisions of section 79-402, R. S. Supp., 1953, it is his duty to give proper notice of and hold a hearing thereon and at or after such hearing to factually determine

whether or not 55 percent of the legal voters affected have lawfully petitioned the same. State ex rel. Donavan v. Palmer, 18 Neb. 644, 26 N. W. 469; State ex rel. Tanner v. Warrick, 106 Neb. 750, 184 N. W. 896; Ruwe v School District, 120 Neb. 668, 234 N. W. 789; Nickel v. School Board of Axtell, 157 Neb. 813, 61 N. W. 2d 566.

Section 79-402, R. S. Supp., 1953, provides in part: "The county superintendent shall create a new district from other districts, or change the boundaries of any district upon petitions signed by fifty-five per cent of the legal voters of each district affected." Such provision of the section is mandatory and jurisdictional. Cowles v. School District, 23 Neb. 655, 37 N. W. 493; State ex rel. Larson v. Morrison, 155 Neb. 309, 51 N. W. 2d 626.

Thus, where the record of the proceedings before a county superintendent of schools in a proper hearing upon petitions filed under section 79-402, R. S. Supp., 1953, discloses that 55 percent or more of the legal voters of each school district affected have filed petitions requesting a change of boundaries, the county superintendent has the jurisdiction and mandatory duty to order the boundary changes requested by such petitions. Also, a hearing upon the questions so presented by such petitions and the findings and determination of facts from the evidence adduced with relation thereto, are judicial in character. In Nickel v. School Board of Axtell, *supra,* it is said: "We said in Pollock v. School District, 54 Neb. 171, 74 N. W. 393: 'The power to change the boundaries of school districts is conferred on the county superintendent by Compiled Statutes, chapter 79, subdivision 1, section 4. To authorize the exercise of such power a petition of voters of the territory affected is requisite. The power so vested in the superintendent is to a certain extent judicial in its character and subject to review. (State v. Palmer, 18 Neb. 644; State v. Clary, 25 Neb. 403.) Section 580 of the Code

of Civil Procedure (now section 25-1901, R. R. S. 1943) authorizes the review by the district court, on petition in error, of judgments rendered or final orders made by a probate court, justice of the peace, or any other tribunal, board, or officer exercising judicial functions, and inferior in jurisdiction to the district court. The provision affords an adequate remedy in such cases as the present.' " See, also, Ruwe v. School District, *supra*.

Further, where the record of the proceedings and final order affirmatively disclose that the county superintendent of schools had mandatory authority and jurisdiction to enter an order changing the boundaries of school districts under section 79-402, R. S. Supp., 1953, such order may not be collaterally attacked unless fraud is alleged, but may be reviewed by proceedings in error which provide an adequate remedy. Cases heretofore cited sustain that conclusion. See, also, School District No. 67 v. School District No. 24, 55 Neb. 716, 76 N. W. 420, wherein it is said: "An order of the county superintendent as to the formation or change of boundaries of a school district cannot be collaterally assailed where he acted within his jurisdiction. (State v. Palmer, 18 Neb. 644.) It is conceded by counsel for plaintiff that this action must fail unless the proceedings before the county superintendent consolidating the two districts were not erroneous merely, but were without jurisdiction and absolutely void; * * *." However, in such case the petition of one district and affidavit attached thereto affirmatively disclosed that the petition was fatally defective. In that respect and another unimportant here, the case is distinguishable from that at bar.

No fraud is alleged by plaintiffs herein and they admit that such an order of the county superintendent cannot be collaterally attacked unless it is void for want of authority and jurisdiction to act because of insufficiency of the legally required petitions. They rely upon State ex rel. Larson v. Morrison, *supra*. However, that case is entirely distinguishable from the one at bar. In

that case the uncontradicted record affirmatively disclosed that the petition filed with the county superintendent was signed by 14 out of 25 legal voters in the school district, but that subsequent to its filing and prior to the order of the county superintendent, which was rendered without a hearing, two such signers had withdrawn their names from the petition which they then had a right to do, so that when the order was made by the county superintendent only 12 out of the 25 legal voters actually remained on the petition, which was less than 55 percent. Thus, the county superintendent, as shown by the uncontradicted record, clearly had no authority or jurisdiction to make the order. Herein, the finding and order of the county superintendent dated May 20, 1953, attached to and made a part of plaintiffs' petition, affirmatively disclosed that after proper notice and hearing whereat legal voters from district No. 78 were present and participated, it was factually found that its petition was signed by more than 55 percent of the legal voters in such district. Thus the authority and jurisdiction of the county superintendent was existent and mandatory as affirmatively shown by the record. Thereafter no error proceedings were taken, and this action was filed more than a year after the making of such order.

The court said in Gergen v. The Western Union Life Insurance Co., 149 Neb. 203, 30 N. W. 2d 558: "This court adheres to the rule that if a court is one competent to decide whether or not the facts in any given proceeding confer jurisdiction, decides that it has jurisdiction, then its judgments entered within the scope of the subject matter over which its authority extends in proceedings following the lawful allegation of circumstances requiring the exercise of its jurisdiction, are not subject to collateral attack but conclusive against all the world unless reversed on appeal or avoided for error or fraud in a direct proceeding. Brandeen v. Lau, 113 Neb. 34,

201 N. W. 665; County of Douglas v. Feenan, 146 Neb. 156, 18 N. W. 2d 740, 159 A. L. R. 569."

In 15 C. J., Courts, § 173, p. 852, it is said: "A court having jurisdiction to decide as to its own jurisdiction in any particular case, it follows that its decision will have the same effect and conclusiveness as would its decision on any other matter within its jurisdiction; and where the jurisdiction of a court depends on a fact which it is required to ascertain, its judgment determining that such fact does or does not exist is conclusive on the question of jurisdiction, until set aside or reversed by direct proceedings." See, also, 21 C. J. S., Courts, § 115, p. 177; 34 C. J., Judgments, § 851, p. 552. In 49 C. J. S., Judgments, § 427, p. 849, it is said: "Where a court of general jurisdiction judicially considers and adjudicates the question of its jurisdiction, and decides that the facts exist which are necessary to give it jurisdiction of the case, the finding is conclusive, as discussed in Courts § 115, and generally cannot be controverted in a collateral proceeding, even though the decision or finding as to jurisdiction was erroneous, * * *.

"The rule is not confined to courts of general jurisdiction, but it has been held that if an inferior court or one of limited jurisdiction is charged with the ascertainment of a jurisdictional fact, and its proceedings show that the fact was ascertained, the finding cannot be collaterally attacked unless want of jurisdiction is apparent on the face of the record." The same rule applies to administrative boards and tribunals acting in a judicial capacity. See, also, 49 C. J. S., Judgments, § 421, p. 828; § 25-1901, R. R. S. 1943.

As stated in 33 C. J., Judgments, § 39, p. 1078: "Want of jurisdiction must be distinguished from error in the exercise of jurisdiction. Where jurisdiction has once attached, mere errors or irregularities in the proceedings, however grave, although they may render the judgment erroneous and subject to be set aside in a proper proceeding for that purpose, will not render the judgment

void, and until set aside it is valid and binding for all purposes and cannot be collaterally attacked."

Finally, in State ex rel. Hymer v. Nelson, 21 Neb. 572, 32 N. W. 589, a case comparable in principle, this court said: "It will thus be seen that the defendants were the proper persons to determine, in the first instance at least, whether the petition presented to them was signed by resident electors of said county equal in number to three-fifths of all the votes cast therein at the last general election.

"In Smiley v. Samson, 1 Neb., 56, it was held that the power to hear and determine the matter in controversy was jurisdiction, and that it is coram judice whenever a case is presented which brings the power into action. * * * If the decision of said board was unsatisfactory to the petitioners it was subject to review by the district court, and the error, if any, could thereby be corrected. No fraud is charged, and such decision cannot be treated as void, nor can the errors of the board be corrected in this proceeding." Also, in State ex rel. Sorensen v. Knudtsen, 121 Neb. 270, 236 N. W. 696, it is said: "This court is committed to the doctrine that: 'The power to hear and determine a matter in controversy is jurisdiction. It is coram judice, whenever a case is presented which brings the power into action. It may be exercised according to the rules of the common law, or by special direction, or informally.' Smiley v. Sampson, 1 Neb. 56. Further, the action of a special tribunal created by statute, to ascertain and declare the existence or non-existence of certain facts, is judicial in its nature, and the determination thereof constitutes a final order which cannot be collaterally impeached. State v. Nelson, 21 Neb. 572; State v. Houston, 94 Neb. 445; State v. Morehead, 101 Neb. 37; State v. Stevens, 78 N. H. 268; 34 C. J. 519, 878. The only conclusion consistent with the pronouncements just referred to is that, if the secretary of agriculture erred in the instant proceeding in determining from evidence adduced that the petitions before

him, fair and regular in form, were sufficient to authorize him to create Cedar county an accredited area for testing cattle, it was an error subject to review, if at all, by a direct proceeding; that his action and order thus made are not subject to collateral attack (Peverill v. Board of Supervisors, 208 Ia. 94); * * *." See, also, Burkley v. City of Omaha, 102 Neb. 308, 167 N. W. 72.

Other matters are presented in briefs of counsel but they require no discussion. The foregoing rules are controlling here, and, for reasons heretofore stated, we conclude that the judgment of the trial court should be and hereby is affirmed.

AFFIRMED.

IN RE ESTATE OF HENRIETTA B. BOLLERUP, DECEASED. OTTO GAS, INCORPORATED, APPELLANT, V. EDNA GRACE STEWART, ADMINISTRATRIX, APPELLEE.
69 N. W. 2d 545

Filed April 8, 1955. No. 33713.

1. **Frauds, Statute of.** An agreement to pay a debt of another antecedently contracted without a consideration to the promisor therefor is within the statute of frauds.
2. ———. A consideration to support a promise, not in writing, to pay the debt of another must operate to the advantage of the promisor and place him under a pecuniary obligation to the promisee independent of the original debt, which obligation is to be discharged by the payment of the debt.
3. ———. The burden is on the litigant to prove by the greater weight of the evidence facts alleged by him to take an oral contract relied upon by him without the operation of the statute of frauds.
4. **Appeal and Error.** This court in determining if findings of the district court are sustained by evidence must consider the proof and permissible inferences therefrom most favorably to the successful party.
5. ———. The findings of a trial court in an action at law have the effect of a verdict of a jury and will not be disturbed on appeal unless they are clearly wrong.

APPEAL from the district court for Red Willow County: VICTOR WESTERMARK, JUDGE. *Affirmed.*

Fred T. Hanson, for appellant.

Stevens & Scott, for appellee.

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

BOSLAUGH, J.

This litigation concerns a claim of appellant against the estate of Henrietta B. Bollerup, deceased. The existence and validity of it were challenged by appellee. The county court allowed it. The representative of the estate prosecuted an appeal to the district court. The result of a trial of the claim in that court was an adjudication disallowing it.

Keith E. Bollerup died testate July 6, 1952. His will was probated August 11, 1952. It named his wife, Henrietta B. Bollerup, as sole legatee and devisee, and she was appointed and qualified as executrix of his will and estate. The deceased was indebted to appellant at the time of his death. A claim for that indebtedness is the subject of this case. The time for filing claims against the estate of the deceased expired with November 28, 1952. Appellant did not file a claim for the indebtedness owing it by the deceased. Henrietta B. Bollerup died intestate January 4, 1953. Her heirs were two daughters then 5 and 3 years of age respectively. Edna Grace Stewart is administratrix of the estate of Henrietta B. Bollerup, deceased.

Appellant alleged that before November 20, 1952, Henrietta B. Bollerup requested that the indebtedness not be filed against the estate of the deceased but that it be transferred to her personal account with appellant so that an extension of the time of payment of it might be effected; that in consideration of her request to be substituted as debtor and her promise to pay the indebtedness appellant did transfer the debit

balance of the account of the deceased to the account of Henrietta B. Bollerup with it; that appellant did not file a claim for the amount owing it by the deceased against his estate; and that by reason thereof the widow of the deceased became and was the only debtor of appellant for the indebtedness in the net amount of $1,872.38.

Appellee denied the allegations of the claimant and asserted that the indebtedness described and alleged in its claim was the debt of Keith E. Bollerup and not the debt of his widow; that no part thereof was incurred by her and she was not indebted to appellant in any amount; that the alleged transfer of the account of the deceased with the appellant to the account of his widow was only a paper transaction on the books of the claimant; that it was without consideration to and without written authority of Henrietta B. Bollerup; that it was wholly void because of the statute of frauds of Nebraska; and that the claim of appellant was not a proper one against the estate of Henrietta B. Bollerup.

Hereafter Keith E. Bollerup will be described as the deceased; Henrietta B. Bollerup by her name or as widow of the deceased; and C. A. Bollerup as Bollerup.

There was a transaction in the offices of appellant November 10, 1952, which concerned the account of Keith E. Bollerup as it existed at the time of his death. His widow, Bollerup, Paul Brandt, and Marieta Balius were there. The three persons last named were respectively the president, bookkeeper, and assistant bookkeeper of appellant. The widow of the deceased and Bollerup had a conversation in a room of the offices. The other persons were not in that room. Later the bookkeeper was called into the room and was informed by Bollerup that the bookkeeper was to transfer the account of the deceased with appellant to the account of Henrietta B. Bollerup, and that he was to observe the proper procedure to accomplish this. Bollerup and the widow of deceased were present and the book-

keeper stated his conclusion that they indicated their desire that the transfer be made. There was nothing said to the knowledge of the bookkeeper about giving the widow an extension of time for payment of the indebtedness. He testified he could not definitely remember that the widow of the deceased said anything in his hearing except "She stated in regard to not having sufficient funds." Notwithstanding this he was permitted to testify "* * * I believe she didn't have sufficient funds and still go on and have enough to live on. That was my idea of it."

Proper entries in the journal of appellant were made by the bookkeeper to balance and close the account of the deceased, and an amount equal to the balance of that account was charged to Henrietta B. Bollerup. The assistant bookkeeper was instructed by her superior to make proper "Accounts Receivable entries" in the records of appellant based on what the bookkeeper had written in the journal and she did this in the presence of Henrietta B. Bollerup. The assistant bookkeeper testified all she heard of the conversation between Bollerup and Henrietta B. Bollerup was she desired the account of the deceased transferred to her account and she asked how it could be done. The witness did not hear any promise of the widow of the deceased to pay the account and did not hear any reason stated for the transfer.

There was no writing signed by Henrietta B. Bollerup evidencing a promise by her to pay appellant the indebtedness her deceased husband owed it at the time of his death. Any oral collateral promise by her to do so by which she became only a surety or guarantor is within the statute of frauds and unenforcible. § 36-202, R. R. S. 1943. An oral agreement to pay a primary debt of another antecedently contracted without a new consideration moving to the promisor is within the statute of frauds. Johnson v. Anderson, 140 Neb. 78, 299 N. W. 343. This provision of the statute has been many times

considered and its meaning has not been enlarged by interpretation. In re Estate of Allen, 147 Neb. 909, 25 N. W. 2d 757.

The fate of the claim of appellant depends upon whether or not the widow of the deceased made a promise to appellant to pay the indebtedness described therein and if she did, whether or not she was motivated in doing so to subserve and promote her interests, objects, or purposes, and not to become a guarantor, and whether or not there was a sufficient consideration for the agreement. The rule is stated in the early case of Fitzgerald v. Morrissey, 14 Neb. 198, 15 N. W. 233: "Where the leading object of a party promising to pay the debt of another is to promote his own interests, and not to become guarantor, and the promise is made on sufficient consideration, it will be valid although not in writing. In such case the promissor assumes the payment of the debt." The latest announcement of the doctrine made by this court is in King v. Schmall, 156 Neb. 635, 57 N. W. 2d 287: "A consideration to support a promise, not in writing, to pay the debt of another must operate to the advantage of the promisor, and place him under a pecuniary obligation to the promisee independent of the original debt, which obligation is to be discharged by the payment of that debt."

The proof discloses only that the bookkeeper of appellant was told by Bollerup in the presence of Henrietta B. Bollerup that he should transfer the account of deceased with appellant to the account of his widow. The bookkeeper states the conclusion that each of the principals indicated a desire to have this done. The bookkeeper could not remember that the widow of the deceased said anything except something about not having sufficient funds. There were entries made in the books of appellant to balance and close the account of the deceased and an amount equal to that amount was charged to the account of the widow of the deceased with her knowledge that it was done. There was evi-

dence stated as a conclusion of the witness that Henrietta B. Bollerup wanted the transfer made and inquired how it could be done. There is no evidence that the widow made any promise to pay appellant the indebtedness of her deceased husband. Likewise there is no proof that appellant bound itself to refrain from filing a claim against the estate of the deceased; that it would or did extend or postpone the time of the payment of the indebtedness; or that it subjected itself to any forbearance. The record is silent as to these subjects. There was no affirmative act of appellant after the transfer indicating its belief that the widow of deceased had become its debtor and that it was pursuing her as such.

Appellant relied upon an alleged oral promise of the widow to pay an indebtedness of her husband. Appellee interposed a denial and asserted that the debt in issue was that of the deceased; that there was no consideration for the alleged promise; and that it was within the statute of frauds. The burden was with appellant to prove that the alleged promise was made; that it was not within the statute of frauds; and that there was a sufficient new consideration. Without proof of these matters by appellant its case could not survive and an adjudication against it was inevitable. Benes v. Reed, 158 Neb. 128, 62 N. W. 2d 320; Sack v. Sack, 156 Neb. 171, 55 N. W. 2d 505; Fitzsimons v. Frey, 153 Neb. 124, 43 N. W. 2d 531. Appellant does not contend otherwise. It interprets the authorities it quotes and discusses, and other cases on the subject by this comment: "Other cases on the point are in agreement that an oral promise to pay the debt of a decedent in consideration of the forgoing (sic) of a claim against the estate is not within the statute of frauds if the forgoing (sic) of the claim operates directly to the advantage of the promisor." The deficiencies in the case of appellant are the absence of proof of a promise of Henrietta B. Bollerup to pay the indebtedness, of an obligation of appellant to refrain from filing a claim against the estate of the deceased, or of any

committal of appellant to enlarge the time within which to pay the indebtedness.

This court must in determining if the findings of the trial court are supported by evidence consider the proof and any inferences deducible therefrom most favorably to appellee. In re Estate of Hunter, 151 Neb. 704, 39 N. W. 2d 418; In re Estate of Fehrenkamp, 154 Neb. 488, 48 N. W. 2d 421.

The evidence is meager, equivocal, and unsatisfactory. The trial court had the advantage of observing the witnesses while they testified. It found that the evidence was insufficient to show that Henrietta B. Bollerup agreed to pay the indebtedness owing to appellant by her husband at the time of his death and it found generally against the appellant and in favor of appellee. The findings of a trial court in an action at law have the effect of a verdict of a jury and will not be disturbed on appeal unless they are clearly wrong. Grant v. Williams, 158 Neb. 107, 62 N. W. 2d 532. The record does not permit it to be justifiably concluded that the findings of the trial court are clearly wrong.

The judgment of the district court should be and it is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. GILBERT GAYLE RENENSLAND, APPELLANT.
69 N. W. 2d 860

Filed April 15, 1955. No. 33597.

1. **Municipal Corporations: Penalties.** A prosecution for an act in violation of a city ordinance which act is not a violation of statute is a civil action for the recovery of a penalty and in such case the burden is on the prosecution to prove the charge by a preponderance of the evidence.
2. ———: ———. In an action to recover a penalty for violation of a city ordinance where a jury is waived the matter of

weighing the evidence to determine whether or not the prosecution has sustained the burden of proving its case by a preponderance of the evidence is one for the trial judge and his finding will not be disturbed unless it is clearly wrong.

APPEAL from the district court for Douglas County: CARROLL O. STAUFFER, JUDGE. *Affirmed.*

John N. Baldwin, for appellant.

Clarence S. Beck, Attorney General, *Homer G. Hamilton, Charles A. Fryzek,* and *Henry C. Winters,* for appellee.

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

YEAGER, J.

In a complaint filed in the municipal court of the city of Omaha, Nebraska, in the name of the State of Nebraska, Gilbert Gayle Renensland was charged with the commission of indecent, lewd, and filthy acts contrary to the ordinance of the city of Omaha, Nebraska. He was tried in that court, found guilty, and sentenced to a term of 30 days in jail. From this judgment he appealed to the district court. In the district court he waived a trial by jury and was tried to the court, found guilty, and sentenced to 60 days in jail. From this judgment he has appealed to this court.

As grounds for reversal the appellant has set forth, in number, five assignments of error. From an examination of them and the presentation made in the brief it becomes clear that, in truth, there is but one, namely that the evidence is insufficient to sustain the judgment. There is no attack upon the form or substance of the complaint and no contention that the evidence adduced in support of the complaint on behalf of the complainant did not support the charge made in the complaint.

As pointed out the charge was made under a city ordinance. The offense charged was not one defined as a crime by statute. This then is a civil action and the

burden was upon the prosecution to prove the charge only by a preponderance of the evidence. State v. Neimer, 147 Neb. 284, 23 N. W. 2d 81; Wells v. State, 152 Neb. 668, 42 N. W. 2d 363.

In an action to recover a penalty for violation of a city ordinance where a jury is waived the matter of weighing of evidence to determine whether or not the prosecution has sustained the burden of proving its case by a preponderance of the evidence is one for the trial judge and his finding will not be disturbed unless it is clearly wrong. State v. Neimer, *supra*.

The record contains evidence that the appellant was guilty of indecent, offensive, and abnormal sexual overtures and advances toward two witnesses who gave testimony in this case. From an examination of this we are unable to say that the finding of the trial judge that the appellant was guilty of the charge made was clearly wrong.

The judgment of the district court is therefore affirmed.

AFFIRMED.

JOHN J. JURGENSEN ET AL., APPELLANTS, V. JAMES S. AINSCOW ET AL., APPELLEES.
69 N. W. 2d 856

Filed April 15, 1955. No. 33683.

1. **Appeal and Error.** When a mandate of the Supreme Court makes the opinion of the court a part thereof by reference, the opinion should be examined in conjunction with the mandate to determine the nature and terms of the judgment to be entered or the action to be taken thereon.
2. **Appeal and Error: Judgments.** When this court reverses a decree as to a matter finally determined thereby, and remands the cause with directions to enter a specific judgment or decree, the mandate of this court is final and conclusive upon all parties, as to all matters so directed, and no new defenses can be entertained or heard in opposition thereto.
3. **Appeal and Error.** Public interest requires that there shall be

an end to litigation, and when a cause has received the consideration of this court, has had its merits determined, and has been remanded with specific directions, the court to which such mandate is directed has no power to do anything other than to enter judgment in accordance with such mandate.

4. **Judgments.** Rights of the parties which may have accrued since the rendition of the original judgment, not in issue in the action in which it was rendered, are not adjudicated therein, but the trial court has no power to reopen the proceeding to settle such rights.

5. ———. If, since the original judgment, something has occurred which would render it inequitable to enforce the judgment of this court, resort must be had to some form of original proceeding by which appropriate relief can be secured. It cannot be done by way of defense to the entry of the judgment this court has directed.

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

Warren C. Schrempp, David S. Lathrop, and *Eugene D. O'Sullivan, Jr.,* for appellants.

William Comstock, Frank L. Burbridge, and *Robinson, Hruska, Garvey & Nye,* for appellees.

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

CARTER, J.

This is an appeal from a decree of the district court for Douglas County entered pursuant to a mandate of this court. It is the contention of the appellants that the decree on the mandate does not conform thereto and this court is asked to reverse the judgment or modify it in order to do equity.

The case was previously in this court and is cited as Jurgensen v. Ainscow, 155 Neb. 701, 53 N. W. 2d 196. The opinion of the court was filed on May 9, 1952. Pursuant thereto and on June 3, 1952, the mandate of this court was issued. On November 17, 1952, the trial court entered its judgment on the mandate in which it is provided: "Wherefore, it is ordered, adjudged and decreed

that plaintiffs have a driveway easement running north and south over the West 6 feet of the East 9 feet of lots 13 and 14, in Hanscom Place, an addition to the City of Omaha, Douglas County, Nebraska, 100 feet in length to permit ingress and egress to and from the plaintiffs' garage situated on Lot 15, Block 5 in Hanscom Place, an Addition to the City of Omaha, Douglas County, Nebraska."

In State ex rel. Johnson v. Hash, 145 Neb. 405, 16 N. W. 2d 734, we said: "It will be noted that the mandate makes the opinion of the court a part thereof by reference. Under such circumstances, the opinion of the court can properly be examined in determining the nature and terms of the judgment to be entered or action to be taken. This seems to be the rule where the opinion is made a part of the mandate or where the remand is with directions to enter a decree in conformity with the views 'herein expressed' or 'in accordance with the opinion.'" See, also, Asbra v. Dean, *ante* p. 6, 68 N. W. 2d 696, and cases therein cited. The mandate in the present case incorporates the opinion of the court as a part of it by reference. We may therefore examine the opinion of the court to determine if the trial court properly entered a judgment in compliance with the mandate of this court.

The former opinion of the court provides: "We conclude that the plaintiffs are entitled to a driveway easement running north and south over the west 6 feet of the east 9 feet of Lots 13 and 14 of the defendants' property, 100 feet in length, as shown by the evidence, to permit ingress and egress to and from the plaintiffs' garage. The judgment of the trial court is reversed and the cause remanded with directions to the trial court to enter judgment in conformity with this opinion." The judgment on the mandate is in strict conformity with the opinion and mandate of this court.

The trial court having entered a judgment in strict compliance with the mandate of this court, there is

nothing to be resolved by this court on appeal. It has long been the rule that there must be an end to the litigation of a particular cause, and that an alleged injured litigant, in order to establish what he may deem the justice of the cause, may not have de novo trial after trial, ad infinitum. The purpose of courts is to end litigation rather than to promote it.

The issue before us was ably discussed in Galbreath v. Wallrich, 48 Colo. 127, 109 P. 417, 139 Am. S. R. 263, wherein it is said: "When a particular judgment is directed by the appellate court, the lower court is not acting of its own motion, but in obedience to the order of its superior. What that superior says it shall do, it must do, and that alone. Public interests require that an end shall be put to litigation, and when a given cause has received the consideration of this court, its merits determined, and then remanded with specific directions, the court to which such mandate is directed has no power to do anything but to obey the mandate; otherwise, litigation would never be ended, and the supreme tribunal of the state would be shorn of that authority over inferior tribunals with which it is invested by our fundamental law. * * * Rights which may have accrued since the rendition of the original judgment, not in issue in the action in which it was rendered, are not adjudicated therein, but the trial court has no power to open or interfere with the judgment of this court in order to settle such rights. If, since the original judgment, something has occurred which would render it inequitable to carry the judgment this court has directed into execution, resort must be had to some form of original proceeding by which appropriate relief can be secured. It cannot be done by way of defense to the entry of the judgment we have directed." See, also, Gadsden v. Thrush, 72 Neb. 1, 99 N. W. 835; Glissmann v. Bauermeister, 149 Neb. 131, 30 N. W. 2d 649; Stocker v. Wells, 155 Neb. 472, 52 N. W. 2d 284. Also, Tourville v. Wabash R. R. Co., 148 Mo. 614, 50 S. W.

300, 71 Am. S. R. 650; Mountain Home Lumber Co. v. Swartwout, 33 Idaho 737, 197 P. 1027; Gudmundson v. Commercial Bank and Trust Co., 160 Wash. 489, 295 P. 167; Barbour, Stedman and Herod v. Tompkins, 58 W. Va. 572, 52 S. E. 707, 3 L. R. A. N. S. 715.

In 3 Am. Jur., Appeal and Error, § 1236, p. 733, it is stated: "Where the appellate court remands a cause with directions to enter judgment for the plaintiff in a certain amount, the judgment of the appellate court is a final judgment in the cause and the entry thereof in the lower court is a purely ministerial act. No modification of the judgment so directed can be made, nor may any provision be engrafted on, or taken from it. That order is conclusive on the parties, and no judgment or order different from, or in addition to, that directed by it can have any effect, even though it may be such as the appellate court ought to have directed." See, also, Cowdery v. London and San Francisco Bank, Ltd., 139 Cal. 298, 73 P. 196, 96 Am. S. R. 115; Mountain Home Lumber Co. v. Swartwout, *supra*.

We necessarily conclude that a judgment on a mandate entered in strict conformity with the latter is a final determination of all matters decided and disposed of by the reviewing court. It is plain therefore that the judgment on the mandate was a final determination of all matters decided by the appeal. There is nothing raised by the appeal from the judgment on the mandate in this case that this court may properly consider.

Appellants rely upon Elliott v. Gooch Feed Mill Co., 147 Neb. 612, 24 N. W. 2d 561, and Regouby v. Dawson County Irr. Co., 128 Neb. 531, 259 N. W. 365. In the Gooch Feed Mill Co. case the following language appears. "Therefore, the cited case holds that if there was a change in the circumstances, or if a new question presented itself, or a new reason appeared which would require a further hearing to do justice and equity between the parties, then this court, on appeal from a judgment on a mandate, will determine such matter

and enter an order accordingly." This rule appears to have had its origin in the Regouby case. We do not think the foregoing applies as between the parties to an appeal resulting in a judgment on which a mandate was issued requiring a specific judgment in which such authority was not given. In the Gooch Feed Mill Co. case the remand required that "compensation payments heretofore voluntarily made" be given credit. The judgment entered on the mandate was in compliance with the directions of the mandate. But as to matters litigated and determined by this court, and remanded with directions for a specific judgment, the rule can have no application unless the matter is within the purview of the mandate. It could have application in a situation where new parties presenting new issues were entitled to intervene. In In re Application of City of Rochester, 136 N. Y. 83, 32 N. E. 702, 19 L. R. A. 161, the court said: "That Holden mistakenly supposed that his interests lay in the success of the executor and so aided and assisted the latter did not make him a party to the proceeding or involve his right to the fund as between him and Hamilton, and an order of this court while conclusive between the parties litigating does not prevent the opening of the judgment by the court whose judgment it has become for the hearing of a new party and the determination of a new claim."

In the case of In the Matters of Howard, 9 Wall. 175, 76 U. S. 175, 19 L. Ed. 634, it was stated: "Undoubtedly it is the duty of all inferior courts to yield a prompt obedience to the mandate of this court, or, in other words, to treat as conclusive the judgment of this court upon the law and facts presented to it in appropriate form for consideration. Any other conduct would be subversive of the relation which the Constitution intends that inferior tribunals shall hold to this court. But the obedience thus due is not a blind obedience, acting upon the letter of the judgment affirmed, or mandate ordered, without any consideration of the rights

of persons not parties to the litigation in which the judgment was entered. The judgment of an inferior court, when affirmed by this court, is only conclusive as between the parties upon the matters involved. Viewed simply as an adjudication between them, it is not open to question. It must be followed and obeyed. The inferior court cannot reopen the case and allow new proceedings to be taken, or further evidence to be given, or new defences to be offered, upon any ground whatever. It must execute the judgment or decree, and only for that purpose has it any authority over it."

Upon the reasoning of the foregoing authorities we conclude that the language quoted from Elliott v. Gooch Feed Mill Co., *supra,* and the similar language in Regouby v. Dawson County Irr. Co., *supra,* has no application as between the parties involved in the present litigation. To the extent that it may be construed in those cases that the language quoted has application to parties to the litigation, in such a case as we have here, it is disapproved. We point out however that a distinction is made between matters in conflict with a mandate and those which involve a partial or total satisfaction of the judgment. The latter does not conflict with the mandate and consequently the trial court is free to deal with such matters.

Our former opinion recites that appellants in their petition claimed an easement running north and south over the west 6 feet of the east 9 feet of Lots 13 and 14. The decree of this court finds that such an easement exists in accordance with the prayer of the appellants. The mandate directs the entry of a judgment awarding such an easement and the judgment of the trial court is in conformity therewith. The appellants, in the district court, requested that the judgment be corrected by changing the location of the easement so that it can be used as a means of egress and ingress without removing large trees that are growing on it. This the trial court has no authority to do under the authorities

cited. The litigation on such issue has become final and conclusive as between the parties.

The trial court entered its judgment on the mandate in strict compliance with its terms. This it was required to do. There being no error in the action of the trial court, the judgment must be 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.

69 N. W. 2d 860

Filed April 22, 1955. No. 33477.

1. **Banks and Banking.** Where a check is deposited or received for collection, the bank of deposit is the agent of the depositor for collection, and each collecting bank to whom it is forwarded becomes the agent of the depositor.
2. ———. The relation between a depositor and a bank may be dual in character. As to a general deposit a debtor and creditor relationship exists. As to the payment of checks drawn upon it, the relationship is that of principal and agent.
3. **Agency.** The knowledge of an agent acting within the scope of his authority is ordinarily imputable to his principal.
4. **Contracts.** Where a party bound by an executory contract repudiates his obligation before the time for performance, the promisee has an option to treat the contract as ended so far as further performance is concerned, and to maintain an action at once for the damages occasioned by such anticipatory breach.
5. ———. At any time before breach the parties to an executory agreement may change its terms by subsequent agreement without a new consideration.
6. ———. A modification of an agreement made after a breach thereof must be supported by a new consideration.
7. ———. Neither the promise to do, nor the actual doing of that which the promisor by law or subsisting contract is bound to do, is a sufficient consideration to support an agreement in his favor.

8. **Compromise and Settlement.** A compromise and settlement must be supported by a consideration, and no consideration exists where it consists of a promise to do that which the promisor was under a previous valid obligation to do.
9. **Appeal and Error.** It constitutes prejudicial error for a trial court to submit an issue of fact to the jury upon which there is no real conflict in the evidence.
10. **Appeal and Error: Damages.** It is error to submit the question of future damages to the jury where such an instruction has no support in the evidence.
11. **Contracts: Damages.** Where there has been a breach of a contract by one party resulting in loss to the other, it is the duty of such other party to take all reasonable steps to reduce the amount of his damages.
12. ———: ———. One who fails to mitigate his damages within the foregoing rule cannot recover from the party breaking the contract the damages which would have been avoided had he performed his duty in that respect.
13. **Sales: Damages.** The measure of damages for failure to deliver goods purchased is the loss directly and naturally resulting, in the ordinary course of events, from the seller's breach of contract.
14. **Damages.** Loss of profits is a proper element of damage when established with reasonable certainty.

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

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.

CARTER, J.

This is an action for damages for breach of contract. A verdict and judgment for $70,000 were obtained by plaintiffs. An appeal was taken to this court where the judgment was reversed and the cause remanded with directions to sustain defendant's motion for a judgment

notwithstanding the verdict. Selig v. Wunderlich Contracting Co., 159 Neb. 46, 65 N. W. 2d 233. Plaintiffs filed a motion for a rehearing. This court allowed a reargument on the motion.

The record shows that Ben L. Selig and Stanley Selig were co-partners doing business under the firm names of Esse Sales Service and Engineering Company, and Esse Radio Company, with their principal place of business in Indianapolis, Indiana. We shall hereafter refer to the partnership as Esse. The defendant Wunderlich Contracting Company is a Nebraska corporation which, for convenience, we shall refer to as Wunderlich.

The defendant purchased a large number of surplus aircraft at Kingman, Arizona, from the government which were required to be dismantled by the purchaser. On January 15, 1947, Esse submitted an offer to Wunderlich for 17 items which were to be stripped from these planes. The offer was accepted. The contract was entered into at Kingman, Arizona, whereby it was provided that Esse was to make a deposit of $2,000 and pay cash prior to the shipment of the items purchased. Pursuant to the terms of the agreement, Esse gave its check to Wunderlich for $2,000 bearing date of January 15, 1946, but which was actually given on January 15, 1947.

The check was drawn on the American National Bank, Indianapolis, Indiana. It was deposited with the Valley National Bank, Kingman, Arizona, which bank forwarded it for collection in the usual course of business. The Indianapolis bank received it on January 21, 1947, and refused payment. The check was returned to the clearing house in Indianapolis where it was protested and protest notices mailed. On January 22, 1947, Esse made a $5,000 deposit in the Indianapolis bank. The check was returned and paid by the Indianapolis bank on January 23, 1947. Wunderlich received notice on January 27, 1947, from the Kingman bank that the check had been protested and on that date it issued

instructions to make no shipments on the contract of January 15, 1947. On January 28, 1947, Wunderlich, through its broker, advised Esse that the check had been protested. Esse advised Wunderlich under date of January 28, 1947, that the check had been returned because of bookkeeping troubles which were being straightened out. On the same day Esse wired Wunderlich to send the check through again and that it was "okay." On February 12, 1947, Wunderlich advised Esse that the bank had been unable to collect the check, and requested a certified check. Ben L. Selig, one of the partners in Esse, arrived in Kingman on February 12, 1947, and was told that Wunderlich was not delivering any of the items purchased because it had not received the $2,000 cash deposit. Wunderlich demanded another check and Ben L. Selig promised to have a certified check sent. Ben L. Selig left Kingman at that time and returned on February 20, 1947. A certified check dated February 13, 1947, for $2,000 was mailed by Esse to Ben L. Selig in care of Wunderlich. Wunderlich offered evidence that Ben L. Selig agreed to deliver cash or a certified check on or before February 18, 1947. This was denied by Selig.

Wunderlich testifies that on February 19, 1947, it received an offer by a third party at a higher purchase price for one of the items contracted to Esse, and wrote Esse that as it had not adjusted the deposit matter by February 18, 1947, as agreed, it was reserving the right to dispose of any or all of the items contained in the agreement of January 15, 1947. Esse received this letter on February 21, 1947. On March 1, 1947, Wunderlich executed the purchase order agreement with the third party.

On February 20, 1947, Ben L. Selig arrived back in Kingman and tendered the $2,000 certified check to Wunderlich. The check was refused by Wunderlich and Ben L. Selig was advised that the contract had been cancelled. Selig was told that two of the items, APN-4

Radar Scopes and I-152-AM Indicators, which we will refer to as radar scopes and indicators, had been sold to another buyer. Wunderlich offered to deliver the remaining items. After much discussion it was agreed that the two items should be deleted, and the change was mutually initialed on the agreement. The $2,000 certified check was tendered and accepted after the deletion of the two items had been made. On March 4, 1947, Wunderlich was advised by Esse that the first $2,000 check was in fact paid by the Indianapolis bank on January 21, 1947. By the same letter Esse demanded the reinstatement of the original contract of January 15, 1947. Wunderlich refused to reinstate the agreement because it had, on March 1, 1947, contracted to sell all radar scopes and indicators at Kingman Field to another buyer.

It seems clear to us that on February 20, 1947, neither Ben L. Selig nor E. B. Fontaine, the authorized agent of Wunderlich, had any actual knowledge that the $2,000 check bearing the date of January 15, 1946, had been paid by the drawee bank. We do not think that this was a fact upon which either Esse or Wunderlich could rely. The Kingman bank, and each intermediate bank to whom it forwarded the check for collection, was the agent of the depositor Wunderlich. Such being the case, Wunderlich had imputed knowledge that the check was paid on January 23, 1947. Western Smelting & Refining Co. v. First Nat. Bank of Omaha, 150 Neb. 477, 35 N. W. 2d 116; Placek v. Edstrom, 148 Neb. 79, 26 N. W. 2d 489, 174 A. L. R. 856.

The Indianapolis bank is likewise the agent of Esse and the knowledge of that bank is imputed to Esse. Exchange Bank of Wilcox v. Nebraska Underwriters Ins. Co., 84 Neb. 110, 120 N. W. 1010, 133 Am. S. R. 614; Modern Woodmen of America v. Berry, 100 Neb. 820, 161 N. W. 534, Ann. Cas. 1918D 302; Scottsbluff Nat. Bank v. Blue J Feeds, Inc., 156 Neb. 65, 54 N. W. 2d 392. A dual relationship exists between a bank and

its depositor. A debtor-creditor relationship exists with respect to funds on deposit and a principal-agent relationship exists with respect to the payment by the bank of checks drawn by a depositor. 9 C. J. S., Banks and Banking, § 267, p. 546. Consequently, the knowledge of the drawee bank that it had paid the check on January 23, 1947, is imputable to Esse. It is clear therefore that Wunderlich and Esse had imputed knowledge that the check was paid on January 23, 1947. No default existed thereafter because of the alleged nonpayment of the $2,000 deposit. It is urged that Esse estopped itself from asserting that the $2,000 check was paid because it had continuously assumed in dealing with Wunderlich that the check had not been paid. But the very facts upon which the estoppel is claimed were known to be untrue by Wunderlich. An estoppel is no more available to Wunderlich than it is to Esse under the circumstances shown.

The record shows that Wunderlich attempted by letter under date of February 19, 1947, to cancel the agreement of January 15, 1947. It is shown that this letter was not received by Esse in Indianapolis until February 21, 1947. The postal department being the agent of Wunderlich, the letter would not operate as a notice of rescission or cancellation of the agreement until the latter date. On February 20, 1947, Ben L. Selig arrived in Kingman and carried on certain negotiations with Wunderlich. It is the effect of these negotiations which must determine the issues here presented.

On February 20, 1947, Ben L. Selig returned to Kingman. He immediately contacted Wunderlich through Fontaine. Selig tendered the certified check for $2,000, which Fontaine refused on the ground that the contract had been cancelled. Fontaine told Selig that Wunderlich was willing to cancel the whole contract and forget everything. Selig testifies that he knew something was wrong and that Esse was being deceived, and he told Fontaine so. After an argument in which Fontaine

stated he would not reinstate the contract under any circumstances without taking the two items off, Selig agreed to do so under protest. They noted the deletion on the margin of the contract and each indicated his assent thereto by initialling the change.

There is no evidence of a breach of the agreement on the part of Esse. The delay in proceeding under the terms of the agreement appears to have been caused by a misunderstanding of facts which were imputed to each by law. The record shows that Wunderlich did negotiate for the sale of the radar scopes and indicators with Air Industries prior to February 20, 1947. The record shows that Air Industries made a firm offer for these items on February 19, 1947, which was conditionally accepted by Wunderlich. It is quite evident that these negotiations were carried on in contemplation of a breach of the agreement made with Esse on January 15, 1947. These negotiations, which were had with Air Industries in anticipation of a breach of contract by Esse, are important in determining whether or not the agreement was cancelled in good faith. Wunderlich did not enter into a contract of sale with Air Industries until March 1, 1947. Such sale without liability to Esse is dependent upon the right of Wunderlich to rescind the agreement on February 20, 1947, without liability for damages.

We conclude from what we have already said that there was no breach of the agreement of January 15, 1947, by Esse. Esse was insisting upon the fulfillment of the agreement on February 20, 1947, when Wunderlich first notified Esse that the agreement was cancelled. There is evidence in the record that Wunderlich had sold 41 of the radar scopes to others before it attempted to rescind, and it had negotiated with another party for the sale of the remainder of the two items involved here. Even if these acts constituted a breach of the agreement, Esse does not rely on it and Wunderlich cannot take advantage of its own wrong to the injury of

Esse. Esse could waive the breach and properly insist upon compliance with the agreement.

The question immediately presents itself as to whether or not the agreement was modified before or after breach. On February 20, 1947, the date the modification of the original agreement was made, Esse was not in default. Wunderlich advised Ben L. Selig on that day that it had cancelled the contract and that it would not comply therewith unless the two items in question were deleted. This was a breach of the agreement, an unequivocal refusal to comply with the terms of the agreement of January 15, 1947. "Where a party bound by an executory contract repudiates his obligation before the time for performance, the promisee has, according to the great weight of authority, an option to treat the contract as ended so far as further performance is concerned, and to maintain an action at once for the damages occasioned by such anticipatory breach." 17 C. J. S., Contracts, § 472, p. 973.

It is clear, therefore, that after the breach of the agreement by Wunderlich, the parties modified the first agreement by deleting two items. We find that no consideration existed for the modification. The rule in this state is stated in Swanson v. Madsen, 145 Neb. 815, 18 N. W. 2d 217, as follows: "Defendant contends that a contract required to be in writing by the statute of frauds can be altered or modified by parol agreement and that the consideration for the original agreement is sufficient to sustain the new. We think this is true where there has been no breach of an executory contract, but where, as here, the contract had been breached at the time of the modification, a new consideration must be shown." See, also, Moore v. Markel, 112 Neb. 743, 201 N. W. 147; Prime v. Squier, 113 Neb. 507, 203 N. W. 582. In the case before us there was a modification of the original agreement after breach. There being no consideration for the modification, it is not effective to defeat the claim of

Esse. Sallander v. Prairie Life Ins. Co., 112 Neb. 629, 200 N. W. 344.

Our former opinion holds that there was a compromise and settlement of the claims of the parties for a sufficient consideration. On a reconsideration of this point we now conclude that we were in error in so holding. Without discussing the question as to whether or not the defense of compromise and settlement was properly raised, we think the record fails to show any consideration for the settlement. The modification consisted of the deletion of two items and a part of a third item from the contract. Esse protested the deletions but agreed thereto as an inducement to Wunderlich to deliver the other items, which it did. The modification makes no change in the original contract except to provide for a lesser number of items than was contained in the original obligation. Wunderlich was required, on February 20, 1947, to deliver the radar scopes and indicators in accordance with its contract. It forced Esse to agree to a deletion of two items without consideration in order that Esse could obtain the delivery of items which Wunderlich was already obligated to deliver. This does not constitute a consideration under the present holdings of this court. Esterly Harvesting Machine Co. v. Pringle, 41 Neb. 265, 59 N. W. 804; Sallander v. Prairie Life Ins. Co., *supra*. We necessarily conclude that the deletions made in the contract of January 15, 1947, constituted a modification of that instrument. The modifications having been made after a breach of the original contract, a legal consideration was essential to its validity as a justifiable excuse for the nonperformance of the original agreement according to its terms. There being no consideration for the deletion of the two items, any claim of compromise and settlement must likewise fail. 11 Am. Jur., Compromise and Settlement, § 18, p. 264; 15 C. J. S., Compromise and Settlement, § 11, p. 732. A summary of the evidence indicates that Wunderlich's attempted rescission was not

made in good faith. We point out that Ben L. Selig came into the office of Wunderlich and tendered a $2,000 certified check before a notice of rescission of the contract had been received by Esse. The check was refused. The record indicates that Wunderlich had been negotiating with Air Industries for the sale of the radar scopes and indicators. Wunderlich advised Selig on February 20, 1947, that these items had been sold. The record reveals that Wunderlich had discovered that the radar scopes and indicators were of much more value than they had estimated. It is noteworthy in considering the matter of the good faith of Wunderlich in attempting a rescission of the contract that it was willing to abide by the contract if the two items were deleted, such two items being those which it had discovered could be sold for considerably more money than the price fixed in the Esse contract. It is quite clear that the attempted rescission of the contract by Wunderlich was not in fact based on the alleged failure to make the $2,000 deposit, but because of the opportunity to make a much better sale to Air Industries. Wunderlich relied upon a legal right to rescind without payment of damages to accomplish that purpose. Not having such a right, legal remedies are available to Esse. There is no basis for the application of equitable principles. It is clear therefore that Esse has established a cause of action for damages against Wunderlich.

Defendant Wunderlich asserts that the trial court erred in giving its instruction No. 4. The part of the instruction first objected to states: "As regards the existence of the contract the burden is upon the plaintiffs to establish by a preponderance of the evidence that E. B. Fontaine in signing Exhibit 4 for the defendant agreed to sell plaintiffs the items described therein from the four fields other than the Kingman field, to-wit, Walnut Ridge, Arkansas, Chino, California, Altus, Oklahoma and Clinton, Oklahoma, which question you are to determine; but as a matter of law you are instructed that there is

no question but that the defendant has agreed to sell the items in question on the Kingman field to the plaintiffs."

The record shows that the federal government advertised for bids on the surplus aircraft located on the five fields named in the instruction. The aircraft were offered for sale on the basis that any one bid should cover all the aircraft at any one field but that no bidder could purchase the aircraft at more than one field. Wunderlich submitted a bid in accordance with the above conditions and was the high bidder for the aircraft at Kingman, Arizona. The aircraft at the other four fields were sold to Texas Railway Equipment Company, Sharpe & Fellows Contracting Co., Sherman Machine & Iron Works, and Esperado Mining Company. These five companies entered into a joint venture agreement whereby they, under the name of Aircraft Conversion Co., were to disassemble the aircraft and salvage, scrap, smelter, and prepare for market the aluminum scrap from the aircraft on each field within the time and under the conditions of the contract each held with the federal government. There is nothing in this agreement which deprives each of his title to the aircraft it purchased or gives it any interest in the aircraft purchased by the others. Simply stated, it was an agreement providing a joint method of processing scrap for market as a matter of convenience and economy. The joint venture agreement expressly states: "No Joint Venturer shall make any contract, commitment, or expenditure, binding upon or affecting the joint venture or any of the Joint Venturers, without the concurrence or approval of the Joint Venturers; * * * Nothing herein shall in anywise be construed or operate to prevent each Joint Venturer and the Joint Venturers collectively from strictly keeping and performing all provisions of their respective agreements with the Government; and it is specifically provided that each Joint Venturer shall have and retain full power and authority to sell and dispose of the scrap aluminum and other salvage from the planes pur-

chased by him or it, respectively, to such person, persons or concerns, and at such price or prices as he may desire, * * *." The Aircraft Conversion Co. did not purport to sign any of the agreements here involved. This agreement is no aid to Esse's claim that all five fields were bound by Wunderlich's agreement.

Before reducing the aircraft to scrap, each purchaser stripped them of all saleable items, including the 17 items listed in the contract of January 15, 1947, between Wunderlich and Esse. One Harry A. Hammill was a broker operating on all five fields in finding buyers and negotiating the sale of items stripped from these aircraft. He was not authorized to sign contracts for the sellers. The evidence shows that Ben L. Selig inspected the aircraft on three of the fields, including Kingman, in the company of Hammill. At the close of the inspection of Kingman field, Selig evidenced a desire to purchase certain electronic equipment at all five fields at the asking price. Hammill wrote up the purchase order on his own brokerage form. It recited that the buyer offers to purchase: "All fields, Indicator 1-152-AM .50." All items within the offer were designated in a similar manner. The contract being construed is not complete in itself. The fields referred to as "all fields" are not described in the offer to purchase. It is necessary to determine, from sources other than the offer of purchase accepted by Wunderlich, the meaning to be given the term "all fields" and the scope of the liability assumed by Wunderlich when it accepted the offer. Hammill says that 30 copies of the offer to purchase were made out and that four were sent to each field. Hammill and Selig signed all copies before any were submitted to Fontaine. Fontaine accepted the offer for Wunderlich at Kingman field. Other copies were sent to the other fields for signature of the purchaser of the aircraft at the respective fields. Hammill further testifies that the use of the words "all fields" was questioned by Fontaine. Hammill stated: "And the man (Fontaine) was justified

in that. But, I wanted to get out and I guess so did Ben, and I said, 'Don't mess up this deal'. 'Selig and I have got this all straightened out. The fact is, you know what it is; Selig knows what it is; so you haven't got anything to worry about. I'm going to send these to Dahlstrom. It will be taken care of. There's nobody here to rewrite it. I will admit I made a mistake on it. Go ahead and sign it. We understand we are going to just get what you got out in them warehouses.' " Ben L. Selig was present at this discussion. It is true of course that Hammill as a broker for "all fields" was attempting to negotiate a sale of the specified items for all fields, but this does not mean that Fontaine was selling the items on all fields. It is clear that each seller on the various fields bound himself when he accepted the offer to purchase. This is confirmed by Lindsey Youngblood, Wunderlich's sales manager, who testified that he was present at the signing of the contract along with Hammill, Fontaine, and Selig. Youngblood testified: "Mr. Hammill assured us it was intended only for our approval for our field, as he intended to get the approval of the other fields for his proposal." Selig was present when this was said. That Selig knew that the contract purported only to bind Wunderlich and the aircraft it purchased at Kingman is plain. Selig made a subsequent contract with the Texas Railway Equipment Company on the Walnut Ridge field covering all of the same items except one. In this respect, the contract with the Texas Railway Equipment Company was rewritten on the offer-to-purchase form provided by Hammill. The words "All fields" were changed to "All on the field" and an ink line was drawn through "APN-4 $1.00." Otherwise the agreement was identical as to content with the offer to purchase accepted by Wunderlich. The agreement with the Texas Railway Equipment Company was signed by Ben L. Selig. If he purchased the items contained in the contract with the Texas Railway Equipment Company by the contract signed with Wunderlich, as

he now says, the contract with the Texas Railway Equipment Company was wholly unnecessary. It is wholly inconsistent with his contract with Wunderlich under the evidence he now relates. It is plain to us that Selig knew at that time that the agreement with Wunderlich covered only the items at Kingman field. It appears also that Esse subsequently threatened suit against Wunderlich and Texas Railway Equipment Company. Suit was never threatened against the purchasers of aircraft on the other three fields for failure to deliver items contained in the agreement of January 15, 1947. It would appear that Esse was not at that time placing the construction on the scope of the agreement that it now does. We conclude therefore that the contract of January 15, 1947, covering "all fields" meant that the offer covered all five fields but that the owners of the aircraft at the respective fields became bound by it only as each accepted the offer to purchase by attaching its authorized signature thereto. The agreement with Wunderlich, therefore, covered the items at Kingman field, and no other. The trial court should have so instructed. It was prejudicial error to permit the jury to speculate as to whether or not items other than at Kingman field were involved in the litigation.

The jury was also informed by instruction No. 4 that: "As to any future damages, if any, which may be suffered after this date, such preponderance of the evidence must establish the same with reasonable certainty." We find no evidence in the record to support the giving of this part of the instruction. The case was submitted to the jury on May 15, 1953. The breach of the contract occurred on February 20, 1947. The damages to which Esse is entitled are those resulting from the breach. Even a loss of good will, if any be shown which resulted from the acts of Wunderlich, could be established only during the period that orders for radar scopes were not being filled. These orders were received in April and May 1947. No basis exists for authorizing the jury to

return a verdict which would include damages that might occur after the date of the trial.

The trial court also instructed that loss of good will was, if established by a preponderance of the evidence, a proper element of damage. Loss of good will is a special damage which is not recoverable in every action for breach of a contract to deliver goods. 78 C. J. S., Sales, § 550, p. 242. Any loss of good will by Esse arises solely from its inability to make deliveries of radar scopes resulting from orders received through advertisements. The evidence shows that some time after January 15, 1947, the exact time not being shown, Esse placed orders for the advertisement of a great many electronic items in Radio News, CQ (The Radio Amateur's Journal), and Radio Craft, three radio electronics monthly magazines with national circulation. The advertisements appeared in the May 1947 issues and reached the newsstands on or about April 25, 1947. Each magazine carried a three-page advertisement of 19 items. Among the items of electronic equipment there listed was the APN-4 radar scope involved in this suit. It was listed for sale at $17.95. The 1-152-AM indicators were not advertised for sale in these advertisements. The record is not clear as to the exact date on which Esse attempted to eliminate the radar scope from these advertisements. The general manager of CQ Magazine states that Esse first attempted to make a change in that magazine after April 1, 1947, but the closing date for the May issue was March 20, 1947. The advertisement of the radar scope in Radio Craft contained the words "Sold Out" in heavy type and, consequently, it brought in no orders for that item nor contributed to any loss of good will. As to Radio Craft the attempted change came after its closing date for May 1947. This evidence indicates that Esse failed to cancel the advertising of the APN-4 radar scope within a reasonable time after the breach of the contract.

We point out that the contract of January 15, 1947,

was cancelled by Wunderlich on February 20, 1947. On that date Esse knew that the APN-4 radar scopes would not be delivered. Ben L. Selig not only knew this to be the fact, but he had agreed to the deletion of the items on the original purchase agreement by affixing his initials to such an understanding. It is clear therefore that Esse was required to mitigate the damages arising from the breach from and after that date. An authoritative text states the rule as follows: "Where a party is entitled to the benefit of a contract and can save himself from loss arising from a breach thereof at a trifling expense or with reasonable exertions, it is his duty, and statutes sometimes so declare, to do so, and he can charge the party in default with such damages only as with reasonable endeavors and expense he could not prevent. This rule is especially applicable where one of the contracting parties has acquired notice of the breach of contract and makes no reasonable effort to mitigate the damages claimed." 25 C. J. S., Damages, § 34, p. 502. In Marcell v. Midland Title Guarantee & Abstract Co., 112 Neb. 420, 199 N. W. 731, this court stated the rule as follows: "It is a well-established rule in this state that, where there has been a breach of a contract by one party resulting in loss to the other, it is the duty of such other party to take all reasonable steps to reduce the amount of his damages." It is the rule, also, that one who fails to perform such duty may not recover damages which would have been avoided had such duty been performed. Uhlig v. Barnum, 43 Neb. 584, 61 N. W. 749. The foregoing rules have been reiterated by this court in Shamblen v. Great Lakes Pipe Line Co., 158 Neb. 752, 64 N. W. 2d 728.

The record before us does not show that Esse made reasonable effort under the circumstances to cancel the advertising of the APN-4 radar scopes. It knew on February 20, 1947, that these radar scopes would not be delivered. The indefiniteness with which this part of the claim was attempted to be proved is such that it

does not establish any loss of good will which Esse could not have reasonably avoided. If Esse had acted within a reasonable time after February 20, 1947, we think the advertising could have been eliminated, under the evidence as it appears in the record before us. Esse assumes that the obligation to mitigate the damages did not arise until March 18, 1947, or thereafter. The record does not support such an assumption. We are of the opinion that the trial court improperly submitted the loss of good will as an element of damage under the evidence then before it.

It seems to us that Esse has no valid claim for loss of good will unless it is able to show on a retrial that it made reasonable effort after February 20, 1947, to eliminate the APN-4 radar scope from its advertising and was unable to do so. But this does not mean that the advertising of the radar scopes at $17.95 each and the orders received were not properly admitted as evidence. They tend to establish a demand for the radar scope at the advertised price. They tend also to fix the market value of the radar scope. For these purposes the evidence was properly received in any event.

In the case before us Wunderlich knew that Esse purchased the radar scopes and indicators for resale. The record shows a general demand for these items at the advertised price. In addition thereto, Wunderlich certainly understood that the resale of the items would result in a profit to Esse. In such case the seller is bound to know that Esse would be damaged in the amount of the profits lost if the items were not delivered in accordance with the agreement. The measure of damages in such a case appears to be in dispute, particularly as to the correctness of instruction No. 9. That instruction states: "You are instructed that the plaintiffs Selig are not required to prove the extent of their damages with mathematical precision; that, if you find that it is certain that damages have been caused by the breach of the contract, you may then consider all

the facts and circumstances of the case having any tendency to show the probable and reasonable amount of the damages."

The measure of damages for failure to deliver goods purchased is fixed by section 69-467(2), R. R. S. 1943, as follows: "The measure of damages is the loss directly and naturally resulting, in the ordinary course of events, from the seller's breach of contract." Under this section, loss of profits is a proper element of damage. The rule is stated by this court as follows: "We have repeatedly held that gains prevented as well as losses sustained may be recovered as damages upon a breach of contract. But it must appear that the profits were reasonably certain to have been realized by performance; that they are not speculative or contingent; that such damages must have been within the contemplation of the parties, and the loss must appear to have resulted proximately and naturally from the breach." O'Shea v. North American Hotel Co., 109 Neb. 317, 191 N. W. 321. In James Poultry Co. v. City of Nebraska City, 136 Neb. 456, 286 N. W. 337, we quoted with approval the rule announced in Wittenberg v. Mollyneaux, 60 Neb. 583, 83 N. W. 842, as follows: "That a party may recover for gains prevented as well as for losses sustained when such damages are not only certain, but are the natural and probable result of the wrong complained of, is a point no longer open to dispute in this state." From these holdings we gather that damages for breach of contract must be established with reasonable certainty although mathematical precision is not required. Proof of damages is limited to those which naturally and probably result from the wrong. The trial court has a discretion in determining whether or not proffered evidence of damage is within the foregoing rule. We do not say that instruction No. 9 was prejudicially erroneous when considered with other instructions given, but it would have been more strictly in conformity with the rule,

under the particular circumstances of this case, to have closed the instruction as follows: "You may then consider all the facts and circumstances of the case tending to show the amount of the damages."

We conclude that our former opinion was in error in reversing the judgment and directing on remand that defendant's motion for judgment notwithstanding the verdict be sustained. We withdraw our former opinion.

For the reasons herein stated, the judgment of the district court is reversed and the cause remanded for a new trial in accordance with this opinion.

REVERSED AND REMANDED.

YEAGER, J., dissenting.

I respectfully dissent from the opinion in this case. I have come to the conclusion that the true issues and the pattern for their determination have been obscured in both the opinion of this court which has been rejected and the one which now represents the determination of the case. As I view the situation, the issues are comparatively simple and the pattern for determination plain, and in the light of this and the facts as disclosed by the record and reflected in the two opinions the proper result is not left, as I believe, in doubt.

For the purposes of this dissent the parties will be referred to herein by their original status in the action in the district court, that is, as plaintiffs and defendant.

The action as instituted was by plaintiffs for damages for breach of contract for the delivery of merchandise. The defense was that the plaintiffs breached the contract which gave the defendant the right to rescind which right the defendant exercised.

In effect the response of the plaintiffs to this was that they did not breach the contract, but that if they did the breach was waived by the defendant. The defendant denied that there was a waiver.

I fail to see how it may reasonably be said that plaintiffs did not breach the contract. To my mind this fact was conclusively established by the evidence. This be-

ing true I cannot escape the conclusion that the defendant had the right to rescind.

Again conclusively, as I see it, the defendant did exercise its right of rescission. After rescission the parties were in the same status as they were before the contract was entered into except as to their rights and liabilities which flowed from the breach.

After the rescission the plaintiffs had no right or rights against the defendant under the contract and could not thereafter have any unless and until the defendant waived the breach and its rescission. After breach and rescission and in the absence of waiver the defendant was in a position of freedom to do as it chose with the merchandise which was the subject of the contract. It was free to deal in relation thereto as to all or any part of it with the plaintiffs or any other persons or parties the same as if the contract in question here had never been entered into.

I think that on the record it may be said as a matter of law there was no waiver by the defendant. There is of course evidence to the effect that plaintiffs tried to obtain a waiver. However there is no evidence that the defendant responded to this effort or that it restored the breached and rescinded contract.

If this is true, and I am convinced that it is, the defendant was entitled to a judgment in its favor and the opinion of this court should so indicate.

The two opinions referred to deal at considerable length with the question of consideration for the agreement of February 20, 1947. This question, I submit, is not an issue in this case. I do not wish to be understood as saying that the evidence surrounding the incident has no significance. This evidence is significant, however, only as it throws light, if it does, on the question of whether or not there was rescission and, if so, if there was a waiver of rescission. We are concerned here only with the rights and liabilities under the contract which is the basis of this action and not any other

contract of a later date. An assumption either that the contract of February 20, 1947, was supported by a consideration or that it was not could not determine any basic issue herein.

SIMMONS, C. J., dissenting.

I adhere to the former opinion and decision of this court in this case. That opinion is now withdrawn by the court.

In the present opinion, the court finds no fault with either facts or issues stated, or rules of law applied in the former opinion. The former opinion is now set aside on a finding that there was no consideration shown for the contract of February 20, 1947. I shall examine that question later herein.

I disagree with the present opinion in six principal matters:

1. In the findings of fact made in the opinion which appear to become conclusive upon the trial court on remand for a new trial.

2. In relieving the Seligs from the results of their breach of the contract by the giving of the insufficient fund check.

3. In the holding that both parties had imputed knowledge of the payment of the check.

4. In the holding that Wunderlich was guilty of bad faith on February 20, 1947, when the new contract was executed.

5. In the holding that there was no consideration for the contract of February 20, 1947.

6. In permitting Seligs to accept full performance under the February 20, 1947, contract and then repudiate that contract and recover damages for the breach of the January 15, 1947, contract.

I shall discuss these matters in that order.

Conclusive Findings of Fact Made on Disputed Issues

We are here dealing with a law action with many issues and disputes of fact. The court now remands for a new trial "in accordance with this opinion." In the

opinion, the court finds that plaintiffs have "established a cause of action." It resolves other facts in favor of plaintiffs. As I read the opinion (and I am not advised to the contrary), those findings of fact now become the law of the case, leaving the only issue to be tried that of the amount of damages. That is contrary to the established practice of this court in remand of a law action which is that a remand generally calls for a retrial of all issues.

In Kuhns v. Live Stock Nat. Bank, 138 Neb. 797, 295 N. W. 818, we held: "* * * all matters decided expressly or by necessary implication by this court in its opinion in reversing the first judgment became the law of the case. This applies not merely to all questions actually and formally presented, but to all existing in the record and necessarily involved in the decision."

In Master Laboratories, Inc. v. Chesnut, 157 Neb. 317, 59 N. W. 2d 571, we held: "The general rule is that a reversal of a judgment and the remand of a cause for further proceedings not inconsistent with the opinion, without specific direction to the trial court as to what it shall do, is a general remand and the parties stand in the same position as if the case had never been tried."

What is the trial court now to do if this decision stands?

In the recent case of Gable v. Pathfinder Irr. Dist., 159 Neb. 778, 68 N. W. 2d 500, the judgment was reversed on the sole ground that there was no proper or competent evidence to fix the amount of plaintiff's damage. On motion for rehearing, plaintiff, contending that the judgment should be affirmed, also pointed out that questions of negligence and proximate cause had been decided in his favor and asked for a remand (if that had to be) limited to the sole issue of the amount of damages. He relied upon Harper v. Young, 139 Neb. 624, 298 N. W. 342. A rehearing was denied and a remand limited to that issue was likewise denied.

Why should there be the difference in treatment?

I see no reason for an exception here.

I do not rest my dissent on that ground alone. I disagree with the primary conclusion of the court.

Who Breached the Contract?

Who set up the chain of events that culminated in this litigation? The answer is conclusive that the Seligs did. The contract of January 15, 1947, called for "cash prior to shipment $2,000 deposit." Seligs gave an insufficient fund check for that "deposit." That act on their part was a material breach. What was its effect?

Corpus Juris Secundum states the rule as follows: "Parties are entitled under the provisions of their contract to that for which they bargained and should not, on breach thereof, be compelled to accept less than that for which their contract called. Accordingly, not only is the party guilty of the first breach of an entire and indivisible contract containing independent covenants and promises precluded from recovering on the contract, * * * but he must answer in some appropriate manner for the loss or injury resulting from such breach to the opposite party, * * *. The party who commits the first breach is also deprived of the right to complain of a subsequent breach by the opposite party." 17 C. J. S., Contracts, § 458, p. 943.

In Demateis v. Vezu, 49 Cal. App. 453, 193 P. 793, a payment of $500 was made by a no-fund check upon the execution of a contract for the sale of grapes. The court held: "Where a buyer fails or refuses, without sufficient cause, to make payment of the first installment of the purchase price of the article contracted to be purchased, the seller is justified in repudiating the contract."

O'Bryan v. Mengel Co., 224 Ky. 284, 6 S. W. 2d 249, was a case involving a sales contract. The court held that the buyer "was not at liberty to break the contract himself and at the same time insist upon performance thereof by the seller. No principle in the law of contracts is better settled than that the breach of an entire and indivisible contract in a material particular excuses further performance by the other party and precludes an

action for damages on the unexecuted part of the contract."

These authorities are brushed aside, apparently on the theory that because the check in the instant case was paid upon its second presentation, no breach occurred. Seligs seem to be entitled to one breach "for free."

Imputed Knowledge Not Applicable Here

In the former opinion we held that there was no imputed notice to the parties here. We relied on our holding in Hargadine McKettrick Dry Goods Co. v. Krug, 2 Neb. (Unoff.) 52, 96 N. W. 286, which is as follows: "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 plaintiffs in their motion for rehearing here do not challenge the correctness of that rule or that holding. They do not mention it. The present opinion ignores the rule and holds that there was imputed notice on the ground that the banks were the agents of the parties.

The present opinion concedes that neither Seligs nor Wunderlich had actual knowledge of the fact that the check had been paid. It holds that both had imputed knowledge that the check had been paid, because forwarding and paying banks had that knowledge.

Our rule is not (or should I say was not?) a maverick rule. It is stated in 3 C. J. S., Agency, § 262, p. 196, as follows: "The rule that notice to an agent is notice to the principal is not one of universal application * * * the rule has no application where the agent is not under a duty to communicate the notice or knowledge to his principal."

Also the rule is stated in 2 Am. Jur., Agency, § 372, p. 291, as follows: "The notice to, or knowledge of, an agent which is to bind the principal must be of some

matter so material to the transaction as to make it the duty of the agent to communicate it to the principal, * * *."

The rule of imputed notice is based on the duty of an agent to communicate material facts to his principal and the presumption that he has performed that duty. 3 C. J. S., Agency, § 262, p. 194; 2 Am. Jur., Agency, § 369, p. 288. Our rule recognized those reasons and states that there is imputed knowledge "in those cases only" in which it is the agent's duty to communicate his knowledge to his principal. This is not a case where a bank is asked about the payment of a check. By this holding it becomes the bank's duty to advise as to the payment of a check on its own motion.

Where is there a duty of a forwarding bank or a paying bank, *on its own motion,* to notify its principal that a check *has been paid?* The statutory duty to protest for dishonor is limited to "foreign bills." § 62-1,152, R. R. S. 1943.

It is common knowledge that banks in America handle daily literally thousands of checks which are forwarded for payment and which are paid. It is now held to be their duty to communicate the fact of handling and payment of a check to the principal for whom they act. Bankers will be interested to know that—and it is the only basis on which imputed knowledge can rest. The necessary conclusion now is not only that the duty to notify of payment exists, but that likewise courts will presume that banks performed that duty. Both the duty and the presumption have no foundation in fact or law.

In the course of our opinion last cited, we held: "It is a harsh and severe rule which imputes to a principal the knowledge possessed by his agent" and "as it is not infrequently the cause of rank injustice, its operation should be rigidly confined to those cases to which it is strictly applicable." We limited imputed notice to "*only*" those cases. I submit that the rule of imputed

notice is not "strictly applicable" here—it is not at all applicable.

However, if we are not going to follow the rule which we have twice stated in accord with general authority, then I submit that we should not ignore the rule, but rather overrule it, and notify banks and their patrons that hereafter in this state we walk alone on that matter. We should not confuse in an area where heretofore there has been no dispute.

Wunderlich Did Not Act in Bad Faith

Preliminary to and as a basis for the finding that there is no consideration shown is one that Wunderlich's attempted rescission was not made in good faith. This is based on the finding that Wunderlich had, prior to February 20, 1947, negotiated for the sale of some of the items covered by the agreement of January 15, 1947.

There is a rule upon which the texts agree: "An agreement, when changed by the mutual consent of the parties, becomes a new agreement, which takes the place of the old, and consists of the new terms and as much of the old agreement as the parties have agreed shall remain unchanged; in other words, a contract may be abrogated in part and stand as to the residue." 17 C. J. S., Contracts, § 379, p. 869. See, also, 12 Am. Jur., Contracts, § 433, p. 1013; Restatement, Contracts, § 408, p. 770; 6 Williston on Contracts (Rev. ed.), § 1826, p. 5172. We have held: "The applicable rule in such circumstances is that a contract complete in itself will be conclusively presumed to supersede another one made prior thereto in relation to the same subject-matter." Price v. Platte Valley Public Power & Irr. Dist., 139 Neb. 787, 298 N. W. 746.

Now what about good faith and bad faith? It is admitted by both parties that there was a conversation on February 12, 1947, between Fontaine and Selig regarding the contract and the dishonored check. It likewise appears without dispute that Wunderlich was required by its contract to break up and remove all air-

planes within a limited period of time. Fontaine (for Wunderlich) testified that Selig was given until February 18 to make good the dishonored check, and that Selig promised to have the check to Wunderlich not later than February 18. Selig denies that agreement and says it was February 20.

The present opinion states that Selig was told that "two" of the items, APN-4 radar scopes and I-152-AM indicators, had been sold to another buyer; it states that the record shows that Wunderlich did negotiate for the sale of the radar scopes and indicators with Air Industries prior to February 20, 1947, and that those negotiations were carried on in contemplation of a breach of the agreement of January 15, 1947, with Selig; that Wunderlich's attempted rescission was not made in good faith; and that it was not based on the alleged failure to make the $2,000 deposit but because of the opportunity to make a much better sale to Air Industries. But that sale occurred *one day* after the February 18 deadline testified to by Fontaine and after the dishonored check business had arisen and had been discussed between the parties. Can Wunderlich be found guilty of bad faith because Selig denies only the February 18 requirement, when Wunderlich was moving in accord with its understanding of the agreement? Assuming that Wunderlich desired a modification of the contract so as to protect the sale to Air Industries, the question comes: Was Selig deceived and not advised as to that purpose?

It now becomes necessary to refer to evidence, not in dispute and relied on in the present opinion, and to one fact in connection therewith not heretofore pointed out. On February 19 (one day after the February 18 date testified to by Fontaine), Wunderlich received from Air Industries a firm offer for *three* items of equipment. Two of the items were those involved in this lawsuit. The third item was "200 marker beacons" as described. Also on February 19, Wunderlich confirmed the order from Air Industries for the *three* items, subject to the

receipt of a purchase order and a $750 deposit.

Was the fact of the sale to Air Industries of the three items concealed from Selig on February 20? It was not.

Fontaine testified that he told Selig of the interest of other purchasers and Selig consented to the deletion of the *three* items (not two) from the contract. Deleted were 200 marker beacons—the exact number involved in the Air Industries order of February 19. Is it reasonable to suppose that Selig did not know why an exact number of marker beacons was being deleted, and did not know that Wunderlich was then protecting against the sale of those *three* items to Air Industries and that that was their purpose in insisting that the items be deleted before a new contract was made? The specific deletion of "200 marker beacons" from the items covered shows that they were protecting against that sale and that Selig knew it. He initialed the deleted items *separately.*

Ben Selig testified that "They did not have an offer of a much higher figure on those." How did he know if he was not told of the offers which Wunderlich had? Selig testified that they wanted "these other items we could make money on." Quite obviously "marker beacons" was not one of them. They make no complaint about that deletion.

Any question as to Seligs' knowledge or lack of knowledge is set at rest by their petition herein, sworn to by Stanley Selig, in which it is alleged that on February 20 Ben Selig was informed by Fontaine that Wunderlich had cancelled the purchase order of January 15 and "could not have completed it in any event * * * because part of the merchandise had been sold to others."

This record does not sustain a conviction of Wunderlich of bad faith and certainly does not sustain the court's accolade of good faith of the Seligs in the position which they now take. Both parties made the new contract with knowledge of what had been done by Wunderlich and why the deletions were necessary.

Is bad faith now to be bottomed on a full and admitted disclosure of material facts? Is bad faith to be charged because a party refuses to make a contract to sell something which he cannot deliver and which the buyer knows he cannot deliver?

The present opinion holds that the attempted rescission of the contract by Wunderlich was not in fact based on the alleged failure to make the $2,000 deposit, but because of the opportunity to make a much better sale to Air Industries.

That same issue of bad faith was raised in the $500 no-fund check case of Demateis v. Vezu, *supra*. The opinion recites: "Appellant claims that the attempted rescission was an act of bad faith prompted by the fact that between the date of the contract and the date of rescission there was a great increase in the market price of black grapes. It is true that the market price of grapes advanced within the specified period of time; but this fact is not alone sufficient to compel a finding that such advance market price was the cause of defendant's rescission of the contract. The court found that the defendant acted in good faith, and that finding is well warranted by the evidence, which tends to prove that defendant rescinded the contract for the very definite and sufficient reason that the check, which he had received on the positive assurance that it was good and in consideration whereof he had delivered the contract, had been dishonored and had so remained for a period of nearly one month."

That describes the situation here.

There Was A Consideration For The February 20, 1947, Contract

I have discussed the "marker beacons" deletion for another reason. The agreement of January 15 was a purchase order whereby Seligs agreed to purchase as well as Wunderlich agreed to sell.

Seligs contend that the agreement of January 15 was to buy all of the items listed in each category. Seligs by the agreement of February 20 were relieved of the

obligation to buy 200 marker beacons. Ben Selig testified that "they would throw them on us; marker beacons. They never had a resale for them at a much higher figure." Obviously, Seligs were glad to be relieved of that burden of the contract as to the 200 marker beacons. They accepted and retained that benefit flowing from the February 20 contract deleting that item.

There was a clear and established benefit to Seligs in this modification of the contract on February 20, 1947. We have held: " 'A valuable consideration may consist either in some right, interest, profit, or benefit accruing to one party, or some forbearance, detriment, loss, or responsibility given, suffered, or undertaken by the other.' " Asmus v. Longenecker, 131 Neb. 608, 269 N. W. 117.

There is another consideration shown here, the fact of which is recited in the proposed opinion. Its impact on the case is ignored.

I start now with the premise based on the conclusion of the present opinion that each of the parties had imputed knowledge of the fact that the first $2,000 check had been paid. On February 20 no goods had been delivered by Wunderlich to Seligs. Seligs did not then owe and were under no contractual obligation to pay Wunderlich any money. Wunderlich had no right then to demand any money. Seligs paid and Wunderlich accepted $2,000 as the consideration for the new contract. It was accepted by Wunderlich only on condition that the original contract be modified. Seligs paid under that condition. There is no dispute in the record on that matter.

I have always been of the impression that a money payment was an adequate consideration.

Seligs Having Accepted Full Performance of The February 20, 1947, Contract Cannot Now Repudiate That Contract

Following their $2,000 payment of February 20, 1947,

Wunderlich began to deliver under the new contract. Seligs began to accept under the new contract. When the fact of the payment of the protested check was brought home to Wunderlich, credit was given to Seligs for that $2,000 on goods delivered under the new contract. Seligs, with full knowledge, accepted the credit and continued to accept deliveries under the February 20 contract. Having panned the quick gold out of the items received that "we could make money on," Seligs now undertake to repudiate and avoid, and desire to dredge more gold. They retain the benefits received from the performance of the new contract and at the same time repudiate it and seek damages for failure of performance of the original contract. Wunderlich performed in reliance on the new contract.

This calls for an application of the rule that where a modified contract has been executed by one party to such an extent that it would work a fraud upon the other party if repudiated, the modified contract will be sustained. United States v. Slater, 111 F. Supp. 418; Agel & Levin v. Patch Mfg. Co., 77 Vt. 13, 58 A. 792; Thurston & Hays v. Ludwig, 6 Ohio St. 1, 67 Am. D. 328. See, also, Restatement, Contracts, § 90, p. 110, followed by us in Fluckey v. Anderson, 132 Neb. 664, 273 N. W. 41; 12 Am. Jur., Contracts, § 112, p. 605; 17 C. J. S., Contracts, § 74, p. 428.

CURTIS S. REED, APPELLEE, V. MARK W. JACOBSON ET AL., APPELLANTS, IMPLEADED WITH R. L. KALIFF RANCH CO., APPELLEE.

69 N. W. 2d 881

Filed April 22, 1955. No. 33668.

1. **Waters.** A watercourse as defined by statute is any depression or draw 2 feet below the surrounding lands and having a continuous outlet to a stream of water, or river or brook.
2. ———. To constitute a watercourse the size of the stream is not material, however, it must be a stream in fact as distin-

guished from mere surface drainage occasioned by freshets or other extraordinary causes, but the flow of water need not be continuous.

3. **Injunction.** In a case where redress is sought for continuing damage injunction is the proper remedy.

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

Kirkpatrick & Dougherty, for appellants.

Keenan & Corbitt, for appellee Reed.

Robert Lloyd Jeffrey, for appellee Kaliff Ranch Co.

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

YEAGER, J.

This is an action in equity by Curtis S. Reed, plaintiff and appellee, against Mark W. Jacobson, Arthur Jacobson, and R. L. Kaliff Ranch Co., defendants, to enjoin the defendants from maintaining dikes and dams across a natural drain or draw which plaintiff contends is, within the meaning of law, a natural watercourse to the injury and damage of plaintiff, and for damages on account of the maintenance of dikes and dams which had been constructed. The action was tried to the court and a mandatory injunction was granted in favor of plaintiff and against the defendants requiring the removal of certain of the dikes and dams and restoration of those areas to their former condition, and judgment was rendered in favor of plaintiff and against the defendant Mark W. Jacobson for $514.80. Motions for new trial were duly filed and in due course overruled. From the decree and the order overruling their motion for new trial the defendants Jacobson have appealed. The defendant R. L. Kaliff Ranch Co. has not appealed. The Jacobsons will hereinafter be referred to as appellants except in those instances when they may not be referred to collectively. In such other instances they will be referred to by name.

The appellants have set forth numerous assignments of error as grounds for reversal and have set forth numerous propositions of law, but the factual questions presented for review are few and simple and the law relating thereto is well settled.

By his petition plaintiff pleaded substantially that he is the owner of the southwest quarter of Section 25, Township 9, Range 3, in York County, Nebraska; that Mark W. Jacobson is the owner of the northwest quarter of the southeast quarter and the southwest quarter of the northeast quarter of this section, and that Arthur Jacobson was the tenant thereon; and that R. L. Kaliff Ranch Co. is the owner of the south half of the southeast quarter of the section. Thus the southwest corner of Mark W. Jacobson's land and the northwest corner of R. L. Kaliff Ranch Co. land were joined with the land of plaintiff at a point on the east line thereof halfway between the north and south borders. Plaintiff further pleaded that his land was higher than that of the defendants and that a watercourse enters his land generally from the south and flows in a meandering course across it to the northeast and leaves it about at the point of joinder of the corners of defendants' lands with plaintiff's land. From that point it traverses the Kaliff land and then enters Mark W. Jacobson's land and flows thence in its natural watercourse northeasterly into the Blue River. He pleaded that the watercourse from its source to its mouth was well defined and its depth was more than 2 feet lower than the surrounding lands. He pleaded further that appellants caused to be constructed a dam of about the height of 4 feet at right angles to the watercourse about 400 feet east of plaintiff's land which dam stopped the natural flow of water in the watercourse and that as a result water was backed up and his lands and crops were damaged. He further pleaded that R. L. Kaliff Ranch Co. caused to be constructed dikes along the sides of the watercourse back to the line of plaintiff's land which,

together with the dam caused to be constructed by the appellants, caused damage to his land and crops.

The answer of the appellants is lengthy but the content of it necessary to be set forth here is that it generally denies the allegations of the petition and particularly denies that there is a watercourse. It admits that a dam was erected but says that it was for the purpose of protecting against water coming from irrigation works constructed by plaintiff and substantially alleges that it was for proper protection against surface water.

It becomes clear from this that the issues which were triable were those of whether or not there was, as claimed by plaintiff, a watercourse and whether or not, if there was a watercourse, it was dammed by the defendants to the injury and damage of the plaintiff.

If the evidence discloses the affirmative of these issues the plaintiff was entitled to the relief which was granted to him by the decree, otherwise he was not.

A watercourse is defined by statute as follows: "Any depression or draw two feet below the surrounding lands and having a continuous outlet to a stream of water, or river or brook shall be deemed a watercourse." § 31-202, R. R. S. 1943. See, also, Courter v. Maloley, 152 Neb. 476, 41 N. W. 2d 732; McGill v. Card-Adams Co., 154 Neb. 332, 47 N. W. 2d 912.

With regard to what constitutes a watercourse this court has said: "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." McGill v. Card-Adams Co., *supra*. See, also, Mader v. Mettenbrink, 159 Neb. 118, 65 N. W. 2d 334.

The evidence of the plaintiff supports his contention that within the meaning of the definitions set forth a watercourse extends across the lands of the parties to this action. The evidence of the appellants tends to support the opposing contention.

The evidence on this question is of too great length to be set out or summarized herein. However from an examination and analysis we are of the opinion that it preponderates in favor of the plaintiff.

The holding accordingly is that the evidence sustains the finding of the decree that this was a watercourse.

A dam was placed across the watercourse on the land of Mark W. Jacobson which retarded the flow. About this there can be no question. Also dikes or dams were placed along the sides of the watercourse from the vicinity of the Jacobson dam upstream toward the plaintiff's land by the R. L. Kaliff Ranch Co. About this likewise there is no question. According to the weight of evidence the effect of the Jacobson dam and a combination of the effect of this dam and the dikes or dams of the R. L. Kaliff Ranch Co. was to retard the water coming down the watercourse as it was wont to flow in nature and cause it to be held on plaintiff's land to his injury and damage.

Injunction was a remedy available to plaintiff for the purpose of obtaining redress for the acts of the defendants. The damage was continuing in character. Where redress is sought for continuing damage the rule is that for such 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 for affording relief. See, Schomberg v. Kuther, 153 Neb. 413, 45 N. W. 2d 129; Beetison v. Ballou, 153 Neb. 360, 44 N. W. 2d 721; McGill v. Card-Adams Co., *supra.*

The appellants do not contend that if plaintiff is entitled to injunctive relief he is not entitled to recover damages. In this connection they contend only that he has failed to prove the amount of his damage by competent evidence. This contention is without merit. He proved his damages agreeable to the rules stated in Hopper v. Elkhorn Valley Drainage Dist., 108 Neb. 550,

188 N. W. 239; Ricenbaw v. Kraus, 157 Neb. 723, 61 N. W. 2d 350; Ballmer v. Smith, 158 Neb. 495, 63 N. W. 2d 862; and Gable v. Pathfinder Irr. Dist., 159 Neb. 778, 68 N. W. 2d 500.

For the reasons herein stated the decree of the district court is affirmed.

AFFIRMED.

BETTY LEE HENNEBERG ET AL., APPELLANTS, V. COUNTY OF BURT, NEBRASKA, ET AL., APPELLEES.
69 N. W. 2d 920

Filed April 22, 1955. No. 33670.

1. **Highways.** The county board has general supervision over the roads of the county except to the extent that the state has undertaken the construction and maintenance of any highway therein.
2. ———. Roads established by law and roads opened by a county board of any county and traveled for more than 10 years are public roads.
3. **Bridges: Drains.** If a public road is intersected by a ditch of a public drainage district it is the duty of the district, in the absence of an agreement with the county in reference thereto, to build a proper bridge over the ditch where it crosses the highway and to restore the road as nearly as possible to its prior condition, and it is the duty of the county to maintain the bridge.
4. **Drains.** It is the duty of a person who places a structure or facility in a drainway to provide sufficient passage for all water which may be reasonably expected to be transported thereto by the drainway.
5. **Bridges: Drains.** Failure to make proper provision for the flow of water under a bridge or culvert imposes liability, although such bridge or culvert may be constructed according to approved principles of engineering. The fact that it materially affects the flow is evidence that it was not properly constructed, regardless of the principles upon which it was built.
6. **Drains: Injunction.** If an obstruction placed in a drainway will be a continuing injury to the land of another the owner thereof may on proper showing have a mandatory injunction for the removal of the obstruction and a restoration of the conditions existing before the advent of it.

APPEAL from the district court for Burt County: HERBERT RHOADES, JUDGE. *Affirmed in part, and in part reversed and remanded with directions.*

Richards, Yost & Schafersman and *Keith Hopewell,* for appellants.

Ellenberger & Pipher, Ralph M. Anderson, Fred S. Jack, and *Paul W. Eagleton,* for appellees.

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

BOSLAUGH, J.

Appellants have been since March 1949 the owners of the southwest quarter and the south half of the northwest quarter of Section 5, and the southeast quarter of the northeast quarter of Section 6, Township 22 North, Range 11 East, of the 6th P. M. in Burt County. This land is within the Burt-Washington Drainage District, hereinafter called the district, and the land has been assessed for benefits. The works designed and constructed by it were completed and put in operation about the year 1916. The district located and excavated a ditch along the center line of Section 5 from the north to and beyond the south line of Section 5. The ditch was along the east boundary of the land of appellants. It was known as the Litel ditch. It is designated herein as the ditch. Its specifications were bottom width 4 feet, depth 6.1 feet, side slopes 1 foot horizontal to 1 foot vertical, and the top width was about 16 feet. There was a public highway along the south of the land of appellants. The district designed and constructed a bridge at the location where the ditch intersected the highway. It was 16 feet long and 16 feet wide. The manner of its construction was that holes were bored in the banks of the ditch and concrete was placed in the holes. The concrete therein was used as piling. About 3 feet of wall piers or bridge caps were built on and above the concrete piling. Metal I-beams were laid lengthwise on

the bridge caps and wood planks were placed transversely on the I-beams for the deck or floor of the bridge.

The bridge was maintained by the County of Burt, identified as the county herein, until the Missouri River flood in April 1952, washed away the support of the bridge at its east end. The bridge cap toppled over and the floor or deck of the bridge at that end fell downward into the ditch. The west end of the bridge and its floor were otherwise undamaged. In May 1952 the county removed what remained of the bridge and substituted a tube 60 inches in diameter. This was the means for the passage of water flowing in the ditch to cross the highway near the southeast corner of the land of appellants until it was removed in November of that year. The county November 6, 1952, removed the tube from the highway described above and installed in lieu thereof a corrugated tube 72 inches in diameter and 34 feet in length. The installation of it and the incidental work necessary to put the highway in suitable condition for travel were completed the following day. The first tube was placed in the ditch so the lowest part of it was 1 foot above the grade of the ditch. It was decided by the county that was not proper engineering. The second tube had 1 foot greater diameter and greater capacity. The lower part of it at the inlet was on the grade of the ditch with a decline of about forty-five hundredths of a foot at the outlet of it.

This litigation concerns the effect of the substitution by the county of the metal tube with a diameter of 72 inches for the bridge constructed by the district. Appellants assert that the latter was adequate and allowed all water in the ditch to flow to the south from the land of appellants without damage to it; that the size of the tube is much smaller than that of the ditch; that it is insufficient to permit the water to flow to the south; and that it acts as an obstruction and causes the water to build up in the ditch and overflow onto the land of ap-

pellants to their damage present and prospective. The relief appellants seek is a mandatory injunction requiring appellees to construct an opening across the road of the capacity and condition as it was before the original bridge was removed, and to erect at the location of the metal tube a bridge of the same character and condition as the one that existed at that location at the time the bridge was damaged by the flood in 1952.

The position of the county was that the bridge across the ditch near the southeast corner of the land of appellants was washed away by the flood of 1952; that the county upon the recommendation and approval of the district placed a 60-inch steel tube 34 feet in length in the ditch through the highway; that it adequately carried the flow of water in the ditch; that it was removed because it was positioned higher than the bottom of the ditch and the county about the time of the filing of this case replaced it with a 72-inch steel tube 34 feet in length through the highway in a proper position to accommodate the flow of water to the capacity of the ditch; that the tube is an adequate structure for the flow of the water in and is a suitable bridge across the ditch; and that appellants have not and will not suffer any damage because of the change made in the structure in that location.

The township responded to the claims of appellants that it had nothing to do with and took no part in the removal of the bridge identified in their petition or in the installation of the culvert substituted for the bridge.

The district traversed the allegations of appellants and asserted that it had no part in the removal of the bridge or the installation of the steel tubing; that the change was made in that respect solely by the county which was responsible for the maintenance of the bridge; that the 60-inch metal tube substituted by the county for the bridge was not placed to the proper grade in the ditch, and the county removed and replaced it with a 72-inch steel tube November 6, 1952; that it is a good

and sufficient bridge over the ditch, and does not and will not constitute an obstruction of the ditch or restrict or reduce the drainage capacity thereof; and that any flooding of the lands of appellants would have occurred in any event and was not due to the installation of the steel tube.

The result of the trial was a finding for appellees and against appellants and a judgment of dismissal.

The allegations made by appellants concerning the Town of Riverside were that it was a township in Burt County; that it consented to the removal by the county of the bridge constructed by the district across the ditch at its intersection with the highway south of the land of appellants and the substitution of a 60-inch steel culvert for the bridge; that it was the duty of the township to maintain the bridge; and that the negligent and wrongful acts of the township, not otherwise specified, caused the water in the ditch to and it did flow upon the lands of appellants during the summer of 1952. The admissions and proof concerning the Town of Riverside were that it was a township of the county; that the road referred to above is a township road; and that the township had a road maintainer and that it maintained the road. It is established in the record that the district built the bridge and that the county maintained it until it was damaged in 1952. There is nothing to establish that the township had anything to do with or concerning the bridge, its removal, or the installation of either of the metal tubes in the highway. It definitely does not appear that the township had any opportunity to consent or that it did consent to the elimination of the bridge or the substitution of a metal tube for it. There is a failure of proof that the township had any knowledge of or participation in the changes that were made in this regard.

The road involved was a public road. A road established by law, opened by the county board of any county, and traveled for more than 10 years is a public road.

§ 39-101, R. R. S. 1943. The county board has general supervision over the roads of the county and is obligated to respect and execute the laws in relation to them except to the extent that the state has undertaken the construction and maintenance of any highway in the county. §§ 39-103, 39-604, R. R. S. 1943; State ex rel. Johnson v. County of Gage, 154 Neb. 822, 49 N. W. 2d 672; Porter v. Lancaster County, 130 Neb. 705, 266 N. W. 584; Cheney v. County Board of Supervisors, 123 Neb. 624, 243 N. W. 881.

The district had, in the absence of an agreement with the county, the responsibility to construct a proper bridge across the ditch where it intersected the highway and the county was obligated to maintain it. § 2983, R. S. 1913; § 39-805, R. R. S. 1943; State ex rel. County of Burt v. Burt-Washington Drainage Dist., 103 Neb. 763, 174 N. W. 316; Ritter v. Drainage District No. 1, 148 Neb. 873, 29 N. W. 2d 782. It is not claimed or established that there was an agreement between the county and the district concerning the construction and maintenance of the bridge. The county recognized its responsibility and attempted to discharge it. It cannot escape the effect of any default on its part in this regard. Franek v. Butler County, 127 Neb. 852, 257 N. W. 235. The dismissal of the cause as to the township was correct.

The allegations made by appellants in reference to the district were that it was an organized and existing district by virtue of the laws of the state; that it constructed the bridge that was partially destroyed by flood in 1952; that it was its duty to maintain the bridge; that it was removed after it was damaged by the county with the consent of the district; that the county replaced the bridge with a 60-inch steel culvert which was insufficient to allow the water in the ditch in which it was placed to flow south from the lands of appellants; that the culvert caused the water to build up in the ditch and flow onto the property of appellants to their dam-

age; that it would continue to do so in the future; and that because of the wrongful and negligent acts of the district, not otherwise stated, the ditch overflowed during the summer of 1952 upon the lands of appellants.

The essence of the charge made by appellants against the district is that it consented to the removal of the bridge and the installation by the county of the metal tube at the location where the bridge had been since the works of the district were constructed until it was damaged in 1952. There was no allegation of any other act or omission of the district. There is no competent evidence of any authorized or binding act or statement of the district concerning the removal of the bridge or the installation of either of the metal culverts. The bridge was designed and constructed by the district. There is no claim or proof of any agreement of the county and district concerning the construction and maintenance of the bridge. It was the sole duty and right of the county to supervise and maintain the bridge. § 2983, R. S. 1913; § 39-805, R. R. S. 1943; State ex rel. County of Burt v. Burt-Washington Drainage Dist., *supra;* Ritter v. Drainage District No. 1, *supra.* The county only was obliged to solve the difficulty that resulted from the damage to the bridge. The district had no right or authority to do anything in reference to it and the proof does not show that it attempted to exercise any influence or authority concerning what should be or was done by the county to solve the problem. The record justifies the dismissal of the case as to the district.

The disposition of this case requires a decision of whether or not the 72-inch steel tube installed in the ditch by the county at the place formerly occupied by the bridge has sufficient capacity for the unobstructed and unimpeded passage of the waters which it may reasonably be expected the ditch will bring to the intake of the tube. The opening under the bridge provided by the district was, according to the evidence, adequate to and it did satisfactorily perform that function for

more than 35 years. The county could not legally abandon the bridge and insert in the ditch a structure or facility in replacement of the bridge that would do less, to the injury and damage of property owners affected adversely by the change.

The testimony of an engineer offered by appellants is in substance that he measured the ditch at a point 45 feet north of the north end of the 72-inch steel tube the day before he testified in the case, and that he inspected the ditch and while there were some variations in its size it was generally, as far as could be determined from observing it, quite uniform. His measurements were and he testified that the ditch was at its bottom 11 feet in width; that it was 8 feet deep; that its width at the top was 32 feet; that the cross-section area of the ditch was 172 square feet; that the 72-inch metal tube had a cross-section area of 28 square feet; and that it was his judgment and opinion that the tube was thoroughly inadequate to accommodate the flow of water to the capacity of the ditch. The conclusion of the witness was deduced from and based upon a comparison of the area of the opening of the tube reduced to square feet with the cross-section area of the ditch expressed in square feet. He excluded all other facts such as speed and momentum of the water, the manner in which the tube was installed, and the decline of the pipe from the inlet downward to its outlet, and other similar considerations. He testified that the result of a ditch with a greater capacity than an opening through which water in the ditch must pass is that the enclosure around the opening acts as a dam, obstructs the flow of the water, and causes it to build up in the ditch. The effect of the testimony of the witness was considerably dissipated by his extravagant opinion that a tube to carry water to the capacity of the ditch should be 20 feet in diameter, his unusual activities on behalf of appellants, and his unconcealed desire that their case succeed.

These were obviously as great as if he had been the party plaintiff in the case.

An engineer presented as a witness by appellants considered that the surface water from 735 acres of land drained into the ditch south of a concrete culvert about a mile north of the 72-inch tube involved in this inquiry. He said that engineers used one of several formulas to determine the proper size of the opening under a bridge or of a culvert in a given situation, and that the one generally in use in this territory is Talbot's formula. There are two factors in the formula, the coefficient of the area and the drainage area. The witness accepted from the formula the equation that $A = .3$. He interpreted it to mean ".3 times the square root of the area squared, raised to the fourth power." He applied this to the drainage area of 735 acres, did the necessary arithmetic, and arrived at the conclusion that the area of a cross section of the opening of any structure placed in the ditch at the location in question sufficient to permit the passage of water to the capacity of the ditch must be 42.35 square feet. He said the area of a cross section of the tube was 28 square feet. He expressed the opinion that the 72-inch tube was inadequate to perform the function intended of it.

A third engineer deposed as an expert at the instance of appellants that engineers generally compute the size of a bridge or culvert opening by the use of a formula and for this purpose he considered the Talbot formula as the one generally employed. He used this and on the basis of his estimate that the drainage area was 1,920 acres of land he found and testified that the size of the opening of a structure sufficient to carry the water across the road involved in this case was 60 square feet. He computed the area of the opening of the 72-inch tube as 28.3 square feet. He concluded that the tube was inadequate to permit an unobstructed flow of the water which the ditch may be expected to drain to the inlet of the tube.

An engineer was presented by the county who testified that the size of the ditch 45 feet north of the inlet of the tube where the first engineer who testified for appellants made his measurements of the ditch was very must larger than the average size of the ditch; that the average cross-sectional capacity of the ditch at the time of the trial measuring 6 feet upward from the bottom of the ditch was 97 square feet; that the discharge capacity of the ditch at 6 feet deep was 317½ cubic feet per second; that the discharge capacity of the 72-inch tube was 230 cubic feet per second; that the maximum discharge or run-off from the drainage area was 230½ cubic feet per second; that he used the depth of 6 feet because water that deep in the ditch would be up to about the original bank line and it would then begin to back up and go through the various openings from the ditch into the fields and into the road ditches; that if water was 6 feet deep in the ditch it would be up to the top of the tube and if it was 7 feet deep it would overflow the land of appellants; and that the cross-sectional area of the opening under the bridge as it was before the bridge was damaged was not less than 40 square feet and was not more than 50 square feet.

The engineer who designed and supervised the construction of the works of the district was a witness called by the county. He said the drainage area of the district was 1,500 acres. The discharge capacity of the original ditch was 125 cubic feet per second. The discharge capacity of the ditch at the time of the trial when filled with water to the depth of 6 feet was 187½ cubic feet per second. The maximum run-off to be reasonably expected from the drainage area was 125 cubic feet per second. The tube has a discharge capacity of 230 cubic feet per second, a difference of 105 cubic feet per second in favor of the tube and this is an abundant safety factor. A comparison of a cross section of the ditch with a cross-section area of the tube is not a fair or true test of the efficiency or serviceability or discharge capacity

of the tube. This method of comparison is an unsound test of the capacity of the tube. "As far as efficiency (of the tube) is concerned it is comparing the velocity of a two-plus against seven. You have a velocity of two, and say this formed a velocity of seven feet per second. If the velocity were much higher then it would be even greater difference. That affects you on comparison of areas. We have to take the area and the velocity both to get a fair comparison." The tube was installed properly in compliance with approved engineering practices. There was a four-tenths of a foot decline of the tube from its inlet to its outlet and the ditch at the location of the tube had a downward grade to the south. These facts resulted in water passing through the tube developing maximum velocity. The witness explained in this way how the tube functioned: "A tube carrying water under normal conditions has its maximum velocity when it is half-full; also when it is running full, and it operates to carry water as in this case and under similar conditions, by developing a velocity that would run up to say seven feet a second, which is the mean velocity in the Missouri River, bank full * * *. It has a lot of * * * open space, when it is running half-full and gets a maximum efficiency as far as velocity is concerned under those conditions. The velocity is greater than it would be in the ditch approaching or in the ditch leaving the location of the pipe." The witness said the tube would not obstruct, hold back, or back up the water in the ditch. The tube does not require the build-up of a head of water to make it perform its function. The ditch by virtue of its situation is in itself a head. The opinion of the witness was the tube was ample to discharge all water brought to it by the ditch. He explained his opinion in this language: "My opinion is that the seventy-two inch culvert will never back the water out onto any of the drainage area; that it will never run full so that there would be no head on the pipe, for the reason that if you had a two-inch rate of run-off, which

I think is ample under existing conditions it would take a little more than half the capacity of the pipe to provide that much discharge capacity and still you would have daylight and room for trash. There wouldn't be any back-water."

The evidence is irreconcilably conflicting on the issue of the capability and suitability of the tube to promptly without causing an overflow of adjacent land to discharge the water brought to its inlet by the ditch. The trial is de novo and the manner of it has been often stated. Keim v. Downing, 157 Neb. 481, 59 N. W. 2d 602.

There are two significant and convincing facts. It is established without dispute that when the works of the district were designed the plans and specifications required a bridge 16 feet long across the ditch at the present location of the tube, notwithstanding that tubes were provided at that time in other parts of the district; that the bridge was constructed and maintained at that location for more than 35 years; and that the opening under the bridge was sufficient during that time to and it did according to the proof discharge all the water transported to it by the ditch without overflow or injury to any adjacent property. There has not been precipitation or run-off from the drainage area since the 72-inch tube was installed in November 1952, to test or demonstrate its sufficiency or inadequacy to discharge the water the ditch is capable of bringing to the tube. However in June 1952 after the 60-inch tube was inserted in the ditch there was a rain of considerable intensity, the exact amount not being definitely shown in the record. The run-off caused thereby was sufficient to build up water at the intake of the tube at least 12 inches above the top of the opening in it, and the water backed up and overflowed onto and flooded about 120 acres of the land of appellants. Water was draining from the land of appellants as much as 2 or 3 days after the rain.

It is concluded that the 72-inch tube does not con-

stitute an adequate or suitable opening to discharge the water that can be reasonably expected to be brought to it by the ditch in which the tube is installed at the place where the bridge was until it was damaged in 1952. It is the duty of one who places a structure or facility in a drainway to provide sufficient passage for all water which may reasonably be anticipated to be transported to the structure or facility by the drainway. In Schmutte v. State, 147 Neb. 193, 22 N. W. 2d 691, it is said: "Failure to make proper provision for the flow of water under a bridge or culvert imposes liability, although such bridge or culvert may be constructed according to approved principles of engineering. The fact that it materially obstructs the flow is evidence it was not properly constructed, regardless of the principles upon which it was built." See, also, Mader v. Mettenbrink, 159 Neb. 118, 65 N. W. 2d 334. If an obstruction in a drainway is and will be a continuing and permanent injury to the lands of another he may on proper showing have a mandatory injunction for the removal of the obstruction and a restoration of the conditions existing before the advent of the obstruction. Andersen v. Town of Maple, 151 Neb. 103, 36 N. W. 2d 620; Mader v. Mettenbrink, *supra*.

The judgment should be and is affirmed as to the appellees Town of Riverside and Burt-Washington Drainage District. The judgment should be and is reversed as to appellee County of Burt and the cause is remanded to the district court for Burt County with directions to render and enter a judgment granting appellants a mandatory injunction requiring the County of Burt with reasonable promptness, the circumstances considered, to remove from the highway south of the southwest quarter of Section 5, Township 22 North, Range 11 East, of the 6th P. M. at the place where the drainage ditch of the Burt-Washington Drainage District intersects the highway, the 72-inch steel tube installed at that location by the county in the ditch aforesaid in November 1952,

and to construct at that place a bridge comparable to the kind, size, and condition and with an opening beneath it for the discharge of water brought there by the ditch as existed in 1952 before the bridge then located there was damaged and removed.

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

PHIL GAIN, A MINOR, BY RAYMOND A. GAIN, HIS FATHER AND NEXT FRIEND, APPELLEE, V. CLAUDE W. DRENNEN, APPELLANT.

69 N. W. 2d 916

Filed April 22, 1955. No. 33673.

1. **New Trial: Appeal and Error.** In an action where the trial court has sustained a motion for a new trial without assigning reasons therefor, appropriate procedure on appeal is for the appellant to bring the record here with an assignment that the court erred in granting a new trial and submit it for critical examination. The duty then devolves upon the appellee to point out the prejudicial error which he contends justifies the granting of a new trial.
2. **Trial.** It is the duty of the trial court to instruct fully upon the theory of a party to an action if the theory finds support in the evidence.
3. **Negligence.** It is error to submit the issue of contributory negligence to a jury if such issue finds no support in the evidence.
4. **Automobiles.** Independent of statute or city ordinance the operator of a motor vehicle on a highway or city street is under a duty to exercise ordinary care to avoid striking a person on a highway or city street.
5. **Evidence.** There is no hard and fast rule for demarcation between that which is and that which is not res gestae, but a declaration to be competent evidence as part of the res gestae must have been made at such a time and under such circumstances as to raise a presumption that it was the unpremeditated and spontaneous explanation of the matter about which made.

APPEAL from the district court for Douglas County: CARROLL O. STAUFFER, JUDGE. *Affirmed.*

Kennedy, Holland, DeLacy & Svoboda and *J. A. C. Kennedy, Jr.*, for appellant.

Robert D. Mullin and *Robert E. McCormack*, for appellee.

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

YEAGER, J.

This is an action in two causes of action by Phil Gain, a minor, by Raymond A. Gain, his father and next friend, plaintiff and appellee, against Claude W. Drennen, defendant and appellant. The first cause of action is for damages for injuries claimed to have been sustained by him as the result of an accident which occurred on May 6, 1953, at the intersection of Forty-second and Leavenworth Streets in Omaha, Nebraska. Plaintiff claims that the accident was the result of negligence on the part of the defendant. Phil Gain is a minor child and the son of Raymond A. Gain. The second cause of action is one on behalf of Raymond A. Gain for the recovery of hospital and doctor bills in the care of Phil Gain following as a consequence of his injuries. This cause of action was assigned to Raymond A. Gain. In consequence of this assignment both causes of action were prosecuted in the name of and in behalf of Phil Gain.

Issues were joined and a trial was had to a jury. The verdicts on the two causes of action were separate and both of them were in favor of defendant and against the plaintiff. After verdict the plaintiff filed a motion for new trial which was sustained. The appeal here is from the order of the court sustaining the motion for a new trial.

The order sustaining the motion for new trial contains no reason therefor. Under such circumstances appropriate procedure is for the appellant to bring the record here with an assignment that the court erred in granting a new trial and submit it for critical examination. The duty then devolves upon the appellee to point out the prejudicial error which he contends justifies the

granting of a new trial. The appellant then may reply to the contentions made by the appellee. Greenberg v. Fireman's Fund Ins. Co., 150 Neb. 695, 35 N. W. 2d 772; Keiserman v. Lydon, 153 Neb. 279, 44 N. W. 2d 513; In re Estate of Fehrenkamp, 154 Neb. 488, 48 N. W. 2d 421. This procedure has been substantially followed in this case.

In the light of the issues made by the pleadings it becomes necessary, as to the first cause of action, to consider only the questions presented by the plaintiff. As to the second cause of action it becomes necessary to consider the issue of contributory negligence. This will be made clear later herein.

As indicated the accident occurred at Forty-second and Leavenworth Streets in Omaha, Nebraska. Leavenworth Street runs east and west and at this location is 54 feet wide. East-bound and west-bound street car tracks are in the street near the center. Forty-second Street extends north and south and is 40 feet in width. The intersection is protected by traffic lights on all four corners. Leavenworth is a very busy thoroughfare particularly as regards east and west traffic. Evidence of plaintiff discloses that at about 5:30 p. m. on May 6, 1953, Phil Gain was on the curb at the southwest corner of the intersection where he waited until the traffic light turned green for north and south traffic when he started north across the intersection in what was regarded as the west cross walk. After he had gone 10 or 15 feet the automobile of the defendant driven by him came from the west and ran into plaintiff after which he was found near the east cross walk or near the east line of Forty-second Street.

The plaintiff charged negligence against the defendant in 12 specifications. The answer to the charge of negligence was a general denial. The court in its instructions submitted only five of them.

In his brief the plaintiff does not contend that there was any impropriety in the submission of the five spe-

cifications. His complaint in this connection is that it was error to fail and refuse to submit some of the others.

Of course it is the duty of the court to instruct fully upon the theory of a party to an action if the theory finds support in the evidence. Dunlap v. Welch, 152 Neb. 459, 41 N. W. 2d 384.

Three of the specifications submitted described the duty of the defendant in the operation of his automobile with regard to traffic signals. One described his duty under city ordinances and one described his duty to keep a proper lookout. This last is as follows: "In failing to keep a proper lookout for pedestrians and especially the person of this plaintiff."

Three specifications pleaded but not submitted were: "In failing to accord Plaintiff the unhampered use of that portion of the street to which he was rightfully entitled," "In failing to seasonably apply his brakes and to slacken the speed of his vehicle or to stop same before colliding with Plaintiff," and "In failing to use the means at his disposal to avoid colliding with the Plaintiff after Defendant saw or, in the exercise of ordinary care, should have seen the Plaintiff in a position of peril." There were other specifications not submitted but we think their substance is contained in these and in those actually submitted; hence they will not be considered herein.

The defendant had something more than a mere duty to keep a lookout for pedestrians. He had a duty, in the exercise of ordinary care, to see that which could have been seen and to take reasonable precautions to avoid an accident such as to apply brakes, slacken speed, or stop.

While perhaps it is not pertinent in determining the question involved here, the testimony of the defendant himself is to the effect that a boy of the height of Phil Gain would have to be 7½ feet out in front of his automobile before he could be seen. The point of this is that if this boy was at the time in the cross walk and

the light was in his favor, and the defendant was to the west of it, he had a duty to exercise ordinary care to avoid striking the boy independent of the duty which was imposed on him by statute or city ordinance, in addition to the bare duty to keep a lookout. Tews v. Bamrick, 148 Neb. 59, 26 N. W. 2d 499.

As to this the court, notwithstanding the allegations of the petition, failed to instruct, which we deem to have been prejudicial error. The court took the necessary step to correct the error as to the first cause of action by granting a new trial.

The basic grounds of negligence as to the second cause of action were the same as they were as to the first and what has already been said as to the first applies to the second, and of course granting a new trial as to the second was proper.

Since a new trial is to be granted it becomes necessary to consider a certain assignment set forth as ground for new trial based on a contention that certain evidence of the defendant, duly objected to, was admitted.

After the accident and after Phil Gain had been taken away in an ambulance a police officer on the scene was making an investigation during which he questioned, apparently together, the defendant and a woman witness. Over objection on the ground of hearsay, the defendant was allowed to testify that the woman told the officer that at the time of the accident the light was green for the defendant. The questions and answers in the bill of exceptions as to the matter are as follows: "Q What did you hear the woman say? A She answered the question of the officer; he asked her what color the light was. Q What did she say? A Green for me. Q Is that what she said? A That is what she told the officer." This testimony was received on the ground that it was a part of the res gestae.

There is no hard and fast rule for demarcation between that which is and that which is not res gestae but this court has said that a declaration, to be compe-

tent evidence as part of the res gestae, must be made at such time and under such circumstances as to raise the presumption that it was the unpremeditated and spontaneous explanation of the matter about which made. Pledger v. Chicago, B. & Q. R. R. Co., 69 Neb. 456, 95 N. W. 1057; Denison v. State, 117 Neb. 601, 221 N. W. 683; Callahan v. Prewitt, 141 Neb. 243, 3 N. W. 2d 435.

In this instance the only disclosed circumstances are that this took place a short time after the accident while an investigation was being made. It is difficult to see how a presumption of non-meditation and spontaneity could flow from these circumstances. It appears that under the circumstances as disclosed this could not be regarded as a part of the res gestae. Accordingly its admission was error.

As pointed out, in defense of the second cause of action the defendant pleaded that the plaintiff was guilty of contributory negligence. The contributory negligence charged was that plaintiff's father as parent failed to use reasonable care in watching and protecting his minor child, in guarding his safety, and in negligently allowing him to be upon the highways unattended.

The trial court submitted this as an issue by its instructions. The bill of exceptions has been carefully searched and no evidence has been found which points to any act of commission or omission on the part of the father from which an inference of negligence could or did flow which could in anywise be regarded as in any degree causative of this accident. In his brief and argument the defendant fails to contend that there was any such act. The issue of contributory negligence not having found any support in the evidence it was error to submit it to a jury. Koehn v. City of Hastings, 114 Neb. 106, 206 N. W. 19; In re Estate of Steininger, 139 Neb. 284, 297 N. W. 159; Becks v. Schuster, 154 Neb. 360, 48 N. W. 2d 67; Perrine v. Hokser, 158 Neb. 190, 62 N. W. 2d 677.

For the reasons herein stated the order of the district

court sustaining plaintiff's motion for a new trial is affirmed.

AFFIRMED.

BESSIE C. MUSIL, APPELLEE, V. OTTO E. BERANEK (REVIVED IN THE NAME OF HELEN BERANEK AS ADMINISTRATRIX WITH WILL ANNEXED OF OTTO E. BERANEK, DECEASED) ET AL., APPELLANTS.

69 N. W. 2d 885

Filed April 22, 1955. No. 33699.

1. **Trusts.** The burden of proof is upon one seeking to establish the existence of a constructive trust to do so by evidence which is clear, satisfactory, and convincing in character.
2. **Frauds, Statute of: Trusts.** Trusts arising by implication, or by operation of law, are excepted from the operation of the statute of frauds. Resulting and constructive trusts therefore fall within the exception.
3. **Fraud: Trusts.** When a person obtains the legal title to real estate belonging to another by means of fraud or misrepresentation, actual or constructive, the law constructs a trust in favor of the party upon whom the fraud or imposition has been practiced. A court of equity will enforce such a trust for the benefit of the grantor or those claiming under him.
4. **Fraud.** The existence of an intent to defraud at the time the promise was made may be inferred from the failure to comply with the promise, and the promisor may be presumed to have intended, when he made the promise, to do what he finally did do with respect thereto.

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

Torgeson, Halcomb & O'Brien and *Blackledge & Sidner*, for appellants.

C. J. Mingus and *DeWayne Wolf*, for appellee.

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

CARTER, J.

This is a suit in equity instituted by the plaintiff, Bessie C. Musil, against Otto E. Beranek and other defendants, to establish a constructive trust on 80 acres of land in Buffalo County and to secure a partition thereof. The trial court found that the land should be impressed with a constructive trust, that plaintiff was the owner of a one-third interest therein, and that the land should be partitioned. Pending a hearing on a motion for a new trial the defendant Otto E. Beranek died testate. The action was duly revived in the name of his wife, Helen Beranek, administratrix with will annexed of the estate of Otto E. Beranek, deceased, and Helen Beranek personally. An appeal was taken to this court from the findings and decree entered, and from the overruling of the motion for a new trial filed by Helen Beranek personally and as such administratrix.

The plaintiff is a sister of Otto E. Beranek and Adolf Beranek, the three being the children of Frank and Anna Beranek. The 80 acres of land involved in this suit were owned and occupied by Frank Beranek and his wife for many years prior to the time they deeded the land to Otto E. Beranek. In the fall of 1940 Frank Beranek became ill. Local physicians advised that little could be done for him. Otto and Bessie took their father, Frank, to Salina, Kansas, in search of medical relief. They traveled by automobile, and on the way it was suggested that Frank turn the deed to the 80 acres over to Otto or Bessie. The purpose was to see that Frank obtained medical care and that certain debts of Frank be paid, and thereby relieve Frank from financial worry during his illness. Bessie states that Otto said to Frank: "Now, you can take the rent shares off of that 80 the same as you always did,"—"the farm will be yours the same as it always was, only it would be in either Bessie's or my name." No definite arrangement appears to have been made at this time. After Frank returned from Salina, he sought medical aid in Denver, Colorado. Otto E.

Beranek took Frank to Denver and paid medical and living expenses for Frank while he was being treated. Frank returned from Denver about Christmas time in 1940. A house was rented in Ravenna and Frank and Anna occupied it about January 1, 1941. In February Frank became ill with influenza. On February 13, 1941, he deeded the land to Otto. Frank returned to Denver for further medical treatment. He returned home a few days before he died on April 30, 1941.

It appears from the record that Frank Beranek owed his brother $700 on a note, $200 on an insurance loan, and a few other obligations including the expenses of his last sickness. Otto put a $1,000 mortgage on the 80 acres to pay these items. Frank's insurance was ample to pay the funeral expenses and to place $300 in the bank for the care of Anna.

The evidence shows that the 80 acres were being farmed by Bessie's husband, Charles. Bessie testifies to an oral agreement with Otto whereby she was to sell certain personal property belonging to Frank at his death and place the money in the bank in her own name for the care of the mother. Bessie also collected the rents from the 80 acres and placed them in the same account. In 1946 Bessie had accumulated more than $1,000 in this fund. On February 4, 1946, Bessie sent $1,000 to Otto to be used in paying the $1,000 mortgage. Otto failed to do so.

By agreement between Otto and Bessie, Bessie collected the rent after Frank's death and put it in the bank for the care of Anna. After Anna's death in 1950 Bessie continued to collect the rent. Instead of placing it in the bank, however, she remitted one-third to Otto, one-third to Adolf, and retained one-third for herself. There is no doubt that Otto acquiesced in this distribution of the rent from the 80 acres. It was so distributed in 1950, 1951, and 1952. On February 22, 1951, Otto mortgaged the land for $2,500 and retained the proceeds

for his own use. On July 31, 1951, Otto served a notice on Bessie's husband to vacate the land.

Bessie testifies that following the funeral of her mother in 1950, Otto stated they would have to get together at a later time to settle the estate. During this conversation, according to Bessie, he also said: "When my dad turned that deed over to me, that was to take care of mother and to be sure that she was taken care of, and if there was anything left when she was gone it was to be divided between the three grandsons." It appears that Otto, Bessie, and Adolf each had one son. This is the only reference to any intent of Frank to convey the land to his grandsons. The statement is evidence, however, that Otto held the land as a trustee and not as sole owner. It was not until January 1952 that Otto informed Bessie that his expenses were such that there was nothing left in the 80 acres for Bessie.

Otto Beranek states that he leased the land to Bessie and Charles Musil in 1941 with the understanding that Bessie should retain all the rent and use it for the care of Anna. He testifies, also, that he received the deed from Frank and Anna with the understanding that he was to pay certain enumerated bills and see that Anna was cared for. No attempt is made by Otto to explain his acquiescence in the equal division of rents between Otto, Bessie, and Adolf after 1950. He does not deny the conversations testified to by Bessie. It is clear that Otto considered Bessie and Adolf part owners of the 80 acres until some time in January 1952. Previous to that time he consulted with Bessie about the 80 acres and matters with reference to it. The evidence shows that the debts of the estate and the expense of the care of the mother were paid from funds derived from the $1,000 mortgage, the $1,000 insurance policy, and the rents from the 80 acres. The appellee contends that the evidence sustains a finding that a constructive trust was created. It is clear that an express trust relating to real estate may not be created by parol agreement.

Such an agreement contravenes the provisions of the statute of frauds. Pollard v. McKenney, 69 Neb. 742, 96 N. W. 679. However, trusts arising by implication, or by operation of law, are excepted from the operation of the statute. Resulting and constructive trusts obviously fall within the exception. Pollard v. McKenney, *supra*.

A constructive trust arises from actual or constructive fraud or imposition, committed by one party on another. It arises if one person obtains the legal title to property from another by fraud or misrepresentation, or by an abuse of some influential or confidential relation which he holds toward the owner of the legal title, or obtains such title from him upon more advantageous terms than he otherwise could have obtained it. When one of the foregoing situations is shown to exist by clear, satisfactory, and convincing evidence, the law constructs a trust in favor of the party upon whom the fraud or imposition has been practiced. Peterson v. Massey, 155 Neb. 829, 53 N. W. 2d 912. And, also, if a party obtains the legal title to property by virtue of a confidential relation, under such circumstances that he ought not, according to the rules of equity and good conscience hold and enjoy the benefits, a court of equity will raise a trust by construction and convert the holder into a trustee of the legal title. Paul v. McGahan, 152 Neb. 578, 42 N. W. 2d 172. If the intention of the promisor not to perform can be shown to have existed at the time the promise was made, the promise is fraudulent, even in the absence of a confidential relationship between the parties. It is also the rule that the violation by the grantee of a promise to reconvey is constructively fraudulent and gives rise to a constructive trust which may be established by parol if he obtains a deed without consideration by means of a parol agreement to reconvey to the grantor to whom he stands in a confidential relation, even when there be no intention at the time not to perform the promise. Pollard v. McKenney, *supra*.

The case being one in equity, it is triable de novo in this court. Wiskocil v. Kliment, 155 Neb. 103, 50 N. W. 2d 786. The burden of proof is on the plaintiff to establish the existence of a constructive trust by evidence which is clear, satisfactory, and convincing in character. Maddox v. Maddox, 151 Neb. 626, 38 N. W. 2d 547.

We think the evidence shows the facts to be as follows, when measured by the foregoing rule: Frank and Otto Beranek were father and son. Frank Beranek, at the time of the conveyance and the events leading up thereto, was in ill health and worried about his finances and the future care of his wife, Anna. He conveyed the 80 acres of land to Otto with the understanding that Otto would see that his debts were paid and that Frank's wife, Anna, would be properly cared for with the proceeds from the 80 acres, and that anything remaining after the death of Anna would be equally divided between Otto, Bessie, and Adolf. This is sufficient to sustain a constructive trust.

The record shows that Otto mortgaged the 80 acres for $2,500 and used the proceeds for his personal needs. The interest of Otto in the 80 acres is therefore primarily charged with the $2,500 in the same manner as decreed by the district court. The record establishes that Otto is the owner of the one-third interest of Adolf. The appellee is the owner of a one-third interest in the 80 acres by virtue of the constructive trust, subject to the contingent liability of the $2,500 mortgage. The order of the district court determining the rights of the parties in the 80 acres and directing the partition of the land is in all respects correct.

AFFIRMED.

LARRY ABBOTT, PLAINTIFF IN ERROR, V. STATE OF NEBRASKA, DEFENDANT IN ERROR.
69 N. W. 2d 878

Filed April 22, 1955. No. 33711.

1. **Appeal and Error.** In the absence of a valid bill of exceptions, the only issue that can be considered on appeal is the sufficiency of the pleadings to sustain the judgment.
2. **Criminal Law: Appeal and Error.** Where a defendant in a criminal action has voluntarily paid a fine imposed upon him, he waives his right of appeal.

ERROR to the district court for Loup County: WILLIAM F. SPIKES, JUDGE. *Affirmed.*

Manasil & Erickson, 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.

SIMMONS, C. J.

This matter comes here by petition in error from the district court, challenging the dismissal of an appeal from the county court in a misdemeanor case. We affirm the judgment of the trial court.

Plaintiff in error will hereinafter be called the defendant.

In county court on November 24, 1952, defendant was charged with unlawful operation of a motor vehicle on the streets and highways in such a manner as to indicate a willful disregard for the safety of persons and property.

Defendant was arrested on the same day. The judgment of the court recites that on November 24, 1952, he was fully informed as to his legal rights, the nature of the offense charged and the penalty, and that defendant was duly arraigned and pleaded guilty. The judgment further recites that from the proofs and the evidence the court found the defendant guilty. He was

fined $50 and costs of $5. His operator's license was suspended for 30 days. Defendant then paid the fine and costs in full and deposited his operator's license with the court.

On December 1, 1952, defendant filed a motion to set aside and vacate the judgment for the reason that the plea of guilty was entered involuntarily; that he did not understand its effect; that he was not appraised of the nature of the charges against him; that he did not receive adequate and timely notice of the hearing; that he did not have an opportunity to obtain and consult with counsel prior to the hearing; and that the State did not offer to grant a continuance.

On the following day he filed a motion for leave to withdraw his plea of guilty for the reasons in part as above recited on the motion to vacate and for the added reason that he had not been afforded a full and fair hearing.

The court's journal entry recites that on December 3, 1952, the matter came on for hearing of the two motions, the parties were represented by counsel, and the motions were "presented and argued," and were denied.

Defendant gave notice of appeal from the "order" in the above matter. His appeal bond, filed December 3, 1952, recited that it concerned the charge of willful reckless driving. Thereafter a transcript was filed in the district court containing copies of all the instruments mentioned above. Thereafter in district court, the State filed a motion to dismiss the appeal on the ground that the defendant had pleaded guilty and satisfied the judgment of the county court.

On May 18, 1953, the district court had "a hearing" on the matter and on August 5, 1953, entered an order dismissing the appeal. A "motion for a new trial" was filed. This was overruled on September 4, 1954, and the proceedings here followed.

We are unable to determine definitely on what theory the matter comes here.

Defendant in his brief states that the question presented is his right to appeal from the county court order denying his motion to vacate the judgment and to withdraw his plea. However, his bond appears to have been one wherein he appeals from the judgment of conviction. The district court appears to have determined the appeal on the ground that the plea of guilty, followed by a judgment of guilt and a fine and costs which were fully paid, disposed of the matter, and that there accordingly was no merit in the appeal.

If the issue here is the ruling of the county court on the motion to vacate the judgment and withdraw the plea of guilty, then we are confronted with the rule that the record imports absolute verity. There is no bill of exceptions reciting the evidence, if any, produced in county court. As to that the rules are: "In all appellate proceedings the record of the trial court imports absolute verity.

"On appeal, error will not be presumed, but must affirmatively appear from the record.

"In the absence of a bill of exceptions it will be presumed that issues of fact raised by the pleadings were supported by the evidence and that such issues were correctly determined.

"A question requiring an examination of the evidence will be disregarded in the absence of a bill of exceptions preserving the evidence.

"In the absence of a valid bill of exceptions, the only issue that can be considered on appeal is the sufficiency of the pleadings to sustain the judgment." State ex rel. League of Municipalities v. Loup River P. P. Dist., 158 Neb. 160, 62 N. W. 2d 682.

Accordingly, the merits of the decision of the county court on the motion to vacate and withdraw the plea are not here for review.

Apparently the defendant desires a determination that he has a right to a trial in the district court on the issue presented by the complaint of the State. That is the

question which was decided by the district court. He relies on Benson v. State, 158 Neb. 168, 62 N. W. 2d 522. We there held that a defendant who had pleaded guilty and had been sentenced on the plea was not barred from a right of appeal. That case is not this case. Here there was a plea, a judgment, and a satisfaction of that judgment in full.

In a civil case saying that the proceeding was "a peculiar one," we held: "After a judgment has been paid in full and the cause dismissed, a motion to set it aside presents no issue." Durland Trust Co. v. Uttley, 103 Neb. 461, 172 N. W. 251.

The texts state the majority rule is that where a defendant in a criminal action has voluntarily paid a fine imposed upon him, he waives his right of appeal. 2 Am. Jur., Appeal and Error, § 231, p. 987; 24 C. J. S., Criminal Law, § 1668, p. 266; Annotations, 18 A. L. R. 867, 74 A. L. R. 638. We find no decisions of our own directly determining the question.

We cite only a few of the decisions where the fact situations are quite comparable. Relying on its earlier decisions and the above texts, the Supreme Court of Kansas in a recent case held: "The trial court did not dismiss the appeal from the police court upon the ground that it had not been taken in time. The appeal was dismissed because the evidence clearly showed that the appellant, while in the police court, voluntarily paid the fines and costs. Under our many decisions, as well as decisions from other states, he had waived his right to appeal." City of Goodland v. Bair, 166 Kan. 228, 199 P. 2d 807. See, also, Wilhite v. Judy, 137 Kan. 589, 21 P. 2d 317.

In State v. Schreiber, 35 Del. 424, 166 A. 669, with reference to a statutory right of appeal, the court said: "This provision of the statute is clearly for the benefit of the person convicted and may, therefore, be waived by him. The defendant voluntarily paid the fine and costs imposed on him by reason of his plea of guilty and

has, therefore, waived his right of appeal in this case."

In State v. Osborne, 143 Maine 10, 54 A. 2d 526, the court reviewed many of the earlier decisions and held: "The great weight of authority is that a voluntary guilty plea, followed by payment of fine imposed terminates the action and precludes a review of the conviction." With reference to the so-called minority view, the court said: "What may be termed the minority view, is in most instances an emphasis favorable to the defendant upon questions of fact when it is shown that a fine was paid with the intent not to waive; in cases where fines were paid under protest or where there was an element of coercion."

People v. Pyrros, 323 Mich. 329, 35 N. W. 2d 281, involved a conviction of drunken driving with a fine or a jail sentence and suspension of driver's license. Defendant paid the fine and thereafter attempted to appeal. On motion, similar to the one here, his appeal was dismissed. We cite it here particularly because of the suspended operator's license that was involved. The court held: "A person upon whom a sentence is imposed must accept all of the sentence or appeal in a manner provided by law in such cases. Defendant, by having paid the fine imposed, thereby accepted all of the sentence. In such a situation there is nothing to appeal from * * *."

We accept and follow the majority rule.

The judgment of the trial court is affirmed.

AFFIRMED.

GERTRUDE MULLER, APPELLANT, V. THE NEBRASKA METHODIST HOSPITAL, A CORPORATION, APPELLEE.
70 N. W. 2d 86

Filed April 29, 1955. No. 33694.

1. Courts. The doctrine of stare decisis is grounded on public policy and, as such, is entitled to great weight. It should be

adhered to unless the reasons therefor have ceased to exist, are clearly erroneous or are manifestly wrong and mischievous, or unless more harm than good will result from doing so.

2. **Constitutional Law: Courts.** Article I, section 13, of the Constitution of the State of Nebraska does not create any new rights but is merely a declaration of a general fundamental principle. It is a primary duty of the courts to safeguard this declaration of right and remedy but, where no right of action is given or remedy exists under either the common law or some statute, this constitutional provision creates none.
3. **Charities.** In this jurisdiction it has long been settled that nonprofit charitable corporations are exempt from tort liability insofar as inmates, participants, or recipients of the charity are concerned. This immunity was adopted for the protection of these institutions as a matter of public policy. This immunity has so inherently become a part of the law affecting them that if any change is to be made therein we think it should come from the Legislature.
4. ———. The fact that patients who are able to pay are required to do so does not deprive a corporation of its eleemosynary character, nor does it permit a recovery for damages on account of the existence of contract relations.
5. **Charities: Insurance.** The fact that a charitable institution carries indemnity insurance indemnifying it from liability to a recipient of its bounty does not create liability.

APPEAL from the district court for Douglas County: L. ROSS NEWKIRK, JUDGE. *Affirmed.*

Abrahams & Kaslow, for appellant.

Swarr, May, Royce, Smith & Story, for appellee.

Joseph O. Burger, Edwin Cassem, George N. Mecham, John J. Gross, and *Sam C. Zimmerman,* amici curiae.

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

WENKE, J.

Gertrude Muller brought this action in the district court for Douglas County against The Nebraska Methodist Hospital, a corporation. The purpose of the action is to recover damages for injuries she claims to have suffered while a patient in a hospital owned and operated

by the defendant. The basis for the action is her claim that defendant was negligent in furnishing an unsafe operating table for her use. The trial court sustained defendant's motion for a summary judgment and, from the overruling of her motion for a new trial, plaintiff appealed.

Appellee is a nonprofit corporation organized under the laws of Nebraska for the purpose of engaging in charitable work. Its principal place of business is in Omaha, Douglas County, Nebraska, where it is engaged in operating and maintaining a hospital to carry out its charitable purposes. On April 25, 1951, appellant entered this hospital for surgery. She entered as a paying patient, agreeing to pay the regular and established charges for hospital services and care preparatory to and during the course of such surgery. In consideration thereof appellee agreed and undertook to provide appellant with suitable, safe, and proper care and facilities. On April 26, 1951, appellant, while a patient in the hospital, was taken to a room therein used for surgery and there placed on a table furnished by appellee and used for that purpose. This table consisted of two sections. The lower section thereof, on which the lower limbs of appellant rested, was so constructed that it could be raised or lowered by means of hydraulic pressure regulated and controlled by a foot pedal. It was intended that such raising and lowering would be done very gradually. While appellant was on the table completely anesthetized an attendant used the foot pedal. This caused the lower section of the table to drop instantly and resulted in appellant's back being severely strained and wrenched, which caused her to have great bodily pain and permanent injuries. The sudden dropping of the lower section of the table, when the attendant stepped on the foot pedal, was due to a defective condition of the mechanism regulating and controlling the hydraulic pressure.

The foregoing facts are either stipulated to, admitted

by the pleadings, or admitted by the motion for a summary judgment for the purpose of ruling thereon.

The principal question raised by this appeal is, shall we adhere to the doctrine of immunity for nonprofit charitable corporations from tort liability, a doctrine which has long been established in this state by holdings of this court? See, Duncan v. Nebraska Sanitarium & Benevolent Assn., 92 Neb. 162, 137 N. W. 1120, 41 L. R. A. N. S. 973, Ann. Cas. 1913E 1127; Sibilia v. Paxton Memorial Hospital, 121 Neb. 860, 238 N. W. 751. However, such nonliability is restricted to inmates, participants, or recipients of the charity and not to strangers or business invitees. See, Marble v. Nicholas Senn Hospital Assn., 102 Neb. 343, 167 N. W. 208; Wright v. Salvation Army, 125 Neb. 216, 249 N. W. 549. Nor is it applicable to hospitals incorporated and conducted for private gain. Malcolm v. Evangelical Lutheran Hospital Assn., 107 Neb. 101, 185 N. W. 330; Wetzel v. Omaha Maternity & General Hospital Assn., 96 Neb. 636, 148 N. W. 582, Ann. Cas. 1915B 1224.

Appellant asks us to re-examine our holdings and seeks to have us reverse them on the basis that they are illogical and fundamentally unsound because they are based on concepts and conditions which no longer exist. On the other hand appellee asks us to apply the doctrine of stare decisis thereto.

"The doctrine of stare decisis is grounded on public policy and, as such, is entitled to great weight and must be adhered to, unless the reasons therefor have ceased to exist, are clearly erroneous, or are manifestly wrong and mischievous or unless more harm than good will result from doing so." 14 Am. Jur., Courts, § 61, p. 284.

We said in Scott v. Scotts Bluff County, 106 Neb. 355, 183 N. W. 573: "So, where the court has decided a question of law in another case and a like state of facts is subsequently presented, the rule of stare decisis applies and will not be easily changed." To the same effect, see Bulgrin v. Schlechte, 88 Neb. 278, 129 N. W.

272; Patterson v. Kerr, 127 Neb. 73, 254 N. W. 704.

However, we have also said: "I fully appreciate the importance of the doctrine stare decisis, and with what reluctance courts consent to the reversal of rules established by repeated decisions, although confessedly erroneous, particularly such as have become rules of property. In such cases, according to the dictates of common justice, they should be adhered to until changed by statute. There are, it is true, to be found cases holding that the same principle is applicable to all statutory constructions, whether involving rules of property or mere questions of practice; but such a consecration of the doctrine of stare decisis is opposed to reason and the overwhelming weight of authority. That rule, like all others, is not without its exceptions, and, in the absence of complications resulting from property rights, it is the undoubted privilege, if not indeed the duty, of courts to re-examine their decisions whenever satisfied that they are fundamentally wrong." State v. Hill, 47 Neb. 456, 66 N. W. 541.

In considering the latter the following principle applies: " 'Before overruling a former decision deliberately made, the court should be convinced, not merely that the case was wrongly decided, but that less injury will result from overruling than from following it.' McEvoy v. City of Sault Ste. Marie, 136 Mich. 172." Torbitt v. Village of Bennett, 98 Neb. 129, 152 N. W. 301.

Appellant calls our attention to the general principle that for negligent or tortious conduct liability is the rule and that the law's emphasis, under such circumstances, is ordinarily on liability, not immunity. We are fully aware that immunity from liability for negligent or tortious conduct is an exception but this court has, since 1912, established such an exception for nonprofit charitable corporations insofar as inmates, participants, or the recipients of the charity are concerned. Other states have adopted a similar exception ranging from complete immunity to varying degrees thereof. See, Crossett

Health Center v. Croswell, 221 Ark. 874, 256 S. W. 2d 548; Jurjevich v. Hotel Dieu (La. App.), 11 So. 2d 632; Howard v. South Baltimore General Hospital, 191 Md. 617, 62 A. 2d 574; Mastrangelo v. Maverick Dispensary, 330 Mass. 708, 115 N. E. 2d 455; Erwin v. St. Joseph's Mercy Hospital, 323 Mich. 114, 34 N. W. 2d 480; Kreuger v. Schmiechen (Mo.), 264 S. W. 2d 311; Rafferzeder v. Raleigh Fitkin-Paul Morgan Mem. Hospital, 33 N. J. Super. 19, 109 A. 2d 296; Williams v. Randolph Hospital, 237 N. C. 387, 75 S. E. 2d 303; Gregory v. Salem General Hospital, 175 Or. 464, 153 P. 2d 837; Bond v. Pittsburg, 368 Pa. 404, 84 A. 2d 328; Caughman v. Columbia Y.M.C.A., 212 S. C. 337, 47 S. E. 2d 788; Felan v. Lucey (Tex. Civ. App.), 259 S. W. 2d 302; Meade v. St. Francis Hospital of Charleston (W. Va.), 74 S. E. 2d 405; Baldwin v. St. Peter's Congregation, 264 Wis. 626, 60 N. W. 2d 349; Forrest v. Red Cross Hospital (Ky.), 265 S. W. 2d 80; Jensen v. Maine Eye & Ear Infirmary, 107 Me. 408, 78 A. 898, 33 L. R. A. N. S. 141; Hearns v. Waterbury Hospital, 66 Conn. 98, 33 A. 595, 31 L. R. A. 224; St. Vincent's Hospital v. Stine, 195 Ind. 350, 144 N. E. 537, 33 A. L. R. 1361; Cullen v. Schmit, 139 Ohio St. 194, 39 N. E. 2d 146; Weston's Adm'x. v. Hospital of St. Vincent of Paul, 131 Va. 587, 107 S. E. 785, 23 A. L. R. 907; Bruce v. Young Men's Christian Assn., 51 Nev. 372, 277 P. 798; Bishop Randall Hospital v. Hartley, 24 Wyo. 408, 160 P. 385, Ann. Cas. 1918E 1172.

While the basis upon which the various courts rest their decisions vary, fundamentally there seem to be five principles on which they rest.

One is the trust fund theory, that is, that the funds and property of these institutions are held in trust and cannot be diverted to purposes other than those designated in the trust. This theory is defined in 10 Am. Jur., Charities, § 146, p. 695, as follows: "The trust fund doctrine in brief is that a trust fund cannot be made liable for breaches of trust by the trustees. The rationale of the doctrine as applied to charitable insti-

tutions, as a basis of immunity from suit, is that if the charity or trust fund could be used to compensate injured parties for the negligence of the agents or servants of the organization, the fund would be diverted to purposes never intended by the donor, and the charitable purposes of the creators or founders frustrated. The policy underlying this theory reduced to its essence, seems to be that the preservation of charitable trust funds is more desirable than a right to compensation from such funds for an injury inflicted by the operation of the charity." See, also, Dille v. St. Luke's Hospital, 355 Mo. 436, 196 S. W. 2d 615; Crossett Health Center v. Croswell, *supra;* Gregory v. Salem General Hospital, *supra;* Bond v. Pittsburg, *supra.*

Another theory is public policy, that is, to allow recovery would be against public policy. This theory is defined in 10 Am. Jur., Charities, § 147, p. 697, as follows: "Another closely allied theory to the trust fund theory is one which denies recovery to recipients of a charity upon broad grounds of public policy, holding that inasmuch as such institutions are inspired and supported by benevolence and devote their assets and energies to the relief of the destitute, sick, and needy, the common welfare requires that they should be encouraged in every way and held exempt from liability for tort; and that to do otherwise would operate to discourage the charitably inclined, dissipate the assets of such institutions in damage suits, and ultimately, perhaps, destroy them." See, also, Jurjevich v. Hotel Dieu, *supra;* Dille v. St. Luke's Hospital, *supra;* Jones v. St. Mary's Roman Catholic Church, 7 N. J. 533, 82 A. 2d 187; Hearns v. Waterbury Hospital, *supra;* Rafferzeder v. Raleigh Fitkin-Paul Morgan Mem. Hospital, *supra;* Gregory v. Salem General Hospital, *supra;* Caughman v. Columbia Y.M.C.A., *supra;* Weston's Adm'x. v. Hospital of St. Vincent of Paul, *supra;* Southern Methodist University v. Clayton, 142 Tex. 179, 176 S. W. 2d 749; Morrison v. Henke, 165 Wis. 166, 160 N. W. 173; Cohen

v. General Hospital Society, 113 Conn. 188, 154 A. 435.

"Another reason put forward for not holding a corporation liable in any case for the negligence of its servants is that such corporations do not come within the main reason for the rule of public policy which supports the doctrine of respondeat superior, because they derive no benefit from what their servants do, in the sense of that personal and private gain which is the real reason for the rule." 10 Am. Jur., Charities, § 150, p. 699. See, also, Crossett Health Center v. Croswell, *supra;* Taylor v. Protestant Hospital Assn., 85 Ohio St. 90, 96 N. E. 1089, 39 L. R. A. N. S. 427; Hoke v. Glenn, 167 N. C. 594, 83 S. E. 807, Ann. Cas. 1916E 250; Southern Methodist University v. Clayton, *supra;* Vermillion v. Woman's College of Due West, 104 S. C. 197, 88 S. E. 649; Morrison v. Henke, *supra;* Schau v. Morgan, 241 Wis. 334, 6 N. W. 2d 212.

Another basis is that of implied waiver. This is defined in 10 Am. Jur., Charities, § 145, p. 694, as follows: "The theory, or one of the theories, favored by some of the cases as a basis for the general immunity of charitable organizations from suit is implied waiver by acceptance of benefits, on the ground that a person who accepts the benefit of a private or public charity enters into a relationship which exempts his benefactor from liability for the negligence of his servants in administering the charity, if the benefactor has used due care in selecting those servants. In such cases there is an assumption of risk by the person who seeks and receives the services of a public charity." See, also, Farrigan v. Pevear, 193 Mass. 147, 78 N. E. 855, 118 Am. S. R. 484, 7 L. R. A. N. S. 481; Hospital of St. Vincent of Paul v. Thompson, 116 Va. 101, 81 S. E. 13, 51 L. R. A. N. S. 1025; Downes v. Harper Hospital, 101 Mich. 555, 60 N. W. 42, 45 Am. S. R. 427, 25 L. R. A. 602; Wilcox v. Idaho Falls Latter Day Saints Hospital, 59 Idaho 350, 82 P. 2d 849; St. Vincent's Hospital v. Stine, *supra;* Bruce v. Young Men's Christian Assn., *supra.*

"In a few cases charitable organizations, principally hospitals, have been held to be immune from liability to recipients of the charity on the basis that they are performing a public function and aid in the performance of a public or quasi-public duty." 10 Am. Jur., Charities, § 148, p. 698. See, also, Schau v. Morgan, *supra*.

We realize there are other states that have adopted a total liability rule. See, Rickbeil v. Grafton Deaconess Hospital, 74 N. D. 525, 23 N. W. 2d 247, 166 A. L. R. 99; Foster v. Roman Catholic Diocese of Vt., 116 Vt. 124, 70 A. 2d 230, 25 A. L. R. 2d 1; Durney v. St. Francis Hospital, 46 Del. 350, 83 A. 2d 753; Haynes v. Presbyterian Hospital Assn., 241 Iowa 1269, 45 N. W. 2d 151; Noel v. Menniger Foundation, 175 Kan. 751, 267 P. 2d 934; Pierce v. Yakima Valley Mem. Hospital Assn., 43 Wash. 2d 162, 260 P. 2d 765; Ray v. Tucson Medical Center, 72 Ariz. 22, 230 P. 2d 220; Geiger v. Simpson Methodist-Episcopal Church, 174 Minn. 389, 219 N. W. 463, 62 A. L. R. 716; Tucker v. Mobile Infirmary Assn., 191 Ala. 572, 68 So. 4, L. R. A. 1915D 1167; Nicholson v. Good Samaritan Hospital, 145 Fla. 360, 199 So. 344, 133 A. L. R. 809; Gable v. Salvation Army, 186 Okla. 687, 100 P. 2d 244.

Appellant calls our attention to the fact that the immunity doctrine in this country was, in its inception, to some extent based upon the supposed authority of English decisions which had been previously repudiated in England and were never subsequently followed there. See, President and Directors of Georgetown College v. Hughes, 130 F. 2d 810; McDonald v. Massachusetts General Hospital, 120 Mass. 432, 21 Am. R. 529; Perry v. House of Refuge, 63 Md. 20, 52 Am. R. 495. If the reasons for the rule are sound then of course the mere fact that the English courts failed to adhere to their earlier decisions in regard thereto would be no reason for our now abandoning it.

Appellant calls our attention to Article I, section 13, of the Constitution of the State of Nebraska which provides: "All courts shall be open, and every person, for

any injury done him in his lands, goods, person or reputation, shall have a remedy by due course of law, and justice administered without denial or delay."

This provision of the Constitution does not create any new rights but is merely a declaration of a general fundamental principle. It is a primary duty of the courts to safeguard this declaration of right and remedy but where no right of action is given or remedy exists, under either the common law or some statute, this constitutional provision creates none. See, Goddard v. City of Lincoln, 69 Neb. 594, 96 N. W. 273; 16 C. J. S., Constitutional Law, § 709, p. 1495; 11 Am. Jur., Constitutional Law, § 326, p. 1124; Scholberg v. Itnyre, 264 Wis. 211, 58 N. W. 2d 698; Kreuger v. Schmiechen, *supra;* Simons v. Kidd, 73 S. D. 41, 38 N. W. 2d 883.

As stated in 11 Am. Jur., Constitutional Law, § 326, p. 1125: "It is a primary duty of the courts to safeguard the declaration of right and remedy guaranteed by a constitutional provision insuring a remedy for all injuries, but such a provision is not violated solely because the granting of a remedy rests in the sound discretion of a court."

"Courts of equity exercise extensive supervisory jurisdiction over charitable trusts to protect them and enforce their execution. * * *." Reils v. Nicholas, 137 Neb. 19, 287 N. W. 853.

"Charitable trusts are special favorites of courts of equity which will preserve and enforce them if possible under the rules of law." Hobbs v. Board of Education of Northern Baptist Convention, 126 Neb. 416, 253 N. W. 627. See, also, Matteson v. Creighton University, 105 Neb. 219, 179 N. W. 1009; Horton v. Tabitha Home, 95 Neb. 491, 145 N. W. 1023, 51 L. R. A. N. S. 161, Ann. Cas. 1915D 1139.

Not only are charitable trusts special favorites of courts of equity but the people of our state, speaking through their Constitution, have recognized the desirability of aiding such institutions by granting to the

Legislature the right of exempting from taxation property owned and used exclusively by such institutions for charitable purpose. See Article VIII, section 2, Constitution of the State of Nebraska, which provides, insofar as here material, as follows: "The Legislature by general law may exempt * * * property owned and used exclusively for educational, religious, charitable * * * purposes, when such property is not owned or used for financial gain or profit to either the owner or user."

The Legislature has exercised this right by providing as follows: "The following property shall be exempt from taxes: * * * (3) Property owned and used exclusively for educational, religious, charitable * * * purposes, when such property is not owned or used for financial gain or profit to either the owner or user; * * *." § 77-202, R. R. S. 1943.

We applied this exemption in the following situation: "The Franciscan Sisters, a religious society, founded the hospital and hold title to its property. The Sisters of St. Francis of the Perpetual Adoration have charge of the institution. The general purpose of the sacred order to which these Sisters belong is to nurse the sick and take care of orphans. Twenty-six Sisters engaged in their life work are caring for the sick at St. Elizabeth Hospital. In devoting themselves to it they are prompted by the love of God. They are bound by a vow of poverty. Property owned by them is used for the purposes to which they have dedicated their lives. Beyond food, clothing and shelter they receive nothing for their services. No individual, society or corporation received any pecuniary profit from hospital property, funds or earnings. Surplus and donations are used to enlarge buildings and to improve hospital facilities, equipment and service. The institution is open alike to charity patients and others without regard to race or religious beliefs. Reasonable compensation is required from those who are able to pay it. Only a small percentage of

those who seek rooms, food and hospital care, however, can be considered charity patients, but this does not change the charitable purpose for which the property as a whole is used, where no one receives any pecuniary profit from any source. Part of the burdens of government in caring for the poor is borne by the hospital. Charitable gifts and gratuitous services are contributed to the welfare of society. There are therefore reasons for immunity from taxation. The better rule, one sanctioned by precedent, is that the property in controversy is used exclusively for religious and charitable purposes within the meaning of the constitutional and statutory provisions relating to exemptions." St. Elizabeth Hospital v. Lancaster County, 109 Neb. 104, 189 N. W. 981.

It seems to us this declaration of policy makes it of prime importance to the public that the purpose of charitable institutions shall be carried out by protecting them and fostering the purposes for which created.

As stated in Vermillion v. Woman's College of Due West, *supra*: "The State is likewise most deeply interested in the preservation of public charities. Questions of public policy must be determined upon consideration of what on the whole will best promote the general welfare."

And in Caughman v. Columbia Y.M.C.A., *supra*: "* * * The principle is that, in organized society, the rights of the individual must, in some instances, be subordinated to the public good. It is better for the individual to suffer injury without compensation than for the public to be deprived of the benefit of the charity. The law has always favored and fostered public charities in ways too numerous to mention, because they are most valuable adjuncts of the state in the promotion of many of the purposes for which the state itself exists.' (Vermillion v. Woman's College of Due West, 104 S. C. 197, 88 S. E. 649.)"

In Horton v. Tabitha Home, *supra*, we quoted the

following from Fordyce v. Woman's Christian Nat. Library Assn., 79 Ark. 550, 7 L. R. A. N. S. 490: "'* * * It is of primary importance to the public that the trust shall be perpetuated. The trustees of the corporation are usually unsalaried agents, devoting their time and labor to the use and benefit of the public. For their own wrongs and misdeeds they are personally answerable, just as are the physicians and the attendants in a hospital. If the doctrine of respondeat superior is applied to them, it follows that, along with their other powers, they possess an implied power to destroy, by a wilful violation of their duties, by collusion, or by negligence, the public interests that they are selected to preserve.'"

We recognize that in recent years some courts have abandoned a previous declaration of absolute or qualified immunity and adopted the doctrine of liability. See, Haynes v. Presbyterian Hospital Assn., *supra,* 1950; Ray v. Tucson Medical Center, *supra,* 1951; Pierce v. Yakima Valley Mem. Hospital Assn., *supra,* 1953; Noel v. Menninger Foundation, *supra,* 1954.

However, we cannot agree with some of the reasons given by these courts for making such change. These opinions suggest that the hardships and burdens of maintaining charitable organizations that existed in the past have, to a large extent, ceased to exist; that these institutions have, in many instances, grown into enormous businesses handling large funds and managing and owning vast properties, much of which is tax free; that in many instances they are set up by large trusts or foundations, enjoying endowments and resources beyond anything thought of when the matter of immunity was first considered; and that they now have a capacity for absorbing losses which did not exist even a few decades ago.

Such may be the general situation in those states where opinions were adopted using this as a background to justify the change but we do not believe such to be

true in Nebraska when we consider the varied institutions to which this doctrine has application; such as, churches, Y.M.C.A.'s, Y.W.C.A.'s, Salvation Army, Boy Scouts, and other organizations falling within this classification. From our observation we believe most of these organizations still have plenty of hardships and burdens in connection with their efforts to carry out the charitable purposes for which they are organized.

Some of these opinions suggest the thought that private charity has been displaced, to a large degree, by the government, both state and federal. While we recognize that to be true to some degree, particularly in the field of hospitals, we are not willing to say the time has come when it has reached the stage where charitable institutions, organized for such purposes, are no longer needed. We do not think such hospitals are intended to completely take the place of charitable hospitals. The latter's continued operation and maintenance always has been and still should be fostered for the benefit of the public.

As stated in Forrest v. Red Cross Hospital, *supra*: "As we gather the reasoning in the opinions from those jurisdictions that have abandoned this well-rooted and salutary policy, it is based upon the theory that private charity has been displaced by a paternalistic government, if not a welfare state, which furnishes free charitable services to the indigent. However, there is still a school of thought in America which does not believe that private charity is a thing of the past and that all burdens of suffering humanity should be placed in the lap of government, state and federal."

Our re-examination of the question convinces us that our present rule is both correct and logical and we therefore refuse to disturb it.

That other courts, who had previously adopted some form of immunity, have recently come to the same conclusion is evidenced by the following cases: Crossett Health Center v. Croswell, *supra,* 1953; Mastrangelo v.

Maverick Dispensary, *supra,* 1953; Kreuger v. Schmiechen, *supra,* 1954; Rafferzeder v. Raleigh Fitkin-Paul Morgan Mem. Hospital, *supra,* 1954; Williams v. Randolph Hospital, *supra,* 1953; Bond v. Pittsburg, *supra,* 1951; Felan v. Lucey, *supra,* 1953; Meade v. St. Francis Hospital of Charleston, *supra,* 1953; Baldwin v. St. Peter's Congregation, *supra,* 1953; Forrest v. Red Cross Hospital, *supra,* 1954.

We think, as stated in De Groot v. Edison Institute, 306 Mich. 339, 10 N. W. 2d 907, that: "In this jurisdiction it is well settled that eleemosynary institutions are exempt from such liability as is asserted in the instant case. Such a rule was adopted for the protection of those institutions and should it be desirable to depart from that rule, it should be done by legislative action."

And, as stated in Bond v. Pittsburg, *supra*: "If and when there is to be any change in the doctrine of the immunity of charitable institutions from tort liability, it ought to be effected, not by the courts, but by the legislature, which is, of course, the ultimate tribunal to determine public policy." See, also, Smith v. Congregation of St. Rose, 265 Wis. 393, 61 N. W. 2d 896; Forrest v. Red Cross Hospital, *supra.*

It will be noted that appellant was a paying patient. As to this feature of the case it is stated in 10 Am. Jur., Charities, § 151, p. 700, that: "The fact that patients who are able to pay are required to do so does not deprive a corporation of its eleemosynary character, nor permit a recovery for damages on account of the existence of contract relations. The amounts thus received are not private gain, but contribute to the more effectual accomplishment of the purpose for which the charity is founded."

In Duncan v. Nebraska Sanitarium & Benevolent Assn., *supra,* we said, by quoting from Duncan v. St. Luke's Hospital, 98 N. Y. S. 867, that: "'* * * Nor can we see any reason why there should be any difference

in the rule where the tortious act which caused death is alleged to be a breach of an express contract than where it is alleged to be a breach of an implied contract, or where no contractual relation at all existed.' " See, also, Sibilia v. Paxton Memorial Hospital, *supra.*

That this is the viewpoint of most states that have passed on this question is evidenced by the following: Meade v. St. Francis Hospital of Charleston, *supra;* Williams v. Randolph Hospital, *supra;* Jurjevich v. Hotel Dieu, *supra;* Jones v. St. Mary's Roman Catholic Church, *supra;* Downs v. Harper Hospital, *supra;* Fisher v. Ohio Valley General Hospital Assn. (W. Va.), 73 S. E. 2d 667; Forrest v. Red Cross Hospital, *supra;* Wilcox v. Idaho Falls Latter Day Saints Hospital, *supra;* Bishop Randall Hospital v. Hartley, *supra;* Weston's Adm'x. v. Hospital of St. Vincent of Paul, *supra;* Taylor v. Protestant Hospital Assn., *supra;* Schau v. Morgan, *supra;* St. Vincent's Hospital v. Stine, *supra;* Greatrex v. Evangelical Deaconess Hospital, 261 Mich. 327, 246 N. W. 137, 86 A. L. R. 487.

We agree with what is stated in Williams v. Randolph Hospital, *supra:* "However, our examination of the authorities on the subject discloses numerous well-considered decisions holding that the immunity of charity from tort liability should not be made to depend upon whether or not the patient or patron assumes the obligation to pay for the services rendered to him by charity. This line of decisions represents what we consider to be the decided weight of authority, both in quality of reasoning and in numerical volume."

We recognize there are some authorities to the contrary on this issue, as there are on almost any issue involving the immunity doctrine, but, as stated in Tucker v. Mobile Infirmary Assn., *supra,* which is one of those cases: "As previously stated in this opinion, we recognize that the weight of authority in this country is opposed to the conclusion we have here reached."

Does the fact that appellee carried liability insurance

make the appellee liable to the extent thereof?

10 Am. Jur., Charities, § 152, p. 701, quotes the rule to be: "The fact that a charitable institution carries indemnity insurance indemnifying it from liability to a recipient of its bounty does not create liability, in instances where such charitable organizations are immune from liability."

We have held the fact a party carries liability insurance has no relevancy to the question of negligence. See, Fielding v. Publix Cars, Inc., 130 Neb. 576, 265 N. W. 726, 105 A. L. R. 1306; Bergendahl v. Rabeler, 131 Neb. 538, 268 N. W. 459.

As stated in Stedem v. Jewish Memorial Hospital Assn., 239 Mo. App. 38, 187 S. W. 2d 469: "To sustain plaintiff's contention it would be necessary (1) to rewrite, by construction, the contract of insurance so that it would become a contract between defendant and the insurer for the benefit of a third person, and not an insurance contract at all."

We think the correct rule is stated in Cristini v. Griffin Hospital, 134 Conn. 282, 57 A. 2d 262. It is as follows: "If the charitable institution is not liable for the negligence alleged, it cannot be made liable because it took out insurance which would cover a judgment recovered against it. The fact is irrelevant to the question of liability." See, also, Dille v. St. Luke's Hospital, *supra;* Meade v. St. Francis Hospital of Charleston, *supra;* Schau v. Morgan, *supra;* De Groot v. Edison Institute, *supra;* Fisher v. Ohio Valley General Hospital Assn., *supra;* Woods v. Overlook Hospital Assn., 6 N. J. Super. 47, 69 A. 2d 742; Williams' Adm'x. v. Church Home, 223 Ky. 355, 3 S. W. 2d 753, 62 A. L. R. 721; Enman v. Trustees of Boston University, 270 Mass. 299, 170 N. E. 43; Herndon v. Massey, 217 N. C. 610, 8 S. E. 2d 914.

We recognize that in three states a different rule obtains but that is due to the qualified nature of immunity as expressed by the holdings in these courts.

See, O'Connor v. Boulder Colorado Sanitarium Assn., 105 Colo. 259, 96 P. 2d 835, 133 A. L. R. 819; Moore v. Moyle, 405 Ill. 555, 92 N. E. 2d 81; Anderson v. Armstrong, 180 Tenn. 56, 171 S. W. 2d 401. The rule is announced in Anderson v. Armstrong, *supra,* as follows: "The protection afforded a charitable organization is not immunity from suit in tort, but is one extended to the trust property itself from execution under a judgment in tort."

It is finally suggested that appellee should be held liable because the negligence complained of was the result of administrative neglect in furnishing a defective operating table. Generally a charity has been held immune from liability for negligence chargeable to the charity itself as well as from negligence chargeable to subordinate employees although in some cases a contrary point of view has been adopted.

As stated in Jones v. St. Mary's Roman Catholic Church, *supra:* "Further as to the plaintiffs' suggestion that the immunity rule does not extend to acts or omissions constituting administrative negligence, we are asked thereby to modify the established common law rule in this State. There is no merit in this contention. There can be no logical distinction between the tortfeasors when all act under the charitable corporation. The corporation acts, through its servants or agents, whether they be directors, trustees or instructors. Cf. Fair v. Atlantic City Hospital, 25 N. J. Misc. Rep. 65 (Circuit Court 1946); Roosen v. Peter Bent Brigham Hospital, 235 Mass. 66, 126 N. E. 392 (Mass. Sup. Ct. 1920)."

And in Jurjevich v. Hotel Dieu, *supra,* the court said: "It is apparent that the doctrine of immunity of charitable institutions for the negligent acts of their servants is firmly established in the jurisprudence of this state. Plaintiff's counsel, however, contend that the action of Sister Agatha was not that of an employee of the institution, but of its manager or superintendent. In our opinion there is no difference in principle between the

action of the superintendent and that of her subordinates, so far as the liability of the hospital is concerned."

And in Ettlinger v. Trustees of Randolph-Macon College, 31 F. 2d 869, the court stated what we think is the logical and reasonable answer to this contention. Therein the court said: "Counsel for plaintiff attempt to distinguish the case at bar from the many other cases against charitable institutions, on the ground that the negligence here alleged is not the careless act of a nurse or other employee, but the negligence of the managers of the corporation themselves in failing to maintain the academy building in a safe condition. We do not think, however, that this is a valid distinction. If there had been negligence in the respects claimed, it would have been the negligence of those who were carrying on the charitable work in which the corporation was engaged; and we see no more reason for diverting the funds of the charity on account of their negligence than there would be if the negligence had been that of any minor employee." See, also, Roosen v. Peter Bent Brigham Hospital, 235 Mass. 66, 126 N. E. 392, 14 A. L. R. 563; Gregory v. Salem General Hospital, *supra;* Schau v. Morgan, *supra.*

In view of what we have herein said we have come to the conclusion that the trial court was correct in sustaining appellee's motion for a summary judgment. Its action in doing so is therefore affirmed.

AFFIRMED.

BERNIECE CHEATHAM, APPELLANT, V. BISHOP CLARKSON MEMORIAL HOSPITAL, A CORPORATION, APPELLEE.
70 N. W. 2d 96

Filed April 29, 1955. No. 33700.

Charities. All questions herein raised are fully discussed and disposed of in Muller v. Nebraska Methodist Hospital. *ante* p.

279, 70 N. W. 2d 86, and the principles therein announced are controlling of the issues herein.

APPEAL from the district court for Douglas County: L. ROSS NEWKIRK, JUDGE. *Affirmed.*

Viren, Emmert & Hilmes, Eisenstatt, Seminara & Lay, and *Donald P. Lay,* for appellant.

Kennedy, Holland, De Lacy & Svoboda and *William P. Mueller,* for appellee.

Joseph O. Burger, Edwin Cassem, George N. Mecham, John J. Gross, and *Sam C. Zimmerman,* amici curiae.

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

WENKE, J.

Berniece Cheatham brought this action in the district court for Douglas County against Bishop Clarkson Memorial Hospital, a corporation. The purpose of the action is to recover damages for injuries she claims to have suffered while a patient in a hospital owned and operated by the defendant. The basis for the action is her claim that one of defendant's agents negligently spilled some ether in the bed she was occupying which resulted in the injuries complained of. The trial court sustained defendant's motion for a summary judgment and, from the overruling of her motion for a new trial, plaintiff appealed.

Appellee is a nonprofit corporation organized under the laws of the State of Nebraska for the purpose of engaging in charitable work. Its principal place of business is in Omaha, Douglas County, Nebraska, where it is engaged in operating and maintaining a hospital to carry out its charitable purposes. On October 29, 1953, appellant entered this hospital as a patient for the purpose of major surgery. On the same day, while appellant was undressed and occupying a bed in the hospital, one of the defendant's agents, while preparing her for

surgery, spilled ether in the bed she was then occupying. The spilled ether was permitted to come in contact with her body and caused severe, deep, and serious burns on both of her buttocks. These burns caused severe pain and resulted in permanent injuries.

The foregoing facts are admitted by the pleadings or are admitted by the motion for a summary judgment for the purpose of ruling thereon.

All issues herein raised have been fully discussed and disposed of in Muller v. Nebraska Methodist Hospital, *ante* p. 279, 70 N. W. 2d 86, and decided contrary to appellant's contentions. In view thereof the action of the lower court is affirmed.

AFFIRMED.

GERTRUDE M. PARKS, APPELLANT, V. HOLY ANGELS CHURCH, INC., A CORPORATION, APPELLEE.
70 N. W. 2d 97

Filed April 29, 1955 No. 33717.

Charities. All questions herein raised are fully discussed and disposed of in Muller v. Nebraska Methodist Hospital, *ante* p. 279, 70 N. W. 2d 86, and the principles therein announced are controlling of the issues herein.

APPEAL from the district court for Douglas County: CARROLL O. STAUFFER, JUDGE. *Affirmed.*

Ben F. Shrier and *Hy S. Shrier,* for appellant.

Gross, Welch, Vinardi & Kauffman and Clancy L. Hollister, for appellee.

Joseph O. Burger, Edwin Cassem, George N. Mecham, John J. Gross, and *Sam C. Zimmerman,* amici curiae.

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

WENKE, J.

Gertrude M. Parks brought this action in the district court for Douglas County against Holy Angels Church, Incorporated, a corporation. The purpose of the action is to recover damages for injuries she claims to have suffered while attending Mass in a church owned and operated by the defendant at 2716 Fowler Avenue, Omaha, Nebraska. The basis for the action is her claim that one of defendant's agents negligently permitted an excessive amount of liquid wax to remain on the floor of the church which caused her to fall and resulted in the injuries herein complained of. Defendant's motion to dismiss was sustained and plaintiff has appealed from the order dismissing her action.

Appellant's petition, as amended, alleges appellee is a nonprofit corporation organized under the laws of the State of Nebraska for the purpose of engaging in religious activities; that its principal place of business is located at 2716 Fowler Avenue in Omaha, Douglas County, Nebraska, where it is engaged in operating and maintaining a church to carry out its religious purposes; that on Sunday, May 13, 1951, appellant, at appellee's invitation, entered this church for the purpose of attending 6 a.m. Mass; that after entering the church appellant turned to her right and, after taking several steps, slipped and fell to the floor; that her fall was due to the slippery condition of the floor, which slippery condition resulted from some agent, servant, or employee of appellant applying and leaving an excess of liquid wax thereon; and that as a result of her fall appellant sustained serious, painful, and permanent injuries to her right hand and lower back area.

The foregoing allegations, in view of the nature of the order from which this appeal was taken, must be accepted as true.

All issues herein raised, and necessary for a determination of the appeal, have been fully discussed and disposed of in Muller v. Nebraska Methodist Hospital,

ante p. 279, 70 N. W. 2d 86, and decided contrary to appellant's contentions. In view thereof the action of the lower court is affirmed.

AFFIRMED.

JOHN MCNEIL ET AL., APPELLEES, V. CITY OF OMAHA, A MUNICIPAL CORPORATION, ET AL., APPELLANTS.
70 N. W. 2d 83

Filed April 29, 1955. No. 33695.

Municipal Corporations: Fixtures. The installation of condensation lines as a necessary part of air conditioning units, under the circumstances described in the opinion, is not work requiring a plumbing permit under the cited ordinances of the city of Omaha.

APPEAL from the district court for Douglas County: JAMES M. PATTON, JUDGE. *Affirmed in part, and in part reversed and remanded with directions.*

Edward F. Fogarty, Herbert M. Fitle, Bernard E. Vinardi, and *Neal H. Hilmes,* for appellants.

Robert E. O'Connor and *William F. Ryan,* for appellees.

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

SIMMONS, C. J.

In this action plaintiffs sought a declaratory judgment that, in performing certain work in the installation of heating and air conditioning units in a building in Omaha, they were not engaged in plumbing within the meaning of certain ordinances of the city, or in the alternative that the ordinances as applied to the installation were unconstitutional, and sought also an injunction against the enforcing of said ordinances. Issues were made and trial was had, resulting in a decree in favor of plaintiffs making extended findings of fact, and de-

creeing extensively upon the findings. An injunction was not granted. Defendants appeal. Plaintiffs cross-appeal as to the denial of the injunction.

We affirm the decree as to the basic issue involved and direct on remand that a decree be entered in accord with our holding herein. We deny an injunction.

The facts are not in serious dispute. A combination air conditioning and heating system was being installed in the Methodist Hospital in Omaha. This system consisted of two large units installed in the basement. One was for heating and one was for cooling water. Pipes ran from these large units to individual units placed variously about the building, and returned to the basement unit. The small unit served to heat or to cool air, depending on whether the coil in the small unit was open to the heating or cooling unit in the basement.

When used for cooling purposes, moisture from the air collects and falls from the cooling unit. A drip pan to catch that moisture is a part of the unit. To the drip pan of each unit is fitted a pipe which leads from the unit downward. This pipe is joined with other like-purpose pipes from other units and ultimately ends immediately over, but not physically attached to, a sewer drain in the basement. These pipes running from the drip pans to the basement are described as condensation lines.

The contractor took out the requisite permits for the installation of the units "where they hook directly to city water." This work was being installed by steam fitters. He was then notified that he was required to have a plumbing permit also, on the theory that the installation of the condensation lines was plumbing work. Under either threats of arrest or arrest, he took out the required permits. Thereafter steam fitters continued the installation. The installation of these condensation lines has been considered at all times to be a part of the work of the installation of the heating and cooling unit. These condensation lines were installed

in a good and workmanlike manner, and passed the required inspections. The city did not require plumbing permits for the installation of the heating and cooling unit. The condensation line is an essential part of the unit. As stated by one witness, it is a "convenient necessity." Installations of this kind have been repeatedly installed in the city of Omaha with the permits originally secured here and without the special plumbing permits that were required in this instance.

The city maintaining its position that plumbing permits were required, plaintiffs brought this action to secure an authoritative answer.

The initial question presented by this litigation is whether or not the installation of the condensation lines is work which requires a plumbing permit from the city.

The city relies on three of its rules governing plumbing. Omaha Municipal Code, Ordinance No. 14924, as amended by Ordinances Nos. 15176 and 15253. Other rules were not furnished the trial court and are not here.

Rule 49 begins, "Waste pipe for refrigerators or other receptacles in which provisions are stored * * *." The next reference is to "Waste pipe for refrigerators * * *," and finally "Special plumbing permits must be procured for refrigerators, the same as for plumbing fixtures."

It is obvious that this rule refers to refrigerators in which provisions are stored, and obviously also that the units here involved are not such refrigerators.

However, if this installation comes within the provisions of Rule 49, then it would seem that Rule 56 approves it "without express permission from the Plumbing Inspector." That rule provides: "No indirect connection of any plumbing fixtures will be allowed except refrigerators as provided in Rule No. 49, without express permission from the Plumbing Inspector."

Rule 63 provides: "A plumbing fixture is any re-

ceptacle, appurtenance, or device or appliance connected to either a water supply or drainage system, or both, intended to receive, to discharge, or to receive and discharge water, liquid or water carried waste into an approved drainage system." This definition of a plumbing fixture is broad enough and indefinite enough to include these condensation pipes. It is likewise broad enough and indefinite enough to include the heating and cooling units, for they also are connected to a water supply system and are intended to receive water. It does not appear that the city has ever construed, and does not now construe, Rule 63 to cover these units of which, by undisputed evidence, the condensation lines are a necessary part. The practical construction of the city, in accord with the construction of the industry, must be considered here.

In City of Pittsburg v. Kane, 141 Pa. Super. 44, 14 A. 2d 887, complaint was made that the two defendants had installed waste pipes to air conditioning units; that such installation was plumbing work; and that the defendants were not plumbers.

After analyzing the extensive ordinances involved, the court held: "The record shows that the air conditioning plant installed by these defendants complied with the regulations, etc. prescribed for Safe and Refrigerator Waste-pipes and for special waste-pipes from air conditioning units. The waste-pipes were not connected directly with any part of the plumbing system or with the house or building drainage system. They discharged over an open, water supplied, properly trapped drain in the cellar.

"The real point involved was whether these defendants, who installed the air conditioning unit could connect it with a pipe which would carry away the condensed moisture that was collected from the humid air in the course of its conditioning and conduct it so that it would drip or empty over and into an open sink or drain which had been properly installed by a plumber.

Admittedly they could have made no connection with any drainage system, nor did they do so. Their work was no more plumbing than the man who takes the 'portable pan' into which water drips from an ice refrigerator and pours it into a sink is engaged in plumbing."

In accord with the above reasoning and decision, we hold that the installation of the condensation lines as a necessary part of the heating and cooling units was not the installation of plumbing and did not require a plumbing permit.

The trial court so found and decreed. We affirm that part of the declaratory judgment. However, the court went further and found and decreed as to several other matters which either are not within the issues or are not necessary to a decision of the basic issue presented.

We reverse the judgment as to other holdings and findings and direct a decree upon remand, limited to the decision herein made.

Plaintiffs cross-appeal and assign error in that the trial court refused an injunction.

Our decision in Omaha Nat. Bank v. Heintz, 159 Neb. 520, 67 N. W. 2d 753, is applicable here. We there held: "We do not deem it necessary to enter such an order. Should such be necessary hereafter the way is open under the provisions of section 25-21,156, R. R. S. 1943, for the plaintiff to apply for such an order."

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

JOHN HAMPTON, APPELLEE, V. HENRY C. STRUVE, APPELLANT.
70 N. W. 2d 74

Filed April 29, 1955. No. 33703.

1. **Evidence.** It is permissible to admit in evidence an unsigned

written instrument made by a third party at the solicitation, direction, and with the assent of the parties to the case, and to permit it to be considered by the jury if there is evidence which tends to show that the instrument contains terms of an oral contract which is an issue in or the subject of the suit.

2. **Landlord and Tenant.** A lease of land is a hiring or renting of it for a certain time upon a named consideration.
3. ———. A tenant of land rents it and pays for the use of it with money or a part of the crop or the equivalent thereof.
4. **Crops.** A cropper is a hired hand who farms land and is paid for his labor with a share of the crops he produces and harvests. A cropper does not have exclusive possession of the land and has no estate in the crop until he is assigned his share thereof by the owner of the land.
5. **Landlord and Tenant: Crops.** Whether a particular instrument is a lease of land or a cropping agreement is resolved by the rules of construction and the distinction between a cropper and a tenant. The most important question to be determined in arriving at the intention of the parties and the consequential relation created is which party was entitled to possession of the land. If it was the intention that the landowner part with, and the other party have, the exclusive possession of the land for the purpose of cultivation, as a general rule the transaction will be considered a lease. The use of technical words usually found in a lease tends to show an intention to create the relation of landlord and tenant.
6. ———: ———. Whether the relation of parties to a contract is that of landlord and tenant or landowner and cropper depends upon the intention of the parties as determined from the entire contract.
7. **Contracts: Trial.** When an agreement is oral and evidence as to the intention of the parties is conflicting the question of the intention of the parties is for determination by the jury.
8. **Witnesses: Appeal and Error.** The reception of evidence collateral to any issue in the case intended to affect the credibility of a witness is usually within the discretion of the trial court, and the ruling concerning it is not reason for reversal of the judgment in the case in the absence of an abuse of discretion.

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

W. O. Baldwin and *Van Pelt, Marti & O'Gara,* for appellant.

George F. Johnson, Jr., for appellee.

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

BOSLAUGH, J.

This is an action for the recovery of money. Appellee alleged two causes of action against appellant. The first was for the unpaid balance of an indebtedness evidenced by a written memorandum executed by appellant. The second was founded on the claim of appellee that by an agreement between him and appellant the latter was to furnish all machinery, power, and seed required for the efficient operation of land owned by appellant; that appellee would conduct the farming operations and care for the livestock furnished thereon by appellant; that appellee would deliver to market for appellant two-thirds of the grain raised and a like amount of the hay and feed produced on the land; that appellee should have one-third of the increase of the livestock; that the agreement was in effect and the obligations thereof were observed and performed by the parties for 4 years prior to 1951; that appellant refused and failed to perform any of his obligations as provided by the agreement for the year 1951; that appellee in order to perform his duties provided by the agreement was compelled to and he did incur and expend the reasonable cost of securing necessary seed, tractor fuel, use of machinery, and baling hay during the year 1951 in the sum of $1,267; that the market value of one-third of the corn belonging to appellee produced that year on a part of the land which was converted and appropriated by appellant was $600; and that the total amount due appellee from appellant on the two causes of action was $2,544.48.

Appellant denied the claims of appellee except he admitted that there was an agreement made by them late in the year 1946 for the conduct of farming operations and stock raising on land of appellant; that the

parties performed the agreement until late in the year 1950; that it was then by mutual agreement of the parties terminated and the personal property and livestock involved in the operations of the parties were sold; that there was an account stated between them on about January 15, 1951, and it was agreed that appellant was indebteded to appellee in the amount of $936.86; and that the account stated was a complete settlement of all matters because of the agreement between them except that 110 acres of wheat then growing on land of appellant, planted by appellee in the fall of 1950, should be harvested by appellee at his expense and one-third of the proceeds thereof and the sum of $247.50 the value of the seed used in planting the wheat should be paid to appellant by appellee. Appellant by cross-action claimed the right of recovery of $2,044.64 from appellee on account of the following: His failure to harvest and his failure to permit appellant to harvest in 1951 the 110 acres of wheat mentioned above; the damage to machinery of appellant by appellee; the removal and appropriation by him of an electric motor and a water heater from the property of appellant; the value of the pasture of cattle by appellee on the land of appellant for 6 months of 1951; and the reasonable rental value of premises of appellant occupied and used by appellee after the agreement of the parties was terminated.

The jury awarded appellee a verdict on each of his causes of action, a judgment was entered thereon, the motion of appellant for a new trial was denied, and this appeal is an attempt to defeat the judgment.

The record establishes that appellant was liable to appellee for the indebtedness pleaded by him in his first cause of action.

Appellant argues that the trial court should have directed a verdict for him at the close of the case-in-chief of appellee as to the second cause of action alleged because the evidence established that the rela-

tionship between the parties was that of master and servant and not that of landlord and tenant. Specifically the essence of this contention is that the oral contract between the parties was not a lease of land but was a cropping agreement.

The evidence produced by appellee concerning the agreement between him and appellant was in substance as follows: In the first part of December 1946, appellant and appellee, who resided in Mullen, had a conversation about appellant renting his 480-acre farm in Nuckolls County to appellee. He consented to accompany appellant to inspect the land the following Sunday. They did this according to the arrangement. Later about December 15, 1946, appellant and appellee met in Deshler and went to the bank to draw up a lease. Appellee was there introduced to a man by the name of Ude in his office in the bank by appellant and he told Ude that "* * * he wanted him to draw up a lease with him and me." Appellant told Ude what to place in the lease, appellee was present and heard what was said, and Ude prepared it. The persons present while the lease was drawn up were appellant, appellee, and Ude. After the lease was completed by Ude the appellant told appellee that he could take it to his home and he and his wife could examine it to determine if it was satisfactory to them. This was done and appellee and his wife found the lease satisfactory except the date of the termination of the term was stated as December 15, 1947, and they desired that it should be March 1, 1948. Appellee saw and talked to appellant about that a few days later and appellant said it was agreeable to him to change the termination of the term of the lease to March 1, 1948, and that appellee might move on the land as soon as he desired and take care of the cattle that were there. Appellee occupied the land commencing with the last Sunday before Christmas in 1946. He was asked if anyone else had control of the land and his answer was in the negative. He occupied

and used the land until 1952. He entered into possession of the land because of and relying upon the oral agreement between him and appellant as stated in and represented by the lease prepared by Ude, and as modified by the agreement concerning the change when the term should end. He performed the obligations imposed on him by the agreement for each of the years 1947 to 1951, inclusive. After the wheat was harvested from 80 acres of land in Nuckolls County owned by appellant which was not included in the original agreement of the parties made about December 15, 1946, appellant asked appellee if he would take it and farm it like the other land. Appellee consented to do so and did farm and handle it the same as the other land until 1952. The lease dated December 15, 1946, prepared by Ude, was offered and received in evidence. It was not signed by either of the parties because at the time appellee reported to appellant that it was satisfactory except the end of the term should be March 1, 1948, and appellant consented to this change therein, appellant said he was pressed for time concerning other matters and was leaving town that day and for this reason the lease was not signed. There was no agreement that appellant could control what crops should be planted or the manner of performing the operations on the land.

The form of lease prepared by Ude bearing date of December 15, 1946, at the request and in the presence of the parties and upon the advice of appellant given to Ude as to what it should contain was under the circumstances of this case properly received in evidence. A writing relating to the terms of a parol agreement made at the time by a third person under circumstances showing assent thereto by the parties or otherwise made under circumstances as to indicate mutual assent although not in itself a written contract may be competent as substantive evidence tending to establish, in connection with other evidence, the terms of the agreement.

In Hines v. Roberts Bros., 117 Kan. 589, 232 P. 1050, it is said: "It is not error to submit in evidence an unsigned written instrument, nor to permit that instrument to be taken to the jury room, where there is evidence which tends to show that the instrument contains the terms of an oral contract which is the subject of the action." See, also, Nickolls v. Barnes, 39 Neb. 103, 57 N. W. 990; Carstens v. McDonald, 38 Neb. 858, 57 N. W. 757; Lomazzo v. King, 137 Conn. 434, 78 A. 2d 538; Squires v. Kilgore, 92 Fla. 1001, 111 So. 113; Smulcer v. Rogers (Tex. Civ. App.), 236 S. W. 2d 172; Hayward v. Morrison, 194 Or. 335, 241 P. 2d 888; Lanier v. Council, 179 Ga. 568, 176 S. E. 614; 32 C. J. S., Evidence, § 697, p. 591.

A lease of real estate is a hiring or renting of it for a certain time for a named consideration. A tenant rents the land and pays for it either in money or a part of the crops or the equivalent. A cropper is a hired hand who farms the land and is paid for his labor with a share of the crops he works to produce and harvest. The crop belongs to the owner of the land and he pays for the labor of producing it with a part of the crop. A cropper does not have the right of exclusive possession of the land and has no estate in the crop until he is assigned his share thereof by the owner of the land. Hansen v. Hansen, 88 Neb. 517, 129 N. W. 982; Leffelman v. Matschullat, 129 Neb. 884, 263 N. W. 383; Wattles v. South Omaha Ice & Coal Co., 50 Neb. 251, 69 N. W. 785, 61 Am. S. R. 554, 36 L. R. A. 424.

There is much confusion and not a little conflict in the decided cases as to the precise relation of the parties created by a contract of the character of the one involved in this case. It is settled however that a contract to cultivate land on shares may be a lease even though the parties are owners in common of the crop. It has been frequently decided that if the party who does the work and produces the crop has exclusive possession of the land this is conclusive of the relation of

landlord and tenant. Provisions for a fixed term, to give up possession at the end of the term, against underletting or subletting, to keep improvements on the premises in repair, and the like are important indications of an intention to create the status of landlord and tenant. The question of whether the relation is that of landlord and tenant or owner and cropper is primarily for the consideration and determination of the jury if the evidence is inconclusive. The solution depends upon determination of the true intention of the parties.

The instrument prepared by Ude for and at the direction of the parties to this case prominently characterizes itself as a farm lease. It recites that appellant has leased the described property to appellee for a definite term and that he will pay to appellant rent as specified; that the rental share of all crops, hay, and feed will be delivered by appellee to market (not on the premises) for appellant; that appellee will protect all improvements on the premises during the term; that he will promptly at the expiration of the term granted yield up possession of the premises to appellant in as good repair as they were or may be put at any time during the term; that appellee will keep the premises free from weeds and will keep the well, pump, and windmill in good repair; that he will not sublet or re-lease any part of the premises; and that appellant may go upon the premises for specifically limited purposes during the term.

In 15 Am. Jur., Crops, § 49, p. 239, the author says: "Whether a particular instrument is a lease of land or a cropping agreement is resolved by the rules of construction and the distinction between a cropper and a tenant. The most important question to be answered in arriving at the intention of the parties and the consequential relation created is which party was entitled to possession of the land. If it was the intention that the landowner part with, and the other party have, the exclusive possession of the land for the purpose of cultivation, as a general rule the transaction will be con-

sidered a lease and the relation between the parties that of landlord and tenant. * * * The use of technical words usually found in leases tends to show an intention to create the relation of landlord and tenant * * *."

In Harrelson v. Miller & Lux Inc., 182 Cal. 408, 188 P. 800, it is said: "In reaching this conclusion we have not attached controlling importance to the fact that the instrument so characterizes itself (as a lease). But, considered with the general tenor of the instrument, the fact that the parties called it a lease is some evidence that they intended it to operate as such. While retention of possession by the owner is one indication of a cropping agreement, the so-called lease repeatedly treated possession as transferred to Crow, right of re-entry being reserved to the owner for certain limited purposes only. * * * If the arrangement was intended to make Crow a mere cropper, there would have been no necessity for the reservation by the plaintiff of such rights, for under a mere cropping agreement plaintiff would have had the right at any time to enter and occupy the land subject only to the rights of Crow with respect to the crops. It further appears that Crow was required to keep the premises in repair at his own expense. Moreover, a definite term of three years was created. * * * These provisions of the agreement, taken together with the description of the instrument as a lease by the parties themselves, indicate, we think, an intention to execute a lease."

In Davis v. Burton, 126 Mont. 137, 246 P. 2d 236, the court said: "The agreement also provided that parties of the second part 'will deliver up to first parties possession of said leased premises at the expiration of this lease.' This clearly contemplated that defendants should have possession during the term of the agreement. It is a circumstance indicating the intention to create the relation of landlord and tenant. * * * Like other contracts, whether the relation of the parties is that of landlord and tenant or landowner and cropper turns upon the

intention of the parties as gathered from the entire contract; the language in which it is cast and the circumstances surrounding its execution. * * * Here the parties to the contract treated it as a lease and not a cropping contract by repeatedly using the word 'lease' in the agreement."

See, also, Larson v. Archer-Daniels-Midland Co., Inc., 226 Minn. 315, 32 N. W. 2d 649; Cry v. J. W. Bass Hardware (Tex. Civ. App.), 273 S. W. 347; Bank of Pendleton v. Martin, 118 S. C. 74, 110 S. E. 76; Graniteville Mfg. Co. v. Renew, 113 S. C. 171, 102 S. E. 18; Presby v. Benjamin, 169 N. Y. 377, 62 N. E. 430, 57 L. R. A. 317; State ex rel. Gillilian v. Municipal Court, 123 Minn. 377, 143 N. W. 978; 52 C. J. S., Landlord and Tenant, § 797, p. 719.

The agreement involved in this case was oral. The evidence as to the intention of the parties was inconclusive. The determination of what agreement the parties entered into was properly submitted to the jury by the trial court. In 52 C. J. S., Landlord and Tenant, § 797, p. 721, it is said: "When the agreement is oral and the evidence as to the intention of the parties is conflicting, the question of intention is for the jury * * *." See, also, Bank of Pendleton v. Martin, *supra*.

The manner of the submission of this issue to the jury is not challenged. The verdict has the support of the most favorable consideration of the evidence and the reasonable inferences deduced therefrom, and the verdict may not be disturbed on this appeal unless it is clearly wrong. Grant v. Williams, 158 Neb. 107, 62 N. W. 2d 532. The record will not permit such a conclusion in this case.

The proof made by appellee was appropriate if accepted, as it was, by the jury to sustain the recovery awarded appellee by the verdict. Appellant does not contest the sufficiency of the evidence to justify the amount of the verdict.

Counsel for appellant inquired of appellee during his

cross-examination as follows: "Did you claim, Mr. Hampton, early in March 1951 that you had rights as a tenant on the premises involved in this lawsuit by reason of an oral agreement between you and Mr. Struve in October 1950?" The court sustained an objection of counsel for appellee to the question. Appellant claims this was prejudicial error. The purpose of the inquiry is indicated by a statement of appellant that "Had it been established, by his (appellee's) own testimony, that he had, at another time, claimed the rights now asserted as arising from an entirely different agreement, his veracity would have been subject to serious question." This inquiry was intended as impeachment. It was collateral to any issue in the case. Griffith v. State, 157 Neb. 448, 59 N. W. 2d 701. The reception of an answer to the question or a rejection of it was within the discretion of the court. There was no error in the ruling unless the court abused its discretion. The record does not show a basis for a claim of abuse of discretion. The reception of evidence collateral to any issue in the case intended to affect the credibility of a witness is usually within the discretion of the trial court and the ruling concerning it is not reason for reversal of the judgment in the case in the absence of an abuse of discretion. Young v. Kinney, 85 Neb. 131, 122 N. W. 679; Peterson v. Andrews, 88 Neb. 136, 129 N. W. 191; Barry v. Anderson, 89 Neb. 332, 131 N. W. 591; Falstaff Brewing Corp. v. Thompson, 101 F. 2d 301. The assignment of error in this respect may not be sustained.

The judgment of the district court should be and it is affirmed.

AFFIRMED.

HARRY RICHARD DIXON, APPELLANT, V. HERBERT H. HANN, WARDEN OF NEBRASKA STATE PENITENTIARY, APPELLEE.
70 N. W. 2d 80

Filed April 29, 1955. No. 33719.

1. **Criminal Law.** A judgment in a criminal action, ordinarily, can be satisfied only by carrying into effect the sentence imposed by the trial court.
2. **Habeas Corpus.** It is the duty of the court on presentation of a petition for a writ of habeas corpus to examine it and if it fails to state a cause of action to enter an order denying a writ.

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

Harry Richard Dixon, pro se.

Clarence S. Beck, Attorney General, and *Ralph D. Nelson,* for appellee.

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

SIMMONS, C. J.

Petitioner sought a writ of habeas corpus. The trial court refused the writ. Petitioner appeals. We affirm the judgment of the trial court.

Petitioner is an inmate of the Nebraska State Penitentiary. Respondent is the warden.

Petitioner alleged that he was committed to the penitentiary for a term of 10 years from Douglas County. The beginning of the term does not appear. He alleged that on March 4, 1954, he was removed from the penitentiary in custody of a United States marshal, and taken under protest without the state; and that on March 5, 1954, he was returned to the state and to the penitentiary, and again detained under the commitment from Douglas County.

Petitioner's theory is that because of this action, respondent has no further authority or jurisdiction to hold him under the commitment by which theretofore he was held.

There is no allegation as to how, in what manner, or by what authority the United States marshal received custody of the petitioner. There is no allegation as to where or for what purpose the petitioner was removed from Nebraska, or why he was returned. The sole fact of removal and return is alleged.

It is alleged that his removal was allowed by respondent by authority of the State of Nebraska. This is followed by an allegation that the respondent had no authority to allow petitioner's removal without proper warrant of removal. These allegations are conclusions of law and not of ultimate facts. The presumption is that the marshal received custody of the petitioner in a lawful manner, that he did not take him from the respondent by force, and that he did not in any way violate the rights of this state. See Vanover v. Cox, 136 F. 2d 442.

We have searched the authorities and find no case where an order of commitment was held to be satisfied by the removal of a prisoner from the state under the circumstances alleged here.

In Banks v. O'Grady, 113 F. 2d 926, a prisoner sought release by habeas corpus from the Nebraska penitentiary under the following factual situation: On November 26, 1918, the petitioner was sentenced in Sarpy County to serve an indeterminate sentence of from 1 to 20 years. He served until September 22, 1923, when, following a parole agreement, he was released to the authorities of the State of Missouri. One of the conditions of his parole was that he "obey the law." He was released by the Missouri authorities on November 15, 1923. The purpose of the removal of Banks to Missouri is not disclosed in the opinion. Banks returned to Nebraska in December 1923. In February 1934, he was sentenced in Keith County to the penitentiary for a period of 2 years. He was discharged from that sentence October 7, 1935, and thereafter was held under the 1918 commitment from Sarpy County. He sought

release upon three grounds, one being that by releasing him to the State of Missouri in 1923, Nebraska had lost jurisdiction of his person. The court held that: "The power and right to punish the violater of its laws is not lost by a state because it consents to waive the infliction of punishment pending punishment by another state of the same criminal for the violation of its laws, or because it defers punishment for one offense until it has punished for a subsequent offense." See, also, Rawls v. United States, 166 F. 2d 532.

We have held: "A judgment in a criminal action, ordinarily, can be satisfied only by carrying into effect the sentence imposed by the trial court, * * *." Volker v. McDonald, 120 Neb. 508, 233 N. W. 890, 72 A. L. R. 1267.

The rules as to habeas corpus are: "A petition for a writ of habeas corpus must state the facts which it is contended constitute the illegal restraint.

"A petition which states as a conclusion that a petitioner is illegally restrained of his liberty is not sufficient as a basis for the issuance of a writ of habeas corpus.

"It is the duty of the court on presentation of a petition for a writ of habeas corpus to examine it and if it fails to state a cause of action to enter an order denying a writ." Stapleman v. Hann, 155 Neb. 410, 51 N. W. 2d 891. See, also, Howell v. Hann, 155 Neb. 698, 53 N. W. 2d 81; Culpen v. Hann, 158 Neb. 390, 63 N. W. 2d 157. The petitioner relies on the Culpen case. There the petition presented a disputed question of fact as to whether the sentences of petitioner ran consecutively or concurrently. We held that: "Where two sentences are imposed in the same court at the same time for two offenses, the sentences will run concurrently if the trial judge does not otherwise order."

There the petition presented an issue of fact, which if resolved in petitioner's favor, would entitle him to the writ. Here petitioner presents no issue of fact

which if resolved in his favor would entitle him to the writ.

The trial court properly denied the issuance of a writ of habeas corpus.

AFFIRMED.

MCGRAW ELECTRIC COMPANY, A CORPORATION, APPELLANT, V. LEWIS & SMITH DRUG CO., INC., A CORPORATION, APPELLEE.

— N. W. 2d —

Filed May 6, 1955. No. 33593.

SUPPLEMENTAL OPINION

APPEAL from the district court for Douglas County: JACKSON B. CHASE and JAMES M. PATTON, JUDGES. *Opinion modified. Motion for rehearing overruled.*

Shotwell, Vance & Marchetti, Lynn A. Williams, and *John H. Holm,* for appellant.

Swarr, May, Royce, Smith & Story, for appellee.

Herman T. VanMell, Jack W. Marer, and *Samuel V. Cooper,* amicus curiae.

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

YEAGER, J.

In order to clarify and correct the opinion adopted in this case the following is substituted for the first full paragraph as it appears at 159 Neb. 717, 68 N. W. 2d 616:

"An effect of this legislation is to permit one producer and one retailer to do on behalf of a class of retailers that which legally the class is forbidden to do as a class."

The following, for the same purpose, is substituted for the third full paragraph as it appears at 159 Neb. 717, 68 N. W. 2d 616:

"It permits the impairment and destruction of the

right of any retailer, who has purchased any commodities for resale either before or after having received notice that an agreement fixing the minimum price for the resale thereof has been entered into by some other retailer, from freely selling such commodities to his customers."

In all other respects the opinion shall remain as originally adopted.

OPINION MODIFIED. MOTION FOR REHEARING OVERRULED.

OFFUTT HOUSING COMPANY, A CORPORATION, APPELLEE, V. COUNTY OF SARPY ET AL., APPELLANTS.
70 N. W. 2d 382

Filed May 6, 1955. No. 33658.

1. **Taxation: Injunction.** The levy, assessment, and collection of taxes which are demonstrably void for want of jurisdiction or authority to impose the same may be enjoined.
2. **States: Judgments.** Generally, the state's immunity from suit in its own courts without its consent is unaffected by declaratory judgment statutes, but such an action may be maintained under statutes which permit actions against the state.
3. **Taxation.** By the enactment of Title 12, U. S. C. A., section 1748d, and other statutes in pari materia therewith, the Congress of the United States has re-ceded to the state the power and authority to tax a lessee's interest in a housing project located on real property owned by the government of the United states which has been leased by it to private industry for the construction, maintenance, operation, and rental of military housing units by the lessee for its own use and profit.
4. **Public Lands.** The meaning of the words "public lands" varies in different statutes enacted for different purposes, and they should be given such meaning in each as comports with the intention of the Legislature in their use.
5. **Public Lands: Taxation.** The term "leased public lands" as used in section 77-1209, R. R. S. 1943, for purposes of taxation, means "lands belonging to the public, which have been leased as authorized by law."
6. **Taxation.** Also, the words "owner of such improvements" as

used in section 77-1209, R. R. S. 1943, for purposes of taxation, include "any lessee who has the dominion or control thereover for his own use and profit during the useful life thereof."

APPEAL from the district court for Sarpy County: JOHN M. DIERKS, JUDGE. *Reversed and remanded with directions.*

Orville Entenman, for appellants.

Charles S. Reed and *Franklyn K. Norris,* for appellee.

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

CHAPPELL, J.

Plaintiff, Offutt Housing Company, a corporation, brought this action against defendants, County of Sarpy and Robert M. Eby, its county treasurer, seeking a declaratory judgment determining that a 1952 tax levy and assessment made by the county upon plaintiff's personal property located within the Offutt Air Force Base was void; to enjoin collection thereof; and to permanently enjoin any levy and assessment of taxes thereon. After trial upon the merits, a judgment was rendered which found and adjudged the issues generally in favor of plaintiff and against defendants, and awarded the relief sought by plaintiff. Defendants' motion for new trial was overruled and they appealed. Numerous errors were assigned, the effect of which was to assert that the judgment was not sustained by the evidence but was contrary thereto and contrary to law. We sustain the assignments.

At the outset we are met with defendants' contention that by reason of section 77-1727, R. R. S. 1943, plaintiff could not maintain injunction. In Hemple v. City of Hastings, 79 Neb. 723, 113 N. W. 187, it is said, after referring to cited cases and such section: "It was settled that, 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. Earl v. Duras, 13 Neb. 234; Burlington & M. R. R. Co. v. Cass County, 16 Neb. 136; Touzalin v. City of Omaha, 25 Neb. 817; Bellevue Improvement Co. v. Village of Bellevue, 39 Neb. 876." Other comparable Nebraska cases too numerous to cite here are cited and comprehensively discussed in Mid-Continent Airlines v. Nebraska State Board of Equalization & Assessment, 105 F. Supp. 188. As indicated therein, this court has uniformly upheld the right to enjoin taxes which are demonstrably void for want of jurisdiction or authority to impose the same, as distinguished from those which are not void but simply irregular or erroneous. We conclude that the remedy of injunction is available, provided the evidence and applicable law warrants its employment.

Relying solely upon section 25-21,159, R. R. S. 1943, defendants also argued that the state was a necessary party defendant, thus there was a defect of parties. We conclude that the contention has no merit. No claim is made in this case that any statute is unconstitutional, requiring opportunity for the Attorney General to be heard. As stated in Northwestern Mutual Life Ins. Co. v. Nordhues, 129 Neb. 379, 261 N. W. 687: "Section 22, art. V of the Constitution, provides: 'The state may sue and be sued, and the legislature shall provide by law in what manner and in what courts suits shall be brought.' Under this provision no suit can ordinarily be maintained unless authorized by legislative provision. The state cannot be sued in its own courts without its consent. State v. Mortensen, 69 Neb. 376; McShane v. Murray, 106 Neb. 512; McNeel v. State, 120 Neb. 674; Eidenmiller v. State, 120 Neb. 430."

Section 24-319, R. R. S. 1943, waived that prerogative in some respects, but this action does not come within its purview. It has been held that: "Generally, an action for a declaratory judgment cannot be maintained against the state without its consent, the state's immunity from suit being held unaffected by declaratory judgment

statutes; but such an action may be maintained under statutes permitting various actions against the state." 81 C. J. S., States, § 214, p. 1304, and authorities cited. It has also been held that: "Ordinarily, general rules as to proper and necessary parties in civil actions apply in taxpayers' suits." 20 C. J. S., Counties, § 291, p. 1244.

On the other hand, as provided in section 23-101, R. R. S. 1943: "Each county, established in this state * * * shall be a body politic and corporate * * * and by that name may sue and be sued, plead and shall be impleaded, defend and be defended against, in any court having jurisdiction of the subject matter, either in law or equity, or other place where justice shall be administered." No exception thereto is operative herein. This court has uniformly entertained jurisdiction in cases brought to enjoin the collection of void taxes wherein only the county in which the property is located and the county treasurer thereof have been made parties defendant. Rothwell v. Knox County, 62 Neb. 50, 86 N. W. 903; Y. M. C. A. of Omaha v. Douglas County, 60 Neb. 642, 83 N. W. 924, 52 L. R. A. 123. See, also, 28 Am. Jur., Injunctions, § 275, p. 450.

In 1949 Congress enacted Chapter 403, Public Law 211, generally referred to as the Wherry Housing Act. As amended, it now appears as Title 12, U. S. C. A., sections 1748 to 1748i. The primary purpose of the legislation was to procure the construction, operation, and maintenance by private industry of adequate housing facilities for rental to civilian and military personnel of the army, navy, and air force. The main impetus for such construction was supplied by provisions of the act which authorize the Federal Housing Commissioner, after appropriate certification of necessity as a permanent part of a military establishment with no intention to substantially curtail activities thereat, to insure a first mortgage on real estate in fee simple or on a leasehold for an amount generally not to exceed five million dollars, and not to exceed 90 percent of the replacement

cost of the property or project when completed.

Section 1748d, insofar as important here, provides that: "Whenever the Secretary of the * * * Air Force determines that it is desirable to lease real property within the meaning of sections 626s-3 to 626s-6 of Title 5, * * * to effectuate the purposes of this subchapter, the Secretary concerned is authorized to lease such property under the authority of sections 626s-3 to 626s-6 of Title 5, * * * upon such terms and conditions as in his opinion will best serve the national interest without regard to the limitations imposed by said sections in respect to the term or duration of the lease, and the power vested in the Secretary of the Department concerned to revoke any lease made pursuant to said sections in the event of a national emergency declared by the President shall not apply. Whenever the Secretary of the * * * Air Force determines it to be in the interest of national defense, he is authorized to sell, transfer, and convey at fair value (as determined by him), for use under this subchapter, all or any right, title, and interest in any real property under his jurisdiction, *notwithstanding any limitations or requirements of law with respect to the use or disposition of such property. The authority conferred by this section shall be in addition to and not in derogation of any other power or authority of the Secretary of the * * * Air Force.*" (Italics supplied.)

In that connection, section 1748f, also provides: "Nothing in this subchapter shall be construed to exempt any real property acquired and held by the Commissioner under this title from taxation by any State or political subdivision thereof, to the same extent, according to its value, as other real property is taxed." Such section is not controlling under the factual situation presented in the case at bar, but it does have application, to be considered as a circumstance in connection with others, indicating the intent of Congress that such housing projects should in any event bear their just proportion of state and local taxation.

Further, however, section 626s-6 of Title 5, specifically referred to and incorporated in Title 12, section 1748d, provides: "The lessee's interest, made or created pursuant to the provisions of sections 626s-3 to 626s-6 of this title, shall be made subject to State or local taxation. Any lease of property authorized under the provisions of said sections shall contain a provision that if and to the extent that such property is made taxable by State and local governments by Act of Congress, in such event the terms of such lease shall be renegotiated." The first sentence of such section specifically makes lessee's interest subject to state and local taxation. However, the latter sentence has application only in the event that Congress should subsequently consent to taxation of the interest of the government in addition to the interest of the lessee. In that connection, as stated in Meade Heights v. Tax Commission of Maryland, 202 Md. 20, 95 A. 2d 280: "As we read this provision, it called for renegotiation only in the event that Congress should consent to taxation of the government's interest in addition to that of the lessee, which is recognized as fully taxable as of the date of execution." As hereinafter observed, section 8 of plaintiff's lease involved herein so recognized that construction.

Only plaintiff lessee's interest in the housing project, together with the fixtures thereof and its personal property used therein, is involved in this case. In other words, contrary to plaintiff's contention, this is not a case where the county has attempted to tax government property, but rather has taxed plaintiff's private property located on an air force base wherein, as heretofore and hereinafter observed, the right to do so was specifically re-ceded by the Congress of the United States.

The facts are not in dispute. Plaintiff is a perpetual private Nebraska corporation, organized December 22, 1950, by one Carl C. Wilson and two other persons living in Omaha. Its authorized capital stock was $800,000, consisting of 80,000 shares, having a par value of $10 per

share. Ten such shares were designated as "Preferred Stock." The rest was "Common Stock." Its principal place of business was designated as in Omaha. The general nature of its business was to provide housing for rent or sale, to acquire any real estate or interest or right therein, or appurtenances thereto, and any and all personal property in connection therewith; to improve, operate, and sell, convey, assign, mortgage, or lease any real estate and personal property; to borrow money and issue evidence of indebtedness in furtherance of any and all the objects of its business, and to secure same by mortgage, deed of trust, pledge, or other lien; and "To apply for and obtain or cause to be obtained from the Federal Housing Commissioner a contract or contracts of mortgage insurance pursuant to the provisions of the National Housing Act as amended, covering bonds, notes and other evidences of indebtedness issued by this corporation and any indenture of mortgage or deed of trust securing the same. So long as any property of this corporation is encumbered by a mortgage or deed of trust insured by the Federal Housing Commissioner it shall engage in no business other than the construction and operation of a Rental Housing Project or projects."

Carl C. Wilson is president of plaintiff corporation. He is also president of another private corporation, called "Carl C. Wilson, Inc." The latter corporation was selected as the building or construction contractor. It constructed the 611 modern housing units here involved for plaintiff corporation, and was compensated therefor by it. The Federal Housing Administration's amended Project Analysis, dated January 24, 1951, estimated that compensation required to be paid the building corporation for such construction would be $285,750. It estimated that plaintiff's net annual income from rentals, with 97 percent occupancy, after payment of maintenance, operating expenses, and taxes, would be $326,798. It estimated that the maximum insurable mortgage on

plaintiff's interest in the project should be $4,949,100. In conformity with the Wherry Housing Act, the Secretary of the Air Force certified that the average monthly rental charged and collected by plaintiff should be and was $71.04 per unit, which at 100 percent occupancy would gross $520,865.28 per year.

On January 18, 1951, the Secretary of the Air Force and plaintiff corporation entered into a lease whereby plaintiff was leased some 63 acres of described land on Offutt Air Force Base for a period of 75 years at $100 a year, "to be used for the purpose of erecting, maintaining and operating a housing project, consisting of approximately 611 units, substantially in accordance with the outline plans and specifications submitted to the Department of the Air Force and in accordance with the detailed plans and specifications to be approved by the Federal Housing Commissioner * * *." Forty-eight acres of such described land had been previously deeded to the United States by the Omaha Chamber of Commerce and the Air Force had appropriately taken exclusive jurisdiction thereof.

The lease required: "That an application for mortgage insurance under Title VIII of the National Housing Act, as amended, for the said housing project, including Exhibits required therein, shall be submitted to the Federal Housing Administration within forty-five (45) days from the effective date of this lease. * * * That the Lessee shall lease all units of the housing project to such military and civilian personnel of the Army, Navy, Marine Corps or Air Force (including Government Contractors' employees) assigned to duty at the military installation or in the area where such property is located, as are designated by the Commanding Officer, OFFUTT AIR FORCE BASE, OMAHA, NEBRASKA; provided, however, that" under certain circumstances and conditions, the lessee might lease such unit or units to persons other than such military or civilian personnel if their leases were limited to a term of 1 year with pro-

vision for an automatic renewal thereafter from month to month.

Section 8 of the lease specifically provides: "That the Lessee shall pay to the proper authority, when and as the same become due and payable, all taxes, assessments, and similar charges which, at any time during the term of this lease, may be taxed, assessed or imposed upon the Government or upon the Lessee with respect to or upon the leased premises. In the event any taxes, assessments, or similar charges are imposed with the consent of the Congress of the United States *upon the property owned by the Government and included in this lease (as opposed to the leasehold interest of the Lessee therein), this lease shall be renegotiated* so as to accomplish an equitable reduction in the rental provided above, which shall not be greater than the difference between the Amount of such taxes, assessments, or similar charges and the amount of any taxes, assessments or similar charges which were imposed upon such Lessee with respect to his leasehold interest in the leased premises prior to the granting of such consent by the Congress of the United States; * * *." (Italics supplied.)

Plaintiff was required to comply with all applicable laws; to keep the buildings and improvements in good order, condition, and repair, and save the government harmless from failure in that respect; to keep them insured against fire in an amount determinable by the government but at its own expense, with loss payable to lessee and any security holder jointly as their interest may appear; and in the event of any partial loss or damage to the improvements, lessee was required within a reasonable time to restore them to their former condition. Plaintiff also had the right to permit utility companies to extend water, sewer, gas, telephone, and electric power lines on the premises for the exclusive purpose of furnishing utilities to the housing project.

Thereafter, on February 1, 1951, plaintiff, as mortgagor, mortgaged its "described leasehold situated in the

of , County of Sarpy, and State of Nebraska, to wit: all right, title, interest and privileges of the mortgagor in and to that certain ground Lease between the SECRETARY OF THE AIR FORCE representing the UNITED STATES OF AMERICA, and Mortgagor, dated January 18, 1951 * * * Together with the privileges and appurtenances to the same belonging, and all of the rents, issues, and profits which may arise or be had therefrom; and * * * all buildings and improvements of every kind and description now or hereafter erected, or placed thereon," including all fixtures of every described kind "together with all building materials and equipment now or hereafter delivered to said premises and intended to be installed therein" and "All articles of personal property owned by the Mortgagor and now or hereafter attached to or used in and about the building or buildings now erected or hereafter to be erected on the lands herein described" all of which property was deemed fixtures to the extent permitted by law. The mortgagee was Manufacturers Trust Company of New York. The principal of the mortgage was $4,949,100, with interest at 4 percent per annum, upon the unpaid balance until paid by monthly installments of $22,683.37, all according to the terms of a promissory note of even date. In addition thereto, plaintiff agreed to pay monthly to the mortgagee a sum sufficient to prevent delinquency of premium charges under the contract of mortgage insurance with the Federal Housing Commissioner, together with ground rentals, tax assessments, water rents, fire, and other hazard insurance premiums. Plaintiff also agreed to pay all taxes levied on the mortgagee's interest in the improvements and upon the mortgage or debt secured thereby, excluding any income tax, state or federal, imposed on the mortgagee.

Plaintiff was required to keep the improvements and equipment then existing or thereafter erected, insured against loss by fire or other hazards, in an amount equal to not less than 80 percent of the actual cash value there-

of, with loss payable to mortgagee and the Federal Housing Commissioner as their interests may appear. The mortgage also provided that any amount paid for loss should, to the extent of indebtedness unpaid, be paid to the mortgagee and at its option such may be applied on the debt or released for repairing or rebuilding the premises.

Plaintiff further agreed to commit or suffer no waste of the property and keep same in good condition and repair, and in all respects conform to and comply with the covenants, provisions, terms, conditions, and agreements of the valid ground lease executed January 18, 1951, then in full force and effect. Many other provisions, terms, and conditions upon which the right of forfeiture or default might depend appear in the mortgage, but they are of no importance here. The mortgage was duly insured by the Federal Housing Administration, and the 611 modern housing units, equipped as covered by the mortgage, were constructed, with 78 percent of them completed by March 10, 1952, and all of them by about June 6, 1952. Concededly, the buildings and improvements have a useful life expectancy of only about 35 years.

On April 11, 1952, the Attorney General of this state rendered an opinion that plaintiff's interest in the project, including all of the personal property used therein, was taxable as personal property. Report of Attorney General, 1951-1952, p. 486. Nevertheless, plaintiff filed no tax return, and on June 23, 1952, the county assessor of Sarpy County prepared and filed a "Business 1952 Schedule," for plaintiff corporation in which he listed "Furniture & Fixtures - Tools & Equipment $205 * * * Household Appliances $69,695 * * * Improvements on Leased Land $755,785." The total was listed as "Apartment Houses $825,685." The property is not located in any municipality or school district, thus there was a state and county tax levy and assessment of $10,783.45,

no part of which tax was ever paid by plaintiff after due notice thereof.

In that connection, section 4 of the Enabling Act provides in part: "* * * that no taxes shall be imposed by said state on lands or property therein belonging to or which may hereafter be purchased by the United States." Volume 2, R. R. S. 1943, p. 7. Section 72-601, R. R. S. 1943, provides in part: "The consent of the State of Nebraska is granted to the United States of America * * * for the purchase by the United States of such other lands within the State of Nebraska as the agents or authorities of the United States may from time to time select for the erection of forts, magazines, arsenals and other needful buildings." Section 72-602, R. R. S. 1943, provides: "The jurisdiction of the State of Nebraska in and over the lands mentioned in section 72-601 shall be ceded to the United States; Provided, the jurisdiction ceded shall continue no longer than the United States shall own or occupy such lands." Section 72-604, R. R. S. 1943, provides: "The jurisdiction ceded shall not vest until the United States shall have acquired the title to such lands by purchase or grant. So long as the lands shall remain the property of the United States, when acquired as provided in section 72-601, and no longer, they shall be exempt from all taxes, assessments, and other charges which may be levied or imposed under the authority of the laws of this state."

Article I, section 8, Constitution of the United States, gives Congress exclusive legislative authority over all such places purchased by consent of the Legislature of the state, and gives it authority "To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."

Thus, if Congress by its legislative acts heretofore set forth consented to the occupation of its lands by lessee and the taxation of lessee's interest in the project erected

thereon, then, in that respect, any immunity or exemption thereof from taxation appearing in the Enabling Act and ceding statutes of this state was waived. In other words, the right to tax lessee's interest in the housing project located on the air base was re-ceded to the State of Nebraska. Board of County Commissioners v. United States, 105 F. Supp. 995. Such case is also comparable in principle with that at bar and supports the right to tax plaintiff's interest here involved.

Article VIII, section 1, Constitution of Nebraska, provides in part: "The necessary revenue of the state and its governmental subdivisions shall be raised by taxation in such manner as the Legislature may direct; but taxes shall be levied by valuation uniformly and proportionately upon all tangible property and franchises, and taxes uniform as to class may be levied by valuation upon all other property." Section 2 provides in part: "The property of the state and its governmental subdivisions shall be exempt from taxation. * * * No property shall be exempt from taxation except as provided in this section." In that connection, plaintiff's interest here involved is not constitutionally exempt from taxation.

Further, our revenue and taxation statutes are controlling. Section 77-102, R. R. S. 1943, provides: "The word 'property' includes every kind of property, tangible or intangible, subject to ownership." Section 77-104, R. R. S. 1943, provides: "The term 'personal property' includes all property other than real property and franchises." Section 77-201, R. R. S. 1943, provides: "All property in this state, not expressly exempt therefrom, shall be subject to taxation, and shall be valued and assessed at its actual value." (Such statute was amended, effective March 6, 1953, to provide that all such property should be valued at its actual value, but shall be assessed at fifty percent of its actual value.) Section 77-1201, R. R. S. 1943, provides in part: "A complete list of all personal property held or owned on March 10 of the year in which the assessment is being made,

except motor vehicles, shall be made as follows: (1) Every person of full age and sound mind, being a resident of this state, shall list * * * all other personal property, * * *." Section 77-1229, R. R. S. 1943, provides: "Every person required to list property shall make out and verify by his oath a statement of all personal property which he is required to list, either as owner, lessee or occupant in control thereof * * * upon the blanks prescribed by the State Tax Commissioner. Such blanks shall be delivered to each taxpayer by the county assessor or his assistants for that purpose, and when so made out shall be verified by each person before the county assessor, his assistants, a notary public, or some other person authorized by law to take acknowledgments, and be delivered to the county assessor or county clerk as ex officio county assessor on or before April 20 of each year."

This court in Ashby v. Peters, 124 Neb. 131, 245 N. W. 408, next reported 128 Neb. 338, 258 N. W. 639, 99 A. L. R. 843, held that: "Save for the purposes of conveyancing, a lease of more than one year is not real estate." See, also, Paul v. Cameron, 127 Neb. 510, 256 N. W. 11. Generally, a leasehold for a term of years is a chattel real, falling within the classification of personal property. 51 C. J. S., Landlord and Tenant, § 26, p. 531. For all practical purposes, it may be the equivalent of absolute ownership. 51 C. J. S., Landlord and Tenant, § 202, p. 809. In that connection, section 77-1209, R. R. S. 1943, specifically applicable here, provides: "All improvements put on leased public lands shall be assessed to the owner of such improvements as personal property, together with the value of the lease, and listed and assessed as such in the place where the land is situated. The taxes imposed on such improvements shall be collected by levy and sale of the interest of such owner, the same as in all other cases of collection of taxes on personal property, or by suit in the name of the county against such owner."

For taxation purposes, what is meant by public lands, as used in section 77-1209, R. R. S. 1943? In Union Pacific Ry. Co. v. Karges, 169 F. 459, quoting from Northern Lumber Co. v. O'Brien, 139 F. 614, 71 C. C. A. 598, it is said: " 'The words "public land" have long had a settled meaning in the legislation of Congress, and, when a different intention is not clearly expressed, are used to designate such land as is subject to sale or other disposal under general laws, but not such as is reserved by competent authority for any purpose or in any manner, although no exception of it is made. (Numerous cases cited.)' " However, thereafter the court said: "These decisions do not conflict with the settled doctrine that, where it clearly appears from the statute that the term 'public lands' is intended to include lands which have theretofore been reserved by Congress for a specific purpose, such intention will prevail, as it is a fundamental rule of construction that a legislative act is to be interpreted according to the plain intention of the legislative body." See, also, Dugan v. Montoya, 24 N. M. 102, 173 P. 118; United States v. Bisel, 8 Mont. 20, 19 P. 251; United States v. Blendaur, 128 F. 910.

Cotulla v. Laxson, 60 Tex. 443, involved a penal statute which made it an offense for any person who was an officer or clerk in the general land office, or a county surveyor or his deputy, to directly or indirectly be concerned in the purchase of any right, title, or interest in any public lands. In that opinion it is said: "That the term 'public land,' as used in that article, is not limited in its signification to unappropriated public domain, but also includes what is usually designated as public school lands, it seems to us admits of no question. These public school lands were set apart for a public purpose, devoted to the promotion of public education. The act of appropriation, or, rather, the dedication of these lands to that purpose, did not work a change in their ownership; true they were not thereafter unappropri-

ated public domain, but as ever belonged to the public."

In DeShazo v. Eubank (Tex. Com. App.), 222 S. W. 976, involving a comparable situation, it is said, referring to public lands: "The sense in which the term is used may vary somewhat in the different statutes, and it should be given such meaning as will effectuate the intention of the Legislature in its use." The opinion thereafter cited and quoted with approval from Cotulla v. Laxson, *supra.*

As stated in 73 C. J. S., Public Lands, § 1, p. 647: "The meaning of the words 'public lands,' may vary somewhat, however, in different statutes passed for different purposes, and they should be given such meaning in each as comports with the intention of the legislature in their use." See, also, State ex rel. Sioux County v. Tucker, 38 Neb. 56, 56 N. W. 718.

We believe our Legislature intended that the term "leased public lands" as used in section 77-1209, R. R. S. 1943, for taxation purposes, should and does mean "lands belonging to the public, which have been leased as authorized by law."

Plaintiff's lease provided that upon its expiration or earlier termination, all improvements made upon the leased premises should, with exceptions unimportant here, remain the property of the government without compensation. It also provided that the buildings and improvements erected by the lessee constituting the housing project should be and become as completed real estate and part of the leased land and public buildings of the United States, leased to lessee for the purpose of serving the governmental and public purpose of military housing in accordance with Title VIII of the National Housing Act, and in accordance with the provisions of the lease and subject to the term of the lease and any renewal or extension of the same. As we view it, the first sentence aforesaid simply provided when and in what manner plaintiff's interest would ultimately become the government's property, while the second

sentence simply prevented plaintiff from destroying the mortgage security insured by the government and from defeating the purpose of the housing project by removing any of the buildings or improvements from the leased land and assured plaintiff's performance of the terms and conditions of the mortgage and lease. The language used therein did serve to retain the bare legal title in the government for a nominal consideration of $100 per year, but it did not in any manner deprive plaintiff of the ownership of its interest as lessee, which for all intents and purposes was the actual value of all the buildings and improvements, together with the fixtures thereof and all personal property used therein on the leased land so long as its lease was in force and effect. In Ken Realty Co. v. Johnson, 138 F. 2d 809, it is pointed out that: "But when a separate interest in a piece of property is exempt, or its owner is immune from taxation, the several separate interests must be recognized" for tax purposes.

In that regard, plaintiff's lease was for a period of 75 years, which was 5 years longer than 3 score and 10, the conventional life of ordinary men. It was for a period so long that plaintiff would have dominion or control and could profitably use and consume the entire useful life of two complete generations of housing units, each having a useful expectancy of 35 years, with 5 years still remaining for unexpected longevity. Also, in conformity with federal laws, plaintiff mortgaged its interest as owner thereof for $4,949,100, the estimated replacement cost of which was $5,449,490, and the Federal Housing Commissioner duly insured the mortgage. In addition, plaintiff corporation entered into and filed conditional sales contracts and chattel mortgages covering furniture, appliances, and equipment used in the housing project, the consideration for which totalled $110,033.97. Further, on July 28, 1953, Carl C. Wilson, both as president of plaintiff corporation and as president of Carl C. Wilson, Inc., duly signed

and acknowledged the execution of a limited assignment of Offutt housing project rentals to the Douglas County Bank of Omaha for the business purposes and advantage of both corporations. Therein it was represented in part that Offutt Housing Corporation was the owner of 611 housing units located at Offutt Field, Sarpy County, Nebraska. As a witness in this case, Carl C. Wilson also conceded that the improvements had only a life expectancy of about 35 years, "that any building that was seventy-five years old was not worth maintaining any farther than that," and that plaintiff was entitled to the possession and use together with all income and profits therefrom, for 75 years at a rental of only $100 a year.

We therefore conclude that for purposes of taxation under the provisions of section 77-1209, R. R. S. 1943, plaintiff was in fact and as a matter of law the owner of all the improvements, including the fixtures, appliances, equipment, furniture, and other personal property used therein, so long as his lease was in force and effect, all of which was taxable as personal property. To conclude otherwise would permit plaintiff to perpetrate a sham and fraud upon the state and its governmental subdivisions.

The following authorities support the foregoing conclusions. Baltimore Shipbuilding & Dry Dock Co. v. Mayor of Baltimore, 97 Md. 97, 54 A. 623, affirmed in 195 U. S. 375, 25 S. Ct. 50, 49 L. Ed. 242, quoted with approval from North Pacific R. R. Co. v. Patterson, 154 U. S. 130, 14 S. Ct. 977, 38 L. Ed. 934, and Wisconsin R. R. Co. v. Price County, 133 U. S. 496, 10 S. Ct. 341, 33 L. Ed. 687, wherein it is said: " 'that he who has the right to property, and is not excluded from its enjoyment, shall not be permitted to use the legal title of the government to avoid his just share of State taxation.' "

The opinion in Meade Heights v. Tax Commission of Maryland, *supra,* disposed of five cases involving the

same taxation principles, wherein three private corporations had leased from the United States five separate parcels of land located upon military reservations over which the federal government had exclusive jurisdiction. They severally constructed housing units thereon under authority of the federal housing statutes heretofore cited and discussed. The corporations had appealed from a tax assessment upon their interest in the buildings at full value thereof, and the court affirmed. The situation in such cases was in all material respects identical with that at bar except the particular applicable state statutes and two provisions of the lease, which could not change the ultimate result herein. In that regard, the lease of Meade Heights, Inc., was of 28½ acres at Fort Meade for 75 years, at a ground rental of $720 per annum, with a provision that title to all improvements erected should remain in lessee with a right of removal at termination, if it so elected. If it did not so elect, they would become property of the government, without compensation to lessee. In that opinion, it is said: "Coming to the main point, it is perfectly clear that, in the absence of congressional consent, express or implied, a State cannot impose a direct tax upon property owned by the federal government or held for it. (Citing cases.) But it is equally clear that private interests in government property are taxable to their full value. (Citing cases.) In the instant case, Congress has definitely consented to the taxation of the lessee's interest, whatever that may be. It can only complain if, in fact, its reserved interest is subject to taxation. * * * The assessment before us is against the lessee, and purports to reach the full value of the buildings in its hands. The government cannot complain if the tax, otherwise sustainable, increases government costs by its economic incidence. James v. Dravo Contracting Co., 302 U. S. 134, 58 S. Ct. 208, 82 L. Ed. 155; Alabama v. King & Boozer, 314 U. S. 1, 62 S. Ct. 43, 86 L. Ed. 3."

Gay v. Jemison (Fla.), 52 So. 2d 137, also involved the same taxation principles, but from a somewhat different statutory angle. In such case, the comptroller appealed from a decree in favor of plaintiff enjoining the collection of taxes on materials to be used in construction of 450 housing units on similar land leased by a private corporation from the United States. As hereinafter observed, the lease was in all material respects identical with that here involved. The court in that opinion dismissed plaintiff's bill of complaint, saying: "Comparing the probable useful life of the buildings with the time for which the lease is to extend, the question immediately arises in one's mind whether the useful life of the buildings will not have ended by the time the lease expires. We have already said also that the buildings are for the 'primary' use of military personnel. It may be assumed that this is the chief purpose of the installation; however, the lease contains the statement that the property may be occupied by civilian as well as military personnel of the army, marine corps, and air force; and, further, that upon failure of the commanding officer of the field to designate persons of those classifications to tenant any units within a certain length of time after they become vacant, the lessee may then rent to parties who do not fall in any of these categories.

"It is an obligation of the lessee to comply with all ordinances with reference to licenses and permits to do business and it is its privilege to engage public utility companies to provide water, fuel, telephone service, and electric power for the use of the occupants of the units. The lessee is bound to maintain the property in a state of good repair and to save the government harmless against all actions and suits springing from any failure in this respect.

"The lessee is required at its own cost to insure the buildings and to restore any of them damaged by fire, but if a building is wholly destroyed, then the lessee has

the right to determine that the building shall not be reproduced.

"The lessee must pay 'all taxes, assessments, and similar charges which, at any time during the term of (the) lease, may be taxed, assessed or imposed upon the Government or upon the Lessee with respect to or upon the leased premises.'

"The bare title of the property, of course, remains in the United States Government, and for its use the government receives but $100 a year.

"Bearing in mind what we consider the evident intent of the Congress of the United States, and construing the language of the contract between the Government of the United States and the lessee, we cannot arrive at the chancellor's conclusion that this housing project when completed will be a public work owned by the United States Government.

"It is true that the government, through its military, retains a certain supervision over the area where the project is located and has a preference with reference to accommodations for its personnel, but taken as a whole, the arrangement is in reality one affording a source of income to the lessee, and we think it is obvious that any money withheld from the state by applying the exemption would not benefit the national exchequer but would reach the pockets of private citizens. The corporation borrows the money, takes the risks, bears the cost of maintenance and insurance, receives the income from rentals, and in case of total destruction of a building by fire, keeps, if it chooses, the money paid by the insurance company to cover the loss. The corporation must pay the debt it incurs to finance the installation, and certainly any profit for a period of seventy-five years belongs to it. Meanwhile as a part of its expenses there is the nominal payment of $100 a year to the government as lessor.

"We believe the Comptroller's position is correct and that the materials furnished by the contractor will not

become a part of a government work but of buildings of a private enterprise, and therefore are subject to state tax."

Tampa Bay Garden Apartments v. Gay (Fla.), 55 So. 2d 739, also involved the same taxation principles from a somewhat different statutory angle. In such case the private corporation appealed from a decree dismissing its bill of complaint and requiring it to secure a certificate of registration and collect a 3 percent sales tax from occupants of the housing units. In the opinion, after citing Gay v. Jemison, *supra,* with approval, the court affirmed the judgment, saying: "We find nothing in these cases or in the language of the pertinent legisative acts that show any purpose whatever to release the jurisdiction of the State over the lands in question so as to prohibit it from imposing the required three per cent sales tax on the housing project."

Davis v. Howard, 306 Ky. 149, 206 S. W. 2d 467, also involved the same taxation principles from a somewhat different statutory angle. In the opinion it was said: "Undoubtedly, it was the purpose of the Congress to recede to the state sufficient sovereignty over Federal areas within its territorial limits to enable it to levy and collect taxes named in the Act. Otherwise the Act was a futile gesture." See, also, Kiker v. Philadelphia, 346 Pa. 624, 31 A. 2d 289, certiorari denied 320 U. S. 741, 64 S. Ct. 41, 88 L. Ed. 439; Bowers v. Oklahoma Tax Commission, 51 F. Supp. 652.

For reasons heretofore stated, we conclude that plaintiff's interest in the housing units and fixtures as owner thereof was and is taxable as personal property, together with the value of plaintiff's lease, as provided by section 77-1209, R. R. S. 1943. All other personal property belonging to plaintiff corporation and located and used by it in the project by virtue of plaintiff lessee's interest is a part thereof, and could acquire no greater rights of exemption. Accordingly, it was and is also subject to state and local taxation in the same manner as other

personal property in Sarpy County. In such a situation, it is elementary that injunction was not available to plaintiff and should have been denied.

The judgment of the trial court should be and hereby is reversed and the cause is remanded with directions to render judgment against plaintiff and for defendants in conformity with this opinion. All costs are taxed to plaintiff.

REVERSED AND REMANDED WITH DIRECTIONS.

HAROLD W. SULLIVAN, APPELLANT, V. OMAHA & COUNCIL BLUFFS STREET RAILWAY COMPANY, A CORPORATION, APPELLEE.

70 N. W. 2d 98

Filed May 6, 1955. No. 33680.

Negligence. To neglect and to omit are not synonymous terms. There may be an omission to perform an act or condition which is altogether involuntary and inevitable; but neglect to perform must be either voluntary or inadvertent. To neglect is to omit by carelessness or design, not from necessity.

APPEAL from the district court for Douglas County: CARROLL O. STAUFFER, JUDGE. *Affirmed.*

David D. Weinberg and *Smith & Smith*, for appellant.

Kennedy, Holland, DeLacy & Svoboda and *William P. Mueller*, for appellee.

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

SIMMONS, C. J.

This is an action to recover damages for personal injury based on the alleged failure of the defendant to perform duties of maintenance and repair of streets and tracks in accord with the provisions of its franchise. Issues were made and trial was had. At the close of plaintiff's case-in-chief, the trial court, on motion of

the defendant, dismissed the action. Plaintiff appeals. We affirm the judgment of the trial court.

Tenth Street in the city of Omaha runs north and south. It is paved with brick. Defendant operated its streetcar line on double tracks in the street, each consisting of two rails. The space between the two pairs of tracks is referred to in the evidence as the dummy. We will use that description.

About noontime on August 27, 1951, plaintiff, in his car, drove out of an alley from the west and started across the tracks in an easterly direction, intending to drive to the east side of the street to go north. There were no visible defects in the pavement. It was like a floor. As his front wheels passed the east rail of the west pair of tracks, the pavement in the dummy gave way and fell into a cavity beneath it. Plaintiff accelerated his motor speed. The front wheels went across the opening which resulted from the fall of the pavement. The rear wheels dropped into the hole. The car stopped with its front wheels beyond the east rail of the east pair of tracks. The rear wheels were in the hole in the pavement. The rear end of the car body rested on the pavement between the two rails of the west pair of tracks. Plaintiff was injured.

In the construction of the pavement between the rails of the track concrete was poured between the ties. The concrete base, the ties, and the flange of the rails supported the bricks above. The pavement that fell into the hole was that in the dummy, excepting the two rows of bricks laid parallel to the rails which were supported by the ties, concrete, and flange of the rails.

Obviously, there was a cavity beneath the pavement of the dummy. What caused it or when it occurred does not appear in the evidence except the suggestion that there "had been an old cable line in there at one time." This was given as a location of the bottom of the hole, rather than the cause.

The evidence is that the opening on the surface was

about 4 feet wide and 10 to 12 feet long, and entirely within the dummy. The hole was 4 to 6 feet deep.

Plaintiff contends that there is evidence in the record from which it could be found that the cavity was wider at the bottom than at the top. Such a conclusion would be contrary to the evidence of the foreman of the city crew that did the repair work. His testimony is that the hole was straight down from the rails, and that the dirt had caved in at the top beneath the rails.

Plaintiff's theory is that the cavity, before the cave-in, extended beneath the rails. As we view the controlling issue here, we need not determine the sufficiency of the evidence to sustain that conclusion.

Plaintiff relies on what he terms the contractual duty of the defendant arising under its franchise. The provisions of the franchise require the defendant "to pave or repave * * * all the space between their rails" and "to keep that portion of the street which they are herein required to pave and repave, in good and proper repair * * *." Plaintiff contends that this is a duty applicable depthwise, and requires that they keep the soil beneath the paving in repair.

Plaintiff then relies on the provision that: "The tracks of all railway companies when located upon the streets or avenues of the city, shall be kept in repair and safe in all respects for the use of the traveling public, such companies shall be liable for all damages resulting by reason of neglect to keep such tracks in repair or for obstructing the streets or avenues of any such city, for injuries to persons or to property arising from the failure of such company to keep their tracks in proper repair and free from obstructions and the city shall be exempt from liability."

Plaintiff alleged the provisions of the ordinance, the events that occurred, and "That the collapse and sinking of the pavement as aforesaid was the direct and proximate result of the neglect of the defendant to keep its tracks at said place in proper repair."

Plaintiff's position is that defendant had a duty to repair the hidden cavity that existed some feet below the surface, and which plaintiff contends was in part under the "space between their rails." He contends that the word "neglect" as used in the charter provision is not synonymous with negligence. "Rather, it means omission or failure to perform without implying carelessness." Plaintiff presented his case on that theory.

He further contends that performance of defendant's charter imposed duties is not conditioned upon notice of the defective condition.

The difficulty with plaintiff's contention is that we have adopted a different meaning of the word "neglect." We have held: " 'To neglect and to omit are not synonymous terms. There may be an omission to perform an act or condition which is altogether involuntary and inevitable; but neglect to perform must be either voluntary or inadvertent. To neglect is "to omit by carelessness or design" (Webster's Dictionary), not from necessity, and there can, therefore, be no possibility of neglecting to do that which cannot be done.' " Brown v. Hendricks, 102 Neb. 100, 165 N. W. 1075.

To "omit by carelessness or design," imports an omission either by negligence or by intention.

We see no need to review extensively the decisions of other courts. We refer to one. South Carolina had a statute which made a city liable for injuries received through a defect in any street. The statute provided: "The said corporation shall not be liable unless such defect was occasioned by its neglect or mismanagement: * * *." 1 Code of Laws of South Carolina, 1902, § 2023, p. 777. The Supreme Court construed the statute in Berry v. City of Greenville, 84 S. C. 122, 65 S. E. 1030, and held: "The 'neglect' mentioned in the statute is the same as negligence, which is the want of ordinary care."

Assuming that a part of this cavity was beneath the rails of defendant's tracks and therefore, depthwise, in the space between their rails, how can it be said that

the defendant was negligent in failing to repair a cavity, hidden in the earth, and about which it had no notice, or notice of facts which would have caused it to investigate the subsurface condition? We see no basis for such a holding.

While maintaining that notice is not necessary, plaintiff contends that the city had actual "notice of an unsubstantial, defective subsurface condition, existing where plaintiff was injured."

The evidence is that there was a cave-in in the street half a block away, and another one about 2 blocks away, from the one involved here. One of these occurred about 3 years and the other occurred about 4 years before this cave-in involved here. Both were outside the space between the rails of the defendant. Both were repaired by the city. No connection is shown between those events and the cave-in in question here. All that appears is that they were holes, and so was this one.

The plaintiff suggests that defendant should have undertaken an "examination by probing" in the area. This is a contention that the defendant was negligent for failure to probe for cavities in the city streets. We see no basis for imputing notice to the defendant based on these two remote-in-time-and-location cave-ins.

Plaintiff further argues that defendant is liable for failure to keep its "tracks in proper repair and free from obstructions." Its tracks, as such, are not shown to have been out of repair. Assuming, but not deciding, that "tracks" here could be construed to include also the space between the rails, this argument resolves down to the contention that the cavity was an obstruction. Hence it is the argument in effect that we have determined adversely to the plaintiff.

Finally plaintiff argues that section 25-1315.01, R. R. S. 1943, requires that a motion for a directed verdict shall "state the specific grounds therefor" and that the defendant's motion did not do so. Plaintiff contends that it was error to sustain the motion. Reliance is had on

Segebart v. Gregory, 156 Neb. 261, 55 N. W. 2d 678.

Defendant's motion here was for a dismissal for the reason that "the evidence so far introduced is not sufficient to constitute a cause of action in favor of the plaintiff and against the defendant, for the reason that there is no evidence showing or tending to show any negligence on the part of the defendant, or any other acts causing or proximately causing or contributing to the cave-in in question."

The motion was specific as to defendant's "grounds." Plaintiff's contention is that the ground was not good because "negligence is not an element in the case." We have determined otherwise.

The motion was sufficient.

The trial court properly sustained the motion for dismissal. The judgment is affirmed.

AFFIRMED.

HAROLD KOHRT, APPELLEE, V. JAMES B. HAMMOND, APPELLANT.
70 N. W. 2d 102

Filed May 6, 1955. No. 33689.

1. **Automobiles.** A vehicle traveling on a highway at a reasonable and lawful rate of speed is not required to slow down or stop upon the appearance of a vehicle about to enter the highway from a private road until it reasonably appears that its driver is not going to yield the right-of-way.
2. ———. If the driver of an automobile entering a highway from a private road looks for approaching vehicles but fails to see one which is favored over him under the rules of the road, he is guilty of negligence.
3. ———. The duty to look for approaching vehicles implies the duty to see that which is in plain sight.
4. **Appeal and Error.** The verdict of a jury on conflicting evidence will not be disturbed on appeal unless it is clearly wrong.
5. **Trial.** An instruction, which correctly advises the jury that plaintiff must prove all the material elements of his case by a preponderance of the evidence and that if it fails to so establish

any one of them the verdict should be for the defendant, is not erroneous in that it fails to inform the jury as to what its verdict should be if the evidence was evenly balanced.

6. **Trial: Appeal and Error.** The ruling of the trial court on a question involving misconduct of the jury will not be disturbed in the absence of a showing of an abuse of discretion.
7. **Juries: Trial.** For the inspection of the scene of an accident by a juror in a personal injury action, which has not been authorized by the court, to be sufficient to vitiate the verdict it must be shown to have related to a matter in dispute and to have been of such a nature as to have influenced the jury in arriving at a verdict.
8. **Juries: Appeal and Error.** Where a juror during a trial acquires information that appears to relate itself to the issues of the case, it will not vitiate the verdict unless the facts gained are of such a character as to enable a reviewing court to say that they influenced the juror in reaching the verdict rendered.
9. **Juries: Trial.** Affidavits of jurors may not be considered to impeach a verdict where the facts sought to be shown are such as inhere in the verdict.

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

Chambers, Holland & Groth, John R. Dudgeon, and *Brogan & Brogan,* for appellant.

Deutsch & Jewell, for appellee.

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

CARTER, J.

This is an action for damages for injuries sustained in an automobile collision. The jury returned a verdict for the plaintiff in the amount of $10,663.56 and judgment was entered thereon for such amount. The defendant appeals.

The accident occurred on December 29, 1951, about 10:50 p. m., on U. S. Highway No. 275 about 4 miles west of Norfolk, Nebraska. The plaintiff at the time of the accident was 23 years of age. He was riding in an automobile owned and driven by Leonard Jensen. At the time of the accident Jensen was 21 years of

age. He had returned to his home at Wayne, Nebraska, to visit friends, of which plaintiff was one, before being inducted into military service. The evidence shows that Jensen drank two bottles and the plaintiff drank two or three bottles of beer in the late afternoon and evening of the accident. There is no evidence that either was intoxicated, although there is testimony that their breath smelled of intoxicating beverages. The defendant was 59 years of age and had driven out to the Henkel Service Station, near the scene of the accident, to pay a fuel oil bill. The collision occurred shortly after he left the station on his way home.

The evidence shows that Jensen and plaintiff were traveling east toward Norfolk on U. S. Highway No. 275 at the time of the collision. The highway was paved and was spotted with ice, particularly where the trees protected it from the sun. It ran east and west and was fairly straight, although the evidence shows that there was a very slight curve that impaired one's vision in seeing cars more than 2,200 feet west of the Henkel Service Station. Such curvature is not important in this case.

The Henkel Service Station is located on the north side of U. S. Highway No. 275. The island containing three fuel pumps is about 40 feet north of the north edge of the paved highway. The service station building is about 22 feet north of the island. There is a power transmission pole 14 feet north of the highway and approximately 70 feet east of the station building. There are two mail boxes immediately south of the pole and 8 feet north of the pavement. A large truck and trailer was parked near this transmission pole. Its exact location is in dispute. Plaintiff and Jensen locate it as being parked facing the east and just north of the pole. The defendant says it was west of the pole with the front end about even with the pole. About 170 feet east of the transmission pole there was a highway bridge, 24 feet wide and 36 feet long. The

collision occurred either on or within 10 feet of the west end of the bridge.

The evidence on behalf of the plaintiff is substantially as follows: Jensen was driving his automobile in an easterly direction at a speed of 40 to 45 miles per hour. His lights were burning and his brakes were in good condition. He was traveling on the right-hand and south side of the highway. As he approached the area of the Henkel Service Station, defendant drove his car onto the pavement at a point east of the parked truck and trailer and 50 or 60 feet west of the bridge into the path of the Jensen car. Jensen states that he turned to the right in an attempt to avoid the collision, but hit defendant's car about 10 feet west of the bridge and then crashed into the bridge railing. Plaintiff was riding in the front seat with Jensen and was seriously injured by the collision. Jensen states that he applied his brakes but the icy condition of the highway made them ineffective.

The evidence in behalf of the defendant was that he had parked his automobile close to and immediately southeast of the station building, facing west. When he left, he says, he circled around from west to southeast and stopped at the north edge of the pavement. He says he looked west and saw no cars approaching. He looked east and saw the lights of cars traveling east. He testifies that his course took him west of the parked truck and that he stopped at the pavement about 40 feet west of the truck and trailer. After seeing that the highway was clear, he proceeded to enter it and to proceed to the right-hand side thereof and travel east at a speed of 15 miles per hour. His evidence is that he entered the highway at a point about 250 feet west of the bridge and that he had cleared the west end of the bridge when he was struck from the rear by the Jensen car.

The foregoing evidence presents a question of fact for a jury to determine. If, as plaintiff alleges, the de-

fendant drove his car into the path of the car in which plaintiff was riding, without taking reasonable precautions for his own safety, he was guilty of negligence. If, on the other hand, defendant entered the highway at a point 250 feet west of the bridge, as he testifies, and, seeing no approaching vehicles, proceeded east on the right-hand side of the road for a distance of approximately 250 feet and was then struck from behind by the Jensen car, the jury could properly find Jensen to be guilty of negligence and the defendant to be free thereof.

The jury evidently believed the story told by the plaintiff and his witnesses. A verdict for the plaintiff was therefore required under the following holdings of this court: A vehicle entering a public highway from a private road must yield the right-of-way to vehicles approaching on the highway. Kubo v. Fish, 152 Neb. 74, 40 N. W. 2d 270. A vehicle traveling on a highway at a reasonable and lawful rate of speed is not required to slow down or stop upon the appearance of a vehicle about to enter the highway from a private road until it reasonably appears that its driver is not going to yield the right-of-way. Kubo v. Fish, *supra*. If the driver of an automobile entering a highway from a private road looks for approaching vehicles but fails to see one which is favored over him under the rules of the road, he is guilty of negligence. The duty to look for approaching vehicles implies the duty to see that which is in plain sight. Dale v. Omaha & C. B. St. Ry. Co., 154 Neb. 434, 48 N. W. 2d 380.

The defendant urges that the trial court erred in submitting issues of negligence to the jury upon which there was no evidence. We find no prejudicial error in the record in this respect.

Defendant asserts that the trial court erred in failing to instruct the jury what its verdict should be if the evidence was evenly balanced. This court has held the rule to be: An instruction, which correctly ad-

vises the jury that the plaintiff must prove all the material elements of his case by a preponderance of the evidence and that if it fails to so establish any one of them the verdict should be for the defendant, is not erroneous in that it fails to inform the jury as to what the verdict should be if the evidence was evenly balanced. Danner v. Walters, 154 Neb. 506, 48 N. W. 2d 635; Kristufek v. Rapp, 154 Neb. 343, 47 N. W. 2d 923.

Defendant contends that a new trial should have been granted because of misconduct of the jury. There is evidence by affidavit that one of the jurors went to the Henkel Service Station after dark and observed the distance that cars could be seen approaching. This was approximately 2½ years after the accident involved in the suit. There was no dispute in the evidence about the matters observed by this juror. We cannot say that defendant was prejudiced in the present case. It is not shown to have involved a matter in dispute, or to have influenced the jury in arriving at a verdict. The ruling of the trial court in such matters will not ordinarily be disturbed in the absence of a showing of an abuse of discretion. Phillips v. State, 157 Neb. 419, 59 N. W. 2d 598; Scherz v. Platte Valley Public Power & Irr. Dist., 151 Neb. 415, 37 N. W. 2d 721.

There is evidence by affidavit that two jurors observed the defendant driving his automobile while they were on their way home one evening of the trial. By counter-affidavits they say they merely saw the defendant turn out on the shoulder of the highway in an abundance of caution when he met a truck. This does not appear to have been communicated to the jury or to have influenced the result in any way. If it could be shown that these jurors uncovered evidence bearing upon the issues before the jury, or tending to prejudice the jury in arriving at a verdict, it would clearly have been prejudicial error under our holdings. But the affidavits indicate that the conduct of these jurors, of which complaint is made, had no part in the reaching

of a verdict by these two jurors. The test has been stated to be: Are the facts thus gained by the unofficial examination of such a character as to enable us to say on review of the record thereof that they had no part in the jurors' reaching the verdict rendered? The two jurors were not seeking information concerning any issue involved in the case. They apparently observed the defendant driving down the highway quite by accident. In any event, they saw nothing, according to their affidavits, that was prejudicial to the right of the defendant. Prejudicial error is not shown. Applicable rules governing this subject are discussed in Kelley v. Adams County, 113 Neb. 377, 203 N. W. 544, and Meyer v. Omaha & C. B. St. Ry. Co., 125 Neb. 712, 251 N. W. 841.

Complaint is made that there was talk in the jury room regarding insurance. The matter of insurance is not ordinarily relevant to the issues in this type of case. It is wholly impossible, however, to protect against the speculation and conjecture of jurors relative to this question. All have some personal information concerning it and it is too much to hope that it will not creep into a jury's discussion of the issues in this type of case. It is a matter which necessarily inheres in the verdict when it is based wholly on speculation and conjecture on the part of the jury. Affidavits of jurors may not be considered to impeach a verdict when the facts sought to be shown are such as inhere in the verdict.

We think the case was fairly tried. We find no prejudicial error in the record. The judgment should be and is affirmed.

AFFIRMED.

OWEN A. FRANK ET AL., APPELLANTS, V. WRAY MACK RUSSELL ET AL., APPELLEES.

IN RE APPEAL OF OWEN A. FRANK AND DOROTHY H. FRANK, HUSBAND AND WIFE, FROM THE PURPORTED ORDER OF THE BOARD OF ADJUSTMENT OF THE CITY OF SCOTTSBLUFF.

OWEN A. FRANK ET AL., APPELLANTS, V. BOARD OF ADJUSTMENT OF THE CITY OF SCOTTSBLUFF, NEBRASKA, APPELLEE.

70 N. W. 2d 306

Filed May 6, 1955. Nos. 33702, 33705.

1. **Municipal Corporations.** The authority of the board of adjustment of the city of Scottsbluff to waive the exactions of the zoning ordinances and allow a variation therefrom may be exercised only if the variation is minor; if it does not interfere with public safety or welfare; if it does not abridge substantial justice; or if it relieves against unnecessary hardship or practical difficulties.
2. ———. The general rule is that a variance from zoning regulations on the ground of unnecessary hardship may not be granted: Unless the denial would constitute an unnecessary and unjust invasion of the right of property; if the grant relates to a condition or situation special and peculiar to the applicant; if it relates only to a financial situation or hardship to the applicant; if the hardship is based on a condition created by the applicant; if the hardship was intentionally created by the owner; if the variation would be in derogation of the spirit, intent, purpose, or general plan of the zoning ordinance; if the variation would affect adversely or injure or result in injustice to others; or ordinarily if the applicant purchased his premises after enactment of the ordinance.
3. **Municipal Corporations: Appeal and Error.** In a review on appeal of the action of a board of adjustment granting a variation from the provisions of a zoning ordinance, the decision of the board will not be disturbed unless it is found to be illegal or from the standpoint of fact it is not supported by evidence, or is arbitrary and unreasonable, or is clearly wrong.
4. **Estoppel.** The doctrine of estoppel applies when one by his words or conduct causes another to believe in the existence of a certain state of facts and to act upon that belief or to alter his previous condition.

APPEAL from the district court for Scotts Bluff County:

CARROLL O. STAUFFER, JUDGE. *Reversed and remanded with directions.*

Mothersead, Wright & Simmons, for appellants.

Russell E. Lovell and *Atkins, Lyman & Ferguson,* for appellees.

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

YEAGER, J.

Here are two actions which were tried together but not consolidated. One is by Owen A. Frank and Dorothy H. Frank, plaintiffs and appellants, against Wray Mack Russell and Marjorie Glandon Russell, defendants and appellees. The action is one for the purpose of enjoining erection of a residential building on Lot 6 and the south half of Lot 5, Block 7, Bungalow Addition to the City of Scottsbluff, Nebraska, with its east end or side less than 40 feet, or only 27 feet, west of the east line of the described property. The injunction was denied and from the judgment the Franks have appealed to this court. This action will be hereinafter referred to by its case number in this court which is 33702.

The other action grows out of the issuance of a permit on December 7, 1953, by the city engineer and ex officio building inspector of the city of Scottsbluff for the construction of a residence building on the described property. The permit granted permission for the construction of the building with its east end or side 27 feet west of the east line and its south end or side 12½ feet north of the south line. The attention of the city engineer was called to a restrictive ordinance of the city whereupon preparation for construction was ordered stopped by the city engineer. Thereafter Wray Mack Russell and Marjorie Glandon Russell appealed from the action of the city engineer to the board of adjustment of the city of Scottsbluff. The board of adjustment conducted a hearing, after due notice to all parties con-

cerned, and on January 5, 1954, approved the plans of the Russells for the construction of the building which had in the first instance been approved by the city engineer. There was an earlier hearing by the board but the parties are apparently in accord that it was ineffective. It therefore will receive no further attention herein. From the order of the board approving the plans, Owen A. Frank and Dorothy H. Frank appealed to the district court where a trial was had. The district court sustained the action of the board and from the judgment the Franks have appealed to this court. This case will be hereinafter referred to by its case number in this court which is 33705.

The Franks are appellants in both actions and they will be so referred to hereinafter in this opinion. The Russells will be referred to as defendants. The board of adjustment, appellee in case No. 33705, will be referred to as appellee.

One apparent reason why the two cases were not consolidated but were only tried together was that the defendants contended in case No. 33702 that the appellants were without right to maintain their action for injunction for the reason that they had a full, complete, and adequate remedy at law. This question was decided adversely to the appellants in the final decree. However, along with this determination and as a part of the decree the court made a determination on the merits of all other questions and issues presented by the pleadings and evidence.

It appears, however, unnecessary to consider this question since the defendants appear to have abandoned this contention and have presented the case fully with insistence that this court shall sustain the decree on the merits of the controversy.

In brief detail and in substance the appellants in case No. 33702 alleged in their petition that on May 1, 1951, ordinance No. 890 was adopted by the city of Scottsbluff and that subdivision (m) of section X is the following:

"Where lots comprising twenty-five (25) per cent or more of the footage of any block are developed with buildings, no building hereafter erected or structurally altered, shall project beyond the average front yard depth so established, provided further that this regulation shall not be interpreted so as to require a front yard depth of more than fifty (50) feet." They further alleged that prior to May 1, 1951, all of the building lots facing east in Block 7, Bungalow Addition, were built upon and occupied as family residences save and except the property owned by defendants and that all of the lots including that of defendants face east on Fifth Avenue; that all of the lots on which buildings had been erected constituted more than 25 percent of the footage of the block; and that all of the buildings had been set back from the east lot line 40 feet.

They further alleged that the defendants will, unless enjoined, build and construct a residence on their property in this block which will project to within 27 feet of the east lot line of the block. The property of the defendants in this block is that hereinbefore described. The dimensions of this property are 75 feet north and south and 130 feet east and west.

They further alleged as grounds for injunctive relief that the construction contemplated would be violative of the city ordinance; that it would obstruct appellants' view; that it would interfere with the enjoyment of their home; and that it would greatly depreciate the value of their property and cause irreparable damage.

To the petition the defendants filed an answer. The substance of the answer necessary to be set forth at this point is the following: They admitted the provision of the ordinance pleaded by the appellants but said that it has no application to the controversy. Instead they said subdivision (1) of section X is applicable and that pursuant to its terms and their building plans and permit from the city of Scottsbluff they have the right to construct their building with a set-back from the east

property line of not more than 27 feet. The provision of the ordinance referred to is the following: "On corner lots, the front yard requirements for the street upon which the front of the building faces shall apply. The side yard shall be not less than one-half (½) of the front yard requirements for buildings on lots fronting upon the side street, except that where there are no lots fronting on that street, the side yard requirements only shall apply. No accessory building on said corner lot, regardless of the way it faces, shall project beyond the front yard line of either street; provided further, that this regulation shall not be so interpreted as to reduce the buildable width of a corner lot facing an intersecting street and of record at the time of the passage of this ordinance to less than twenty-eight (28) feet nor to prohibit the erection of an accessory building with which this regulation cannot reasonably be complied."

Also by way of answer they said that the appellants were estopped to assert any rights under the provision of the ordinance pleaded by the appellants.

For convenience in understanding it appears well to state here that in these cases there is no attack by anyone upon the validity of any ordinance provision. The question in this respect is only of interpretation and application. It may be said also that there is no material factual dispute as to any matter determinative of the issues in either case.

From this point forward the two cases, for the purposes of decision, will be treated together. The questions presented are so intermingled that this appears proper.

As has been observed case No. 33705 is an appeal from action of the district court sustaining a decision of the board of adjustment permitting the defendants to erect their building within 27 feet of the east lot line. In it the issues presented to the trial court and decided by it were in substance the same as those presented and tried in case No. 33702. The decisions were substantially the

same and both were adverse to the appellants. The appeals are from these decrees. There are numerous assignments of error set forth which appellants urge as grounds for reversal, but substantially those necessary to be considered herein are embodied in the contentions that the board of adjustment acted without proper authority; that the district court improperly interpreted and applied the zoning ordinances; and that the court erred in holding that the appellants were estopped to assert any rights under the ordinances.

On the trial of both cases in the district court the question of which of the two provisions of ordinance No. 890 defined the rights of defendants as to erection of a building on their property was presented. The appellants contended that subdivision (m) of section X applied. The defendants contended that subdivision (l) of section X applied and that by appropriate application of it they were entitled to erect their building as planned.

It cannot be known to what extent these conflicting contentions were presented to the board of adjustment in the proceeding out of which case No. 33705 flows since no evidentiary record was made of what transpired at the hearing. It is known however that the board did not decide between the contentions. It decided in this connection only that under authority of paragraph 5 of section XI of ordinance No. 890 the exactions of subdivision (m) of section X of this ordinance should be waived and it did waive them and granted permission for the erection of the building 27 feet from the east lot line and 12½ feet from the south line. Paragraph 5 of section XI is the following: "Where there are practical difficulties or unnecessary hardships in the way of carrying out the strict letter of this ordinance, the Board of Adjustment shall have power in passing upon appeals to make minor variations in regulations or provisions of this ordinance relating to the use, construction or alteration of buildings or structures or the use of land so that the spirit of the ordinance shall be ob-

served, public safety and welfare secured, and substantial justice done. Such variations shall be passed by a majority of the Board."

The true issue presented to the district court in case No. 33705 therefore was the question of whether or not there was a valid exercise of the grant of power contained in paragraph 5 of section XI of the ordinance. As pointed out earlier herein there is no attack upon the validity of any provision of the ordinance.

Paragraph 5 of section XI contains elements for the determination of the basis upon which the power therein contained may be properly exercised and departures and variations permitted. Variations to be permissible must be minor; they may not violate the spirit of the ordinance; they may not interfere with public safety or welfare; they may not abridge substantial justice; they must be in relief of unnecessary hardship; and they must relieve against practical difficulties.

Taking these elements in the order set forth it may well be said that the term minor has no technical or specific significance. It is a relative term indicating a situation of inferior degree or importance.

The design of the ordinance as of the time involved and as to the property involved here was to provide uniformity of frontage in this block of not less than 40 feet. This was a condition to which the other owners of property in the block were entitled under the ordinance. It does not appear that an interference with that right to the extent of a 13 foot encroachment may be regarded as minor.

Obviously the spirit of the ordinance in this connection was to provide a harmony certainly aesthetically desirable in city planning. A building constructed as this one was planned would be destructive of that harmony and thus of the spirit of the ordinance.

In all probability this departure would not in anywise interfere with public safety or welfare.

On the question of substantial justice it is, to say the

least, difficult to perceive how this departure which destroys the symmetry of the block front and takes away a large part of the frontage view of the other property in the block may be said to result in substantial justice.

To deny the defendants the right to construct in accordance with their plan would involve hardship to them, and also, a departure from the ordinance would relieve them against practical difficulties. It must be remembered however that these hardships and difficulties were created by them, in the face and in the light of the prohibitions of the ordinance. It would certainly be unreasonable to allow one to create his own hardship and difficulty and take advantage of it to the prejudice of innocent parties.

The subject of hardship and the subject generally of the right to have a departure from the provisions of a zoning ordinance are extensively considered in annotations in 168 A. L. R., pages 15 to 46, and from an examination of these annotations and the cited cases it becomes clear that the action of the board of adjustment was unreasonable and arbitrary.

At page 27, it is said: "—the essential inquiry on an application for a variance on the ground of undue hardship is whether, in the circumstances exhibited, the denial thereof would constitute an unnecessary and unjust invasion of the fundamental right of property."

At page 28, it is said: "It is generally held that, to warrant the granting of a variance on the ground of unnecessary hardship, the hardship relied upon must be special and peculiar to the applicant, and must not arise from a condition which affects other property in the same zone or district generally."

At page 30, it is said: "—the financial situation or pecuniary hardship of a single owner affords no adequate grounds for putting forth this extraordinary power affecting other property owners as well as the public."

At page 33, it is said: "Ordinarily, a claim of un-

necessary hardship cannot be based upon conditions created by the owner or applicant."

Again at the same page, it is said: "A hardship intentionally created by the owner of premises for the purpose of laying a basis for an application for a variance cannot be considered for such purpose."

At page 34, it is said: "The fact that the applicant has made expenditures for the purpose of fitting a building for a nonconforming use, under the belief that such use was permissible under the zoning regulations, has been held not to warrant or require the granting of a variance on the theory that the refusal thereof would impose unnecessary hardship on the applicant."

At page 37, it is said: "The power to vary the application of zoning regulations, or to permit special exceptions thereto, is commonly expressly limited to such variations or exceptions as are consistent or in harmony with, or not subversive or in derogation of, the spirit, intent, purposes, or general plan of such regulations."

At page 38, it is said: "—'the dominant design of any zoning act is to promote the general welfare. The protection of health and the promotion of safety are salient factors. The stability of the neighborhood and the protection of property of others in the vicinity are important considerations.' "

At page 40, it is said: "A board of zoning appeals has power to grant a variance on the ground of unnecessary hardship only where the grant of such privilege will not injure or result in injustice to others."

At page 45, it is said: "The claim of unnecessary hardship as a ground for a variance is not ordinarily available to one who purchased the premises after the enactment of the regulation in question."

It appears that the rule respecting the right of a board of adjustment, such as the one here, to grant a variance from zoning regulations on the ground of unnecessary hardship is generally that it may not be granted: Unless the denial would constitute an un-

necessary and unjust invasion of the right of property; if the grant relates to a condition or situation special and peculiar to the applicant; if it relates only to a financial situation or hardship to the applicant; if the hardship is based on a condition created by the applicant; if the hardship was intentionally created by the owner; if the variation would be in derogation of the spirit, intent, purpose, or general plan of the zoning ordinance; if the variation would affect adversely or injure or result in injustice to others; or ordinarily if the applicant purchased his premises after enactment of the ordinance.

The appellee asserts that the district court was bound to sustain the action of the board, and that this court is likewise bound, in the absence of a finding that the action of the board was illegal.

This contention finds support in the statute. Section 19-912, R. R. S. 1943, which is a part of the act granting cities their powers as to zoning, provides for appeal only on the ground of illegality. The act clearly contemplates a review of facts as well as law on appeal. Therefore we conclude that as to questions of fact the rule which has application to other administrative agencies and actions at law should apply, that is, that the decision of the board of adjustment will not be disturbed unless it is found to be illegal or from the standpoint of fact it is not supported by evidence, or is arbitrary and unreasonable, or is clearly wrong. See, Rawlings v. Chicago, B. & Q. R. R. Co., 109 Neb. 167, 190 N. W. 569; Omaha & C. B. St. Ry. Co. v. City of Omaha, 125 Neb. 825, 252 N. W. 407; Furstenberg v. Omaha & C. B. St. Ry. Co., 132 Neb. 562, 272 N. W. 756.

The conclusion is therefore that the finding and order of the board of adjustment was violative of the power it had under paragraph 5 of section XI of ordinance No. 890 and that the district court erred in holding in its decree to the contrary.

As pointed out in cases No. 33702 and No. 33705 the

question of the interpretation and application of subdivisions (l) and (m) of section X was presented and tried on the merits and a decree was rendered in each case fully determining all issues presented on the merits.

The court found and decreed that the property of defendants was a corner lot and that subdivision (l) of ordinance No. 890 was applicable thereto. The appellants seek a reversal of this part of the finding and decree and an adjudication that the restriction of subdivision (m) of section X of the ordinance applies as a restriction against the erection of buildings on defendants' property nearer than 40 feet from the east lot line.

The two provisions have been quoted herein and from examination it is clear that the prohibition of subdivision (m) is absolute and without exception. It is further clear that as to new construction or alteration it permits no building, no matter how it is faced or constructed, to extend into the restricted area.

This provision is in apparent conflict with subdivision (l). We think the conflict is real and not merely apparent.

In this light and in the light of the fact that no party has seen fit to challenge the validity but only the interpretation and application of ordinances it appears to be our duty, if possible, to harmonize the two. In order to do so it becomes necessary to examine into the purposes to be accomplished by the provisions in the light of reason and common and general knowledge and experience.

It becomes readily apparent that, if the defendants' contention with reference to subdivision (l) is to be accepted, the restriction of subdivision (m) is completely nullified as to defendants' property because this property is a corner lot. The effect of this would be to allow the defendants under subdivision (l) to place the front of their building on Twenty-second Street in conformity with the frontage restriction thereon, if any,

and place the east end of their building 20 feet from the east lot line or one-half the distance of the restriction for buildings fronting on Fifth Avenue.

By analysis it becomes clear that subdivision (l) grants to owners of corner lots the right to select either of the two sides for the front of his house. Having selected one side for the front he is bound by the building line established for the front of buildings on that street. In such case, as pointed out, the side of his building shall be not less than half of the front yard restriction for the street which he has selected for the side of his building.

It is impossible to conclude that this was the purpose of the provision or the intent of the city in the adoption of the zoning ordinance. It is inconceivable that the city intended to destroy the right of property owners or itself to exact adherence to restriction so clearly and positively set forth in subdivision (m).

The grant of subdivision (l) as to width of the side yard is not absolute. It is limited. The provision of subdivision (m) is absolute and unlimited.

The only way to give effect to the two provisions of this ordinance is to say that subdivision (m) is a fixed limitation upon the provision of subdivision (l) as to width of the side yard. This conclusion, we hold, gives full effect to the purposes of the ordinance and the intent of the city in its adoption. It does not destroy but preserves the ordinance. It is reasonable. Any other conclusion would be unreasonable and arbitrary. Thus applied the defendants were required to construct their building so that its east side should be not less than 40 feet from the east lot line.

There is another question necessary to be considered herein. The defendants have insisted that the appellants are estopped to claim any right to the maintenance of the restriction of subdivision (m) of the ordinance. This contention is based on the fact that at one time the appellants owned the property now owned by the

defendants and that when they sold it they did so with a 5-year restriction which had expired.

This was a fact, but the restriction had expired before the zoning ordinance was adopted and before defendants started construction. The appellants had no interest in or control over the property when the ordinance was adopted. In truth the restrictive provisions under examination here have attached to this property since 1947 which was before the defendants acquired it. The doctrine of estoppel applies when one by his words or conduct causes another to believe in the existence of a certain state of facts and to act upon that belief or to alter his previous condition. See, State v. Smith, 135 Neb. 423, 281 N. W. 851; Bleicher v. Heeter, 141 Neb. 787, 4 N. W. 2d 897. The contention that appellants are estopped is without merit.

The decree in case No. 33702 is reversed and the cause remanded to the district court with directions to enjoin defendants from construction of their building with its east end less than 40 feet from the east lot line.

The decree in case No. 33705 is reversed with directions to render decree effectually overruling the order of the board of adjustment wherein it granted authority to the defendants to construct a building on the property in question less than 40 feet from the east line thereof.

REVERSED AND REMANDED WITH DIRECTIONS.

NORMAN H. MARMET, SR., ET AL., APPELLEES, V. NORMAN H. MARMET, JR., ET AL., APPELLANTS, IMPLEADED WITH PATTY SUTTER MARMET ET AL., APPELLEES.

70 N. W. 2d 301

Filed May 6, 1955. No. 33712.

1. **Subrogation.** The doctrine of subrogation is not available to one who pays his own primary obligation.
2. **Husband and Wife.** At common law the husband and wife are treated as one person, that is, the legal existence of the wife

is suspended during marriage, and she becomes incapable of making a valid contract to bind either herself or her estate.

3. ———. The common-law disability of a married woman is still in force in this state, except as it has been abrogated by statute.

4. ———. Under our statute, a married woman is but partially emancipated from her common-law disability to contract.

5. ———. The statute has removed the common-law disability of a married woman to bind her separate property, where her contract is made with intent on her part to bind it.

6. **Husband and Wife: Bills and Notes.** When a married woman signs a note there is no presumption that she intended thereby to fasten a liability upon her separate estate.

7. **Husband and Wife: Evidence.** A valid provision in the contract, expressly and unequivocally binding her separate estate, is conclusive proof of such intention, and cannot be contradicted by parol evidence.

8. ———: ———. In cases where the note does not contain a clause to the effect that the wife intends to bind her separate estate, parol evidence is admissible to show the intent of the parties.

9. **Husband and Wife: Bills and Notes.** When coverture is pleaded and proved or admitted, the burden is upon the plaintiff to establish that the note, upon which the action is based, was made with reference to, and upon the credit of, her property and with the intent to bind the same.

10. **Case Modified.** Insofar as the rule laid down in First Nat. Bank of Chicago v. Stoll, 57 Neb. 758, 78 N. W. 254, can be said to be in conflict herewith the same is modified.

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

Archibald J. Weaver, for appellants.

Wiltse & Wiltse, for appellees.

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

WENKE, J.

This is a partition action brought in the district court for Richardson County by Norman H. Marmet, Sr., and Viola E. Marmet. The district court found that plaintiff Norman H. Marmet, Sr., had an undivided seven-ninths

interest in the 152.58 acres being partitioned and that each of the defendants, Norman H. Marmet, Jr., Gene F. Marmet, and Melvin O. Marmet, had an undivided two twenty-sevenths interest therein. The court then decreed partition thereof accordingly but charged each of these defendants' share with $645.52 in favor of the plaintiff Norman H. Marmet, Sr. These defendants filed a motion for new trial and, from the overruling thereof, have filed this appeal.

We shall herein refer to Norman H. Marmet, Sr., as appellee except when necessary to refer to him by his name and to the three appealing defendants as appellants except when it becomes necessary to refer to them by their names.

Two of the appellants, Gene F. Marmet and Melvin O. Marmet, are minors over 14 years of age. They were represented in the district court by a guardian ad litem. The guardian ad litem took this appeal for them and is properly representing them here.

The principal question presented by this appeal is, under the facts disclosed by the record, is appellee entitled to be subrogated to the mortgage lien which was on the lands being partitioned at the time appellants became the owners of an interest therein as heirs of their mother, and if so, the amount?

The record shows, either by admissions in the pleadings or stipulations of the parties, that on October 30, 1946, appellee and his then wife, Amanda E., signed a $9,000 note payable to Henry C. Barton and executed a mortgage on the lands referred to herein to secure it, which lands constituted their homestead; that thereafter, on November 14, 1948, Amanda E. Marmet died intestate leaving as her sole and only heirs at law appellee, her husband, and their four sons, Norman H., Jr., Gene F., Melvin O., and Meryln Leon; that her estate has never been administered; that she died seized of an undivided one-third interest in the 152.58 acres herein being partitioned which were then subject to the

$9,000 mortgage hereinbefore described; that the son Merlyn Leon, born November 13, 1948, died intestate on November 15, 1948; that his estate has never been administered; that on July 14, 1951, appellee and his then wife, Viola E., executed a $15,500 note and mortgage to W. R. Boose, giving as security therefor appellee's interest in the 152.58 acres; that $9,000 of this loan was used to pay the existing mortgage on the farm, the origin of which has already been set forth; and that the mortgage given to secure this loan of $9,000 was cancelled and released of record.

The pleadings of both parties show that on October 30, 1946, when Amanda E. Marmet executed the $9,000 note and mortgage, she was a married woman, the wife of appellee. Appellants pleaded, and here contend, that appellee was primarily liable for the indebtedness which he paid and consequently not entitled to the benefit of the doctrine of subrogation.

Section 62-1,192, R. R. S. 1943, defines a person primarily liable on an instrument as follows: "The person 'primarily' liable on an instrument is the person who by the terms of the instrument is absolutely required to pay the same. All other parties are 'secondarily' liable."

If appellee was the only one primarily liable for the $9,000 indebtedness then he would not be entitled to subrogation for, as we said in Luikart v. Buck, 131 Neb. 866, 270 N. W. 495: "The doctrine of subrogation is not available to one who pays his own primary obligation." In that opinion the court went on to say: "The right of subrogation never follows an actual primary liability, and one who discharges a primary liability has no right of subrogation against another. In such cases payment is an extinguishment of the liability. 60 C. J. 712." See, also, 50 Am. Jur., Subrogation, § 20, p. 695; 83 C. J. S., Subrogation, § 8, p. 600; 9 Thompson on Real Property (Perm. ed.), § 5055, p. 515; 59 C. J. S., Mortgages, § 876, p. 1706.

As stated in 83 C. J. S., Subrogation, § 8, p. 601: "* * * subrogation is not allowed in favor of him who pays a debt in performance of his own obligation, since the right of subrogation never follows an actual primary liability, and there can be no right of subrogation in one whose duty it is to pay, or in one claiming under him against one who is secondarily liable, or not liable at all."

On the other hand appellee contends that the property was subject to a mortgage indebtedness incurred by both Norman H. Marmet, Sr., and Amanda E. Marmet and that, being joint makers, both Amanda E. Marmet and Norman H. Marmet, Sr., were primarily liable to the other for contribution in event one paid the indebtedness.

Amanda E. Marmet could and did give a valid mortgage on her interest in the land. See § 42-202, R. R. S. 1943.

If Amanda E. Marmet, the wife, was primarily liable with appellee, her husband, for the $9,000 debt secured by their mortgage we could agree with appellee that he would then be entitled to contribution from her and, to the extent of the right to contribution, subrogated to all rights under the mortgage which was given to secure it. See Exchange Elevator Co. v. Marshall, 147 Neb. 48, 22 N. W. 2d 403. Therein we said:

"A joint or joint and several debtor who has been compelled to pay more than his share of the common debt has the right of contribution from each of his co-debtors. * * *

"The paying debtor is entitled to recover from the other or others the amount which he has paid in excess of his own proportionate part."

"At common law the husband and wife are treated as one person, that is, the legal existence of the wife is suspended during marriage, and she becomes incapable of making a valid contract to bind either herself or her estate." Webb v. Hoselton, 4 Neb. 308, 19 Am. R. 638.

"The common-law disability of a married woman is

still in force in this state, except as it has been abrogated by statute." Fidelity & Deposit Co. v. Lapidus, 136 Neb. 473, 286 N. W. 386. See, also, Grand Island Banking Co. v. Wright, 53 Neb. 574, 74 N. W. 82.

"Under our statute, a married woman is but partially emancipated from her common-law disability to contract." Farmers' Bank v. Boyd, 67 Neb. 497, 93 N. W. 676.

"The statute has removed the common-law disability of a married woman to bind her separate property, where her contract is made with intent on her part to bind it." John Fletcher College v. Estate of Pailing, 121 Neb. 847, 238 N. W. 750.

"When a married woman signs a note there is no presumption that she intended thereby to fasten a liability upon her separate estate, but in an action on such note, where coverture is pleaded as a defense, and proved, the burden is upon the plaintiff to establish that it was made with reference to, and upon the credit of, her property, and with the intent to bind the same." Grand Island Banking Co. v. Wright, *supra*.

We have also said: "A valid provision in the contract, expressly and unequivocally binding her separate estate, is conclusive proof of such intention, and cannot be contradicted by parol evidence." Fidelity & Deposit Co. v. Lapidus, *supra*.

But, "* * * in cases where the note does not contain a clause to the effect that the wife intends to bind her separate estate, parol evidence is admissible to show the intent of the parties." Sturm v. Lloyd, 130 Neb. 89, 264 N. W. 150.

There is nothing in the pleadings, nor in the stipulation agreed to, to show that Amanda E. Marmet bound, or intended to bind, her separate estate when she signed the note and mortgage. In the absence thereof the trial court was without authority to find that she was personally liable for the $9,000 indebtedness. See, Dodge

v. Healey, 103 Neb. 180, 170 N. W. 828; Filley v. Mancuso, 135 Neb. 403, 281 N. W. 850.

The pleadings set forth the married status of Amanda E. Marmet at the time she signed the note and mortgage but the appellants did not specifically allege in their answers that she did not intend to thereby bind her separate estate. In First Nat. Bank of Chicago v. Stoll, 57 Neb. 758, 78 N. W. 254, we said: "A plea of coverture must negative the conditions under which a married woman is by statute permitted to contract."

The foregoing is based on our holding in Gillespie v. Smith, 20 Neb. 455, 30 N. W. 526, wherein we said: "* * * when a married woman sets up her coverture to avoid liability on her contracts she must in her answer negative all the causes from which otherwise her liability may be inferred, as that 'the contract did not concern her separate property, trade, or business.'"

However, in Grand Island Banking Co. v. Wright, *supra,* we said: "When a married woman signs a note there is no presumption that she intended thereby to fasten a liability upon her separate estate * * *." Consequently it could not be inferred that by merely signing a note Amanda E. Marmet intended to bind her separate estate.

As stated in Farmers' Bank v. Boyd, *supra*: "The signing of a promissory note by a married woman creates no presumption of consideration or of her intention to bind her separate estate."

We think the correct rule is stated in Grand Island Banking Co. v. Wright, *supra.* Therein this court held that when coverture is pleaded and proved or admitted, the burden is upon the plaintiff to establish that the note, upon which the action is based, was made with reference to, and upon the credit of, her property and with the intent to bind the same. Insofar as the rule laid down in First Nat. Bank of Chicago v. Stoll, *supra,* can be said to be in conflict therewith the same is modified. In support of this holding, see First Nat. Bank of Sutton v.

Grosshans, 54 Neb. 773, 75 N. W. 51; State Nat. Bank v. Smith, 55 Neb. 54, 75 N. W. 51; Citizens State Bank v. Smout, 62 Neb. 223, 86 N. W. 1068; Farmers' Bank v. Boyd, *supra;* Northwall Co. v. Osgood, 80 Neb. 764, 115 N. W. 308; Dodge v. Healey, *supra;* Fidelity & Deposit Co. v. Lapidus, *supra.*

As stated in First Nat. Bank v. Ernst, 117 Neb. 34, 219 N. W. 798: "Intent of a married woman to bind her separate estate for the payment of a note executed in Nebraska, as surety for her husband with whom she is living in Nebraska, where such note does not relate to her separate estate, trade, or business, is a condition precedent, in the absence of which she has no capacity to make a binding contract."

And in Farmers' Bank v. Boyd, *supra,* we said: "The burden of proof is upon the holder of a promissory note signed by a married woman to show that she intended to bind her separate estate for the satisfaction of the obligation." See, also, John Fletcher College v. Estate of Pailing, *supra;* Fidelity & Deposit Co. v. Lapidus, *supra;* Dodge v. Healey, *supra;* Filley v. Mancuso, *supra.*

Appellee had a life estate in the property when he paid the $9,000 indebtedness, since it was the homestead of the parties at the time Amanda E. Marmet died. Appellee calls our attention to the principle that when a life tenant is compelled to pay off a mortgage debt in order to protect his life estate that he ordinarily is, as against remaindermen, subrogated to the lien of the mortgage indebtedness.

As stated in Downing v. Hartshorn, 69 Neb. 364, 95 N. W. 801, 111 Am. S. R. 550: "It is undoubtedly a general rule that where a tenant for life pays off a mortgage or other charge upon the entire estate, he is presumed to do so for his own benefit, and may preserve and enforce the lien for reimbursement over and above the proportion of the debt which he is bound to contribute."

And in Tindall v. Peterson, 71 Neb. 160, 98 N. W.

688, we said: "It is a general rule, subject to exceptions not applicable to the case at bar, that a life tenant, who in order to preserve the estate pays off an incumbrance upon the fee, is entitled to reimbursement from the reversioners or remaindermen."

But this principle has no application where the life tenant paid off his own debt for which he alone was primarily liable. That situation results in an exception to the general rule.

Appellee also calls our attention to the principle that a tenant in common who has paid off a lien or an incumbrance on the property is ordinarily entitled, on partition, to a proportionate reimbursement therefor from the other tenants. Likewise this principle has no application where the tenant in common has paid off his own debt for which he alone was primarily liable.

Having come to the conclusion that appellee has failed to show that Amanda E. Marmet intended to obligate herself upon the $9,000 note when she signed it by agreeing to make her separate estate liable therefor, we find she was not personally obligated to pay it. On the other hand we find the indebtedness evidenced by the note was the primary obligation of appellee, that he was personally obligated to pay it, and that when he did so the debt was extinguished. Consequently we think the trial court was in error in subrogating the appellee to the lien of the mortgage given to secure the note, which appellee had paid, and in charging the share of these appellants in the land with any part thereof.

We therefore reverse that part of the trial court's decree charging each of the appellants' interest in the land with $645.52 with direction that the decree be modified in accordance with our opinion herein. The guardian ad litem is allowed a fee of $150 for services in this court, which amount is to be taxed as costs. Costs are taxed to appellee, Norman H. Marmet, Sr.

REVERSED AND REMANDED WITH DIRECTIONS.

NORMAN HOFFMAN, PLAINTIFF IN ERROR, V. STATE OF NEBRASKA, DEFENDANT IN ERROR.

70 N. W. 2d 314

Filed May 6, 1955. No. 33732

1. **Criminal Law.** Extrajudicial admissions or a voluntary confession is insufficient to prove that a crime has been committed, but either or both are competent evidence of the fact and may, with corroborative evidence of facts and circumstances, establish the corpus delicti and guilty participation of the defendant.
2. **Criminal Law: Witnesses.** The credibility of witnesses and the weight of their testimony are for the jury to determine in a criminal case, and the conclusion of the jury will not be disturbed unless it is clearly wrong.
3. **Intoxicating Liquors: Trial.** If intoxication of a person is an issue in litigation and foundational requirements are observed evidence of the alcoholic content of a specimen of his body fluid determined by a chemical analysis and expert opinion evidence as to intoxication based upon the fact of such alcohol in the system of the person in question are admissible.
4. **Intoxicating Liquors: Statutes.** The legislative act providing that a presumption results that the operator of a motor vehicle is under the influence of intoxicating liquor from a determination that the amount of alcohol in the body fluid of the operator at the time in question is 0.15 percent or more by weight as shown by a chemical analysis is in derogation of the common law, and it must be strictly interpreted and applied as limited by the terms of the act.
5. ———: ———. The provisions of section 39-727.01, R. R. S. 1943, are only applicable to and available in a prosecution for a violation of section 39-727, R. S. Supp., 1953.
6. **Criminal Law: Appeal and Error.** If it does not appear from the record that an incorrect instruction to the jury did not affect the result of a trial of a criminal case unfavorably to the defendant the giving of the instruction must be considered prejudicial error.

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

Dryden & Jensen, for plaintiff in error.

Clarence S. Beck, Attorney General, and *Ralph D. Nelson*, for defendant in error.

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

BOSLAUGH, J.

Norman Hoffman, identified herein as defendant, was charged with and convicted of the crime of motor vehicle homicide. § 28-403.01, R. S. Supp., 1953. He was adjudged to be confined in the State Reformatory. He prosecutes error to review the record of his conviction.

The defendant contests the sufficiency of the evidence to authorize a verdict of guilty. He and Billy Carlson, hereafter referred to as Carlson, were traveling westward on U. S Highway No. 30 in the early morning of May 16, 1954, in the 1949 Ford convertible automobile of defendant. The White Spot Service Station is near to, north of the highway, and east of Kearney. A 2 or 3 ton straight Chevrolet truck was serviced at the station. Its lights were checked and were found to be in serviceable condition. The lights on the sides of the truck were amber color, there were red ones on each rear corner, and a stop light on the back of the truck. The truck left the station, was driven out of the driveway, and westward on the highway.

The automobile of the defendant was at about 3:45 a. m. driven into and collided with the rear of the truck described above some distance west of the station. There were two persons traveling eastward on the highway and when they were 500 to 800 yards west of the station they saw the collision of the car and the truck. A spare tire was thrown into the air and over the highway. The noise made by the collision was heard. The truck twisted around to the left and then to the right down into the ditch on the north of the highway. The car collided with the rear of the truck on the north side of the highway, swerved towards the south, and traveled southwest to about the right-of-way fence of the Union Pacific Railroad Company. One of the men who witnessed the tragedy heard what he termed an explo-

sion and saw the truck leave the highway as if it had been picked up and thrown from the road. The drive shaft of the truck was broken and detached from it. It was upright with one end in the shoulder of the highway a considerable distance east of where the truck came to rest. The dual wheels on the rear of the truck were broken off and were hanging on the south side of it.

The shoulders of the road were wet and muddy. There were wheel and skid marks for 50 feet east of the truck, for the next 6 feet eastward there were none, and for an additional distance of 57 feet there were tire marks on the surface of the road. At the extreme east end of the 57 feet there was debris consisting of chrome strips, pieces of battery casing, and broken glass in the north lane of the highway but none in the south lane. The distance from the debris to where the truck stopped was 147 feet.

The car of defendant was substantially destroyed. It is not easily understandable how anyone could have been riding in the driver's position or at all in the car and survived. The convertible top of the car was not collapsed. It was broken down on and into the body of the car by the collision. The distance from the debris and where the skid marks first appeared southwesterly to where the car went into the ditch on the south side of the road was 141 feet, and it thereafter traveled 101 feet. The total distance it went from the probable place of the collision was 242 feet. The distance from the debris in the north lane of the highway to the center driveway at the White Spot Service Station was 603 feet.

Immediately after the accident Carlson was on the passenger or right side of the front seat of the car. He was leaning to the right against the door which was partly open and the upper part of his body was hanging out of the car. He was dead. He had light or blond hair. Blood and blond hair were found on the post on the right front of the car. A man with dark hair was

found in the front seat of the car almost but not wholly behind and under the steering post and wheel. He was afterwards identified as the defendant. He regained consciousness as the first person reached the car after the accident. Defendant was saying "'Don't, honey. Don't, honey.'—like that." His right foot was between the clutch and the brake pedals. The front door on the left side of the car was forced open and his foot was loosened. The steering wheel had been bent downward and was against the defendant. It was pried upward and the defendant was removed from the car and taken to a hospital at Kearney. Alcohol was detected on the breath of defendant and in the car. There were drinking glasses, pop bottles, bottle openers, whisky bottles, beer bottles, and chlorophyll mints in the car.

The defendant and Carlson left Holdrege about 3 p. m., May 15, 1954, on an adventure to Grand Island and met two lady friends at the race track. They had 5 or 6 drinks before about 7 p. m. when they retired to the Sunset Motel where the ladies were staying and had highballs. Their liquor supply was not adequate to their demands and Carlson left to secure a supply of whisky. They met later, had dinner, and thereafter visited numerous night spots. The frequency or continuity of their indulgence in intoxicating liquor was remarkable. There was some unpleasantness and the ladies left defendant and Carlson about 2:30 a. m. at the Top Hat but they stayed there until 2:45 a. m. They then went to the Sunset Motel to see the girls and "give them a social call * * *." When they left there on the trip back to Holdrege Carlson was in the front seat alone and was driving the car, and defendant was lying on the back seat.

The defendant said he went to sleep a few minutes after they left the Sunset Motel in Grand Island and that he was not conscious of anything thereafter until about 9:30 a. m. when he realized that he was in a hospital in Kearney. He did not drive his car from the time they

left the race track in Grand Island about 7 p. m. the night before until after the accident. The car was driven by Carlson during this period. Defendant did not deny that he and Carlson were on an intensive drinking experience during the afternoon and night preceding the accident. Defendant denied that he gave consent to anyone that a specimen of his blood might be taken for a test of the alcoholic content of it; that he was not to his knowledge asked concerning this; that he did not tell the sheriff of the county that he was driving his car at the time of the collision; and that he had no recollection of being asked concerning this. He claims inability to have given binding consent or to have made any responsible statement at the time the sheriff claims to have talked with him at the hospital because of his condition resulting from his injuries, shock, and injections of morphine. The injuries defendant suffered in the accident were the fractures of the bones of each arm and an abrasion on the forehead between his eyes.

The sheriff claims he talked with defendant at the hospital at 6 a. m., about 2 hours after the accident; that defendant told him he was driving the car; that defendant then gave permission for a specimen of blood to be taken from his body and tested for its alcoholic content; that a specimen of blood was taken by the attending physician, placed in a container, and delivered to the sheriff; and that he retained it in his possession until he delivered it to the person in charge of the city and county public health laboratory in Grand Island. The person to whom the specimen of blood was delivered by the sheriff had a permit from the Department of Health of the state authorizing him to make body fluid tests and he was qualified to make such tests. He made an examination and test of the specimen of blood immediately after it was placed in his custody at about 10:45 a. m., May 17, 1954, the day after the accident, and he found thereby that the alcoholic content in the blood specimen was 0.24 percent by weight.

An examination of the body of Carlson established that he had two severely blackened eyes with hemorrhage into the eyeball structure; that areas on his head had the skin and underlying tissue dug out; that in the left temple there was a cut through the scalp starting on the hair line on the left and extending posteriorly to the bregma; that there was a depressed fracture beginning immediately above the left eye, extending backward about 3 centimeters above the hair line, and extending to the left and to the right so that there was an island of bone tissue about 4½ inches long completely broken off of the skull structure and depressed inward; that there were, continuous with the posterior portion of the depressed island of bone, several radiating radial fractures through the bone like spokes of a wheel; that there were deep severe cuts on both knees and the kneecap of the right knee had a complete transverse fracture; that there was no skin discoloration on the chest; that the sternum and ribs were intact; and that there were no injuries to the abdomen. The opinion of the physician who made the examination was that the death of Carlson was caused by a compound depressed fracture of the skull with laceration of the brain substance.

Defendant argues that the proof is insufficient to sustain the verdict because it does not show, as the law requires, that defendant was operating a motor vehicle at the time of the accident which caused the death of Carlson; that the statement claimed to have been made by defendant in the hospital after the accident that he was driving the car does not have sufficient probative force to justify conviction; and that it was not made to appear that defendant at the time it was claimed he made the admission had ability to make a rational or binding statement. If the statement attributed to defendant was the only evidence of the fact that he was operating the motor vehicle it would be insufficient. There is proof of other facts and circumstances: The

position of defendant in the car after the accident; the position of the only other passenger in the car; the nature and location of the injuries Carlson received; the blood and light or blond hair on the doorpost of the car in front of where he was found in the car; and the fact that he had light or blond hair and that the hair of defendant was dark. In Fisher v. State, 154 Neb. 166, 47 N. W. 2d 349, it is said: "Extrajudicial admissions or a voluntary confession is insufficient to prove that a crime has been committed, but either or both are competent evidence of the fact and may, with corroborative evidence or circumstances, establish the corpus delicti and guilty participation of the defendant." See, also, Vanderheiden v. State, 156 Neb. 735, 57 N. W. 2d 761.

There is conflict in the evidence concerning the condition of defendant after the accident when it is said he talked with the sheriff. There is proof that he was conscious when being taken to the hospital and that he asked the men with him if he was being taken to jail. The sheriff did not notice the defendant was incapacitated to understand and talk. The doctor who was administering to defendant was present and he did not protest the desire of the sheriff to converse with the defendant. The doctor by taking the specimen of blood from the body of defendant after the conversation evidenced his belief in the sufficiency of the assent thereto given by the defendant. In any event it was the privilege and duty of the jury to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, and weigh the evidence. The conclusion of the jury may not be disturbed unless it is clearly wrong. Fisher v. State, *supra,* states the rule: "The credibility of witnesses and the weight of their testimony are for the jury to determine in a criminal case, and the conclusion of the jury cannot be disturbed unless it is clearly wrong." The trial court properly denied the motion of defendant to dismiss

the case on the ground of insufficiency of evidence.

The admissibility of evidence of the result of an examination and test of a specimen of blood taken from the body of defendant is challenged. The proof concerning consent of defendant to the taking of a specimen of his blood for a test of its alcoholic content is conflicting. The State produced proof that he did give his consent thereto. The defendant denies that he gave such permission and asserts his mental incapacity to do so at that time. The evidence concerning this has been sufficiently stated above. The requirements as to conditions of relevancy in point of time, tracing, and identification of the specimen of the blood, the accuracy of the analysis of it, and the qualification of the person who made the examination and test and who testified concerning it were shown to have been observed. Otherwise stated a sufficient foundation was established for the admission of the result of the test if it was competent evidence in the case. In a case in which there was a conviction for the crime of motor vehicle homicide and foundational requirements were conceded, this court said that evidence of this character was admissible on the issue of the intoxication of the defendant at the time it was charged he committed the offense. Vore v. State, 158 Neb. 222, 63 N. W. 2d 141. It is quite generally considered that if the intoxication of a person is important in litigation evidence as to the taking of a specimen of body fluid of the person in question and of the alcoholic content of the specimen as determined by analysis, and expert opinion evidence as to intoxication based upon the result of the presence of such alcohol in the system of the person are admissible against him. Annotations, 127 A. L. R. 1513, 159 A. L. R. 209.

The court by instruction No. 14 advised the jury that if it found from the evidence concerning the analysis of the blood of the defendant that there was 0.15 percent or more by weight of alcohol in it there was a presumption of law that he was under the influence of alcoholic

liquor at the time the specimen of blood was procured from him but that the presumption was not conclusive of the fact. The defendant contests the legality of this part of the charge to the jury. The legislative act providing that a presumption results that the operator of a motor vehicle is under the influence of intoxicating liquor from a determination that the amount of alcohol in the body fluid of the operator at the time in question is 0.15 percent or more by weight as shown by chemical analysis is in derogation of the common law and it must be strictly interpreted and applied as limited by its terms. § 39-727.01, R. R. S. 1943; Vore v. State, *supra*. The unequivocal language of the act limits its application to a criminal prosecution of a person for operating or being in the actual physical control of a motor vehicle while under the influence of alcoholic liquor or of any drug. The first sentence thereof contains this language: "In any criminal prosecution for a violation of section 39-727 relating to driving a vehicle while under the influence of intoxicating liquor, the amount of alcohol in the defendant's body fluid at the time alleged, as shown by chemical analysis of the defendant's blood, spinal fluid, or urine, shall give rise to the following rebuttable presumptions: * * * (3) If there was 0.15 per cent or more by weight of alcohol in the defendant's blood, spinal fluid, or urine, it shall be presumed that the defendant was under the influence of intoxicating liquor at the time the specimen was taken." § 39-727.01, R. R. S. 1943. The section of the statute described in the foregoing says: "It shall be unlawful for any person to operate or be in the actual physical control of any motor vehicle while under the influence of alcoholic liquor or of any drug. Any person who shall operate or be in actual physical control of any motor vehicle while under the influence of alcoholic liquor or of any drug shall be deemed guilty of a crime * * *." § 39-727, R. S. Supp., 1953.

The crime of motor vehicle homicide and the crime

of having possession or operating a motor vehicle while under the influence of intoxicating liquor or a drug are separate and distinct crimes created by independent and complete acts by the Legislature. It is presumed that the Legislature acted with knowledge and purpose in limiting the application of section 39-727.01, R. R. S. 1943, to a prosecution for a violation of section 39-727, R. S. Supp., 1953. This presumption is contributed to by the fact that section 39-727.01, R. R. S. 1943, providing for a body fluid test and the effect of the result thereof, and section 28-403.01, R. S. Supp., 1953, creating the crime of motor vehicle homicide, were enacted at the same session of the Legislature. It is not probable that it would have overlooked the latter section if it intended the former section should have application to a prosecution by virtue of the latter. A determination that the provisions of section 39-727.01, R. R. S. 1943, have application to a prosecution for the crime of motor vehicle homicide, notwithstanding the unambiguous language of the section to the contrary, would not be a strict interpretation of its terms and the limitation expressly contained therein, but would be judicial legislation of the most obvious character. The instruction complained of submitted to the jury inapplicable extraneous matter, it was contrary to law, and its inclusion in the charge to the jury was error.

The evidence is not conclusive that the defendant was under the influence of intoxicating liquor at the time of the accident. There is no direct testimony that he was. The first person to the car of defendant after the accident did not detect any odor of liquor. The sheriff was at the place of the accident. Soon thereafter he went to the hospital and talked with the defendant. He did not detect or observe any evidence of the defendant being under the influence of liquor. The sheriff said the defendant was coherent and spoke as a normal person. The jury was permitted to and may have concluded from instruction No. 14 concerning the presumption

arising from the result of the test of the blood of defendant that he was under the influence of intoxicating liquor at the time of the accident and was thereby then unlawfully operating a motor vehicle which caused the death of Carlson, and hence defendant was guilty of motor vehicle homicide. In any event it cannot be ascertained from the record that the jury was not improperly influenced by the instruction or that the defendant was not thereby prejudiced. It must therefore be determined that the giving of instruction No. 14 permitted the defendant to be convicted of a crime contrary to law and that it was prejudicial error. Jacox v. State, 154 Neb. 416, 48 N. W. 2d 390; Borden v. General Insurance Co., 157 Neb. 98, 59 N. W. 2d 141.

The conviction and judgment should be and they are reversed and the cause is remanded to the district court for Buffalo County for further proceedings according to law.

REVERSED AND REMANDED.

EUNICE WASHINGTON, PLAINTIFF IN ERROR, V. STATE OF NEBRASKA, DEFENDANT IN ERROR.
70 N. W. 2d 378

Filed May 13, 1955. No. 33675.

1. **Homicide: Appeal and Error.** Where the evidence does not establish a higher grade of homicide than manslaughter it may be prejudicial error to submit to the jury the issue of murder in the second degree even though the trial results in an acquittal of the accused on the graver charge and a conviction on the lesser.
2. **Homicide: Trial.** Where the evidence is such that different conclusions may properly be drawn therefrom as to the degree of the crime, it is the duty of the trial court to instruct the jury on such degrees of homicide as find support in the evidence.
3. **Homicide: Evidence.** A photograph of the victim of a homicide which tends to throw light upon or illustrates a controverted

issue may properly be received in evidence where a proper foundation has been laid for its admission.

4. **Trial: Appeal and Error.** The cross-examination of a witness which relates to the issues and facts pertinent thereto may be pursued by counsel as a matter of right, but when the object of the cross-examination is to collaterally ascertain the accuracy or credibility of a witness, some latitude should be permitted. The scope of such latitude is ordinarily subject to the discretion of the trial judge and, unless abused, its exercise is not reversible error.
5. **Criminal Law: Trial.** A plea of not guilty in a criminal action puts in issue all the material allegations of the information and all matters of defense which have sufficient support in the evidence to be submitted to the jury. It is the duty of the trial court to instruct as to the law applicable to all of such matters whether requested to do so or not.
6. **Trial.** A trial court is not required to instruct in the exact language of a requested instruction. If the point is covered by an instruction couched in proper terms it meets all the requirements of the law.

ERROR to the district court for Douglas County: L. ROSS NEWKIRK, JUDGE. *Affirmed.*

Eugene D. O'Sullivan, Sr., and *Eugene D. O'Sullivan, Jr.*, for plaintiff 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.

CARTER, J.

The defendant, Eunice Washington, was charged with second degree murder. The information charges that on or about January 5, 1953, defendant killed Orville Washington maliciously and purposely, but without premeditation. Defendant entered a plea of not guilty. The jury found the defendant guilty of manslaughter, and the trial court imposed a sentence of 5 years in the Nebraska Reformatory for Women. The defendant brings error proceedings to this court.

The deceased, Orville Washington, was the husband

of the defendant. On the evening of January 4, 1953, they drove to a bar in South Omaha where they drank some beer. They left about 11:30 p. m., accompanied by three men who had asked for a ride to North Omaha. The three men were let out at the Off-Beat Club located at Twenty-fourth and Lake Streets. Defendant and her husband went to the Elks Club, a few doors from the Off-Beat Club. Shortly thereafter the three men, who had stopped at the Off-Beat Club, came into the Elks Club. Defendant testifies that her husband assumed the men had followed them by a prearrangement with her, and he became angry. Defendant and her husband left and went to their nearby apartment where the argument continued. The deceased was shot and killed in the apartment by defendant sometime shortly thereafter.

The defendant called the police after the shooting. Officer Pitman Foxall and two other officers responded to her call. Officer Foxall made a complete investigation of the premises and interrogated the defendant concerning the shooting. He thereafter took her to the police station where she made a statement which was transcribed by a shorthand reporter. Her statements to the shorthand reporter were read into the evidence by the reporter from his original notes. The evidence of Officer Foxall and the statement made by the defendant to the shorthand reporter were substantially the same.

The evidence as related by the defendant in her statement to the shorthand reporter was in part as follows: "It wasn't about anything that amounted to anything that I could see, but in the meantime we had been out and drank a couple bottles of beer or so and come home and you know how your family is, and how my family is, it is all the same thing when you are upset and I had some glasses on my kitchen table that I had unpacked * * * and he started arguing about nothing in particular and when I turned my back, Mr. Washington

come by me and did this (indicating). That is how I got this bruised eye (indicating) and it made me angry and in the meantime he come out of the bedroom and he come right out in the kitchen and I had those glasses on the table and I got angry and I started throwing the glasses * * *. I threw the glasses at him * * *. I just really did what I did just to scare him * * *, and when I fired it hit him and I couldn't do it again in a thousand times and I only fired one time." The gun was a .32 caliber automatic which she kept in the house. When Washington came up behind her he brushed her or hit her and she fell into a closet, and that made her angry. She said there had been arguments on the way home from the Elks Club but it was all about nothing. She went into the bedroom and got the gun from a drawer. She came out with the gun and fired the shot. She only meant to scare him. She was only 10 feet or less from him when she fired. The bullet struck him between the eyes. She intended to shoot into the ceiling just to scare him. Several times she was asked what the argument was about and her answer was that as far as she was concerned it was an argument about nothing.

That the deceased came to his death in Douglas County as a result of being shot above the right eye is established by the evidence. Defendant admits shooting the deceased. She did not attempt to aid the deceased after he was shot. She did not call a doctor. Upon the arrival of the police she related the story without any show of emotion. She delivered the gun to Officer Foxall. One shell had been fired.

In her testimony at the trial the defendant did not question any of the pertinent facts contained in her statement. She added thereto in a substantial manner. In her evidence she testifies that Washington beat her about the head and face, causing many bruises and abrasions. She says that she feared that she was in great danger and that she threw the glasses, an ash

tray, and shot the gun as a protection to her person, although she did not intend to injure him. There are photographs of the defendant, taken the day following the shooting, which show a bruise below defendant's right eye. A Mrs. Oneta Thomas testified that she saw bruises on defendant's arms and body the next day. Several witnesses testified to defendant's good reputation for being a quiet and peaceful person.

The defendant claims that the trial court erred in submitting second degree murder to the jury. The rule is: Where the evidence and circumstances of the crime are such that different conclusions may properly be drawn therefrom as to the degree, the trial court does not err in submitting the different degrees to the jury for its determination. Woodard v. State, 159 Neb. 603, 68 N. W. 2d 166. The evidence in the present case shows that defendant and the deceased were engaged in a quarrel at the time of the shooting. Defendant admits that she became angry, threw dishes and an ash tray at the deceased, went into the bedroom and got a loaded gun, pointed it at the deceased, pulled the trigger, and hit him in a vital spot. From this evidence a jury could find that defendant maliciously and purposely killed the deceased. Under such circumstances it was the duty of the trial court to submit the issue of second degree murder to the jury.

Defendant assigns error by the trial court in admitting a picture of the deceased into evidence. The picture shows the deceased lying on his face in the doorway between the bathroom and hall. It tends to illustrate and explain the evidence given by Officer Foxall. There is nothing about it that would tend to inflame the passions of the jury. The rule is stated in MacAvoy v. State, 144 Neb. 827, 15 N. W. 2d 45, as follows: "Where a photograph illustrates or makes clear some controverted issue in the case, a proper foundation having otherwise been laid for its reception in evidence, it may properly be received, even though it may present a grue-

some spectacle." There was no error in the admission of the photograph.

Defendant assigns as error the rulings of the trial court which permitted the defendant to be impeached on what are alleged to be immaterial matters. In this connection the defendant was cross-examined about the gun. She said she had it several years before she was married to Washington, that she knew it was loaded, and that she intentionally pulled the trigger, although she says she did not intend to hit the deceased. She testified positively that she had never fired the gun before. The State attempted to show that she had fired it at one Charles Liggins, a former suitor. We do not think this is a collateral matter within the meaning of the rule. We are in accord with the view that the State may not inject inflammatory and highly prejudicial matters into a criminal prosecution under the guise of laying the foundation for impeachment as was done in the cited case of Swogger v. State, 116 Neb. 563, 218 N. W. 416. But in the present case the ownership of the gun and defendant's familiarity with its use were proper evidence in the case. We point out, also, that the trial court has considerable latitude in admitting evidence seeking to bring to light collateral facts bearing on the credibility of a witness. O'Connor v. State, 123 Neb. 471, 243 N. W. 650. The ruling of the trial court in regard to the scope of cross-examination will be sustained unless it amounts to an abuse of discretion. The rule is that, although a witness is permitted to be cross-examined as to matters not brought out on direct examination, the judgment will not be reversed when it appears that no prejudice could have resulted. Griffith v. State, 157 Neb. 448, 59 N. W. 2d 701. The rule is correctly summarized in Rakes v. State, 158 Neb. 55, 62 N. W. 2d 273, as follows: "The general rule is that so far as cross-examination of a witness relates either to facts in issue or relevant facts, it may be pursued by counsel as matter of right, but when its object is to collaterally ascertain the accuracy or

credibility of a witness, a latitude should be permitted, but its method and duration are ordinarily subject to the discretion of the trial judge and, unless abused, its exercise is not reversible error." We have examined the evidence as it pertains to this assignment and we find that it is within the limits of the trial court's discretion. The assignment is therefore without merit.

The defendant complains of the failure of the district court to properly instruct the jury on her theory of the case. We have stated the applicable rule in Foreman v. State, 127 Neb. 824, 257 N. W. 237, as follows: "The law is well established in this state that it is the duty of the court to instruct the jury upon all the issues of the case presented by the pleadings and the evidence. In civil cases the issues are presented in writing and no other issues need be stated, but in criminal cases plea of not guilty not only puts in issue all of the material allegations of the information but lets in any other matter of defense, such as justifiable homicide, self-defense, insanity, alibi, mistake and so forth; and if there is any sufficient evidence upon any of those matters to go to the jury, it is the duty of the court to instruct as to the law applicable, whether the defendant requests such instruction or not." The evidence shows the defendant alleged as defenses that she did not intend to harm the deceased and that she acted in self defense. These issues were fully presented to the jury by the court's instructions. There is no merit in the contention that the trial court failed to properly and adequately submit defendant's theory of the case to the jury.

We have examined the record with reference to the other assignments of error set out in defendant's brief. We find no merit in them. The record shows that defendant had a fair trial and that the verdict is amply sustained by the evidence. The record being free from prejudicial error, the judgment of the court is affirmed.

AFFIRMED.

DAN CARY AND CORNELIA S. CARY, SUBSTITUTED AS PLAINTIFFS FOR JOHN F. NELSON, JR., APPELLANTS, V. OTTO A. ARMBRUST ET AL., APPELLEES, IMPLEADED WITH JOHN L. ARMBRUST, AN INCOMPETENT PERSON, APPELLANT.

70 N. W. 2d 427

Filed May 13, 1955. No. 33706.

1. **Partition.** In an action for partition, as between partition in kind or sale of land for division, the courts favor partition in kind, since it does not disturb the existing form of inheritance or compel a person to sell his property against his will.
2. ———. A sale in partition cannot properly be decreed merely to advance the interests of one of the owners, but before ordering a sale, the court must judicially ascertain that the interests of all will be promoted thereby.
3. **Appeal and Error.** In an equity action the Supreme Court will, in determining the weight of evidence which is in irreconcilable conflict on a material issue, consider the fact that the trial court observed the witnesses and their manner of testifying.
4. **Partition: Attorney and Client.** The plaintiff in an action for partition is not entitled to have fees taxed for his attorney if the action is adversary.
5. ———: ———. This rule applies to the proceedings after decree of partition as well as to those leading up to decree.

APPEAL from the district court for Douglas County: JACKSON B. CHASE and L. ROSS NEWKIRK, JUDGES. *Affirmed in part, and in part reversed and remanded with directions.*

Cranny & Moore, for appellants Cary.

George L. DeLacy, for appellant Armbrust.

Jack W. Marer and *Samuel V. Cooper,* for appellees.

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

YEAGER, J.

This is an action for partition of real estate by Dan Cary and Cornelia S. Cary, plaintiffs and appellants,

against John L. Armbrust, defendant and appellant; and Otto A. Armbrust, Helen Armbrust, Peter Hansen, Jr., and Bernice Hansen, defendants and appellees. A trial was had to the court following which a decree was entered in which it was adjudged that the plaintiffs were the owners of an undivided three-fifths interest in the land in question; that Otto A. Armbrust had an undivided one-fifth interest; and that John L. Armbrust had an undivided one-fifth interest therein. In addition to this William W. Wenstrand was appointed referee to make partition of the real estate and to make his report to the court.

The regularity and propriety of this decree is not brought into question in this appellate proceeding.

It ought to be said at this point that the record discloses that John L. Armbrust, because of physical handicaps, was and is incapable of protecting his own interests and because thereof George L. DeLacy was appointed by the court as guardian ad litem to represent and protect his interests.

The referee qualified and in due time made his report. The report to the extent necessary to set it forth here is as follows: "The Referee therefore finds and hereby reports that it is impossible to divide and partition the premises without great prejudice to the owners thereof; that from his investigation, there is a ready and active market for tracts of this kind and the entire tract may be sold at a fair price; that it is to the advantage of the parties that the tract be sold and the proceeds thereof divided among the parties in proportion to the respective interests in the land."

The defendants Otto A. Armbrust and Helen Armbrust filed objections to the report of the referee. In the objections they asserted that it was practicable and feasible to divide the land in kind.

A hearing was had on the objections, whereupon a decree was rendered setting aside the report of the referee and partitioning the real estate in kind. By this

decree also the plaintiffs were denied an attorneys' fee for their attorneys.

The land in question consists of 120 acres or three contiguous 40-acre tracts. One of these is bounded on the south generally speaking by a highway known as Center Street. The south line departs from Center Street slightly northward but this is of no real consequence for the purposes of the case. The east line is a highway known as Ninetieth Street. This one will be hereinafter referred to as the southeast forty. Another 40 acres is immediately to the north. Its east line is also Ninetieth Street. Its north line is Shirley Street. This one will be referred to as the northeast forty. Immediately to the west of this is the third 40 acres. It will be referred to as the northwest forty.

There is no evidence outlining with any degree of accuracy the contours of this land but from the evidence it may be said that in the northeast portion the elevation is higher than that of the south and west portions. The slope of the land is to the south and west. Where the slope ends and the low level begins is not pointed out. There is a large drainage ditch extending from northwest to southeast which severs about 8 acres in the southwest corner from the remainder of the northwest forty. This ditch also severs about 4 acres from the southwest corner of the southeast forty. All of the land has in the past been used for agricultural purposes. Land immediately to the north of the 120 acres has been platted for residential use. This is true of some, if not all, of the land to the northeast and east on the other side of Ninetieth Street.

In partitioning the land in kind the court allotted to plaintiffs an area of about 56 acres. This area extends east and west all the way across the northeast and northwest forties with the north line thereof as the north boundary. The depth of the area southward varies. The greatest depth is on Ninetieth Street. Otto A. Armbrust was alloted about 24 acres. This is to the

south of that allotted to plaintiffs. Eight acres are in the northwest forty and the rest is part in the northeast forty and part in the southeast forty. John L. Armbrust was allotted what remained in the southeast forty including the part severed by the drainage ditch and that part of the northwest forty which was severed by the drainage ditch. He was allotted about 40 acres.

The plaintiffs and the defendant John L. Armbrust duly filed motions for new trial, which motions were overruled. From this decree and from the order overruling the motions for a new trial the plaintiffs and the defendant John L. Armbrust have appealed. The defendants Hansen, who were tenants on the land, are not parties to the appeal.

The brief of appellants contains 40 separate assignments of error but one alone is basic in the determination of the issues presented. This one contains the contention that the court erred in sustaining the objection of appellees to the report of the referee and its refusal to approve and carry it into effect.

A determination upon this contention requires an outline of the situation involved and also an analysis of the surrounding evidentiary considerations as disclosed and the reasonable inferences and conclusions to be drawn therefrom.

It also requires an application of certain recognized principles of law to this outline and analysis. Some of these principles are as follows:

"As between a partition in kind or sale of land for division, courts will favor partition in kind, since it does not disturb the existing form of inheritance or compel a person to sell his property against his will." Trowbridge v. Donner, 152 Neb. 206, 40 N. W. 2d 655. See, also, McClave v. McClave, 60 Neb. 464, 83 N. W. 668.

"A sale in partition cannot be decreed merely to advance the interests of one of the owners, but before ordering a sale, the court must judicially ascertain that the

interests of all will be promoted thereby." Trowbridge v. Donner, *supra.*

In an equity action the Supreme Court will, in determining the weight of evidence which is in irreconcilable conflict on a material issue, consider the fact that the trial court observed the witnesses and their manner of testifying. Gentry v. Burge, 129 Neb. 493, 261 N. W. 854; Maddox v. Maddox, 151 Neb. 626, 38 N. W. 2d 547; Cain v. Killian, 156 Neb. 132, 54 N. W. 2d 368.

The appellants Cary called several witnesses who had knowledge of the area and of residential conditions in Omaha and its environs, experience in the laying out and promotion of such areas, and knowledge of values in such situations. They described generally the land in question and gave their opinions as to the best use to which this land could be put and the manner in which it could be most profitably utilized in the interest of the owners. Their opinion was to the effect that this interest and this utility would be best served by a plan for the development of the entire tract as a residential area; that the value for this purpose would greatly exceed the use of the tract for agricultural purposes; and that the value as a whole would greatly exceed the combined value of separate tracts if the area should be partitioned in kind.

On the other side Otto Armbrust called a witness who qualified for the purposes of giving an opinion as to the best use to which the land could be put and the manner in which it could be most profitably utilized in the interests of the owners. His opinion was the opposite of that of the witnesses for the appellants Cary. He gave it as his opinion in effect that the land could be partitioned in kind in the best interests of the parties. In truth the land was partitioned by the court pursuant to a plan proposed by this witness in his testimony.

The testimony of this witness antecedent to his opin-

ion however appears to take much from the value of the opinion.

In his antecedent testimony he testified that for agricultural purposes one forty was worth $350 an acre, one was worth $300 an acre, and the other was worth $250 an acre. The total value for agricultural purposes on the basis of this testimony would be $36,000. He further testified that the total value, obviously for the purpose of sale for residential development, was $80,000. He attributed to the 56 acres allotted to plaintiffs a value of $48,000. This in effect would attribute to the remainder a value of $32,000. This attributed value was with reference to residential development and not agricultural purposes.

It is inferable, since under the partition plan he was allotted 40 acres for his share, that John L. Armbrust got the least valuable land or land which was worth $250 an acre for agricultural purposes, or land worth $10,000 for those purposes.

It is inferable that the land allotted to Otto A. Armbrust was not the highest in value for agricultural purposes, but assuming that it was and was worth $350 an acre the total value would be $8,400. If it was of the value of $300 an acre its total value would be $7,200. On one of these theories the total value of the land allotted to John L. and Otto A. Armbrust would be $18,400 and on the other $17,200.

Therefore on the basis of one of these hypotheses and an assumption that the purpose was to use the lands allotted to John L. and Otto A. Armbrust for agricultural purposes, there would be a combined detriment to them by partition in kind of $14,800, and on the other of $13,600.

Assuming that the land is worth $65,000 instead of $80,000 for residential purposes and following through on the land values for agricultural purposes fixed by the witness and the hypothesis employed, the value of the land allotted to John L. and Otto A. Armbrust for resi-

dential development would be $26,000, thus resulting in disadvantage to the two on one theory of $8,800 and on the other of $7,600.

This assumption has a basis since the record discloses that plaintiffs or their representatives offered to buy the tract for $65,000 and that they did pay $39,000 for a three-fifths interest in it.

No violence to the record is involved in the assumption that the value attributed to the lands by appellees is their value for agricultural purposes. This is evidenced by the following appearing on the last page of their brief: "The remainder of the farm, even according to the Appellants' witnesses, is not suitable for subdivision, but for pasture and farming, which is exactly what it has been used for for years and years and which these Appellees intend to use it for in the future."

Of course these hypotheses, in and of themselves, do not determine whether or not the objections to the report of the referee should be sustained and the real estate partitioned in kind as it was, but they do have a material bearing in the ascertainment of the true force and effect of the testimony of the witness for Otto A. Armbrust. In this light it is difficult to escape the conclusion that the true effect of the testimony of this witness is to say as did the witnesses for the plaintiffs that the best interests of all owners, even including Otto A. Armbrust, and especially those of the incapacitated John L. Armbrust, would be served by a sale as recommended by the report of the referee. This appears to be the proper conclusion even in face of the fact that the trial court observed the witnesses on the trial and their manner of testifying.

Accordingly it must be said that the court erred in its order sustaining the objections to the report of the referee and it further erred in refusing to order a sale in conformity with the report.

This conclusion makes unnecessary a consideration of all the other assignments of error except one. That

one relates to the refusal of the court to allow a fee for the attorneys for the plaintiffs.

In Oliver v. Lansing, 57 Neb. 352, 77 N. W. 802, the following rule was laid down by this court on the question of taxability of attorney's fees for plaintiff's attorney in partition cases: "The plaintiff's attorney's fees are not taxable as costs in an action for partition where the proceedings are adversary."

This general rule has been approved in Johnson v. Emerick, 74 Neb. 303, 104 N. W. 169; Branson v. Branson, 84 Neb. 288, 121 N. W. 109; Harper v. Harper, 89 Neb. 269, 131 N. W. 218; and Smith v. Palmer, 91 Neb. 796, 137 N. W. 843. All of the cases make it clear that if the proceedings are adversary the attorney's fees are not allowable. In all of the cases adversary is treated as the opposite of amicable.

In none of the cases has this court by its own expression defined adversary proceedings. Definitive language however was adopted in the opinion in Oliver v. Lansing, *supra,* from Kilgour v. Crawford, 51 Ill. 249. It appears from this language that the point which chiefly controls in determining whether or not a partition action is amicable or adversary is: Did the defendants deem it necessary to employ counsel to protect their interests? It is obvious from the record in this case that Otto A. Armbrust deemed it necessary to have counsel to protect his interests.

By inference from Harper v. Harper, *supra,* this court has said that the adversary proceeding rule applies to proceedings after decree in partition as well as before. In that case a fee was allowed. Apropos of this, this court said: "The allowance itself necessarily includes, at least, a general finding that the important proceedings relating to the sale, to the transfer of title, and to the distribution of more than $37,000 were not adversary, * * *."

In Kilgour v. Crawford, *supra,* the court made the following observation which we deem significant as re-

gards this subject: "But where the defendants deem it necessary to employ counsel, in order to protect their interest, and secure a just partition, or an equitable assignment of dower, we can see no reason why they should be required not only to pay the fees of their own counsel, but also a part of the fees of adverse counsel."

The conclusion therefore is that this proceeding was adversary and that the court did not err in refusing to allow an attorneys' fee for plaintiffs' attorneys.

That portion of the decree of the district court refusing to allow an attorneys' fee for plaintiffs' attorneys is affirmed.

That part of the decree sustaining the objections to the report of the referee and partitioning the land is reversed and the cause in that connection is remanded with directions to the court to approve the report and proceed to carry into effect its purposes and the purposes of partition.

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

STATE OF NEBRASKA EX REL. THE SCHOOL DISTRICT OF SCOTTSBLUFF ET AL., APPELLEES AND CROSS-APPELLANTS, V. P. COOPER ELLIS, COUNTY TREASURER OF SCOTTS BLUFF COUNTY, NEBRASKA, ET AL., APPELLANTS AND CROSS-APPELLEES, IMPLEADED WITH SCHOOL DISTRICT NO. 2 ET AL., APPELLEES, STATE OF NEBRASKA EX REL. THE CITY OF SCOTTSBLUFF ET AL., INTERVENERS-APPELLEES.

70 N. W. 2d 320

Filed May 13, 1955. No. 33707.

1. **Taxation: Municipal Corporations.** The obligation of a public power district under section 70-651, R. R. S. 1943, has not been changed by the amendment of 1947 to section 70-653, R. S. 1943, now contained in section 70-653, R. R. S. 1943.
2. ———: ———. The amendment of 1947 effected a change in the apportionment and distribution of funds which a public

power district was obligated to pay in such manner that instead of such funds being paid annually to the governmental subdivisions in the same amounts as were paid in taxes for the year before purchase, they became payable in the proportion that the levies of the separate subdivisions bore to the total amount all of them received before the amendment.

3. **Taxation.** The Legislature has the power to take funds raised for one governmental subdivision and give them to another governmental subdivision if it is done for the benefit of the public in the taxing district.
4. ———. The Legislature is without power to transfer funds raised for the benefit of one district or subdivision to another district or subdivision.
5. ———. The power of the Legislature with regard to the transfer of funds received in lieu of taxes is the same as it has with regard to funds raised by taxation.
6. **Officers: Attorney and Client.** The provision of section 44-359, R. R. S. 1943, with relation to the allowance of attorney's fees has application to actions upon the bonds of public officials.
7. ———: ———. The provision of section 44-359, R. R. S. 1943, with relation to the allowance of attorney's fees is mandatory.

APPEAL from the district court for Scotts Bluff County: FAY H. POLLOCK, JUDGE. *Reversed and remanded with directions.*

Straight Townsend, for appellants.

Mothersead, Wright & Simmons, Herman & Van Steenberg, Holtorf & Harris, R. M. Van Steenberg, Oscar E. Nelson, James W. Ponder, Jr., and *Willard F. McGriff,* for appellees.

Davis, Healey, Davies & Wilson, Jack E. Lyman, and *Neighbors & Danielson,* for interveners-appellees.

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

YEAGER, J.

The appeal here presents for review the decree rendered in the disposition of three actions which were consolidated and tried to the court. In order that the matters presented may be properly understood it be-

comes necessary to set forth in considerable detail the background of the litigation and to outline the issues presented by the three cases as originally instituted.

In the year 1942 the Consumers Public Power District, a public corporation and political subdivision of the State of Nebraska, which will be hereinafter referred to as Consumers, pursuant to statutory authority, purchased property from the Western Public Service Company, a corporation, which was situated in various political subdivisions of Scotts Bluff County, Nebraska. Before the purchase taxes were assessed against the property purchased. These taxes were distributable in 27 school districts, 4 cities and villages, and 1 junior college district, and of course to the state and county. Since that time there has been consolidation of school districts but for the ultimate purposes of this opinion this is of no consequence.

On acquisition of the property by the contract of purchase entered into in conformity with requirements of statute Consumers became obligated to pay in lieu of taxes "to the State of Nebraska, county, city, village and school district in which such public utility is located" a sum equal to the amount which the "state, county, city, village and school district" received from taxation including occupation taxes from such property or from the person, firm, or corporation during the year immediately preceding the purchase or acquisition of such property. This obligation and requirement exists as long as Consumers continues to own the property. The statutory provision prescribing the requirement is section 70-651, R. R. S. 1943, as follows: "Whenever any such district shall purchase or acquire the plant or property of an existing privately owned public utility furnishing electrical energy for heat, light, power, or other purposes, for use within this state, such purchase shall be upon the condition expressed in the contract of purchase and instrument of conveyance that such district as long as it shall continue to be the

owner of such property, shall annually pay out of its revenue, to the State of Nebraska, county, city, village and school district in which such public utility property is located, in lieu of taxes, a sum equal to the amount which the state, county, city, village and school district received from taxation, including occupation taxes, from such property or from the person, firm or corporation owning the same during the year immediately preceding the purchase or acquisition of such property by such power district. The directors of any such district shall not incur any personal liability by reason of the making of such payments."

Consumers has annually fully performed its obligation in this respect.

The method for distribution was contained in section 70-653, R. S. 1943. The method simply was that the tax collecting officers should receive the money from Consumers and distribute it to the state and the political subdivisions as equivalents of what they received prior to 1942.

This method was followed through 1952 although section 70-653, R. S. 1943, was amended in 1947. By the amendment the tax collecting officers are "directed to receive and collect the same, and distribute all money so received to the state and governmental subdivisions entitled thereto proportionate to the respective tax levies for the current year of the state and governmental subdivisions entitled to participate in such distribution."

This amendment was disregarded until the year 1953 by the county treasurer who acted as tax collecting officer.

In 1953, P. Cooper Ellis, county treasurer, who is plaintiff in one of the actions and defendant in two of them, adopted a new and different method of distribution from the one previously followed. This party will be hereinafter referred to as Ellis.

He took the annual levy in dollars on the property in the county including the levy in dollars of the junior

college district, of each of four cities and villages, and each of the school districts, and apportioned the total received from Consumers in the proportions that the levies for the several political subdivisions bore to that total, without regard to the amount or value of the property located or previously assessed in the respective subdivisions of the county, and distributed the fund accordingly. He did this without counsel or advice from anyone.

The first of the three actions is by the State of Nebraska, on relation of the junior college district of Scottsbluff, against P. Cooper Ellis, county treasurer, and National Surety Corporation, the surety of the treasurer. In it the plaintiff, who will hereinafter be referred to as the college, charges that the distribution made by Ellis was improper and that it deprived the college of money which should have been distributed to it. The action is to recover the funds with interest and an attorney's fee.

The second action is by the State of Nebraska, on relation of the school district of Scottsbluff, against P. Cooper Ellis, county treasurer, and National Surety Corporation, the surety of the treasurer. The substantial claim is the same as that in the first action and the kind and character of relief prayed is the same.

The third action is by P. Cooper Ellis, county treasurer, plaintiff, against the County of Scotts Bluff, the cities of Scottsbluff and Minatare, the villages of Melbeta and McGrew, and 27 school districts, all in Scotts Bluff County, Nebraska.

To the extent necessary to set it forth the purpose of this action is to have interpreted and declared the proper method for allocation and distribution under section 70-653, R. R. S. 1943, of funds received by him as treasurer from Consumers under the provisions of section 70-651, R. R. S. 1943.

The first and second actions were decided in favor of plaintiffs and judgments were rendered in their favor

in amounts not necessary to set out here. Attorneys' fees were allowed in favor of attorneys for plaintiffs and against the county treasurer and the National Surety Corporation in each of the cases.

The city of Scottsbluff intervened in both cases and judgment was rendered in its favor. An attorney's fee was allowed for its attorney.

In the third case section 70-653, R. R. S. 1943, was interpreted and its meaning judicially declared. That declaration in the findings was "that the payments made in lieu of taxes to the various entities should be distributed to said taxing entities in amounts equal to the tax payments received by them prior to acquisition by the Public Power District of the theretofore taxed properties, and that apportionment of such payments should be made within the taxing entity in proportion to its current levies." The decree was to the same effect but it was worded slightly differently.

Effectually this was to say that the amendment of 1947 to section 70-653, R. S. 1943, had no relation to apportionment as between or among governmental subdivisions but that it had application to the apportionment by a subdivision to the purposes to be served by its levy.

Ellis filed a motion for new trial as did also the school districts, the junior college, and the State of Nebraska. The motions were overruled. From the decree and the order overruling the motions for new trial Ellis has appealed. The college and the Scottsbluff school district have cross-appealed from that part of the decree interpreting section 70-653, R. R. S. 1943.

It appears that a proper interpretation and application of sections 70-651 and 70-653, R. R. S. 1943, will furnish a basis and a plan for the disposition of all matters of dispute presented by these three actions. The decisions examined furnish little assistance in this interpretation except to the extent that they contain the legal principles with regard to which it must conform.

By the clear language of section 70-651, R. R. S. 1943, it was intended that the money to be paid in lieu of taxes was to be paid to the governmental subdivision in which the particular property acquired was located and had been taxed for the previous year. That was the statutory obligation and the obligations of the contract entered into pursuant to the statute. That statutory obligation has not been changed.

Therefore under this clear language if Consumers acquired property in a school district the district became entitled to receive the equivalent of what it had received in taxes for the previous year. If there was a city or village which levied taxes on this property it was entitled to receive in lieu of taxes what it had received the previous year. The county and state of course must be assumed to have levied taxes on such property the previous year. Each was entitled to receive in lieu of taxes what it received as taxes on this property for the previous year.

Section 70-653, R. R. S. 1943, in nowise changes or purports to change the obligation of Consumers under section 70-651, R. R. S. 1943. It does however by its terms change the method of distribution of the money payable in lieu of taxes on the property in the school district. Interpreted, it provides that the total of the money payable and applied to a situation where there are four coexistent governmental subdivisions, in lieu of taxes, to the school district, the city or village, the county, and the state, shall be distributed to the respective governmental subdivisions in the proportion that the levy of each for the current year bears to that total amount.

The same interpretation would be equally applicable where the number of subdivisions was either more or less than four.

As a hypothetical example, if the mill levy for the school district was 8 mills, that for the city or village was 6 mills, that for the county was 4 mills, and that for

the state was 2 mills, the total levies for the property in the district would be 20 mills. Then if the total payable in the school district in lieu of taxes was $2,000, the school district would be entitled to 8/20ths, the city or village 6/20ths, the county 4/20ths, and the state 2/20ths.

This interpretation flows logically and reasonably from the wording of the 1947 amendment to section 70-653, R. R. S. 1943.

The effect of this interpretation if applied does have the possible effect of changing from year to year the amounts receivable by coexisting governmental subdivisions from the total amount payable thereto by Consumers. And the objection is made substantially that this invalidates the amendment.

If in a literal sense this was a new and different plan for the distribution of tax funds it could not under the facts be said that there was a legal inhibition against it. Prior to 1947 all of the money raised in each particular school district was for the benefit of the public in the district. This was not changed by the amendment of 1947. The amendment of 1947 provided only a new method for distribution within the district for the benefit of the public in the district.

This court adheres to the principle that the Legislature has the power to take funds raised for one governmental subdivision and give them to another governmental subdivision if it is done for the benefit of the public in the taxing district. See, Turner v. Althaus, 6 Neb. 54; State ex rel. Jones v. Graham, 16 Neb. 74, 19 N. W. 470; State ex rel. City of Omaha v. Board of County Commissioners, 109 Neb. 35, 189 N. W. 639; City of Beatrice v. Gage County, 130 Neb. 850, 266 N. W. 777; City of Fremont v. Dodge County, 130 Neb. 856, 266 N. W. 771.

The rule is otherwise where the legislative effort is to transfer the funds raised for the benefit of one district or subdivision to another district or subdivision. In such event the act of the Legislature is invalid. See,

State ex rel. City of Omaha v. Board of County Commissioners, *supra;* City of Fremont v. Dodge County, *supra;* Peterson v. Hancock, 155 Neb. 801, 54 N. W. 2d 85.

If these funds are to be treated the same as tax funds and if the Legislature intended by the amendment that distribution should be made in accordance with the interpretation placed upon it by Ellis, the amendment would under this latter rule be invalid since that purpose would require the use of funds raised in one school district for the sole benefit of another or others.

As indicated the rule of the cases granting the right of the Legislature to take funds raised for one governmental subdivision and give them to another if it is done for the benefit of the public in the taxing district has reference to funds raised by taxation. The funds involved here, as has been made clear, are not funds raised by taxation but are funds paid in lieu of taxes. No good and sufficient reason has been made apparent why funds received according to law in lieu of taxes should not be subject to the same legislative control as funds raised by tax levies. We hold that they are so subject.

In the light of these rules and this analysis it becomes clear that the analysis made by the trial court in the decree of the issues presented by the third action is erroneous.

It becomes obvious from this that the judgments in the first and second actions are erroneous, at least, for the reason that the allotments made by the decree were based upon an incorrect formula. They must accordingly be reversed and remanded.

In relation to the judgments Ellis by his argument and propositions of law, and we think sufficiently although not specifically, by his assignments of error, raises the question of the propriety of a judgment against him in any event or for any amount. He contends that his acts, if wrong, constituted only an error of judgment in the performance of his official duties in a situation

wherein it was his duty to exercise judgment and discretion and that therefore there is no liability against him for his wrongful acts. In support of his position he cited Keifer v. Smith, 103 Neb. 675, 173 N. W. 685, and Harmer v. Petersen, 151 Neb. 412, 37 N. W. 2d 511.

The two cases cited express the principle contended for but they do not relate to a question of statutory interpretation and application. They relate to actions for damages for negligence in the performance of duty. The question is not briefed by the other parties to the actions. It would appear therefore that since the actions must be returned to the district court this issue should again be presented to that court along with the other issues.

In the actions wherein judgments were rendered against Ellis, judgments were also rendered in like amounts against his surety, the National Surety Corporation, and as pointed out an attorney's fee was assessed against it. This was done under the authority of section 44-359, R. R. S. 1943. This court has held that this statute has application to actions based upon the bonds of public officials. City of Scottsbluff v. Southern Surety Co., 124 Neb. 260, 246 N. W. 346; Ericsson v. Streitz, 132 Neb. 692, 273 N. W. 17.

These cases do not pass upon the question of whether the statute is directory or mandatory. There was no reason for doing so since in one of the cases a fee was allowed in the district court and approved by this court. In the other a fee was allowed in this court. In each it was said that the statute authorized a fee.

The statute is in terms mandatory and there is nothing in it to indicate that it should be applied otherwise. We hold that it is mandatory. However since the judgments are to be reversed and the actions remanded the allowances heretofore made must fall with that reversal, and the question of attorney's fees shall depend upon the outcome of the new trial.

The decree of the district court is reversed and the

cause remanded with directions as follows:

As to the third action decree shall be rendered in conformity with this opinion.

As to the first and second actions a new trial shall be granted and conducted also in conformity with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

JOHN PEETZ, JR., ADMINISTRATOR OF THE ESTATE OF MARVIN L. HAGLER, DECEASED, APPELLEE, V. MASEK AUTO SUPPLY COMPANY, INC., A CORPORATION, APPELLANT, IMPLEADED WITH BEKINS VAN LINES COMPANY, A CORPORATION, APPELLEE.

70 N. W. 2d 482

Filed May 20, 1955. No. 33632.

1. **Children Born Out of Wedlock.** Where a statute provides in part: "Every child born out of wedlock shall be considered as an heir of the person who shall, in writing, signed in the presence of a competent witness, have acknowledged himself to be the father of such child, * * *" a person claiming to be an heir under such statute has the burden of proving (1) that he is illegitimate, (2) that his alleged father was actually his illegitimate father, and (3) that the alleged father recognized the child in accordance with the statute.
2. ———. A writing to constitute an acknowledgment of paternity within the provisions of section 30-109, R. R. S. 1943, must be one in which the paternity is directly, unequivocally, and unquestionably acknowledged.
3. ———. Writing introduced in evidence examined and determined insufficient as acknowledgment to fulfill the requirements of section 30-109, R. R. S. 1943.
4. **Master and Servant: Trial.** Where the inference is clear that there is, or is not, a master and servant relationship, the determination is made by the court; otherwise the jury determines the question after instruction by the court as to the matters of fact to be considered.
5. ———: ———. The right of control, or the want of it, determines whether the relationship of master and servant or that of an independent contractor exists. Whether or not the

right of control exists is ordinarily a question of fact for the jury, and is usually arrived at by inference from the terms of the contract, the character of the employment, and all other facts and circumstances.

6. ———: ———. Each case must be determined with a view to the surrounding facts and circumstances, the character of the employment, and the nature of the wrongful act. Whether the act was or was not such as to be within the scope of his employment is, ordinarily, one of fact for the determination of the jury.

APPEAL from the district court for Cheyenne County: JOHN H. KUNS, JUDGE. *Affirmed in part, and in part reversed and remanded.*

Neighbors & Danielson, Chambers, Holland & Groth, and *Orie C. Adcock,* for appellant.

Maupin & Dent, Martin, Davis & Mattoon, and *Richard W. Satterfield,* for appellee.

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

MESSMORE, J.

This is an action at law brought in the district court for Cheyenne County by John Peetz, Jr., administrator of the estate of Marvin L. Hagler, deceased, against the Masek Auto Supply Company, Inc., a corporation, and Bekins Van Lines Company, a corporation, defendants, for damages resulting by virtue of a collision between a tractor-truck owned and operated by Marvin L. Hagler, hereinafter referred to as Hagler, and an automobile owned and operated by Kenneth J. Conner, hereinafter referred to as Conner. Both of the operators of the vehicles were killed in the accident.

The cause was submitted to a jury, and the jury, pursuant to instructions, returned special findings. The jury found for the plaintiff and assessed the recovery as follows: On the first cause of action, that Marvin L. Hagler would have contributed an average amount of $1,136 annually to Michael Dennis Hagler for 19 years,

and an average amount of $1,165 annually to David Lee Hagler for 17 years; on the second cause of action, pursuant to stipulation and instructions of the court, that the value of the funeral expenses was $928.30; and on the third cause of action, pursuant to stipulation and instructions of the court, that the value of Marvin L. Hagler's truck was $925.

The defendant filed a motion for judgment notwithstanding the verdict and in the alternative a motion for new trial. These motions were overruled and judgment was rendered for the plaintiff on all his causes of action in the sum of $30,946.45. The defendant Masek Auto Supply Company, Inc., a corporation, appeals.

The appellant assigns as error that (1) the trial court erred in holding that Marvin Lee Hagler, by way of exhibit No. 15, legitimated Michael Dennis Hagler and David Lee Hagler, in not holding that they had not been legitimated, and in admitting such exhibit into evidence; and (2) the trial court erred in not holding as a matter of law that Conner was an independent contractor and not an employee of the defendant Masek Auto Supply Company, Inc., a corporation.

We will take up the assignments of error necessary for a determination of this appeal in continuity.

It appears from the record that Hagler and Conner were killed in a collision at about 5 p. m., on June 11, 1953, on U. S. Highway No. 30 about 15 miles west of Sidney, Nebraska, in an area locally known as Point of Rocks. Hagler had been operating a Bekins Van Lines semi-trailer traveling eastward. He had attached a trailer loaded with furniture to his tractor about 1 p. m., in Cheyenne, Wyoming, and left for the east. Conner had transacted some business in Sidney, Nebraska, for the defendant, Masek Auto Supply Company, Inc., and was in Sidney between 4 and 4:30 p. m. of that day. Eyewitnesses to the collision, traveling westward on Highway No. 30, testified that they observed Conner's car approaching them from the rear, weaving from side

to side on the highway. They pulled completely off the pavement to the right side of the highway and stopped, believing that Conner's car would crash into them. However, Conner's car missed their car and succeeded in weaving around another westbound car between their car and a truck approaching from the west. Conner's car then swerved to the left side of the highway and collided head-on with Hagler's truck. Hagler's truck left tire marks on the pavement in his right hand lane of traffic beginning 98 feet west of the point of the collision. These tire marks were light from the point of origin for the first 65 feet and then became heavy for the last 33 feet before the collision. It appeared to one of the eyewitnesses that Hagler, at the last instant, swerved his truck sharply to the left to miss Conner's approaching car. Hagler's truck appeared to pass over the top of Conner's car, overturning and catching fire in the process. Hagler was in the flames and could not be removed. Conner's body was lying possibly 10 feet beyond his car, and he was dead. A blood sample taken from Conner's body after death, on analysis by a state chemist, showed an alcoholic content of .07 percent by weight. Such a concentration, in the opinion of a doctor, would appreciably affect anyone's judgment and possibly co-ordination.

A state safety patrolman testified that the truck tire marks veered sharply to the left; that the impact of Conner's car appeared to have been on the left front and across the car to the right rear; that after a careful search he was unable to find any tire marks on the pavement east of the point of impact which could have been made by Conner's car; and that the speedometer on Conner's car was stuck at 65 miles an hour after the collision.

While the appellant makes no assignment of error upon the phase of the case with reference to the sufficiency of the evidence to submit the cause to the jury, the foregoing statement of facts clearly indicates there

was sufficient evidence from which a jury would be able to find that the direct and proximate cause of the collision and the injuries sustained by Hagler resulting in his death and the damage to his tractor truck was the negligence of Conner.

It might be mentioned also that the trial court instructed the jury that there were no questions in the case relating to the rights of the Bekins Van and Storage Company for its consideration.

The record discloses that Ruby Hagler, the name she took after she became acquainted with and went to live with Hagler, was born in Tennessee in 1921, and was divorced in 1947, in Missouri. She met Hagler at Bethany, Missouri, in 1947. She was unaware of the fact that he was a married man and had a child, and did not learn of this fact until the spring of 1948. Hagler was not sure whether his wife had obtained a divorce or not. It is apparent from the record that Ruby Hagler was unable to ascertain this fact, was unable to contact the wife after the death of Hagler, and therefore had no direct information on this subject. Ruby and Hagler started to live together in Burlington, Iowa, on November 1, 1947. They were both working at that time. Ruby worked as a practical nurse for 2 or 3 months and had no outside employment after that time. Hagler worked in a jewelry and appliance store for a while. They resided in Burlington, Iowa, for about 2 years. On February 24, 1950, a child named David Lee Hagler was born at St. Anthony's Hospital in Hays, Kansas. On September 16, 1951, a child named Michael Dennis Hagler was born at Rosary Hospital in Corning, Iowa. On September 2, 1952, a third child, Verna Jean Hagler, was born at Greater Community Hospital in Creston, Iowa. Ruby Hagler testified that Marvin Lee Hagler was the father of the above-mentioned children. When the first child was born, Hagler was working as a Fuller brush salesman. Thereafter he, Ruby, and the baby moved to McFall, Missouri, where they lived with

Hagler's parents for a short time. Hagler helped his father with the farming. They then moved to Tingley, Iowa, where Hagler was employed as a farm hand. After the second child was born they borrowed $4,358.10 from a landowner by the name of Houck and purchased some farm machinery and livestock. Hagler entered into a farming venture with Houck in March 1952. In November 1952, Hagler sold out and settled with Houck. He had accumulated about $900, after paying off the note. Hagler then bought the tractor involved in the accident, and started to work for the Bekins Van and Storage Company. At that time Ruby and the children moved in with Hagler's sister for about a month, then moved to Corning, Iowa, where they were living at the time of his death. Hagler filled out an application for such position on December 27, 1952.

The witness R. Lowell Johnson testified that he resided in Omaha and was secretary of the Bekins Van and Storage Company, which position he had held for about 10 years. One of his duties was to take applications from prospective employees. In that capacity he became acquainted with Hagler. He identified exhibit No. 15, which is in the record, as being the job application executed by Hagler. He saw Hagler sign exhibit No. 15. Objection was made because this exhibit did not satisfy the requirements of section 30-109, R. R. S. 1943. The pertinent part of the exhibit reads as follows: "6. Names, ages, relationship and address of any persons dependent on you for support or to whose support you are contributing Ruby Hagler - Wife age 26. 2 Sons. David Lee & Michel Dennis Hagler. age 2 - 1 yr. * * * (Sign here) Lee Hagler."

The record discloses that Ruby Hagler and Verna Jean Hagler are not here involved in any manner.

This brings us to the appellant's first assignment of error noted above.

Section 30-109, R. R. S. 1943, insofar as necessary to be considered here, provides in part: "Every child born

out of wedlock shall be considered as an heir of the person who shall, in writing, signed in the presence of a competent witness, have acknowledged himself to be the father of such child, * * *."

It is true, as asserted by the appellee, that said section provides for the prescribed evidence of paternity, and that no intention to make the child an heir, and no distinct statement that it is an illegitimate child, need appear in the writing. See Thomas v. Estate of Thomas, 64 Neb. 581, 90 N. W. 630.

In In re Estate of Winslow, 115 Neb. 553, 213 N. W. 819, it is said: "Such an acknowledgment need not be in a formal paper, executed for the specific purpose, but may be contained in a letter, provided the father unequivocally acknowledges therein his paternity of the illegitimate child, and signs the written acknowledgment in the presence of a competent witness."

The appellee contends the foregoing cases are determinative of the question by virtue of the language used therein, therefore the application of employment signed by Hagler, heretofore set out in part, met the requirements of section 30-109, R. R. S. 1943. We are not in accord with the appellee's contention in such respect.

This court held in In re Estate of Oakley, 149 Neb. 556, 31 N. W. 2d 557, with reference to section 30-109, R. R. S. 1943, that a person claiming to be an heir under such statute has the burden of proving (1) that he is illegitimate, (2) that his alleged father was actually his illegitimate father, and (3) that the alleged father recognized the child in accordance with the statute.

The appellant asserts that the appellee discharged his burden with reference to the first two requirements above set out. However, with reference to the third requirement, the appellee failed to discharge the burden.

In Lind v. Burke, 56 Neb. 785, 77 N. W. 444, it was held that a writing, to fulfill the requirement of the law, must be at least one in which the paternity is directly, unequivocally, and unquestionably acknowledged.

It was also said: "It must not be forgotten in this examination that it is not because the person can be shown to be the offspring, or is in fact the illegitimate child, that it may assert heirship, but because it has been in writing acknowledged; and hence the writing must be in and of itself sufficient, unaided by extrinsic evidence, to establish the paternity." See, also, Moore v. Flack, 77 Neb. 52, 108 N. W. 143, which followed Lind v. Burke, *supra.*

In the instant case all that Hagler signed was an application for employment setting forth whom he deemed to be his dependents. This instrument is insufficient, under section 30-109, R. R. S. 1943, to prove that the alleged father legitimated the two children, the subject of this action. Such instrument was not an express, unequivocal, and unquestionable acknowledgment of the paternity of the illegitimate children that would make proper compliance with the statute. We believe that the appellant is entitled to prevail on its first assignment of error, and that the first cause of action, found by the jury to be in favor of the appellee, must necessarily fail. The trial court was in error, as contended for by the appellant.

This brings us to the appellant's second assignment of error as above noted. On this phase of the case there are two questions to be determined: First, was the salesman (Conner) an employee or an independent contractor; and second, if the salesman was an employee, was he acting within the scope of his employment at the time of the accident?

Where the inference is clear that there is, or is not, a master and servant relationship, the determination is made by the court; otherwise the jury determines the question after instruction by the court as to the matters of fact to be considered. Restatement, Agency, § 220, p. 483. See, also, Thurn v. La Crosse Liquor Co., 258 Wis. 448, 46 N. W. 2d 212.

Each case must be determined with a view to the sur-

rounding facts and circumstances, the character of the employment, and the nature of the wrongful act. Whether the act was or was not such as to be within the scope of his employment is, ordinarily, one of fact for the determination of the jury. See, Dafoe v. Grantski, 143 Neb. 344, 9 N. W. 2d 488; LaFleur v. Poesch, 126 Neb. 263, 252 N. W. 902; 35 Am. Jur., Master and Servant, § 553, p. 986.

With the foregoing authorities in mind, we proceed to the evidence on this phase of the case.

The appellant sets forth the following elements by which it contends that Conner was an independent contractor and not an employee of the appellant, and which find some support in the record: Conner was permitted to select his own territory and to drop towns therefrom where he had been selling, and occasionally did so; other salesmen sold in his territory and he sold in theirs; Conner was permitted to sell for other companies; although he was given a drawing account, his commissions and bad credits were charged against it; he paid his own expenses; he was not required to call on customers; he operated his own automobile and was given no allowance for its use; and he was not required to make reports as to his operations or whereabouts.

There is no evidence of a written agreement between the salesman Conner and the appellant corporation.

There is also evidence, exclusive of the testimony of Mr. Masek, to the effect that for nearly 3 years Conner had been designated on the corporate records as an employee; the appellant corporation made social security payments in his behalf and had contributed to premiums of an employees' group insurance policy; it had carried workmen's compensation coverage for Conner; it had consistently paid a fixed sum monthly to Connor which included his on-the-road traveling expenses; and it had consistently withheld from the net amount of monthly payments to Conner withholding taxes for application on Conner's income tax.

We held in Riggins v. Lincoln Tent & Awning Co., 143 Neb. 893, 11 N. W. 2d 810, that the fact that social security tax was deducted from the plaintiff's earnings was evidence of the fact that the relationship of employer and employee existed. Carter v. Hodges, 175 Tenn. 96, 132 S. W. 2d 211, was cited.

In the instant case it is noted that the appellant paid social security payments in behalf of Conner, paid part of the premium on an employees' group insurance policy, carried workmen's compensation coverage for Conner, and withheld certain amounts for income tax purposes from the amount earned by Conner. All of these facts constitute evidence of the fact that Conner was an employee of the appellant.

The evidence of Conner's conduct over a 3-year period in behalf of the appellant, such as the continuity of his service; the regularity of his calls upon customers; the pattern established by his expense records and the payment thereof as sales expense by the appellant; the regularity of Conner's attendance at the company meetings on Saturday mornings; and the indication of Conner's desire to conceal knowledge from the appellant of his selling some items of clothing after his working hours indicate the appellant's control over the salesman Conner.

The evidence also shows the method of payment for Conner's services by the appellant to be established as the amount of $375 a month, which may be considered a guarantee, from which Conner was to pay his own expenses while on the road. In addition thereto he was to, and did, receive additional pay when the volume of his sales was sufficient to exceed the $375 a month. The service or work Conner was performing was a part of the regular business of the employer, and each and every record of the appellant's accounting system submitted in evidence in the case at bar was indicative of the inference, if not the establishment of the fact, that the parties believed they were creating the relationship of master and servant during the entire period of

Conner's activity for the appellant.

Conner had called on his customers in Sidney shortly before the collision occurred, and had loaded in his car tires from a customer to be returned to the appellant for adjustment. He had told the customer of his intention to proceed to Potter to call on another customer who was awaiting his call. Between the towns of Sidney and Potter, where Conner had intended to call and then proceed on to Gering for the night and return to work at Kimball the following day, he collided with the truck driven by the appellee's decedent.

We conclude that the above matter was a jury question and, under proper instructions given by the trial court, was resolved against the appellant. The appellee's second and third causes of action are sustained.

In the light of what has been said in this opinion it becomes unnecessary to consider appellant's other assignments of error. We find nothing in the record to indicate that the verdict was the product of passion, prejudice, mistake, or some other means not apparent in the record, or that the jury disregarded the evidence or rules of law and that the verdict should be set aside.

For the reasons given herein, the judgment of the trial court is reversed as to the appellee's first cause of action and affirmed as to the second and third causes of action.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED.

CHRISTIAN P. PETERSON, APPELLEE, V. STATE AUTOMOBILE INSURANCE ASSOCIATION, APPELLANT, IMPLEADED WITH FRANCES GIFFORD ET AL., APPELLEES.
70 N. W. 2d 489

Filed May 20, 1955. No. 33674.

1. **Negligence: Pleading.** In order to constitute actionable negligence, there must exist three essential elements, namely, a duty

or obligation which the defendant is under to protect the plaintiff from injury; a failure to discharge that duty; and injury resulting from the failure. The petition must allege these essential elements, and the proof must support them, or there can be no recovery.

2. **Negligence: Customs and Usages.** While the existence of a duty to use due care may be predicated merely upon a relation between the parties, and while its extent depends in the last analysis upon the circumstances of the particular case, it is of necessity a real duty in every case of negligence, not to be supplied by proof of mere usage or custom.
3. **Negligence.** Although inaction as well as action may be negligence, mere inaction does not constitute negligence in the absence of a duty to act, and even though a duty has been undertaken, if such undertaking was purely gratuitous, negligence cannot be predicated on abandonment of or failure to perform such duty.
4. **Insurance: Customs and Usages.** Generally, the mere custom of insurance companies to give notice of approaching dates for the payment of premiums does not bind them contractually to continue to do so, and a mere custom to renew will not of itself bind an insurance company in the absence of a contract to do so.
5. **Contracts: Customs and Usages.** Usage or custom cannot take the place of a contract where none has been made by the parties, and custom or usage cannot create a contract or liability where none otherwise exists.
6. **Insurance: Customs and Usages.** A custom or usage must be compulsory or binding upon both insured and insurer, and not left to each party's option to obey it. Likewise, a custom or usage, in order to be regarded as entering into a contract, must be clearly distinguished from mere acts of courtesy or accommodation.
7. **Contracts: Customs and Usages.** Custom or usage may annex incidents to a written instrument in order to aid in its construction and to ascertain the intention of the parties in reference to matters about which the contract is silent, provided such usage or custom is not expressly or by necessary implication contradictory of or inconsistent with the plain, explicit, and unambiguous terms of the written agreement and its effect is not to vary such terms or add to or ingraft any new agreement or stipulation thereon.

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

Chambers, Holland & Groth, for appellant.

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

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

CHAPPELL, J.

Plaintiff, Christian P. Peterson, was involved in an automobile collision while driving his 1937 Chevrolet 4-door sedan in Lincoln, on December 1, 1951, about 6:20 p. m., when, by its terms, his annual automobile insurance policy thereon issued by defendant, State Automobile Insurance Association, had theretofore expired. Plaintiff subsequently brought this action against such defendant and other named defendants who allegedly had claims against him on account of the accident. The latter, who were only nominal defendants, need not be referred to again. In the action, plaintiff sought a declaratory judgment determining that defendant was liable to reimburse him for any damages sustained by him and for any judgments obtained against him as a result of the accident up to and including the limits of the insurance policy.

Plaintiff's theory of recovery was that by reason of customs and usages of automobile insurance companies and their agents, defendant negligently breached its duty to either advise plaintiff of the expiration date of his policy or to renew the policy or to advise him that it did not wish to continue on the policy, or in the alternative that such customs and usages were tacitly implied incidents to the policy requiring defendant to either advise plaintiff of the expiration date of his policy or to renew the policy or to advise him that it did not wish to continue on the same, and defendant breached the same by failing to do so.

So far as important here, defendant's answer traversed the material allegations of plaintiff's petition, and, after

trial on the merits whereat evidence was adduced, the trial court rendered a judgment. Therein it found and adjudged the issues generally in favor of the plaintiff and against defendant, State Automobile Insurance Association. Plaintiff was also awarded an attorney's fee of $500, as a part of the costs taxed to defendant. Defendant's motion for new trial was overruled, and it appealed, assigning in effect that the judgment was not sustained by the evidence but was contrary thereto and contrary to law. We sustain the assignments.

The material evidence is not in dispute and may be summarized as follows: One F. W. Blomenkamp is a druggist who also solicited and received applications for automobile insurance policies written and issued by defendant. In doing so he would contact a prospect, and if an application was obtained, he would deliver it to the Wendell Groth Agency, defendant's district manager or agent in Lincoln, who then forwarded the application to defendant's home office in Des Moines, Iowa, where and by whom all policies were written and issued. The policy when issued would be forwarded to the Groth Agency office and sent by it to Blomenkamp who would countersign same, as required by the Department of Insurance, and deliver the policy to the customer. He would also collect or attempt to collect the premium at that time or within 60 days after the effective date of the policy.

The policies were not continuous but only for a period of 1 year, and Blomenkamp had no authority to either write or issue any policy. He was given a copy of each policy issued, and as a general rule received a notice from the Groth Agency ahead of time informing him of the date when a given policy would expire. In some cases when he knew the policy was about to expire, he contacted the policyholder and inquired whether or not he wanted a new policy. In other cases he would tell the Groth Agency to order a new policy from defendant and after issuance thereof would deliver it

ahead of the expiration date. This was done not only to get the business, lest a competitor should sell his customer a policy, but also to keep his customers insured. In any event, after a policy was delivered, the customer was not required to accept it, and if within 60 days from its effective date he did not pay the premium, the policy automatically lapsed and he was not bound to keep the policy or pay any premium. In other words, if plaintiff had been timely notified of the expiration date he would not have been required to order a renewal, or if a new policy had been delivered to plaintiff before expiration or thereafter, he would not have been bound to accept it or pay the premium thereon.

A general insurance agent, who has sold automobile insurance in Lincoln for 11 years, testified that it was the custom of most such agents to either advise the insured of the expiration date of his policy and ask him whether or not he would like it renewed, or to notify him and automatically renew the policy. The time when that would be done varied among agencies, but the usual procedure was to do so 30 days in advance of expiration. It was done to keep the business in the office and to keep the customer insured. Sometimes when a renewal policy was delivered to a customer he refused to accept the policy or sent it back and bought his insurance elsewhere, which he had a right to do.

In 1949, plaintiff had an automobile insurance policy in another company covering his 1931 Chevrolet ½-ton pickup truck, and Blomenkamp solicited the business, whereupon plaintiff told him, "When it expires you can have it." Thereafter, plaintiff applied for a policy covering that truck. The policy was issued by defendant and delivered by Blomenkamp to plaintiff in due course. It was effective from July 6, 1949, to July 6, 1950, and plaintiff paid the premium August 26, 1949. A renewal policy covering the truck was thereafter ordered by Blomenkamp, issued by defendant, and delivered to plaintiff by Blomenkamp in the usual course, effective

from July 6, 1950, to July 6, 1951. The premium was paid by plaintiff July 28, 1950. In a similar manner a renewal policy was issued thereon and delivered to plaintiff effective from July 6, 1951, to July 6, 1952, and plaintiff paid the premium July 9, 1951.

In October 1950 plaintiff bought the 1937 Chevrolet 4-door sedan here involved. Plaintiff's daughter called Blomenkamp and ordered insurance thereon. An application was made for such a policy to be effective at 12 a. m., October 19, 1950, for a period of 1 year. However, the car was being repaired and could not then be used by plaintiff, so issuance of the policy thereon was agreeably deferred, and when issued and delivered it was made effective from December 1, 1950, to December 1, 1951, at 12:01 a. m. Plaintiff paid the premium December 18, 1950. It is the policy directly involved herein.

Insofar as important here, the policy, a copy of which was filed with and approved by the Department of Insurance as required by section 44-348, R. R. S. 1943, reads: "Policy No. M472036 Expires 12-1-51 * * * Policy Period From 12-1-50 To 12-1-51 12:01 a. m. standard time at the address of the named insured * * * VIII * * * This policy applies only to accidents which occur and to direct and accidental losses to the automobile which are sustained during the policy period, * * *. Notice to any agent or knowledge possessed by any agent or by any other person shall not effect a waiver or a change in any part of this policy or estop the Association from asserting any rights under the terms of this policy; nor shall the terms of this policy be waived or changed, except by endorsement issued to form a part of this policy, signed by the Attorney. * * * By acceptance of this policy the named insured agrees * * * that this policy embodies all agreements existing between himself and the Association or any of its agents relating to this insurance. * * * The total premium for this policy is due two calendar months from the policy effective date. Fail-

ure of the named insured to pay the total premium to the Home Office of the Association on or before the due date shall cause this policy to lapse and terminate as of such due date. * * *" Such provisions are plain, explicit, and unambiguous.

Nevertheless, plaintiff testified that since he gave Blomenkamp his automobile insurance business, he had paid no attention to it with regard to expirations or renewals, because he just left it to Blomenkamp, who always took care of it and brought out a policy. He said it was his desire to obtain a renewal of the policy had he known its expiration date, but he did not do so because neither Blomenkamp nor anyone else notified him about it. Plaintiff saw and talked with Blomenkamp on July 9, 1951, when he paid the premium on the last policy covering his Chevrolet pickup truck, but nothing was then said about the policy covering his Chevrolet sedan, "because I knew it wasn't due yet * * * I expected him to issue me a new policy, which he had always done before on the other car."

There is no evidence that defendant or any of its authorized agents sought to avoid issuing a renewal policy by the use of any clandestine act or stratagem. The only inference that can be drawn from the evidence is that if defendant had timely received an application or order for it, a new policy would have been issued, but defendant received no order therefor until after the accident when plaintiff's policy had expired.

Blomenkamp first learned of plaintiff's accident when he read about it in the Sunday paper December 2, 1951. Plaintiff's daughter also called him about it. Blomenkamp had not theretofore ordered a renewal policy or notified plaintiff of the expiration date of his policy because he had no notice or knowledge of its expiration date. On Monday, December 3, 1951, Blomenkamp reported plaintiff's accident to defendant's claim agent, and upon learning that the policy had expired, he called the Groth Agency and ordered another one without con-

sulting plaintiff. Such agency required a verification of the order, and plaintiff's daughter verified it. Thereupon defendant wrote and issued a new policy effective December 3, 1951, to December 3, 1952, at 12:01 a. m. In the usual course such policy was delivered to plaintiff, but he never paid the premium within the 60-day optional period, and on February 20, 1952, defendant notified him that such policy had lapsed for nonpayment of premium. In the meantime, defendant had notified plaintiff in writing that because the policy effective December 1, 1950, to December 1, 1951, at 12:01 a. m., had expired before the accident, it declined to afford coverage thereunder. Suits were ultimately filed against plaintiff to recover damages resulting from the accident, and he brought this action.

Plaintiff concedes that the policy involved had by its terms expired at the time of plaintiff's accident. Also, plaintiff makes no contention that there was any oral contract of insurance in force at that time or that the customs and usages of insurance companies created a contract of insurance which was then in force. Further, there is no evidence that either Blomenkamp, the Groth Agency, or the defendant ever orally or in any policy provision or otherwise agreed that defendant would remain bound up to the limits of the policy unless plaintiff was timely notified of the expiration date of his policy, or a renewal policy was timely issued. The question presented then is whether or not the mere customs and usages heretofore discussed would impose any duty upon defendant to do so or be liable to plaintiff up to the limits of the policy either in tort or contract. We believe they would not. In that connection, the many authorities relied upon and discussed by plaintiff are entirely distinguishable upon the facts and applicable law. To review them at length here would serve no purpose.

In Ring v. Kruse, 158 Neb. 1, 62 N. W. 2d 279, this court held: "In order to constitute actionable negli-

gence, there must exist three essential elements, namely, a duty or obligation which the defendant is under to protect the plaintiff from injury; a failure to discharge that duty; and injury resulting from the failure. The petition must allege these essential elements, and the proof must support them, or there can be no recovery." As stated in 38 Am. Jur., Negligence, § 12, p. 654: "In other words, there can be no actionable negligence where there is no act or service or contract which a party is bound to perform or fulfill. While the existence of a duty to use due care may be predicated merely upon a relation between the parties, and while its extent depends in the last analysis upon the circumstances of the particular case, it is of necessity a real duty in every case of negligence, not to be supplied by proof of mere usage or custom, and the care which must be observed in its performance is measured by a definite standard." See, also, National Iron & Steel Co. v. Hunt, 312 Ill. 245, 143 N. E. 833, 34 A. L. R. 63.

In 65 C. J. S., Negligence, § 18, p. 413, it is generally stated that: "Although inaction as well as action may be negligence, mere inaction does not constitute negligence in the absence of a duty to act. Even though a duty has been undertaken, if such undertaking was purely gratuitous, negligence cannot be predicated on abandonment of, or failure to perform, such duty."

In 44 C. J. S., Insurance, § 345, p. 1315, it is said: "Generally speaking, insured must exercise diligence in paying premiums when they are due." In Pierce v. Massachusetts Accident Co., 303 Mass. 506, 22 N. E. 2d 78, the general rule is stated that: "The custom of insurance companies to give notice of approaching days for the payment of premiums does not bind them contractually to continue to do so, and does not alter the duty of the insured to pay, whether he gets notice or not. Thompson v. Insurance Co. 104 U. S. 252, 258, 259. Kukuruza v. John Hancock Mutual Life Ins. Co. 276 Mass. 146, 150." See, also, 45 C. J. S., Insurance, § 473

(5), p. 185. The case at bar does not come within any exception cited therein.

As stated in 44 C. J. S., Insurance, § 283, p. 1127: "A mere custom of companies or their agents in certain localities to renew, without request, is not sufficient to establish a renewal, unless it is of such a nature as to be binding on insured as well as on insurer." Also, in Gresham v. Norwich Union Fire Ins. Society, 157 Ky. 402, 163 S. W. 214, it is said: "A mere custom to renew will not of itself bind the company. There must be a contract to renew." Also, in Nippolt v. Firemen's Ins. Co., 57 Minn. 275, 59 N. W. 191, it is said: "Then, if such a custom existed, and it was valid, it would not bind the plaintiff to pay the premium for such a renewal of policy; and, unless he was himself bound by such a custom, he cannot hold the opposite party." As stated in 25 C. J. S., Customs and Usages, § 5, p. 80: "A custom must be compulsory, and not left to each one's option to obey it. Likewise, a usage, in order to be regarded as entering into a contract, must be clearly distinguished from mere acts of courtesy or accommodation."

In 55 Am. Jur., Usages and Customs, § 27, p. 287, it is said: "Usages and customs are primarily of importance in the field of contractual relations. Their operation and effect in the field of tort liability is limited. * * * The broad general rule is that proof of a valid usage or custom is admissible to annex incidents to a written instrument, to aid in its construction, and to ascertain the intention of the parties in reference to matters about which the contract is silent, provided such usage or custom is not contradictory of or inconsistent with the plain terms of the written agreement and its effect is not to add to or ingraft any new agreement or stipulation thereon." Also, as said in § 28, p. 289: "Although admissible to aid in the construction of the terms of a written contract and for the purpose of aiding the court in arriving at the intention

of the parties thereto, the effect of a custom or usage upon contractual obligations of parties to litigation is dependent upon the existence of an actual contract between the parties; a usage or custom cannot take the place of a contract or create a contract where none has been made by the parties. 'Where there is no contract, proof of usage will not make one.'" Also, in § 30, p. 291, it is said: "Evidence of custom or usage is admissible to explain the meaning of words and phrases used and to annex to such contract certain incidents which circumstances indicate the parties intended to annex when the words they have used do not necessarily exclude the operation of such custom or usage." As said in § 31, p. 293: "An express written contract embodying in clear and positive terms the intention of the parties cannot be varied by evidence of usage or custom which either expressly or by necessary implication contradicts the terms of such contract. Such evidence is inadmissible either to restrict or enlarge the explicit language of the instrument in question, or otherwise to control the real intent of the parties. A custom or usage cannot be relied upon to make the legal rights of the parties to a contract other than as expressed by the plain terms of the contract."

As said in 29 Am. Jur., Insurance, § 1456, p. 1092: "In general, contracts of insurance are to be interpreted in the light of the usages and customs affecting such agreements, where the terms used are of doubtful meaning otherwise; and evidence of a general custom or usage which does not conflict with the express terms of the policy is admissible as an aid to the construction of the contract. * * * As a further qualification, evidence of usage or custom is not admissible to contradict the terms of an insurance policy; and where a written contract is susceptible on its face of a plain and unequivocal interpretation, resort cannot be had to evidence of custom or usage to explain its language or qualify its meaning." As said in 25 C. J. S., Customs

and Usages, § 30, p. 118: "The terms of a contract prevail over a trade custom or usage. Where the terms of an express contract are clear and unambiguous, they cannot be varied or contradicted by evidence of custom or usage, and this is true whether the contract is written or verbal." See, also, Newark Fire Ins. Co. v. Smith, 176 Ga. 91, 167 S. E. 79, 85 A. L. R. 1330; City Mortgage & Discount Co. v. Palatine Ins. Co., 226 Ala. 179, 145 So. 490.

As stated in Fireman's Fund Ins. Co. v. Williams, 170 Miss. 199, 154 So. 545, citing authorities: "Next, it is insisted that the custom and usage alleged is sufficient in this case, independent of the oral agreement, to create an enforceable contract by implication. We are unable to perceive the validity of this contention. The patent and obvious answer to this view is that it is elementary law that usage and custom cannot create a contract or liability where none otherwise exists, and custom and usage may not be invoked in contravention of law."

Furthermore, plaintiff dealt solely with Blomenkamp, who was merely a soliciting agent, authorized only to procure applications and collect premiums. After the policy was issued, delivered, and premium paid, defendant would not then be bound by any acts or promises made by Blomenkamp beyond the terms of the policy, under the facts and circumstances presented in this case. Parker v. Knights Templars & Masons Life Indemnity Co., 70 Neb. 268, 97 N. W. 281; Dohlin v. Dwelling House Mutual Ins. Co., 122 Neb. 47, 238 N. W. 921; Krug Park Amusement Co. v. New York Underwriters Ins. Co., 129 Neb. 239, 261 N. W. 364.

The authorities heretofore set forth are applicable and controlling. In the light thereof, and our conclusions herein, plaintiff cannot recover; therefore, we are not required to discuss the question of allowance of attorney's fees, except to say that in such a situation none are allowable.

For the reasons heretofore stated, we conclude that the judgment of the trial court should be and hereby is reversed and the cause is remanded with directions to render a judgment against plaintiff and for defendant, State Automobile Insurance Association, in conformity with this opinion. All costs are taxed to the plaintiff.

REVERSED AND REMANDED WITH DIRECTIONS.

COUNTY OF JOHNSON, NEBRASKA, ET AL., APPELLEES, V. OTTO R. WEBER, APPELLANT.
70 N. W. 2d 440

Filed May 20, 1955. No. 33693.

1. **Drains: Statutes.** It was the intention of the Legislature in the enactment of Laws 1905, chapter 161, to impose a duty on drainage districts organized thereunder to maintain and keep in repair the drainage systems constructed under the powers given them by such act, to the end that landowners whose land was assessed for the construction of such system on the basis of expected benefits from such construction may be protected in the enjoyment of such benefits.
2. ———: ———. The performance of the powers delegated to drainage districts by that act, especially those pertaining and relating to the continuance of the corporate entity authorized thereby and the care and preservation of its drainage ditches and other works and improvements, involves the protection of public and private interests by a public corporation organized for that purpose, and this legislation, in view of its inherent nature and purpose, must be construed as a statute mandatory.
3. **Contracts: Statutes.** Every contract is made with reference to, and subject to, existing law, and every law affecting such contract is read into and becomes a part of the same.
4. **Easements.** A grant in gross is never presumed when it can fairly be construed as appurtenant to some other estate.
5. ———. Whether an easement in a given case is appurtenant or in gross is to be determined mainly by the nature of the right and the intention of the parties creating it. If it be in its nature an appropriate and useful adjunct of the land conveyed, having in view the intention of the grantee as to its use, and there being nothing to show that the parties intended it to be a mere personal right, it should be held to be an easement

appurtenant to the land, and not an easement in gross.

6. **Municipal Corporations.** 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.
7. **Easements.** Except as prevented by the terms of its transfer, or by the manner or the terms of the creation of the easement appurtenant thereto, one who succeeds to the possession of a dominant tenement thereby succeeds to the privileges of use of the servient tenement authorized by the easement.
8. **Drains.** Landowners having paid assessments for the construction and maintenance of the system on the basis of benefits have the right to be protected in the enjoyment of those benefits.
9. **Easements.** If the grant of an easement or reservation is specific in its terms, it is decisive of the limits of the easement.

APPEAL from the district court for Johnson County: VIRGIL FALLOON, JUDGE. *Affirmed as modified.*

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

Raymond B. Morrissey, J. W. Weingarten, and *W. P. Loomis,* for appellees.

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

SIMMONS, C. J.

In this action plaintiff sought an injunction preventing the defendant from trespassing on a levee constructed by Drainage District No. 1 of Johnson County, from damaging the levee, and from interfering with plaintiffs or their agents in repairing, maintaining, and improving the levee. A decree was entered favorable to the plaintiffs. Defendant appeals.

We affirm the judgment of the trial court as modified.

The plaintiff County of Johnson will be hereinafter referred to as the County; the plaintiff Chicago, Burlington and Quincy Railroad Company will be hereinafter referred to as the Burlington; and Drainage District No.

1 of Johnson County will be hereinafter referred to as the District. The defendant will be referred to by such designation.

The parties here use the word levee and dike interchangeably as meaning the same thing. We do likewise.

As nearly as we can determine from this record, the District was organized under the provisions of Laws 1905, c. 161, p. 610 (which in turn became Comp. St. 1907, c. 89, art. IV), and as amended by Laws 1909, c. 147, p. 507. As amended, the act is now found generally in Chapter 31, article 3, R. R. S. 1943. The District's articles of association were filed in the district court on October 22, 1909 (see, Laws 1909, c. 147, § 1, p. 507; § 31-302, R. R. S. 1943), and decree was filed May 7, 1910, declaring the creation of the District. (See, Comp. St. 1907, § 6241; § 31-304, R. R. S. 1943.) By its articles of association it was provided that it should "continue in existence for a period of twenty (20) years." The acre area included in the District is not summarized in the evidence.

No further showing is made as to the District, its organization, or its functioning, save that it appears that a drainage ditch was constructed somewhat according to the plans of the engineers.

On June 17, 1913, the Burlington was assessed, and paid, $15,000 for benefits from the District. It appears that other lands, including those of the defendant, were assessed for benefits also.

On August 3, 1914, for a consideration of $200, Ind Weber (then the owner of the land involved in this action) and his wife, executed and delivered a "right of way deed" to the District. Reference will be made to the terms of that deed later herein. The ditch and dike involved here were built on the right-of-way there granted in 1915.

In 1929, the Legislature enacted Laws 1929, c. 130, § 1, p. 480 (now section 31-132, R. R. S. 1943), containing this language: "When any improvement shall have

been completed under the provisions of this article, or by any drainage district which shall have been dissolved, it shall be and remain under the direct control and supervision of the county board, and if at any time the same in their opinion requires repairing or the removal of obstructions in any part thereof, they shall cause the same to be done, and shall pay for the same out of the county ditch fund."

In 1930, the 20 years' "existence" provided in the articles of association of the District expired. The parties here submit this cause on the assumption that the District became dissolved at that time. Without determining that assumption, we accept it for the purposes of this opinion.

In 1935, defendant acquired the land involved by warranty deed from his father.

The profile elevation of the dike through defendant's land was originally planned and built at an elevation expressed as 489.5.

In 1942, there were severe floods in the area which caused water to run over the dike on defendant's land and damaged the dike materially.

On June 8, 1943, the County entered into a contract with the Burlington whereby the County granted the right to the Burlington to enter the strip of land involved in this action "for the purpose of restoring said dike and in the future if and when the Railroad deems necessary or advisable, for the purpose of maintaining said dike." The Burlington agreed "at its own cost and expense to restore said dike at this time and if and when it deems it necessary or advisable in the future, to maintain said dike."

Thereafter the Burlington, in 1943, entered and restored the damaged part, raising the elevation to 491.5, being an increase of 2 feet in elevation. Defendant testified that he ordered the work stopped at that time, but it is clear from the evidence of witnesses, including

the defendant, that the repairs were completed at that time.

In May 1950, there was another flood which went over the dike at its increased elevation, cut holes in it, and materially damaged it.

In November 1950, the Burlington put its employees upon the property with the intent of restoring the dike and increasing its elevation to a level of 493, or 3½ feet above the original grade line. It is undisputed that that elevation is necessary if the dike is to serve the purpose for which it was constructed. Defendant ordered the workmen off the property and succeeded in stopping the construction involved.

It appears that the vulnerable point in the dike is at the turn of the channel of the stream. In 1951, defendant had dirt removers enter the land and lower the dike at its vulnerable point from 2½ to 3 feet for a distance of 50 feet in direct line with the current of the stream. Defendant's purpose, as stated by him, was to let the water go through if it wished.

This litigation followed by petition initially filed in March 1952. Issues were finally made up in February 1954, trial was had, and decree was rendered in June 1954.

Defendant here submits several "principal questions" which he advises us are involved. He makes 40 assignments of error. Thereafter he pays no particular attention to the questions stated or the errors assigned. This leaves us to determine the questions argued.

This is an equity action for trial de novo here.

Defendant's first argument here is that the right-of-way deed of Ind Weber to the District created an easement in gross and not an easement appurtenant, and as such is not inheritable, assignable, or subject to succession. He contends that it was an easement, personal in nature, attached to the named grantee and became a nullity after the dissolution of the grantee District in 1930. He contends that these conclusions follow as a matter of

law and are reinforced by the terms of the instrument itself.

He contends basically that to be an easement appurtenant there must be a dominant estate to which the easement attaches and that the District does not have such a dominant estate.

This contention is without merit.

The District is a public, as distinguished from a private, corporation. The statute so declared. § 6241, Comp. St. 1907. We have so held. See Drainage Dist. No. 1 v. Suburban Irr. Dist., 139 Neb. 333, 297 N. W. 645.

We held also in the above decision that it was the intention of the Legislature in the enactment of Laws 1905, c. 161, § 1, p. 610, "to impose a duty on drainage districts organized thereunder to maintain and keep in repair the drainage systems constructed under the powers given them by such act, to the end that landowners whose land was assessed for the construction of such system on the basis of expected benefits from such construction may be protected in the enjoyment of such benefits."

We also held that the performance of the powers delegated to drainage districts by that act, "especially those pertaining and relating to the continuance of the corporate entity authorized thereby and the care and preservation of its drainage ditches and other works and improvements, involves the protection of public and private interests by a public corporation organized for that purpose, and that this legislation, in view of its inherent nature and purpose, must be construed as a statute mandatory."

By provisions of section 6250, Comp St. 1907 (now as amended section 31-321, R. R. S. 1943), the District is given the power to acquire easements for rights-of-way. This is a power conferred for the benefit of the lands within the District that are to be drained. Under these circumstances the easement owner is the dominant tenant. Sheppard v. City and County of Dallas Levee

Imp. Dist. (Tex. Civ. App.), 112 S. W. 2d 253.

The rule is: "Every contract is made with reference to, and subject to, existing law, and every law affecting such contract is read into and becomes a part of the same." McWilliams v. Griffin, 132 Neb. 753, 273 N. W. 209, 110 A. L. R. 1039. This rule has been repeatedly followed as late as Niklaus v. Miller, 159 Neb. 301, 66 N. W. 2d 824.

The statutes under which the District was organized are the authority under which the parties acted when the right-of-way deed was given. Whether referred to or not in the deed, the terms of the statute necessarily, in legal effect, were a part thereof and are to be considered in construing the deed.

We have held that: "'A grant *in gross* is never presumed when it can fairly be construed as appurtenant to some other estate. * * * Whether an easement in a given case is appurtenant or in gross is to be determined mainly by the nature of the right and the intention of the parties creating it. * * * If it be in its nature an appropriate and useful adjunct of the land conveyed, having in view the intention of the grantee as to its use, and there being nothing to show that the parties intended it to be a mere personal right, it should be held to be an easement appurtenant to the land, and not an easement in gross, * * *.'" Smith v. Garbe, 86 Neb. 91, 124 N. W. 921, 136 Am. S. R. 674. See, also, Neilson v. Leach, 140 Neb. 764, 1 N. W. 2d 822.

The right-of-way deed granted to the District an "easement" over the described parcel of land upon which to construct a levee with borrow pit; it is referred to in the deed as a "grant and conveyance" of a right-of-way reserving "the full use and possession of all the land in said right of way not actually occupied by the said drainage district, after the completion thereof, for all purposes not inconsistent with its use by the said drainage district in preserving and maintaining said

ditch in a proper state of efficiency for the purpose for which it was constructed."

The applicable statutory provisions gave the District the right to acquire easements "to construct and maintain" the contemplated works. Other provisions in the act will be referred to later herein.

We conclude that the right-of-way deed granted an easement appurtenant to the land.

But the defendant contends that if that be so, the easement expired at the end of the 20-year period covering the "existence" of the District. If that be so, the purpose to be served by the construction of a drainage system would be accomplished only for the period fixed in the articles of association and thereafter nature would take its course. It would be the duty of the District to maintain the system for the period fixed and thereafter both duties and rights disappear. The substantial investments of landowners in these projects would likewise "dissolve."

We find nothing in the act that would sustain such a conclusion of legislative intent.

Plaintiffs rely on the provision enacted in 1929, and now section 31-132, R. R. S. 1943, providing that: "When any improvement shall have been completed * * * by any drainage district which shall have been dissolved, such improvement shall be and remain under the direct control and supervision of the county board, and if at any time the same, in the opinion of the board, requires repairing * * * the board shall cause the same to be done, * * *."

Plaintiffs say that under the provisions of this act it is not only the right but the duty of the county to make the necessary repairs involved here.

Defendant contends that to apply the 1929 amendment here is to apply it retroactively, to rewrite the right-of-way deed, to insert covenants and grants not contained therein, and to deprive him of his property without compensation, impair the obligation of the con-

tract, and otherwise violate constitutional provisions both state and national. Defendant relies on the rule last stated in Ritter v. Drainage Dist., 137 Neb. 866, 291 N. W. 718, that: "A legislative act will not be permitted, even if an attempt so to do is disclosed, to operate retrospectively where it will have the effect to invalidate or impair the obligation of contracts or interfere with vested rights."

There is no retrospective, but rather a prospective, application of the statute here involved.

It is quite apparent that the Legislature was confronted with situations, such as this record discloses, where the purpose of drainage systems would be defeated or jeopardized because of the dissolution of the constructing and operating districts. The Legislature simply provided that when that situation happened, the improvement should thereafter be under the control and supervision of the county board and "Upon the dissolution of any drainage district the right-of-way interests of such drainage district shall pass to and become the property of the county where located * * *." Laws 1929, c. 130, § 1, p. 480.

This act singly provides that when a district, a public corporation, dissolves, its right-of-way interests and the control and supervision of the improvement pass to the county, a public corporation, to be exercised by the county board. That is what happened here.

We have held that: "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." Seward County Rural Fire Protection Dist. v. County of Seward, 156 Neb. 516, 56 N. W. 2d 700.

Restatement, Property, § 487, p. 3029, states the following rule: "Except as prevented by the terms of its

transfer, or by the manner or the terms of the creation of the easement appurtenant thereto, one who succeeds to the possession of a dominant tenement thereby succeeds to the privileges of use of the servient tenement authorized by the easement."

There is nothing in the terms of the transfer or of the creation of the easement that prevents the County succeeding to the privilege of the use of the servient tenement.

The County properly brings this action pursuant to its rights and to permit the performance of its duties within the scope of the legislative act.

Defendant contends that the County was not doing this work but that the Burlington had determined the necessity and was performing the work; that the contract under which it proposed to do the work was void because the statute requires the direct control and supervision of the County and the county board of the necessity of the repair of the dike; and that the contract between the County and the Burlington was an unauthorized delegation of power.

It is clear from the record that the workmen ordered from the property by the defendant were employees of the Burlington. It is also apparent that the Burlington determined the necessity of these repairs. However, the County by this action clearly accepted that determination, made it its own, and produced the evidence of the necessity.

The actions of the defendant precipitated this litigation. He here challenges not only the right of the Burlington but the right and duty of the County as well. He resists the rights of the County as well as the Burlington.

The plaintiffs allege that the contract was between the County and the Burlington, and that the Burlington attempted to repair the dike and was prevented by the defendant. They also allege that thereafter defendant

entered and cut the dike on the right-of-way. These allegations are established as true.

Plaintiffs also allege that because of the acts of the defendant, that plaintiffs and their agents are unable to repair and maintain the levee so that it will serve the purposes for which the ditch and dike were constructed. Those allegations are established as true. Plaintiffs pray for a decree enjoining the defendant from trespassing on the right-of-way, from damaging the dike, and from interfering with plaintiffs or their agents in repairing and maintaining the levee.

Defendant by answer alleges the invalidity of the contract between the Burlington and the County; that neither of the plaintiffs had succeeded to the rights granted the District by the right-of-way deed; and prays that each of them be enjoined from further trespass upon his land.

The basic issue is the right and duty of the County in this matter. That in no way turns on the validity of the contract between the County and the Burlington. We do not determine that question. Clearly, the County has the right to the injunction which it seeks. The Burlington is likewise entitled to injunctive relief, not as an agent of the County but as the owner of an estate within the District and shown to be directly affected by the failure to repair the dike (see Ritter v. Drainage Dist. No. 1, 148 Neb. 873, 29 N. W. 2d 782), for as we said in Mooney v. Drainage Dist., 126 Neb. 219, 252 N. W. 910, landowners having paid assessments for the construction and maintenance of the system on the basis of benefits have the right to be protected in the enjoyment of those benefits.

The next question argued here goes to the right to raise the elevation of the top of the levee from 489.5 to 493, an increase of 3½ feet. The evidence is that the original elevation as planned and built was at 489.5. That elevation was proven to be inadequate by the 1942 flood and was raised in 1943 to 491.5. That elevation

likewise was shown to be inadequate by the 1950 flood. It is now planned to raise it to 493.

It appears that defendant cut the dike to about the 489.5 elevation. The evidence is without dispute that that elevation would not serve the purpose for which the dike was constructed and that if constructed to an elevation of 493, it would do so.

The trial court restricted the construction of the dike to an elevation of "approximately" 489.5. The defendant contends that the use of the word approximately affords the foundation for future litigation to determine how much higher the levee can be raised within the decree. This record indicates that result might occur.

The defendant relies on the terms of the right-of-way deed to sustain his contention that the elevation cannot go above 489.5.

Plaintiffs contend that the elevation must be at 493 if the dike is to be maintained in a proper state of efficiency for the purposes for which it was constructed. The general figures 489.5 and 493 each represent a datum level. The difference is one in feet.

As heretofore pointed out, the right-of-way deed granted the right "to dig, excavate and construct a Levee with burrow (sic) pit of and according to the plans prepared" by the engineer and adopted by the District. The plans for the original construction fixed the elevation of the dike, at the point here involved, at 489.5. As nearly as can be determined from the evidence, it was built at that level.

The rule is that if the grant of an easement or reservation is specific in its terms, it is decisive of the limits of the easement. 28 C. J. S., Easements, § 75, p. 752; 17 Am. Jur., Easements, § 97, p. 995. Accordingly we hold that the limit of the height of the dike at the point here involved is 489.5.

The right-of-way deed granted "such temporary right of way or means of ingress and egrees (sic) over their other lands adjacent to the said right of way herein-

before granted as may be necessary and convenient for the transportation of materials, machinery, supplies, tools and fuel upon said right of way during the period of the construction of the ditch or new channel by its agents, employees and contractors." The trial court granted the plaintiffs that right applicable to the work here involved.

In the light of our construction of the act, we hold that the right to so use the premises is impliedly granted for the purposes involved here. To hold otherwise would be to limit, if not destroy, the right to repair and remedy defects, by possibly making the dike inaccessible for that purpose.

The trial court held that plaintiffs had the right to enter and to reconstruct and maintain the levee in the manner herein considered, including the exercise of the right of ingress and egress over defendant's adjoining lands, and enjoined the defendant from interfering with such compliance. The decree in that respect is affirmed.

The trial court further enjoined the defendant from interfering with plaintiffs in preserving, reconstructing, and maintaining said levee and from trespassing on or damaging said levee. Of course, the decree is applicable to the situation and acts here involved. The decree in that respect is affirmed.

With reference to the elevation of the reconstructed dike, the decree of the trial court is modified so as to require that the elevation of the dike be limited to the elevation described in the record as 489.5.

As so modified, the decree of the trial court is affirmed. All costs are taxed to the defendant.

AFFIRMED AS MODIFIED.