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REPORTS OF CASES

DECIDED BETWEEN
JUNE 29, 1956 and MARCH 1, 1957

IN THE

Supreme Court of Nebraska

JANUARY TERM 1956, SEPTEMBER TERM 1956,
and
JANUARY TERM 1957

VOLUME CLXIII

WALTER D. JAMES
OFFICIAL REPORTER

GANT PUBLISHING COMPANY
LINCOLN, NEBRASKA
1957

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By WALTER D. JAMES, REPORTER OF THE SUPREME COURT
For the benefit of the State of Nebraska

SUPREME COURT

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Number of District	Counties in District	Judges in District	Residence of Judge
First	Johnson, Nemaha, Pawnee, and Richardson.	Virgil Falloon	Falls City
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Third	Lancaster.	John L. Polk Harry Ankeny Harry A. Spencer Paul White	Lincoln Lincoln Lincoln Lincoln
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Fifth	Butler, Hamilton, Polk, Saunders, Seward, and York.	H. Emerson Kokjer John D. Zeilinger	Wahoo York
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Eighth	Cedar, Dakota, Dixon, and Thurston.	John E. Newton	Ponca
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MEMORIAL RESOLUTION IN MEMORY OF LEONARD A. FLANSBURG

HONORABLE F. B. BAYLOR.

If Your Honors Please:

Mr. Chief Justice Simmons, Justices of the Court, Mrs. Leonard Flansburg, Mrs. Clarissa Fisher, Mr. Charles Flansburg, Dr. Harry Flansburg, Ladies and Gentlemen:

The Supreme Court of Nebraska now foregoes its deliberations and devotes this extraordinary session to the purpose of paying tribute to and asserting its respect and high regard for a former member of the court, who dedicated his great talents to the interpretation and application of the laws of this state and nation.

Leonard A. Flansburg was born in Alma, Nebraska, the son of Claude C. Flansburg and Clarissa Wilkinson Flansburg, the former a lawyer of outstanding ability, who practiced his profession with notable success in Harlan County and Lancaster County, Nebraska.

Having received his tutelage from those exceptional preceptors, Roscoe Pound, Henry H. Wilson, William G. Hastings, George D. Ayers, George P. Costigan, and John J. Ledwith, Leonard Flansburg was graduated from the University of Nebraska College of Law in 1906. He thereupon entered the practice in Lincoln as an associate of his father, and in 1910 and 1911 served as deputy to his father, then the City Attorney. In 1917, he was a member of the Nebraska House of Representatives and of the Convention which prepared the Home Rule Charter of the City of Lincoln.

During 1918, Mr. Flansburg became one of the judges of the Third Judicial District, wherein he served with distinction until October 8, 1919. On that date, he was appointed by Governor McKelvie a member of the Su-

preme Court Commission, of which William C. Dorsey and George W. Tibbets also were members. In 1920, he, as the successor of Albert J. Cornish, was made one of the Associate Justices of the Supreme Court, and as such, sat on the bench with Chief Justice Andrew M. Morrissey and Associate Justices Charles B. Letton, William B. Rose, James R. Dean, Chester H. Aldrich, and George A. Day. During the time of his service on the Supreme Court and the Supreme Court Commission, Judge Flansburg wrote the majority opinions in ninety-four cases, of which one was adopted upon rehearing in conformity with his dissenting opinion theretofore submitted. Of the ninety-four opinions written by Judge Flansburg, thirteen have been published in the American Law Reports as leading cases.

On January 3, 1923, Judge Flansburg retired from the bench to re-enter the general practice of law as a member of the firm of Hainer & Flansburg. He continued as an indefatigable and brilliant advocate without interruption until almost the day of his death on April 2, 1957. Not only did corporations seek his counsel and business judgment by retaining him as their attorney and placing him on their boards of directors, but many individuals relied confidently upon his advice in matters involving almost every phase of dispute and human endeavor. It was in the development and application of the principles of law that he took his greatest interest.

In 1910, the marriage of Frances Westervelt to Mr. Flansburg was solemnized. Of this union, two children were born—Clarissa Flansburg Fisher, who is the wife of a lawyer of Omaha, and Charles Flansburg, who was associated with his father from 1938 to the time of the latter's death. Their mother died in 1949. Mr. Flansburg is survived by Mildred Welch Flansburg, who became his wife in 1951.

In his political, legal and judicial thinking, Judge Flansburg was a conservative, resisting with well-developed logic those innovations which might be expected to invade or destroy freedom of thought and

expression and the rights to possession and legitimate use of property. He was a man of highest integrity and character, and held tenaciously those opinions which he considered to be right.

In 1946, in a memorial service held as a tribute to William B. Rose, the last of those who had served with him on this bench, Judge Flansburg said:

> "The last few years have been a period when the vast influence and power of the judiciary has been brought to public attention with compelling force. It is a time now when we more than ever appreciate the worth of sound judicial temperament and character.
>
> "It is true that the law must keep pace with the growth and development of society, but settled laws, until legally changed, should be the anchors of the courts. The judiciary must be the bulwark for the preservation of established rights and liberties."

These principles, forcefully stated by him, directed his philosophy as a lawyer and as a citizen.

By virtue of the commission duly granted by the Supreme Court of Nebraska, the following resolution hereby is submitted:

> BE IT RESOLVED: That, humbly and sorrowfully accepting the Final Judgment by which his family, the Bench, the Bar and this community, city and state have lost a devoted husband and father, and a wise and upright jurist, we approve and adopt the words uttered and the sentiments expressed at this service held in memory of Leonard A. Flansburg.
>
> June 3, 1957
>
> F. B. Baylor
> William I. Aitken
> Guy C. Chambers
> Earl M. Cline
> Don W. Stewart

HONORABLE EARL M. CLINE.

MAY IT PLEASE THE COURT:

If your Honors will indulge me, I would like to speak in a personal vein of the late Judge Leonard A. Flansburg—a friend who is gone, but whose cherished memory will remain with us always.

The name of Flansburg has meant much to me through the passing years—more years now than I would like to count. Honorable C. C. Flansburg, father of the Flansburg boys, Leonard, Harry, Claude, Allan and Robert, was an eminent and able member of the Bar of this state, with whom I came into contact in the later years of his practice in Lincoln. I was not acquainted with Allan Flansburg, but Claude Flansburg and I, and for a short time Robert and I, were in school together. One of the indelible recollections which I shall never forget is sitting in a front-line trench, south of Verdun and north of Nancy, in 1918, during World War I, and receiving from a Salvation Army man a copy of the two-page Paris Edition of the Chicago Tribune, which listed the names of those who had been killed and wounded. The first name under the heading, "Killed In Action", was Robert H. Flansburg, 1645 A Street, Lincoln, Nebraska.

Judge Leonard A. Flansburg and Dr. Harry E. Flansburg have been my close friends during the thirty-five years of my residence in Lincoln. Judge Flansburg was sitting on this Court when I argued my first case here. My acquaintance and friendship with Judge Flansburg, generally known as "Len" by his friends, was not confined to the practice of law, although in the profession, we worked both together and as adversaries. That acquaintance and friendship extended to social occasions, and carried us to the golf course and to vacations together in Colorado, Wisconsin and Canada.

I do not have the words to adequately portray the qualifications and achievements of Judge Flansburg, nor to record the successes attained by him. He always

measured up to every confidence reposed in him. His scholastic, intellectual and legal attainments were of the highest order; his character and integrity were above reproach; his capacity for friendship and comradeship was valued by all who knew him; and his services to his state as a citizen, as a lawyer, and as a judicial officer, were outstanding. He was a great lawyer, an excellent judge, a fine citizen, and a real gentleman in all that that term implies. His life may be summarized in the words of the old Latin eulogy, "Nihil quod tetigit, non ornavit."—"There is nothing he touched he did not adorn."

HONORABLE DON W. STEWART.

MAY IT PLEASE THE COURT:

Throughout my long acquaintance with Judge Leonard Flansburg, I have been impressed with his friendly and gracious manner. Our offices were on the same floor for nearly thirty years and I saw him almost every day. He always greeted me with a warm friendliness and infectious smile.

Another characteristic which I especially admired in Judge Flansburg was his willingness to give his fellow lawyers the benefit of his wide experience in the law. I am sure his clear and logical analysis helped many to solve difficult legal problems.

Judge Flansburg made a substantial and valuable contribution in his service to the City of Lincoln as deputy city attorney, his service to Lancaster County as a district judge and to the State of Nebraska as a member of the Supreme Court. His adherence to the high principles of the law did much to strengthen our system of jurisprudence.

We have lost an eminent lawyer and a good friend. His distinguished career and his gracious personality will serve as a lasting memorial to him and should be an inspiration to all of us.

HONORABLE GUY C. CHAMBERS.

MAY IT PLEASE THE COURT:

I knew Leonard A. Flansburg well as a lawyer, a District Judge, Judge of the Supreme Court Commission, Associate Justice of this Court, and as a member of the Round Table, a discussion club.

As a member of the discussion club his range of information was wide. Based upon that information, he usually took firm positions upon all matters of public interest. He stated his conclusions clearly and defended them with facts and logic. The listener was never left in doubt as to what he thought nor why, nor did he bury his thoughts in a camouflage of words to make discovery difficult.

As a lawyer he was a vigorous advocate. On the bench he was a dispassionate judge; he combined these qualities in a rare degree. No one could be a more persistent partisan in all the incidents affecting his clients' interests. He put every resource of his remarkable intellect and physical endurance into espousing his client's position at every stage of any proceeding.

As a trial judge he was capable of and habitually did listen at length to every argument presented by each party. He generally followed that by diligent research and study. His impartiality as a judge was as outstanding as his loyalty to his client's cause as an advocate. Few men have combined so notably the finest qualities of both the lawyer and the judge.

As a Judge of this Court and as a Judge of this Court's Commission his opinions were noted for their clarity and thorough grasp of the legal principles involved and their evidence of careful research and preparation. Both the bar and the bench were enriched by his many years of service.

ASSOCIATE JUSTICE E. B. CHAPPELL:

It is an honor to speak for this court at a memorial for Judge Leonard A. Flansburg, and thus call to mind again

the great and honorable service which he rendered this state during his lifetime as a lawyer, legislator, and judge. We recognize that mere speaking can add nothing to his immortal record already lived, spoken, and written, but we do not wish to remain silent lest posterity in the legal profession should fail to remember that record. Also, we speak of him and meditate upon his service to mankind because it enriches our own lives and stimulates a desire to emulate it.

Judge Flansburg was a great, industrious lawyer, with a mind of his own that was gracious but unafraid. He recognized a proposition of law when he found it and had the ability to apply it with honorable power and distinction. His advocacy was predicated upon applicable authority, which he presented with logic and eloquence. On the other hand, he was not afraid to admit that he was unable to find any authority which supported his client's position. I well remember one occasion in important litigation when he did exactly that.

He was a great and just judge. His opinions, written while a member of this court, demonstrate that assertion beyond peradventure of a doubt. They were written with a sure and facile hand which cited and discussed authorities in such manner that lawyers and judges confidently read and rely upon his opinions.

He thus lives on as an example to be emulated by lawyers and judges who have a passion to live even after death in the minds and hearts of honorable living men. We are proud to pay him such a tribute.

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CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

JANUARY TERM, 1956

IN RE APPLICATION OF BURT COUNTY PUBLIC POWER DISTRICT.

VIRGIL LANE ET AL., APPELLEES, V. BURT COUNTY RURAL PUBLIC POWER DISTRICT, A PUBLIC CORPORATION, APPELLANT.

77 N. W. 2d 773

Filed June 29, 1956. No. 33874.

1. **Eminent Domain.** The power conferred upon a county judge by the eminent domain act and the duties required of him by that act are not judicial powers and duties but are purely ministerial in character.
2. **Courts: Appeal and Error.** A district court cannot acquire jurisdiction of a cause if the court from which the appeal was taken had no jurisdiction of the subject matter.
3. **Eminent Domain: Appeal and Error.** On appeal to the district court from appraisal of damages in a condemnation proceeding, it becomes a judicial proceeding, and if other issues than the question of damages are involved, they must be presented by proper pleadings and heard and decided in that court.
4. ———: ———. Jurisdiction of an eminent domain proceeding cannot ordinarily be conferred on an appellate court by consent, waiver, or estoppel. However, a party may be estopped to deny the existence of facts upon which jurisdiction thereof depends.
5. **Eminent Domain: Evidence.** Evidence as to the value of the land taken and damaged by condemnation proceedings must be based upon its value in the condition in which it was at the time of the condemnation, which is the date of filing the petition therefor.

6. **Trial: Appeal and Error.** The proof in a trial of a jury case must be confined to legal evidence tending to prove or disprove an issue made by the pleadings and the admission of improper evidence is prejudicial if it may have influenced the verdict.
7. ———: ———. If it does not appear from the record that evidence wrongfully admitted in the trial of a jury case did not affect the result of a trial unfavorably to the party against whom it was admitted, its reception must be considered prejudicial error.
8. **Damages.** General fear, or fear which is not connected with or an incident of knowledge of present or potential danger, cannot be made the basis upon which to predicate depreciation in the market value of land.
9. ———. The only fear which may be considered as an element in fixing value is that of danger, the present or potential existence of which is grounded in authentic observation and experience, or in scientific investigation, and which fear circumscribes activity or limits freedom of use in the area of the present or potential danger, and which tends to lessen the market value of the land.
10. **Eminent Domain: Interest.** The proper procedure in a condemnation action, where an appeal is taken from the award and the case is tried to a jury in the district court, is for the court to reserve the question of interest for its determination and direct the jury not to include it in its verdict.

APPEAL from the district court for Burt County: WILLIAM A. DAY, JUDGE. *Affirmed in part, and in part reversed and remanded with directions.*

Brown, Crossman, West, Barton & Quinlan, Ellenberger & Pipher, and *C. A. Sorensen,* for appellant.

Moodie & Burke and *H. M. Nicholson,* for appellees.

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

CHAPPELL, J.

On September 6, 1949, Burt County Public Power District, hereinafter called defendant, filed a petition with the county judge of Burt County seeking to condemn an easement and right-of-way for the construction and maintenance of a 34,000-volt electric transmission line

extending 1 mile on and along the north border of described lands owned by Virgil Lane and Lauren Lane, hereinafter called plaintiffs. On the same date an order providing for appraisal was filed by the county judge which ordered that on September 28, 1949, at 9 a. m., appraisers, to be thereafter appointed and qualified, should appear to qualify and proceed in a body to inspect the premises, hear the parties, assess plaintiffs' damages, and make written report thereof to the county judge to be certified by him and filed of record in the office of the county clerk. On September 22, 1949, the county judge entered an order appointing named appraisers and prescribing the duties to be performed by them. The appraisers were duly served and qualified as such.

The transcript of the proceedings discloses that the written report made by the appraisers awarding plaintiffs $1 as damages, was "Filed Oct 19, 1949" and that thereafter, on October 26, 1949, such report was certified by the county judge under the seal of his office and transmitted by him to the county clerk who filed same of record. Also on that date defendant paid the award to the county judge for the use of plaintiff owners. In the meantime, on October 19, 1949, plaintiffs filed a motion with the county judge to vacate and set aside the award as grossly inadequate and so shocking as to require a reappraisal, but such motion was overruled on November 14, 1949, and on November 15, 1949, plaintiffs' appeal bond was duly filed and approved. Also, on December 7, 1949, the county judge certified that the entire transcript of all the condemnation proceedings was correct, and on that date such transcript was filed in the district court by plaintiffs.

Thereafter, on January 12, 1950, defendant filed a motion in the district court to dismiss plaintiffs' appeal upon the ground that their appeal bond had not been filed within 30 days from October 10, 1949, when defendant alleged the appraisers' report had actually been

filed. However, such motion was never presented to or disposed of by the district court. Rather, on March 4, 1950, counsel for plaintiffs and defendant stipulated that the deposition of the county judge as a witness for defendant might be taken on March 8, 1950, at a stated time and place, without further notice. Such deposition was taken and duly filed in the district court but it was never used either before or in the trial on the merits. Also, on October 23, 1951, the trial court entered an order that no action having been taken in the cause for an extended period, it should be placed on the dismissal docket. However, on December 24, 1951, as requested by plaintiffs, and without objection by defendant, the cause was removed from the dismissal docket and placed on the trial docket. Also, on February 21, 1952, without any objection by defendant, the cause came on for trial to a jury upon the merits, the sole issue being the amount of plaintiffs' damages. Such issue was presented and tried upon the record as reflected by the transcript on appeal, without any new pleadings being filed. After a hearing upon the merits as so presented, whereat both parties adduced evidence, the cause was submitted to the jury on February 22, 1952, for a determination of plaintiffs' damages, and the verdict of the jury awarded plaintiffs $3,800. Thereupon, judgment was rendered upon the verdict for $4,328.83, which included interest at 6 percent from October 26, 1949, the date on which defendant paid the award to the county judge, instead of from September 6, 1949, the date of filing defendant's petition for condemnation. However, plaintiffs have not cross-appealed.

On March 1, 1952, after such trial on the merits with regard to the sole issue of plaintiffs' damages, and after defendant had taken the chance of a favorable verdict without in any manner theretofore presenting or having a hearing in the district court upon its motion to dismiss because plaintiffs' appeal bond had not been timely filed, defendant filed another such motion to dismiss.

That motion also requested the stay of all further proceedings pending determination of an application filed by defendant in the county court seeking to secure a correction of its record to show that the appraisers' report was filed on October 10, 1949, instead of October 19, 1949. On March 1, 1952, defendant also filed a motion to set aside the verdict and judgment thereon and for a new trial, alleging among other things that the district court was without jurisdiction to hear the appeal.

Further, on March 1, 1952, defendant filed an application in the county court to correct its record and issue a supplemental transcript showing that the appraisers' report was filed on October 10, 1949, and not on October 19, 1949, as shown by the certified transcript. Also, on April 2, 1952, theorizing that such application was part of a judicial proceeding, defendant filed a motion in the county court requesting the county judge to disqualify himself from acting in a judicial capacity upon defendant's application to correct the record in the county court.

On April 17, 1952, such motion and application were heard by the county judge, whereat both were overruled and dismissed upon the ground that the county court as such had no jurisdiction over the subject matter and that there was no judicial proceeding pending in the county court. On April 18, 1952, defendant filed in the county court a notice of appeal therefrom, and on April 23, 1952, filed an appeal bond. A certified transcript of such proceedings made by the county judge was filed in the district court on May 8, 1952. Thereafter, on December 20, 1954, defendant filed a motion for order of hearing on its purported appeal from the county court subject to disposition of its motions to dismiss plaintiffs' appeal and its motion for new trial.

Also, on December 20, 1954, over objections of plaintiffs to the reception of any evidence upon the matter involved in defendant's appeal from the county court for the reason that the county court had no jurisdiction

of the subject matter thereof, thus the district court had no jurisdiction, evidence was adduced at length in the district court upon defendant's purported appeal from the county court.

Subsequently, on June 15, 1955, the trial court overruled defendant's motion for new trial, and overruled defendant's motions to correct the record of the county court and to dismiss plaintiffs' appeal. Thereafter, on June 23, 1955, defendant filed a supplemental motion for new trial which was overruled on June 29, 1955, whereupon the trial court fixed supersedeas bond which was approved and duly filed by defendant on that date, together with a notice that defendant intended "to appeal the above entitled case to" this court. On that date defendant also deposited a docket fee with the clerk of the district court.

In that complicated situation, defendant in its brief has assigned some 16 alleged errors, divided into two separate parts. The first part assigned in effect that the trial court erred in refusing to dismiss plaintiffs' appeal and terminate the litigation for failure of plaintiffs to timely file an appeal bond as allegedly proved by defendant in its purported appeal from the county court. The second part assigned in effect that the trial court erred during the trial to the jury on the merits in the admission of certain evidence and in giving and failing to give certain instructions. We conclude that the first part of defendant's assignments has no merit, but the second part thereof should be sustained in part, requiring a reversal of the judgment and a remand of the cause for new trial solely upon the question of the amount of plaintiffs' damages.

Concededly, the condemnation proceedings here involved were controlled by and must be determined under statutes in effect on September 6, 1949, the time of filing of defendant's condemnation petition. In such respect, section 74-309, R. S. 1943, provided for the appointment of appraisers by the county judge, whose duty it would be

to inspect and view the real estate, hear either party interested with reference to the amount of damages when they are inspecting and viewing such real estate, and thereafter assess the damages which the owner shall sustain, and make report in writing to the county judge, who, after certifying same under his seal of office, shall transmit same to the county clerk for record. If the condemner shall at any time before entering upon the real estate for purposes of construction pay to the county judge for the use of the owner the sum so assessed, it is authorized to construct and maintain its construction across the premises.

In the case at bar, the record discloses that appraisers were duly appointed and qualified, and inspected the premises on September 28, 1949. Their report in writing was affirmatively shown to have been filed with the county judge on October 19, 1949, who duly certified same and transmitted it to the county clerk on October 26, 1949, where it was recorded. Also on that date defendant paid the award to the county judge.

Section 74-311, R. S. 1943, gave either party the right to appeal from such assessment of damages to the district court of the county in which such lands are situated, within 60 days after such assessment. Herein, plaintiffs as landowners appealed from such assessment.

Section 74-312, R. S. 1943, required that the party appealing should, within 30 days after such assessment, enter into an undertaking to be approved by the county judge, conditioned as provided by such section. Herein plaintiffs furnished such bond, duly approved and filed on November 15, 1949. In that regard also, as stated in 5 C. J. S., Appeal and Error, § 1579, p. 462: "In the absence of statutory provisions to the contrary, and provided there is something on which to base it, the general presumption, on appeal, is that all steps necessary to bring the case into the appellate court were regularly and properly taken, and the burden of proving irregularities in taking and perfecting the appeal is on the

party alleging them. Accordingly, presumptions have been indulged on appeal in favor of the * * * filing in time * * * of the appeal bond or undertaking; * * *."

Section 74-313, R. S. 1943, provided that the party appealing should, within 60 days allowed for such appeal, procure and file in the office of the clerk of the district court a certified transcript of all the proceedings of such assessment, including also all papers and files relating to or connected with the assessment appealed from, and the county judge should upon demand make such certified transcript and deliver same to the party appealing. Herein such a transcript was duly certified by the county judge on December 7, 1949, and same was filed on that date in the office of the clerk of the district court.

Section 74-314, R. S. 1943, provided that, upon the filing of such transcript in the district court within 60 days from the date of the filing of the appraisers' assessment appealed from, the appeal should be deemed perfected and completed, and the cause should be docketed by the clerk of the district court, making the owner of the land plaintiff and the condemner defendant. Such section then specifically provided: "The parties shall proceed in all respects in the trial of the cause in the same manner as though the action had been originally instituted in such appellate court."

Speaking of such statutes, this court as early as Mattheis v. Fremont, E. & M. V. R. R. Co., 53 Neb. 681, 74 N. W. 30, said: "It is to be observed that the county court has nothing whatever to do with this proceeding. It is not a proceeding instituted in the county court. The appraisers are not selected by the county court. The summons is not returnable to the county court, and with the report of the appraisers the county court has no concern whatever; and the statute does not even require that a report of the proceedings of the appraisers shall be kept in the county court. The entire proceeding is conducted by the county judge, the sheriff, and the ap-

praisers selected by the former. These constitute a tribunal not to try a civil action pending between the land owner and a railroad company, not to pronounce a judgment, but simply to inquire and report to the county judge what damages the land owner will sustain by reason of the appropriation of his land for the railroad's right of way. The power conferred by the act upon the county judge and the duty required of him by that act are not judicial powers or duties, but purely ministerial powers and duties."

Such authority was cited with approval in In re Application of City of Sidney, 144 Neb. 6, 12 N. W. 2d 104, wherein we said: "The selection of six freeholders by the county judge as required by the applicable statute did not constitute the proceeding a matter instituted and pending in the county court. The power conferred by the act upon the county judge and the duty required of him by that act are not judicial powers or duties, but purely ministerial acts."

By analogy from such authorities, no part of the condemnation proceedings at bar was ever instituted in the county court as such. It has not in the past been pending in that court, and if the result of the proceedings could in any sense be regarded as judgment or an order made, then the county court as such did not render such judgment or make such order. Contrary to defendant's contention, its application filed in the county court purportedly to correct the county court's record, did not have the effect of lodging a civil action in that court or becoming a part of any judicial proceeding therein. The condemnation proceeding became a judicial proceeding only when it was appealed to the district court. Therefore, defendant's attempted appeal from the county court in support of its motion to dismiss accomplished nothing, since the county court had no jurisdiction of the subject matter, and the statutes make no provision for such appeal.

As early as Jacobson v. Lynn, 54 Neb. 794, 75 N. W.

243, this court held that: "A district court cannot acquire jurisdiction of a cause if the court from which the appeal was taken had no jurisdiction of the subject-matter."

In Scheer v. Kansas-Nebraska Natural Gas Co., 158 Neb. 668, 64 N. W. 2d 333, this court said: "It is a fundamental rule in this state that if new issues other than the assessment of damages are to be raised on appeal in a condemnation proceeding, they must be pleaded. On appeal the proceeding is judicial as distinguished from the administrative proceeding before the county judge. A condemnee is required to raise any and all issues in the district court and, if he does not, he is bound by the rule of res judicata in a collateral attack."

As recently stated in Heppe v. State, 162 Neb. 403, 76 N. W. 2d 255, citing with approval Higgins v. Loup River Public Power Dist., 157 Neb. 652, 61 N. W. 2d 213: "The procedure in the county court contemplates an informal hearing by the appraisers, a view of the lands, no record of the testimony, and a report of damages assessed to be filed subject only to the right of appeal, not to confirmation by the appointing court. It is obvious that the plaintiffs and the intervener could only raise the proposition heretofore contended for by them on appeal to the district court in the condemnation proceedings."

In Webber v. City of Scottsbluff, 155 Neb. 48, 50 N. W. 2d 533, we held: "On appeal to the district court from the appraisement of damages, if other issues than the question of damages are involved, they must be presented by proper pleadings." Such rules have application here. The time and place for hearing and decision upon the question of whether or not plaintiffs timely filed an appeal bond was in the district court, which had judicial authority and jurisdiction to hear same as in an original action before the cause had been voluntarily tried and submitted to a jury upon the merits with regard to the amount of plaintiffs' damages. Under the

circumstances presented here, defendant has waived and is now estopped as a matter of law to deny that the appraisers' report of assessment was filed on October 19, 1949, the very fact upon which jurisdiction of plaintiffs' appeal on the merits depended.

As stated in 31 C. J. S., Estoppel, § 107, p. 341: "The doctrine classified as quasi estoppel has its basis in election, ratification, affirmance, acquiescence, or acceptance of benefits, and the principle precludes a party from asserting, to another's disadvantage, a right inconsistent with a position previously taken by him. The doctrine applies where it would be unconscionable to allow a person to maintain a position inconsistent with one in which he acquiesced, or of which he accepted a benefit."

In that regard, as held in Brisbin v. E. L. Oliver Lodge No. 335, 134 Neb. 517, 279 N. W. 277: " 'Estoppel means the preclusion of a person from asserting a fact, by previous conduct inconsistent therewith, on his own part or the part of those under whom he claims, or by an adjudication upon his rights which he cannot be allowed to call in question.' Graham Ice Cream Co. v. Petros, 127 Neb. 172, 254 N. W. 869."

In 4 C. J. S., Appeal and Error, § 44, p. 126, it is said: "As jurisdiction cannot be conferred on an appellate court by consent of the parties, want of jurisdiction cannot be waived by them, but may be taken advantage of at any time, and jurisdiction cannot be supplied by estoppel or laches. The parties, however, may be estopped to deny the existence of facts upon which jurisdiction depends, * * *."

As stated in 30 C. J. S., Eminent Domain, § 346, p. 26: "Jurisdiction of an eminent domain proceeding cannot ordinarily be conferred on an appellate court by consent, waiver, or estoppel. Where, however, a party invokes the right of appeal to a particular court, he cannot later be heard to deny the existence of such right; nor may a party who participates in the trial of an appeal without objection be later heard to say that

no valid appeal had been taken and that the court was without jurisdiction to hear and determine the controversy. Where an appeal is taken to a court having original, as well as appellate, jurisdiction of the subject matter, the consent of the parties may vest the court with full and complete jurisdiction." See, also, Farmers Irrigation Dist. v. Calkins, 104 Neb. 196, 176 N. W. 367; Webber v. City of Scottsbluff, *supra*; Hulett v. Snook, 57 N. D. 338, 221 N. W. 879; Simons v. Mason City & Fort Dodge R. R. Co., 128 Iowa 139, 103 N. W. 129.

Also, as stated in 31 C. J. S., Estoppel, § 118, p. 380: "A party who has taken a position with regard to procedure, which has been acted or relied on by his adversary or by the court, is estopped from taking an inconsistent position respecting the same matter, in the same proceeding, to his adversary's prejudice."

In the case at bar defendant did, on January 12, 1950, some 2 years before the trial on the merits, file a motion to dismiss for want of jurisdiction. However, it was never presented to the trial court for decision thereon in any form until after defendant, assuming that the district court had jurisdiction as heretofore recited, consented to a trial on the merits, and had taken the chance of a favorable verdict to the prejudice of plaintiffs in a case wherein the certified transcript and the record on the merits in the district court affirmatively disclosed that the appraisers' report was filed on October 19, 1949, and plaintiffs' appeal bond had been timely filed thereafter on November 15, 1949. In such respect, defendant's motion to dismiss for want of jurisdiction in the district court should have been heard and decided in that court before defendant consented to and took the chance of a trial on the merits. Any other method of procedure would be contrary to law and permit the perpetration of a grave injustice.

Contrary to plaintiffs' contention, however, the assignments of error presented by defendant upon appeal with regard to the trial on the merits involving the issue of

plaintiffs' damages are here for determination. This is true because the issue of plaintiffs' damages was the only subject matter jurisdictionally presented on appeal in the district court, and defendant timely filed a notice of appeal of the case to this court and paid the docket fee to the clerk of the district court.

In that connection, defendant argued that the trial court erred prejudicially in admitting oral testimony of damages to defendant's transmission line caused by lightning about 2 years after the filing of defendant's condemnation petition and construction of its transmission line, and erroneously admitted as exhibits splinters from poles caused by such damage. In Platte Valley Public Power & Irr. Dist. v. Armstrong, 159 Neb. 609, 68 N. W. 2d 200, cited with approval in City of Lincoln v. Marshall, 161 Neb. 680, 74 N. W. 2d 470, we held: "The market value of lands taken by eminent domain proceedings, together with damages, if any, to other remaining lands by severance, are computable as of the time of the taking, which is deemed to occur when the petition for condemnation is filed." The petition for condemnation herein was filed September 6, 1949.

As stated in In re Platte Valley Public Power & Irr. Dist., 137 Neb. 313, 289 N. W. 383: "It necessarily follows that the evidence as to the value of the land taken and damaged by the condemnation proceedings must be based upon its value in the condition in which it was at the time of the condemnation."

It thus requires no extended argument to demonstrate that evidence of what damages occurred to defendant's transmission line by lightning 2 years after the date of the condemnation and construction of the transmission line was erroneously admitted. However, the record discloses that no objection whatever was made by defendant to the oral testimony adduced by plaintiffs which meticulously and graphically described the damages by lightning to each of several poles in defendant's transmission line and the splinter exhibits

taken by plaintiffs therefrom. Defendant did object when such splinter exhibits were offered in evidence, and its objections were overruled. However, the jury evidently had theretofore without objection had opportunity to clearly and fully observe such exhibits in court and hear the graphic description thereof. While the testimony and the evidence about which defendant complains was erroneously admitted, defendant, without having timely and properly objected thereto, is in no position here to complain.

Defendant also argued that the trial court, over appropriate objections timely made by defendant, erred prejudicially in admitting in evidence a 2-page pictorial spread appearing in Life Magazine on September 17, 1951, which showed numerous cattle sprawled dead along a line fence. The photograph appearing in the article was illustrated by an explanatory statement at the top thereof which used the following language: "Electrocuted cattle lie stretched along a fence. Near San Antonio, Texas a 2,000-volt power line snapped and fell on a pasture fence. Grazing innocently near the charged barbed wire, cattle came up one by one, touched it and were electrocuted. Two bulls, 22 cows died, leaving 14 orphaned calves to be bottle-fed by disconsolate owners." We sustain defendant's contention. In such respect, plaintiffs attempted to limit their offer of the article, but the offer was made without appropriate limitation, and the exhibit was in fact received in evidence without any limitation by the court. It was inadmissible in any event.

As recently as Higgins v. Loup River Public Power Dist., 159 Neb. 549, 68 N. W. 2d 170, we affirmed that: "The proof in a trial of a jury case must be confined to legal evidence tending to prove or disprove an issue made by the pleadings and the admission of improper evidence is prejudicial if it may have influenced the verdict.

"If it does not appear from the record that evidence wrongfully admitted in the trial of a jury case did not

affect the result of a trial unfavorably to the party against whom it was admitted its reception must be considered prejudicial error." Such rules are controlling here. We conclude that admission of the Life Magazine exhibit was a flagrantly prejudicial error which requires reversal of the judgment rendered on the verdict and remand of the cause for new trial upon the merits solely with regard to the amount of plaintiffs' damages.

Citing Papke v. City of Omaha, 152 Neb. 491, 41 N. W. 2d 751, defendant argued that instruction No. 1 given by the trial court was prejudicially erroneous because it commented on the insufficiency of the award of the appraisers by stating among other things that: "The appraisers filed their report fixing the damages to the land. The plaintiff, Virgil Lane, not being satisfied with said amount so allowed, appeals to this Court for determination by jury of the amount to which he is entitled from said Burt County Power District, defendant." In that respect, we have examined the entire instruction and all others given, none of which stated the amount of the appraisers' award. Further, no evidence with relation thereto was adduced before the jury. The effect of the instruction, when considered with all others given, was simply to tell the jury the nature and purpose of the trial and to identify the parties as plaintiffs and defendant. The instruction could not have been prejudicial to defendant.

Defendant also argued that the trial court erred prejudicially by failing in any instruction to fix the time of ascertaining the damages as the time of filing defendant's condemnation petition. In that regard, instruction No. 7 given by the trial court told the jury, among other things not material here, that the measure of plaintiffs' damages was the market value of the small amount of land actually taken by defendant plus the difference if any between the fair market value of plaintiffs' remaining land immediately before the taking by defendant of the right-of-way and easement, and the market value

thereof immediately thereafter. No instruction specifically told the jury that the taking was on September 6, 1949. However, in such respect four witnesses without objection testified to the value of plaintiffs' farm in October 1949, immediately before the condemnation, and its lesser value immediately thereafter.

As early as Northeastern Nebraska R. R. Co. v. Frazier, 25 Neb. 53, 40 N. W. 609, cited with approval in Platte Valley Public Power & Irr. Dist. v. Armstrong, *supra*, this court said: "The time of filing the petition is to be taken as the period when the damages are to be determined. This, however, we do not understand to be limited to any particular day. The estimate is to be made at about that time. If there is a fluctuation in value, it may be shown, but testimony as to the value a short time after the appropriation is admissible, and in the absence of any proof showing an increase or diminution in value after the appropriation, a jury would be warranted in finding that the same values had existed at the time of the appropriation."

We conclude that while the trial court should have instructed the jury that the time of taking was September 6, 1949, its failure to do so under the circumstances presented here was not prejudicially erroneous.

Defendant also argued that part of instruction No. 5 given by the trial court was prejudicially erroneous in that it placed too great an emphasis upon the element of fear in considering what might lessen the market value of plaintiffs' land. The instruction is of such length that to recite it here would serve no useful purpose. In Wahlgren v. Loup River Public Power Dist., 139 Neb. 489, 297 N. W. 833, quoting with approval from McGinley v. Platte Valley Public Power & Irr. Dist., 133 Neb. 420, 275 N. W. 593, and Dunlap v. Loup River Public Power Dist., 136 Neb. 11, 284 N. W. 742, 124 A. L. R. 400, this court stated and reaffirmed simple and correct rules with relation to the element of fear in condemnation cases such as that at bar. In doing so we held that: "General

fear, or fear which is not connected with or an incident of knowledge of present or potential danger, cannot be made the basis upon which to predicate depreciation in the market value of land.

"The only fear which may be considered as an element in fixing value is that of danger, the present or potential existence of which is grounded in authentic observation and experience, or in scientific investigation, and which fear circumscribes activity or limits freedom of use in the area of the present or potential danger, and which tends to lessen the market value of the land."

In the light thereof, it is sufficient for us to say that the portion of instruction No. 5 about which defendant complained was in accord with such rules. Thus it was not prejudicially erroneous.

The trial court in its instructions made no mention of the question of interest upon damages to be awarded plaintiffs. The jury was specifically told that the measure of plaintiffs' damages was as heretofore set forth in instruction No. 7, without any mention of the item of interest in that or any other instruction. However, the question of interest was not called to the attention of the jury in any manner disclosed by this record, and the trial court in its judgment rendered on the verdict added interest thereto. In that situation, defendant argued that the trial court erred prejudicially in failing to instruct the jury that the court reserved to itself the question of interest and not to include any interest in its verdict.

In Webber v. City of Scottsbluff, 150 Neb. 446, 35 N. W. 2d 110, we reaffirmed that: "The proper procedure in a condemnation action, where an appeal is taken from the award and the case is tried to a jury in the district court, is for the court to reserve the question of interest for its determination and direct the jury not to include it in its verdict." See, also, Langdon v. Loup River Public Power Dist., 144 Neb. 325, 13 N. W. 2d 168; Papke v. City of Omaha, *supra*.

In the case at bar, the trial court did erroneously fail to instruct the jury, but we cannot under the circumstances presented here, and without any competent affirmative showing with regard thereto, assume that the jury disregarded the court's specific and definite instructions upon the measure of damages and allowed interest in its verdict. In other words, we conclude that under the circumstances presented here the failure of the trial court to specifically reserve to itself the question of interest was not prejudicial error.

For reasons heretofore stated, we conclude that such portion of the judgment of the trial court as refused to dismiss plaintiffs' appeal and terminate the litigation for failure of plaintiffs to timely file an appeal bond, should be and hereby is affirmed, with all costs of such related proceedings in the county court and district court taxed to defendant. However, the judgment on the merits should be and hereby is reversed and the cause is remanded for new trial solely upon the merits of plaintiffs' claim for damages. All costs in the trial upon the merits in the district court and on appeal thereof to this court are taxed to plaintiffs.

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

IN RE APPLICATION OF HAROLD JOHNSON.
HAROLD JOHNSON, APPELLEE, V. RAY PEAKE, NOW R. B. "DICK" WILSON, INC., OF NEBRASKA, ET AL., APPELLANTS.
77 N. W. 2d 670

Filed June 29, 1956. No. 33949.

Public Service Commissions. Courts are without authority to interfere with the findings and orders of the Nebraska State Railway Commission except where it exceeds its jurisdiction or acts arbitrarily.

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

Viren, Emmert & Hilmes and *G. M. Gunderson,* for appellants.

Jack Devoe and *James E. Ryan,* for appellee.

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

SIMMONS, C. J.

This appeal involves a certificate of convenience and necessity granted to the applicant Harold Johnson by the Nebraska State Railway Commission, hereinafter referred to as the commission. Harold Johnson is the appellee herein. The only appellant appearing by brief is Ray Peake, a protesting certificate-holding common carrier. We affirm the order of the commission.

Appellee has been engaged in business since 1948, with headquarters at Alliance, Nebraska. He held an intrastate certificate issued by the commission which provided:

"SERVICE AUTHORIZED: Petroleum products.
ROUTE OR TERRITORY AUTHORIZED: Irregular routes from Superior, on the one hand, and on the other hand, O'Neill, Atkinson, Stuart, Bassett, Springview, Long Pine, Ainsworth, Johnstown, Cody, Merriman, Gordon, Hay Springs, Chadron, and Valentine."

He also held a certificate for interstate commerce which authorized: "*Petroleum Products,* in bulk, in tank vehicles, over irregular routes, from Glenrock, Wyo., and points within five miles thereof, to points in Nebraska on and west of U. S. Highway 183, with no transportation for compensation on return except as otherwise authorized."

On April 9, 1954, he applied for authority to transport "Between all points and places in Nebraska on and west of U. S. No. 183, over irregular routes" for the "Lack of adequate service to territory involved."

Several protestants and interveners resisted the application.

The matter was heard before an examiner, who recommended that the application be denied. Johnson made exceptions to the report.

The commission heard the matter and in its "Opinion, Findings and Order" recited: "The opinion of the Commission differs somewhat from that of the Examiner in his report and recommendation. It is the opinion of the Commission that the applicant should be authorized to service his presently certificated destination territory from all producing, refining, distributing and loading points in the State of Nebraska, with return of rejected shipments authorized in the transportation of the involved commodities except liquified petroleum gas. The transportation of liquified petroleum gas should be authorized from all producing and loading points in Nebraska, as points of origin, to all points and places in Nebraska, on and west of U. S. No. 183, as points of destination, with return of rejected shipments authorized.

"The source of supply of petroleum products shifts from time to time. Neither the Commission nor the carriers have any control over these shifts. Because of this condition it has been the practice and also the policy of the Commission in recent years to grant petroleum carriers authority to serve from all producing, refining, distributing and loading points within the state as points of origin.

"Adherence to this policy does not result in the placing of additional carriers in the field, nor has it disturbed the competitive situation. It has resulted in a continuity of dependable service to the destination areas concerned.

"Insofar as the application relates to the transportation of liquified petroleum gas the Commission is of the opinion that a public demand and need has been demonstrated for the transportation of this commodity to the destination territory on and west of U. S. No. 183. It appears that liquified petroleum has been transported from Huntsman, Nebraska, for the shippers by private carriers and that common carrier service has not been available

to shippers for this transportation. The Commission is of the opinion that shippers are entitled to this service which existing carriers have been unwilling and have failed to provide."

The commission ordered: "That Harold Johnson, Alliance, Nebraska, should be issued a consolidated certificate of public convenience and necessity in Application No. M-9648, Supplement No. 1, authorizing the following operations in Nebraska intrastate commerce:

"A. SERVICE AUTHORIZED: Petroleum and petroleum products, except crude oil and anhydrous ammonia, in bulk in tank vehicles.

ROUTE OR TERRITORY AUTHORIZED: From all producing, refining, distributing and loading points within the State of Nebraska as points of origin, to O'neill (sic), Atkinson, Stuart, Bassett, Springview, Long Pine, Ainsworth, Johnstown, Cody, Merriman, Gordon, Hay Springs, Chadron and Valentine, as points of destination, with return of rejected shipments authorized, over irregular routes.

"B. SERVICE AUTHORIZED: Liquified petroleum gas in bulk in tank vehicles.

ROUTE OR TERRITORY AUTHORIZED: From all producing, refining, distributing and loading points within the State of Nebraska as points of origin, to points and places in Nebraska on and west of U. S. 183, as points of destination, with return of rejected shipments authorized.

NOTE: The authority granted herein, to the extent of any duplication shall not be construed to authorize the issuance of more than one operating authority."

The authority granted the applicant by the commission as to Part A of service authorized broadens materially applicant's points of origin. It does not change the points of destination. As to service authorized under Part B for liquified petroleum gas, the service authorized is an added intrastate authority with a broad base

as to points of origin and points of destination.

Three protestants and one intervener filed a motion for reconsideration and rehearing. The commission overruled the motion.

Three protestants, including Peake, filed notice of appeal and entered appearances here. A brief is filed on behalf of Peake only.

In summary the evidence offered before the examiner and considered by the commission would support a finding by the commission of the following factual situation:

During the last several years various pipeline companies have established terminals in Nebraska and made petroleum products available for intrastate common-carrier delivery at several points in various places in Nebraska. Different petroleum marketers have delivery points at one or more places in this state. Refineries are also located in Nebraska with delivery points at the refineries. The evidence amply sustains the finding of the commission in that regard.

Applicant's customers have requested service from points not within his authority in Nebraska to points within his authority. Applicant has been required to refuse the service and his customers on occasion have been required to furnish it to themselves.

The applicant under his interstate authority had transported petroleum products from Wyoming to his authorized points of delivery in Nebraska. That source of supply is being changed to terminal pipeline points of delivery at Sidney and North Platte. The applicant's customers desire that he should be authorized to serve them from the intrastate points of delivery. The bringing of petroleum products into western Nebraska by pipeline and by production in Nebraska has established additional and large quantities of petroleum products for delivery to customers in that area.

The delivery of petroleum products to customers is a business that requires prompt and efficient service, which in turn requires the ready availability of adequate and

satisfactory carrier service in the area being served. It is a competitive business that requires a satisfied customer. This in turn requires not one but several carriers in the area available to render the adequate prompt and efficient service that the customer requires.

U. S. Highway No. 183 runs generally across Nebraska north and south through Alma on the south to through Springview on the north. The new intrastate pipeline terminals at North Platte and Sidney are in the area west of that highway. Applicant's place of business is in that area. His customers and potential customers are in that area. There is no question of his readiness, ability, and willingness to render service under the new authority granted by the commission.

Applicant's customers as well as petroleum suppliers have sought adequate and satisfactory common-carrier service in the area and have not found it. They testified that their business had not been solicited by certificate-holding carriers who could supply that adequate and satisfactory service.

The present point of delivery of liquified petroleum gas is at Huntsman north of Sidney. The evidence is, as to that product, that other points of delivery will be established in western Nebraska.

Without question there are among the protesting carriers those who have intrastate authority to serve the area involved. Some of them are presently serving customers in the area involved. The larger of these carriers, from the standpoint of business handled and equipment available, do not maintain terminals nor equipment in the area involved. Two of them offered evidence that they were ready, willing, and able to establish terminals and maintain equipment in the area involved and to render the newly required service. They, however, obviously were not ready or willing to do so until it appeared to be economically feasible.

The evidence is ample to sustain the commission's finding that existing authorized intrastate carriers have been

unwilling and have failed to furnish the adequate and satisfactory service in the area that the business requires.

Protestant Peake first presents here the contentions: The failure or refusal of the Commission (1) "to consider and determine the adequacy of existing motor carrier service and the willingness and ability of such carriers to provide any necessary service," and (2) "to hold that appellee had the burden affirmatively to negate those conditions is fatal to the validity of the assailed order as it authorizes the issuance of a certificate of public convenience and necessity."

As to point (1) we need not determine the necessity of such a finding. It appears to have been made. As quoted above, the commission clearly considered and determined a basis for the broadening of the points of origin authority of the applicant as to his existing certificate. As to the liquified petroleum authority, the commission found: "It appears that liquified petroleum has been transported from Huntsman, Nebraska, for the shippers by private carriers and that common carrier service has not been available to shippers for this transportation. The Commission is of the opinion that shippers are entitled to this service which existing carriers have been unwilling and have failed to provide." We find no basis in the record for the contention advanced as to point (2) above.

We deem the contentions to be without merit.

Peake next contends that: "The assailed order is void as not being supported or sustained by competent evidence and as resting on findings similarly without integrity in the evidence. * * * It is the settled policy in Nebraska that carriers already in the field shall, in the public interest, be protected against new and unnecessary competition to the end that sound economic conditions in transportation may be maintained and so that the ability of existing carriers to continue adequate transportation shall not be unduly imperiled."

We have summarized the evidence that was considered

by the commission. As to all three of these contentions Peake relies upon In re Application of Canada, 154 Neb. 256, 47 N. W. 2d 507. The language in that opinion upon which Peake relies was analyzed and applied in Houk v. Peake, 162 Neb. 717, 77 N. W. 2d 310. So far as material here, that case dealt with a request for an enlargement of points of origin in an intrastate authority. Factually and legally that case is largely comparable to the instant one. We see no reason for repeating here what was said and held there.

In Dalton v. Kinney, 160 Neb. 516, 70 N. W. 2d 464, we had a case involving a new intrastate authority granted authorizing service in an area which existing intrastate certificate holders were authorized to serve, but were unwilling to do so unless assured of profitable operations. Factually and legally the Dalton v. Kinney case is quite comparable with the instant case as to that question. Our holding there was approved in Houk v. Peake, *supra.*

We deem Houk v. Peake, *supra,* and Dalton v. Kinney, *supra,* controlling here and requiring an affirmance of the commission's order.

We restate the rule: "Courts are without authority to interfere with the findings and orders of the Nebraska State Railway Commission except where it exceeds its jurisdiction or acts arbitrarily." Dalton v. Kinney, *supra.*

The order of the commission is affirmed.

AFFIRMED.

CALVARY BAPTIST CHURCH, A CORPORATION, APPELLANT, V. TAL COONRAD ET AL., APPELLEES.
77 N. W. 2d 821

Filed June 29, 1956. No. 33960.

1. **Church: Definition.** The plain, ordinary, and popular meaning of the word "church" is a building in which people assemble

for the worship of God and for the administration of such offices and services as pertain to that worship.

2. **Intoxicating Liquors.** The distance required by section 53-177, R. R. S. 1943, between a church and a place where it is proposed to sell intoxicating liquor at retail should be determined by measuring in a straight line between the nearest walls of the two buildings.

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

Viren, Emmert & Hilmes and *G. M. Gunderson,* for appellant.

Clarence S. Beck, Attorney General, *Homer G. Hamilton, John H. Binning,* and *Chambers, Holland, Groth, Dudgeon & Hastings,* for appellees.

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

CHAPPELL, J.

Plaintiff, Calvary Baptist Church, a corporation, brought this action against defendants, Nebraska Liquor Control Commission, its named members, Francis J. Willy and John R. McCormack, doing business as Willy Drug, and Willy Drug, seeking to obtain a declaratory judgment interpreting and applying part of section 53-177, R. R. S. 1943. For brevity, the Nebraska Liquor Control Commission and its members will hereinafter be designated as the commission, and all other defendants as Willy Drug.

The purpose of the action was to determine: (1) Whether, as contended by plaintiff, the measurement required by such section with relation to the issue of a license to sell alcoholic liquors at retail should be made by measuring in a straight line between the nearest lot line of real property belonging to plaintiff and the nearest lot line of real property occupied by Willy Drug where an off-sale package beer and liquor license had been issued to it; or (2) whether, as contended by defendants, such measurement should be made in a straight

line between the nearest wall of plaintiff's church building and the nearest wall of the building occupied by Willy Drug, as construed and applied by the commission. Plaintiff prayed for cancellation of defendant Willy Drug's license if the first above-cited formula were found to be correct, and for equitable relief.

Defendant commission and its members answered plaintiff's petition, denying generally, and after admitting that they had issued such a license to Willy Drug, they then alleged that it was in conformity with action taken in prior comparable cases, and denied that such action was in violation of section 53-177, R. R. S. 1943. They prayed for dismissal of plaintiff's action and equitable relief. All other defendants filed comparable answers and prayed for like relief. Plaintiff's reply was in the nature of a general denial.

After a hearing on the merits, whereat evidence was adduced by the parties, the trial court rendered judgment finding and adjudging the issues generally in favor of defendants and against plaintiff, whose action was dismissed at plaintiff's costs. Thereafter, plaintiff's motion for new trial was overruled, and it appealed, assigning that the judgment was not supported by the law and evidence, and that the trial court erred in excluding certain offered evidence. We conclude that the assignments should not be sustained.

The relevant part of section 53-177, R. R. S. 1943, here involved, was originally enacted by Laws 1935, c. 116, § 35, p. 399. Such section was subsequently amended by Laws 1947, c. 189, § 2, p. 626, without in any manner or form changing or amending the provisions here involved, which state that: "No license shall be issued for the sale at retail of any alcoholic liquor within one hundred and fifty feet of any *church* * * *. No alcoholic liquor, other than beer, shall be sold for consumption on the premises within three hundred feet from the *campus* of any college or university in the state." (Italics supplied.)

The relevant and material evidence is not in dispute. Summarized, it is as follows: The Willy Drug store was formerly located on the northwest corner of Fortieth and Cuming Streets in Omaha, where it had an off-sale package beer and liquor license. There Cuming Street was subsequently divided by making it a radial highway, and Willy Drug was forced to relocate. It then obtained the right to occupy the southeast corner of Fortieth and Cuming Streets, and moved into a building there known as 3923 Cuming Street, located at the west end of the block on the north and west portion of Lot 6, where Willy Drug was issued a permissive change of address for its off-sale package beer and liquor license.

Plaintiff's church, known as 3903 Cuming Street, and fronting north thereon, is located partly on Lot 1 and partly on Lot 2. Such church is located on the southwest corner of Thirty-ninth and Cuming Streets at the east end of the same block in which Willy Drug is located. Plaintiff also owned Lot 3. Its east line is 14 feet from the west wall of plaintiff's church building. Adjacent to Lot 3 on the west is the Blackburn Pharmacy property and its building. Extending on west of Blackburn Pharmacy, hereinafter called Blackburn, there are four business establishments between it and Willy Drug, which left five business establishments, a parking lot, and plaintiff's lawn between Willy Drug and the west wall of plaintiff's church building.

In that connection, on January 1, 1946, plaintiff had leased the west 40 feet of Lot 3 to Blackburn as a parking lot for the use of its customers, with a right of plaintiff's church attendants and others to use same. Thereafter, on April 30, 1955, well knowing that this case would be tried on the merits May 4, 1955, plaintiff and Blackburn cancelled such lease by written agreement purportedly in order to give plaintiff control of the parking lot, but at time of trial there never had in fact been any change in the use of it. Such parking lot had

been graded and black-topped at the expense of Blackburn. There was a fence and hedge running north and south on Lot 3 at the east line of the parking lot just 24 feet west of the west wall of plaintiff's church, which entirely separated the parking lot from the church and its lawn.

Concededly, in that situation it was 210 feet in a straight line from the nearest east wall of Willy Drug to the nearest west wall of plaintiff's church. It was 196 feet in a straight line from the nearest east wall of Willy Drug to the nearest west line of Lot 2, one of the lots upon which plaintiff's church was located. It was 186 feet in a straight line from the nearest east wall of Willy Drug to the fence and hedge marking the east edge of the parking lot on Lot 3, between Blackburn and plaintiff's church. It was also 146 feet in a straight line from the nearest east wall of Willy Drug to the nearest west line of such parking lot owned by plaintiff and leased to or used by Blackburn, its customers, and others. In such a situation, plaintiff contended that Willy Drug was less than 150 feet from plaintiff's church. We do not agree.

The answer depends upon the plain, ordinary, and popular meaning of the word "church" in order to determine whether the measurement required by section 53-177, R. R. S. 1943, should be made by a straight line between the nearest east wall of Willy Drug and the nearest west line of Lot 3 owned by plaintiff, or by a straight line between the nearest east wall of Willy Drug and the nearest west wall of plaintiff's church building. We conclude that the measurement required by such section was the latter and not the former.

In doing so, we conclude that section 53-177, R. R. S. 1943, insofar as here involved, is not ambiguous. In Ledwith v. Bankers Life Ins. Co., 156 Neb. 107, 54 N. W. 2d 409, we reaffirmed that: "If a statute is unambiguous courts will not by interpretation or construction usurp the function of the lawmaking body and give it a

meaning not intended or expressed by the Legislature.

"A statute is not available for construction as a matter of course. If it is unambiguous there is no room for construction and courts may not search for its meaning beyond the statute itself.

"In the consideration and application of a statute effect should be given, if possible, to all its several parts and nothing should be avoided. The subject of the enactment and the language thereof in its plain, ordinary, and popular sense should be considered to determine the legislative will.

"It is the duty of the court, so far as practicable, to give effect to the entire language of a statute and to reconcile the different provisions of it so that they are consistent, harmonious, and sensible.

"The maxim, expressio unius est exclusio alterius, means that where a statute enumerates the things upon which it is to operate, or forbids certain things, it is to be construed as excluding from its effect all those not expressly mentioned, unless the Legislature has plainly indicated a contrary purpose or intention."

In Allen v. Tobin, 155 Neb. 212, 51 N. W. 2d 338, we concluded that section 53-1,118, R. R. S. 1943, provided for a liberal construction of the Liquor Control Act. However, bearing that in mind, such case also held that: "The fundamental principle of statutory construction is to ascertain the intent of the Legislature, and to discover that intent from the language of the act itself, and it is not the court's duty nor within its province to read a meaning into a statute that is not warranted by legislative language." See, also, Hanson v. City of Omaha, 157 Neb. 403, 59 N. W. 2d 622.

The plain, ordinary, and popular meaning of the word "church" has often been authoritatively stated without equivocation. In such respect, Webster's New International Dictionary (2d ed.), Unabridged, p. 482, defines "church" as: "A building set apart for public worship * * *. A house of worship for a parish * * *. A house of

worship for members of the established (or formerly established) church * * *. A place of worship of any religion * * *."

As stated in Black's Law Dictionary (3d ed.), p. 325, citing numerous authorities: "The term may denote * * * the building in which such persons habitually assemble for public worship."

14 C. J. S., Church, p. 1116, defines "church" as: "Used in its primary and more general meaning, as expressive of a building or place, the term may be defined as an edifice or place of assemblage for * * * worship, a temple or building consecrated to * * * worship or to the honor of God and religion; or the place where persons regularly assemble for worship. * * * In what may be called its secondary or derived sense, it refers to a religious association, organization, or society, * * *." See, also, 76 C. J. S., Religious Societies, § 1, p. 735; 45 Am. Jur., Religious Societies, § 2, p. 723.

In Presbyterian Church v. Allison, 10 Pa. 413, it is said: "All churches are spoken of in common parlance as buildings." See, also, In re Rupp, 55 Misc. 313, 106 N. Y. S. 483.

In Stubbs v. Texas Liquor Control Board (Tex. Civ. App.), 166 S. W. 2d 178, citing Hallum v. Texas Liquor Control Board (Tex. Civ. App.), 166 S. W. 2d 175, it is said: "A church is a place where persons regularly assemble for worship * * *."

Newark Athletic Club v. Board of Adjustment, 7 N. J. Misc. 55, 144 A. 167, citing authorities and quoting therefrom, defines a "church" as: "* * * 'a building in which people assemble for the worship of God and for the administration of such offices and services as pertain to that worship.' * * * The place where such persons regularly assemble for worship."

In Wiggins v. Young, 206 Ga. 440, 57 S. E. 2d 486, 13 A. L. R. 2d 1237, it is said: "A church is a building consecrated to the honor of God and religion, with its

members united in the profession of the same * * * faith."

Matter of Zinzow, 18 Misc. 653, 43 N. Y. S. 714, citing and quoting from authorities, defines a "church" as: "* * * 'a building consecrated to the honor of God and Religion. * * * the place where such persons regularly assemble for worship.'"

It is clearly apparent that the Legislature of this state had such definitions in mind when it enacted section 53-177, R. R. S. 1943. Thus, by analogy and in order to give certainty to such situations, the distance between a "church" as above defined, and a building wherein it is proposed to sell intoxicating liquor, should be determined, as was done by the commission in the case at bar and other comparable situations, by measuring in a straight line from the nearest walls of the two buildings. In re the Liquor Locations, 13 R. I. 733. The last sentence of section 53-177, R. R. S. 1943, supports that conclusion, by including therein the campus of any college or university in this state as distinguished from their buildings.

To hold otherwise would require this court to act legislatively and read into the statute involved the words "premises or property" after the word "church," something not found in the statute, or give it a meaning not warranted by the plain language used in the statute. Authorities cited and relied on by plaintiff are generally distinguishable upon the basis of the particular statutes or facts involved. To discuss them at length here would serve no useful purpose.

Plaintiff also contended that the trial court erred in excluding evidence offered by it to the effect that some whiskey bottles had been found in the church yard; that some beer cans and whiskey bottles had been found on the parking lot west of the church; and that some persons who parked in the parking lot drank intoxicating liquor and used offensive language while there. In that respect, no attempt whatever was made to connect such circumstances and incidents with the operation of Willy

Drug, when admittedly there were other retail outlets for package beer and liquor within five or six blocks of the premises in question. Moreover, if plaintiff now has exclusive control of the parking lot, it can readily exclude all such persons therefrom. In any event, such evidence could not have been of any assistance to the court in determining the meaning and application of the unambiguous statute. Plaintiff's contention has no merit.

For reasons heretofore stated, the judgment of the trial court should be and hereby is affirmed. All costs are taxed to plaintiff.

AFFIRMED.

WILLARD W. KISSINGER, APPELLEE, V. SCHOOL DISTRICT NUMBER 49, OF CLAY COUNTY, NEBRASKA, APPELLANT.
77 N. W. 2d 767

Filed June 29, 1956. No. 33967.

1. **Evidence.** The provisions of section 25-1267.41, R. S. Supp., 1955, are not merely directory, but substantial compliance therewith is required. However, they are not self-executing, and the party claiming admissions for failure to deny must prove service of a proper request in compliance therewith and failure to appropriately respond thereto.
2. ———. The rule is that where a party properly serves a request for admissions of relevant matters of fact, the failure to make a proper response within the time allotted constitutes an admission of the facts sought to be elicited.
3. ———. When a request for admissions is properly made, the party served must answer even though he has no personal knowledge, if the means of obtaining the information is available to him.
4. ———. It is not proper to refuse to respond to a requested admission on the ground that the requesting party has the burden of proving the matters contained in the request, or that the matters requested to be admitted are controverted by the pleadings.
5. ———. In a proper request for admissions an improper

response is treated as no response at all and hence as an admission.

6. **Schools and School Districts: Taxation.** When a school district has money in its treasury and from other sources available for general school purposes for the ensuing year, it is bound to take that fact into account in fixing the tax levy, and the levy should be made for no more than will approximately raise the difference between the amount on hand and to be received from other sources, and the amount determined as necessary to meet the expenses of the district for the ensuing school year.
7. ———: ———. Whether or not such funds on hand or to be received from other sources result from taxation is not material if such funds are available for general school purposes for the ensuing year.
8. **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.
9. ———. The summary judgment is effective and serves a useful purpose only when it can be used to pierce allegations in the pleadings and show that the material facts are undisputed and otherwise than as alleged.
10. ———. Where the answers to a proper request for admissions show that the facts are undisputed and the movant is entitled to a judgment as a matter of law, a motion for a summary judgment affords a proper remedy.

APPEAL from the district court for Clay County: FRANK J. MUNDAY, JUDGE. *Affirmed.*

Robert B. Waring, Lawrence S. Dunmire, and *John C. Gewacke,* for appellant.

Massie, Bottorf & Massie, for appellee.

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

CARTER, J.

This is an action to recover $267.55 and interest from School District No. 49, Clay County, Nebraska, which is alleged to have been excessively levied and was therefore unauthorized and unlawful. The trial court sustained plaintiff's motion for a summary judgment. The defendant appeals.

The petition alleges that the annual meeting of School District No. 49, hereafter referred to as the district, was held on June 8, 1953, at which time a resolution was adopted determining the total anticipated operating expenses for school purposes for the year 1953-1954 to be $28,550. The petition alleges that on such date the district had on hand the sum of $9,788.55 in cash and a further sum in the hands of the county treasurer in the amount of $10,200. It is alleged also that the district had an anticipated income of $7,800. The record shows the anticipated income to be derived from the federal government for the purpose of providing adequate school facilities for the children and dependents of the personnel of the Navy Depot situated in Adams and Clay Counties. The total cash on hand and anticipated income is alleged to be $27,788.55. The amount voted to be levied was $17,000. Plaintiff asserts that $761.45 was all that was required to be raised by taxation under the foregoing facts and he seeks a return of the excess tax paid by him in the amount of $267.55, together with interest from November 12, 1954. Demand was made within 30 days for the return of plaintiff's portion of the excess levy, which was refused, and this action resulted.

The plaintiff served a request for admissions on defendant's counsel on October 7, 1955, in accordance with section 25-1267.41, R. S. Supp., 1955. The decision in this case rests largely on the effect to be given to the answers returned to the request for admissions. The nature of the answers returned can be demonstrated by considering requests No. 4, 5, 6, 7, and 9, and the answers made thereto. Such requests and answers are as follows:

"4. That there was cash on hand in the school district treasury at the time of the annual meeting the sum of $9,788.55." Answer. "As affiant is informed and believes there was not cash on hand in the School District Treasury at the time of the annual meeting in the sum of $9,788.55 or similar amount, which sum of $9,788.55 was raised from taxes."

"5. That there was cash on hand in the County Treasury at time of the annual meeting to the credit and order of said district number 49 in the sum of $10,200.00." Answer. "As affiant is informed and believes, there was a balance in the hands of the County Treasurer at the time of the annual meeting to the credit and order of District No. 49. The amount can readily be ascertained by counsel for the plaintiff by the simple process of walking across the street from his office to the office of the County Treasurer of Clay County, Nebraska, and at the time of the trial of this case, affiant will go into the Office of the County Treasurer, ascertain the balance, if any, to the credit of School District No. 49 in the hands of the County Treasurer at the time of the annual meeting and will, without further parley, agree that such balance was on hand in the exact amount as shown by the County Treasurer's books reserving only objections to its relevancy and materiality."

"6. That income from sources other than taxes was on June 8, 1953, reasonably anticipated in the sum of $7,800.00." Answer. "In reference to income from sources other than taxes, affiant states that he is unable to fairly admit or deny what income defendant school district might or might not receive from sources other than taxes."

"7. That the total anticipated school expense for the school year 1953-1954 was determined to be the sum of $28,550.00." Answer. "In reference to anticipated school expense for the year 1953-1954, the same answer is made as heretofore made in reference to the proof of the minutes of the defendant school secretary. Whatever the record shows will be admitted."

"9. That said School District Number 49, Clay County, Nebraska instructed the county board and county clerk of Clay County, Nebraska, to make a levy on all taxable property of said district to raise the total amount of $17,000.00." Answer. "In reference to the instruction of the defendant to the County Board and County Clerk

of Clay County, Nebraska to make a levy on all taxable property to raise the total amount of $17,000.00 the same answer is given as heretofore, namely that affiant has agreed that if the record shows upon examination that fact, it will be readily admitted."

Section 25-1267.41, R. S. Supp., 1955, was before this court in Mueller v. Shacklett, 156 Neb. 881, 58 N. W. 2d 344. With reference to it we there said: "Section 25-1267.41, R. S. Supp., 1951, is identical with Rule 36 of the Federal Rules of Civil Procedure. Its provisions are not merely directory, but substantial compliance therewith is required. However, they are not self-executing, and the party claiming admissions for failure to deny must prove service of a proper request in compliance therewith and failure to appropriately respond thereto. In that connection, the applicable rule here is that where a party properly serves a request for admissions of relevant matters of fact or the genuineness of relevant documents, and all objections thereto are heard and appropriately denied by the court, and the other party has been ordered to respond thereto, his failure to do so within the time alloted constitutes an admission of the facts sought to be elicited. In such situation a motion for summary judgment is appropriate and may be granted if admissions made or failure to deny as required by the statute, together with the pleadings, show that there is no genuine issue as to any material fact or that the court is without jurisdiction of the subject matter. See, 2 Barron and Holtzoff, Federal Practice and Procedure, ch. 9, p. 534, and 4 Moore's Federal Practice (2d ed.), ch. 36, p. 2701, in both of which texts numerous supporting cases are cited. See, also, Mecham v. Colby, ante p. 386, 56 N. W. 2d 299; § 25-1332, R. S. Supp., 1951."

It will be noted that the answers given to the requests for admissions are equivocal and fail to meet the requirements of the statute. It is the contention of the defendant that it may answer requests for admissions in any

one of three ways, to wit, either (1) admit or deny, (2) set forth reasons why it cannot admit or deny, or (3) make objections. No proper objections appear to have been made. The attempts of defendant's counsel to explain why he could neither admit nor deny do not meet the requirements of the act. Counsel for defendant appears to have a misconception as to the duty imposed when request for admissions is served upon him under the statute. When a request for admissions is made under this section, the party served must answer even though he has no personal knowledge if the means of obtaining the information are available to him. It is not a sufficient answer that he does not know, when it appears that he can obtain the information. The information here sought was in the possession of the secretary of the district or the county treasurer of Clay County. It is immaterial that the plaintiff is acquainted with the facts as to which admission is sought. The purpose of the rule is to expedite the trial and to relieve parties of the cost and inconvenience of proving facts which will not be disputed on the trial, the truth of which can be ascertained by reasonable inquiry. Hanauer v. Siegel, 29 F. Supp. 329.

The rule is stated in Dulansky v. Iowa-Illinois Gas & Electric Co., 92 F. Supp. 118, as follows: "The above-quoted portion of Rule 36(a) demonstrates clearly the drastic character of the burden placed upon the one to whom the requests are made. It is clear, unambiguous, unequivocal and means just what it says. Walsh v. Conn. Mut. Life Ins. Co., D. C., 26 F. Supp. 566. The party served with a request for an admission which he finds legally objectionable shall respond thereto not by denying the requested admission but by making written objection upon whatever legal grounds he feels himself entitled to under Rule 36. And, as stated in the rule, a denial shall fairly meet the substance of such requested admission and when good faith requires that a party deny only a part or a qualification of a matter of which

an admission is requested, he shall specify so much of it as is true and deny only the remainder. There can be no evasion from this requirement. One cannot answer properly in the alternative but must comply strictly and literally with the terms of the statute upon his peril of having his response construed to be in legal effect an admission." We point out that Rule 36(a), referred to in the foregoing quotation, is similar to a corresponding provision of section 25-1267.41, R. S. Supp., 1955. Unless the reasoning of the Dulansky case applies, the very purpose of the statute would be defeated. Counsel for the defendant in the instant case has the impression that he cannot be compelled to answer and thereby assist in making the plaintiff's case. The purpose is a different one altogether. It is not proper to refuse to respond to a requested admission on the ground that the requesting party has the burden of proving the matters contained in the request. Adventures in Good Eating, Inc. v. Best Places to Eat, Inc., 131 F. 2d 809. A party must respond to a requested admission even though the matters requested may be controverted by the pleadings. In re Independent Distillers of Kentucky, 34 F. Supp. 724. A bad response is treated as no response at all and hence as an admission. Walsh v. Connecticut Mut. Life Ins. Co., 26 F. Supp. 566.

We find from an examination of the requests for admissions, under the foregoing rules, that the following facts are established: The district had cash on hand on June 8, 1953, in the amount of $9,788.55. The district had cash on hand in the county treasury to its credit and order on such date in the amount of $10,200. The anticipated income to the district from sources other than taxation for the year 1953-1954, as determined at the annual meeting, was $7,800. The total anticipated school expenses for the school year 1953-1954 were $28,550. The district authorized a levy on all taxable property to raise the amount of $17,000. The school taxes levied against plaintiff's property were $276.10 which he paid

on November 12, 1954. Plaintiff made proper demand for the return of the excess tax in the amount of $267.55 and interest, which demand was refused.

The total amount of cash on hand on June 8, 1953, was $19,988.55. The anticipated income was $7,800, making a total of $27,788.55. The amount needed to operate the school for the year 1953-1954 was $28,550, leaving a balance of $761.45 to be raised by taxation. The pertinent facts are established. Counsel for the defendant contends that there is a dispute in the facts and he asserts that defendant has specifically denied that the district had $9,788.55 in cash in its treasury and $10,200 on hand in the county treasury to the credit of the district. But the answers to the request for admissions as to these facts do not sustain such contention. The request for admission and the answer thereto as to the item of $9,788.55 is hereinbefore set out as request and answer number 4. It will be noted that the answer in effect was that affiant is informed and believes there was not cash on hand in the sum of $9,788.55 which was raised from taxes. The amount on hand was readily determinable from the records of the district. The answer was clearly within the knowledge of the district. The answer was equivocal when included therein was the statement that there was not on hand such amount "raised from taxes." Request and answer number 5 was likewise insufficient. Defendant equivocated by offering to admit any amount shown by the county treasurer's records at the time of trial. The statutory provision requires good faith answers as to the facts, not equivocations which defeat the very purpose of the legislation.

The defendant alleges that any money on hand at the time of the annual meeting in 1953 was money received from the federal government under section 421(d), Title 5, U.S.C.A., for the purpose of providing school facilities for the dependents and children of the personnel of the Navy Depot situated nearby and did not represent

any tax money paid by the taxpayers of the district. This is not a defense. It was money available for the payment of the general expenses of the district in operating its school for the 1953-1954 school year. In Union Pacific R. R. Co. v. Troupe, 99 Neb. 73, 155 N. W. 230, this court said: "No complaint is made of the estimate, and there is no attempt to deprive the district of money sufficient to meet its expenses. But no reason is advanced for levying a tax to defray expenses when there is money in the treasury available for that purpose. The district court was right in holding that the amount in excess of that required to raise the difference between the amount on hand and the amount needed was levied for an illegal and unauthorized purpose." See, also, Peterson v. Hancock, 155 Neb. 801, 54 N. W. 2d 85.

We think that section 79-515, R. S. Supp., 1955, clearly indicates the correctness of our position in using the following language: "It shall contain only a general statement of the total amount of funds proposed to be raised by taxation for the ensuing fiscal year, subdivided and classified into the different objects or branches of expenditures, together with a concluding statement of the entire revenue of said district raised by taxation and from other sources for the previous fiscal year. The resolution of annual estimate shall be spread at large upon the minutes of the annual meeting. The district may at the annual meeting adopt such resolution, as proposed or with amendments, voting such sums, to be raised by tax upon the taxable property of the district, as may be required to maintain the several schools thereof for the ensuing year." In City of Omaha v. Hodgskins, 70 Neb. 229, 97 N. W. 346, the term "revenue" is defined as follows: " 'The word is broad and general, and includes all public moneys which the state collects and receives, from whatever source and in whatever manner.' " See, also, State v. Stanton County, 100 Neb. 747, 161 N. W. 264. The funds on hand on June 8, 1953, were revenue which the district must take into consid-

eration in fixing the tax levy for general school purposes for the 1953-1954 school year.

The defendant argues that exact calculations as to the amount of taxes to be raised for school purposes were not contemplated and that consideration can be had for possible nonpayments of taxes and other similar contingencies. We are of the opinion that defendant's position is correct as a general proposition. However, an excessive levy of more than $16,000 to meet the needs of the district which have been fixed at $28,550 exceeds any reasonably contemplated leeway for such contingencies. The tax levy is required to be a reasonable approximation of the amount required. It has not been the policy of the law to permit the creation of funds by taxation in large amounts for future use, except where statutory authorization exists as in the case of building funds, sinking funds, and the like.

Defendant contends that it was error for the trial court to sustain plaintiff's motion for a summary judgment. The rule is that a summary judgment may be properly entered only when there is no genuine issue of fact to be decided and the movant is entitled to judgment as a matter of law. Healy v. Metropolitan Utilities Dist., 158 Neb. 151, 62 N. W. 2d 543; Illian v. McManaman, 156 Neb. 12, 54 N. W. 2d 244. In the present case the plaintiff properly served a request for admissions of relevant matters of fact. The answers filed thereto were equivocal and constitute an admission of the facts sought to be elicited. Since all of the pertinent facts stand admitted, a motion for a summary judgment affords an appropriate remedy. Plaintiff's motion for a summary judgment was supported by an affidavit establishing the regularity of the service of the request for admissions. No showing, by affidavit or otherwise, was made which purported to rebut the admitted facts. Under such circumstances there was no issue of fact to be determined and the question to be resolved was one of law. Under the admitted facts plaintiff was entitled to judgment as a matter of

law and the trial court was correct in granting plaintiff's motion for summary judgment.

AFFIRMED.

JOHN SCHROEDER ET AL., APPELLANTS, V. HOMESTEAD CORPORATION ET AL., APPELLEES, WILLIAM W. FREELAND, INTERVENER-APPELLEE.
77 N. W. 2d 678

Filed June 29, 1956. No. 33986.

1. **Pleading: Judgments.** A motion to dismiss is not the proper mode of raising the defense of a former adjudication.
2. **Judgments.** A litigant, relying upon the doctrine of res judicata involved in a pending case, bears the burden of introducing evidence to prove such defense.
3. ———. Judicial notice will not be taken of a judgment in another suit as res judicata when not pleaded or given in evidence.

APPEAL from the district court for Washington County: JAMES T. ENGLISH, JUDGE. *Reversed and remanded.*

William L. Walker and *Roy M. Harrop,* for appellants.

O'Hanlon & O'Hanlon, for appellees.

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

MESSMORE, J.

This is an action wherein John Schroeder and Roy M. Harrop, plaintiffs, make application for writ of scire facias for execution against Ned Tyson and Irma Tyson, husband and wife, and other defendants. The action is instituted under the Uniform Enforcement of Foreign Judgments Act, sections 25-1587 to 25-15,104, R. S. Supp., 1955, which became effective August 27, 1949, on a foreign judgment rendered December 30, 1952, in the district court for Harrison County, Iowa, an authenticated copy of said judgment being registered in the office of the

clerk of the district court for Washington County, Nebraska, on September 2, 1955.

This case is here on the transcript, there being no bill of exceptions presented on this appeal.

On January 6, 1956, the plaintiffs as above mentioned filed a pleading in the district court for Washington County, Nebraska, entitled: "Praecipe and application for writ of scire facias for execution on registered judgment and decree." The purpose of the action was to have execution issued by the clerk of the district court for Washington County, Nebraska, to the sheriff of said county directing the sheriff to place the applicants, John Schroeder and Roy M. Harrop, as owners of the said premises described in the registered judgment, in possession of the same, and for such other and further relief as might be just and equitable.

On January 10, 1956, Ned Tyson and Irma Tyson filed a motion for dismissal of the action with prejudice as to them, setting forth that they, as plaintiffs, jointly commenced an action in the district court for Washington County, Nebraska, to quiet their title in certain real estate in said county owned by them, in which action Roy M. Harrop and John Schroeder were made parties defendant, and were duly served and entered their appearance; that thereafter, on November 17, 1955, the district court for Washington County entered its decree finding that Ned Tyson and Irma Tyson were the owners in fee simple of the real estate described in their petition, free and clear of any rights, claims, interests, or titles of all the defendants including Roy M. Harrop and John Schroeder, and restrained all of the said defendants from setting up or asserting any right, title, interest, lien, claim, or demand in or to said real estate; and that said decree had not been appealed from and was final and conclusive, and that by the terms thereof the said Roy M. Harrop and John Schroeder were barred, restrained, and enjoined from thereafter asserting any right, claim, demand, or title in or to the real estate

described therein, including any rights or titles which they assert in the above-entitled action and which rights and titles so alleged and asserted in said action are by the pleadings of said plaintiffs (Ned Tyson and Irma Tyson) shown to have been acquired prior to the date of said quieting title action of these parties.

On January 19, 1956, the applicants, John Schroeder and Roy M. Harrop, filed a pleading entitled "resistance to motion for dismissal" wherein they alleged that there were no such lands as purported to be described in the judgment obtained by Ned Tyson and Irma Tyson, within the jurisdiction of the district court for Washington County, Nebraska, as shown by the United States government survey; that the lands owned by the applicants in their registered judgment embraced lands in which they had the legal title describing the same in Harrison County, Iowa, making the judgment a part of the pleadings; and alleged further that the district court for Washington County, Nebraska, was required to take judicial notice of the said judgment which was entitled to full faith and credit under the Iowa-Nebraska Boundary Compact of 1943, approved by the Nebraska Legislature on May 7, 1943. In addition, the applicants moved the court to enter judgment on the pleadings in their favor against Ned Tyson and Irma Tyson, to issue a writ of scire facias for execution, and deliver the same to the sheriff of Washington County, Nebraska, to place them in possession of the lands described in their registered judgment. In addition, the applicants requested that the motion of Ned Tyson and Irma Tyson for dismissal of their action be overruled and that they have judgment on the pleadings against the said defendants.

On January 19, 1956, the trial court sustained the motion of Ned Tyson and Irma Tyson for dismissal with prejudice, and allowed other defendants further time to plead.

From the order of dismissal with prejudice, plaintiffs

John Schroeder and Roy M. Harrop appeal to this court.

Before determining this appeal, we set forth the sections of the statutes involved under the Uniform Enforcement of Foreign Judgments Act.

Section 25-1587, R. S. Supp., 1955, provides in part as follows: "As used in sections 25-1587 to 25-15,104: (1) 'Foreign judgment' means any judgment, decree or order of a court of the United States or of any state or territory which is entitled to full faith and credit in this state. (2) 'Register' means to file and docket and record a foreign judgment in a court of this state."

Section 25-1588, R. S. Supp., 1955, provides: "On application made within the time allowed for bringing an action on a foreign judgment in this state, any person entitled to bring such action may have a foreign judgment registered in any court of this state having jurisdiction of such an action."

Section 25-1589, R. S. Supp., 1955, provides in part as follows: "A petition for registration shall set forth a copy of the judgment to be registered, the date of its entry and the record of any subsequent entries affecting it, * * * and a prayer that the judgment be registered."

Section 25-1594, R. S. Supp., 1955, provides: "Any defense, set-off, or counterclaim, which under the law of this state may be asserted by the defendant in an action on the foreign judgment may be presented by appropriate pleadings and the issues raised thereby shall be tried and determined as in other civil actions. Such pleadings must be filed within thirty days after personal jurisdiction is acquired over him or within thirty days after the mailing of the notice prescribed in section 25-1591."

Section 25-1597, R. S. Supp., 1955, provides: "An appeal may be taken by either party from any order sustaining or setting aside a registration on the same terms as an appeal from a judgment of the same court."

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

The principal assignment of error and the one that determines this appeal may be stated as follows: The trial court erred in sustaining the defendants' motion to dismiss with prejudice the plaintiffs' action.

It is obvious that the defendants are relying on the defense of res judicata, that is, that the judgment obtained by them in the district court for Washington County, Nebraska, fixes the rights of the parties and terminates the controversy to any subsequent litigation as brought by the plaintiffs, and is conclusive evidence of those rights. See, Nelson v. Nelson, 152 Neb. 741, 42 N. W. 2d 654; Robinson v. Dawson County Irr. Co., 142 Neb. 811, 8 N. W. 2d 179; and other cases too numerous to cite.

We deem the following to be applicable.

As stated in Kralick v. Shuttleworth, 49 Idaho 424, 289 P. 74: "In any event the defense of res adjudicata cannot be raised by motion to dismiss. (34 C. J., p. 1058; Attica State Bank v. Benson, 8 Kan. App. 566, 54 Pac. 1037; Vyse v. Richards, 208 Mich. 383, 175 N. W. 392; Samples v. United Fuel Gas Co., 100 W. Va. 441, 130 S. E. 670; International Ry. Co. v. Prendergast, 29 Fed. (2d) 296.)"

In Auld v. Smith, 23 Kan. 65, it was held that only a final determination on the merits can be considered as an adjudication amounting to res judicata. See, also, Horstman v. Bowermaster, 90 Okl. 262, 217 P. 167; Hoskins v. Hays, 135 Okl. 262, 275 P. 347.

As stated in Samples v. United Fuel Gas Co., 100 W. Va. 441, 130 S. E. 670: "Nor should the motion to dismiss the Gas Company's petitions on the ground of former adjudication have been sustained, for the reason that there was no pleading on which an issue of that character could be based. The defense of res adjudicata must be plead and proved. * * * A motion to dismiss, or a motion to strike out, is not a pleading on which evidence of a former adjudication can be introduced. Hall v. Morris, 219 Pac. (Okla.) 903; 34 C. J. 1058, Sec. 1494;

Desert King Mining Co. v. Wedekind, 110 Fed. 873; Jordan v. Jordan, 175 Ala. 640; Coffee v. Groover, 20 Fla. 64, 77; Carlin's Hoggs Eq. Proc. 531, Sec. 403; Beall v. Walker, 26 W. Va. 741; 9 Ency. Pl. & Pr. page 616; Horstman v. Bowermaster, 217 Pac. 167; Keown v. Hughes, 265 Fed. 572." See, also, 30 Am. Jur., Judgments, § 254, p. 983; First State Bank v. Larsen, 72 Mont. 400, 233 P. 960; 50 C. J. S., Judgments, § 824, p. 393; In re Estate of McCleneghan, 145 Neb. 707, 17 N. W. 2d 923; Gutzmer v. Nelsen, 121 Neb. 214, 236 N. W. 614; Gregory v. Kenyon, 34 Neb. 640, 52 N. W. 685.

By the weight of authority, even where a judgment of the same court is pleaded as a bar or as conclusive on an issue, the existence and contents of the judgment must be proved by offering the record or a certified copy thereof in evidence. See Annotation, 96 A. L. R. 944.

In Divide Creek Irr. Dist. v. Hollingsworth, 72 F. 2d 859, 96 A. L. R. 937, it was held that in the trial courts, a claim of res judicata must be pleaded, and, if traversed, proof thereof must be made, and the material parts of the record of the former proceeding in the same court must be offered in evidence to sustain a plea of res judicata, in order that there may be a record upon which a review may be had. It was said in the annotation following the above case: "The court pointed out that, while the Supreme Court of the United States had sometimes wound up protracted litigation by taking judicial notice of its records in other cases, the situation is different in trial courts, whose judgments are subject to review, for which review a record must be made up, since an appellate court cannot take judicial notice of the records of every district in its jurisdiction."

The general rule is that a person relying upon the doctrine of res judicata as to a particular issue involved in the pending case bears the burden of introducing evidence to prove that such issue was involved and actually determined in the prior action. See 30 Am. Jur., Judg-

ments, § 283, p. 997. See, also, Wilch v. Phelps, 14 Neb. 134, 15 N. W. 361.

In Bush v. Tecumseh Nat. Bank, 64 Neb. 451, 90 N. W. 236, this court said: "We can not take judicial notice of the records of the district court. We can only consider such records of that court as are shown by the transcript. Thompson & Sons Mfg. Co. v. Nicholls, 52 Nebr., 312; Royal Trust Co. v. Exchange Bank, 55 Nebr., 663."

Judicial notice will not be taken of a judgment in another suit as res judicata, whether in the same court or another court, when not pleaded or given in evidence. See Pickens v. Coal River Boom Co., 66 W. Va. 10, 65 S. E. 865, 24 L. R. A. N. S. 354. The record must be either pleaded or given in evidence. United States v. Bliss, 172 U. S. 321, 19 S. Ct. 216, 43 L. Ed. 463.

The defendants filed a supplemental transcript in this court on April 19, 1956, setting forth a judgment obtained by Ned Tyson and Irma Tyson in another case and the record in said case to show the defense of res judicata in the instant case. The plaintiffs filed a motion to strike this supplemental transcript. This motion should be sustained. This is especially true in the light of the foregoing authorities cited.

The plaintiffs contend that their motion for judgment on the pleadings, which appears in their motion resisting the motion of the defendants for dismissal of the action against the plaintiffs with prejudice, should be sustained. This motion was not presented to the trial court. If the plaintiffs desired to present the motion they should have informed the trial court and had the trial court rule on it. This motion is not for determination here.

We conclude that the trial court committed prejudicial error in sustaining the defendants' motion to dismiss the plaintiffs' action with prejudice.

The judgment of the trial court should be and is hereby reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

MERLE HAYNES ET AL., APPELLANTS, V. VICTOR E. ANDERSON AS GOVERNOR OF THE STATE OF NEBRASKA ET AL., APPELLEES.
77 N. W. 2d 674

Filed June 29, 1956. No. 34024.

1. **Declaratory Judgments.** The court in its discretion may refuse to render or enter a declaratory judgment or decree when such judgment or decree, if rendered or entered, would not terminate the uncertainty or controversy giving rise to the proceeding.
2. ———. The statute which provides that when declaratory relief is sought, all persons shall be made parties who have or claim an interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceeding, is mandatory.
3. ———. The statute authorizing a declaratory judgment is applicable only where all interested persons are made parties to the proceeding.
4. **Injunction: Officers.** A resident taxpayer of the state, without showing any interest or injury peculiar to himself, may enjoin illegal expenditures by a public board or officer.
5. **Parties: Officers.** The Auditor of Public Accounts and the State Treasurer are necessary parties to an action wherein the legality of expenditure of public funds in payment of the obligation of a contract with the state is brought into question.
6. **Parties: Contracts.** Parties who have entered into contracts with the state which contracts require payment of the obligation thereof out of public funds are necessary parties to an action a purpose of which is to have the contracts declared void and unenforceable.

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

Harry N. Larson and *Doyle, Morrison & Doyle,* for appellants.

Clarence S. Beck, Attorney General, and *Ralph D. Nelson,* for appellees.

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

YEAGER, J.

This is an action instituted by Merle Haynes, an elector, taxpayer, resident, and Mayor of South Sioux City,

Nebraska; John D. Forsyth, a resident, elector, taxpayer, and chairman of the board of supervisors of Knox County, Nebraska; Doyle Hanson, a resident, elector, taxpayer, and chairman of the board of supervisors of Dixon County, Nebraska; John Kinney, a resident, elector, and taxpayer of the city of Wakefield, Dixon County, Nebraska; Joseph Beckenhauer, a resident, elector, and taxpayer of Dixon County, Nebraska; the city of Wakefield, Nebraska; and the Northeast Nebraska Rural Public Power District, plaintiffs and appellants, against Victor E. Anderson, L. N. Ress, and Clarence S. Beck, respectively Governor, State Engineer, and Attorney General of the State of Nebraska, defendants and appellees.

By the action the plaintiffs seek, under the Uniform Declaratory Judgments Act, to have declared unconstitutional, null, and void Legislative Bill No. 187 (§§ 39-1301 to 39-1362, R. S. Supp., 1955), which was enacted by the Sixty-seventh Session of the Legislature of Nebraska and which, if valid as law, became effective on the 18th day of September 1955.

To the petition of plaintiffs the defendants filed an answer and later an amended answer. Issues were joined by reply. After joinder of issues the case was tried to the court, after which a decree was rendered whereby the issues were adjudicated in favor of defendants and the action was accordingly dismissed. The plaintiffs filed a motion for new trial which was overruled. From the decree and the order overruling the motion for new trial the plaintiffs have appealed.

In their brief the plaintiffs have set forth six assignments of error which they contend are grounds for reversal of the decree rendered. Before, however, these assignments of error may be considered the question of whether or not this action may be maintained by plaintiffs must be considered and determined.

The defendants contend that it may not be maintained. Grounds asserted as a basis for this contention are substantially that there are no proper parties plaintiff; that

there is a lack of necessary parties defendant; and that no justiciable issue is presented for determination.

In the light of this contention it becomes necessary to ascertain the extent to which the Uniform Declaratory Judgments Act is available. The act appears as section 25-21,149, R. S. Supp., 1955, and sections 25-21,150 to 25-21,164, R. R. S. 1943.

Section 25-21,149, R. S. Supp., 1955, generally empowers courts of record to render declaratory judgments.

Section 25-21,154, R. R. S. 1943, is as follows: "The court may refuse to render or enter a declaratory judgment or decree where such judgment or decree, if rendered or entered, would not terminate the uncertainty or controversy giving rise to the proceeding."

It is observable that this provision by its terms indicates discretionary rather than mandatory power. The decisions of this court appear to treat the power as discretionary within the limits of the section. Smithberger v. Banning, 130 Neb. 354, 265 N. W. 10; Arlington Oil Co. v. Hall, 130 Neb. 674, 266 N. W. 583; Redick v. Peony Park, 151 Neb. 442, 37 N. W. 2d 801.

Section 25-21,159, R. R. S. 1943, relates to the question of parties to a declaratory judgment action. The portion of the section of consequence here is the following: "When declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceeding."

It is observable that the terms of this provision are mandatory, and this court has held that they are to be so regarded. In Wood Realty Co. v. Wood, 132 Neb. 817, 273 N. W. 493, it was said: "It is well-settled law that the statute authorizing a declaratory judgment is applicable only where all interested persons are made parties to the proceeding." See, also, Redick v. Peony Park, *supra;* Schroder v. City of Lincoln, 155 Neb. 599, 52 N. W. 2d 808; Nebraska Seedsmen Assn. v. Depart-

ment of Agriculture & Inspection, 162 Neb. 781, 77 N. W. 2d 464.

As to the power of the court to render a judgment on the combined question of parties and issues this court has said: "The requisite precedent conditions of obtaining declaratory relief are: That a controversy exists in which a claim is asserted against one who has an interest in contesting it; that the controversy is between persons whose interests are adverse; that the parties seeking declaratory relief must have a legally protectible interest or right in the controversy; and that the issue involved is capable of present judicial determination." Schroder v. City of Lincoln, *supra*. See, also, Nebraska Seedsmen Assn. v. Department of Agriculture & Inspection, *supra*.

It then becomes necessary to examine the record in order to ascertain whether or not within the meaning of these rules a declaratory judgment may properly be rendered.

As already pointed out the action is to have declared unconstitutional, null, and void Legislative Bill No. 187 enacted by the Sixty-seventh Session of the Legislature of Nebraska with September 18, 1955, the effective date thereof. The grounds upon which it is contended that the bill is unconstitutional are not important at this point in this opinion.

By the bill an integrated system of state highways was defined and established. It is the contention of plaintiffs that this definition and establishment of the entire state highway system is unconstitutional.

After the bill became effective, as is shown by the pleadings and the evidence, the State of Nebraska entered into contracts with various contractors for construction and improvements on this system. The total obligation of the state to the contractors on these contracts amounts to more than four and one-half million dollars. In direct and practical application the plaintiffs by their action seek to have each and all of these contracts de-

clared null and void and thus prevent the contractors from performance under their contracts and from recovery thereon from the State of Nebraska.

More elaborately than previously stated it is a contention of defendants that there are not proper parties plaintiff for the purpose of maintenance of the action.

This contention of defendants is without substantial merit. While it may be true that the city of Wakefield and the Northeast Nebraska Rural Public Power District have no such interest as to permit them to maintain the action, a question which is not decided, this may not be said as to the other plaintiffs. The other plaintiffs have become plaintiffs as taxpayers of the state. As such they were and are proper plaintiffs.

In Woodruff v. Welton, 70 Neb. 665, 97 N. W. 1037, it was said: "A resident taxpayer, without showing any interest or injury peculiar to himself, may enjoin illegal expenditures by a public board or officer." This statement was made in reference to a transaction within a county. However in Fischer v. Marsh, 113 Neb. 153, 202 N. W. 422, a case involving state funds, the quotation was treated as applicable. Again in Rein v. Johnson, 149 Neb. 67, 30 N. W. 2d 548, the principle was reannounced.

The same may not be said as to parties defendant. The subject of the audit and allowance of claims against public funds is inevitably of vital concern under the issues presented. The functions in this connection are those of the Auditor of Public Accounts. See, §§ 84-302 and 84-303, R. R. S. 1943; § 84-304, R. S. Supp., 1955. Clearly under the rules cited he was a necessary party. The State Treasurer was no less a necessary party, since all payments must be made out of funds over which he has exclusive control. See § 84-602, R. R. S. 1943.

As has been pointed out the declaration which the plaintiffs seek would have the effect of invalidating 30 contracts between the State of Nebraska and 16 contractors for the construction upon the defined highways. Yet none of them was made a party to this action. These

were necessary parties. This conclusion clearly conforms to the result of the analysis of the statute relating to necessary parties appearing in Redick v. Peony Park, *supra,* from which we are unwilling to depart.

In the light of this, necessity does not arise for consideration of the defendants' contention that no justiciable issue was presented for consideration, or for a consideration of the plaintiffs' assignments of error. It becomes necessary to say only that necessary parties were not made parties defendant, hence plaintiffs could not properly maintain the action. On that ground the adjudication of the district court in dismissing the action is affirmed.

AFFIRMED.

GRACE M. HAUFF, APPELLEE, V. KATHERINE KIMBALL, EXECUTRIX OF THE ESTATE OF A. C. KIMBALL, DECEASED, APPELLANT.

77 N. W. 2d 683

Filed June 29, 1956. No. 34054.

1. **Workmen's Compensation.** A latent injury, progressive in character, which results in compensable disability, occurs within the meaning of the Nebraska Workmen's Compensation Act when the condition produced by the injury culminates in disability of the employee.
2. ———. If an occupational disease results from continual or repeated inhalation of small quantities of a deleterious substance from the environment of the employment over a period of time, an afflicted employee is injured when the accumulated effects of the substance manifest themselves by causing disability of the employee, and the time of the injury within the meaning of the Nebraska Workmen's Compensation Act is when disability is first experienced by the employee.
3. ———. The Nebraska Workmen's Compensation Act provides benefits on account of the death of an employee caused by an occupational disease arising out of and in the course of the employment for the use of the dependents of the employee.
4. ———. It is the practice of this court in all cases under the

Nebraska Workmen's Compensation Act to avoid rules of technical interpretation as much as is possible and to determine the intention of the Legislature from the language of the act as a whole rather than from loose words or phrases of isolated paragraphs.

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

Doyle, Morrison & Doyle, for appellant.

Neely, Otis & Neely, for appellee.

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

BOSLAUGH, J.

Walter R. Hauff, referred to herein as the deceased, was a granite cutter. He was employed by A. C. Kimball, who used the name of Kimball Monument Company in the conduct of his business at McCook and who is referred to herein as Kimball, from December 1923 until he was disabled in July of 1954. He substantially managed and performed the work required not including sales and promotion. He employed others to assist him infrequently and at irregular intervals. His work of converting stones into monuments was done in a room about 16 feet wide and 50 feet long. In this was a workshop and a sandblast room. The latter was in the northeast part of the workshop, was about 8 feet by 10 feet, and about 8 feet high. It had an exhaust fan in the ceiling estimated to have been not more than 50 percent efficient. There was a door in the ceiling through which were admitted the stones when work was to be done on them. In one part the stones were put on bankers and in the other the sandblast machine was located. An opening in the latter was covered with fine screen through which the operator observed the work. The operator was required to wear goggles to prevent sand and dust from entering his eyes. The stone was prepared for marking in the outer workshop, the lettering

was there marked on the stone, and a coat of glue was put on the parts of the stone that were to be protected from the abrasive action of the sandblast.

The stone was then taken to the sandblast room where the lettering was done by placing silica sand under great pressure against the stone by the operation of the sandblast machine. When this operation was completed the finishing work was done, especially on raised-letter monuments, in the workshop area. This was accomplished with an air hammer and chisel. This caused a large amount of dust to be released in the air. The chisel did not chip off the stone but it did create stone dust. The sandblast operation made a great amount of dust. The stone would be covered with from one-quarter to one-half an inch of white flour-like dust from the sand and the operator would be saturated and covered with it. The sand was used more than once but it was required to be screened each week to separate the dust from the abrasive. The dust from the silica sand constantly saturated the air in the building and each part of it. The deceased usually conducted these operations and when he finished he looked as though he had been showered all over with flour. The time required to complete the sandblasting and do the finishing work on a stone was from one-half hour to 5 hours, depending upon the size of the stone and the amount and character of the lettering thereon. The sandblast room had three-fourths inch matched pine lumber on the inside of it and the inner surface of the lumber was covered with rubber. The deceased actively worked as a granite cutter from 1915 until he became disabled in July 1954. The last 31 years of this period he was engaged by Kimball at McCook. His wages were $75 per week. Appellee is his dependent.

The deceased performed the duties of his employment to July 3, 1954. He had suffered some discomforture from arthritis and it was observed in the spring of 1954 that his breathing was not normal when he was lying

down or exerted himself. This became more pronounced thereafter. The record does not advise that he had at any time during his engagement at McCook been detained from his labors by illness before July 3, 1954. He then became disabled, he was thereafter wholly incapacitated to perform labor, and he was after about August 1, 1954, hospitalized until his death November 3, 1954. His normal weight was about 168 pounds. In the spring of 1954 it had decreased to about 148 pounds and in August of that year it was 113 pounds.

Appellee instituted and prosecutes this cause to recover benefits awarded by the Nebraska Workmen's Compensation Act for disability suffered by the deceased from July 12, 1954, to and including November 3, 1954, and dependency benefits subsequent to the death of the deceased, the husband of appellee. The district court found for appellee and awarded her judgment against Katherine Kimball as executrix of the estate of A. C. Kimball who was substituted by revivor as defendant in the cause because of the death of the original defendant, for $28 per week from July 12, 1954, to and including November 3, 1954, a period of 16 3/7 weeks, as temporary total disability benefits, and thereafter and in addition thereto $28 per week for a period of 308 4/7 weeks as dependency benefits due to the death of the deceased resulting from a compensable disease, hospital and medical expenses paid by appellee in the sum of $335.50, and burial benefits in the sum of $300.

The thesis of appellant is that the evidence does not establish that deceased was afflicted with an occupational disease; that if he was it did not arise out of or in the course of his employment by Kimball but while he was employed by others; that the Nebraska Workmen's Compensation Act does not provide benefits for death caused by occupational disease; and that disability from occupational disease is not compensable by the act if the disease was contracted before 1943, the date the act was amended making such disability compensable.

The proof is that the cause of the death of the deceased was what is sometimes termed silicosis but medically known as pneumoconiosis silicosis, an inflammatory disease of the lungs due to silica dust. The record shows without dispute that silicosis is an occupational disease; that the deceased was for more than 30 years while employed by Kimball subjected to conditions favorable to the contraction of the disease, that is, the environment of the employment was atmosphere permeated with silica dust inhaled over a period of time by deceased in the air he breathed; that he first suffered disability about July 3, 1954; and that soon thereafter it was discovered for the first time that he had the disease. The evidence supports the conclusion that the personal injuries to deceased within the meaning of the Nebraska Workmen's Compensation Act were caused by a compensable disease arising out of and in the course of his employment by Kimball. Associated Indemnity Corp. v. Industrial Accident Commission, 124 Cal. App. 378, 12 P. 2d 1075.

The Nebraska Workmen's Compensation Act was amended in 1943 to include within its scope and operation personal injury caused an employee by occupational disease. Laws 1943, c. 113, § 1, p. 397. Since the effective date of the amendment personal injury caused to an employee by occupational disease arising out of and in the course of his employment entitled the employee to compensation therefor from his employer as designated in the act. § 48-101, R. R. S. 1943. The terms "injury" and "personal injuries" are defined by the act as violence to the physical structure of the body and it is provided therein that the terms shall include disablement resulting from occupational disease arising out of and in the course of employment in which the employee was engaged. § 48-151, R. R. S. 1943. An occupational disease is classed not as an accident but as an injury. The act associates occupational disease with accidental injuries and applies the law applicable to one

to the other but it does not prescribe a method by which the time of injury in case of occupational disease may be ascertained. This court has not been required before the appearance of this cause to resolve that precise problem. It has been the subject of decision by other courts.

In Textileather Corp. v. Great American Indemnity Co., 108 N. J. Law 121, 156 A. 840, it was decided: "Under the Workmen's Compensation act, as amended, the time fixed for compensation for disability or death occurring by reason of certain occupational diseases is when incapacity or death occurs, and not when the poison specified makes its first appearance." The opinion contains the following: "It is a well known fact that industrial diseases are gradual in development—the first and early steps are not always perceptible. The rate of progress may vary. * * * Sometimes the disease is quiescent and latent; sometimes the fatal course is swift. Medical science cannot always detect and describe the progress of disease. Employes exposed to occupational diseases frequently work for different employers. It is unthinkable that the legislature should have contemplated that in such instances the recovery of compensation should be defeated. The legislature has properly assumed a benevolent care for workmen. * * * The legislature must have intended that compensation should be determined, subject to procedural limitations, when the disability or death occurred, and at no other time. Otherwise, the whole plan would prove ineffective."

Marsh v. Industrial Accident Commission, 217 Cal. 338, 18 P. 2d 933, 86 A. L. R. 563, discussed the subject in this manner: "An injury may arise out of and in the course of the employment when there is a causal connection between the employment and the injury; but for the purposes of compensation the injury dates from the time when the diseased condition culminates in an incapacity for work, and it is at that time that the employer's liability becomes fixed, for until then the work-

man has received no injury in the legal sense, though the seeds productive of the injury had lodged in his frame long before."

Zurich General Accident & Liability Ins. Co. v. Industrial Commission, 203 Wis. 135, 233 N. W. 772, expresses the conclusion of the court in this language: "Upon a full reconsideration of the entire matter, it is considered that it should be held that the 'time of accident' within the meaning of the statute in occupational disease cases should be the time when disability first occurs; "

The court stated in Associated Indemnity Corp. v. Industrial Accident Commission, *supra:* "Where an occupational disease results from the continual absorption of small quantities of some deleterious substance from the environment of the employment over a considerable period of time, an afflicted employee can be held to be 'injured' only when the accumulated effects of the substance manifest themselves, which is when the employee becomes disabled and entitled to compensation; and the 'date of injury', within the meaning of the Workmen's Compensation Act, is the date when the disability is first incurred, and the six months' period of limitations runs from that date and not from the time the employee has knowledge of the disease." See, also, Annotation, 86 A. L. R. 572.

It has been consistently declared by this court that a latent injury, progressive in character, which results in compensatory disability, occurs within the meaning of the Nebraska Workmen's Compensation Act when the condition produced by the injury culminates. Johansen v. Union Stock Yards Co., 99 Neb. 328, 156 N. W. 511; Travelers Ins. Co. v. Ohler, 119 Neb. 121, 227 N. W. 449; Marler v. Grainger Bros., 123 Neb. 517, 243 N. W. 622; Park v. School District, 127 Neb. 767, 257 N. W. 219; Keenan v. Consumers Public Power Dist., 152 Neb. 54, 40 N. W. 2d 261. See, also, Annotation, 108 A. L. R. 316.

The cause of action for benefits under the Nebraska Workmen's Compensation Act alleged in this cause did not accrue until the injury to the deceased culminated in his disability in July 1954. The time of the amendment of the act enlarging its scope to include occupational diseases is immaterial to this case.

The major premise of appellant in this litigation is that the Nebraska Workmen's Compensation Act does not provide benefits for the death of an employee caused by occupational disease arising out of and in the course of his employment. The Legislature amended the act to afford benefits for injury or death suffered by an employee from occupational disease arising out of and in the course of his employment. This is clear proof of the purpose and intention of the Legislature to provide coverage of the result of such illness suffered by an employee within the provisions of the act and death benefits to his dependents in the event of death from such cause. This is expressed by the court in Textileather Corp. v. Great American Indemnity Co., *supra*: "The legislature in setting up a plan for compensation for occupational diseases intended to provide a complete and workable arrangement for the compensation of those disabled by occupational diseases, and also for suitable provisions for their dependents in the event of death."

The relevant part of section 48-101, R. R. S. 1943, is as follows: "When personal injury is caused to an employee by accident or occupational disease, arising out of and in the course of his * * * employment, of which the actual or lawful imputed negligence of the employer is the natural and proximate cause, such employee shall receive compensation therefor from his * * * employer if the employee was not willfully negligent at the time of receiving such injury." Section 48-109, R. R. S. 1943, declares: "If both employer and employee become subject to sections 48-109 to 48-147, both shall be bound by the schedule of compensation provided in section 48-121, which compensation shall be paid in every case of injury

or death caused by accident or occupational disease arising out of and in the course of employment, except accidents caused by, or resulting in any degree from the employee's willful negligence as defined in section 48-151." The pertinent portion of subparagraph (4) of section 48-151, R. R. S. 1943, is: "The terms 'injury' and 'personal injuries' shall mean only violence to the physical structure of the body and such disease or infection as naturally results therefrom. The terms shall include disablement resulting from occupational disease arising out of and in the course of the employment in which the employee was engaged and which was contracted in said employment, and the disability commenced within two years subsequent to the date of termination of the employment."

The essence of the quoted provisions is a legislative mandate that if injury is caused an employee by accident or occupational disease arising out of and in the course of his employment the employee shall have compensation therefor from his employer unless the injury was caused by willful negligence of the employee; that the employer and the employee are bound by the schedule of compensation contained in the act and such compensation shall be paid for every "injury or death caused by accident or occupational disease" arising out of and in the course of the employment not caused by willful negligence of the employee as defined in the act; and that the terms "injury" and "personal injuries" include disablement received from occupational disease arising out of and in the course of the employment. The operation of the provisions for death benefits is conditioned by the words "If death results from injuries." § 48-122, R. S. Supp., 1955. The terms "injury" and "injuries" include disablement from occupational disease. It follows that if the disablement of an employee from such disease results in his death the employee is covered by the act and his dependent is entitled to death benefits provided therein because the first section of the act says compensation is

payable "When personal injury is caused to an employee by accident or occupational disease." The language of Dobesh v. Associated Asphalt Contractors, 138 Neb. 117, 292 N. W. 59, may be appropriately repeated: "We would hesitate in this situation to allow the loose language of one section to curtail or defeat, by technical construction, the general intent which the legislature has declared as to the entire statute. In all questions under the workmen's compensation law, it is our duty to avoid rules of technical construction as much as possible, and to determine the intention of the legislature from the language of the act as a whole, rather than from the loose words or phrases of isolated paragraphs." The argument that the act does not provide benefits for the death of an employee caused by occupational disease is without merit.

Appellee contends the penalty provision of the act should be applied to and enforced in this case. § 48-125, R. R. S. 1943. There is no indication in the record that the defense raised was not in good faith or that delay in the litigation was caused by appellant. The principal ground of defense urged by appellant raised a question of law of first impression in this jurisdiction. It is not considered that this is an appropriate case for exaction of a penalty.

The judgment of the district court should be and it is affirmed. Appellee should be and is allowed an attorney's fee to be paid by appellant in the sum of $250 to be taxed as costs and all costs of appeal should be and they are taxed to appellant.

AFFIRMED.

OPAL L. ELSASSER, APPELLANT, V. WILLIAM A. SZYMANSKI ET AL., APPELLEES.

77 N. W. 2d 815

Filed July 6, 1956. No. 33966.

1. **Boundaries.** Section 34-301, R. R. S. 1943, is broad enough to, and does, authorize actions in equity to determine boundaries of real estate, the ownership of which is in whole or in part in dispute.
2. **Adverse Possession.** The plea of title to land by adverse possession must be proved by actual, open, exclusive, and adverse possession under claim of ownership for the full statutory period of 10 years.
3. ———. The possession must not only have been actual, open, and continuous, but it must have been accompanied by an intention on his part to hold the land as the owner of it.
4. **Easements.** An easement is usually defined as a right in the owner of one parcel of land, by reason of such ownership, to use the land of another for a special purpose not inconsistent with the general property right of the owner.
5. **Waters.** Surface waters may be controlled by the owner of the land on which they fall, or originate, or over which they flow and he may refuse to receive any that falls, or originates, or flows on or over adjoining land. His right in this respect however must be so exercised as not to unnecessarily or negligently cause injury to the rights and property of others.

APPEAL from the district court for Douglas County: PATRICK W. LYNCH, JUDGE. *Affirmed.*

A. W. Elsasser, for appellant.

Martin A. Cannon, for appellees.

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

WENKE, J.

Opal L. Elsasser brought this action in the district court for Douglas County against William A. Szymanski and Elizabeth L. Szymanski. The purpose of the action is to have judicially determined the boundary line between the parties' adjoining properties located in Omaha. The relief sought is a mandatory injunction to compel

defendants to remove any and all structures and encroachments which they have placed across the parties' boundary line and on plaintiff's property and to permanently enjoin them from again doing so. Plaintiff also asks for damages which she claims she suffered by reason thereof. Trial was had. After plaintiff had adduced her evidence the trial court sustained defendants' motion to dismiss her action, and did so. Plaintiff's motion for new trial having been overruled, she perfected this appeal therefrom.

The parties agree, in view of the trial court's ruling, that in considering the record this court will apply thereto the following principle: "The plaintiff, as against a motion for a directed verdict, is entitled to have every controverted fact resolved in his favor and to the benefit of every inference that can reasonably be deduced from the evidence." Koutsky v. Bowman, 157 Neb. 919, 62 N. W. 2d 114. However, in an action of this character, appellant must recover upon the strength of his own title, not upon the weakness of his adversary. Knight v. Denman, 64 Neb. 814, 90 N. W. 863.

The record shows that in October 1927 appellant became the owner of the south 43.85 feet of Lot 55, Rees Place, an addition to the city of Omaha. These premises she has ever since occupied with her family as their home. Located thereon is a house and a three-car garage, the driveway to the garage running along the north edge of the property from Twenty-eighth Street east. The garage is located on the northeast part of the property.

Defendants, in October 1944, became the owners of the property located immediately to the north of appellant's property. It is described as the north 21.92 feet of Lot 55 and south 21.92 feet of Lot 56, Rees Place, an addition to the city of Omaha. On this property is located a duplex in which appellees make their home.

The lots are approximately 140 feet in depth from west to east and face west on Twenty-eighth Street. The

duplex on appellees' property is located 4 feet north of their south lot line and immediately to the south of the duplex was a 3 foot 6 inch cement sidewalk. In April 1953 appellees put in a fence along the boundary line from a point about in line with the east side of appellant's house and extending east 71.7 feet to within about 12.5 feet of the back of their property. This fence consists of a cement base in which are set steel posts, the fence being woven wire. Later, in October 1953, appellees widened the sidewalk south of their duplex some 5 to 6 inches. Appellant contends both of these improvements encroach on her property and interfere with her rights, especially the use of her driveway just north of her home. In connection with widening the sidewalk appellees removed a section of fence, about 9 feet 6 inches in length, from a post supporting an archway located across the sidewalk at the southwest corner of their duplex. Because of the sidewalk being widened appellant contends this was also in violation of her rights. We will discuss the factual situation in more detail as we deal with the several contentions appellant makes.

While this is an action primarily for the purpose of establishing a boundary line under section 34-301, R. R. S. 1943, we have said of this statute that it: "* * * is broad enough to, and does, authorize action in equity to determine boundaries of real estate, the ownership of which is in whole or in part in dispute." McGowan v. Neimann, 139 Neb. 639, 298 N. W. 411.

Although appellant testified she and her family have never occupied more than to their lot lines and only want to occupy the land they own, the fact is, particularly in relation to the driveway as it passes between the houses, she herein claims more than to her lot line by virtue of adverse possession. In regard to this claim we have said: "The plea of title to land by adverse possession must be proved by actual, open, exclusive and adverse possession under claim of ownership for the full

statutory period of ten years." McGowan v. Neimann, 144 Neb. 652, 14 N. W. 2d 326.

"The possession must not only have been actual, open, and continuous, but it must have been accompanied by an intention on his part to hold the land as the owner of it. It must have been under a claim of ownership." Colvin v. Republican Valley Land Assn., 23 Neb. 75, 36 N. W. 361, 8 Am. S. R. 114. See, also, Knight v. Denman, *supra*.

The most that can be said of appellant's testimony in this regard is that occasionally the wheels of cars and trucks using her driveway would get onto the area between the south edge of appellees' sidewalk and their lot line. We do not think adverse possession can be based on such occasional acts of trespass. Knight v. Denman, *supra*.

Appellant contends, because the original sidewalk south of the duplex was only constructed 3 feet 6 inches wide when, in 1922, it was put in by the original owners of both properties, Benson and Carmichael, and then left in that condition until October 1953, that there has been a recognition of and acquiescence in her ownership of 5 to 6 inches south of this sidewalk to the boundary line. See McGowan v. Neimann, 144 Neb. 652, 14 N. W. 2d 326. We do not think an owner of property recognizes and acquiesces in the ownership by his neighbor of any part of his property merely because, in constructing a sidewalk near the edge of his property, he does not extend it to his property line. An owner of real property can put a sidewalk on his land wherever he pleases and by doing so does not thereby recognize a relinquishment to his ownership of any part of the property outside thereof.

On the west 27.9 feet of the boundary line appellant had built a white picket fence. This was done in 1939. The east end of this fence had been nailed to a post on appellees' land. The post was the outer support of an archway built over the sidewalk south of the duplex

at the southeast corner thereof. The outer edge of this post is on the property line. In October 1953 appellees unfastened this fence from the post and, by extending the sidewalk out to the property line, made it impossible to refasten the fence to the post in the identical manner in which it had been. In this respect appellant claims an easement which she had has been interfered with. We have defined an easement as follows: "An easement is usually defined as a right in the owner of one parcel of land, by reason of such ownership, to use the land of another for a special purpose not inconsistent with the general property right of the owner." Paloucek v. Adams, 153 Neb. 744, 45 N. W. 2d 895.

In regard to an easement we have said: "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 findings so made." Paloucek v. Adams, *supra.*

While appellant can maintain this fence on her property we do not think, by what had been done, she could require appellees to forever refrain from making any changes on their property. In other words, she could not compel appellees to keep this post available in an identical status merely so she could keep this fence fastened thereto.

Appellant contends the fence built by appellees interferes with what has been the drain of waters toward the rear of these properties. The evidence shows this drainage is surface waters. See Courter v. Maloley, 152 Neb. 476, 41 N. W. 2d 732.

Of surface waters we have said: "In this jurisdiction it is a general rule that surface waters may be controlled by the owner of the land on which they fall, or originate, or over which they flow and he may refuse to receive any that falls, or originates, or flows on or over adjoining land. His right in this respect however must be so exercised as not to unnecessarily or negligently cause injury to the rights and property of

others. Jorgenson v. Stephens, 143 Neb. 528, 10 N. W. 2d 337; Snyder v. Platte Valley Public Power and Irrigation District, supra (144 Neb. 308, 13 N. W. 2d 160, 160 A. L. R. 1154)." Courter v. Maloley, *supra*.

Also that: "As to surface waters he may set up works so as to prevent their entry upon his land provided that he is free from negligence in the construction of the works even though damage to an adjoining landowner may be an incident thereof." Courter v. Maloley, *supra*.

And an easement for the flow thereof cannot be obtained by prescription. Courter v. Maloley, *supra*. Consequently appellees had a right to do what they did, even though it affected the flow of this surface water, as long as what they did was on their own land and not negligently done.

We come then to the actual boundary line itself. If the survey made by Ostrom for the appellees is correct, then none of the things done by appellees extend over onto appellant's property. However, if the survey made by Thomas for appellant is correct then the cement base of the fence at its west end extends 1.2 inches onto appellant's property and at the east end 3.6 inches. If this is true, and appellant has established it, then, of course, she is entitled to an order requiring appellees to remove the fence to the extent it encroaches on her property.

Rees Place addition was originally surveyed and platted in 1882. It consisted of 8 lots numbered 53 to 60. Each lot was 66 feet wide and 140 feet in length. They faced west on Twenty-eighth Street. The area between Twenty-seventh and Twenty-eighth Streets was apparently a ravine or draw some 30 feet in depth. Nothing was done with this property until 1922 when it was all owned by Benson and Carmichael. They had it resurveyed by Meuntefering but because some of the area had been filled in and due to the passage of time none of the stakes set out at the time of the original

survey in 1882 could be found. Consequently Meunteferíng had to make a resurvey and set out new stakes.

Benson and Carmichael decided to develop the addition. In doing so they increased the number of lots from 8 to 12, although they retained the old numbers. Stakes were set out to mark the corners of the new lots. The amount of ground in the addition was found to be slightly deficient as compared to what was shown on the original plot so the new lots were established at a width of 43.84 feet at the west end on Twenty-eighth Street and 43.87 feet on the east end or at the alley. These lots were improved by Benson and Carmichael and then sold on the basis of the resurvey. The foregoing is the background for the description contained in both appellees' and appellant's deeds.

Both Ostrom and Thomas tried to perpetuate Meunteferíng's resurvey accepting that as what should be used. They both found the stake at the west property line but neither could find the one at the back or east property line. Consequently both set new stakes and these are 6 inches apart and give rise to the difficulties here. Ostrom's stake, which was set 6 inches south of that subsequently set by Thomas, was used by appellees. According to it everything appellees did was constructed on their property. However, according to the Thomas resurvey the base of the fence made the encroachments already referred to.

Thomas testified they did the best they could but admitted there could be error in the resurvey he made as no one making a resurvey can be sure of exactly relocating the original markings; that such a resurvey could, depending upon the conditions under which it was made, be off as much as 3 inches; and that it is difficult to relocate such a corner, therefore he could not be positive whether his or Ostrom's resurvey is correct. Since appellant must depend upon the strength of her claim we do not think she has made a case. There is another significant fact appearing on the survey plat

made by Thomas. If Ostrom's survey is correct then the duplex on appellees' property was originally constructed square with the south property line, if Thomas' survey is correct, it was not. Taking the evidence adduced by the appellant to establish the boundary line in its best light we do not think it establishes the survey of Ostrom to be wrong and that of Thomas right, nor do we think it establishes any encroachment by appellees on the appellant's property by reason of the improvements they made.

Having come to the foregoing conclusions we affirm the action of the trial court.

AFFIRMED.

MINNIE E. DRYER, APPELLANT, V. EUGENE H. MALM ET AL., APPELLEES.
77 N. W. 2d 804

Filed July 6, 1956. No. 33974.

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 to have the benefit of every inference which can reasonably be deduced from the evidence.
2. ———. In an action wherein there is any evidence which will support a finding for a party having the burden of proof, the trial court cannot disregard it and direct a verdict against him.
3. **Negligence: Trial.** In a case where different minds may reasonably draw different conclusions or inferences from the adduced evidence, or if there is a conflict in the evidence as to whether or not the evidence establishes negligence or contributory negligence, and the degree thereof, when one is compared with the other, such issues must be submitted to a jury.
4. **Negligence.** Proximate cause, as used in the law of negligence, is that cause which in a natural sequence, unbroken by any efficient intervening cause, produces the injury, and without which the accident could not have happened.
5. **Automobiles: Negligence.** As a general rule it is negligence

as a matter of law for a motorist to drive an automobile on a highway in such a manner that he cannot stop in time to avoid a collision with an object within the range of his vision.

6. ———: ———. Exceptions to the general rule are situations where on streets or highways the nature of the object or its condition or color in relation to the street or highway may be such as to affect immediate visibility.

7. ———: ———. Exceptions do not extend to that which is clearly seen or in the exercise of ordinary care would or should have been seen.

8. ———: ———. In a negligence case the sudden emergency rule cannot be invoked by a party unless there is competent evidence to support a conclusion that a sudden emergency actually existed, unless the party invoking it has not brought the emergency on by his own act, and unless he has used due care to avoid it.

APPEAL from the district court for Cheyenne County: ISAAC J. NISLEY, JUDGE. *Affirmed.*

James L. Thorpe and *George T. Burr,* for appellant.

Martin, Davis & Mattoon, 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 Minnie E. Dryer, plaintiff and appellant, against Eugene H. Malm and Joe Vetchek, defendants and appellees. The first cause of action is for damages for personal injuries which the plaintiff claims were caused by the negligence of the defendants. The second cause of action is for hospital and miscellaneous expenses incurred by H. G. Dryer, the husband of plaintiff, in the care and treatment of plaintiff, which it is claimed were made necessary by the negligence of the defendants. The claim for these expenses was duly assigned to plaintiff.

The case came on for a trial to a jury. At the conclusion of plaintiff's evidence, the defendant Malm made a motion for dismissal of plaintiff's petition or in the alternative that a verdict be directed in favor of the defend-

ant and against the plaintiff. The motion to dismiss was sustained and judgment was rendered accordingly. The plaintiff filed a motion for new trial which was overruled. From the judgment and the order overruling the motion for new trial the plaintiff has appealed.

The motion to dismiss was predicated upon the contention of the defendant Malm that the evidence failed to establish the causes of action in favor of the plaintiff. The plaintiff asserts as ground for reversal that the court erroneously so found. This contention requires an analysis of plaintiff's first cause of action and the evidence in support thereof. The second cause must stand or fall with the first.

By her petition the plaintiff alleged, to the extent necessary to state here, that on February 4, 1954, at about 9:15 a. m., she was driving a 1951 Oldsmobile sedan in a westerly direction in a careful manner about 11 miles north and east of Dalton, Nebraska, on a graveled county road in Cheyenne County, Nebraska; that she passed over a knoll and as she did so she saw that to the west the entire roadway and the borrow pits on both sides were completely blocked with sheep; that she applied the brakes of the automobile and swung it to the north edge of the road and, seeing that she could not drive safely through the flock of sheep, she pulled to the left or south edge of the road and into the ditch where the automobile turned over and she was thrown out and injured; and that the accident was the result of negligence of the defendant Eugene H. Malm, owner of the sheep, and the defendant Joe Vetchek, the agent and servant of Malm, who was tending the sheep, in allowing them to block the highway. The particular specifications of negligence are that the flock of sheep were allowed to block the highway in such manner as to endanger the life and limb of motorists lawfully on the highway; in failing to warn motorists lawfully on the highway of the blockade caused by the sheep; and in permitting the sheep to be on the highway when by

the exercise of ordinary care they knew or should have known that injury and damage would be the natural and probable consequences of the sheep being at large on the highway.

The defendant Malm filed an answer to the petition. There was no answer by the other defendant and no information in the transcript to indicate that the other defendant was brought into the case by service of process, so for the further purposes of this opinion Malm will be treated as the only defendant.

By answer the defendant admitted that the plaintiff had an accident but denied that negligence on his part or on the part of Vetchek was the cause. He further alleged that the proximate cause was negligence of the plaintiff which was more than slight. The negligence with which the plaintiff was charged was that she was driving at a high, dangerous, and excessive rate of speed while approaching and passing a hill crest contrary to the laws of Nebraska; that she failed to decrease her speed or to stop when she saw or should have seen the sheep after passing over the crest of the hill; that she failed to have or maintain her vehicle under proper control; that she failed to keep a reasonable lookout ahead; and that she failed to operate her vehicle in such a manner and at such a speed as to be able to stop within the range of her vision.

By reply the plaintiff generally denied the charges of negligence made against her. With the pleadings in this state the case went to trial.

In a determination of whether or not a motion for directed verdict or dismissal should be sustained certain principles are of controlling importance.

One is: "A motion for 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." Fick v. Herman, 159 Neb. 758, 68 N. W. 2d 622. See, also, Stark v. Turner, 154 Neb. 268, 47 N. W. 2d 569; Behrens v. Gottula, 160 Neb. 103, 69 N. W. 2d 384; Cook Livestock Co., Inc. v. Reisig, 161 Neb. 640, 74 N. W. 2d 370.

Another is: "In an action where there is any evidence which will support a finding for a party having the burden of proof, the trial court cannot disregard it and direct a verdict against him." Stark v. Turner, *supra*. See, also, Haight v. Nelson, 157 Neb. 341, 59 N. W. 2d 576, 42 A. L. R. 2d 1; Parsons v. Cooperman, 161 Neb. 292, 73 N. W. 2d 235; Davis v. Dennert, 162 Neb. 65, 75 N. W. 2d 112.

Another is: "Where different minds may reasonably draw different conclusions or inferences from the adduced evidence, or if there is a conflict in the evidence, as to whether or not the evidence establishes negligence or contributory negligence, and the degree thereof, when one is compared with the other, such issues must be submitted to a jury." Pierson v. Jensen, 150 Neb. 86, 33 N. W. 2d 462. See, also, Thomison v. Buehler, 147 Neb. 811, 25 N. W. 2d 391.

Still another is: "Proximate cause, as used in the law of negligence, is that cause which in a natural and continuous sequence, unbroken by any efficient intervening cause, produces the injury, and without which the accident could not have happened." Anderson v. Byrd, 133 Neb. 483, 275 N. W. 825. See, also, Shupe v. County of Antelope, 157 Neb. 374, 59 N. W. 2d 710; Ambrozi v. Fry, 158 Neb. 18, 62 N. W. 2d 259; Ricker v. Danner, 159 Neb. 675, 68 N. W. 2d 338.

The evidence viewed in the light of these rules discloses that the plaintiff came from the east over an elevation in a well-maintained gravel road with which she was familiar at a speed of 55 miles an hour or more but not in excess of 60 miles an hour. The road descended to the west. The rate of descent is not disclosed

but from exhibits it does not appear to be great. As she came over the elevation she had an open and unobstructed view of at least a half mile to the west. At the elevation she saw that the road over its entire width and across the borrow pits on both sides was blockaded by a flock of sheep estimated by her to be about 1,800. She was at the time about 400 feet to the east. She did not slacken the speed of the automobile and did nothing else to protect her safety or to avoid running into the blockade until she had traveled a distance of about 287 feet westward at which time she turned and went partly off the gravel to the right but came back on about 60 feet farther on, then crossed the road, and left it on the left side about 379 feet west of the elevation and 10 or 12 feet east of the blockade. Whether or not she attempted to slacken speed at the point 287 feet west is not made clear. She testified to the effect that she may have done so. Her best recollection was that she applied brakes when she started southwest across the road. That point was about 347 feet west of the elevation. Thus, according to her testimony, the first precautionary step in the interest of her own safety was taken when she was within a little more than 100 feet of the barricade of which she had been fully cognizant for almost 300 feet.

The theory of the motion for directed verdict or for dismissal was two-fold. The first was that the evidence was insufficient in proof that negligence of the defendant was the proximate cause of the accident. The second was that the evidence disclosed affirmatively that the plaintiff was guilty of contributory negligence more than slight which as a matter of law defeated her right to recover.

Neither the ruling on the motion nor the journal entry dismissing the action discloses the theory adopted by the trial court in dismissing the action but the parties have presented the case here on the latter of the two theories and since the case may be properly and fully

disposed of by a consideration of that theory no consideration will be given to the other.

The issue then, as is apparent, is that of whether or not on the facts as outlined the plaintiff was guilty of contributory negligence which was a proximate cause of the accident and which negligence was as a matter of law more than slight.

The question here must be considered in the light of the following rule: "As a general rule it is negligence as a matter of law for a motorist to drive an automobile on a highway in such a manner that he cannot stop in time to avoid a collision with an object within the range of his vision." Greyhound Corp. v. Lyman-Richey Sand & Gravel Corp., 161 Neb. 152, 72 N. W. 2d 669. See, also, Redwelski v. Omaha & C. B. St. Ry. Co., 137 Neb. 681, 290 N. W. 904; Mundy v. Davis, 154 Neb. 423, 48 N. W. 2d 394; Fridley v. Brush, 161 Neb. 318, 73 N. W. 2d 376; Guerin v. Forburger, 161 Neb. 824, 74 N. W. 2d 870.

The general rule has its exceptions which must also be considered. The exceptions embrace conditions under which reasonable minds may differ as to whether or not the driver was able to see in the exercise of ordinary care the situation with which he was confronted. The appropriate test has been fairly summarized as follows: "However, on unlighted streets and highways, and those lighted but where the light is obstructed, we have made exceptions to this general rule when the nature of the object or its condition, such as color, dirt, et cetera, in relation to the highway or road, affected its immediate visibility or when, because of the lights of oncoming traffic, the driver's attention is distracted or his vision impaired and his opportunity for immediate discernment thereby affected." Buresh v. George, 149 Neb. 340, 31 N. W. 2d 106.

The facts as disclosed bring this case clearly within the general rule and not any exception. The plaintiff had an unobstructed view of and saw the complete blockade about 400 feet away and did nothing whatever

in the interest of her own safety until she had traversed at a high rate of speed well over one-half of that distance. It became her duty in the light of what she admittedly knew and saw, in the exercise of ordinary care, to so operate her automobile as to bring it under control and avoid such an eventuality as befell her.

The plaintiff contends that from this duty a jury could properly say that she was excused on the ground that she was confronted by a sudden emergency.

The sudden emergency rule is not applicable to a situation such as has been presented by the facts of this case. The controlling principle is the following: "The emergency rule cannot be successfully invoked by either party in a negligence case unless there is competent evidence to support a conclusion that a sudden emergency actually existed, and then it cannot be successfully invoked by one who has brought that emergency upon himself by his own acts or who has not used due care to avoid it." Roby v. Auker, 149 Neb. 734, 32 N. W. 2d 491. See, also, Davis v. Dennert, *supra*.

The sudden emergency here, if there was one, was brought about by the failure of plaintiff to use due care to avoid it.

The conclusion reached is that the district court committed no error in dismissing the action of the plaintiff. The judgment is affirmed.

AFFIRMED.

MINNIE W. FIREBAUGH, APPELLEE, V. FRANK E. FIREBAUGH, APPELLANT.

77 N. W. 2d 891

Filed July 6, 1956. No. 33977.

1. **Divorce: Appeal and Error.** It is the duty of this court, on appeal of proceedings to modify a decree of divorce, to try it de novo on the record and to reach a conclusion uninfluenced by what was done by the trial court, except if there is irrecon-

cilable conflict in the evidence the court may consider that the trial court saw the witnesses and accepted one version of the facts.

2. **Divorce.** The district court may at any time within 6 months of the trial and decision of a divorce case, if no appeal is taken therefrom, vacate or modify the decree therein.
3. ———. The right to vacate or modify a decree of divorce within 6 months of the trial and decision of the cause is not absolute but must be exercised within a sound discretion.
4. ———. In order that it may be said that the court exercised a sound judicial discretion in vacating or modifying a decree of divorce good reason therefor must be shown and it must also appear that such action did not produce an unconscionable result.

APPEAL from the district court for Lincoln County: ISAAC J. NISLEY, JUDGE. *Affirmed.*

William S. Padley, for appellant.

Sam S. Diedrichs and *Baskins & Baskins*, for appellee.

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

BOSLAUGH, J.

This cause concerns proceedings instituted by appellee to modify a decree of divorce and to have an award of permanent alimony made to her. The relief was sought by petition filed in the divorce case less than 6 months after its trial and decision. The decree was rendered April 5, 1955. The petition to modify it was filed September 28, 1955.

Appellee was awarded an absolute divorce by decree of the district court of Lincoln County April 5, 1955. It provided that appellee should have as her property the household goods and furniture then in the home of the parties except the floor covering in the dining and living room. The floor covering and the tools and personal effects of appellant were assured to him as his property and he was adjudged to pay the costs of the action including $150 awarded appellee as compensation of her attorney in the case. The property given

appellee had a value of $20. The appellant by fraud and deception overreached and fraudulently persuaded appellee to accept an unfair and unjust settlement.

The parties were divorced by decree of court September 11, 1952. There was awarded thereby to appellee $1,261.17 and she received payment thereof September 19, 1952. Appellant induced appellee to place in his custody $1,141 of the amount she received by representation and promise that appellant would buy a designated property in North Platte, have it conveyed jointly to the parties to this cause, and they would thereafter resume a marital relationship. Appellant used the money appellee gave him to purchase the property and had the title thereto conveyed to his son by a prior marriage, in violation of his obligation and promise to appellee and with the purpose and intention of defrauding her. Appellee did not disclose the facts recited above during the litigation resulting in the decree of April 5, 1955, because of the repeated false and fraudulent representations, request, and assurance of appellant that she should not do so; that if she refrained from doing so he would recompense appellee for the amount involved by assisting her in getting into a business of her own; and that he caused her to believe by his conduct and statements that they would again live together as man and wife. She believed, relied, and acted upon the statements and inducements of appellant. Appellee asked that the decree of April 5, 1955, be modified and that she be awarded from appellant $1,141 with interest from the date she surrendered the money to appellant.

Appellant denied the charges made by appellee; and alleged that appellee waived alimony and division of property except as set forth in the decree of April 5, 1955; that he received no amount from her on September 19, 1952, or at any time; that he made no promise to appellee at any time incidental to the decree of April 5, 1955; that he was represented and acted only by his

counsel concerning all matters in that litigation; and that he did not promise to purchase property and place the title in the joint names of the parties.

The trial court found generally for appellee; that the allegations of the petition for modification of the decree of April 5, 1955, were true; that appellant received from appellee $1,141 on September 19, 1952, in the manner and for the purpose stated in the petition; that appellant practiced fraud upon appellee to induce and cause her not to mention to her counsel the facts concerning the money she furnished appellant; that he caused appellee to refrain from having that matter pleaded, investigated, and adjudicated in the cause decided by the decree; and that the decree of April 5, 1955, should be modified by inserting therein the requirement that appellant pay the appellee $1,141 with interest thereon at 6 percent per annum from September 20, 1952, or a total sum of $1,362 in addition to the requirements of the original decree. A decree was rendered in accordance with the findings. This appeal challenges the correctness of the findings and decree of the trial court.

The parties to this case were first married November 26, 1951, at Burley, Idaho. They were divorced by decree rendered September 11, 1952. They lived together again from about 3 weeks after the divorce decree until sometime in February 1954. They were married the second time in that month. The decree sought to be modified by the pending proceeding was rendered April 5, 1955, in an action commenced by appellee January 11, 1955.

The parties agree that the amount appellee received by the decree in the first divorce case was $1,261.17. This was paid to her September 19, 1952. The amount appellee gave appellant was $1,141. There are some general statements made from memory that do not wholly agree with these amounts but they are conceded by the parties to be correct and they were found by the trial court. Appellee gave the appellant money

because they planned to buy property. He was employed by the Union Pacific Railroad Company and was making $600 per month. He said he would buy a lot and a barracks building with the money she gave him. The parties talked with a real estate firm about buying a lot. They were taken to view a lot. They examined it and talked about how they were going to build a house by the use of the material they had bought at Kearney. They went out to look at the property at North Platte three or four times and they went to Kearney several times in connection with the barracks property purchased. The property they examined in North Platte was purchased by appellant and the title was taken in the name of his son by a prior marriage. A house was constructed thereon and the parties were living there at the time of the divorce. Appellant claims that the property was bought with money of his son. Appellee first knew of this claim when it was stated in the divorce case. She thinks that she first learned that the title to the property was taken in the name of the son of appellant in June of 1954.

Appellee did not present the facts about the money she gave appellant, the representations made concerning it, and the facts about the property which he bought, improved, and put in the name of his son because she believed, relied, and acted upon the statements, requests, and representations of appellant that if appellee would drop everything and not insist on anything in the divorce case he would make up to her what he owed her—meaning the money she gave him and referred to by her as $1,200; that he would help her start up in business; that he wanted her to come and live with him after she got the divorce; that the night before the decree was rendered in the last divorce case he urged her to drop everything and he would make it up after the divorce; and that at one time he told appellee that they would finish the house and when Bill, his son, came back he would do something about the title so that

they could both own it jointly because it was their money that bought the barracks and property. She testified she believed and relied upon what appellant said. She talked with appellant weeks after the divorce case was heard and she learned that he had no intention of doing anything for her. He then claimed that she did not give him any money but he asked her to live with him without being married and she refused. She believed until this time that he would respect his promises. She after that commenced this proceeding.

The pastor of the First Methodist Church of North Platte had known the parties for about 3 years and he testified that appellant had talked with him on occasions about the disagreements between him and appellee. Appellant in September 1952, probably about September 20, came to see the witness and told him he had made a financial settlement with his wife and that she had given him back some money. Appellant produced bills from his pocket and said there was $1,200 that his wife gave him to keep for her. A few days later while appellant and the witness were talking, appellee arrived. She and appellant argued. She asked him for the money. He pleaded ignorance of what she was talking about. The witness asked appellant why he did not give appellee the money appellant had shown the witness. Appellee left and appellant complained to the witness that he had betrayed the confidence of appellant.

A saleswoman for a real estate firm said she had negotiations with appellant concerning the sale of property. Appellee and appellant were in the office about three times and the saleswoman took them to examine the property. They told her about the barracks they bought and that they were going to build a house. Appellant told the saleswoman when they were alone and appellee was not present he was buying the property for his boy. There is no evidence that appellee was present when the deal was closed, and the conveyance was

made and delivered to appellant in which his son was named as grantee.

The proof offered by appellant is a denial of all the material evidence produced by appellee. The evidence of each of the parties contains improbabilities. The explanations of appellant are evasive and far from convincing. He attempted to avoid many situations by denial or the assertion that he did not remember. He claims his son sent him the money to buy the property in North Platte discussed above but appellant could not say how it was sent, how much, or on how many occasions. It was not deposited in any customary manner so that there is a record. Appellant said when he got the money he put it in a hole under a dead tree about 7 miles from North Platte. There is evidence he had an account in the First National Bank at North Platte. This illustrates the character of the testimony of appellant.

The evidence conflicts. The court heard and observed the persons as they testified. A greater part of the evidence is oral. This appeal must be tried in this court de novo upon the record. The manner of the consideration of cases of this character in this court has often been stated and will not be repeated. Shepardson v. Chicago, B. & Q. R. R. Co., 160 Neb. 127, 69 N. W. 2d 376; Bahm v. Raikes, 160 Neb. 503, 70 N. W. 2d 507.

The district court may at any time within 6 months of the trial and decision of a divorce case, if no appeal has been taken within 1 month therefrom, vacate or modify the decree therein. § 42-340, R. R. S. 1943; Pittman v. Pittman, 148 Neb. 864, 29 N. W. 2d 790; Roberts v. Roberts, 157 Neb. 163, 59 N. W. 2d 175. The right of the court to vacate or modify a decree of divorce within 6 months of the rendition is not an absolute one but must be exercised within a sound discretion. The discretion must be supported by good reason and the result produced may not be unconscionable. In Pittman v. Pittman, *supra,* it is said: "No decree of divorce

shall become final or operative until six months after trial and decision except for purposes of review. * * * In a divorce action if no appeal shall be taken within three months (now 1 month) from trial and decision the court may within six months vacate or modify the decree. * * * The right to vacate or modify a decree of divorce within six months is not absolute but must be exercised within a sound discretion. * * * In order that it may be said that the court exercised a sound judicial discretion in vacating or modifying a decree of divorce good reason therefor must be shown and it must also be shown that such action would not produce an unconscionable result." See, also, Shinn v. Shinn, 148 Neb. 832, 29 N. W. 2d 629, 174 A. L. R. 510; Roberts v. Roberts, *supra;* Arent v. Arent, 159 Neb. 347, 66 N. W. 2d 813; Kasai v. Kasai, 160 Neb. 588, 71 N. W. 2d 105; Moran v. Moran, 161 Neb. 372, 73 N. W. 2d 709.

It may not be concluded that the trial court abused its discretion in the modification made by it in the decree of divorce involved in this cause.

The judgment of the district court should be and it is affirmed. Appellee should be and is allowed as compensation of her counsel in this case the sum of $150, to be taxed as costs, and all costs of appeal should be and they are taxed to appellant.

AFFIRMED.

STATE OF NEBRASKA EX REL. THE SCHOOL DISTRICT OF SCOTTSBLUFF ET AL., APPELLEES, V. P. COOPER ELLIS, COUNTY TREASURER OF SCOTTS BLUFF COUNTY, NEBRASKA, ET AL., APPELLANTS, IMPLEADED WITH SCHOOL DISTRICT NO. 2 ET AL., APPELLEES, STATE OF NEBRASKA EX REL. THE CITY OF SCOTTSBLUFF ET AL., INTERVENERS-APPELLEES.
77 N. W. 2d 809

Filed July 6, 1956. No. 33985.

1. **Officers.** A county treasurer is considered a ministerial officer. However, he may be vested with power and authority of a

quasi-judicial character without affecting the general classification of a ministerial officer.

2. ———. The character of a duty as ministerial or discretionary must be determined by the nature of the act to be performed, and not by the office of the performer.

3. ———. When the law, in words or by implication, commits to any officer the duty of looking into facts, and acting upon them, not in a way which it specifically directs, but after a discretion in its nature judicial, the function is termed quasi-judicial.

4. **Officers: Taxation.** A county treasurer is not personally liable in a civil action brought to recover funds paid in lieu of taxes by a public power district, a public corporation, when such officer is required to determine facts and construe a statute to enable him to distribute such funds. He is, under the circumstances, exercising judgment and discretion and performing a quasi-judicial act.

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, for appellees.

Jack E. Lyman and *Neighbors & Danielson,* for interveners-appellees.

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

MESSMORE, J.

This is the second appearance of this case in this court. Our opinion in the first appeal will be found at 160 Neb. 400, 70 N. W. 2d 320. Therein this court reviewed the decree rendered in the disposition of three actions which were consolidated by the trial court. The purpose of the action was to have interpreted and declared the proper method for allocation and distribution under section 70-653, R. R. S. 1943, of funds received by P. Cooper Ellis, the county treasurer of Scotts Bluff County, from Consumers Public Power District under the provisions of section 70-651, R. R. S. 1943.

To identify the three actions consolidated as aforesaid, the first was 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 charged 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 was to recover the funds with interest and attorney's fees.

The second action was 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 was the same as that in the first action and the kind and character of relief prayed for was the same.

The third action was brought by the county treasurer against the County of Scotts Bluff and all other taxing subdivisions in the county entitled to share in the in lieu of tax payments (except the plaintiffs and intervener city of Scottsbluff in the cases above designated) made by Consumers Public Power District. This action set forth the three interpretations made by the plaintiffs, the intervener city of Scottsbluff, and the county treasurer, and was for a construction of section 70-653, R. R. S. 1943.

By order of the court, the State of Nebraska intervened in this action, as did also Consumers Public Power District.

In the year 1942 the Consumers Public Power District, a public corporation and political subdivision of the State of Nebraska, 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.

Sections 70-651 and 70-653, R. R. S. 1943, furnished the basis for all matters in dispute on the first appeal of this case. Said sections provide as follows:

"Whenever any such district shall purchase or ac-

quire 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 occupational 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." § 70-651, R. R. S. 1943.

"All sums of money to be paid by such districts in lieu of taxes shall be paid at the times, places, and to the tax-collecting officers, as now or may hereafter be provided by law for the payment of taxes, as long as such district shall continue to be the owner of such property, and such tax-collecting officers are hereby authorized and 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." § 70-653, R. R. S. 1943.

This court in our former opinion interpreted the aforementioned sections of the statute as follows: 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 ob-

ligation and the obligations of the contract entered into pursuant to the statute.

Under the clear language of the statute, section 70-651, R. R. S. 1943, if Consumers acquired property in the 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.

This court went on to say: "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."

The funds here involved 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 held that they were so subject.

By the manner in which this court interpreted the foregoing sections of the statute, this court held that as to the first and second actions a new trial should be granted

and conducted in conformity with the opinion. As to the third action, this court held that decree should be rendered in conformity with the opinion, and reversed the judgment and remanded the cause with directions.

On retrial of the actions, the question of the formula to be used in making distribution was not in issue, having been determined by this court in our former opinion.

The record discloses the amounts allocated and distributed by the county treasurer to the junior college of Scottsbluff, the school district of Scottsbluff, and the city of Scottsbluff of the money paid in lieu of taxes by the Consumers Public Power District as provided for by the statutes cited above, and the demands made by these respective parties. The county treasurer testified to the formula he used in making such allocation and distribution. Due to the fact that the formula of distribution is not questioned in this appeal, we deem it unnecessary to set forth this evidence.

The trial court adjudged and decreed that the junior college district of Scottsbluff, the school district of Scottsbluff, and the intervener city of Scottsbluff should have judgments against the county treasurer and his surety in certain amounts with interest, and that the county treasurer and his surety have credit on the various judgments in certain amounts for payments made by the county treasurer to the junior college district, the school district of Scottsbluff, and the city of Scottsbluff. Attorneys' fees were awarded and taxed against the surety of the county treasurer, and all other costs except attorneys' fees were taxed against the county treasurer.

The defendants, P. Cooper Ellis and the National Surety Corporation, filed a motion for new trial which was overruled. Thereafter defendants perfected appeal to this court.

The principal assignment of error made by the appellants, and the one determinative of this appeal, may be stated as follows: The trial court erred in not finding

that the defendant Ellis, in making the distribution complained of, exercised discretion and judgment in the performance of his official duties as county treasurer in determining the facts and interpreting and applying the statutes, and in doing so was exercising a quasi-judicial function, and therefore, the defendant Ellis and his surety company were not liable in any event for any amount.

We now discuss the assignment of error above stated.

At the outset it might be said that a county treasurer is considered to be a ministerial officer performing ministerial duties. See, Jones v. Duras, 14 Neb. 40, 14 N. W. 537; State ex rel. Jordan v. Quible, 86 Neb. 417, 125 N. W. 619, 27 L. R. A. N. S. 531. However, if ministerial officers can perform nothing but ministerial acts, then it is hard to conceive of such officer, for some of the acts of every ministerial officer must require the exercise of judgment and discretion, which is the very antithesis of a ministerial act. The ministerial officer may, therefore, very properly be invested with power and authority of a quasi-judicial character without at all affecting the general classification into which all civil officers are divided. See State v. Loechner, 65 Neb. 814, 91 N. W. 874, 59 L. R. A. 915.

The true test is whether the county treasurer in the instant case was performing a ministerial act or a quasi-judicial act and not whether he was a ministerial officer or a quasi-judicial officer.

It is the county treasurer's contention that he was required to exercise judgment and discretion as distinguished from a purely ministerial act in making the distribution of the money paid in lieu of taxes by the Consumers Public Power District.

In Larson v. Marsh, 144 Neb. 644, 14 N. W. 2d 189, 153 A. L. R. 101, it is said: "A ministerial act has been defined as one performed in response to a duty which has been positively imposed by law and its performance required at a time and in a manner or upon conditions

which are specifically designated, the duty to perform under the conditions specified not being dependent upon the officer's judgment or discretion. Mechem, Public Officers, 442."

From their nature, the powers and duties of public officers are, in general, classified as ministerial and discretionary. The character of a duty as ministerial or discretionary must be determined by the nature of the act to be performed, and not by the office of the performer. Official duty is ministerial when it is absolute, certain, and imperative, involving merely execution of a specific duty arising from fixed and designated facts; that a necessity may exist for the ascertainment of those facts does not operate to convert the act into one discretionary in its nature. See 43 Am. Jur., Public Officers, § 258, p. 74. See, also, Stephens v. Jones, 24 S. D. 97, 123 N. W. 705.

The appellant treasurer asserts that he not only exercised judgment and discretion in the construction, interpretation, and application of a statute, or statutes, but had to exercise that same judgment and discretion in a determination of the basic facts involved, and had to determine the following matters before he could make the distribution: Which of all the taxing entities in Scotts Bluff County were entitled to share in the distribution; the groups of taxing entities entitled to share in the distribution of any particular portion of the sum available; and the particular portions of the sum available which should be distributed among each of the groups of taxing entities entitled to share in such sums.

In other words, the county treasurer is obligated to make an examination of the facts involving the distribution of the money paid by the Consumers Public Power District in lieu of taxes to all the subdivisons of government entitled to receive a proportionate share thereof. These conditions change from year to year and require investigation and interpretation of the facts

and the application of the same to the subject matter involved.

In construing section 70-653, R. R. S. 1943, the treasurer needs to know the total of the sums to be paid by the power district, then there must be a break-down of the total of the sums as to the situs of the property, description of the property, whether real property or personal property, and the amount paid in lieu of taxes. Many other duties pertinent to a determination of this distribution could be set out, but it would unnecessarily lengthen this opinion to do so.

There is no contention but that the treasurer acted in good faith in making the apportionment he did.

Section 70-653, R. R. S. 1943, is an uncertain and ambiguous statute. It does not sufficiently or adequately define with any degree of exactitude the duties of the county treasurer in making distribution of the funds paid in lieu of taxes by the Consumers Public Power District. This is manifest by the first appeal of this case to this court where it was obvious that the school district, the junior college district, the county treasurer, and the trial court failed to arrive at the proper formula by an interpretation of section 70-653, R. R. S. 1943. This is a clear indication of the ambiguousness of this statute.

In addition, the following are applicable.

Allen v. Miller, 142 Neb. 469, 6 N. W. 2d 594, was a law action brought by Allen, one of 27 precinct assessors in Lancaster County, in his own right and as assignee of 26 other precinct assessors, to recover damages from two members of the board of county commissioners of Lancaster County, these two members constituting a majority of the said board. The alleged damages arose because certain warrants, issued on claims duly allowed, were withheld from the plaintiff and his assignors from June 4, 1940, the date the claims were allowed, until February 7, 1941, when the warrants were finally delivered pursuant to a mandate of the Supreme Court.

The alleged damages consisted of the interest on each warrant between the dates mentioned. This court said that the question narrowed down to whether the two county commissioners, in voting to hold up the delivery of these several warrants, were performing a ministerial act, in which no discretion was involved, or whether it was a judicial act. It appeared that the problem presented to the county board was to decide a disputed question of what was meant by a day, which might be a day of 8 hours, as in some labor contracts, or a calendar day, and was definitely a judicial question for the board to determine. This court said: "This court agrees with the trial court in finding that the question of how a certain statute should properly be construed by the county board was not a ministerial act, but was clearly a quasi judicial act, * * *."

"A public officer is not liable to an action if he acts unwisely in a matter wherein it is his duty to exercise judgment and discretion, even though a private person may be damaged thereby." Harmer v. Petersen, 151 Neb. 412, 37 N. W. 2d 511. See, also, School Dist. v. Burress, 2 Neb. (Unoff.) 554, 89 N. W. 609.

"The general rule is stated that an administrative officer ("administrative officer" is used interchangeably with "ministerial officer") is not personally liable in a civil action for damages for his error or mistake in making a determination, where he was acting within his jurisdiction, in the honest exercise of his judgment, without bad faith, malice, or corrupt motives, in a judicial or quasi-judicial capacity, or in a capacity which was not merely ministerial but one in which it was his duty to exercise judgment and discretion. * * * The rule of immunity protects an officer from liability for a mistake of fact or an erroneous construction and application of the law, or for an error of judgment in the determination of law or fact, including the officer's duties under the law. * * * Exemption from liability is unaffected by any subsequent reversal or correction

of the administrative judgment." 42 Am. Jur., Public Administrative Law, § 257, p. 705.

When the law, in words or by implication, commits to any officer the duty of looking into facts, and acting upon them, not in a way which it specifically directs, but after a discretion in its nature judicial, the function is termed quasi-judicial. See State v. Loechner, *supra.*

In Keifer v. Smith, 103 Neb. 675, 173 N. W. 685, the Legislature had created a stallion registration board whose duty it was to pass upon pedigrees and to license stallions for breeding purposes either as purebreds or grades. The statute made provision for resort to certain specified books in ascertaining whether a pedigree was signed by the proper officers of recognized stud associations, and whether such signatures were genuine. The board would have to make reference to these books. The court said that these acts necessarily involved the examination of evidence and the exercise of judgment. It was held: "In the absence of malice, oppression in office, or wilful misconduct, public officers cannot ordinarily be held liable for mistaken exercise of discretion, or error in judgment, in the performance of official duties."

We conclude that the county treasurer in the instant case was required to determine basic facts in an endeavor to ascertain the manner of the distribution of the money paid in lieu of taxes by the Consumers Public Power District and, in addition, to construe an ambiguous statute. To do these things required the use of judgment and discretion on the part of the county treasurer. We hold that no liability attaches personally to the county treasurer or his surety under the circumstances presented by this record.

In the light of our holding, attorneys' fees are not allowable as against the county treasurer or his surety in this case.

The decree of the district court is reversed and the

cause remanded with directions to enter judgment in conformity with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

OMAHA PARKING AUTHORITY, APPELLANT, V. CITY OF OMAHA, ET AL., APPELLEES.
77 N. W. 2d 862

Filed July 6, 1956. No. 33997.

1. **Constitutional Law: Statutes.** The findings of the Legislature as set out in a declaration of policy contained in an act, while not absolutely controlling, are entitled to great weight in determining the constitutionality of the act.
2. **Municipal Corporations: Statutes.** For the purpose of legislation the Legislature may classify counties and cities when such classification rests upon some difference of situation or circumstance which, in reason, calls for distinctive legislation for the class. The class must have a substantial quality or attribute which requires legislation appropriate or necessary for the counties and cities in the class and which would be inappropriate or unnecessary for those without the class.
3. **Statutes.** The Legislature may classify the subjects, persons, or objects as to which it legislates if such classification rests upon differences in situation or circumstances between the things dealt with in one class and those dealt with in another.
4. **Constitutional Law: Statutes.** When an act does not purport to be amendatory, but is enacted as original and independent legislation, and is complete in itself, it is not within the constitutional requirement as to amendments, though it may, by implication, modify or repeal prior acts or parts thereof.
5. ———: ———. If by a fair and reasonable construction the title calls attention to the subject matter of a legislative bill, it may be said that the object is expressed in the title. It need not be a complete abstract of the contents of the bill.
6. **Municipal Corporations.** A provision of a home rule charter takes precedence over a conflicting state statute in instances of local municipal concern. A state law affecting municipal affairs which is of state-wide concern takes precedence over any municipal action under a home rule charter.
7. ———. The alleviation of congested streets and highways in a city of the metropolitan class by subway and off-street parking is a matter of state concern and not a matter of exclusive local concern.

8. ———. The providing of subway and off-street parking in metropolitan cities is a public function and the facilities provided are for a public use.
9. **Counties.** The state may direct the use, management, and disposition of county property so long as it is done for the benefit of the public in the taxing district.
10. **Municipal Corporations.** The property of a city used in carrying out its governmental as distinguished from its proprietary functions is likewise subject to the control of the state.
11. **Constitutional Law: Municipal Corporations.** The lease of public property to a private person may serve a public purpose. An act of the Legislature authorizing such a lease must provide controls for the manner and method of operation to insure its operation for the public good and not primarily for private gain or for the benefit of a privileged few.
12. ———: ———. A supervisory control of prices to be charged is necessary to a proper leasing of parking facilities under the Parking Authority Law.

APPEAL from the district court for Douglas County: PATRICK W. LYNCH, JUDGE. *Reversed and remanded with directions.*

Wells, Martin, Lane, Baird & Pedersen, for appellant.

Edward F. Fogarty, Bernard E. Vinardi, Neal H. Hilmes, Irving B. Epstein, Herbert M. Fitle, Eugene F. Fitzgerald, John C. Burke, and *August Ross,* for appellees.

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

CARTER, J.

This is an action for a declaratory judgment to have the validity of the Parking Authority Law determined. The trial court found the law to be unconstitutional, and the plaintiff, Omaha Parking Authority, has appealed.

The Parking Authority Law consists of sections 14-1701 to 14-1725, R. S. Supp., 1955. It is admitted by the pleadings that the Omaha Parking Authority has been duly established under the provisions of the act. The petition alleges that plaintiff made a request to the city of Omaha for the right to enter upon the streets surrounding the county courthouse site for the purpose of

constructing parking facilities as provided by the law, and that a similar request was made to the county of Douglas to enter upon the courthouse site for the same purpose. The city of Omaha and the county of Douglas refused such requests on the ground that the Parking Authority Law was unconstitutional for the reasons set forth in the pleadings. The petition prays for a declaratory judgment finding the Parking Authority Law to be valid in all respects, for an order requiring the city of Omaha to grant the plaintiff the right to use the streets surrounding the courthouse site, and for an order requiring the county of Douglas to permit plaintiff to use the county courthouse site for the purpose of constructing parking facilities as authorized by the Parking Authority Law.

The city of Omaha contends that the Parking Authority Law is unconstitutional because it is special legislation in that it applies only to the city of Omaha and the county of Douglas. It is contended that the sole purpose of the act is the control of vehicular traffic which is a matter common to all cities and counties of the state. In this connection the act by its terms is made to apply only to cities of the metropolitan class. The term "county" as used in the act means the county in which the parking authority is located and necessarily refers only to counties containing cities of the metropolitan class in which parking authorities have been established by the Governor in accordance with the terms of the Parking Authority Law. Ordinarily the Legislature may properly enact laws applicable to all cities of a given class, even though there is only one city within such class. It is true that the handling of traffic is a problem on all the highways of the state, but to assert that the problem is the same in the congested areas of a metropolitan city as it is in other parts of the state is to ignore plain facts. The declaration of legislative policy contained in the act states that the business districts of metropolitan cities have become congested by the

great number of motor vehicles using the streets and the likelihood of a continued increase, that such traffic congestion has created a hazard to life and property of those using such streets, that there is insufficient space for the parking of motor vehicles on the streets, that off-street parking is required, and that the relieving of traffic congestion in the areas specified by the act is a matter of public welfare, of general public interest, and of state-wide concern in promoting the public safety and convenience. The findings of the Legislature as set forth in the declaration of policy contained in the act, while not absolutely controlling, are entitled to great weight. It is obvious that there is a direct relation between the size of a city and the amount of vehicular traffic using its streets; the larger the city the greater the traffic. It would seem that the Legislature could properly deal with the traffic problems of metropolitan cities without violating Article III, section 18, of the Constitution, prohibiting special legislation. It stands to reason that even if traffic problems existed in cities of other classifications, the remedy may be altogether different. The Legislature may classify the subjects, persons, or objects as to which it legislates if such classification rests upon differences in situation or circumstances between the things dealt with in one class and those dealt with in another. The controlling rule is stated in State ex rel. Cone v. Bauman, 120 Neb. 77, 231 N. W. 693, as follows: "The rule is well established that the legislature may, for the purpose of legislating, classify persons, places, objects or subjects, but such classification must rest upon some difference in situation or circumstance which, in reason, calls for distinctive legislation for the class. The class must have a substantial quality or attribute which requires legislation appropriate or necessary for those in the class which would be inappropriate or unnecessary for those without the class." See, also, Lennox v. Housing Authority of the City of Omaha, 137 Neb. 582, 290 N. W. 451. The legisla-

tion has general application to cities of the metropolitan class and it has none of the aspects of special legislation.

The city contends also that the Parking Authority Law is unconstitutional because it amends Chapter 14, R. R. S. 1943, delegating the control of streets in metropolitan cities to such cities, but does not describe or repeal them. The section of the Constitution relied upon states in part: "And no law shall be amended unless the new act contain the section or sections as amended and the section or sections so amended shall be repealed." Art. III, § 14, Constitution. The plaintiff contends that the Parking Authority Law is complete in itself and is an independent act not subject to the cited constitutional prohibition. The rule is stated in Live Stock Nat. Bank v. Jackson, 137 Neb. 161, 288 N. W. 515, as follows: "The modern rule is: 'Where an act does not purport to be amendatory, but is enacted as original and independent legislation, and is complete in itself, it is not within the constitutional requirement as to amendments, though it may, by implication, modify or repeal prior acts or parts thereof.' 1 Lewis' Sutherland, Statutory Construction (2d ed.) 446, sec. 239." See, also, Peterson v. Hancock, 155 Neb. 801, 54 N. W. 2d 85; State ex rel. City of Columbus v. Price, 127 Neb. 132, 254 N. W. 889.

The Parking Authority Law deals with a new subject, complete in itself. It is original and independent legislation, and is not within the contemplation of the constitutional requirement as to amendments. There is no merit to the contention that the quoted portion of Article III, section 14, of the Constitution, was violated.

The city further urges that the title to the act is defective in that it makes no reference to the fact that the city is required to grant to the authority the right to use the space below the surface of the streets abutting on the courthouse site and that the county is required to grant to the authority the right to use any space below the plot of ground used as a courthouse site and such portion of the surface of such plot not used

for a courthouse located thereon. The title to the act provides: "An Act establishing a Parking Authority; to provide for its formation, termination, and members including ex officio members; to provide for the appointment, tenure of office, duties, compensation, and qualifications of certain of its members; to provide for powers and duties of the authority; to define terms; to permit it to borrow money as prescribed and limited; to provide for issuance of bonds and the procedure therefor; to prescribe a legislative finding and policy; to provide how this act shall be known or referred to; to declare that the provisions of this act shall be complete and in addition to other provisions of the law of the State of Nebraska as prescribed; to provide duties and powers of certain public officials, bodies, or corporations as prescribed; to provide a savings clause; and to declare an emergency." Laws 1955, c. 22, p. 101.

The portion of Article III, section 14, of the Constitution, here relied upon by the city provides: "No bill shall contain more than one subject, and the same shall be clearly expressed in the title." The purpose of this provision limiting a legislative enactment to the object expressed in the title is to challenge the attention of those affected by the provisions of the act and to prevent surreptitious legislation. The rule in this state has been announced by this court to be: "The provisions of * * * the Constitution, should be liberally construed so as to uphold a provision in a legislative act which, though not specifically expressed in the title, is germane to the subject-matter, and comprehended within the objects and purposes, of the act." Pandolfo v. State, 120 Neb. 616, 234 N. W. 483. It is not necessary that the title analyze all the details of the bill. In State ex rel. City of Columbus v. Price, *supra,* we said: "If by a fair and reasonable construction the title calls attention to the subject-matter of the bill, it may be said that the object is expressed in the title." In an earlier case this court stated: "It is not essential that the title chosen by the

legislature be the most appropriate; if it indicates the scope and purpose of the act, it is sufficient. * * * Neither is it necessary that the title inform its readers of the specific contents of the bill. If it indicates the subject of the proposed legislation, it meets all essential requirements. It needs not that it be a complete abstract and epitome of the contents of the bill." Nebraska Loan & Building Assn. v. Perkins, 61 Neb. 254, 85 N. W. 67. See, also, Spier v. Thomas, 131 Neb. 579, 269 N. W. 61. In the case of State ex rel. Graham v. Tibbets, 52 Neb. 228, 71 N. W. 990, 66 Am. S. R. 492, we stated the rule to be: "The purpose of the constitutional provision under consideration, * * * is to give notice, through the title of the bill, to the members of the legislature and the public, of the subject-matter of the projected law,—in other words, that the title should clearly indicate the legislation embraced in the bill. * * * The title to a bill may be general, and it is not essential that it specify every clause in the proposed statute. It is sufficient if they are all referable and cognate to the subject expressed. When the subject is expressed in general terms, everything which is necessary to make a complete enactment in regard to it, or which results as a complement of the thought contained in the general expression, is embraced in and authorized by it. If the subject-matter is within the scope of the title, the constitutional requirement is met." This rule was approved by this court in County of Dawson v. South Side Irr. Co., 146 Neb. 512, 20 N. W. 2d 387. See, also, Lennox v. Housing Authority of the City of Omaha, *supra;* Nebraska Mid-State Reclamation Dist. v. Hall County, 152 Neb. 410, 41 N. W. 2d 397.

The title here involved gave notice that the object and purpose of the act was to provide for the establishment of a parking authority and the procedure provided for its organization. It indicated that terms were to be defined in the act and that the duties of its officers were therein set out. It set forth the general

nature of the powers granted. All parts of the title indicate the general nature of the legislation. Everything in the act is necessary to make a complete enactment in regard to the general nature of the act as expressed in the title. The use of streets for parking purposes and the development of off-street parking is the primary function of a parking authority. The subject matter of the act is within the general scope of the title. This is all that the Constitution requires. The title to the act meets constitutional requirements.

The next contention raised by the city of Omaha is that the Parking Authority Law, even if valid, has no application to the city of Omaha for the reason that it operates under a home rule charter and that the use to which streets, including subway areas, is to be put is a matter of local concern. Under the Constitution a home rule charter must be consistent with and subject to the Constitution and laws of this state. This has been construed to mean that a provision of a home rule charter takes precedence over a conflicting state statute in instances of local municipal concern, but when the Legislature enacts a law affecting municipal affairs which is of state-wide concern, the state law takes precedence over any municipal action taken under the home rule charter. State ex rel. Martin v. Cunningham, 158 Neb. 708, 64 N. W. 2d 465; Axberg v. City of Lincoln, 141 Neb. 55, 2 N. W. 2d 613, 141 A. L. R. 894. The constitutional limitation that a home rule charter must be consistent with and subject to the laws of the state means that on matters of state-wide concern to the people of the state involving a public need or policy, the charter must yield to state law. State ex rel. Fischer v. City of Lincoln, 137 Neb. 97, 288 N. W. 499. It has been held that the construction of a viaduct over a railroad right-of-way within a city is a matter of public concern, and not a local one. Hinman v. Temple, 133 Neb. 268, 274 N. W. 605, 111 A. L. R. 1217. The improvement of streets, alleys, and highways within corporate limits

is ordinarily a strictly municipal matter. Salsbury v. City of Lincoln, 117 Neb. 465, 220 N. W. 827. The levying of assessments for water mains within a city is likewise a matter of local concern. Pester v. City of Lincoln, 127 Neb. 440, 255 N. W. 923. The city of Omaha contends that subway and off-street parking fall in the category of matters of purely local concern.

The state has inherent power to establish, maintain, and control the highways of the state, including those within corporate limits of municipalities. While the Legislature may properly delegate certain powers over streets, alleys, and highways to a municipality, it retains the power to legislate with reference thereto, even in home-rule cities, where a matter of state-wide policy and concern are involved.

City streets are necessarily a part of the highway system of the state. The concentration of traffic in metropolitan cities through which traffic in and out of the city must move is a matter of general rather than strictly local concern. The state is concerned when traffic in a large city becomes congested and interferes with traffic, particularly that which is designated as through traffic. It is of state-wide concern that traffic lanes through congested areas be kept open and that such areas be not permitted to operate as a bottleneck in the free movement of traffic. In order to deal with highway traffic problems of state-wide concern, the state can by legislative action provide the means of alleviating such conditions in the public interest. The choosing of the means and methods of accomplishing such purpose is a legislative function limited only by constitutional prohibitions. Its justification stems directly from the exercise of the police power, the inherent power of government. The major and primary object of the legislation is to facilitate and make safe the use of the highways. It transcends any purely local concern and is one of state-wide interest. The power of a municipality over its streets is statutory and not exclusive. Carlberg v. Met-

calfe, 120 Neb. 481, 234 N. W. 87. It is subject to the superior control of the state except where the Constitution prevents its doing so. There is no such constitutional prohibition where the subject matter is one of state-wide concern.

We think the Parking Authority Law is of general state concern and falls within the reasoning of Axberg v. City of Lincoln, *supra;* Lennox v. Housing Authority of the City of Omaha, *supra;* and Hinman v. Temple, *supra.* The state has not surrendered its inherent powers over highways and highway traffic problems which are of concern to the state generally. It is plain that Article XI of the Constitution contemplated a division between state affairs and municipal affairs of purely local concern. It does not define the laws that relate to each. The court must consider each case as it arises. We approved the following quotation from Helmer v. Superior Court, 48 Cal. App. 140, 191 P. 1001, in the case of Carlberg v. Metcalfe, *supra,* which we think has application here: "Until the advent of the automobile, interurban traffic was so small as to be negligible and, as a result, traffic regulations were a matter of concern only to the inhabitants of the city. But when autos and motor-trucks invaded our highways and streets in tens and hundreds of thousands, a matter that yesterday was local has become of state and nation-wide importance to-day. * * * The term 'municipal affairs' is not a fixed quantity, but fluctuates with every change in the conditions upon which it is to operate."

We conclude that highways and highway control are preeminently a state affair. They concern and affect the whole state. Conditions in a metropolitan city with respect to them concern and affect the whole state even though the remedies for alleviating such congested areas may be altogether different than elsewhere. It is for the law-making body to determine if the authority over highways shall be exercised by county boards and city councils exclusively, or whether it shall act directly

in such matters. We hold that the Parking Authority Law deals with a matter of state-wide concern.

The city next contends that it is in a favored position in the present case because of the history of home rule in Omaha. On July 18, 1922, it adopted its home rule charter. Upon the adoption of its charter the legislative act of 1921 "lost its qualities as a statutory charter or law imposed by the sovereign power of the state, and in lieu thereof, by virtue of an explicit constitutional grant, its terms then existing became a home rule charter created and to be thereafter continued in force at the will of the grantee municipality lawfully expressed, every section of which was expressly made subject to its own lawful amendments." Munch v. Tusa, 140 Neb. 457, 300 N. W. 385. In Sullivan v. City of Omaha, 146 Neb. 297, 19 N. W. 2d 510, on rehearing, 146 Neb. 305, 21 N. W. 2d 510, we construed this to mean that an amendment to the home rule charter adopted on July 18, 1922, will be considered valid even though it involves a matter of state-wide concern until such time as the Legislature shall occupy the field after the adoption of the home rule charter. The Parking Authority Law was enacted subsequent to the adoption of the Omaha home rule charter, consequently the fact that Omaha once had a statutory home rule charter is of no importance in resolving the present litigation.

The county of Douglas asserts in its brief that the state may not take its property or direct its use to the benefit of another public corporation without its consent. It urges that such power does not exist unless it will be to the benefit of the whole taxing district, and that mere incidental benefits do not fulfill the requirements of the law. We are of the opinion that subway parking and off-street parking constitute a public use, and in providing them, a public function is being accomplished. Cleveland v. City of Detroit, 324 Mich. 527, 37 N. W. 2d 625, 11 A. L. R. 2d 171; Lowell v. City of Boston, 322 Mass. 709, 79 N. E. 2d 713; Foltz v. City of

Indianapolis, —— Ind. ——, 130 N. E. 2d 650; City and County of San Francisco v. Linares, 16 Cal. 2d 441, 106 P. 2d 369; Poole v. City of Kankakee, 406 Ill. 521, 94 N. E. 2d 416.

The state clearly has the right to direct the use, management, and disposition of county property so long as it is done for the benefit of the public in the taxing district. State ex rel. City of Omaha v. Board of County Commissioners, 109 Neb. 35, 189 N. W. 639. In the foregoing case the court said: "It must be remembered that a county does not possess the double governmental and private character that cities do. It is governmental only, and in that capacity acts purely as an agent of the state. The funds raised by taxation in the county are subject to the direction and control of the legislature for public use in that county, and the property of the county, acquired by funds raised through taxation, is property of which the state can direct the management and disposition, so long at least as it acts for the benefit of the public in the taxing district." See, also, City of Fremont v. Dodge County, 130 Neb. 856, 266 N. W. 771. The property of a city used in carrying out its governmental functions as distinguished from its proprietary activities is subject to the same rule as other governmental subdivisions. Seward County Rural Fire Protection Dist. v. County of Seward, 156 Neb. 516, 56 N. W. 2d 700; Nickel v. School Board of Axtell, 157 Neb. 813, 61 N. W. 2d 566; State ex rel. School Dist. v. Ellis, 160 Neb. 400, 70 N. W. 2d 320.

The contention that the property to be transferred to the Omaha Parking Authority is not for the benefit of the whole taxing district is without merit. It is a matter of county concern as well as state concern.

The county of Douglas next contends that the Parking Authority Law is unconstitutional in that it provides for the acquisition of public property for a private use. The act contains the following provisions which give rise to the claim that the property is for a private

use: "The authority shall lease or grant concessions for the use of the facilities or various portions thereof to one or more operators to provide for the efficient operation of the facilities. All leases or concessions shall be let on a competitive basis and no lease or concession shall run for a period in excess of thirty years. In granting any lease or concession, the authority shall retain such control of the facilities as may be necessary to insure that the facilities will be properly operated in the public interest and that the prices charged are reasonable." § 14-1711, R. S. Supp., 1955.

The determination of the foregoing question is dependent upon the over-all purposes to be accomplished in the leasing of public property to a private person. If the purposes to be accomplished in leasing parking facilities to a private person remain a public use, the leasing is a proper one. The fact that a lessee might gain some private benefit from the operation of a parking facility does not necessarily alter the public character of its use. Such benefits are merely incidental to the public purpose and do not constitute exclusive benefits for a private few. Poole v. City of Kankakee, *supra*. If the purpose of the leasing of the facilities was to accomplish a private purpose, it would, of course, contravene constitutional prohibitions. We think the statute properly guards against a leasing of the property of the authority for a private purpose. It provides that in leasing any of the property the authority shall retain such control of the facilities as may be necessary to insure that such facilities will be properly operated in the public interest and that the prices charged are reasonable. These provisions enjoin upon the authority a duty to maintain the public character of the enterprise and to see to it that it is operated in the public interest and at reasonable prices. A lease that does not protect the public use to the extent noted is not in compliance with the statute. The statute affords ample protection against converting the facilities to a private

use and any attempt to so do would subject the authority and its lessee to legal remedy.

In Foltz v. City of Indianapolis, *supra,* this same question was raised and disposed of in the following language: "It seems to us that the language of the statute is sufficiently broad that the character of the control which the City and Commission may impress on the property when leased or sold, will assure its public use and dedication for the purposes intended, without the control, by the Commission, over the rates to be charged for the off-street parking. It is necessary that the statute grant the power for placing such restrictions on the use of the property, in order for the statute to be constitutional; otherwise the property might be devoted to private use after its lease or sale by the Commission. The Commission has no discretion in failing or refusing to exercise such powers and taking such protective measures by terms and conditions in the lease as will assure the dedication of the property to the public use intended." In the foregoing case the fixing of price controls was not deemed controlling because of the stated power of the state to regulate businesses affected with the public interest. An express provision to control prices was held to be unnecessary. It will be noted that the opinion adheres to the principle of rate control, although it relies upon the common-law right to do so rather than any stated authorization in the Off-Street Parking Act of the State of Indiana.

In Poole v. City of Kankakee, *supra,* the contention was made that the authority to lease the parking facilities imputes a private purpose to the act. In disposing of this question the court said: "As regards the nature of the act, appellees' last assertion is that the public purpose is destroyed by the provisions which permit a municipality, once owning land, to use it for any type of private business it may choose. Appellees do not point out the language which is susceptible of such interpretation nor do we find that it exists. * * * Specula-

tion that a city might attempt to devote the land acquired to a private purpose could not render the act invalid but would be ground for future judicial relief should the need arise." In this respect, we find that the limitations on leasing of its facilities placed upon the parking authority by the act before us are adequate protection against the facilities being converted to a private use. The fact that the authority may not perform its duty in this respect does not make the act unconstitutional, although it may give rise to legal proceedings to compel the proper carrying out of the purposes of the act. Measured by the principles announced in the foregoing decisions, we fail to see how the Parking Authority Law in any manner authorizes the use of public property for a private purpose. See, City and County of San Francisco v. Ross, 44 Cal. 2d 52, 279 P. 2d 529, where it was held that the failure to provide for the control of parking rates divested parking facilities of their public character.

The Parking Authority Law was enacted for a public purpose. The title of the act contains but one subject. It is an independent act complete in itself, and is not amendatory. It involves a matter of state-wide concern and is controlling over the home rule charter of the city of Omaha. The object sought to be reached by the statute could not be realized by the action of private individuals for the statute indicates that the purpose could not be accomplished except by the use of streets and county courthouse areas. Adequate controls are provided in leasing such facilities to private persons for their operation to insure that they will retain their public character. The act does not authorize the use of public property for a private purpose. For these reasons, among others stated in the opinion, we hold the Parking Authority Law to be constitutional. This being true, the judgment of the district court must be reversed and the cause remanded with directions to grant the prayer of the petition.

REVERSED AND REMANDED WITH DIRECTIONS.

ELDON G. COLVIN ET AL., APPELLEES, V. JOHN POWELL & COMPANY, INC., A CORPORATION, APPELLANT, IMPLEADED WITH JAMES V. HAWK ET AL., APPELLEES.

77 N. W. 2d 900

Filed July 13, 1956. No. 33889.

1. **Interest.** Recovery of interest on an unliquidated claim, the subject of reasonable controversy, and incapable of being fixed by computation, may be had only from the date of the determination of the right of recovery and the ascertainment of the amount.
2. **Trial.** A motion for directed verdict or for judgment notwithstanding the verdict must be treated as an admission of the truth of all material and relevant evidence submitted on behalf of the party against whom the motion is directed. Such party is entitled to have every controverted fact resolved in his favor and to have the benefit of every inference that can reasonably be deduced from the evidence.
3. **Negligence: Trial.** In a jury case involving issues of negligence, where different minds may reasonably draw different conclusions or inferences from the evidence adduced, or if there is a conflict in the evidence, the matter at issue must be submitted to the jury, but where the evidence is undisputed, or but one reasonable inference or conclusion can be drawn from the evidence, the question is of law for the court.
4. **Negligence.** A party is only answerable for the natural, probable, reasonable, and proximate consequences of his acts; and where some new efficient cause intervenes, not set in motion by him, and not connected with but independent of his acts and not flowing therefrom, and not reasonably in the nature of things to be contemplated or foreseen by him, and produced the injury, it is the dominant cause.
5. ———. If the original negligence is of a character which, according to the usual experience of mankind, is liable to invite or induce the intervention of some subsequent cause, the intervening cause will not excuse it, and the subsequent mischief will be held to be the result of the original negligence.
6. ———. A cause of an injury may be the proximate cause notwithstanding it acted through successive instruments or a series of events if the instruments or events were combined in one continuous chain or train through which the force of the cause operated to produce the disaster.
7. **Poisons: Negligence.** Where one who knows that a substance is poisonous carelessly or negligently leaves it where he knows,

or has reason to know, or by ordinary care should know, that it may cause injury to some one ignorant of its character, he is ordinarily liable for any injury resulting from such exposure, and the same liability attaches to one who leaves exposed a substance not known to be poisonous where his lack of knowledge is due to his own negligence.

8. **Sales: Negligence.** In principle, a manufacturer or other person owning or controlling a thing that is dangerous in its nature or is in a dangerous condition, either to his knowledge or as a result of his want of reasonable care in manufacture or inspection, who deals with or disposes of that thing in a way that he foresees or in the exercise of reasonable care ought to foresee will probably carry that thing into contact with some person, known or unknown, who will probably be ignorant of the danger, owes a legal duty to every such person to use reasonable care to prevent injury to him.

9. ———: ———. In the application of the principle it is immaterial whether or not the conduct of a defendant amounted to a breach of contract between him and the immediate buyer from him. The duty is not created by contract, but is an instance of the general human duty not to injure another through disregard of his safety.

10. **Judgments: Appeal and Error.** Where the excessive amount in a judgment is subject to exact determination, a remittitur may be required as a condition of affirmance for the correct amount.

11. **Negligence: Damages.** The measure of damages in a negligence case is such sum as will, under the particular surrounding facts and circumstances, compensate the person injured for the loss sustained with the least burden to the wrongdoer consistent with the idea of fair compensation, and with the duty upon the person injured to exercise reasonable care to mitigate the injury according to the opportunities that may fairly be or appear to be within his reach.

12. **Damages.** Where it has been proved that damage has resulted and the only uncertainty is the exact amount, it is sufficient if the record shows data from which the extent of the injury can be ascertained with reasonable certainty.

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

Fitzgerald, Ross & O'Conner, for appellant.

Gross, Welch, Vinardi & Kauffman, for appellees Colvin et al.

Cassem, Tierney, Adams, Kennedy & Henatsch, for appellees Hawk et al.

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

CHAPPELL, J.

Plaintiffs, Eldon G. Colvin and Leonard Sweeney, brought this action against defendants, James V. Hawk and L. R. Hawk, doing business as Hawk Sales, Doctors Ross C. and James Bailey, and John Powell & Company, Inc., seeking to recover damages for the death of 33 head of feeder cattle and one sow, and for permanent injuries to the rest of their surviving herd of cattle which resulted from eating blackstrap molasses feed containing a deadly poison known as parathion. Such damages were alleged to have been proximately caused by negligence of defendant, John Powell & Company, Inc., in one cause of action, and by the negligence and breach of implied warranty by all other defendants in another. At conclusion of the evidence, plaintiffs' action was dismissed as against defendant L. R. Hawk. No complaint is made in that respect, and he is not involved in this appeal.

The separate answers of defendants James V. Hawk and Doctors Ross C. and James Bailey denied generally, then admitted the alleged negligence of defendant John Powell & Company, Inc., and alleged that such negligence of that defendant was the sole proximate cause of plaintiffs' damages for which it was liable. The answer of John Powell & Company, Inc., was a general denial.

The cause was tried and submitted to a jury as if plaintiffs' reply were a general denial. Thereupon, the jury returned a verdict in favor of plaintiffs but against only defendant John Powell & Company, Inc. The verdict awarded plaintiffs, as damages for the death of their livestock and incidental expenses in connection therewith, the sum of $5,508.90, with interest thereon from and after February 12, 1953, and awarded $11,472.22 as dam-

ages for injuries to the remainder of plaintiffs' herd. Judgment was rendered thereon accordingly against defendant, John Powell & Company, Inc., for $5,508.90, with interest at 6 percent from February 12, 1953, and for $11,472.22, with interest at 6 percent from April 7, 1955, the date of the verdict and judgment. At this point it should be said that the allowance of interest as aforesaid upon the $5,508.90 item has not been assigned as error by defendant, but it was a plain error unassigned. Such part of the judgment comes squarely within the rule that: "Recovery of interest on an unliquidated claim, the subject of reasonable controversy, and incapable of being fixed by computation, may be had only from the date of the determination of the right of recovery and the ascertainment of the amount." National Fire Ins. Co. v. Evertson, 157 Neb. 540, 60 N. W. 2d 638. However, it is conclusive that the jury did not include any interest in the sum of $5,508.90, so the trial court is directed to modify that part of its judgment allowing interest thereon at 6 percent from February 12, 1953, and require that such item, as hereinafter modified, shall bear interest at 6 percent from April 7, 1955, the date of the verdict and judgment.

Subsequently, plaintiffs' motion for new trial as to defendants James V. Hawk and Doctors Ross C. and James Bailey was sustained, and a new trial was granted as to them, from which ruling they have not pursued their appeal to this court. On the other hand, a hearing was had upon the motions of defendant John Powell & Company, Inc., hereinafter called defendant, for judgment notwithstanding the verdict, and for new trial. In that connection, the trial court overruled defendant's motions after approving plaintiffs' offer to remit $67.44, a sum subject to exact determination from the evidence and exhibits appearing in the record, which represented the difference in the cost of marketing. That item will be later discussed herein.

Thereafter, defendant appealed to this court, assign-

ing and arguing substantially: (1) That as a matter of law, negligence of defendant, if any, was not the proximate cause of plaintiffs' damages; (2) that the trial court erred prejudicially in giving instructions Nos. 1 and 7; and (3) that the verdict and judgment were not sustained by the evidence but were contrary thereto and contrary to law, and were the result of passion and prejudice. We conclude that assignments (1) and (2) should not be sustained, but that assignment (3) should be sustained in part only with relation to the allowance of $208 for 13 barrels of molasses included as incidental expenses in the award of $5,508.90. However, that sum of $208 is subject to exact determination, and we order and direct remittitur thereof from the sum of $5,508.90, as a condition of affirmance of the judgment. Such item will also be hereinafter discussed.

At the outset, it should be noted that defendant called no witnesses and offered no direct evidence in its own behalf either upon the issue of liability or the issue of damages about which it here complains. It relied solely upon the direct and cross-examination of plaintiffs' witnesses, including defendant's manager, and testimony adduced by witnesses called in behalf of other defendants, who admitted that defendant was negligent as alleged, and claimed that its negligence was the sole proximate cause of plaintiffs' damages. In that connection, plaintiffs claimed that defendant was negligent in selling as new or unused, barrels which had been previously used for poisonous substances, without properly inspecting the same, although defendant well knew or should have known that the barrels were to be used for livestock feed by placing blackstrap molasses therein, and failed to warn plaintiffs of the presence of poisonous substances in the barrels although defendant knew or should have known that the barrels contained poisonous substances.

This court recently reaffirmed that: "A motion for directed verdict or for judgment notwithstanding the verdict must be treated as an admission of the truth

of all material and relevant evidence submitted on behalf of the party against whom the motion is directed. Such party is entitled to have every controverted fact resolved in his favor and to have the benefit of every inference that can reasonably be deduced from the evidence.

"In negligence cases the trial court should sustain a motion for directed verdict or for judgment notwithstanding the verdict, only when the evidence, viewed in the light most favorable to the party against whom the motion is directed, fails to establish actionable negligence." Griess v. Borchers, 161 Neb. 217, 72 N. W. 2d 820.

Also, in Driekosen v. Black, Sivalls & Bryson, 158 Neb. 531, 64 N. W. 2d 88, we reaffirmed that: "In a jury case involving issues of negligence, where different minds may reasonably draw different conclusions or inferences from the evidence adduced, or if there is a conflict in the evidence, the matter at issue must be submitted to the jury, but where the evidence is undisputed, or but one reasonable inference or conclusion can be drawn from the evidence, the question is of law for the court.

"A party is only answerable for the natural, probable, reasonable, and proximate consequences of his acts; and where some new efficient cause intervenes, not set in motion by him, and not connected with but independent of his acts and not flowing therefrom, and not reasonably in the nature of things to be contemplated or foreseen by him, and produced the injury, it is the dominant cause.

"If the original negligence is of a character which, according to the usual experience of mankind, is liable to invite or induce the intervention of some subsequent cause, the intervening cause will not excuse it, and the subsequent mischief will be held to be the result of the original negligence.

"A vendor and the manfuacturer or supplier of a chattel who know or have reason to know that it is likely to be dangerous when used and which is pur-

chased as safe for use in good faith reliance upon their professions or representations of safety, competence, and care, are subject to liability to the purchaser or to others whom they should expect to share in or be in the vicinity of its use, for damages proximately caused by their failure to exercise reasonable competence and care to supply the chattel in a condition safe for use."

Further, in that opinion we said: "In Restatement, Torts, § 388, p. 1039, it is said: 'One who supplies directly or through a third person a chattel for another to use, is subject to liability to those whom the supplier should expect to use the chattel with the consent of the other or to be in the vicinity of its probable use, for bodily harm caused by the use of the chattel in the manner for which and by a person for whose use it is supplied, if the supplier (a) knows, or from facts known to him should realize, that the chattel is or is likely to be dangerous for the use for which it is supplied; (b) and has no reason to believe that those for whose use the chattel is supplied will realize its dangerous condition; and (c) fails to exercise reasonable care to inform them of its dangerous condition or of the facts which make it likely to be so.' Also, in Restatement, Torts, § 399, p. 1085, it is said: 'A vendor of a chattel, manufactured by a third person, who sells it knowing that it is, or is likely to be dangerous, is subject to liability as stated in §§ 388 to 390.' As stated in Restatement, Torts, § 401, p. 1087: 'A vendor of a chattel made by a third person which is bought as safe for use in reliance upon the vendor's profession of competence and care is subject to liability for bodily harm caused by the vendor's failure to exercise reasonable competence and care to supply the chattel in a condition safe for use.'

"In that connection, in Restatement, 1948 Supp., § 401, p. 710, it is said: 'A vendor of a chattel manufactured by a third person who has reason to know that the chattel is, or is likely to be, dangerous when used by a person to whom it is delivered or for whose use it is

supplied, or to others whom the vendor should expect to share in, or be in the vicinity of its use, is subject to liability for bodily harm caused thereby to them.' See, also, Restatement, Torts, § 402, p. 1089, wherein it is said: 'A vendor of a chattel manufactured by a third person is subject to liability as stated in § 399, if, although he is ignorant of the dangerous character or condition of the chattel, he could have discovered it by exercising reasonable care to utilize the peculiar opportunity and competence which as a dealer in such chattels he has or should have.'

"As stated in 46 Am. Jur., Sales, § 817, p. 943: 'Moreover, where the seller of an article reasonably must know that if it is defective it will be imminently dangerous to persons likely to come in contact therewith, a duty rests upon him to use ordinary care to ascertain the condition of the article and see that it is safe, especially where, by representation or warranties that the article is safe, he induces the sale. If he fails to exercise ordinary care to ascertain the safety of the article, so that he actually sells it in an imminently dangerous condition, he is liable for injuries to third persons who he knows will come in contact with the article.' See, also, 46 Am. Jur., Sales, § 803, p. 928."

In Kroeger v. Safranek, 161 Neb. 182, 72 N. W. 2d 831, we held that: "A cause of an injury may be the proximate cause notwithstanding it acted through successive instruments or a series of events, if the instruments or events were combined in one continuous chain or train through which the force of the cause operated to produce the disaster."

In Hickman v. Parks Construction Co., 162 Neb. 461, 76 N. W. 2d 403, we said, citing numerous authorities: "The general rule, which governs where a party is responsible for a dangerous place, agency, instrumentality, or operation likely to cause injury or damage to persons or property rightfully in its proximity, is that he is charged with the duty of taking due and suitable pre-

cautions to avoid injury or damage to such persons or property, and his failure to take such precautions constitutes negligence. * * * The person on whom the duty devolves is not excused from taking the necessary precautions by * * * relying on others to take necessary precautionary measures."

In 49 C. J., Poisons, § 4, p. 1045, citing numerous authorities, it is said: "All persons who deal with deadly poisons or noxious and dangerous substances are held to strict accountability, and the highest degree of care must be used to prevent injury from their use." Also, in § 8, p. 1046, it is said: "Where one who knows that a substance is poisonous carelessly or negligently leaves it where he knows, or has reason to know, or by ordinary care should know, that it may cause injury to some one ignorant of its character, he is liable for any injury resulting from such exposure."

Further, as stated in 72 C. J. S., Poisons, § 5, p. 168, citing numerous authorities: "Where one who knows that a substance is poisonous carelessly or negligently leaves it where he knows, or has reason to know, or by ordinary care should know, that it may cause injury to some one ignorant of its character, he is liable for any injury resulting from such exposure, and the same liability attaches to one who leaves exposed a substance not known to be poisonous where his lack of knowledge is due to his own negligence."

In Carter v. Yardley & Co., Ltd., 319 Mass. 92, 64 N. E. 2d 693, 164 A. L. R. 559, a leading case, citing many authorities, it is said: "In principle, a manufacturer or other person owning or controlling a thing that is dangerous in its nature or is in a dangerous condition, either to his knowledge or as a result of his want of reasonable care in manufacture or inspection, who deals with or disposes of that thing in a way that he foresees or in the exercise of reasonable care ought to foresee will probably carry that thing into contact with some person, known or unknown, who will probably be ignorant of

the danger, owes a legal duty to every such person to use reasonable care to prevent injury to him. * * * In the application of the principle it is immaterial whether or not the conduct of a defendant amounted to a breach of the contract between him and the immediate buyer from him. The duty is not created by contract, but is an instance of the general human duty not to injure another through disregard of his safety."

In the light of such authorities and others hereinafter discussed, we have examined the record. The oral evidence is voluminous and there are numerous related exhibits. Summarized, the jury could have reasonably concluded as follows: Plaintiffs were equal partners in the raising of livestock and feeding of cattle upon a large scale. They were both experts with many years of successful experience in that field. In August 1952 plaintiffs went to Glendive, Montana, to inspect and buy reputation feeder calves. Plaintiff Colvin had made such purchases there each successive year since 1946 except 1951, during which year he fed heavier cattle because it was a financially hazardous calf-feeding year. In August 1952, while at Glendive, plaintiffs contracted to buy 302 head of mixed heifers and steers for delivery October 15, 1952, so that the calves could longer remain upon the range and obtain all possible cheaper gain in weight before delivery. All but two of the 302 head were branded reputation white-faced, fetter-necked Herefords. Upon delivery they were in excellent condition. They averaged 400 pounds each in weight, and cost plaintiffs a top price of $30.75 per hundredweight delivered. Plaintiffs sold 100 of those lighter in weight, which left 202 head, uniform in color, size, and weight, for better marketing. Thereto plaintiffs added 24 head of native-raised cattle of like kind and quality, which made a herd of 226 feeders so nearly alike that they could hardly tell one from another. From October 15, 1952, until Thanksgiving Day, the herd was permitted to range in the pasture and fields to better obtain a cheap-

er gain. However, upon that day there was a severe snowstorm, so the herd was put in the lot and started on feed earlier than usual. During December and January the herd was doing the best of any cattle plaintiffs had ever fed, and they continued to make such progress until February 10, 1953, the day the poisoning incident occurred.

Hawk was engaged in the selling of livestock feed, including barreled blackstrap molasses which is fed to cattle by gravity as a conditioner. He purchased such molasses from Doctors Bailey who were veterinarians at Atlantic, Iowa. There they had a 20,000-gallon, half-submerged supply tank into which they placed molasses from tank cars and from which they pumped molasses into barrels and sold them to Hawk who would make delivery thereof to his customers, collect from them, and pay the Baileys.

In the latter part of 1952 the Baileys could not obtain enough barrels in which to place the molasses so they requested Hawk to locate some. Hawk then contacted a broker in Omaha who advised him to contact defendant. Defendant then had some 500 such barrels stored outside its plant in Omaha, which barrels had been obtained from another chemical company in Wisconsin, but defendant could not use them because they were side-bung type.

In that connection, defendant was a large chemical company, engaged in the manufacture of insecticides which involved the use and processing of parathion, a deadly poison so powerful that it severely injures or kills man or animal either by inhalation, absorption, or oral ingestion. However, plaintiffs had no knowledge or notice of such use by defendant or the dangerous nature of the substance until after the loss of their cattle by such poisoning, and Hawk had no notice or knowledge thereof when he purchased the barrels from defendant, and had no notice or knowledge thereof until after another customer had suffered a loss hereinafter discussed.

In such a situation, Hawk contacted defendant's manager in January 1953 about the purchase of barrels and proceeded to defendant's plant for that purpose. There defendant's manager was told that the barrels were to be filled with molasses and sold for livestock feed, whereupon defendant's manager assured Hawk that they were all new barrels, although weather-worn, and had never been used or filled. Hawk made a spot check of a few of the barrels, all of which were blue-black with yellow ends, and finding no reason to believe that they were not unused and unfilled barrels as represented, and relying upon such representations made by defendant's manager, he bought 100 of the barrels for which he was reimbursed by the Baileys. Such barrels were subsequently picked up at defendant's plant by a trucker on Sunday and delivered to the Baileys. A short time later, by telephone order, another 50 barrels were purchased from defendant by the Baileys and delivered to them. At that time defendant's manager was also told that the barrels were to be used for molasses feeding. When delivered, the Baileys proceeded to make a spot check of some of the barrels, and finding no reason to believe that they were not unused, unfilled barrels as represented by defendant's manager, they proceeded to fill them with molasses.

On January 16, 1953, plaintiffs purchased 16 barrels of molasses from Hawk and began feeding it to their herd. On February 10, 1953, plaintiffs were feeding their fourth barrel, which was almost empty, when their cattle were poisoned. As they subsequently discovered, they were poisoned as the result of eating parathion solution in the barrel, which did not mix with but remained on the top of the molasses, and was consumed after the barrel was almost empty.

In the meantime, on February 1, 1953, one Haines, another customer of Hawk, notified him that one of his calves had died suddenly, and a veterinarian suspected that its death was caused by the molasses. Hawk im-

mediately contacted Doctor Ross C. Bailey and they met at the customer's farm. There they inspected the dead animal and the barrel of molasses. They observed an amber-colored, acrid-smelling, watery fluid floating on top of the molasses. The doctor siphoned off a quantity of the fluid as a sample and placed it in a quart fruit jar. Further inspection also disclosed one other barrel so contaminated. Suspicious, but without knowledge of its nature, they took the sample with them. They also took the second barrel back to the doctor's office. Hawk contacted defendant's manager that evening, who assured him that there was nothing in the barrels. The next day Hawk took the Haines sample into his basement and divided it into four pint fruit jars so that there would be one sample for himself, one for Doctor Bailey, one for defendant, and one for the Omaha Testing Laboratory. As Hawk was dividing the sample, his dog sniffed it and immediately passed out with its eyes contracted to pin points. The following day Hawk took a sample to defendant's manager and reported the dog incident to him, whereupon he suggested that Hawk should have the Omaha Testing Laboratory run a test for parathion. Defendant's manager also informed Hawk that he had checked with his warehouse foreman and discovered that he had used two of the barrels in question to drain off lines and vats in defendant's plant after which they had then carelessly thrown those barrels back on the pile of unused barrels. Hawk was then assured by defendant's manager that those two barrels were the only ones they had ever used parathion in, and that Hawk's worries were over since they had been found and the rest of the barrels had never been used or filled.

Thereupon Hawk took a sample to the Omaha Testing Laboratory, and in a letter dated February 4, 1953, but obtained by Hawk February 8, 1953, it reported that the solution contained 63.5 percent parathion. In that connection, defendant's manager never had a test made of

his sample and subsequently, without explanation, he destroyed it.

In the meantime, although assured by defendant's manager that there were no other contaminated barrels, Hawk checked all the rest of them as a matter of precaution. However, for some reason, he failed to discover that any of them were contaminated. In making such inspection he visited plaintiffs' farm on February 5, 1953, and checked their barrels, but did not inform them that he was looking for contamination in their molasses. Rather, he advised that he was merely checking to see how fluid the molasses was in cold weather. Having no knowledge of the Haines incident or that the barrels of molasses were under suspicion, plaintiffs continued to feed the molasses until February 10, 1953, when their loss occurred.

Without question the barrel which caused the Haines' loss as well as the one taken from his farm and the one which caused plaintiffs' loss were parathion-contaminated barrels purchased from defendant. On February 12 defendant's manager, Hawk, and Doctor Ross C. Bailey had a conference, whereat defendant's manager was accused of selling barrels which had a poisonous substance in them, whereupon he replied that it began to look like that was the case.

Plaintiffs had a sample of the substance found in their barrel analyzed by the Harris Laboratory in Lincoln, which reported that the sample contained relatively large quantities of a chemical of the parathion class, which, after diluted 50 percent and administered orally in small quantities to two guinea pigs, caused them to become "restless within 15 minutes," to start "having convulsions about 30 minutes after the administration," and they "were dead within 10 minutes following onset of the convulsion." Although defendant's manager came out to plaintiffs' farm and they offered him a sample from plaintiffs' contaminated barrel, he showed no in-

terest. He did inspect Doctor Bailey's molasses plant and found no possible contamination there.

Two Iowa lawyers, who respectively represented Hawk and Doctors Bailey, called upon defendant's manager at defendant's plant on or about February 27, 1953, whereat he informed them that parathion handled at defendant's plant, was a dangerous substance, and that two or three more barrels containing parathion had subsequently been found in their stock of barrels. Admittedly, defendant's manager subsequently received orders from defendant's New York office to dispose of all the remaining 400 barrels "in such a way that they will be protected from any further contact with anybody." In conformity therewith, all of the barrels were taken out and buried in an east Omaha dump.

In the light of such evidence and rules heretofore set forth, we conclude that there was ample competent evidence from which the jury could have reasonably concluded that defendant was negligent as alleged, and that such negligence was a proximate cause of plaintiffs' loss.

Also, contrary to defendant's contention, instruction No. 3 specifically told the jury that no recovery could be had by plaintiffs against defendant for breach of implied warranty, but that in order to recover against such defendant the plaintiffs were required to prove by a preponderance of the evidence that defendant was negligent in one or more particulars as alleged by plaintiffs; that such negligence was *the* proximate cause of the death and injury to plaintiffs' cattle; and that as a result thereof plaintiffs were damaged, and the amount thereof. As a matter of fact, the instruction was favorable to defendant, because in order to recover plaintiffs were only required to establish by a preponderance of the evidence that such negligence of the defendant was *a* proximate cause of their damages.

We turn then to the question of the amount and measure of plaintiffs' damages. In doing so, we dispose of

the second and third assignments of error together, since they overlap in argument.

Originally, plaintiffs had 226 feeder calves in their herd. Before the poisoning incident on February 10, 1953, one of them had been slaughtered, two had been killed by lightning, two had been turned out of the feed lot because with calf, and one had died of bloat. Thus, immediately before February 10, 1953, there remained 220 head in plaintiffs' feed lot. They had been on full feed for some time and appeared to be doing better than any cattle plaintiffs had ever fed. Conservatively, they then weighed an average of 550 pounds each, and as feeder calves they could have readily been sold as such and had a reasonable market value of 28 to 30 cents a pound. On February 10, 1953, and immediately following, 33 of them and one sow died from poisoning by parathion. For such loss plaintiffs asked for and recovered 28 cents a pound on the basis of 550 pounds each. Such recovery was sustained by ample competent evidence.

In addition, 15 or 20 of the 187 surviving cattle were down and could not even get up. Forty or fifty of them were panting, frothing at the mouth, and stumbling about. At least half of those remaining showed that something had really hit them. Their sides were caved in; they were damp; and they looked as if they would die. The week following the poisoning, some of the cattle actually lost half their weight and generally the herd would not come up to eat. Several days after the poisoning 60 percent of them were in very bad condition. After the first 60 days some 60 to 70 percent of them did not put on enough weight to pay for half their feed bill. After 90 days it appeared that plaintiffs were wasting feed on two-thirds of the cattle. They were not fattening but remained in stocker stage. They had rough hair and a stale look; the whole herd was affected by the poisoning, although some of them were worse than others. It is undisputed that following the poison-

ing incident, the surviving cattle had no market value because there would be no buyer on the market if the truth were told, and the news of their poisoning had spread throughout the surrounding territory into the Omaha markets, and there was no place to market them.

Plaintiffs did not know what to do with them, so they consulted a market expert who had inspected the herd, knew the facts, and although prognosis was debatable, plaintiffs decided that the only thing they could do was to continue feeding the cattle, baby them along with the best of care, and attempt to get them ready for the late summer or fall market. Such cattle normally should be fed only about 4 months when on full feed, and with comparable care they should normally gain 2¼ to 2½ or 3 pounds a day. In such respect, plaintiffs' surviving cattle were fed much longer before they were marketed, and, although extra protein was made available, they gained an average of only 1.68 pounds a day. One of the parties who bought 50 head of the original 100 lighter Glendive calves sold by plaintiffs shipped some of them at the same time and to the same market as plaintiffs shipped some of their surviving cattle. He received 75 cents per hundredweight more for them than plaintiffs received for theirs, despite the fact that his cattle had been on full feed only a little over 4 months, while plaintiffs' cattle had been on full feed about 11 months and normally should have outsold them.

This case was tried on the theory that the whole surviving herd was damaged, because under the circumstances no man could ascertain the nature and extent of injuries and damage to any specified number of the cattle, and damage to the herd could not be ascertained until marketing time. Plaintiff sought to recover as damages to the 187 cattle the difference, if any, between the reasonable market value of the cattle at the time of marketing if there had been no injury, and the reasonable market value of the claimed injured cattle at the time they were marketed. Competent evidence dis-

closes that the 187 surviving cattle, when expertly marketed to the best advantage with regard to weight and price, weighed 189,915 pounds and grossed $46,156.90, when without the poison injury they should have weighed 217,965 pounds and produced a gross total of $57,812.55, whereby plaintiffs suffered a loss of $11,655.65. Such proven loss was well above the jury's award of $11,472.22, less the remittitur of $67.44 offered and approved by the trial court, which part of the judgment, subject to the remittitur, should be affirmed unless other alleged errors require reversal thereof. We conclude that they do not.

In that connection, instruction No. 7 given by the trial court read: "If you find for the plaintiffs against one or more of the defendants, you will award the plaintiffs as against such defendant or defendants as you may find to be liable to the plaintiffs such sum as damages as you find plaintiffs have proved by a preponderance of the evidence will fairly and reasonably, but not excessively, compensate them for their damages.

"You are instructed that the measure of damages for 33 dead cattle and one dead sow is the fair and reasonable market value of those cattle and the sow at the time of their death and, in addition, the incidental expenses, if any, necessarily incurred by the plaintiffs in connection with said incident. In this connection, plaintiffs claim incidental expenses including payment to Harris Laboratories in the amount of $61.90; payment to Dr. South in the amount of $80.00; payment to Dr. Perley in the amount of $17.00; and the loss of 13 barrels of molasses in the amount of $208.00.

"You are further instructed that as to the 187 cattle, all or part of which are claimed by plaintiffs to have been injured but not rendered worthless, the measure of damages is the difference, if any, between the reasonable market value of the cattle at the time of marketing if there had been no injury and the reasonable market value of the claimed injured cattle at the time they were marketed. In arriving at the amount of damages in

this connection, you may take into consideration the quality of the cattle before the poisoning incident, their condition of health and thrift, and their condition after the incident, the care and feeding which they were given, the length of time they were fed, the circumstances as to whether as a result of poisoning they failed to feed in a normal and thrifty manner and to make normal gains in weight, and whether they failed to fatten and finish so as to commend a higher price than they brought on the market at the time of their sale. You may consider also any other fact or circumstance in the evidence bearing on the question whether the cattle made normal gain and whether they obtained proper finish.

"You are further instructed that in arriving at damages in this case, the burden is upon the plaintiffs to establish their damages with reasonable certainty, and you should not take into consideration any damages which are speculative and not established and proven with a reasonable degree of certainty, nor are you entitled to award plaintiffs any punitive or exemplary damages so as to punish defendants for any of the acts complained of."

The propriety of the rule with regard to the measure of damages for the 33 dead cattle and one dead sow as stated in the first sentence of the second paragraph of instruction No. 7 is not questioned. However, defendant argued that the jury award therefor was contrary to the evidence. In that respect, defendant claimed that about half of the dead cattle were heifers, worth less than steers, but the jury, assuming that each animal weighed 550 pounds, awarded plaintiff therefor 28 cents a pound, the then top market price for steers. Defendant's contention has no merit. The evidence discloses that at the time these reputation cattle died, they were feeder calves whose value could not be measured by a run-of-the-mill slaughter market. The evidence is undisputed that plaintiffs paid $30.75 per hundredweight for them when delivered, weighing an average 400 pounds

each, and that at the time of their death they weighed conservatively an average of 550 pounds each and were reasonably worth an average of 28 to 30 cents a pound. As a matter of fact, there is competent evidence in this record that the 33 dead cattle weighed as much as 600 to 650 pounds at the time of their death, yet plaintiffs asked only 28 cents a pound based upon an average weight of 550 pounds each. The jury allowed that amount, and competent evidence sustains that award.

Defendant also complained that among expenses incident to such loss, the jury awarded plaintiffs $208 for 13 barrels of molasses for which plaintiffs had paid Hawk, who retained the money. In that respect, the record discloses such to be the fact. It further discloses that at the time of trial plaintiffs still kept and retained such barrels of molasses, 12 of which do not appear to have been contaminated. Thus, the award of $208 was erroneously made, but concededly such sum was subject to exact determination and the error may be cured by remittitur.

In Moore v. Schank, 148 Neb. 228, 27 N. W. 2d 165, we held: "Where the excessive amount in a judgment is subject to exact determination, a remittitur may be required as a condition of affirmance for the correct amount."

In conformity therewith, a remittitur of $208 from the award of $5,508.90 for the dead cattle and sow and incidental expenses is hereby ordered and required as a condition for affirmance of a judgment for the correct amount, which is $5,300.90 with interest at 6 percent from April 7, 1955, the date of the verdict and judgment, and not from February 12, 1953.

In connection with the $208 item aforesaid, defendant also argued that its allowance demonstrated that the verdict and judgment were the result of passion and prejudice. We conclude that such contention has no merit under the circumstances presented in this case.

Defendant also argued that instruction No. 1 given by

the trial court, which summarized plaintiffs' petition, erroneously submitted the allegation that "187 cattle became ill and permanently injured and that their growth was stunted" rather than limiting the damages to a certain specified number of injured but surviving animals, and limiting recovery therefor in instruction No. 7 to the difference between their reasonable market value just before the poisoning and their reasonable market value immediately thereafter. In making such argument, defendant assumes, contrary to the evidence, that only 50 out of 187 surviving cattle were injured, and that immediately after the injury they had a reasonable market value. The evidence is directly contrary to such assumption.

In that connection, the case was tried on the theory of damage to the herd being prepared for market in the late summer or fall. The evidence is conclusive that 33 died, that 15 or 20 were down unable even to get up, and 40 to 50 were panting, frothing at the mouth, and staggering, with ultimate survival in doubt. All of the herd were injuriously affected to a considerable degree in one form or another, and after the poisoning they were disturbed, ill, would not eat, lost much weight, and thereafter gained an average of only 1.68 pounds a day, when normally without injury they should have gained 2¼ to 2½ or 3 pounds a day. The evidence discloses that it was utterly impossible for plaintiffs and their experts after the poisoning to take each animal separately, or any exact number of them, and show how much damage was done. As a matter of fact, defendant, although having plenty of opportunity to do so, offered no evidence whatever upon such issue of damages, and this record shows conclusively that after the poisoning the surviving animals had no reasonable market value. Further, by simple mathematical calculation, if the measure of damages contended for by defendant had been submitted to the jury, plaintiffs would have been entitled to recover a much larger verdict and judgment.

It will be observed also that instruction No. 7 read in part: "You are further instructed that as to the 187 cattle, *all or part of which* are claimed by plaintiffs to have been injured * * * the measure of damages is the difference, if any, between the reasonable market value of the cattle at the time of marketing if there had been no injury and the reasonable market value of the claimed injured cattle at the time they were marketed." (Italics supplied.) The proper elements to be considered by the jury in arriving at the amount of such damages with reasonable certainty were thereafter set forth and circumscribed in detail. Contrary to defendant's contention, under the evidence appearing in this record, the damages recoverable were direct and certain and not remote or speculative.

In 25 C. J. S., Damages, § 71, p. 560, citing authorities, it is said: "Definite rules which will measure the extent of recovery in all cases even of a particular class are difficult to formulate owing to the consideration which must be given in each case to its specific and perhaps peculiar surrounding circumstances. Stated in broad terms, however, the measure of damages is such sum as will compensate the person injured for the loss sustained, with the least burden to the wrongdoer consistent with the idea of fair compensation, and with the duty upon the person injured to exercise reasonable care to mitigate the injury, according to the opportunities that may fairly be or appear to be within his reach * * *. While the fundamental rule of the law is to award compensation, yet rules for ascertaining the amount of compensation to be awarded are formed with reference to the just rights of both parties, and the standard fixed for estimating damages ought to be determined, not only by what might be right for plaintiff to receive in order to afford just compensation, but also by what is just to compel defendant to pay." In § 72, p. 562, it is said: "Where there is more than one method of ascertaining damages, that method which is most defi-

nite and certain should be adopted. No one method is exclusive, where several exist, but that one should be chosen which best achieves the fundamental purpose of compensation to the injured person for his loss; and if the facts show that either of two measures of damages will fully compensate plaintiff for his loss, that measure must be adopted which is less expensive to defendant."

In Jaeger v. Hackert, 241 Iowa 379, 41 N. W. 2d 42, it is said: "Where it has been proved that damage has resulted and the only uncertainty is as to the exact amount, it is sufficient if the record shows 'data from which the extent of the injury * * * can be ascertained with reasonable certainty * * *. Data for an exact calculation is not necessary.' Osterling v. Frick, 284 Pa. 397, 404, 131 A. 250, 252; 25 C. J. S., Damages, section 28."

We find no case from this jurisdiction dealing with damages to feeder cattle where a portion of the herd has been injured but survived without having any reasonable market value, and no case has been cited or found from any other jurisdiction presenting comparable facts and circumstances. It would seem logical, however, that cases dealing with damages to growing crops which are injured by defendant, although not rendered worthless by them, but having no market value upon which any witness could or would give an opinion as to value until marketed, would present a situation comparable with that at bar. Here we are dealing with raising and feeding a herd of cattle for the late summer and fall market. In several cases this court has dealt with the question of damages to crops being grown for such markets. They support the logic of the measure of damages in instruction No. 7 given in the case at bar.

In Hopper v. Elkhorn Valley Drainage Dist., 108 Neb. 550, 188 N. W. 239, this court concluded that where a growing crop is injured but not rendered entirely worthless as a direct result of the acts and omissions of defendant, the damage to it is measured by the difference, if any, between the reasonable market value at maturity of

the probable crop if there had been no injury, and the reasonable market value of the actual crop at time of maturity, less the expenses of fitting for market that portion of the probable crop which was prevented from maturing by the injury. The instant case was tried on a comparable theory. No other measure of damages could have been submitted under the evidence adduced which would have fairly compensated plaintiffs, yet imposed a less burden upon defendant.

As recently as Gable v. Pathfinder Irr. Dist., 159 Neb. 778, 68 N. W. 2d 500, citing with approval Hopper v. Elkhorn Valley Drainage Dist., *supra*, we reaffirmed the foregoing rule, and then held: "In determining the damage to farm products consideration should be given to the circumstances which conditioned the probability or improbability of the maturing of the crops in the absence of injury, and all other facts and circumstances tending to establish such value, which would properly include those arising before, at the time of, and after injury."

Further, such case also held: "The office of the ad damnum in a pleading is to fix the amount beyond which a party may not recover on the trial of the action.

"As a general rule an amendment may be made to a pleading at any stage of the proceedings which does not change the quantum of proof as to a material fact." Such rules adversely dispose of defendant's contention that the trial court erred in permitting plaintiffs to amend their petition during the trial.

We conclude that under the unusual circumstances presented in this case, the issue of the measure of damages was not erroneously submitted to the jury with one exception, which does not require reversal. In such respect, relying upon Ricenbaw v. Kraus, 157 Neb. 723, 61 N. W. 2d 350, defendant argued that instruction No. 7 was erroneous because it failed to instruct the jury to deduct the difference in the cost of marketing. That contention has some merit, but the amount thereof,

$67.44, was the subject of exact determination by mathematical calculation from evidence and exhibits appearing in the record even independently of an affidavit filed by plaintiffs, and offered and received in evidence without objection by defendant, who made no counter showing at the hearing upon defendant's motion for new trial whereat plaintiffs' offer to remit the sum of $67.44 was approved by the trial court as a condition of overruling defendant's motion for new trial. Thus the failure of the court to instruct the jury to deduct the difference in the loss of marketing was not prejudicial error. Ricenbaw v. Kraus, *supra,* is distinguished upon the ground that no evidence therein established in any manner the reasonable expenses of fitting for market that portion of the probable crop which was prevented from maturing by the injury, and the trial court erroneously took judicial notice of what he thought would have been the fair and reasonable cost thereof, and deducted it. In that respect, we said: "We do not think it is a fact of which a court can take judicial notice as it may vary greatly under different circumstances. It is a fact which must be proved.

"In the absence thereof any judgment for damages would be speculative, conjectural, and uncertain."

Except as herein specifically modified, we conclude that the verdict and judgment were amply sustained by competent evidence, and that under the unusual circumstances presented in this case, the measure of plaintiffs' damages was not erroneously submitted.

Defendant argued that during the trial the court made some six improper remarks which influenced the jury and resulted in prejudice against the defendant. We have held that: "Each party to a lawsuit is entitled to have the jury pass upon the evidence without having its effect or importance altered, either as to credibility or value, by the indulgence of the court in remarks to witnesses or comments upon them or their testimony, which may tend either to magnify or diminish it in the jury's

estimation." Styskal v. Brickey, 158 Neb. 208, 62 N. W. 2d 854.

We have also held that: "A prerequisite to review on appeal of alleged improper conduct of and statements by a trial judge, on the trial in the presence of the jury, is an objection and exception thereto." Bolio v. Scholting, 152 Neb. 588, 41 N. W. 2d 913.

The latter rule is controlling here because defendant's counsel made no objection during the trial to the statements made by the court about which it complains. Furthermore, three of the six statements were directed to counsel for defendants Hawk and Bailey, for whom the jury awarded a favorable verdict, and could not have been prejudicial to them or to defendant. Some of the statements should not have been made, but defendant is in no position to complain thereof in this court.

For reasons heretofore stated, we conclude that if plaintiffs will file a remittitur within 20 days reducing the judgment to $16,705.68 with interest thereon at 6 percent per annum from April 7, 1955, the judgment of the district court will be affirmed as thus modified, with all costs taxed to defendant, John Powell & Company, Inc. Otherwise, the judgment will be reversed and the cause remanded for new trial.

AFFIRMED ON CONDITION.

A. C. MEFFORD, APPELLEE AND CROSS-APPELLANT, V. WILSON CONCRETE COMPANY, APPELLANT AND CROSS-APPELLEE.
77 N. W. 2d 895

Filed July 13, 1956. No. 33925.

1. **Motor Carriers: Public Service Commissions.** In a dispute between a shipper and a common carrier as to a tariff rate fixed by the Nebraska State Railway Commission, application by the shipper to the commission to determine the proper rate empowers the commission to determine the dispute.
2. ———: ———. In a dispute between a shipper and a common carrier as to a tariff rate fixed by the Nebraska State Rail-

way Commission, an application by the carrier to the commission to determine the proper rate does not under the powers granted to the commission empower it to determine the dispute.

3. ———: ———. A dispute between a shipper and a common carrier as to a tariff rate fixed by the Nebraska State Railway Commission is determinable by the courts unless the shipper has invoked the power of the commission to make the determination.

APPEAL from the district court for Sarpy County: JOHN M. DIERKS, JUDGE. *Affirmed in part, and in part reversed and remanded with directions.*

Viren, Emmert & Hilmes, G. M. Gunderson, and *Peterson, Smith, Peterson, Beckman & Wilson,* for appellant.

J. Max Harding and *Pilcher, Haney & Howard,* 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 A. C. Mefford, plaintiff and appellee, against Wilson Concrete Company, defendant and appellant. The first cause of action is to recover the difference between what the plaintiff received as a motor carrier holding a certificate as a common carrier for the transportation of sand and gravel from a pit located on the Platte River about two miles south and one-fourth mile east of Richfield, Nebraska, to the plant of the defendant about one mile south of Omaha, Nebraska, near U. S. Highway No. 75, and what he contends he was entitled to receive.

The second cause of action involves a like claim in favor of one John Sorensen which was assigned by Sorensen to the plaintiff. The two causes of action do not require further separate consideration in this opinion.

A jury was waived and the case was tried to the court. At the conclusion of the trial a judgment was rendered in favor of plaintiff on the two causes of action for $1,567.73. Thereafter the defendant filed a motion for new trial which was overruled. The plaintiff also filed

a motion for new trial which was likewise overruled. From the judgment and the order overruling the motion for new trial the defendant has appealed. The plaintiff cross-appealed.

The contention of the plaintiff as substantially declared by his petition and by computation is that from August 8, 1953, to December 28, 1953, as a common carrier, he transported sand and gravel between the pit described and the plant of the defendant in the amount of 4,277 yards for which he received from the defendant $2,780.66, the rate therefor being 65 cents a yard; that from January 1, 1954, to January 8, 1954, he transported 110 yards of sand and gravel for which he received $81.49, the rate therefor being 74 cents a yard; and that from October 25, 1953, to December 19, 1953, Sorensen, likewise a common carrier, transported sand and gravel between the two points in the amount of 2,188 yards for which he received $1,619.12, which was at the rate of 74 cents a yard. As to each cause of action the plaintiff contends that the proper tariff as fixed by the Nebraska State Railway Commission was 92 cents a yard instead of the rates paid. The difference as to the first cause of action is $1,173.89 and as to the second $393.84 or a total of $1,567.73. The judgment was for this amount.

The defendant has not disputed the amount of sand and gravel transported or the amount or rate of payment made therefor. The sole question in dispute when the case was presented to the district court was that of whether under the Nebraska State Railway Commission tariff the rates paid or the 92 cent rate was applicable.

In this court however a new question has been presented by the defendant. The defendant contends here that the district court had, and this court has, no jurisdiction over the subject matter of the action.

The theory advanced is that under law the fixation, classification, regulation, and interpretation of intrastate freight and passenger tariffs is a function of the Nebraska State Railway Commission and since involved

here is a dispute over tariffs resort may be had only to the commission for the resolution of the dispute. In support of the contention the defendant cites sections 75-208, 75-401, and 75-402, R. R. S. 1943.

Section 75-208, R. R. S. 1943, grants broad regulatory power, but it is to be observed that nothing appears directly or by implication to permit action to be taken against anyone not acting in the capacity of a carrier. The provision does not directly or by implication permit or allow a carrier to institute action before the commission against a shipper for the purpose of determining a dispute concerning rates.

In Central Bridge & Construction Co. v. Chicago & N. W. Ry. Co., 129 Neb. 726, 262 N. W. 852, this court upheld the right of a shipper to seek and obtain relief with reference to tariffs fixed by the commission. This case does not, and no other case in this state has been found which does permit or require a carrier to bring before the commission a shipper to have determined a disputed tariff.

Sections 75-401 and 75-402, R. R. S. 1943, attribute broad powers to the commission but among these is not contained the bringing of shippers before it for the purpose of adjudicating rate disputes.

The contention that the court does not have jurisdiction over the subject matter is without merit. This conclusion makes necessary a determination of the case upon the merits to the extent they are presented by the other assignments of error. By the assignments as a whole the defendant contends substantially that factually and legally there is no support for the judgment rendered.

This contention requires only the ascertainment, interpretation, and application of the tariff established for the transportation of sand and gravel between the points involved. There is no dispute as to the origin or destination of shipments, the quantity shipped, or the rate paid by the shipper.

The defendant contends that Item 6 (b) of Supplement

No. 2 to Official Highway Builders and General Contractors Tariff No. 4 is applicable. This item exacts a charge of 53 cents a ton or, converted to a yardage basis, a charge of 74 cents a yard. This rate was paid by the defendant for 110 yards of the amount involved in the first cause of action. The remainder of the yardage involved in this cause of action or 4,277 yards was paid for at the rate of 65 cents. The rate of 74 cents was paid for the yardage involved in the second cause of action. On the other hand the plaintiff contends that the schedule of yardage and mileage rates contained in Item 7 is applicable. The appropriate charge under this item would be 92 cents a yard. It was this rate that the district court accepted and adopted as the basis of the judgment rendered.

The determination must turn in the main upon the meaning of the words "from pits located on the Platte River south of Omaha."

The plaintiff contends that these words limit the point of origin for the purposes of Item 6 to pits directly south of Omaha and not to any pits west of a line directly south from the westernmost limits of the city of Omaha, which the parties agree was at the time Seventy-second Street. The pit from which these shipments came was west of such a line. The distance is not authentically shown but it cannot be great since the entire distance of the haul was 13 miles.

The defendant substantially contends that the words do not so limit the point of origin but that they apply to pits on the Platte River from which shipments come into Omaha from the south.

The conclusion reached herein is that the contention of the defendant must be accepted and that of the plaintiff must be rejected.

In the first place, the contention of the defendant is reasonable. If the commission had intended to limit the application in the manner contended for by the

plaintiff it could so easily have said so. This it failed to do.

Further it is apparent from the knowledge that the commission obviously had of the Platte River in its meandering circuit south and west of Omaha to its outlet into the Missouri River, and the introductory paragraph of Item 6, that its purpose was to provide rates applicable to pits on this entire segment of the river. This paragraph, to the extent necessary to set it out here, is as follows: "The rates for transportation of sand and gravel from pits located on the Platte River to points within the corporate limits of Omaha or at all directly intermediate points * * * including the wet concrete plant located at 76th and Dodge Street * * * shall be as follows: * * *." The point of delivery for the purposes of this case was clearly a directly intermediate point.

The pertinent parts of Item 6 are subsection (b) and the paragraph denoted Zone I, as follows: "(b) The rates for transportation of sand and gravel, minimum weight 12,000 pounds, from pits located on the Platte River south of Omaha to points and places within the corporate limits of Omaha shall be as follows: ZONE I Beginning at the south city limits to but not including Leavenworth Street, the rate shall be 53 cents a ton." Tons converted to yards causes the rate to Leavenworth Street to be 74 cents. This conversion rate appears to be accepted by the parties. It is 5 miles from the south city limits to Leavenworth Street.

The first paragraph of subsection (a) of Item 6, not directly involved but of pertinence in the interpretation of the tariff in question, is as follows: "(a) The rates for transportation of sand and gravel, minimum weight 12,000 pounds, from pits located on the Platte River west of Omaha to points and places within the corporate limits of Omaha and including the wet concrete plant at 76th and Dodge shall be as follows: * * *."

If the theory of the defendant is not to be accepted then notwithstanding the apparent intention of the com-

mission to establish tariffs for pits along the meandering course of the Platte River to the south and west of Omaha, it only established tariffs from an area bounded on the west by a line extending directly south from Seventy-second Street and an area bounded on the south by a line extending directly west from the south extremity of Omaha, thus leaving the area between these lines without any rate except the mileage rate contained in Item 7.

The language employed does not reasonably admit of such an interpretation. Further such an interpretation would place a much heavier burden upon transportation from without the line than upon transportation of identical character and quality from within. This becomes clearly apparent from a comparison of Item 6 (b), Zone I, with Item 7 and its schedule of rates. By this comparison it is demonstrated that a shipment from a pit just east of the line extending south from Seventy-second Street and 10 miles distant from the south line of Omaha would carry a rate of 53 cents a ton or 74 cents a yard to this line and 5 miles beyond whereas a shipment from a pit just west of the line and also 10 miles south of the south line of Omaha would carry a rate of 53 cents a ton or 74 cents a yard to this south line but it would also carry an additional rate of 21 cents a ton or 30 cents a yard for the additional 5 miles. This additional charge would be clearly discriminatory and could not be justified on any reasonable basis.

There is another reason, we think, why Item 7 must be regarded as inapplicable. It is observable that this item does not refer to sand and gravel from pits. It has reference to aggregates to be used for particular purposes. The statement is the following: "The rates for transportation of aggregates principally sand, gravel, crushed stone, earth, clay, soil binder, mineral filler, agricultural limestone and other similar materials used for construction and maintenance of highways, dams, general construction projects, soiling practices or any

other purpose in which the above named aggregates are used shall be as follows: * * *."

It is not to be assumed that the commission employed the term "aggregates" in any other than the usual and ordinary sense. Neither does the manner of use indicate that it was used in any other sense. The New Century Dictionary, p. 24, defines an aggregate as follows: "An assemblage of particulars; a collective mass or whole; a total; also, any hard material used in small fragments for mixing with mortar or cement to form concrete." In Webster's Dictionary (2d ed.), Unabridged, p. 49, it is defined as follows: "A mass, assemblage, or sum of particulars; as, a house is an *aggregate* of stone, brick, timber, etc. In an *aggregate* the particulars are less intimately mixed than in a *compound*."

Thus it appears that "aggregate" connotes a combination of materials. Adhering to this connotation as well as the language quoted it appears that the purpose of Item 7 was to establish a tariff on a mileage basis for the transportation of mixtures for uses named in the item, and that there is no indication that it was ever intended to apply to shipment of sand and gravel as such from pits on the Platte River to Omaha or directly intermediate points.

In this view it must be said that the plaintiff is entitled to recover nothing on his second cause of action and nothing on his first cause of action for the 110 yards transported from January 1, 1954, to January 8, 1954. He is entitled however to recover the difference between 65 cents and 74 cents a yard for the 4,277 yards transported from August 8, 1953, to December 28, 1953, or $384.93.

This conclusion renders unnecessary a consideration of the cross-appeal except to say that by the cross-appeal was presented the question of whether or not the plaintiff, if he was entitled to recover at all, was entitled to recover treble damages. In his petition he claimed treble damages on the ground that the difference between the

amount paid and the rate claimed amounted to a rebate. The conclusion arrived at fully disposes of this question except as to the $384.93.

It may not well be said that as to this amount any question of rebate was involved. This in the light of the record presented was obviously only an error in computation. It was not considered in the briefs but was discovered by analysis here on review.

The judgment of the district court in favor of plaintiff to the extent of $384.93 is affirmed. To the remaining extent it is reversed and the cause remanded with directions to render judgment in favor of the defendant.

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

WENKE, J., concurs in the result only.

CARPENTER PAPER COMPANY, A CORPORATION, APPELLANT, v. KEARNEY HUB PUBLISHING COMPANY, AN UNINCORPORATED COMPANY OR PARTNERSHIP, APPELLEE.

78 N. W. 2d 80

Filed July 13, 1956. No. 33987.

1. **Contracts.** While executory and before breach, the terms of a written contract may be changed by a subsequent parol agreement. Such subsequent agreement requires no new consideration.
2. ———. The making of a contract may be done under such circumstances of business necessity or compulsion as will render the same involuntary and entitle the party so coerced to recover back any money paid thereunder or excuse him from performing the contract.
3. ———. The rule is that when such pressure or constraint is brought to bear as will compel a man to go against his will and take away his free agency, thus destroying the power of refusing to comply with the unjust demands of another, it will constitute legal duress.
4. ———. For an agreement to be voidable because of duress in the form of business compulsion it must not only have been obtained by means of pressure brought to bear upon the party

seeking relief therefrom but the agreement itself must be unjust, unconscionable, or illegal. The essence of such duress is the surrender to unlawful or unconscionable demands. It cannot be predicated upon demands which are lawful or a threat to do that which the demanding party has a legal right to do.

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

Wells, Martin, Lane, Baird & Pedersen, for appellant.

Barlow Nye and *DeWayne Wolf,* for appellee.

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

WENKE, J.

Carpenter Paper Company, a corporation, brought this action in the district court for Buffalo County against the Kearney Hub Publishing Company, a partnership. The action is for the purpose of recovering $4,096.71, which plaintiff alleges is due it for a carload of newsprint which it sold and delivered to the defendant on March 2, 1954. Defendant acknowledges receiving the carload of newsprint and makes no objection to the quantity or quality thereof, however, it does claim the amount sought to be recovered is incorrect, alleging the correct amount of the purchase price to be $3,927.30.

Defendant filed a counter-claim for $5,461.20 based on the claim that between January 1, 1948, and July 1, 1952, the partnership had been overcharged $5 a ton on carload lots of newsprint, and, from July 1, 1952, up to and including the last carload shipped on March 2, 1954, $6 a ton. The basis for this counter-claim is the contention that defendant's 1942 mill brokerage contract with the plaintiff fixed the mill price as the cost of newsprint sold to it by the plaintiff, defendant claiming a November 1947 agreement for cancellation thereof to have been without force or effect because of duress or

business compulsion which induced it to enter into such agreement.

Jury was waived and trial was had to the court. The trial court entered a judgment dismissing plaintiff's petition. It found for the defendant on its counter-claim and rendered judgment thereon in the sum of $1,364.50, that amount being the difference between what it found the purchase price of the carload of newsprint to be and the amount it found defendant was entitled to recover on its counter-claim. Plaintiff filed a motion for a new trial and, from the overruling thereof, has perfected this appeal.

When a jury is waived and a law action tried to the court, findings of fact have the same effect as findings of a jury. Tullis v. Blixt, 136 Neb. 142, 285 N. W. 307; In re Estate of Wotke, 133 Neb. 739, 277 N. W. 45; Vohland v. Barron, 126 Neb. 50, 252 N. W. 470. We consider the record accordingly.

Appellant is, and was at all times herein material, engaged in selling and distributing paper, including newsprint. Appellee, a co-partnership consisting of Ormand P. Hill and others, is, and was at all times herein material, engaged in publishing the Kearney Hub, a daily newspaper.

The evidence shows there are three ways in which newsprint is commonly sold: First, direct by the mill to the publisher or consumer. We shall refer to such as mill contracts and the price therein established as the mill price. Second, by mill brokerage contracts, which we will refer to by that name. While such contracts are made in the name of the distributor, the distributor is only acting for the mill. Under a mill brokerage contract the mill pays the distributor a brokerage fee for the handling. The price in such contracts is the mill price. Third, where the distributor buys the newsprint from the mill and resells it. In such contracts the distributor may charge whatever price he wishes as the mill is not a party to such contract with the consumer.

On May 18, 1942, the appellant entered into a mill brokerage contract with the Kearney Hub Publishing Company, a corporation, to supply its entire requirements for newsprint subject to an estimated annual quota of 125 tons. Its duration was for one year, May 1, 1942, to April 30, 1943, but to continue from year to year until canceled by either party.

Subsequent to this contract the Kearney Hub Publishing Company was dissolved and the question is raised, was the contract ever assigned to appellee and did appellant ever consent to the substitution? The partnership was organized by agreement dated June 30, 1943; the members were the same as the stockholders in the corporation; the partnership agreement provided the partnership was to take over and acquire title to all of the corporation assets which the stockholders would, on dissolution, be entitled to; the contract was an asset of the corporation; and appellant, until November 1947, continued to sell appellee newsprint at the mill price as in such contract provided. We find there is evidence which can be said to establish that the contract was acquired by the appellee and that appellant, by its conduct, consented to appellee being substituted therein for the corporation.

Ormand P. Hill, president of the Kearney Hub Publishing Company, later an original partner of the appellee partnership and the publisher and general manager of the Kearney Hub, testified that G. E. Carpenter, vice-president of appellant, told him, as an inducement to his agreeing to enter into the contract of May 18, 1942, and leave their then source of supply, Minnesota & Ontario Paper Company, that "Come hell or high water the Kearney Hub will be taken care of on paper." The parties are of course bound by their written agreement which they entered into and such sales talk is not a part thereof. The counter-claim is not an action to set aside the agreement of 1942, but rather an action based thereon.

Appellant's sole source of newsprint was from the mills of Abitibi Sales Company, Limited, whom we shall hereinafter refer to as Abitibi. Up until 1946 it had been handling newsprint for Abitibi solely on the basis of mill brokerage contracts, receiving $1.50 a ton brokerage for doing so. However, beginning in 1946, appellant sought to change this basis because it felt the brokerage fee, considering the increased cost of doing business, was an inadequate return for its services. In 1947 appellant succeeded in this endeavor and Abitibi agreed to sell it its allotment of newsprint except that Abitibi took over all of appellant's customers using 250 tons a year or more on a direct mill contract basis. This included the newspapers at Fremont and Hastings. As a consequence of this change of business policy between appellant and Abitibi appellant proceeded to and did cancel all of its mill brokerage contracts and entered into direct sale agreements for newsprint between itself and its customers. In doing so it added, commencing January 1, 1948, $5 a ton to what is referred to as the mill price. It thus had a gross margin of $6.50 a ton as it was able to buy the newsprint from Abitibi at $1.50 less than mill price, that being the reduction on the mill price which Abitibi allowed appellant on all of its direct purchases. This gross margin was later, as of July 1, 1952, increased to $7.50 when appellant raised the price $6 above the mill price. These prices were as low or even lower than prices generally quoted for newsprint in the area during this period of time and were not out of line with prices being charged by other distributors or jobbers.

Ormand P. Hill, one of the partners of appellee, and to whom we have already referred, went to Omaha in November of 1947 to see appellant about a possibility of getting some additional newsprint above its quota. It should be said here that appellant placed all of its customers on a quota, the amount of which depended upon the needs of the individual customer and the total

newsprint allotted to appellant by Abitibi. There Hill met and talked with Wyman D. Clark who was then appellant's merchandise and sales manager in the Omaha office which serviced Kearney. Clark advised Hill of this change in policy on the part of appellant and that beginning with January 1, 1948, it would sell appellee newsprint only on a direct basis and the price would be $5 a ton above mill price, explaining why appellant felt it was necessary to do so.

Appellant, at this time, was not under legal obligation, by reason of its 1942 mill brokerage contract, to continue to supply appellee with newsprint at mill price regardless of whether or not doing so was profitable. It could change the basis on which it was willing to sell.

Hill agreed to go along with this new arrangement although he testified he told Clark that he was doing so only because he had no other choice since he had to have newsprint. He also told Clark that he would, at the first opportunity, get a direct mill contract. The evidence shows he continuously, from then on, tried to do so, and finally did succeed in obtaining such a mill contract in 1952. He also, whenever possible, bought newsprint from other sources but such purchases were very limited.

"While executory and before a breach, the terms of a written contract may be changed by a subsequent parol agreement; and such subsequent agreement requires no new consideration." Bowman v. Wright, 65 Neb. 661, 91 N. W. 580. See, also, Personal Finance Co. v. Hynes, 130 Neb. 547, 265 N. W. 541; Swanson v. Madsen, 145 Neb. 815, 18 N. W. 2d 217.

Appellee apparently contends the mill brokerage contract of 1942 was never actually canceled because appellant did not pursue the method therein provided, which is: "* * * this contract shall continue from year to year * * * until cancelled by either party by notice in writing by registered mail on or before January 1st of any year to take effect the following April 30th."

This is of course a unilateral method for that purpose but does not in any way prevent the parties from mutually agreeing to do so, which is the situation here.

We come then to the principal question involved, that is, was the raise in price of $5 a ton, effective January 1, 1948, and the subsequent raise to $6 a ton, effective July 1, 1952, of such a character and made under such conditions that agreeing thereto can be said to be voidable because done under duress or business compulsion? We think the making of a contract may be done under such circumstances of business necessity or compulsion as will render the same involuntary and entitle the party so coerced to recover back any money paid thereunder or excuse him from performing the contract. See, Fitzgerald v. Fitzgerald & Mallory Construction Co., 44 Neb. 463, 62 N. W. 899; Nelson v. Nelson, 99 Neb. 456, 156 N. W. 1036. The same would be true of an agreement obtained to cancel an existing contract and to enter into a new one. First Nat. Bank of David City v. Sargeant, 65 Neb. 594, 91 N. W. 595, 59 L. R. A. 296.

As stated in First Nat. Bank of David City v. Sargeant, *supra:* "The rule is that when such pressure or constraint is brought to bear as will compel a man to go against his will, and takes away his free agency, destroying the power of refusing to comply with the unjust demand of another, this will constitute legal duress, regardless of manifestations or apprehension of physical force."

We think the rule is well stated in Newland v. Child, 73 Idaho 530, 254 P. 2d 1066, as follows: "* * * appellants contend that the lien agreement was obtained by the state by duress, specifically 'business compulsion,' and for that reason is unenforceable. * * * To be voidable because of duress, an agreement must not only be obtained by means of the pressure brought to bear, but the agreemeent itself must be unjust, unconscionable, or illegal. The essence of duress is the surrender to unlawful or unconscionable demands. It cannot be pred-

icated upon demands which are lawful, or the threat to do that which the demanding party has a legal right to do."

The evidence shows that newsprint was in extremely short supply all through the years following World War II until in 1953 when the market therefor seems to have eased up; that as far as appellee was concerned the appellant was its only practical source of supply as it could not have obtained another contract, since it had, from 1942 on, bought practically all of its newsprint from appellant; that the black market furnished no dependable source of supply and what was available thereon was generally of poor quality and sold at prohibitive prices; and that a daily newspaper without a regular adequate source of supply of newsprint would soon have to cease. In fact, the evidence shows that in 1947 and up until 1953 appellant had a monopoly on newsprint insofar as appellee being able to get an adequate supply thereof was concerned.

In this respect we mention briefly that appellee refers to the fact that appellant would not release its tonnage to Abitibi so it could enter into a mill contract with Abitibi. Of course appellant was under no legal obligation to do so and, in fact, appellee could not have gotten such a contract from Abitibi even if appellant had released the amount of appellee's annual tonnage from its allotment from Abitibi because it was against the policy of the latter to do so.

The evidence also shows that appellant always divided its allotment from Abitibi to its customers who used newsprint on a fair basis and this was true as to appellee. Appellant did not at any time refuse to sell appellee newsprint nor threaten to cut down its quota. It only sought to handle it on a more profitable basis. This it had a perfect right to do if, in doing so, it did not make unjust demands upon appellee in view of all the circumstances then existing.

The mill price of newsprint under appellee's mill

brokerage contract had reached $100 a ton by January 1, 1948, and gradually continued to rise until it had reached $131 a ton by March 2, 1954. To this appellant added $5 a ton until July 1, 1952, and $6 a ton thereafter. These increases in price resulted in an over-all raise in the cost of newsprint to appellee of almost 4.6 percent. We do not find such a raise to be unjust, considering the increased cost of doing business which occurred during these years, and certainly not a factual situation which would permit the appellee, on the grounds of business compulsion, to avoid the effect of its agreement with appellant entered into in November of 1947.

In its amended answer appellee alleges that in January 1954 appellant had reduced its price $6 a ton for like paper to its users of over 100 tons a year in carload lots and therefore the market price of the carload shipped on March 2, 1954, was $3,927.30 and not $4,096.71 as appellant claims.

The evidence discloses that in 1953 newsprint became more plentiful on the market so Abitibi, to meet competition, requested appellant to give all of its customers using 100 tons or more a year of newsprint a mill brokerage contract. This request appellant agreed to comply with and in December of 1953 and January of 1954 entered into such contracts with the publishers of newspapers at Columbus, Alliance, Falls City, Nebraska City, and Beatrice. It also, on January 3, 1954, offered such a contract to appellee. Due to the fact that appellee had signed a mill contract with Wright Paper Company in 1952, effective in 1954, it refused such offer. Consequently appellee was not in a position to demand that appellant charge it the mill price of $131 a ton for the carload it purchased on March 2, 1954, but rather, was still on the basis of buying direct from appellant, and it was perfectly proper for appellant to charge the $137 a ton which it did.

There are other questions raised by appellant such as the claim that the trial court improperly made a set-off

of a claim arising in tort against one arising on contract; that the counter-claim, if valid, is barred by the statute of limitations; and that no action for damages was alleged or proved. We do not pass on any of these questions as we find it neither necessary nor desirable to do so in view of our holdings hereinbefore set forth.

In view of what we have said we find no factual basis to support appellee's counter-claim and the trial court was clearly wrong in entering judgment thereon. We also find no factual basis to support appellee's defense as to the amount due on the carload of newsprint which it purchased on March 2, 1954. We therefore reverse the judgment of the trial court so holding and remand this cause with directions that it dismiss appellee's counter-claim with prejudice and enter a judgment for the appellant in the sum of $4,096.71 with interest at 6 percent from March 2, 1954.

REVERSED AND REMANDED WITH DIRECTIONS.

CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

SEPTEMBER TERM, 1956

CHARLES KISER, APPELLANT, V. CLAYTON CHRISTENSEN, APPELLEE.

78 N. W. 2d 823

Filed October 19, 1956. No. 33937.

1. **Negligence.** Gross negligence means great and excessive negligence, that is, negligence in a very high degree. It indicates the absence of slight care in the performance of a duty.
2. **Automobiles: Negligence.** Where a driver of an automobile is suddenly confronted with an emergency requiring instant decision, he is not necessarily guilty of negligence in pursuing a course which mature reflection or deliberate judgment might prove to be wrong.
3. **Automobiles: Railroads.** An operator of an automobile who becomes frightened and bewildered at the discovery of the near approach of a train at a railroad crossing is not guilty of gross negligence toward his guest where the latter acquiesced in the method of operating the automobile resulting in the creation of the danger.
4. **Automobiles: Negligence.** A warning of imminent danger to a host by a guest riding in an automobile operated by such host must be made in time to afford the host a reasonable opportunity to avoid an accident, if such warning is to operate to the benefit of the guest.
5. ———: ———. What amounts to gross negligence in any given case must depend upon the facts and circumstances. The fact that the operator of the automobile may have been guilty of ordinary negligence is insufficient to warrant a recovery in favor of a guest.

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

Luebs & Elson, for appellant.

John E. Dougherty, 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 by the plaintiff while riding in defendant's automobile as a guest. The trial court directed a verdict for the defendant at the close of plaintiff's evidence, and the plaintiff has appealed.

The accident occurred on January 26, 1953, in Grand Island, Nebraska, at the point where Greenwich Street crosses the railroad tracks of the Union Pacific Railroad. The accident happened after dark at about 8 p. m. The road was graveled and described as wet. There are six railroad tracks at the point of the accident. The collision between defendant's pickup truck and the railroad engine occurred on the east-bound main-line track, the fifth track from the north, the direction from which the defendant approached the tracks. The headlight on the engine was burning and there is no contention that the truck lights were not on. There are buildings on each side of Greenwich Street north of the railroad tracks, but there is no contention that they obstructed the view of plaintiff and defendant as they approached the crossing. There were no cars on the switch and passing tracks blocking the view from the west, the direction from which the train came.

The evidence shows that plaintiff and defendant were farmers living near St. Paul. They lived in the same community and were good friends. At the times herein mentioned both were working at the Ordnance Plant near Grand Island. They took turns driving to and from work. On the day of the accident defendant drove

his pickup truck and plaintiff rode with him as his guest. They finished work at 4 p. m. They left the Ordnance Plant and went to Grand Island, where they drank three or four beers and then went to the sale barn where defendant purchased and arranged for the delivery of three head of cattle. They went to a grocery store and made some purchases, after which they were going to a restaurant for their evening meal. They went to Greenwich Street and turned south. As they approached the Union Pacific tracks, at about 8 p. m., they were traveling from 20 to 25 miles an hour. The defendant was driving and plaintiff was riding with him in the front seat. When the pickup was about 8 feet from the first track, plaintiff saw the train approaching from the west and said to the defendant: "Christ sake, a freight coming, stop." The defendant said he saw the train at about the same time as the plaintiff. At this time they were about 80 feet from the east-bound main track. The train was 200 to 300 feet west of the crossing and traveling from 30 to 35 miles an hour. Plaintiff said they both became scared. Defendant said he applied his brakes, which were in good working order, although he has no recollection whether they took hold or not. When about 40 feet from the east-bound track, defendant attempted to turn east to avoid a collision. He struck the engine at about its center as he attempted to turn left and plaintiff suffered the injuries of which complaint is here made. Plaintiff testified that defendant failed to slow down upon receipt of the warning. Defendant said he saw the train too late to avoid the accident. He testified he saw the train first when he was on the first or second track. If he saw it when he was on the first track, he was about 70 feet from the point of the accident. If he saw it from the second track, he was about 35 feet from that point. Plaintiff testified that he did not complain about or warn the defendant about his driving at any time except the one instance herein recited.

A guest may not recover damages for personal injuries from his host except where the host is guilty of gross negligence. Gross negligence has been defined by this court as meaning great or excessive negligence, that is, negligence in a very high degree. It indicates the absence of slight care in the performance of a duty. The burden of proof rests upon the guest to establish gross negligence on the part of his host. It must be established by the facts and circumstances surrounding the particular case. When the trial court directs a verdict, the party against whom the motion for a directed verdict is directed is entitled to have every controverted fact resolved in his favor and to have the benefit of every inference that can reasonably be deduced from the evidence. If there is evidence which will support a finding for a party having the burden of proof, the trial court may not disregard it and direct a verdict against him. A trial court may direct a verdict in a guest case only when the court can determine that the evidence fails to approach the degree of negligence recognized as gross under all the circumstances of the case. The foregoing rules have been announced by this court on numerous occasions. A citation of authorities in support of them would only serve the purpose of proving that which has long been established.

The evidence in this case shows that defendant was approaching the railroad tracks at a speed of 20 to 25 miles an hour. No complaint or warning concerning the speed at which the tracks were approached was made by the plaintiff. Plaintiff and defendant knew they were approaching the main tracks of the Union Pacific Railroad. It was evident to plaintiff that defendant did not intend to stop before proceeding across them, and he acquiesced in this method of operating the pickup truck. When plaintiff first saw the train when the pickup was 80 feet from the east-bound track, he shouted a warning. It appears, however, that the warning was too late to give the defendant a reasonable op-

portunity to avoid the accident. The plaintiff testified that he became scared when he saw the train, plain evidence of an emergent situation. Plaintiff stated that defendant also became scared, further evidence that danger was imminent when the warning was given. The language used in giving the warning clearly indicates that the parties were in a dangerous predicament at or before the time the warning was given. This court has held that a host who approaches a railroad track without looking is not guilty of gross negligence to his guest because of that fact alone. Bishop v. Schofield, 156 Neb. 830, 58 N. W. 2d 207. In the present case the operator of the pickup truck did look and see the train approaching. In this respect he was less negligent than the host in the Schofield case. But it is urged that as he did look for and see the train, he was guilty of gross negligence in not avoiding the accident. It is contended in the instant case that the warning given and the failure to avoid the collision raise the degree of negligence to that which is termed gross. We have no doubt that there may be cases when a warning given in ample time would induce such a result. But for a warning to accomplish this purpose, it must be made in time to afford the host a reasonable opportunity to avoid an accident. In the present case the guest had acquiesced in the speed of the car as it approached the railroad tracks. He may not wait until a state of emergency exists before giving a warning and then claim the host was guilty of gross negligence in the subsequent operation of the car unless it can be shown that the latter had a reasonable opportunity to avoid the accident. We do not think the evidence is sufficient to show gross negligence on the part of the host. The fact that the defendant became frightened, or "froze up" in the emergency, is something other than negligence of a high degree. It has been the rule in this state that where a driver of an automobile is suddenly confronted with an emergency requiring him to act quickly,

he is not necessarily negligent if he pursues a course which mature reflection or deliberate judgment might prove to be wrong. Riekes v. Schantz, 144 Neb. 150, 12 N. W. 2d 766. In a case somewhat similar in principle this court stated in effect that one who becomes frightened and bewildered at the near approach of an automobile while crossing a public street, and for that reason fails to avoid a collision, is not guilty of contributory negligence as a matter of law. Smith v. Coon, 89 Neb. 776, 132 N. W. 535. This court quoted with approval from Navailles v. Dielmann, 124 La. 421, 50 So. 449, in the foregoing case as follows: "The act of a pedestrian in running in front of an automobile as a result of terror, caused by discovering the automobile near him, is not voluntary, and it is not negligence." The rule is stated in 65 C. J. S., Negligence, § 123, p. 735, as follows: "In order to relieve a person from the consequences of his own acts on the ground that they were done suddenly and under impending danger, there must be either a real danger or the circumstances must be such as might create apprehension of danger in the mind of an ordinarily prudent person, and the appearance of danger must have been imminent, leaving no time for deliberation." It might be urged that this rule has no application here for the reason that the danger was of his own creation and that the controlling rules governing such cases could not be applied to him. We point out however that plaintiff acquiesced in defendant's driving up to the time the peril was discovered and, consequently, plaintiff is in no position to assert the rule of nonapplicability when his own contributory negligence helped bring it about. Under the facts shown, negligence on the part of defendant and contributory negligence on the part of the plaintiff might well have been submitted to a jury in a proper case. But the question before us is whether or not gross negligence on the part of defendant has been

shown by the evidence sufficient to present a jury question.

In determining if gross negligence has been sufficiently established, we must look to the facts and circumstances of each case that comes before us. No two cases are exactly alike. We find no case so similar on its facts as to control the result in the present case. The fact that the operator of the pickup truck in the present case may have been guilty of ordinary negligence is insufficient to warrant a recovery in favor of a guest. Under the facts of this case as we have analyzed them, and the rules announced in Eilts v. Bendt, 162 Neb. 538, 76 N. W. 2d 623; Rice v Neisius, 160 Neb. 617, 71 N. W. 2d 116; Ottersberg v. Holz, 159 Neb. 239, 66 N. W. 2d 571; Born v. Estate of Matzner, 159 Neb. 169, 65 N. W. 2d 593; Bishop v. Schofield, *supra;* and other authorities cited herein, we conclude that the evidence was insufficient to warrant the trial court in submitting the issue of gross negligence to the jury. The trial court therefore properly directed a verdict for the defendant.

AFFIRMED.

EVERETT SATTERFIELD, APPELLANT, V. MARLIN BRITTON ET AL., APPELLEES, FRED E. BOHY, INTERVENER-APPELLANT.
78 N. W. 2d 817

Filed October 19, 1956. No. 33988.

1. **Taxation.** A levy of taxes authorized by law in the manner provided therefor is not invalid because of the name by which the tax is designated in making the levy if the statute under which it is made does not attach a name to the tax by which it is required to be designated.
2. ———. A taxpayer, who voluntarily pays an unauthorized and illegal tax and who does not make a demand for its return within 30 days of the time of the payment of the tax, is forever barred and has no capacity to contest the validity of the tax by any legal proceeding.

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

Davis & Vogeltanz and *Manasil & Erickson,* for appellants.

A. F. Alder, for appellees.

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

BOSLAUGH, J.

This is an action by Everett Satterfield, a resident taxpayer of the county of Loup, against the board of commissioners and the county clerk of that county for an injunction to prevent them from making a contract for the construction of a courthouse in Taylor, the county seat of Loup County, and from using any money raised by taxation for that purpose.

The circumstances recited by Everett Satterfield, one of the appellants, and Fred E. Bohy, a resident taxpayer of the county and the intervener and other appellant, as the basis of the relief they seek are identical and are as follows:

The county board of Loup County during a period of time made a levy of taxes upon the property of the taxpayers of the county and collected the taxes thereby assessed from the taxpayers, including the appellants. The fund created thereby is referred to as the special improvement fund or some similar name. The taxpayers did not authorize the levy or collection of the taxes by an election or otherwise. The taxes levied and collected as described are usually referred to as a fund for the building of a new courthouse. The county board advertised for bids for the construction of a building intended to be erected and used when completed as the courthouse of the county. Plans and specifications for the building or an estimate of its cost were not secured by or for the county as the law requires as a condition of making a valid contract for the construction of the con-

templated building. The erection of the courthouse or the expenditure of the money to pay its cost were not budgeted during the fiscal year of 1955-1956 by the county and the expenditure therefor would be illegal and the taking of property of appellants and other taxpayers without due process of law contrary to the Constitution of the United States and the Constitution of Nebraska. Appellees, unless prevented by the court, will enter into a contract on behalf of the county for the building of a courthouse and will expend, and obligate the county to expend funds produced by taxes, illegally without their action in that regard having been authorized by the electors of the county in any manner.

Appellees assert these matters in answer to the claims of appellants:

Taxes were levied and collected from the taxpayers of the county, including appellants, by the proper officials of the county at the time and in the manner specified by law for the years 1946 to 1953, inclusive, for the purpose of providing an improvement fund to defray the expense of the erection of a courthouse for the county. The proceeds of the levies were placed in a fund designated "Improvement Fund." The amount realized and now therein is sufficient to pay the cost of the construction of the contemplated building. The levies made and the taxes collected were not requested by petition of the electors or authorized by an election held for that purpose. The levy made each year as aforesaid did not exceed any limitation or violate any provision of the law. There was no objection to or contest of the levy of taxes made for any of the years to provide funds for the erection of a courthouse by appellants or any other taxpayer of the county. The taxes levied and assessed for that purpose were paid by the taxpayers, including appellants. The amount thereof exceeds the cost of the proposed building, is in the improvement fund of the county, and is held by it for the purpose for which it was levied and collected. The county does not have a

suitable or adequate courthouse. The improvement fund was legally included as an item or part of the county budget for each of the years designated and for the year 1955. The county procured plans and specifications for the proposed building. The county board approved and adopted them, and it directed the county clerk to publish notice as provided by law that bids would be entertained for the erection of the building in accordance with the plans and specifications approved by the county board and on file in the office of the county clerk. Further action of the county to erect the building was interrupted by the commencement of this case.

The claims of appellants made in the petition not admitted by appellees were denied by them and the parts of the answer not conceded to be true were traversed by appellants.

The district court found generally for appellees and rendered a judgment of dismissal of the case. This appeal contests the validity of that adjudication.

The record does not present an issue of fact. The substance of the proof is as follows:

The county board of Loup County made a proposed budget for the fiscal year commencing July 1, 1946, which included an item for a proposed levy of .40 of a mill for a fund designated "Improvement Fund." A summary of the budget containing this item was published with notice that the county board would hold a public hearing at a designated time at the courthouse of the county for the purpose of hearing objections, suggestions, or corrections to the 1946 county budget. The county board at its meeting on August 1, 1946, made levies, including one for the improvement fund, in harmony with the budget except that the levy for the improvement fund was .55 of a mill. There was a levy of taxes for the improvement fund made by the board for each of the fiscal years thereafter to and including the year 1953 by like procedure as the one for 1946 referred to above. The amount of levies for this fund

were not uniform as to amount throughout the period but none of them exceeded 1 mill or violated any legal limitation. There was no petition by electors requesting the county board to levy taxes and no election that authorized it to be done to provide for the expense of constructing a new county building. The county had bonded indebtedness during the year 1946 and thereafter through 1951.

The taxes levied and assessed for the improvement fund for the years 1946 to 1953, both inclusive, were paid by the taxpayers of the county, including appellants, before this case was commenced without objection or protest and there was no legal contest of any of the levies for the improvement fund by anyone before this action was instituted in August of 1955. The proceeds of the taxes were credited to the improvement fund as payment of them was made and the total thereof was sufficient to pay the cost of the construction of the building the county proposed to build. The amount thereof has been continued by the county in the fund and the intention and desire of the county is to use it for the purpose for which it was created. The county has no suitable courthouse. The building being used for that purpose is more than 70 years old, is in very bad condition, and is inadequate and unsuitable for courthouse purposes.

The proposed budget of the county for the fiscal year commencing July 1, 1955, was prepared and published with notice of a public hearing by the county board at a designated time and place at which time the hearing was held. There was no objection made to or change suggested in the proposed budget, it was adopted, and levies were made in accordance with it. The reference to the improvement fund in the budget as published was as follows: Following the designation of the fund was the heading "Requirements" and below it was 29,000.00. Under the words "Cash on Hand 7-1-55" was 26,817.92. Under the words "Misc. Revenue" was 105.80.

Under the words "Amount to be raised by Taxation 1955 Levy" was 2,076.28 and below the words "Proposed 1955 Levies" was .50. The county board adopted what was designated a "RESOLUTION OF ADOPTION AND APPROPRIATION" at the time the proposed budget for 1955 was approved and the levies were made for that year. The following are parts of the resolution:

"Section 1. That the budget for the fiscal year, 7-1-55 to 6-30-56, * * * be, and the same hereby is, adopted as the budget for Loup County for said fiscal year; and that item designated as County Improvement Fund is for construction of a new court house * * *.

"Section 2. That for the expenditures proposed in said budget document as adopted, there is hereby appropriated, by offices, departments, activities, institution and funds, the following amounts, to-wit: * * * For General-Miscellaneous * * * County Improvement Fund $29,000.00. * * *

"Section 3. That the offices, departments, activities and institutions hereinbefore named, are hereby authorized to expend the amounts hereinbefore appropriated to them during the fiscal year beginning July 1, 1955, and ending June 30, 1956.

"Section 4. That the income necessary to finance the appropriations made and expenditures authorized shall be provided out of cash on hand in each fund, revenues to be collected during the fiscal year in each fund, and a tax ley (levy) for each fund as follows: * * * Improvement .50 mills."

A qualified engineer, registered in this state, was employed by the county to prepare plans and specifications for the proposed building, to generally supervise the work, and to perform the services of an engineer and architect necessary in the construction of the building. He prepared plans and specifications for the building, they were approved and adopted by the county, and they were filed and deposited in the office of the county clerk for the use of the public before bids for the con-

struction of the building were invited. The county board caused an advertisement for bids to be published and bids for the construction of the building were made. That was the occasion of the commencement of this litigation. It is conceded that appellants are resident taxpayers of the county. They occupy no other status in or concerning this case.

Appellants attempt to challenge the authority of Loup County to create the fund to defray the cost of construction of a courthouse as the facts existed concerning it. The county board relied upon section 23-120, R. S. 1943. It contained these relevant provisions during the year 1946 and thereafter until it was amended in 1951:

"The county board shall erect or otherwise provide a suitable courthouse, * * *. But no appropriation exceeding fifteen hundred dollars shall be made for the erection of any county building except as hereinafter provided, without first submitting the proposition to a vote of the people of the county at a general election or a special election * * * and the same is ordered by a majority of the legal voters thereon; Provided, that the county board * * * is hereby authorized and empowered, when requested so to do by a petition signed by at least fifty-five per cent of the legal voters in the county, * * * to make an annual levy not exceeding five mills upon the dollar on all taxable property in the county for the purpose of providing a fund for the erection of a courthouse * * *. In counties having no bonded indebtedness, the county board, without the filing of such petition, may levy a tax of not to exceed one and one-half mills per year for not exceeding two years for the purpose of providing a fund for the erection or repair of a jail or courthouse * * *."

The above section was amended in 1951. § 23-120, R. R. S. 1943; Laws 1951, c. 46, § 1, p. 162. The amendment became effective August 27, 1951. It increased the amount the county board had authority to appropriate

for the erection of a county building without an election or a petition of electors from not exceeding fifteen hundred dollars to not exceeding ten thousand dollars and it changed the limitation of "not exceeding two years" in the last sentence of the section to "not exceeding ten years."

It is argued that all of the acts of the county board were invalid because it did not adopt a special resolution or take any other appropriate proceedings establishing a fund for defraying the cost of building a courthouse in specific and clear terms before any attempt was made to levy a tax for that purpose. Appellants say it should have shown clearly that the fund was for the purpose of erecting a courthouse. The statute does not so require. It does not attach to the fund created by such a tax any name or specifically state the manner in which the intention to levy the tax or its purpose shall be expressed. This court passed on a somewhat similar situation in Burlington & M. R. R. Co. v. Cass County, 16 Neb. 136, 19 N. W. 700, and it is there said: "Taxes levied by the county commissioners, upon the receipt of the certificate of the state auditor, to pay the amount due from the county to the hospital for the insane are legal if levied and collected for that purpose, without reference to the name by which the tax is designated in making the levy." The following appears in the opinion: "While the evidence is not as clear as it perhaps might have been, yet it sufficiently appears that this was being done though in rather an irregular way; and the mere fact that this tax was named or denominated the 'insane fund' does not change its character or vitiate the tax, and especially is this true in a case like this where the law does not attach to it any name or specially point out the manner in which the addition to the state tax shall be made." See, also, Burlington & M. R. R. Co. v. Lancaster County, 12 Neb. 324, 11 N. W. 332.

It is asserted by appellants that there was no action

taken by the county to transfer the amount in the improvement fund to a courthouse building fund. This is not supported by any authority. There is no requirement in the law therefor. The money was exacted to pay the cost of a county courthouse. It was placed in a fund designated an improvement fund which was usually referred to as a fund for building a new courthouse, as is evidenced by the allegations of the pleadings of appellants. It is proposed to be used for that precise purpose. This contention is not convincing.

It is true, as appellants assert, that the county had a bonded indebtedness during the year 1946 and thereafter through the year 1951. They contend that all the taxes levied during this period and referred to above were unauthorized and illegal. If this is true, it is unimportant in this case. The proof is that the taxes for the years 1946 to 1953, inclusive, were voluntarily paid by the taxpayers against whose property they were levied and assessed. The appellants were two of the taxpayers of the county and they voluntarily paid the taxes levied against their property. This is not a class action. It is an action by the plaintiff, who is one of the appellants, for himself only. The other appellant intervened in the case for himself only. The legal right of appellants to contest the validity of the taxes levied by the county board described herein for the period stated in any proceeding ceased when appellants voluntarily paid the taxes. It is not shown that either of them made any demand for a return of any of the taxes paid by them. The record shows that they do not have the capacity and are not legally qualified to dispute or contest the validity of the actions of the county board on behalf of the county of which they complain herein. Appellants will not legally gain or lose however this case may be decided.

Section 77-1735, R. R. S. 1943, contains the following: "If a person claim a tax, or any part thereof, to be invalid for the reason that it was levied or assessed for

an illegal or unauthorized purpose, * * * when he shall have paid the same to the treasurer, or other proper authority, in all respects as though the same was legal and valid, he may, at any time within thirty days after such payment, demand the same in writing from * * * the treasurer of the county, * * * for the benefit, or under the authority, * * * of which the same was levied, and if the same shall not be refunded within ninety days thereafter, may sue such county, * * * for the amount so demanded."

In Monteith v. Alpha High School District, 125 Neb. 665, 251 N. W. 661, it is held: "In the absence of statute, taxes voluntarily paid cannot be recovered back. When a tax imposed is illegal and unauthorized for any purpose, an original action may be brought to recover the tax only by virtue of statutory or constitutional authority. * * * One who seeks to avail himself of the statutory right to recover from a county or school district a tax voluntarily paid must show a substantial compliance with the statute." In the opinion it is said: "There is no evidence in the record to the effect that any of the taxes were paid involuntarily. They were paid by the persons assessed more than three years prior to the date that demands were made for their return. The law is settled in this state that where a person assessed, voluntarily and without compulsion, pays taxes, they cannot be recovered back in an action at law unless there is some constitutional or statutory provision expressly or impliedly giving the taxpayer such right. The only statute applicable to this case is section 77-1923, Comp. St. 1929 (now section 77-1735, R. R. S. 1943), but it provides as a condition precedent to the maintaining of the action that a demand in writing must be made within 30 days after the payment of the taxes. Demand in this case was not made for more than three years after the taxes were voluntarily paid. This clearly was not a substantial compliance with the statute. * * * We are obliged to hold, therefore, that

when plaintiff failed to demand repayment within 30 days from the date of payment of the taxes claimed to be void, * * * he was forever barred." See, also, Dorland v. City of Humboldt, 129 Neb. 477, 262 N. W. 22; Arlington Oil Co. v. Hall, 130 Neb. 674, 266 N. W. 583; State v. Smith, 135 Neb. 423, 281 N. W. 851; Loup River Public Power Dist. v. County of Platte, 144 Neb. 600, 14 N. W. 2d 210.

The court in Dorland v. City of Humboldt, *supra,* commented on the meaning of the words "voluntary payment" in this manner: "When a voluntary payment of special assessments is spoken of, the word 'voluntary' is not used in its ordinary sense, for many such payments are held to be voluntary which are made unwillingly."

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

AFFIRMED.

RICHARD BROCKMAN, PLAINTIFF IN ERROR, V. STATE OF NEBRASKA, DEFENDANT IN ERROR.
79 N. W. 2d 9

Filed November 2, 1956. No. 33961.

1. Rape. The degree of force required to sustain a conviction for rape is relative, depending upon the particular circumstances, but it must be sufficient to subject the dissenting woman to the power of the man and thus enable him to have carnal knowledge of her notwithstanding good-faith resistance on her part.
2. ———. The degree of resistance required of the prosecutrix is also relative, depending upon the particular circumstances, but she must in good faith resist to the utmost of her physical ability as long as she has the power to do so until the offense is consummated.
3. ———. In a prosecution for rape it must be shown by competent evidence beyond a reasonable doubt not only that defendant committed the act charged but that he did so under such

circumstances that every element of the alleged offense existed.

4. **Criminal Law.** Where competent evidence is adduced to support every element of the offense charged in a criminal prosecution, it is ordinarily for the jury to determine if the offense has been established by evidence beyond a reasonable doubt.
5. **Evidence.** A photograph proved to be a true representation of the person, place, or thing which it purports to represent is proper evidence of anything of which it is competent and relevant for a witness to give a verbal description.
6. **Juries.** Where the trial court endeavored to ascertain from the jurors whether they would like to go to a hotel for the night due to the lack of facilities in the courthouse to keep the jury overnight, or return to their jury room for further deliberation, then, ascertaining the jurors' desire, the trial court sent the jurors back to the jury room for further deliberation; held, such action on the part of the trial court did not amount to coercion or an attempt to influence the verdict of the jury.

ERROR to the district court for Douglas County: L. ROSS NEWKIRK, JUDGE. *Affirmed.*

Alfred A. Fiedler, for plaintiff in error.

Clarence S. Beck, Attorney General, and *Homer G. Hamilton,* for defendant in error.

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

MESSMORE, J.

Plaintiff in error, Richard Brockman, hereafter called the defendant, was charged by indictment with rape. He was 19 years old at the time of the alleged offense. The prosecutrix was 19 years old at that time. The defendant pleaded not guilty. Upon trial to a jury he was found guilty, and upon the overruling of his motion for new trial he was sentenced to serve 12 years in the penitentiary. He thereupon prosecuted error to this court.

The defendant assigns as error that the verdict is not sustained by the evidence and is contrary to law, and that the trial court should have sustained the defendant's motion for directed verdict at the close of the State's

evidence and at the close of all of the evidence.

The record discloses that Rosemary Menges, at the time of trial Rosemary Menges Gray, who formerly lived in Council Bluffs, Iowa, knew and was a friend and schoolmate of Laura Kobold, now Laura Lemire, and Louann Carlson. Joan Bennett, whom the prosecutrix had known for a short time, on the evening of July 30, 1954, went to Council Bluffs and contacted the girls previously mentioned. They drove to Omaha, Nebraska, to a house on Thirty-sixth Street between Dodge and Farnam Streets, for the purpose of meeting some girls who lived there. When they arrived the girls were not at home so they sat on the porch to wait for them. Shortly thereafter a Ford convertible drove up containing four boys, one of whom was the defendant. The boys saw the girls and stopped the car. The boys got out of the car, introduced themselves at least by their first names, and talked to the girls. Some conversation developed as to whether the girls would like to go to Campbell's minature golf course, not too far distant, and play golf. The girls who lived in the house returned in a few minutes. The prosecutrix and Laura Kobold went into the house to visit with them. Upon their return it was agreed by the girls that they would accompany the boys. The prosecutrix sat in the front seat with the defendant to her right, Laura Kobold to her left, and to the left of Laura was Bob Morse the driver. The other two girls and boys got into the back seat of the car. They drove to Fortieth and Hamilton Streets and parked near a bar where the boys finally obtained some whisky. They brought it back to the car, mixed it with Seven-Up, and offered it to the girls who refused to take it. The girls told the boys that it was getting late, to forget the golf, that they wanted to go home. The boys agreed to take them back to the house. They proceeded to the corner of Thirtieth Street where a convertible containing some boys was parked in a filling station. These boys yelled, and

Brockman and one of the other boys jumped out of the car. Brockman had a knife that he had taken from the glove compartment of the car, and the other boy had a pop bottle. They pursued the other car as it pulled out of the filling station but were unable to catch it and returned to their car. The girls pleaded to be taken home. The boys said they would take them home, but they continued to drive around in a circuitous route which they claimed to be a short cut, and in so doing met another car containing friends of the boys. They had a short conversation and then proceeded to an isolated, wooded section in Hummel Park. The boys got out of the car and proceeded to the back thereof and held a conversation.

Laura Lemire testified that she was sitting next to the prosecutrix and observed Brockman attempting to pull the prosecutrix out of the car. The prosecutrix reached for the door or something to get hold of to keep herself in the car, but she was pulled out and away from the car. She was struck in the face and knocked down. When she stumbled, she was pulled up again by the defendant and then knocked down again. None of the other girls could get away to help her. The prosecutrix was screaming and calling for help, and sounded as if she were afraid. Laura could not see the prosecutrix after that but could hear her screaming and calling for help.

Louann Carlson testified that the defendant grabbed the prosecutrix by her arm and was pulling her while she was hanging on to Laura; that he pulled her out of the car and dragged her away; that the prosecutrix was fighting and screaming and saying "Help me"; and that she was unable to see the prosecutrix but that prosecutrix called Louann's name two or three times.

Joan Bennett testified that the defendant pulled the prosecutrix from the car; that the prosecutrix endeavored to restrain him from doing so and pulled back; that the prosecutrix seemed to fall when she was pulled

from the car and Brockman continued to pull her away from the car; and that she was away from the car herself later on. She could hear the prosecutrix screaming and pleading for help. She could hear a sound as if someone was hitting someone else.

The prosecutrix testified that the defendant opened the door, grabbed hold of her arm, and said something about getting out of the car. The prosecutrix said no, that they wanted to go back home, and asked that he let go of her. He kept pulling. She had one hand on the car door and her feet braced against the car. The defendant grabbed hold of her by her other hand and pulled her out of the car. She then called for Louann to help her. Laura grabbed hold of her waist but the driver of the car loosened Laura's grip and the defendant pulled the prosecutrix out of the car and she lost her balance. The defendant kept pulling her away from the car. Her heel had come out of her shoe and she was endeavoring to put it back and asked the defendant to please let her put her shoe on. He kept pulling, and the shoe came off. She asked the defendant to help her find her shoe. He had a tight grip on both of her arms. She tried to pull back away from him, but he kept pulling her away from the car. When they were 10 or 15 feet away from the car he grabbed hold of her blouse and it came open, and her bra strap broke. He had let go of one of her hands and she tried to jerk away. The defendant grabbed hold of her loose hand again and started to pull her. She was calling for Louann to come and help her. The defendant slapped her with the palm of his hand. She tried to pull away and he slapped her again. She continued to cry out. He pulled her back into a place where there were bushes and trees all around. She continued to call for Louann, and the defendant struck her with his fist on the cheek and kept pulling her back. She kept calling for Louann and pulling herself away. The defendant struck her again and knocked her down. She brought her

knees up against her chest and he was leaning against her legs while she was lying on the ground on her back. While his chest was up against her knees "he kept saying that he was going to get it and he wanted to know if I was going to give it to him the easy way or the hard way." She further testified that she kept pleading with him to let her up; that she called to Louann to come and help her; and that this made the defendant mad. She had one hand free and spread it across his mouth with the fingers separated. The defendant said "Damn you," pressed his hand around her throat, and hit her on both sides of the face with his fist while holding her around the neck. He grabbed hold of her shorts, jerked and ripped them, and her pants came off with the shorts. She covered her person with her hands. This made him mad and he hit her in the face again with his fist. He then started to get up against her and held her with one hand around the top of her body. She tried to raise her hands to defend herself and he kept pushing against her and she was unable to raise a hand or to defend herself.

When the prosecutrix returned to the car her clothes were torn and dirty and her face was swollen. The girls were taken back to the place where their car was parked. The boys drove into an alleyway and parked and let them out, and someone said: "If you go to the police with this we will find you and kill you." One of the boys got out of the car and stood in front of the license plate.

The prosecutrix was taken immediately to her home in Council Bluffs by Joan Bennett. When she arrived there she found she had lost her key. She rang the doorbell and her mother let her in.

The mother of the prosecutrix testified that the prosecutrix fell against her and the mother asked what was wrong, if she had been attacked. The prosecutrix could not talk. Her hair was stringing and dirty, her face and eyes were swollen and black and blue, her jaw

was swollen, and her lips were black and blue.

A nurse who roomed in the home of the prosecutrix saw her when she arrived at home and testified that her face was practically unrecognizable, it was so swollen, and discolored a deep red and sort of blue. There were red marks around her throat. Her blouse was hanging open, her shorts were ripped, and one shoe was gone. She seemed to be groggy.

The prosecutrix was taken to a hospital where she was examined by a senior medical student and later by a physician. The examination disclosed that her face was badly swollen, she had numerous bruises and contusions about the face, and her eyelids were swollen. She had severe bruises on her face, particularly on the left side. Her neck was bruised and swollen. Scratches were apparent on her neck, chest, and abdomen. The hymen was lacerated and bleeding, and the posterior floor of the vaginal vault was badly contused and bruised. There were lacerations on the floor of the vagina caused by the use of force. It was the doctor's opinion that this was the first act of intercourse she had had. There was male semen present in her vagina.

The defendant testified that he and the boys he was with had never met the girls before, and that the girls agreed to go riding with them. He further testified that he made love to the prosecutrix during the course of the ride and when they arrived at the section in Hummel Park where the car stopped he opened the car door and asked her to take a walk. She said it was dark, and he said he would help her. She got out of the car voluntarily. She fell, and he helped her up. They walked up a hill, with his arm around her shoulders, and she had her arm around his waist. He started kissing and making love to her and asked her to have intercourse. She agreed, after telling him she was not a virgin. She tempted him, and it was a complete act of intercourse which she did not resist and willingly consented to. As they were finishing the act of intercourse she started

to cry and whimper, grew hysterical, and "passed out." He did not know what to do, so he slapped her on both sides of the face four times to bring her out of it, because he was afraid when she did not respond to his calling her name.

The defendant argues that the fact that the evidence shows he had intercourse with the prosecutrix is not sufficient to show that he exercised force or that she resisted to the extent the law requires.

The rule as stated in Cascio v. State, 147 Neb. 1075, 25 N. W. 2d 897, is as follows: "The degree of force required is relative, depending upon the particular circumstances, but in any such case it must be sufficient to subject and put the dissenting woman within the power of the man, and thus enable him to have carnal knowledge of her, notwithstanding good-faith resistance on her part. In that connection, whether carnal knowledge was forcible and against her will or with her consent, is ordinarily indicated by resistance or lack of it by the woman. While the degree of resistance required is also relative, depending upon the particular circumstances, the general rule is that a mentally competent woman must in good faith resist to the utmost with the most vehement exercise of every physical means or faculty naturally within her power to prevent carnal knowledge, and she must persist in such resistance as long as she has the power to do so until the offense is consummated."

Under all the circumstances shown by this record, the jury could properly find that the prosecutrix resisted the defendant in good faith and to the utmost of her ability. The evidence shows that the prosecutrix was a virgin, 19 years of age, weighing 110 pounds. The defendant was a young man 19 years of age, 6 feet tall, weighing 195 pounds. The evidence shows that the prosecutrix was forced out of the car. She was beaten before the act of intercourse took place. Her clothing was torn, and her appearance could leave no doubt that

unusual force was used in the commission of the act. The physical facts refute the story told by the defendant that he simply slapped her when he was afraid because she did not answer. The evidence of the examining physician was that the damage to her sexual organs was the result of violent force. She resisted until she could not even raise a hand.

"Whether or not the prosecutrix resisted advances of the defendant to the extent of her ability under the circumstances presented by the evidence is a question of fact, and where her testimony, if believed, would indicate that she had so resisted, a verdict based on such testimony will not be set aside." Medley v. State, 156 Neb. 25, 54 N. W. 2d 233.

The lurid details of the crime, as shown by the evidence, beyond question demonstrate that if the State's evidence is believed, every element of the crime of rape was established. The evidence clearly sustains the finding of the jury that the defendant raped the prosecutrix at the place and time charged.

The defendant assigned as error the ruling of the trial court that defendant's expert witness was not permitted to testify as to the foundation for the admission of exhibit 14, a colored transparency of the prosecutrix, in evidence.

Lieutenant Elliott of the Omaha Police Department took the colored transparency of the prosecutrix at her home in Council Bluffs on August 3, 1954, 3 days after the alleged rape. He used standard equipment. He described the manner in which the prosecutrix was dressed, her physical condition, and facial features at the time he took the picture, to the effect that her face was swollen beneath the eyes and the lower eyelids were dark red. Her eyes were bloodshot, and her face and lips badly swollen. The exhibit was authenticated by his statement that it truly and accurately reproduced and reflected the general appearance and the appearance

he had described of the prosecutrix on the date that he took the picture.

The defendant's counsel requested that the jury be excused as he desired to offer the testimony of an expert witness on the foundation going to the admissibility in evidence of the colored transparency, exhibit 14, on the ground that the State's witness testified to the effect that he did not believe you could get an exact reproduction of the object photographed, and that he wished to argue a point of law on this proposition. The trial court refused to permit the witness to testify.

In the annotation, 9 A. L. R. 2d 904, it is said: "In view of the practical impossibility of obtaining photographs which perfectly represent their subject, it would seem that when the courts state that one offering photographs in evidence should prove that they are accurate and correct, they really mean that it must be shown merely that the photographs are sufficiently correct to be helpful to the court and jury. * * * And in Blake v. Harding (1919) 54 Utah 158, 180 P 172, the court said: 'As a matter of course, before a photograph is admissible under the circumstances disclosed in this case, it must be made to appear that it is a true or correct picture or representation of the objects photographed and in question. By that is not meant that it must be shown that the photograph is a true and correct picture or representation of the object photographed in the minutest details, but it must be made to appear that the photograph is a substantially true and correct picture or representation of the objects, and not a distorted or false one.' * * * The fact that there is conflicting evidence as to the accuracy of photographs does not require their exclusion. If the witnesses for the party offering the photographs testify that they are substantially correct they may be admitted, and their correctness then becomes a question for the jury."

In Beads v. State, 160 Neb. 538, 71 N. W. 2d 86, wherein a colored transparency was offered in evidence,

this court held: "A photograph proved to be a true representation of the person, place, or thing which it purports to represent is proper evidence of anything of which it is competent and relevant for a witness to give a verbal description." See, also, Vanderheiden v. State, 156 Neb. 735, 57 N. W. 2d 761; Turpit v. State, 154 Neb. 385, 48 N. W. 2d 83.

The defendant cites Kitts v. State, 151 Neb. 679, 39 N. W. 2d 283, where the court had before it the question of the foundation as to the admissibility of a confession, and it was said that: "When the State in the case at bar offered testimony relating to defendant's alleged confession, his counsel opportunely and appropriately objected to its admission for the reason that no sufficient foundation had been laid, and requested that all the evidence relating to foundation therefor, and the nature and character of the statements allegedly made by the defendant, should be first adduced out of the presence of the jury, as approved in Schlegel v. State, 143 Neb. 497, 10 N. W. 2d 264, and cases cited therein."

The defendant contends that the identical situation exists in this case with reference to exhibit 14. In the case of Kitts v. State, *supra,* it was held that the question of proper foundation for admission of a confession was a question of law to be decided by the court, but, if the confession was admitted it was error not to submit to the jury for its determination the factual question of whether it was obtained voluntarily or by force, threats, or fear. In the instant case the foundation for exhibit 14 had already been made by the police officer who took the picture. What defendant wanted to do was to refute the testimony which exhibit 14 injected into the case, and to prove that it did not actually reproduce and represent the prosecutrix at the time it was taken. That type of evidence should have been introduced by the defendant as part of his case. We believe the trial court ruled properly that if defendant wanted to attack the authenticity of this photograph

he should do it as part of his defense. It is obvious that Kitts v. State, *supra,* on the point contended for by the defendant, has no applicability to the case at bar. The above assignment of error is without merit.

The defendant contends the trial court erred in coercing a verdict of the jury by oral instruction.

What the trial court did was to make a statement which in no sense constituted an instruction. This statement was to inquire whether or not the jurors desired to continue their deliberation or, due to the lack of facilities to accommodate the jury overnight, to go to a hotel for the night and further deliberate the next day. The jurors indicated they would rather retire to the jury room and continue their deliberation. We have examined this oral statement and conclude that by it the court did not attempt to tell the jurors anything except to explain that there were no facilities available for them to stay overnight in the courthouse and that they could go to a hotel if they desired. The court was not asking for information, and gave no directions nor any urging to do or not to do any particular thing. Insofar as proceedings in the instant case are concerned, there is no indication that the statement made by the trial court could amount to coercion or any attempt to influence the verdict of the jury. See, Williams v. State, 69 Neb. 402, 95 N. W. 1014; Gebhardt v. State, 80 Neb. 363, 114 N. W. 290; Griess v. State, 121 Neb. 467, 237 N. W. 405; Annotation, 85 A. L. R. 1425. This assignment of error is without merit.

Upon the entire record, there is no error prejudicial to the accused, and the judgment of the district court is affirmed.

AFFIRMED.

OSCAR W. WEIBEL, APPELLEE, V. CITY OF BEATRICE, A MUNICIPAL CORPORATION, APPELLANT.
79 N. W. 2d 67

Filed November 2, 1956. No. 33983.

1. **Municipal Corporations.** Where a city, exercising its paramount right to the use of a street for the primary purposes for which it was dedicated, removes trees growing in the street in order to place a sidewalk therein and does so in a proper manner, it is not liable to respond to an adjacent property owner for consequential damages occasioned by a diminution in value of his property caused thereby.
2. **Constitutional Law: Municipal Corporations.** Such damages are not within the recoverable damages provided for in Article I, section 21, of the Constitution of Nebraska.
3. **Case Overruled.** Insofar as in conflict herewith, Stocking v. City of Lincoln, 93 Neb. 798, 142 N. W. 104, 46 L. R. A. N. S. 107, is expressly overruled.

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

Frederick W. Carstens, for appellant.

Sackett, Brewster & Sackett, for appellee.

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

SIMMONS, C. J.

In this action plaintiff seeks to recover damages occasioned by the removal of shade trees from the street in front of his property and by the relocation of a sidewalk as a part of a street improvement. He filed a claim with the city, which was denied. On appeal to the district court issues were made and trial was had to the court, a jury being waived. Judgment was entered for the plaintiff. The defendant appeals.

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

Plaintiff filed a claim with the defendant asserting that it had by grading and construction operations

destroyed and removed from his premises four ornamental shade trees, the fair and reasonable value of the trees being $500.

Plaintiff in his petition in the district court alleged the ownership and possession of one and one-half lots in the defendant city which constituted his residence and home. He further alleged that there were four ornamental shade trees growing "on that portion of south sixth street * * * adjacent and opposite" to his property, and that by grading and paving operations the defendant had changed the elevation and grade of the street opposite his premises resulting in the destruction of the trees. He then alleged that the difference in value of his property before and after the destruction of the trees was $500. He prayed judgment for that amount.

The defendant by answer admitted ownership of the described real estate by the plaintiff; denied that its paving operations had caused plaintiff damage; and alleged that it had improved plaintiff's property and that the removal of the trees from the street was necessary in the public interest.

The trial court found generally for the plaintiff; that the construction and improvement of the street had caused a material change; that the plaintiff had been damaged thereby in the sum of $300; and that there were no special benefits shown to be offset against such damage. It entered judgment for the plaintiff in the sum of $300.

The factual situation as nearly as it can be determined from the record, in the light of the court's finding for the plaintiff, is as follows:

The street involved is South Sixth Street and by stipulation has a "platted" width of 66 feet. The plaintiff is the owner of property described by lots and block adjacent to South Sixth Street on its east side. The terms and conditions of the plat of the street or the property or when the plat was made do not appear.

The right of the city to use the street for street purposes is not questioned.

In 1925 or 1926 four houses were built in the block where plaintiff's property is located, his house being the one to the north.

Either the builder or later owners planted trees in the street in front of the property. There is no showing as to whether the trees were planted by city permission or otherwise. The trees were there when plaintiff purchased the property in 1944. His showing of interest, then, is that he bought property with trees growing in the street in front of it.

It does not appear when the street was paved and the sidewalk was built. Evidently for many years the street was paved with a 24-foot width down the center. Apparently a 4-foot wide sidewalk was constructed with a 2-foot space between it and the pavement curb on the east side.

In 1929 the city established a grade for the street which was confirmed by ordinance in 1941.

The trees grew. Two of them in front of plaintiff's property became large shade trees. Two of the trees were ornamental and of no value for shade.

The city's traffic problems grew. Sixth Street became a part of U. S. Highway No. 77 through the city. In 1955 the city improved the street and widened the pavement to 48 feet so as to accommodate two lanes of vehicular travel in each direction. The old sidewalk was removed and a new one installed, all within the street lines.

The public convenience and necessity for the improvement is not challenged. The evidence sustains it.

The center elevation of the new pavement was about 12 inches higher than the old, and at the curb it was about 7 inches higher than the old. Those grades are not in accord with the grade established by ordinance.

It appears clearly from the evidence that the new pav-

ing as such did not disturb the trees involved in this action.

Plaintiff's property sloped downward from his lot line to the old curb. When the curb line was moved 12 feet nearer the lot line, the angle of the incline increased.

The city removed the trees and built a new sidewalk 4 feet wide occupying lengthwise the exact area, so far as plaintiff's property was concerned, where the trees had been. The east line of the new sidewalk was 3 feet out in the street from the lot line of plaintiff's property.

It appears also that the elevation of the ground where the new sidewalk was placed was lowered some 6 inches, requiring the placing of two steps upward to plaintiff's property instead of one.

It is stipulated that there is no claim of negligence in the construction by the city.

In substance the errors assigned here are that the judgment is contrary to the evidence and contrary to law.

The trial court rested its decision in part on the proposition that there had been a change in grade of the street and that damages were recoverable under the provisions of section 16-615, R. R. S. 1943.

We need not determine whether or not there was a change in grade under that act. Assuming it to be so, plaintiff cannot recover on that ground. All of his evidence as to damages goes to the value of the trees and the depreciated value of his property caused by the loss of the shade and ornamental value of the trees. He affirmatively asserted that there was no damage caused by the change of grade as such.

The rules stated by recognized authorities are as follows:

"The title or interest of the abutting owner in the shade trees must yield to the power of the city to grade the street, or to build sidewalks, or otherwise improve it. For any injury resulting therefrom the abutting owner has no redress." 2 Dillon, Municipal Corporations (5th ed.), § 721, p. 1097.

"The owner may recover damages for the unnecessary injury or destruction of shade trees along the sidewalk caused by a change of street grade, or the construction of a sewer. But where the trees are within the lines of the street or sidewalk on which grading is done, the municipality is not liable to abutting owner, should their destruction become necessary in the proper execution of the work." 13 McQuillin, Municipal Corporations (3d ed.), § 37.253, p. 670.

"Subject to the requirement that it must act in good faith and not abuse its exercise of power, the city has the power of control over its streets including parks and all spaces occupied by both the trees and wires thereon; and this power is paramount to any right that either the grower of trees or the owner of wires may acquire thereon." 10 McQuillin, Municipal Corporations (3d ed.), § 30.67, p. 683.

"As a general rule the right of an abutting owner to plant and maintain trees in front of his land within the street is recognized where there is no interference with the public use of the street, even though such owner is not the owner of the fee of the street. It has been held that an abutting owner does not have a true servitude in shade trees planted between the sidewalk and the curb in front of his property, but has a right in the nature of an easement. In any event, his title to, or interest in, trees in the street is subservient to the public right, and to the power of the municipality to regulate and control such trees, as discussed infra § 1693." 64 C. J. S., Municipal Corporations, § 1685, p. 72.

"The power of a municipality over such trees includes the right to remove or trim them where it is reasonably necessary for public safety or convenience, or for the improvement of the street, or its beautification, or for preservation of city sewers; and this power exists, even though the fee of the street is not in the municipality." 64 C. J. S., Municipal Corporations, § 1693, p. 87.

These rules, in principle, were recognized by us in

Bronson v. Albion Telephone Co., 67 Neb. 111, 93 N. W. 201, 60 L. R. A. 426, where we held: "The right of an abutting owner to maintain shade trees upon or overhanging the sidewalk is general and well recognized. In many jurisdictions it is customary; with us it has the sanction of express legislation. But this right is subject to all proper uses of the street for the primary purposes for which it was dedicated or condemned. * * * At one time there was a tendency to attach some weight to the ownership of the fee of the street or highway. But it is becoming well settled, for obvious and convincing reasons, that that question is immaterial."

Other states have faced the same factual problems generally that are in this case. They have reached the conclusion that the city is not liable. We cite Lynch v. Town Council of Georgetown, 21 Del. Ch. 25, 180 A. 594; Webber v. Salt Lake City, 40 Utah 221, 120 P. 503, 37 L. R. A. N. S. 1115; City of West Point v. Barry, 218 Miss. 739, 67 So. 2d 729; Neil v. City of Glendale, 106 Cal. App. 553, 289 P. 877; Ditzen v. Kansas City, 138 Kan. 830, 28 P. 2d 739.

The trial court held that plaintiff's right to recover was grounded also on Article I, section 21, of the Constitution of Nebraska, which is: "The property of no person shall be taken or damaged for public use without just compensation therefor."

Relying on Stocking v. City of Lincoln, 93 Neb. 798, 142 N. W. 104, 46 L. R. A. N. S. 107, we are urged to so hold. Concededly language used in that opinion would sustain the holding of the trial court. There plaintiff's trees were growing between the curb and the lot line. There the jury was permitted to consider evidence as to damage by reason of the digging and removal of the trees. The plain import of the opinion is that the constitutional provision as to damaging property for public use applied, and recovery was allowed.

However, an analysis of the authorities cited do not sustain the opinion in that regard.

The first case cited is City of Omaha v. Flood, 57 Neb. 124, 77 N. W. 379. In that case, for the purpose of determining when a cause of action accrued, we assumed negligent grading of a street and assumed damages resulting therefrom. The rules stated in the syllabus go beyond the issues decided and are based on the assumed fact of negligence and recoverable damages. The decision does not help us here.

The next case cited in Stocking v. City of Lincoln, *supra,* is Bronson v. Albion Telephone Co., *supra.* It states that it was there held: "* * * where an abutting owner has planted trees along the street adjacent to his property, under the terms of a city ordinance pursuant to statutory provisions, a telephone company which removes, destroys, or injures such trees in erecting poles and wires under its franchise is liable for the resulting damage, even though no unnecessary injury is inflicted."

The analysis of that opinion is not complete. The Bronson case turned upon the question of: "* * * whether use of a street or highway for poles and wires is an ordinary use within the contemplation of the parties when it was dedicated or condemned, or is a new and additional burden, for which the abutting owner is entitled to compensation in case of injury."

The opinion is premised on the proposition that the right of an abutting owner to maintain shade trees in the street "is subject to all proper uses of the street for the primary purposes for which it was dedicated or condemned" and as to the particular dedication it "Undoubtedly * * * in the first instance was subject to all ordinary uses to which the street might be put." The opinion held that the use which the defendant telephone company was making of the streets was an "additional burden" for which compensation for injuries caused thereby was recoverable.

Certainly the use of a part of a busy street for sidewalks is an "ordinary use" and not an additional uncontemplated burden. It is a primary purpose of the street.

It would seem that if the city has that superior right that its proper exercise would not call for a payment of damages resulting therefrom.

The next opinion cited in the Stocking case is that of Slabaugh v. Omaha Electric Light & Power Co., 87 Neb. 805, 128 N. W. 505, 30 L. R. A. N. S. 1084. This case seems to have turned on the absence of a legislative act, enacted before the planting of trees, granting the power company authority to trim shade trees growing in the streets. It was decided by a divided court. Judge Sedgwick, dissenting, construed the opinion to be based on the "additional burden" theory. The writer of the opinion in the Stocking case quoted from concurring opinions. The quote from the opinion of Chief Justice Reese seems to be bottomed on the proposition that the trees were planted and growing ahead of the granting of the franchise. The quote from an Alabama decision in the concurring opinion of Judge Letton is to the effect that if there was no necessity for the cutting of the trees, then liability would follow. His concurrence indicates that he rested his views on negligent performance of the right by the power company. The paramount right of the city to the use of the street was not denied in the Slabaugh case.

The Stocking case then quotes at length from Pennsylvania cases. We do not analyze them here for the reason that this whole subject matter is exhaustively considered in Webber v. Salt Lake City, *supra*. There the facts were quite similar to the fact situation here. There a constitutional provision substantially like ours was relied upon. There the court analyzed the decisions and constitutional provisions including those of Pennsylvania, which decisions it refused to follow. The court there denied recovery under the constitutional provision.

We conclude that where a city, exercising its paramount right to the use of a street for the primary purposes for which it was dedicated, removes trees growing

in the street in order to place a sidewalk therein and does so in a proper manner, it is not liable to respond to an adjacent property owner for consequential damages occasioned by a diminution in value of his property caused thereby.

We conclude further that such damages are not within the recoverable damages provided for in Article I, section 21, of the Constitution of Nebraska.

Insofar as in conflict herewith, Stocking v. City of Lincoln, 93 Neb. 798, 142 N. W. 104, 46 L. R. A. N. S. 107, is expressly overruled.

The judgment of the trial court is reversed and the cause remanded with directions to dismiss.

REVERSED AND REMANDED WITH DIRECTIONS TO DISMISS.

HERMAN E. HANSEN, APPELLANT, V. DON HENSHAW, APPELLEE.
79 N. W. 2d 15

Filed November 2, 1956. No. 33996.

1. **Negligence.** In an action for damages for negligence the burden is on the plaintiff to show that there was a negligent act or omission by the defendant and that it was the proximate cause of plaintiff's injury or a cause which proximately contributed to it.
2. ———. Negligence is a question of fact and may be proved by direct or circumstantial evidence.
3. ———. Proof of negligence is sufficient if the facts and circumstances proved, together with the reasonable inferences which may be drawn therefrom, shall indicate with reasonable certainty the negligent act of which complaint is made.

APPEAL from the district court for Dakota County: ALFRED D. RAUN, JUDGE. *Affirmed.*

Leamer & Graham, for appellant.

Sherman W. McKinley, Jr., and *Shull, Marshall, Mayne, Marks & Vizintos,* for appellee.

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

YEAGER, J.

This is an action for damages for personal injuries which was commenced by Herman E. Hansen, plaintiff and appellant, against Don Henshaw, defendant and appellee, in the district court for Dakota County, Nebraska.

The action was tried to a jury. A verdict was returned in favor of the plaintiff for $2,150. At the close of plaintiff's evidence and again at the close of all of the evidence the defendant moved for a directed verdict in his favor on the ground, among others, that the evidence of the plaintiff failed to sustain any charge of negligence against the defendant. These motions were overruled.

After the verdict was returned the defendant duly filed a motion for judgment notwithstanding the verdict. A motion for new trial was also filed but for reasons which will become apparent it requires no consideration herein.

The motion for judgment notwithstanding the verdict was sustained. From the ruling on this motion and the judgment rendered pursuant thereto the plaintiff has appealed. There is but one assignment of error, as follows: "The Court erred in entering judgment notwithstanding the verdict."

By the appeal but one question is presented for review, namely, that of whether or not there was evidence which would sustain the charge of negligence against the defendant.

By his petition the plaintiff pleaded substantially that on November 22, 1953, as an invitee he entered into an enclosed motor truck in which the defendant had stored merchandise some of which plaintiff purchased, and that due to the negligent and defective condition of the truck while plaintiff was an invitee he was caused to

be tripped in consequence of which he fell out of the truck and was injured and damaged.

The specifications of negligence to which attention is required are in substance the following: The defendant failed to give plaintiff any warning of the dangerous condition of the floor of the truck; the defendant was negligent in maintaining the truck in a defective and dangerous condition; the defendant failed to have the truck floor properly lighted; and the defendant was negligent in allowing plaintiff to be in the truck in its defective condition. There are three other specifications but consideration of them is not here required. One is in essence the same as one of those set forth and the other two relate to failure to provide warning signs and safety devices. There was no evidentiary basis at all for the submission of these specifications for consideration by the jury.

The evidence discloses that on the day in question the defendant was in possession of a semitrailer which was of about the length of 24 feet with an interior width of about 8 feet. It was entirely enclosed. It had doors on the rear end of the width of the truck. On the interior the defendant had placed or stored along the sides articles of merchandise among which were apples in cardboard containers and baskets and potatoes in bags. There was a passageway along the center. The doors were open and the vehicle was well lighted.

The plaintiff came to the vehicle where he encountered the defendant. His purpose, which he communicated to the defendant, was to purchase apples. In order to find the apples the defendant entered the vehicle and was followed by the plaintiff. The plaintiff says that he was invited to enter, and this will be assumed to be true. The plaintiff purchased a box of apples and a bag of potatoes. After plaintiff had selected the apples and potatoes he turned to leave and was precipitated to the ground on the outside.

The only evidence as to the cause of the fall was

furnished by the plaintiff. The direct examination in his case-in-chief discloses the following: "Q What did you do? A As he was bringing the sack of potatoes back I turned around and started to turn to get out of the truck and caught my toe under a strip of iron in the bottom of the truck, tripped me, threw me off balance and threw me out of the back end of the truck." "Q And what happened to you as you turned? A Well, my toe caught on something there, the toe of the shoe over the top of the sole, and it tripped me as I went to turn and step. Q Do you know what your toe caught under? A No, I never investigated to see what it was. Q Did you ever go back and look in the truck again? A I never did."

In his cross-examination the following appears: "Q As I understand it you don't know just exactly what your foot caught on, do you? A No, I couldn't tell, I didn't look at the object that caught my toe. Q And you didn't look around afterward? A No, I had so much pain in my knee I couldn't look at anything at that time."

The following appears in rebuttal testimony given by the plaintiff: "Q And at that moment you turned and went out the truck? A Yes, I turned and caught my toe on a strip of iron or something and tripped me and threw me off balance and threw me out the back of the truck."

It is obvious that, although the plaintiff in the first instance testified that he tripped on a strip of iron, there is no evidence of plaintiff from which a reasonable inference may be drawn as to the cause of tripping and the fall. On three subsequent occasions he unquestionably negatived any knowledge as to what caused him to trip and fall.

The defendant testified positively that the floor of the vehicle was smooth and effectually that there was no strip of iron on which the plaintiff could have tripped.

It must be said therefore that the record leaves the cause of plaintiff's fall altogether within the realm of

speculation and conjecture. It must be said to be insufficient to sustain a verdict in favor of the plaintiff.

In the recent case of Brown v. Slack, 159 Neb. 142, 65 N. W. 2d 382, wherein a number of decisions were reviewed dealing with the duties and obligations of an inviter to an invitee, this court announced certain controlling principles. One of them is the following: "In an action for negligence the burden is on the plaintiff to show that there was a negligent act or omission by the defendant and that it was the proximate cause of plaintiff's injury or a cause which proximately contributed to it."

In Rocha v. Payne, 108 Neb. 246, 187 N. W. 804, it was said: "Negligence is a question of fact and may be proved by circumstantial evidence. All that the law requires is that the facts and circumstances proved, together with the inferences that may be legitimately drawn from them, shall indicate, with reasonable certainty, the negligent act complained of." See, also, Leon v. Kitchen Bros. Hotel Co., 134 Neb. 137, 277 N. W. 823, 115 A. L. R. 1078; Simcho v. Omaha & C. B. St. Ry. Co., 150 Neb. 634, 35 N. W. 2d 501.

As pointed out negligence may be proved by circumstantial evidence. There must be proof however, whether it be circumstantial or direct, of an act of negligence either of commission or omission. We are aware of no authority the effect of which is to say that a case is made in the absence of evidence in proof, circumstantial or direct, of a causative factor.

The causative factor may be a condition or an affirmative act from which an inference of negligence may reasonably flow.

The principle has application in cases where the action is for damages by an invitee. It was applied in the opinions in the following cases: Rogers v. J. C. Penney Co., 127 Neb. 885, 257 N. W. 252; Taylor v. J. M. McDonald Co., 156 Neb. 437, 56 N. W. 2d 610; Brown v. Slack, *supra*. Each of these cases has relation to a con-

dition which it was claimed existed at the time of the accident.

The following are cases wherein it was contended that negligence flowed from active incidents rather than from a negligently created condition: Rocha v. Payne, *supra;* Gilliland v. Wood, 158 Neb. 286, 63 N. W. 2d 147; Davis v. Dennert, 162 Neb. 65, 75 N. W. 2d 112.

In this case there was an absence of proof of any causative factor falling within either classification and accordingly the defendant was at the trial entitled to have his motion for a directed verdict sustained. This being true the judgment notwithstanding the verdict in his favor was properly rendered.

The judgment of the district court is affirmed.

AFFIRMED.

PLATTE VALLEY PUBLIC POWER AND IRRIGATION DISTRICT, A PUBLIC CORPORATION, APPELLANT, V. COUNTY OF LINCOLN, A MUNICIPAL CORPORATION, ET AL., APPELLEES.
79 N. W. 2d 61

Filed November 2, 1956. No. 34008.

1. **Bridges: Highways.** It was at common law the duty of the county to build and maintain highway bridges; but if the highway was crossed or disturbed for any purpose by other than highway authorities, it was the obligation of the one interfering with the road to restore it.
2. **Statutes.** A statute does not change the common law beyond what is clearly expressed in the statute.
3. ———. Section 39-805, R. R. S. 1943, is in conflict with the common law and it must be strictly interpreted.
4. **Bridges: Highways.** A county cannot be obligated to maintain a bridge constructed across a ditch of a public irrigation district which intersects a county public highway unless the governing board of the district, before any construction work is done on the bridge, attempts in good faith to negotiate and agree with the county board for the building and maintenance of the bridge and the approaches thereto.
5. ———: ———. If such negotiations are unsuccessful, the district may build the bridge under the supervision of the

county board and restore the highway to its former state as nearly as may be as it was before the construction of the ditch and thereafter it is the duty of the county to maintain the bridge and its approaches. If the county refuses an opportunity to supervise the construction of the bridge, it is sufficient if the district constructs a good, substantial, and serviceable bridge and in that event the county will be liable for its maintenance.

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

Crosby, Crosby & Nielsen and *Robert H. Beatty,* for appellant.

James G. McIntosh and *Baskins & Baskins,* for appellees.

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

BOSLAUGH, J.

The objective of this action is to secure a declaratory judgment determining and declaring the rights, obligations, and relationships of the parties in reference to the construction, maintenance, and repair of bridges which have been erected and maintained by appellant at locations where drainage ditches excavated, maintained, and owned by it, or that may be excavated and owned by it in the future, intersect and cross county highways.

The allegations of appellant necessary to be here stated are as follows:

Appellant is a public corporation and a political subdivision of the State of Nebraska organized by virtue of sections 70-601 to 70-679 of the Revised Statutes of Nebraska, 1943. Appellees are respectively the County of Lincoln and the members of the board of commissioners of that county. Land along and in the area of the works of appellant became seeped and waterlogged because of the operation and maintenance of its works and it became desirable and necessary to the proper continuance of the works and the reclaiming of the

areas affected by seepage waters which escaped from the works of appellant to construct ditches to drain away the excess waters. The construction and operation of the ditches required that they cross county highways in Lincoln County and that they have bridges built over them at their intersection with the highways. Appellant constructed nine bridges over its drainage ditches at their intersection of highways in the county during the period commencing with the year 1936 and continuing through the year 1951. They complied with the approved plans for bridges as prepared by the State Engineer of Nebraska. The bridges have been since their original construction maintained, repaired, and, in some instances, rebuilt and replaced by the district and they were being so maintained December 14, 1954, when this litigation was instituted. A statute of the state makes it the duty of the county board and the governing body of a public irrigation district involved to enter into an agreement by negotiation for the construction and maintenance of such bridges and the approaches thereto; but if for any reason the boards fail to agree, it is the statutory duty of the irrigation district to build bridges and restore the highway where it is intersected by a ditch to its former state as nearly as may be and it is then the duty of the county involved to maintain the bridges and the approaches. The bridges were built by appellant with the knowledge and consent of the county but without an agreement with it although repeated unsuccessful efforts were made to obtain such an understanding. Appellant has maintained the bridges contrary to the statutory duty imposed on the county in that regard. The bridge designated No. 3-0.56 was in unsatisfactory condition and required repair and replacement. Representatives of appellant had repeated conferences with the county board concerning it but were unable to make an agreement for its repair and replacement. Appellant made and delivered to the county board April 26, 1954, a proposal that appellant would at

its expense promptly replace the bridge with a new one in accordance with the applicable statute and would on completion thereof tender the new bridge to the county for its acceptance and future maintenance. Appellant requested acceptance and approval of the proposal by the county and obligated itself when this was done to proceed at once with the building of the new bridge. The county board took no action on the proposal. Appellant made temporary repairs on the bridge and on May 3, 1954, advised the county board in writing that it would at once make repairs on and replacement of the bridge as the statute provided and that the bridge when completed would be tendered to the county for its acceptance and future maintenance and repair.

The answer of appellees contains the following:

An admission that appellant is a political subdivision of the state as alleged by it; that Lincoln County is a municipal corporation; that the individuals made parties are members of the board of county commissioners of Lincoln County; that appellant constructed the bridges referred to by its petition and it has maintained, repaired, and replaced them and is continuing to so act in reference to them; and that Lincoln County has refused to accept the bridges or to maintain, repair, or replace them or any of them. A denial of any liability to repair, replace, or maintain the bridges. The assertion that it is the statutory duty of appellant when it excavated a ditch across a public highway of the county to construct, maintain, and keep in repair a bridge across the ditch as a part of the highway; that appellant is not a public drainage district or a public irrigation district and is not within the terms or provisions of section 39-805 of the Revised Statutes of Nebraska, 1943; that appellant is not authorized by law to drain land affected by water that escapes from its works; that appellant is primarily a public power institution; that its works are used for the generation of electricity and not for irrigation or drainage purposes; and that to permit

appellant the benefit of section 39-805 would be a violation of Article III, section 18, of the Constitution of Nebraska. Appellant denied the statements of the answer inconsistent with its petition.

The findings of the trial court were favorable to appellees. A judgment of dismissal of the case was rendered. This appeal is from that adjudication.

The bridges involved in this case are across ditches of appellant at the places where they intersect with and cross county highways. The ditches were constructed by appellant to drain land between its canal and the river affected by seepage waters from the supply canal of appellant. The ditches also collect and discharge other underground water and surface water. The water collected by and which flows through the ditches is discharged in the river and is not returned to the works of appellant.

The bridges were designed, plans for them were made by, and they were constructed under the supervision of engineers of appellant who were acting for it. The material and labor for their construction were furnished by appellant. The design and plans of the bridges complied with the requirements made and approved by the Department of Roads and Irrigation of the state as to the construction of bridges of the type built by appellant. The first one of the nine bridges involved in this case was constructed in the year 1936. The others were built in subsequent years to and including 1951. There is much said in the record concerning a proposal in 1954 to replace one of the bridges by the construction of a new bridge at the location of the existing one but there is no allegation or proof that this was done. In Ritter v. Drainage District No. 1, 148 Neb. 873, 29 N. W. 2d 782, this court said the following concerning a similar situation: "As a matter of fact, then, it will be observed that the duty of the county to maintain the bridge and approaches involved is not presented for de-

cision in this case, since the drainage district has not yet constructed the same."

The bridges were from the time of their completion maintained, repaired, rebuilt, and replaced by appellant. This was true until the time of the commencement of this case December 14, 1954. The record does not show that appellees or either of them had notice or knowledge that any of the bridges were to be built, the location, or the construction of them. There is a failure of proof of any attempt of negotiations by the board of directors of appellant with the county board for the purpose of seeking an agreement as to the building and maintenance of the bridges. It is not shown that there was any attempt to negotiate or agree in this regard. There is no proof of any request by appellant that the county by its board of commissioners participate in any respect, manner, or degree in the location of, the plans for, or the supervision of the construction of any of the bridges. There is no showing that the county has by its board of commissioners taken any affirmative action in reference to any of the bridges.

The relevant parts of section 39-805, R. R. S. 1943, are: "Whenever any public highway within this state shall cross or be crossed by any ditch * * * of any public * * * irrigation district it shall be the duty of the governing board of the * * * irrigation district and the governing board of the county * * * to negotiate and agree for the building and maintenance of bridges and approaches thereto on such terms as shall be equitable, all things considered, between such * * * irrigation district and such county * * *. If such boards for any reason shall fail to agree with reference to said matter, it shall be the duty of the * * * irrigation district to build the necessary bridges and approaches, and restore the highway in question to its former state as nearly as may be as it was laid out prior to the construction of the ditch * * * in question, and it shall be the duty of the county * * * to maintain said bridges and approaches;

* * *. Any bridge that may be built by any * * * irrigation district * * * under the provisions of this section, shall be constructed under the supervision of the * * * county board * * * if under the jurisdiction of such board * * *."

The statute in the respect that it obligates a county to maintain a bridge constructed by a public irrigation district over a ditch which crosses a public highway is contrary to the common law and must be strictly construed. It was at common law the duty of the county to build and maintain bridges. However, if the highway was crossed or disturbed for any purpose by other than the highway authorities, it was the obligation of those interfering with the road to restore it. Richardson County ex rel. Sheehan v. Drainage District, 92 Neb. 776, 139 N. W. 648, 43 L. R. A. N. S. 695, Ann. Cas. 1914A 546; State ex rel. County of Dawson v. Dawson County Irr. Co., 125 Neb. 836, 252 N. W. 320. A statute does not make a change in the common law other than that which is clearly expressed in it. Strauel v. Peterson, 155 Neb. 448, 52 N. W. 2d 307.

The statutory provisions recited above must be interpreted and applied strictly in favor of the County of Lincoln and against appellant. The latter may enjoy no advantage from them unless it has strictly satisfied the conditions of the statute or unless the county has estopped itself from exacting full compliance therewith. The statute plainly requires the governing bodies of the respective entities involved to negotiate and agree as to the construction and maintenance of any bridge within reach of the statute. The words therein "for any reason shall fail to agree" contemplate a failure of negotiations had between parties in a good-faith attempt to agree and not a failure to negotiate. It is self-evident that there can be no failure to agree without an attempt to do so or, as the statute says, to negotiate. The good-faith negotiation that the statute exacts is intended to be had before there is any construction. This is con-

vincingly apparent by the language that any bridge built on a county highway shall be under the supervision of the county board. A conclusion that the language if such boards shall fail to agree dispenses with negotiations in good faith to agree would make meaningless that part and mandate of the statute that they must negotiate and agree if possible and it would disregard the firmly established doctrine that effect must if possible be given to every part of a statute and that no part thereof will be rendered inoperative or futile. Ledwith v. Bankers Life Ins. Co., 156 Neb. 107, 54 N. W. 2d 409; Ewert Implement Co. v. Board of Equalization, 160 Neb. 445, 70 N. W. 2d 397.

This court considered a statute on the subject of eminent domain which contemplated that the owner of real estate and the person who desired to acquire it for a public purpose must attempt to agree on the price for the purchase of it as a condition of the commencement of proceedings to condemn the real estate desired to be taken. It was in that litigation determined that a failure of the condemner to attempt to agree with the landowner before commencing condemnation proceedings was a jurisdictional defect and a bar to the prosecution of the proceedings to condemn. Higgins v. Loup River Public Power Dist., 157 Neb. 652, 61 N. W. 2d 213; Higgins v. Loup River Public Power Dist., 159 Neb. 549, 68 N. W. 2d 170. In the latter case the court said: "If a statute requires that, prior to the institution of condemnation proceedings, attempt to agree with the owner must first be made, such provision is mandatory, and condemnation proceedings are void in case no attempt is made, before beginning them, to come to an agreement with the owner. * * * In order to satisfy statutory requirement of attempt to agree with the owner prior to the institution of condemnation proceedings, there must be a good faith attempt to agree, consisting of an offer made in good faith and a reasonable effort to induce the owner to accept it." The obligation imposed

by the statute in that instance does not appear to be more binding than the statutory duty applicable to this case that the parties involved must negotiate and if possible agree as to the construction and maintenance of bridges before there can be any liability fastened on the county to maintain them. There is no proof of an attempt to negotiate concerning the construction of the bridges involved by the board or any representative of appellant and the county commissioners of Lincoln County. Any bridge built on a county highway by virtue of the provisions of the statute, section 39-805, R. R. S. 1943, must be constructed under the supervision of the county board. It is conclusive in this case that this was not complied with but that the bridges that were constructed were designed, planned, and constructed by and under the supervision of engineers of appellant acting for it. Mandatory provisions of the statute were ignored and they cannot be applied to relieve appellant from the obligation to repair and maintain the bridges.

Appellant urges the court to accept State ex rel. County of Burt v. Burt-Washington Drainage Dist., 103 Neb. 763, 174 N. W. 316, as decisive of this cause. It is distinguishable from this case. The facts therein were that the county board of Burt County was notified by the drainage district that it was required and desired to erect bridges. The board did nothing. The district, before any work on the bridges was done, requested the county board to supervise the construction of the bridges but it would not and did not do so. There are no comparable facts shown in this case. There is no fact developed in this case on which an estoppel against the county could be sustained.

Henneberg v. County of Burt, 160 Neb. 250, 69 N. W. 2d 920, is strongly relied upon by appellant. The facts considered in that case were that the drainage district about 1916 constructed a bridge over one of its ditches at a location where it crossed a county road. The county

accepted and maintained the bridge until 1952 when it was partially destroyed by a flood. The county voluntarily removed the remnants of the bridge and installed a metal pipe where the bridge had been. The district had no part in and was not consulted concerning this. Later the county removed the pipe and installed a larger one but its capacity was not sufficient to accommodate the passage of all water that could reasonably be expected to be transported to the pipe. It was concluded from these circumstances that the county was obligated to maintain a proper bridge at that location and was liable for any default therein. The facts distinguish that case from the present one.

The conclusion is that appellant failed to comply with the provisions of section 39-805, R. R. S. 1943, in the construction of the bridges involved in this case and that the judgment of the district court to the extent that it dismissed the action of appellant should be, because of what is said in this opinion, and it is affirmed.

AFFIRMED.

FRANK VAN WYE, APPELLEE, V. ROBERT L. WAGNER, DOING BUSINESS AS FERTILIZER & CHEMICAL SUP. CO., ET AL., APPELLANTS.

79 N. W. 2d 281

Filed November 9, 1956. No. 33981.

1. **Trial: Appeal and Error.** It is error for the trial court to submit to the jury an issue pleaded by the plaintiff which under the evidence adduced in the case affords no basis for recovery.
2. ———: ———. If it does not appear from the record that an incorrect instruction to the jury did not affect the result of the trial of the case unfavorably to the party affected by it the giving of the instruction must be considered prejudicial error.
3. ———: ———. It is error without prejudice to instruct on questions not raised by pleadings or applicable evidence when the instructions do not have a tendency to mislead the jury.
4. ———: ———. A judgment of the district court is presumed

to be correct, and a party assailing the correctness of it must assume the burden of pointing out specifically the rulings of which he complains and the mistake made by the court.

5. **Damages: Appeal and Error.** The question of the amount of damage is one solely for the jury and its action in this respect will not be disturbed on appeal if it is supported by evidence and bears a reasonable relationship to the elements of injury and damage proved.

APPEAL from the district court for Cedar County: ALFRED D. RAUN, JUDGE. *Affirmed.*

Philip H. Robinson and *Frederick M. Deutsch*, for appellants.

Mark J. Ryan and *Edward L. Moran*, for appellee.

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

YEAGER, J.

This is an action for damages for personal injuries by Frank Van Wye, plaintiff and appellee, against Robert L. Wagner, doing business as Fertilizer & Chemical Sup. Co., and Robert Wagner, Jr., defendants and appellants.

The action was tried to a jury at the conclusion of which a verdict was returned in favor of plaintiff and against the defendant for $31,500. Judgment was rendered on the verdict. Thereafter a motion for new trial was filed. This motion was overruled. From the judgment and the order overruling the motion for new trial the defendants have appealed. By the appeal no question of liability on the part of the defendants is presented. The only questions presented relate to submission by the trial court of issues, the failure of the court to instruct properly as to the measure of damages, and the amount or size of the verdict. There are three assignments of error, as follows:

"1. The court erred in giving on its own motion its Instruction No. 11 * * *, because it informed the jury that it should consider plaintiff's medical expense al-

though none was claimed in the pleadings and no evidence of the cost or value of the same was offered.

"2. The court failed to instruct the jury on the proper measure of damages.

"3. The verdict of the jury is excessive."

In an approach to the determination upon the first assignment it must be said that there was no claim presented to the jury for medical or hospital expense. No recovery was claimed for these expenses for the reason that the plaintiff was a sergeant in the United States Army and on this account he was not required to pay for or obligate himself to pay for the services.

The court, notwithstanding this, did in instruction No. 11 submit the question of medical expense in the following manner: "* * * In this connection you are instructed that in arriving at your verdict you should take into consideration plaintiff's injuries, if any he has sustained; * * * together with whatever medical expense to which he has been put on account of his injuries, if any has been shown; * * *."

The submission of an issue to a jury which has been pleaded but not proved is error. In Long v. Whalen, 160 Neb. 813, 71 N. W. 2d 496, it was said: "It is error for the trial court to submit to the jury an issue pleaded by the plaintiff which under the evidence produced in the case affords no basis of recovery by the pleader." See, also, Barney v. Adcock, 162 Neb. 179, 75 N. W. 2d 683. This rule is applicable in a case such as this where there is neither pleading nor proof. Barney v. Adcock, *supra.*

In such a situation the error must be regarded as prejudicial unless it is apparent from the record that the incorrect instruction did not affect the result unfavorably to the complaining party. The rule is set forth in Long v. Whalen, *supra,* as follows: "If it does not appear from the record that an incorrect instruction to the jury did not affect the result of the trial of the case unfavorably to the party affected by it the giving

of the instruction must be considered prejudicial error."

An apposite statement of the rule is found in Bailey v. Spindler, 161 Neb. 563, 74 N. W. 2d 344, as follows: "It is error without prejudice to instruct on questions not raised by pleadings or applicable evidence when the instructions do not have a tendency to mislead the jury." See, also, Ross v. Carroll, 140 Neb. 350, 299 N. W. 477; In re Estate of Keup, 145 Neb. 729, 18 N. W. 2d 63; Becker v. Hasebroock, 157 Neb. 353, 59 N. W. 2d 560.

It becomes apparent from this that as to this assignment this court is called upon to determine the question of whether or not the error was prejudicial. In response to this question the conclusion is reached that the effect of the last five words of the quoted portion of the instruction which are "if any has been shown," together with the fact that the parties and the jury well understood that the plaintiff was treated by the army without cost to him and that thus the record affirmatively shows that no such issue existed, is fairly and reasonably determinative of this question. Effectually and without uncertainty the jury was told that in case of recovery by the plaintiff it could properly allow medical expense if any had been shown. To say that this instruction was prejudicially erroneous would be to say that the jury was incapable of understanding the clear and explicit language, the meaning of words, and the undisputed facts. Such a conclusion cannot be justified.

The first assignment of error must therefore be said to be without merit.

In the light of the instructions given, the assignment itself, and the argument, the basis of the second assignment of error has not become apparent, in consequence it must be said to be without merit.

The first instruction sets forth plaintiff's claim. Succeeding instructions define the issues and the approach which was required of the jury as to principles of law and the evidence. The eleventh instruction sets forth

a measure of damages. The point of the assignment of error is not that the court did not instruct as to the measure of damages, but only that it did so improperly.

The defendants, notwithstanding this, have wholly failed to point to any particular deficiency or impropriety in the instruction either in the assignment of error or in argument.

For verification of this statement as applied to the assignment itself reference is made to it as quoted herein. The argument consists of the statement in general terms of a legal proposition with citations, together with the following observation, and nothing more: "We believe the foregoing Nebraska cases required the court to define the items of damages and to define the method of arriving at them. This, it did not do."

This in the light of the statute and the decisions leaves this court without any proper basis for a consideration of the assignment of error. Section 25-1919, R. R. S. 1943, provides: "* * * The brief of appellant shall set out particularly each error asserted and intended to be urged for the reversal, vacation or modification of the judgment, decree or final order alleged to be erroneous; * * *."

In the early case of Quinn v. Moss, 45 Neb. 614, 63 N. W. 931, it was said: "An assignment of error is insufficient which fails to point out the particular error objected to."

In Wilson v. Wilson, 94 Neb. 192, 142 N. W. 543, it was said: "The judgments of the district courts of this state are presumed to be correct, and counsel assailing the correctness of the same must assume the burden of pointing out specifically the rulings of which they complain and the mistake made by the trial court." See, also, Ketelman v. Chicago Brush Co., 65 Neb. 429, 91 N. W. 282; Packard v. De Voe, 94 Neb. 740, 144 N. W. 813; Labs v. Farmers State Bank, 135 Neb. 130, 280 N. W. 452.

By the third assignment, as has been pointed out, it

is charged that the verdict is excessive. A late expression of this court of the proper basis for determining whether or not a verdict is excessive is found in Peacock v. J. L. Brandeis & Sons, 157 Neb. 514, 60 N. W. 2d 643. Numerous citations of other cases supporting that expression appear in the opinion in that case and therefore they will not be repeated herein. That expression is as follows: "The question of the amount of damage is one solely for the jury and its action in this respect will not be disturbed on appeal if it is supported by evidence and bears a reasonable relationship to the elements of injury and damage proved."

In this case the major elements of injury and damage are the character and extent of the injury, the past, present, and future effect upon the plaintiff, as proved, and the loss of earnings, past, present, and future, also as proved.

The evidence discloses that at the time of the accident which was the basis of this action the plaintiff was of the age of 33 years. He was a sergeant first class in the United States Army. He was otherwise untrained in any occupation. He had some experience in occupations involving the handling of heavy equipment. At the time of injury his salary and other allowances amounted to $342 a month. As to injuries, no effort will be made to do more than generally refer to and describe them. The evidence discloses that the ball of the left femur and its socket were displaced backward which displacement is permanent and on account thereof there is a restriction of movement. The leg was severely burned as a result of which numerous skin grafts were required. There were other less serious injuries which will not be described since those described furnish the true basis for the consideration of whether or not within the rule stated it may be said that the verdict was excessive.

The evidence further discloses that as a result of the injuries the plaintiff was hospitalized in Yankton, South Dakota, for 11 days; at Fort Riley, Kansas, for 3 months;

and thereafter at Fitzsimons Army Hospital at Denver, Colorado, until September 1955, except for brief convalescence periods and a brief return to duty. During this period he submitted to numerous operations the apparent main purpose of which was to produce a recovery from the burns. During all of this period he suffered constant pain.

The evidence of plaintiff discloses that at the time of trial plaintiff's total and permanent loss of physical ability was 60 per cent. This is not directly disputed. The evidence also discloses that plaintiff will suffer pain the rest of his life.

In this connection the evidence of the defendants is to the effect that the pain may be eliminated by an operation which would immobilize the joint but it does not have the effect of saying that the operation would reduce the percentage of disability. Such an inference may however be drawn therefrom.

As pointed out the monthly income of plaintiff while he was in the army was $342. He received a disability discharge from the army in September 1955. He was awarded disability compensation in the amount of $145 a month. He will continue to receive that amount during his lifetime. The trial of this case was concluded on October 25, 1955. At that time the plaintiff was of the age of 36 years. On the trial excerpts from three expectancy tables which contained the life expectancy of a man of 36 years of age were received in evidence. One showed 30.15 years, one 31.07, and the third 32.59.

From this it appears that before the trial the plaintiff suffered a loss in pay of approximately $197. Also if it be assumed that the plaintiff would live out the expectancy of the table providing the minimum and that he would remain in the army for that length of time he would be deprived of additional pay in the amount of $71,274.60.

Of course, in this elements of speculation are involved,

such as partial discontinuance of income on account of a release of obligation to support dependents, and voluntary separation from the service. There is evidence that included in the $342 was an amount for support of dependents.

There is evidence the effect of which is to say that the plaintiff at the time of the trial was unable on account of his physical condition and lack of training to engage in any other occupation whereby he might gain earnings to offset his loss of earnings in the United States Army.

It requires no citation of authority to confirm an assertion here that the plaintiff was entitled to receive a reasonable amount to be fixed by the jury on account of pain and suffering. No fixed basis for such an allowance has ever been declared.

Neither one nor all of the phases of this discussion of the damages to plaintiff fix the amount he was entitled to receive at the hands of the jury, but together they appear to demonstrate that the allowance of $31,500 in this case did not violate unfavorably to the defendants the rule that it must appear from the evidence that the allowance bears a reasonable relationship to the elements of injury and damage proved.

The judgment of the district court is affirmed.

AFFIRMED.

GERTRUDE ZORINSKY, APPELLANT, V. THE AMERICAN LEGION, OMAHA POST NO. 1, APPELLEE.

79 N. W. 2d 172

Filed November 9, 1956. No. 34002.

1. **Food: Sales.** A restaurateur engaged in serving food to paying guests for immediate consumption on the premises impliedly warrants that the food so served is wholesome and fit for human consumption and is liable for injuries to such guests proximately caused by a breach thereof without proof of negligence,

although he may be liable for actionable negligence if same is supported by competent evidence.

2. **Trial.** It is the duty of the trial court, without request, to instruct the jury on each issue presented by the pleadings and supported by evidence.
3. **Trial: Appeal and Error.** A litigant is entitled to have the jury instructed as to his theory of the case as shown by pleading and evidence, and a failure to do so is prejudicial error.

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

Frederick M. Cassman and *Abrahams & Kaslow,* for appellant.

Mecham, Stoehr, Rickerson & Sodoro, for appellee.

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

CHAPPELL, J.

Plaintiff, Gertrude Zorinsky, a married woman, brought this action in two causes of action against defendant, The American Legion, Omaha Post No. 1, seeking recovery of damages for personal injuries, together with assigned medical and dental expenses. Plaintiff's amended petition alleged in substance that on August 11, 1954, she was a paying dinner guest at a restaurant owned and operated by defendant; that she ordered ice cream sherbet for dessert and while partaking of same she was injured and damaged by a puncture wound in the upper gums of her mouth caused by a piece of glass concealed in the sherbet and not apparent or discernible by plaintiff, from which a painful inflammation and infection developed, ultimately causing the loss of her left and right upper incisor teeth. Plaintiff predicated liability of defendant upon allegations that general negligence and breach of implied warranty of fitness by defendant proximately caused her injuries and damages.

Defendant's answer denied generally; specifically denied that injuries suffered by plaintiff as alleged were proximately caused by any negligence of defendant; and

alleged that defendant had exercised every precaution to inspect, preserve, and maintain said ice cream in a clean, wholesome condition so far as the character and nature of such dessert permitted without destroying its function and the purpose of its manufacture, and if it contained any deleterious substance at the time same was served to plaintiff, which defendant denied, it was not therein by reason of any negligence of defendant. The cause was tried as if plaintiff's reply were a general denial.

At conclusion of plaintiff's evidence, and again at conclusion of all the evidence, defendant moved for directed verdict upon the ground that plaintiff had failed to adduce sufficient competent evidence to sustain a charge of actionable negligence. Such motions were overruled and the trial court, by giving instruction No. 5 and related instructions, submitted the cause to the jury, thereby limiting its consideration solely to alleged negligence, and specifically refusing as a matter of law to submit the issue of implied warranty of fitness.

The jury returned a verdict for defendant and judgment was rendered thereon. Plaintiff's motion for new trial was overruled, and she appealed, assigning and arguing in substance that the trial court: (1) Erred in so giving instruction No. 5; (2) erred in refusing to appropriately submit plaintiff's theory of implied warranty although requested so to do; and (3) erred in overruling plaintiff's motion for new trial. We sustain plaintiff's assignments.

At the outset it should be noted defendant argued, citing authorities, that the judgment should be affirmed in any event: (1) Because defendant, a restaurateur, would as a matter of law not be liable to plaintiff upon any theory of implied warranty as alleged by plaintiff; and (2) that although defendant would be liable to plaintiff for actionable negligence proximately causing her alleged injuries and damages if proven, she failed to establish the same by competent evidence. We con-

clude that defendant's first contention has no merit.

With regard to defendant's second contention, the record now before us does disclose that plaintiff failed to adduce competent evidence which would sustain a charge of actionable negligence by defendant, and if a new trial is had and pertinent evidence with relation to negligence is substantially the same as now appearing in this record, then the issue of negligence should not be submitted to the jury.

On the other hand, plaintiff argued, citing numerous applicable and controlling authorities, that even in the absence of sufficient proof of actionable negligence, if plaintiff adduced competent evidence that while a paying customer of defendant, admittedly a restaurateur, she sustained injuries to her mouth and resulting damages proximately caused by the presence of glass concealed or not reasonably discernible or anticipative by plaintiff in food so served and eaten in defendant's premises, she had a submissible cause of action against defendant for breach of implied warranty that such food was wholesome and fit for human consumption and contained nothing injurious to her health and safety. We sustain that contention.

Viewed in such light, the record discloses that plaintiff pleaded, relied upon, and adduced sufficient competent evidence to support the issue of a breach of implied warranty of fitness, proximately causing injuries and damages, which required submission of that issue to the jury for its determination upon proper instructions, but the trial court failed and refused to do so. In that connection, this court reaffirmed, in McKain v. Platte Valley Public Power & Irr. Dist., 151 Neb. 497, 37 N. W. 2d 923, that: "It is the duty of the trial court, without request, to instruct the jury on each issue presented by the pleadings and supported by evidence.

"A litigant is entitled to have the jury instructed as to his theory of the case as shown by pleading and evidence, and a failure to do so is prejudicial error." See,

also, Snyder v. Lincoln, 153 Neb. 611, 45 N. W. 2d 749.

The record discloses that plaintiff adduced competent evidence from which the jury could reasonably have concluded as follows: On the evening of August 11, 1954, plaintiff met six of her lady club friends at defendant's restaurant. They had previously reserved a dining room table there for the purpose of having dinner together and celebrating the birthday of one of the ladies. Plaintiff was a paying customer of defendant, whose headwaiter seated the group at one long table, with plaintiff at the head and the others on either side. Such table was illuminated by one candle in the center, as were other tables in defendant's dining room. It was rather dark there. Plaintiff ordered her dinner and after eating the main course she ordered and was served ice cream sherbet for dessert. It was rather soft, and as she began to eat it a piece of glass therein suddenly inflicted a sharp puncture wound in her gums behind and to the left of her two upper central incisor teeth. Feeling the sharp pain, and scared, she reached into her mouth with two fingers and pulled out a sharp piece of glass about as wide as a toothpick and one-half inch long. Plaintiff immediately exclaimed to her friends: " 'Oh, my God! a piece of glass,' " or, " 'Oh, there is a piece of glass,' " and laid it back on the sherbet plate. Her mouth was bleeding, so she held her napkin to her mouth to stop the blood and called a waiter, who, when informed of the circumstances, immediately removed the plate to defendant's kitchen and informed defendant's headwaiter of the incident and the fact that plaintiff was bleeding. Thereafter, defendant's headwaiter came over and took plaintiff to the desk of defendant's assistant manager for consultation. Arrangements were then made whereby a husband of one of the lady club members, accompanied by one of the ladies, took plaintiff to Doctors Hospital in his car, where the house physician examined and treated her. His examination revealed a puncture wound about one-eighth of an inch

in diameter and three-eighths of an inch deep in plaintiff's upper gums, near her upper central incisor teeth. Such physician probed plaintiff's wound, treated it with antiseptic, and controlled the bleeding. Plaintiff left the hospital later that evening.

The next day, August 12, 1954, plaintiff was examined by her dental surgeon. He testified that plaintiff had been his patient both before he entered military service and since his return in June 1946, during which periods he had regularly X-rayed and cleaned her teeth, which were in excellent condition without any cavities or extractions. His examination on August 12, 1954, revealed that plaintiff's gum area back of her upper central incisor teeth was swollen, lacerated, inflamed, and painful. He treated plaintiff therefor on 16 occasions between that date and September 4, 1954, to combat inflammation and infection present in that area. Thereby plaintiff's condition was somewhat relieved, but the inflammation and infection which resulted from her injury ultimately caused deterioration and loss of bone tissue, thereby loosening her two upper incisor teeth, which about 6 months later required extraction thereof and replacement by bridge denture. The reasonable value of the services rendered by and paid to plaintiff's dental surgeon was not disputed.

An oral surgeon who examined plaintiff on behalf of defendant early in December 1954, testified as a witness for defendant. In doing so, he repeated the history given him by plaintiff with regard to the accident as substantially heretofore set forth in plaintiff's evidence. His examination found that plaintiff had an unusually clean mouth, with no evidence of healed puncture scars, but plaintiff's gum tip at the midline of the upper lingual surface was very inflamed, swollen, and tender. He also found that plaintiff's left upper central incisor tooth was tender but the right one was not, although both were equally and easily movable with bone loss about the roots. He testified that in his

opinion such condition was caused not by infection but by inflammation which resulted from constant biting trauma against plaintiff's two central incisor teeth, which carried a load of rear and side gold crowns with a bridged space-tooth attached on each side thereof, rather than by infection and inflammation resulting from plaintiff's injuries, as testified by plaintiff's dental surgeon. As we view it, such causal question was for determination by the jury.

In defense of alleged negligence, defendant also adduced evidence in substance that its ice cream and sherbet purchased by defendant in bulk containers from an outside manufacturer, was stored in a metal freezer, and dished up in glasses by a pantry girl without negligence. Further, the headwaiter and pantry girl testified that after they were informed of the incident, they examined a dish of vanilla ice cream, not sherbet, and found no glass in it. In that regard, on cross-examination, the headwaiter stated that the dish of vanilla ice cream which they examined was taken from about the center of the table and not from in front of plaintiff.

The specific issue of whether or not a restaurateur engaged in the serving of food for immediate consumption on his premises may be held liable for breach of an implied warranty of wholesomeness and fitness for human consumption of food served to a paying customer, who was injured by eating such food which was contaminated by the presence therein of a concealed or not reasonably discernible or anticipative foreign or deleterious substance, has never heretofore been passed upon by this court.

In that connection, there is a sharp conflict in the authorities. A small minority of jurisdictions still adhere to the so-called "Connecticut-New Jersy rule," that there is no implied warranty by a restaurateur of the wholesomeness and fitness of food served by him for immediate consumption on the premises, and that he is

liable only for actionable negligence in the preparation and serving thereof.

On the other hand, a large and increasing majority of courts adhere to the so-called "Massachusetts-New York rule" that a restaurateur engaged in serving food to paying guests for immediate consumption on the premises impliedly warrants that the food so served is wholesome and fit for human consumption, and is liable for injuries to such guests proximately caused by a breach thereof without proof of negligence, although he may be liable for actionable negligence if same is supported by competent evidence.

As stated in Annotation, 7 A. L. R. 2d 1029: "The reasoning underlying the Massachusetts-New York rule recognizing liability on the theory of implied warranty is that the transaction between the restaurateur and a customer is a sale, both under the Uniform Sales Act and under the common law, or is, at least, a qualified sale, in either event having a legal foundation for an implied warranty of fitness; that even if the food dispensed is said to be 'uttered,' so as not to constitute a sale, the relation between the parties is one of contract in which there is an implied term that the food and drink shall not be harmful but shall be appropriate for eating; that the customer can make no intelligent selection but, as a necessary inference from the relation of the parties, he relies upon the skill and trade wisdom of the restaurateur, who has many more facilities for ascertaining the wholesomeness or unwholesomeness of the food than are possessed by the customer, and there is no basis for an exception to the general rule of liability of a retailer in implied warranty; that the consequences resulting from the serving of unwholesome food are so dangerous to health and life that the rule is not only reasonable but essential to public safety." That statement is supported by many authorities subsequently cited, and we believe that such view is based upon better reasoning and sounder public policy.

In that connection, as said in Annotation, 7 A. L. R 2d 1032, citing and discussing many authorities from 20 jurisdictions: "The majority of the jurisdictions in which the question has arisen adhere to the view that one engaged in the business of serving food for immediate consumption on the premises impliedly warrants that the food is wholesome and fit for human consumption, and is liable, upon a breach of such warranty, without proof of negligence, to a customer injured by eating deleterious food." We adhere to that rule and apply it here. Such cited cases are too numerous to cite or discuss at length in this opinion. A few are comparable upon the facts and applicable law. These will be briefly discussed.

In Amdal v. F. W. Woolworth Co., 84 F. Supp. 657, plaintiff's petition alleged that defendant served her ice cream as a part of her lunch at its place of business in Cedar Rapids, Iowa, and that the ice cream contained a piece of broken glass which caused her serious injury. She charged defendant with negligence and with breach of implied warranty of fitness. Defendant moved to strike that portion charging a breach of implied warranty, and, in a well-reasoned opinion, citing many authorities, the court overruled defendant's motion upon the ground that warranty of fitness would be implied in connection with food served by a restaurateur, which entitled plaintiff, a patron, to maintain an action against defendant for injuries sustained while eating ice cream allegedly containing glass.

In Goetten v. Owl Drug Co., 6 Cal. 2d 683, 59 P. 2d 143, plaintiff went into defendant's place of business and ordered chow mein. As in the case at bar, it allegedly contained broken glass, and plaintiff was injured thereby while eating the chow mein purchased by defendant from an outside manufacturer. Defendant's basic contention was that it was liable only for actionable negligence and not for implied warranty of fitness. As in the case at bar, the trial court submitted the issue

to the jury only upon defendant's theory. Defendant recovered a verdict and the trial court granted a new trial from which defendant appealed. The order granting plaintiff a new trial was affirmed. After citing authorities and quoting from section 1735 of the Civil Code of California, which is comparable with section 69-415, R. R. S. 1943, of our own Uniform Sales Act, the court said: " 'Ordinarily a patron at a lunch counter makes known, at least by implication, that he desires wholesome food; he relies upon the proprietor's skill and judgment to produce food which can be eaten without deleterious effect, and there is an implied warranty under the provisions of section 1735 that the food delivered is wholesome. A person who maintains a restaurant, or lunch counter holds himself out as one who has for sale food which, so far as it is under his control, is wholesome and free from foreign substances dangerous to the human system. Patrons of such food dispensers rely upon this implied representation, for without it they would not be patrons. While there exists the action for damages where negligence of the purveyors of food can be proven, this is not the only protection afforded to their customers. * * * The case at bar was submitted to the jury under the legal theory, declared in the instructions, that unless it appeared from a preponderance of the evidence that the glass was allowed or permitted to get into the food through the negligence of the defendants, appellants here, the jury should return a verdict for the defendants. This error in excluding from the consideration of the jury the question of implied warranty—a warranty which existed regardless of whether the glass entered the food before or after it came into appellants' possession—amply justified the trial court in granting a new trial.' "

In Cushing v. Rodman, 82 F. 2d 864, 104 A. L. R. 1023, plaintiff ordered and was served coffee and a roll at defendant's lunch counter. The roll, purchased by defendant from others, contained a concealed pebble which

injured plaintiff's teeth. She sought recovery upon the theory of breach of implied warranty of fitness by defendant. Plaintiff appealed from a judgment for defendant rendered upon the theory that defendant was liable only for negligence upon which there was failure of proof. The judgment was reversed. In doing so, the court, after citing and discussing many authorities, said: "We conclude in respect of the choice of a general rule of liability that liability should not be restricted to cases of negligence only, but predicated also upon breach of an implied warranty of wholesomeness. We think such a rule much the more effective in securing the public safety, and not unduly harsh so far as the dispenser of food is concerned.

"As to the further question, ought there be an exception to this rule where the harmful article was purchased by the restaurant keeper from a reliable dealer and in a form not subject to effective inspection, without destruction of marketability: We see no basis for such an exception, either upon the ground that the rule of implied warranty is not technically applicable to such a situation, or upon the ground of undue hardship to the dispenser. As to the technical applicability of warranty: Again the customer is forced to rely upon the experience and trade wisdom of the dispenser in selecting food obtained from another, such as canned goods, or, as in the instant case, baked goods. Moreover, since liability in warranty is not predicated upon negligence but is absolute and rests in its ultimate basis in large part upon the necessity for public protection, there is no less reason for recognizing it where the dispenser is not able effectively to inspect the goods than where he is."

In the light of the record and authorities heretofore cited and discussed, we conclude that the trial court erred prejudicially in failing and refusing to appropriately submit the issue of implied warranty to the jury.

The judgment of the trial court should be and hereby

is reversed and the cause is remanded for further proceedings in accord with this opinion.

REVERSED AND REMANDED.

ELIZABETH C. BORSEN, APPELLEE, V. MILTON MOSKOWITZ AND MAX M. MOSKOWITZ, DOING BUSINESS AS CHERRY GARDEN GARAGE, APPELLANTS.

79 N. W. 2d 178

Filed November 9, 1956. No. 34004.

1. **Trial.** Where the facts adduced to sustain an issue are such that reasonable minds can draw but one conclusion therefrom, it is the duty of the court to decide the question, as a matter of law, rather than submit it to a jury for determination.
2. **Appeal and Error.** In an appeal to review the ruling of the district court on a motion for new trial the Supreme Court may order and direct judgment to be entered in favor of the party entitled thereto.
3. ———. A judgment will not be reversed for errors against a party not entitled to succeed in any event.

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

Cassem, Tierney, Adams, Kennedy & Henatsch, for appellants.

Fraser, Connolly, Crofoot & Wenstrand, for appellee.

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

MESSMORE, J.

The plaintiff brought this action in the district court for Douglas County against the defendants to recover damages for personal injuries sustained by her and property damage to her automobile. The plaintiff charged the defendants with negligence in their failing to discover and repair mechanical defects in the plaintiff's automobile. As a consequence, she was injured and her automobile demolished in an accident. The cause

was tried to a jury resulting in a verdict for the defendants. The plaintiff filed a motion for new trial and supplemental motion for new trial which the trial court sustained, the trial court not giving any reasons for granting a new trial. The defendants appealed, contending the trial court erred in granting the plaintiff a new trial.

The plaintiff having been granted a new trial by the trial court which gave no reason for its decision and defendants having appealed from such order, it is the plaintiff's duty to point out the prejudicial error or errors existing in the record which she contends justify the decision of the trial court. See, Vielehr v. Malone, 158 Neb. 436, 63 N. W. 2d 497; Greenberg v. Fireman's Fund Ins. Co., 150 Neb. 695, 35 N. W. 2d 772.

The errors contended for by the plaintiff are as follows: Irregularities in the proceedings of the jury by which the plaintiff was prevented from having a fair trial, and misconduct of the jury.

The principal charges of negligence appearing in plaintiff's amended petition are as follows: Failing to discover mechanical defects in plaintiff's automobile when same were readily apparent to a skilled mechanic; failing to make any and all necessary repairs to plaintiff's vehicle and thereby releasing same to plaintiff in an unrepaired and dangerous operating condition; failing to observe that the radius rod mounting and plate on the right rear-end assembly was broken; and failing to repair the aforesaid radius rod mounting and plate, all to plaintiff's detriment and peril. It is alleged that said negligence on the part of the defendants was the direct and proximate cause of the damages sustained by the plaintiff.

The defendants' answer denied any negligence on their part and affirmatively alleged contributory negligence on the part of the plaintiff. Contributory negligence was not submitted to the jury.

The record shows that the plaintiff, Elizabeth Borsen,

was the owner of a 1951 Buick convertible automobile. On August 13, 1953, with his wife's consent, Russell Borsen drove her automobile to take their young daughter, a member of a riding club, to Hillside Stables on Seventy-second Street between Dodge and Pacific Streets in Omaha. This was about 8 p.m. After leaving the stable, he drove on a private driveway toward the entrance on Seventy-second Street where he came to almost a complete stop. In pulling out onto the street, the right rear wheel of the automobile hit a rut or chuckhole a reasonably severe bump, the chuckhole being 3 or 4 feet long and wide enough to let a tire fall into it to a minimum of 8 inches in depth. As he proceeded north on Seventy-second Street the car operated all right. However, as he was going along people in traffic called his attention to something, so he pulled into a service station on the southeast corner of Seventy-second and Dodge Streets. He got out of the car and looked at the back part of it and discovered that the gas tank was leaking gas. The service station was not equipped to salvage the gas so he got back into the car and drove east on Dodge Street to Thirty-eighth Street and across on Thirty-eighth Street to Leavenworth Street to the Cherry Garden Garage. He was admitted to the garage. He knew Max Moskowitz, commonly referred to as Nick, one of the owners and operators of the garage, and informed him that he had punctured a hole in the gas tank and something should be done to salvage the gas. The garageman went about the business of jacking up the car and salvaging the gasoline left in the gas tank. He then left the garage and telephoned for his wife to come to the garage.

The plaintiff testified that she received a telephone call about 8:30 or 8:45 p.m., to go to the garage. She used a car which belonged to the company for which her husband worked. When she arrived at the garage she talked to Max Moskowitz, one of the defendants. It was decided that the defendants would repair the plain-

tiff's automobile and if there was nothing wrong but the leak in the gas tank the plaintiff could have her automobile the next afternoon. The following day, Friday, August 14, 1953, she received a call at 4 p.m., that her car was ready. It was driven to her home, and she drove it back to the garage. She testified that she had no difficulty with the car. She stopped at the garage, parked the car, and went in and talked to Max Moskowitz and asked him what he had found. He said that he had not found anything other than that the gas tank leaked. She then asked him if he checked it over and if he was sure it was all right. He said: "It is perfectly all right, we checked it over and it is safe for you to drive." She paid her bill. She then drove the car down to about a block north of Cuming Street on Twenty-fourth Street to buy some paint, and arrived home about 6 p.m. Her husband drove the car from where it was parked into the garage and parked it. The next day, August 15, 1953, the plaintiff had an early appointment to go to Brandeis beauty parlor. She drove her car from 2422 South Forty-eighth Street and parked it herself in a parking lot at Eighteenth and Douglas Streets. She came back from her appointment at 11:45 a.m., and an attendant at the parking lot drove the car from its parking position so that the plaintiff could leave with it. She then started for her home, driving over to and up St. Marys Avenue to Leavenworth Street, and out on Leavenworth Street to Thirty-sixth Street where she turned south to Center Street. During this driving she did not notice any trouble with the car. She used her brakes for stop lights, or red lights, and stopped at times. She further testified that she had to stop for a stop light at the intersection of Thirty-sixth Street and Leavenworth Street. Leavenworth Street runs east and west and Thirty-sixth Street north and south. After the signal changed on Thirty-sixth and Leavenworth Streets, she turned to go south to Center Street.

There is a stop sign on the right side of Thirty-sixth Street protecting traffic on Center Street. Thirty-sixth Street does not continue on across Center Street, but at that point forms a "T" intersection. She estimated her speed at 25 miles an hour. Her car was equipped with a standard manual gear shift, a foot brake which she operated with her right foot, a clutch pedal to the left of the foot brake, and an emergency brake to the left of the clutch pedal which is operated by the left foot. She started to slow down at the alleyway about a quarter of a block before she got to Center Street. She put her foot on the brake pedal but there was no brake. The brake pedal went to the floor and stayed there. She then reached for her emergency brake, and nothing happened. She had arrived at the point where the stop sign is located on Center Street. She looked into a service station located across Center Street to the right, but it was crowded with people so she could not turn in there. She could glance to the left and right, but her car was carrying right into the intersection. To the east of the filling station there was an open yard. She endeavored to steer her car in such manner as to keep into open space and avoid obstacles. There was a small curb, a sidewalk, and incline over which her car proceeded into a tree, causing damage to her automobile and personal injuries to herself.

A garage operator and mechanic, familiar with the plaintiff's car which was towed to his garage following the accident, testified to the effect that upon inspection and investigation the radius rod mounting on the right rear of the plaintiff's car had been broken; that its broken and jagged end had cut through the steel tubing of the car's hydraulic brake line causing the hydraulic brake fluid to escape from the brake system, rendering the brakes inoperable; and that it was possible that the car going over the bump near the Hillside Stables could possibly fracture this radius rod. However, if after going over such a bump it developed that the weld was

still in place, the bump would not have damaged the car.

Max Moskowitz testified that he and his brother had been engaged in the general garage business since June 1, 1920, and that they had had experience as mechanics, and also had employed a mechanic and a mechanic's helper; that he had been acquainted with the plaintiff for 15 years or more and she had used their garage to store her car; and that on August 13, 1953, the plaintiff's husband came to the garage and told this witness that the gas tank was leaking. The nightman and this witness put a pan under the leak in the tank. He further testified that he heard no noise whatsoever from the car; and that the plaintiff's husband told him he had hit some object while driving on Seventy-second Street which struck the bottom of the gas tank and punctured it. Fifteen or 20 minutes later the plaintiff drove into the garage and asked what happened to her car. This witness told her that it was evident there was a hole in the gas tank. She wanted to know if they would be able to take care of it. He said they would be, that they would have the shop boys get on it in the morning and if there was nothing more than the gas tank leak, she could possibly have her car the next day. Taking the gas tank off from under the car was a simple operation. The hole in the tank was in the extreme left center portion of the tank. The plaintiff left the garage. This witness further testified that he inspected the plaintiff's automobile by getting down under the car on a creeper and making the inspection by looking at the parts with a good light and feeling of them. He looked at the brake lines and brake cables. He grabbed hold of the radius rod and shook it up and down. It was not damaged, but in good condition. He looked along the axle housing for grease or gas leaks, examined the springs and frame, inspected the emergency brake cable, and found the brakes to be in good order. He also examined the inside of the tires and could find nothing wrong. The foot brake worked all right, and there was no noise

when the car was driven out by his brother to be delivered to the plaintiff.

A mechanic who had been employed by the Moskowitz brothers for more than 30 years testified that he took the gas tank off the plaintiff's automobile; that on August 14, 1953, he got under the car on a creeper, made an examination, and found nothing wrong; that the right radius rod was not loose, if it had been they would have called the plaintiff; and that he, by his examination, could have seen if it had been loose.

We deem it unnecessary to discuss the assignments of error made by the plaintiff. In the light of the record and the disposition we make of the case, we believe the following to be applicable.

At the close of the plaintiff's evidence the defendants moved the court to direct a verdict in favor of the defendants or, in the alternative, to dismiss the plaintiff's action for the reason that there was no competent evidence of any negligence on the part of the defendants as pleaded by the plaintiff. This motion was overruled. Again, at the close of all of the evidence, the defendants made the same motion which we assume was overruled, no ruling appearing in the bill of exceptions. In any event, the cause was submitted to a jury.

It is apparent from the record that the plaintiff drove her automobile without complaint on her part with reference to the brakes or mechanical condition of the car and the brakes functioned until just prior to the accident when, from some cause, the brake fluid escaped from the brake system and rendered the brakes inoperative. Just what caused this condition is not ascertainable from the record. The evidence does show that when the plaintiff's automobile left the defendants' garage the damage complained of by the plaintiff had been repaired and an inspection made with the conclusion that the mechanism in the undercarriage of the plaintiff's car was in good mechanical condition. There is no competent evidence refuting these facts.

A witness testified in behalf of the plaintiff as to the condition of her automobile after the accident. He had not seen the plaintiff's car prior to the time of the accident. He received it in a wrecked condition after the accident. While this witness testified that it was possible for the bump received by the plaintiff's car when it struck the bottom of the chuckhole to cause the radius rod mounting in the rear of plaintiff's car to become broken and in its broken and jagged condition to cut through the steel tubing of the car's hydraulic brake line causing the hydraulic brake fluid to escape from the brake system rendering the brakes inoperative, this type of evidence is speculative and conjectural. The witness, under the circumstances, would be in no position to testify as to when the condition he described occurred or what caused it, and did not do so.

The evidence shows, by the testimony of Max Moskowitz and his mechanic, that the radius rod was in place when these persons examined it. If it had not been in place, during the course of time that the plaintiff operated her automobile, it would have been noticeable due to the rubbing of metal or other noise. There is no competent evidence that at the time the plaintiff's automobile left the defendants' garage the radius rod was not in place. The record is void of competent evidence to prove negligence on the part of the defendants as contended for by the plaintiff.

"Where the facts adduced to sustain an issue are such that reasonable minds could draw but one conclusion therefrom, it is the duty of the court to decide the question, as a matter of law, rather than submit it to a jury for determination." Corbitt v. Omaha Transit Co., 162 Neb. 598, 77 N. W. 2d 144.

"In an appeal to review the ruling of the district court on a motion for new trial the Supreme Court may order and direct judgment to be entered in favor of the party entitled thereto." Wax v. Co-Operative Refinery Assn., 154 Neb. 42, 46 N. W. 2d 769.

In Eilts v. Bendt, 162 Neb. 538, 76 N. W. 2d 623, this court held: "A judgment will not be reversed for errors against a party not entitled to succeed in any event." See, also, Holberg v. McDonald, 137 Neb. 405, 289 N. W. 542.

Concluding as we do that the verdict was the only one that could be sustained by the evidence, the judgment of the trial court is reversed and the cause is remanded with directions to enter judgment in favor of the defendants.

REVERSED AND REMANDED WITH DIRECTIONS.

FRED E. BOETTCHER ET AL., APPELLANTS, V. COUNTY OF HOLT ET AL., APPELLEES.
79 N. W. 2d 183

Filed November 9, 1956. No. 34007.

1. **Pleading.** A general demurrer admits all allegations of fact in the pleading to which it is addressed, which are issuable, relevant, material, and well pleaded; but it does not admit the pleader's conclusions of law or fact.
2. **Taxation.** If a county assessor performs the duties in fixing the value of property in the manner required of him by law, the fact that in the performance of the duties he resorted to recommendations and evidence furnished by an appraisal committee does not affect the validity of the assessment.
3. **Taxation: Injunctions.** If a county assessor fails to make an inspection of real estate and relies upon and accepts for assessment purposes the valuation of an appraiser, the assessment is not void and thereby no ground is afforded for injunctive relief.
4. ———: ———. Where the complaint of a taxpayer is based upon irregularities as distinguished from incidents rendering the tax void, the remedy of the taxpayer is not by injunction but by resort in the first instance to the board of equalization.

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

Francis D. Lee, for appellants.

William W. Griffin, for appellees.

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

YEAGER, J.

This is an action in equity instituted by Fred E. Boettcher and 18 other named persons, residents of Holt County, Nebraska, on their own behalf and on behalf of all other residents of Holt County similarly situated, plaintiffs and appellants, against the County of Holt, Nebraska, the county treasurer, the county assessor, the county board of equalization, the county clerk, and the seven county supervisors of Holt County, Nebraska, defendants and appellees, the object and purpose of which is to secure an injunction against the collection of taxes based upon the valuation of real estate for the year 1955 which was in excess of the valuation for the year 1954.

The plaintiffs duly filed their petition and to it the defendants filed a general demurrer. The demurrer was sustained and the action dismissed. From the order sustaining the demurrer and the judgment dismissing the action the plaintiffs have appealed.

The assignments of error as grounds for reversal are that the court erred in sustaining the demurrer; that the court abused its discretion; and that the order entered is not sustained by and is contrary to law.

Attention has not been called in the briefs to the abuse of discretion of which complaint is made, therefore it becomes apparent that the only question for consideration is that of whether or not the petition states a cause of action. This of course requires an examination of the petition. The examination is to be made in the light of the following rule: "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 re Estate of Halstead, 154 Neb.

31, 46 N. W. 2d 779. See, also, Richter v. City of Lincoln, 136 Neb. 289, 285 N. W. 593; Johnson v. Marsh, 146 Neb. 257, 19 N. W. 2d 366.

It does not appear that the petition should be set out in its entirety here. The conclusion reached is that a summary of pertinent parts will suffice. What it is believed contains a fair summary of the pertinent parts follows.

By the petition it is alleged that all of the named plaintiffs were in 1955 the owners of lands in Holt County, Nebraska, described in the petition, and that the defendants, except the county itself, were officers of the County of Holt as described above; that the board of equalization of the county, prior to the time fixed by law for it to sit as a board of equalization, entered into a contract with E. T. Wilkins Associates, without complying with statutes, to appraise and revalue the real estate in the county; that a report required by the terms of the agreement with E. T. Wilkins Associates was not furnished; that E. T. Wilkins Associates and a reappraisal committee made a reappraisal and reclassification of the real estate in the county but that it was contrary to the statutes and the Constitution of the State of Nebraska (the identity of the committee is not clearly disclosed); that the appraisal was illegal and unconstitutional for the following reasons: E. T. Wilkins Associates were unlawfully employed; the report was made to the county assessor and not to the board of equalization; that no minutes were in the hands of the county assessor and that the assessment of the assessor was made from the records of E. T. Wilkins Associates; that the committee failed to make a report to the county assessor before May 1, 1955; that E. T. Wilkins Associates used unqualified workers; that E. T. Wilkins Associates failed to make actual inspections; that each of the plaintiffs was given due notice prior to the first Monday in May that his assessment had been changed from the previous year which change was described in the notice; and that also

they were given notice that E. T. Wilkins Associates would conduct preliminary hearings as to the values between May 2 and 6, 1955, which notice contained a request that they respond before going to the board of equalization.

Following this series of alleged incidents of illegality and unconstitutionality are allegations of inability to be heard by E. T. Wilkins Associates, and impropriety of action by the board of equalization at its hearings and in the making and preservation of records.

As already indicated the petition specifically declares that each of the plaintiffs was duly notified of change of value of his property with information as to the change made together with proper information as to the time of the convening and the sessions of the board of equalization. The members of the class in whose behalf the action was instituted were likewise duly notified.

As has been made clear the petition challenges the legality and constitutionality of steps leading up to the assessment, but at no point in the petition is it alleged that any one or more of the plaintiffs ever protested or attempted to protest to the board of equalization the value placed upon his or their property by the county assessor.

Before it may be said that the court erred in sustaining the general demurrer an allegation or allegations of fact must be found the effect of which, if true, would render the assessment to the extent that it exceeds the assessment for the previous year void.

The brief of appellants fails to point particularly or specifically to any such allegation or allegations.

An examination of the petition discloses allegations which, if true, may be regarded as irregularities taking place during the sessions of the board of equalization but nothing has been pleaded the effect of which could in law be said to render void the assessment made by the assessor or the equalization made by the board of

equalization, or to have deprived the plaintiffs of any right to which they were entitled.

These allegations of the petition condensed present the following elements which it appears are basic in the determination of whether or not the plaintiffs have stated a cause of action:

The petition effectually declares that the assessor made the assessment as he was required to do. The only complaint is that the basis for the valuations came from an improper source.

The petition specifically declares that proper statutory notices of increase were given which notices gave the required information as to the sittings of the board of equalization.

The petition declares effectually that the board of equalization failed and refused to receive and hear numerous complaints as to valuation. It does not declare that any complaint from these plaintiffs was individually or collectively ever made or refused or that hearing was denied.

This court effectually said in Midwest Popcorn Co. v. Johnson, 152 Neb. 867, 43 N. W. 2d 174, that if a county assessor performs the duties in fixing the value of property in the manner required of him by law the fact that in the performance of the duties he resorted to recommendations and evidence furnished by an appraisal committee does not affect the validity of the assessment.

Even if an assessor does fail to make an inspection of real estate and relies upon and accepts for assessment purposes the valuation of an appraiser the assessment is not rendered void. It does not afford grounds for injunctive relief. The only effect of this is to give to the taxpayer in a proper action the right to a reduction on proof that the valuation was excessive. Gamboni v. County of Otoe, 159 Neb. 417, 67 N. W. 2d 489.

Where the complaint of a taxpayer is based upon irregularities as distinguished from incidents rendering

the tax void the remedy of the taxpayer is not by injunction but by resort to the board of equalization. See, South Platte Land Co. v. City of Crete, 11 Neb. 344, 7 N. W. 859; Western Union Telegraph Co. v. Douglas County, 76 Neb. 666, 107 N. W. 985; Power v. Jones, 126 Neb. 529, 253 N. W. 867; Gamboni v. County of Otoe, *supra;* LeDioyt v. County of Keith, 161 Neb. 615, 74 N. W. 2d 455. In this case the plaintiffs did not resort to this remedy. This is an exclusive remedy where, as in this case, a party has received a valid statutory notice of an increase in the value of his real estate. Gamboni v. County of Otoe, *supra;* LeDioyt v. County of Keith, *supra.*

In this case as already indicated the petition does not state that the plaintiffs or any of them ever availed or attempted to avail themselves of this remedy which was open to them. From the fact, if it was a fact, that unnamed persons attempted to avail themselves of this remedy and were denied by the board of equalization can flow no right of action in favor of these plaintiffs.

In the light of the observations made herein the conclusion is inescapable that the petition of plaintiffs failed to state a cause of action and that the demurrer was properly sustained.

The judgment of the district court is accordingly affirmed.

AFFIRMED.

AUGUST J. POSPICHAL, APPELLANT, V. ROBERT V. WILEY ET AL., APPELLEES.
79 N. W. 2d 275

Filed November 16, 1956. No. 33962.

1. **Trial.** In testing the sufficiency of evidence to support a verdict it must be considered in the light most favorable to the successful party, that is, every controverted fact must be resolved in his favor and he should have the benefit of every

inference that can reasonably be deduced therefrom.

2. **Negligence: Trial.** Where different minds may reasonably draw different conclusions from the evidence, or there is a conflict in the evidence as to whether or not negligence or contributory negligence has been established, the question is for the jury.
3. **Automobiles: Negligence.** Where snowdrifts or other conditions have left only a narrow lane open for travel, and one motorist has already entered the lane, it is the duty of another driver approaching from the opposite direction to slow down and yield the right-of-way, and if he does not do so because of failure to keep a proper lookout or because his speed makes it impossible, a finding of actionable negligence on the part of such driver is permissible.
4. **Trial: Appeal and Error.** The refusal of the trial court to permit the jury to view the premises involved in the litigation is not reversible error in the absence of an abuse of discretion.
5. **Automobiles: Master and Servant.** A person is liable for the negligent operation of an automobile by his servant or agent only where such servant or agent, at the time of the accident, was engaged in his employer's or principal's business with his knowledge and direction.
6. **Trial.** Where a verdict is returned against a plaintiff and in favor of several defendants, on different, distinct, and separate defenses pleaded separately by them, a single joint motion for a new trial against them all is insufficient, and it should be overruled if the verdict is good as to any one of the defendants.

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

Leo F. Clinch and *Davis & Vogeltanz,* for appellant.

Frederick M. Deutsch and *William F. Manasil,* for appellees.

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

WENKE, J.

This is an appeal from the district court for Garfield County. August J. Pospichal brought this action against Robert V. Wiley and his employer, the American Salt Corporation, to recover for injuries sustained by him and damages to his truck, a 1948 1-ton Chevrolet pick-up, claiming Wiley's negligence in operating his car, a 1952

Packard sedan, caused the accident which resulted in the injuries and damages of which complaint is made. Wiley filed a cross-petition whereby he sought to recover from Pospichal for injuries he personally suffered and for damages to his car, both of which resulted from the accident, claiming it was the negligence of Pospichal in driving his truck that caused the accident and his resulting injuries and damages. Upon trial a jury found neither Pospichal nor Wiley had established a cause of action against the other and rendered a verdict accordingly. Pospichal filed a motion for new trial against both defendants and, from the overruling thereof, has taken this appeal. For convenience we shall, when referring to the appellees separately, refer to them as Wiley and the company.

The accident involving appellant and Wiley happened about 4:30 p. m. on Friday, December 4, 1953, on State Highway No. 11 at a point about 16 miles north of Burwell, Nebraska. There had been a snowstorm or blizzard on Thursday, December 3, 1953, which, to some extent, had drifted the snow and, at the point of the accident which was just south of the crest of a hill, a rather long and deep snowbank had formed across the highway. A lane for travel had been cut in this drift and the accident happened in this lane when the parties' truck and car met almost head-on, the left front of the car and the left front of the truck coming together. Both appellant and Wiley were injured and the truck and car damaged.

Appellant contends the verdict of the jury was against the evidence. In support of this contention he cites the following principles:

"A verdict so clearly wrong as to induce the belief on the part of the reviewing court that it must have been found through passion, prejudice, mistake, or some means not apparent in the record, will be set aside and a new trial awarded." Garfield v. Hodges & Baldwin, 90 Neb. 122, 132 N. W. 923. See, also, Hoffman v.

McKeen Motor Car Co., 95 Neb. 238, 145 N. W. 257.

"When the judgment is clearly against the weight of the evidence, it is the duty of the court to set it aside." Nebraska Mutual Ins. Co. v. Borden, 132 Neb. 656, 272 N. W. 767. See, also, Bentley v. Hoagland, 94 Neb. 442, 143 N. W. 465.

But, in considering these principles we must review the record, since a verdict was rendered for appellees, 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. See, also, Simcho v. Omaha & C. B. St. Ry. Co., 150 Neb. 634, 35 N. W. 2d 501; Fuss v. Williamson, 160 Neb. 141, 69 N. W. 2d 539.

In reviewing the evidence in the foregoing manner there is a jury question when the evidence with relation to negligence is conflicting or such that minds may reasonably reach different conclusions therefrom with regard to its existence. See, Hickman v. Parks Construction Co., 162 Neb. 461, 76 N. W. 2d 403; Scottsbluff Nat. Bank v. First State Bank, 162 Neb. 475, 76 N. W. 2d 445. As stated in Price v. King, 161 Neb. 123, 72 N. W. 2d 603: "Where different minds may reasonably draw different conclusions from the evidence, or there is a conflict in the evidence as to whether or not negligence or contributory negligence has been established, the question is for the jury."

From the evidence the jury could have found that the snowdrift, which had formed across highway No. 11, started a short distance south of the crest of the hill and extended south on the highway for a distance of some 225 to 300 feet; that it extended into a curve in the road where the road is partially in a cut along the side of a hill, which hill is to the west, there being a ravine and

lower ground to the east; that a one-way lane, about 9 feet in width, had been cut through this drift by means of a snowplow; that the snow along the east side of this cut or lane, which had a slight curve in it where it followed the curve in the road, was between 2½ and 3 feet high while that to the west side was between 7 and 8 feet high; that Wiley, who was coming from the north, entered the lane first, doing so just after passing over the crest of the hill; that he proceeded into it for some distance at about 35 miles an hour before he noticed appellant's truck about 100 feet away; that appellant was, at the time Wiley saw his truck, just about to enter the one-way lane; that appellant was, at that time, driving about 35 miles an hour; that appellant did not see Wiley's car until it was about 60 feet from him; that appellant did not attempt to stop his truck, as is indicated by the fact there were no skid marks south of the point where the car and truck came together; that appellant was driving his truck about 30 miles an hour when the collision occurred; that Wiley attempted to stop his car by applying the brakes, as is evidenced by about 44 feet of skid marks north from the point of impact, but was unable to do so because the highway was icy from the snow packed thereon; that the accident, or point of impact, occurred about 45 feet from the south entrance to the lane, which lane was 225 to 300 feet in length; and that upon impact both cars stopped immediately, the truck facing slightly northwest in the direction of the highway and the car slightly southeast, its back end having skidded sideways toward the west. We realize appellant testified otherwise but the members of the jury did not have to believe him and, from a careful study of the record, we can understand why they did not.

As stated in 1 Blashfield, Cyclopedia of Automobile Law and Practice (Part 2, Perm. ed.), § 749, p. 686: "* * * where snowdrifts or other conditions have left only a narrow lane open for travel, and one motorist

has already entered the lane, it is the duty of another driver approaching from the opposite direction to slow down and yield the right of way, and if he does not do so because of failure to keep a proper lookout or because his speed makes it impossible, a finding of actionable negligence on the part of such driver is permissible." The same would be true as to contributory negligence. The evidence adduced presented a jury question as to both appellant and Wiley and the court was correct in submitting it accordingly.

Appellant contends the jury was misled by certain instructions given by the court. The first relates to the second paragraph of instruction No. 9. This advised the jury that: "Where as a result of such weather conditions (described in the first paragraph) the portion of the highway remaining for travel is not of sufficient width for vehicles to pass, then the vehicle first entering such narrow portion has the right-of-way over vehicles approaching from the other direction, if the vehicle first entering is visible to the driver of the second vehicle approaching such narrow portion before such second vehicle enters such narrow portion, and it would be the duty of such second vehicle to stop before entering and not proceed until the first vehicle had passed through the narrow portion."

The criticism appellant makes of this instruction is that thereby the trial court told the jury the cut was not of sufficient width to permit two vehicles to pass, and, since there was evidence showing the cut was actually wide enough for two vehicles to pass, doing so was misleading and prejudicially erroneous. He cites in support thereof the principle that: "Ordinarily, it is error for the court in its instruction to assume the existence of a material fact as to which there is a conflict in the evidence." Jessup v. Davis, 115 Neb. 1, 211 N. W. 190, 56 A. L. R. 1403.

Ordinarily the first vehicle to enter a one-way passage has the right-of-way and it is the duty of the other

vehicle to stop and accord the right-of-way to it. 3-4 Huddy, Encyclopedia of Automobile Law (9th ed.), § 119, p. 193; 60 C. J. S., Motor Vehicles, § 315, p. 731.

"Instructions to a jury should be considered as a whole and if they fairly submit the case that is all the law requires." Benedict v. Eppley Hotel Co., 161 Neb. 280, 73 N. W. 2d 228.

By the second paragraph of its instruction No. 8 the court informed the jury that: "The laws of Nebraska further provide that 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."

From the evidence in the record the jury could have found either that the lane would only carry traffic one way or that it was wide enough to permit cars traveling therein to pass each other. Under this situation it was incumbent upon the trial court to inform the jury of the principles applicable in either case. This we think it did by the quoted parts of instructions Nos. 8 and 9. In view thereof we find appellant's contention to be without merit.

Appellant also contends that the court erred by advising the jury in the third paragraph of its instruction No. 10 as follows: "If, however, the plaintiff has proven all of the material allegations of his amended petition, by a preponderance of the evidence, and you further find that the plaintiff was not guilty of negligence which contributed to his injuries, then plaintiff will be entitled to recover such damages as he has shown, by a preponderance of the evidence, to have sustained by reason of the negligence of the defendant."

The criticism made of this language is it had the effect of telling the jury if appellant was guilty of negligence in any degree he could not recover. Standing alone this one paragraph might, by inference, be subject to the foregoing criticism. However, in the very next paragraph of the same instruction the court

advised the jury that: "If, however, you find, from a preponderance of the evidence that the plaintiff was guilty of negligence which contributed to his *injures,* then plaintiff's right to recover will be governed by Instruction No. *12.*" Instruction 12 is a complete and correct instruction relating to the doctrine of contributory negligence.

As we have already said, instructions must be considered as a whole. When these two instructions are considered together they fairly and fully present to the jury the question of Wiley's negligence and the contributory negligence, if any, of appellant insofar as they relate to appellant's right to recover. We find appellant's contention to be without merit.

Finally appellant contends the trial court abused its discretion when it refused to permit the jury to view the place of the accident, as he had requested.

Section 25-1108, R. R. S. 1943, provides it may be done whenever, in the opinion of the court, it is proper for a jury to do so.

We have said the trial court has a right to grant such a request and permit a jury to view the premises, but such right is discretionary and this court will not set aside a verdict because the court refused to grant such a request unless it is apparent there has been an abuse of such discretion by doing so. Peake v. Omaha Cold Storage Co., 158 Neb. 676, 64 N. W. 2d 470; Ricenbaw v. Kraus, 157 Neb. 723, 61 N. W. 2d 350. As stated in Peake v. Omaha Cold Storage Co., *supra:* "The refusal of the trial court to permit the jury to view the premises involved in the litigation is not reversible error in the absence of an abuse of discretion."

As stated in 53 Am. Jur., Trial, § 442, p. 350: "The rule generally recognized and applied is that the granting or denying of an order for a view of the premises, upon application by a party, rests in the sound discretion of the court both in criminal and civil cases, and its action in this regard will rarely be disturbed, especially,

in case of a refusal, where there has been a change in the conditions since the cause of action arose or the crime was committed."

And, as stated in 9 Blashfield, Cyclopedia of Automobile Law and Practice (Perm. ed.), § 5905, p. 394: "It rests largely within the discretion of the trial court whether the jury should be permitted to view the scene of an automobile accident and if conditions there have changed since the accident, it is not an abuse of discretion to refuse such permission."

When ruling on this request, and denying it, the trial court stated: "Well, I don't think it would help, myself, unless we could build a snow bank and make it identical to what it was then." And when ruling on appellant's motion for new trial, which raised this same contention, the trial court said: "* * * the conditions at the time of the trial were entirely different from what they were at the time of the accident. * * * It was a temporary condition caused by the snow piling up just below the brow of that hill. Now that couldn't be shown by view and all the other facts are pretty well established."

We think the trial court was correct in its refusal.

Appellees raise the question of whether or not the appeal is here because of certain procedures that took place in the trial court. By the allegations of its amended petition appellant sought to hold the company liable for the negligence of Wiley on the ground that: "* * * at all times hereinafter mentioned (Wiley) was an employee of the defendant, the American Salt Corporation * * * and was acting within the scope of his employment for the said defendant company and with its consent, knowledge and permission." To these allegations the company filed a general denial.

In response to interrogatories served upon it, the company admitted Wiley was employed by it on December 4, 1953, at about 4:30 p. m. At the beginning of the trial it was stipulated: "* * * that the defendant,

American Salt Corporation, admits that the defendant Robert V. Wiley was employed by it on the 4th day of December 1953, at about 4:30 P. M. * * * that Mr. Wiley was employed by the American Salt Company on the day of the accident at the time of the accident." The only evidence adduced in regard thereto is that of Wiley who testified that on December 4, 1953, he was the district representative for American Salt Corporation; that he had samples in his car; that despite the accident he kept on the job the best he could; that he was a salesman for American Salt Corporation; and that he went back to traveling for the company on December 22, 1953.

The rule in this regard is stated in Bartek v. Glasers Provisions Co., Inc., 160 Neb. 794, 71 N. W. 2d 466, as follows: "A person is liable for the negligent operation of an automobile by his servant or agent only where such servant or agent, at the time of the accident, was engaged in his employer's or principal's business with his knowledge and direction."

At the conclusion of all the evidence the company moved for a directed verdict on the grounds that the evidence against it was insufficient to sustain a verdict for plaintiff (appellant) and against the defendant (the company). This motion should have been sustained because there was no proof to support a finding that Wiley, at the time of the accident, was engaged in his employer's business with its knowledge and direction. Thereafter, after the jury had returned its verdict, appellant filed one motion for new trial asking for a new trial against both appellees, which was overruled. In this situation the following applies: " ' "Where a verdict is returned against a plaintiff and in favor of several defendants, on different, distinct and separate defenses pleaded separately by them, a single joint motion for a new trial against them all is insufficient, and it should be overruled if the verdict is good as to any one of the defendants." ' * * * If error assigned in such motion for

new trial is not good as to all it is not good as to any." Gunn v. Coca-Cola Bottling Co., 154 Neb. 150, 47 N. W. 2d 397.

Having come to the conclusion that all of appellant's contentions are without merit we affirm the judgment of the trial court.

AFFIRMED.

SCHOOL DISTRICT NO. 65 OF PERKINS COUNTY ET AL., APPELLEES, V. RUTH REES MCQUISTON AS COUNTY SUPERINTENDENT OF PERKINS COUNTY, NEBRASKA, ET AL., APPELLANTS.
79 N. W. 2d 413

Filed November 16, 1956. No. 33984.

Judgments. Where parties to an action have voluntarily complied with the order of the court, the judgment is thereby satisfied and its force exhausted. After a judgment has thus been satisfied there is nothing left of which such parties can thereafter complain or about which they can say they are still aggrieved.

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

W. C. Conover, Loyd E. Christiansen, Van Pelt, Marti & O'Gara, and *Chauncey C. Sheldon,* for appellants.

Beatty, Clarke, Murphy & Morgan, for appellees.

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

MESSMORE, J.

Pursuant to section 79-1102, R. S. Supp., 1953, school districts Nos. 29 and 49 in Chase County, both Class I country school districts that maintain and teach only elementary grades up to the eighth grade, school districts Nos. 31, 61, and 8, all of Perkins County, Class I country school districts teaching only elementary grades

up to the eighth grade, and school district No. 65 of Perkins County, a Class II school district that taught both elementary and high school grades, filed with the county superintendents of both Chase and Perkins Counties petitions, identical in form, asking to have such districts united and formed into a single high school district for high school purposes.

School district No. 65 of Perkins County, being a Class II school district and having a board of education at the time of filing its petition, also filed with each of the superintendents a resolution asking for the uniting of said school districts for high school purposes.

The county superintendents of Chase County and Perkins County, on the filing of the petitions and the resolution of the board of education of school district No. 65, gave notice by publication in legal weekly newspapers of general circulation in Chase and Perkins Counties of a hearing on said petitions to be held on July 11, 1955, at 10 o'clock a. m., in the district courtroom at Grant in Perkins County.

On July 11, 1955, the county superintendents held said hearing and, acting jointly and multilaterally and on the record and evidence, determined that they had jurisdiction in the premises by virtue of section 79-1102, R. S. Supp., 1953. The county superintendents jointly declined to form the proposed new rural high school district.

The petitioning districts and a legal resident and taxpayer of each district prosecuted error proceedings from the findings and order of the county superintendents to the district court for Perkins County. Trial was had in the district court for Perkins County. A judgment was entered that the order entered by the county superintendents jointly on July 11, 1955, be reversed and set aside. It was further ordered that said county superintendents jointly enter an order finding that the organization of the Venango rural high school district by school districts Nos. 8, 31, 61, and 65 of Perkins County and school districts Nos. 29 and 49 of Chase County had been

completed, authorized, and perfected. This judgment was entered on December 6, 1955.

The county superintendents filed a motion for new trial on December 10, 1955. The motion for new trial was overruled on December 28, 1955, and upon motion of defendants in error for the fixing of a supersedeas bond, the supersedeas bond was fixed in the amount of $5,000.

On January 6, 1956, the following was filed in the office of the clerk of the district court for Perkins County: "ORDER Pursuant to the Decree of the District Court of Perkins County, Nebraska, entered on December 5, 1955, Ruth Rees McQuiston, County Superintendent of Perkins County, Nebraska, and Sylvia Ziegler, County Superintendent of Chase County, Nebraska, do hereby jointly find and order that the organization of the Venango Rural High School District by School Districts 8, 31, 61 and 65 of Perkins County, Nebraska, and School Districts 29 and 49 of Chase County, Nebraska, has been completed, authorized and perfected. Dated at Grant, Nebraska, this 6 day of January, 1956. /s/ Ruth Rees McQuiston County Superintendent of Perkins County, Nebraska /s/ Sylvia Ziegler County Superintendent of Chase County, Nebraska."

On the same date the county superintendents filed what is entitled a "deposit in lieu of supersedeas bond" which reads as follows: "Comes now Ruth Rees McQuiston, County Superintendent of Perkins County, Nebraska, and Sylvia Zeigler, County Superintendent of Chase County, Nebraska, and do each, jointly and severally deposit herewith with the Clerk of the District Court of Perkins County, Nebraska, an order executed in accordance with the Decree of the District Court entered in this cause on December 5, 1955, to abide the judgment of the Appellate Court instead of the undertaking prescribed in the second subdivision of Section 25-1916, pursuant to the provisions of Section 25-1917 of the Revised Statutes of Nebraska, Reissue of 1948.

Dated this 6 day of January, 1956. /s/ Ruth Rees McQuiston County Superintendent of Perkins County, Nebraska /s/ Sylvia Ziegler County Superintendent of Chase County, Nebraska. The deposit of the order described above is hereby acknowledged, and is approved as to form and sufficiency in lieu of supersedeas bond, this 6 day of January, 1956. /s/ Harry Shalla Clerk of the District Court."

On January 18, 1956, the county superintendents gave notice of appeal to this court. On the same date the clerk of the district court for Perkins County received from one of the counsel for appellants $75 in lieu of cost bond, and on the same date $20 for costs of appeal.

The appellants set forth several assignments of error. However, we believe the first question to be determined relates to the instrument filed by the appellants with the clerk of the district court for Perkins County entitled "deposit in lieu of supersedeas bond."

The appellants contend that they have complied with sections 25-1916 and 25-1917, R. R. S. 1943; that the instrument so designated and filed constitutes a substitute for supersedeas bond; and that said appellants have perfected their appeal to this court.

Section 25-1916, R. R. S. 1943, provides in part as follows: "No appeal in any case shall operate as a supersedeas, unless the appellant or appellants shall within twenty days next after the rendition of such judgment or decree, or the making of such final order, execute to the adverse party a bond with one or more sureties as follows: * * * (2) When the judgment, decree, or final order directs the execution of a conveyance or other instrument, the bond shall be in such sum as shall be prescribed by the district court, or judge thereof in vacation, conditioned that the appellant or appellants will prosecute such appeal without delay; and will abide and perform the judgment or decree rendered, or final order which shall be made by the Supreme Court in the cause; * * *."

Section 25-1917, R. R. S. 1943, provides: "Instead of the undertaking prescribed in the second subdivision of section 25-1916, the conveyance or other instrument may be executed and deposited with the clerk of the court in which the judgment was rendered or order made, to abide the judgment of the appellate court."

The appellants assert that the January 6, 1956, order of the appellants was made solely by way of compliance with sections 25-1916 and 25-1917, R. R. S. 1943, relative to supersedeas, and that such order was deposited and accepted in lieu of supersedeas bond, and not as a presently operative order, to abide the ultimate judgment of this court, just as the execution and deposit of a deed pursuant to section 25-1917, R. R. S. 1943, would not constitute a presently operative conveyance of title.

We are not favored by any citation of authority by the appellants to sustain their position. We have merely the statement that the appellants have complied with sections 25-1916 and 25-1917, R. R. S. 1943, by the filing of an instrument entitled "deposit in lieu of supersedeas bond" which is heretofore set out.

As we interpret subdivision (2) of section 25-1916, and section 25-1917, R. R. S. 1943, we conclude such sections contemplate a conveyance such as a deed, an assignment of an interest in property, real or personal, such as a mortgage, or any other instrument comparable thereto. As for instance, in the case of Walter v. Gillan, 129 Neb. 514, 262 N. W. 33, the case involved a school land lease and fraud. The defendants executed and deposited with the clerk of the court an assignment of a school land lease with notice that it was done in lieu of a supersedeas undertaking pursuant to section 20-1917, Comp. St. 1929 (now section 25-1917, R. R. S. 1943), and the same bore the endorsement and approval of both the trial judge and the clerk, objections thereto having been overruled.

The county superintendents entered a joint order while sitting and acting as a quasi-judicial body, which order

complied with the order of the district court. The county superintendents were not, in any sense of the term, executing a conveyance or other instrument required by the judgment of the district court to be executed. The county superintendents having fully complied with the order of the district court uniting the six school districts into a high school district for the purpose of holding high school, any question involved here would be wholly moot. We conclude, the appellants having complied with the judgment of the district court, the following is applicable.

A defeated party's compliance with the judgment destroys his right to appeal where such compliance makes it impossible for the appellate court to grant him effective relief on the merits. Annotation, 39 A. L. R. 2d, § 16, p. 179.

As stated in Betts v. State ex rel. Jorgensen, 67 Neb. 202, 93 N. W. 167, quoting from City of San Diego v. Board of Supervisors, 97 Cal. 438, 32 P. 517: " 'The defendant voluntarily complied with the mandate of the court, and the judgment was thereupon satisfied and its force exhausted. After it had thus been satisfied, there was nothing in the judgment which the court had rendered of which the defendant could complain, or about which it could say that it was aggrieved.' " The court further said: "As was said in Matter of Manning, 139 N. Y., 446, 448, * * * 'The appeal does not now present an actual litigation but an abstract question. The practice of this court has been to refuse to entertain appeals when it is plain that nothing can be accomplished by the decision.' " See, also, Harmon v. James, 146 Kan. 205, 69 P. 2d 690; Rose v. Helstrom, 177 Kan. 209, 277 P. 2d 633.

For the reasons given herein the judgment of the district court should be and is hereby affirmed.

AFFIRMED.

MARY MARSHALL, DOING BUSINESS AS CEDAR MANOR NURSING HOME, FULLERTON, NEBRASKA, APPELLEE, V. COUNTY OF NANCE, APPELLANT.
79 N. W. 2d 417

Filed November 16, 1956. No. 33999.

1. **Paupers.** There is no common-law liability upon any governmental unit to support poor and destitute persons, and they are not a public charge unless made so by statute.
2. **Paupers: Counties.** A statute which expressly imposes the care of poor and destitute persons upon the county is ordinarily mandatory.
3. **Counties.** The powers of a county are limited by statute and a county board can discharge a statutory duty only by the means provided by the Legislature.
4. **Paupers: Counties.** Whether a person comes within the purview of the statute fixing the liability of a county for the relief of the poor, and whether the relatives of a poor person are of sufficient ability, or have failed or refused to maintain such poor person, and the amount, if any, required to be paid by the county to maintain such poor person, involve the determination of facts by the county board by which any liability on the part of the county is fixed.
5. ———: ———. Before a county can be held liable for the care of a poor person, it must be shown that the county board was given an opportunity to exercise its judgment and discretion in the matter by passing upon the facts necessary to determine the extent of the county's liability, if any.

APPEAL from the district court for Nance County: RUSSELL A. ROBINSON, JUDGE. *Reversed and remanded with directions to dismiss.*

Clarence S. Beck, Attorney General, *Homer L. Kyle,* and *Robert B. Conrad,* for appellant.

Brower & Brower, for appellee.

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

CARTER, J.

This action was brought by Mary Marshall against County of Nance to recover $77 for nursing-home care

furnished to Catherine Cyza, an indigent person. A supplemental petition was subsequently filed praying for an additional sum of $210. The trial court found for the plaintiff and entered a judgment for the amount claimed. The county appeals.

The evidence shows that Catherine Cyza was placed in the Cedar Manor Nursing Home, which was operated by the plaintiff, Mary Marshall, on June 8, 1949, by members of her family. She was afflicted with arthritis and has at all times been a bedfast patient. Until 1951 the family of Catherine Cyza paid $65 per month for this nursing-home care. In 1951 the cost of the nursing-home care was increased to $90 per month, the family continuing to pay $65 and the county of Nance the additional $25. Commencing in March 1953, the cost of caring for Catherine Cyza was increased to $120 per month. During this period Catherine Cyza was a recipient of old age assistance in the amount of $65 per month. The children of Catherine Cyza made payments to the county assistance director. The balance was made up from federal, state, and county funds. The county by legislative act was required to pay any necessary amounts which were not paid by the children of the indigent person. § 68-103, R. R. S. 1943. In 1953 the cost of medical, surgical, and hospital care was transferred from state and federal funds to the county. As a result of this legislative change the county gave notice of a change in policy which required the children and relatives of Catherine Cyza to pay the difference between the $65 old age assistance and the amount which plaintiff was then charging. The children made the payments until January 1, 1954, when they began failing in their obligations. In March 1954, plaintiff had $40 unpaid which she requested the county board to pay. They refused; but in April 1954, the county board allowed the $40 claim, with the understanding that the children of Catherine Cyza would pay the difference from that time on. The county board determined that $100

per month would be paid as follows: By old age assistance, $65; $10 from the old age assistance grant of the husband of Catherine Cyza; $7.50 by Louis, her son; and $2.50 each by the 7 other children of Catherine Cyza. In April, May, June, July, August, and September, 1954, the family failed to meet its obligations in the amounts of $7.50, $12.50, $12.50, $9.50, $17.50, and $17.50, respectively. This constitutes the items making up the sum of $77 for which suit was brought.

There is no common-law liability upon a county to support poor and indigent persons. Any liability must arise by a statute imposing the duty upon the county and prescribing the manner of its discharge. The extent of the liability of a county must therefore be found in the legislation creating the duty. State ex rel. Boxberger v. Burns, 132 Neb. 31, 270 N. W. 656.

The general liability of a county to support the poor is prescribed by section 68-103, R. R. S. 1943, which states: "When any poor person shall not have any relatives, as are named in sections 68-101 and 68-102, or if such relatives shall not be of sufficient ability or shall fail or refuse to maintain such poor person, then the poor person shall receive such relief as his or her case may require, out of the treasury of the county in which he or she has legal settlement at the time of applying therefor, in the manner provided in section 68-105." By section 68-105, R. R. S. 1943, it is provided in part the county board "in its discretion may confide such poor persons to some moral and discreet householder or householders in the county of sufficient ability to provide for them."

The record shows also that when Catherine Cyza reached the age of 65 years she was granted old age assistance in the amount of $65 per month in accordance with section 68-208, R. R. S. 1943. By section 77-1601, R. S. Supp., 1955, it was provided that the cost of medical, surgical, and hospital care should be provided by the county. Under section 68-206.01, R. S. Supp., 1955, the

county's liability in this respect commenced on January 1, 1954. We point out that while the present claim was for nursing-home care accruing after January 1, 1954, the nature of the care required by Mrs. Cyza, as shown by the record, was not medical, surgical, or hospital care. The claim cannot therefore fall within the provision.

There is no dispute in the evidence that Catherine Cyza, at all times herein mentioned, was a bedfast patient without any means of support and that she was a poor person within the meaning of section 68-101, R. R. S. 1943. The duty imposed upon the county is a mandatory one. There are, however, some limitations inherently contained in the exercise of the power. The money must be available as was held in State ex rel. Boxberger v. Burns, *supra*. There is no contention here made that funds were not available, but even so, the county board has some discretion in the granting of relief for the poor. It is the duty of the county board to determine if an applicant is without means, whether the applicant has relatives who are able to provide the cost of adequate care, and the amount, if any, that the county will be required to furnish in order to comply with its statutory obligation.

The evidence shows that Catherine Cyza was placed in the plaintiff's nursing home by her relatives. What the agreement was between plaintiff and the members of the family is not material here. When the family failed to provide the necessary funds because of a claimed inability to do so, the county provided certain amounts of money for a period of time. When plaintiff failed to get the amount of her charges for Mrs. Cyza's care from the members of the family, she took it up with the county board to secure its payment. The latter eventually paid the claim of plaintiff amounting to $40, with the distinct understanding that it would continue to pay $65 per month as old age assistance and no more, and that the husband and children of Mrs. Cyza should pay the additional $35 per month. The plaintiff

was informed of this arrangement. She had no agreement with the county board for the payment of any amount over the $65 per month for old age assistance, although she was informed by the old age assistance director that the county would pay the amounts if the children did not. The assistance director could not, of course, bind the county board in this respect. When the children defaulted in their payments, plaintiff did not communicate with the county board for the purpose of obtaining a further understanding or agreement relative to Mrs. Cyza's care. There was no emergency as in the case of Miller v. Banner County, 127 Neb. 690, 256 N. W. 639, which might excuse proper handling with the county board. The record clearly shows that plaintiff had an agreement with the county for the payment of $65 per month for old age assistance and that she was to look to the husband and children for the remainder. She never had any other arrangement with the county board. She did not even seek any different agreement or understanding. The county board did not confide Mrs. Cyza into the care of plaintiff in accordance with section 68-105, R. R. S. 1943. The mandatory duty of the county to care for the poor and indigent does not require it to pay any sum for that purpose which others may have contracted, or which the person furnishing the service might see fit to charge. If the plaintiff was dissatisfied because of the refusal or failure of the husband and children to provide the necessary funds over and above those provided by the county, it was incumbent upon her to seek and obtain a new agreement with the county board if compensation is expected from that source. If the county board refuses to make a new agreement she can properly discontinue to furnish the service. The law does not require the county to assume the obligations of others, whatever they may be. It is required to pay the obligations which it assumes under the mandatory provisions of the controlling statute. If the county board or other public officers, charged

with the care of the poor and indigent, arbitrarily refuse to perform the mandatory duty imposed upon the county, appropriate legal remedies may be employed. But in the absence of an emergency situation, such matters must be handled with the county authorities charged with the duty of caring for the poor. The plaintiff in the present case failed to take the steps necessary to impose liability on the county for the care of Mrs. Cyza over and above the $65 per month it had agreed to pay. Before she can recover, plaintiff must show that she gave the county board an opportunity to exercise its judgment and discretion in the matter by presenting the case to it for consideration and approval. The additional claim for $210 is governed by the same rules.

The appellee argues that the case was tried to the court with the right to a jury waived, and that under such circumstances the findings of the court are entitled to the same weight as the verdict of a jury. With this we agree, but where, as here, the plaintiff has failed to make a case as a matter of law, this court may properly enter the judgment which the trial court should have entered. The judgment of the trial court is clearly wrong as a matter of law. The judgment is reversed and the cause remanded with directions to dismiss.

REVERSED AND REMANDED WITH DIRECTIONS TO DISMISS.

IRVIN KOHL, APPELLEE, V. LOREN G. UNKEL, APPELLANT.
79 N. W. 2d 405

Filed November 16, 1956. No. 34001.

1. **Trial.** Under section 25-1315.02, R. R. S. 1943, a motion for directed verdict is an absolute prerequisite to a motion for judgment notwithstanding the verdict, and the trial court cannot, either upon its own motion or upon motion for judgment notwithstanding the verdict, set aside a verdict and enter a judgment notwithstanding the verdict, where no preliminary motion for a directed verdict has been made.

2. **Trial: New Trial.** A party aggrieved by a verdict may move for a new trial upon the grounds that the verdict is "not sustained by sufficient evidence, or is contrary to law" as provided in section 25-1142, R. R. S. 1943, and the trial court has the power and authority to grant a new trial where such legal cause or reason therefor appears in the record and timely appropriate motion for new trial has been filed, notwithstanding the fact that no preliminary motion for directed verdict has been made.
3. **Trial.** In testing the sufficiency of evidence to support a verdict it must be considered in the light most favorable to the successful party, that is, every controverted fact must be resolved in his favor and he should have the benefit of every inference that can reasonably be deduced therefrom.
4. **Automobiles: Negligence.** When the driver of an automobile entering an intersection looks but fails to see an approaching automobile not shown to be in a favored position, the presumption is that the driver of the approaching automobile will respect his right-of-way, and the question of his contributory negligence in proceeding to cross the intersection is a jury question.
5. ———: ———. If the driver of an automobile entering an intersection looks for approaching vehicles but fails to see one which is favored over him under the rules of the road, he is guilty of contributory negligence sufficient to bar a recovery as a matter of law.
6. **Trial.** A motion for directed verdict must for the purpose of decision thereon be treated as an admission of the truth of all material and relevant evidence submitted on behalf of the party against whom the motion is directed. Such party is entitled to have every controverted fact resolved in his favor and to have the benefit of every inference that can reasonably be deduced from the evidence.
7. ———. Where the facts adduced to sustain an issue are such that reasonable minds can draw but one conclusion therefrom, it is the duty of the court to decide the question, as a matter of law, rather than submit it to a jury for determination.

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

McKillip, Barth & Blevens and *Moyer & Moyer,* for appellant.

Frederick M. Deutsch, for appellee.

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

CHAPPELL, J.

Plaintiff, Irvin Kohl, brought this action against defendant, Loren G. Unkel, seeking recovery for personal injuries and damages to his car alleged to have been proximately caused by negligence of defendant when their cars collided at an intersection of county roads. Plaintiff alleged that defendant was negligent because he: (1) Failed to accord plaintiff the right-of-way at the intersection; (2) failed to maintain a proper lookout; (3) did not have his vehicle under proper control; and (4) drove at a rate of speed greater than was reasonable and proper under the circumstances and conditions of the road.

On the other hand, defendant's answer denied generally and alleged that any injuries and damages sustained by plaintiff were proximately caused by his own negligence. Defendant alleged that plaintiff was negligent because he: (1) Failed to accord defendant the right-of-way when he entered the intersection first; (2) failed to maintain a proper lookout; (3) failed to keep his vehicle under proper control; (4) drove at a rate of speed greater than was reasonable and proper under the circumstances and conditions of the road; and (5) failed to reduce his speed or turn aside to avoid collision. Also, in a cross-petition defendant sought recovery for personal injuries and damages to his car and for personal injuries to his wife upon an assigned claim, alleged to have been proximately caused by the aforesaid negligence of plaintiff.

For amended reply and answer plaintiff denied generally; incorporated and made his petition a part thereof; alleged that the aforesaid negligence of defendant was the sole proximate cause of the collision referred to in defendant's cross-petition; and alleged in paragraph No. 4 that wholly without plaintiff's knowledge

and for a consideration of $11 to them paid, defendant and his wife had on September 27, 1954, executed, signed, and delivered a release of all claims or demands by them for personal injuries and medical expenses. A copy of such release was attached to and made a part of plaintiff's answer and reply, whereby it was alleged plaintiff had been entirely released and discharged except for damages to defendant's car.

Thereupon, defendant moved to strike said paragraph No. 4 upon the ground that the release allegedly purported to split a cause of action in tort and that language used therein rendered it ineffective and void. An alternative part of such motion is unimportant here. In a pretrial order, such motion was overruled.

It is well to note here that such purported release was never offered or received in evidence, or attempted to be used in defense either pro tanto or in toto, by plaintiff at or during the trial in any manner whatsoever. Thus, defendant's assignment here that the trial court erred in overruling defendant's motion to strike is simply moot and requires no further discussion except to say that under the record as presented we are not required to determine whether or not the release was legally effective or void as a bar to defendant's right of recovery.

The cause was tried to a jury and at conclusion of defendant's evidence plaintiff moved to dismiss defendant's cross-petition for insufficiency of the evidence to support a verdict thereon because the undisputed evidence showed that defendant was guilty of more than slight negligence as a matter of law which precluded any recovery upon his cross-petition. Thereto defendant objected upon the ground that the evidence presented a jury question upon the issue of whether defendant entered the intersection first and had the right-of-way under the statute. However, the trial court sustained plaintiff's motion and dismissed defendant's cross-petition with prejudice.

Thereafter the related issues of alleged negligence presented by plaintiff's petition, defendant's answer, and plaintiff's reply were submitted to the jury and it returned a verdict for plaintiff, awarding him $5,000 upon which judgment was rendered. Defendant's alternative motion for judgment notwithstanding the verdict or for new trial was overruled, and defendant appealed.

Here it should be said that defendant made no prerequisite motion for directed verdict either at conclusion of plaintiff's evidence or at conclusion of all the evidence. In In re Estate of Kinsey, 152 Neb. 95, 40 N. W. 2d 526, we held that: "Under section 25-1315.02, R. R. S. 1943, a motion for directed verdict is an absolute prerequisite to a motion for judgment notwithstanding the verdict, and the trial court cannot, either upon its own motion or upon motion for judgment notwithstanding the verdict, set aside a verdict and enter a judgment notwithstanding the verdict, where no preliminary motion for a directed verdict has been made.

"A party aggrieved by a verdict may move for a new trial upon the grounds that the verdict is 'not sustained by sufficient evidence, or is contrary to law' as provided in section 25-1142, R. R. S. 1943, and the trial court has the power and authority to grant a new trial where such legal cause or reason therefor appears in the record and timely appropriate motion for new trial has been filed, notwithstanding the fact that no preliminary motion for directed verdict has been made."

Thus, contrary to defendant's assignment and argument made herein, the trial court properly overruled his motion for judgment notwithstanding the verdict.

However, defendant did timely file a motion for new trial upon the ground, among others, that the verdict was not sustained by sufficient evidence and was contrary to law. Defendant's assignment with regard thereto will be hereinafter discussed.

Defendant assigned that the trial court erred in fail-

ing to define "slight negligence" and "gross negligence" in the instructions given. Defendant argued that a definition thereof "is an integral part of the comparative negligence formula, and the failure to define these terms constitutes error" prejudicial to defendant. In that regard, however, defendant admits that "the adoption of this rule requires the overruling of the case of Kelso v. Seward County, 117 Neb. 136, 219 N. W. 843," which we are not inclined to do. Under the circumstances presented here, the assignment has no merit.

Defendant assigned that the trial court erred in permitting plaintiff to testify over objection that if he had not been injured he would have had the ability to labor and earn $200 a month without board and room in farming during an 8-month period of temporary total disability. The record clearly discloses that such evidence was not admitted to establish loss of earnings or profits, but its admission was specifically limited by the court to the matter of plaintiff's loss of earning ability during such period. We conclude that defendant's assignment has no merit. See, 25 C. J. S., Damages, § 87, p. 619, citing Yost v. Nelson, 124 Neb. 33, 245 N. W. 9, and numerous other cases. Authorities cited and relied upon by defendant are either distinguishable upon the facts or refute his contention.

Defendant's other assignments of error were in substance that: (1) Plaintiff's own evidence showed that he was guilty of negligence more than slight, thus the verdict was not sustained by the evidence; (2) the trial court erred in dismissing defendant's cross-petition; and (3) the trial court erred in the giving of instructions Nos. 1, 6, and 8, which failed to submit defendant's theory that he entered the intersection first and had the right-of-way over plaintiff. We conclude that such assignments should not be sustained.

The following is undisputed: The accident occurred about 7 p. m. on Sunday, August 1, 1954, a dry, clear day. It happened in almost the exact center of a level,

hard, dry, graded, and graveled intersection where two level county roads intersected each other at right angles. Each right-of-way was 66 feet wide. The traveled portions of each road were hard, graded, dry gravel about 22 feet wide. There were no stop or traffic signs at either side of the intersection. At the southwest corner intersection line fences extended both north and south and east and west along which were weeds about shin high. There was also a field of corn 9 or 10 feet high growing on tiled land at the southwest corner a few feet inside the fence lines which obstructed the view to the west of drivers approaching from the south and obstructed the view to the south of drivers approaching from the west until they arrived almost up to such respective fence lines.

Both drivers were farmers. They were going to Norfolk as they approached the intersection. Plaintiff, unmarried, was alone and driving his 1947 2-door Ford north. Defendant, with his wife and two young sons, was driving his 1952 2-door Pontiac east. Both drivers were entirely familiar with the intersection and the dangerous conditions existing there. The left front corner of plaintiff's car and the right front corner, more to the right of the front wheel of defendant's car, collided with force in almost the exact center of the intersection. At that point the cars jackknifed together. After the impact plaintiff's car whirled or spun around and came to rest upright on the road facing southwest with its rear to the northeast near a roadside ditch. Its left front corner was then 29.6 feet from point of impact. Plaintiff had been thrown out of his car into a ditch at the northeast corner of the intersection, where he lay unconscious and seriously injured. His car was damaged beyond repair. After the impact defendant's car went northeast, rolled over, and came to rest on its top facing east in a ditch near the fence row at the northeast corner of the intersection. Its left front corner was then 56 feet from point of impact. Defend-

ant's car was damaged beyond repair, but no one in his car received serious injuries. Defendant and one son had no injuries. His wife had a bump on her head and a sprained ankle. One of their sons had a cut on his mouth and bruises on his face. Their entire medical expenses were only $18.60.

Plaintiff's version of the accident, as shown by evidence adduced in his behalf, was in substance as follows: His car had been recently overhauled with new brakes put on about 2 months previously and they were in good working order. In that connection, a witness for defendant testified that in November he had a conversation with plaintiff about the accident and his injuries, whereat plaintiff said, "if I would have had the brakes, it wouldn't have happened." However, plaintiff denied such conversation. Before plaintiff got to the intersection he had been driving about 30 miles an hour, but as he approached the south fence line, knowing that the intersection was dangerous, he applied his brakes some and slowed down to about 18 miles an hour. There plaintiff looked east and saw no cars, but when he was just coming out of the fence line into the intersection, he looked west and saw defendant's car coming a little east of the second telephone pole about 150 feet west of the center of the intersection. He did not know how fast defendant was driving, but it appeared to plaintiff that he had plenty of time to cross the intersection, so without applying his brakes, or continuing to watch defendant's car, he stepped on it and, watching the road, proceeded on across the intersection. However, defendant did not permit plaintiff to pass but came right on and collided with the left front corner of plaintiff's car. Defendant's car then glanced off, hitting the door and back fender of plaintiff's car, dragging or whirling it around to the east and south, whereupon plaintiff was thrown out into a ditch beside defendant's car, causing him to be unconscious for 3 or 4 days, temporarily totally disabled from serious

injuries for about 8 months, and partially disabled thereafter.

In Remmenga v. Selk, 150 Neb. 401, 34 N. W. 2d 757, reaffirmed in Fuss v. Williamson, 160 Neb. 141, 69 N. W. 2d 539, we held that: "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."

Also, in Whitaker v. Keogh, 144 Neb. 790, 14 N. W. 2d 596, reaffirmed in Parsons v. Cooperman, 161 Neb. 292, 73 N. W. 2d 235, we held: "When the driver of an automobile entering an intersection looks but fails to see an approaching automobile not shown to be in a favored position, the presumption is that the driver of the approaching automobile will respect his right of way, and the question of his contributory negligence in proceeding to cross the intersection is a jury question." However: "If the driver of an automobile entering an intersection looks for approaching vehicles but fails to see one which is favored over him under the rules of the road, he is guilty of contributory negligence sufficient to bar a recovery as a matter of law."

In the light of such rules and others hereinafter discussed, we conclude that plaintiff adduced sufficient competent evidence to support a verdict in his favor.

On the other hand, defendant's version of the accident, as shown by evidence adduced in his behalf, was in substance as follows: His Pontiac was in good working condition and his brakes were in good working order. It was evening and, although visibility was clear, the parking lights of his car were on. He had been driving east at about 40 or 45 miles an hour, but about 100 feet from the intersection he slowed down to about 30 or 35 miles an hour as he approached and entered the intersection. His vision was obscured by the tall corn and weeds and after he had already driven the

front of his car into the intersection where he could see out the windshield, he first looked and saw plaintiff's car just coming up to about the south line fence at the edge of the intersection not far from defendant. He had no time to judge plaintiff's speed, but thought that it was about the same as his own, and smack, they collided that second. Plaintiff's car struck his from about the right front and door panel to the front end of the grille, damaging it beyond repair. On cross-examination, defendant admitted that when he got even with the north-south fence line, 33 feet from the center of the intersection, he could have looked straight south and observed cars approaching therefrom for about a quarter of a mile or more, and that looking at an angle across the corner he could have seen a car approaching from the south when he was farther back west of the fence. He did not apply his brakes or turn because the accident occurred so quickly after seeing plaintiff that he had no time to do so. Also, in defendant's deposition, offered by plaintiff and inquired about on cross-examination of defendant, he admitted that when he approached the intersection he was probably driving about 40 or 45 miles an hour and that when he came into the intersection he let up on the gas and at the time of the impact his speed was 35 miles an hour.

Defendant's wife testified that she sat on the right of defendant in the front seat as they rode toward the intersection at about 40 or so miles an hour. They had been looking at, talking about, and admiring the tall corn on the south side of the road. As they approached the intersection, she was still watching and admiring the corn. As they approached where you could first see anyone coming from the south, plaintiff's car was to the side of them about at the south fence line. She did not know its speed, and yelled "watch out" to defendant, but the accident happened very quickly.

In Milk House Cheese Corp. v. Chicago, B. & Q. R. R. Co., 161 Neb. 451, 73 N. W. 2d 679, this court re-

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

"Where the facts adduced to sustain an issue are such that reasonable minds can draw but one conclusion therefrom, it is the duty of the court to decide the question, as a matter of law, rather than submit it to a jury for determination."

In the light of such rules and others heretofore and hereafter discussed, we conclude that the trial court was right when it dismissed defendant's cross-petition on the ground that as a matter of law he was guilty of negligence more than slight which precluded his right to recover thereon.

The statute does provide that vehicles approaching along intersecting highways from the right shall have the right-of-way over those approaching from the left when such vehicles shall reach the intersection at approximately the same time, and in all other cases the vehicle reaching the intersection first shall have the right-of-way. § 39-728, R. R. S. 1943. It is also provided by statute that persons may ordinarily drive a vehicle on such highway at 60 miles an hour between sunrise and sunset, but the fact that such speed is lower does not relieve the driver from the duty to decrease speed when approaching and crossing an intersection or when special hazards exist with respect to other traffic. Also, speed shall be decreased as may be necessary to avoid colliding with any other vehicle on the highway, in compliance with legal requirements. Further, it is the duty of all persons to use due care and no person shall drive a vehicle on a highway at a speed greater than is reasonable and prudent under

the conditions then existing. § 39-7,108, R. R. S. 1943. In such respect, section 39-751, R. R. S. 1943, provides that: "The driver of any vehicle traveling at an unlawful speed shall forfeit any right of way which he might otherwise have * * *."

With reference to section 39-751, R. R. S. 1943, which also provides that when two vehicles approach an intersection at approximately the same time, the driver of the vehicle on the left shall yield the right-of-way to the vehicle on the right if it is traveling at a lawful rate of speed, we said in Long v. Whalen, 160 Neb. 813, 71 N. W. 2d 496: "The statute is intended to avoid collisions between vehicles at intersections and the right-of-way is not to be determined by the single test of which vehicle actually entered the intersection first, if the vehicles approached or entered the intersection at approximately the same time. The driver of a vehicle who does not have the right-of-way as explained herein is not justified in taking close chances and if there is reasonable danger of collision if both vehicles proceed then it is his duty to yield the right-of-way. * * * A driver of a vehicle on the left is approaching an intersection at approximately the same time as a party to his right when there is such relative proximity of the vehicles to the intersection that, upon appraisal of all the factors in the situation it would appear to a man of ordinary prudence in his place that there is danger of a collision if he fails to yield or forego the right-of-way to cross the intersection. The statute giving right-of-way to a vehicle coming to or entering an intersection from the right over another coming to it at approximately the same time imposes upon the driver from the left the duty of deciding as a man of ordinary prudence whether, under the circumstances, which includes a consideration of the relative distances of the approaching vehicles, their apparent speeds, and the probable conduct of the other driver, his arrival at the intersection will sufficiently precede that of the vehicle crossing his line of travel to

warrant the reasonable belief that he can safely cross the intersecting road or highway ahead of it."

With reference to section 39-728, R. R. S. 1943, we said in Gernandt v. Beckwith, 160 Neb. 719, 71 N. W. 2d 303: "This does not mean that drivers of motor vehicles are permitted to race or to gamble on which vehicle may enter the intersection a few feet ahead of the other. When a collision occurs in the ordinary city or country intersection, unless there is evidence that one of the vehicles was traveling at a very much greater rate of speed than the other, it is self-evident that the vehicles were reaching the intersection 'at approximately the same time.' "

We paraphrase language used in Miller v. Aitken, 160 Neb. 97, 69 N. W. 2d 290, as applicable to defendant in denial of his right to recover upon his cross-petition. In doing so, we think that defendant as a matter of law under the evidence adduced in this case was not entitled to recover upon his cross-petition. He admittedly well knew that the intersection involved, which he approached from the left, was a blind, dangerous, and hazardous one. He admittedly well knew that his vision to the right was completely blocked until just before he reached the intersection, but nevertheless he proceeded into the intersection at an excessive speed of 30 or 35 miles an hour without regard for possible traffic coming from the south on his right, when plaintiff was admittedly then just entering the intersection and defendant failed to look and see him until just a second before they collided in almost the exact center of the intersection. As a matter of fact, defendant so drove on into the intersection without looking for traffic from the south at a point where he could have seen plaintiff had he timely looked. Defendant was thus taking close dangerous chances with disregard for his own safety, which as a matter of law amounted to more than slight negligence when compared with any negligence of plaintiff. When a driver of an automobile approaches or enters

an intersection of two highways he is obliged to timely look for approaching vehicles and to see those within that radius which denotes the limit of danger. Looking at a point where one cannot see, or failure to timely look at a point where he can see such approaching vehicles, is not a compliance with this rule, and as applicable in this case constitutes negligence more than slight as a matter of law.

As stated in Miller v. Aitken, *supra*: "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."

Further, in the light of authorities heretofore discussed and evidence appearing in this record, we conclude that the trial court did not err prejudicially in the giving of instructions Nos. 1, 6, and 8.

Finding no error in this record prejudicial to defendant, we conclude that the judgment should be and hereby is affirmed.

AFFIRMED.

MARTIN U. BLOCK ET AL., APPELLEES, V. MEINERT J. FRANZEN, JR., ET AL., APPELLANTS.
76 N. W. 2d 446

Filed November 23, 1956. No. 33992.

1. Waters. The term lake comprehends a reasonably permanent body of water substantially at rest in a depression in the surface of the earth.
2. ———. A lake is distinguished from a stream by the fact that in the former the body of water is substantially at rest while in the latter it has a perceptible flow.
3. ———. Surface waters comprehend waters from rains, springs, or melting snows which lie or flow on the surface of the earth but which do not form part of a watercourse or lake.
4. ———. The principles of law applicable to waters in lakes are similar to those applicable to waters in watercourses.

5. ———. The owner of a lake wherein the surface water from the surrounding land accumulates, and from which it has no means of escape except by evaporation or percolation, cannot lawfully, by means of a ditch or dike, discharge such water upon the land of his neighbor without his consent, to his injury.

APPEAL from the district court for Dawson County: ISAAC J. NISLEY, JUDGE. *Affirmed.*

William S. Padley, for appellants.

Smith Brothers, for appellees.

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

SIMMONS, C. J.

Plaintiffs are the owners and a tenant of a farm of 160 acres. Defendants own a farm of 200 acres adjacent to plaintiffs' land on the south. A large, landlocked pond is partly on each piece of land, lying across the common boundary. Defendants built a dike along the north side of their land so as to prevent water flowing into the pond on plaintiffs' land from reaching the area of the pond on defendants' land.

Plaintiffs petitioned for an injunction restraining the maintenance of the dike and ordering its removal. Plaintiffs prayed for crop damage. Defendants resisted the action and by cross-petition sought an injunction against plaintiffs maintaining dams and ditches on their land, and an order requiring plaintiffs to restore their land to its natural condition.

The trial court granted the prayer of plaintiffs' petition, assessed crop damage, and denied defendants' cross-petition.

Defendants appeal. The denial of the cross-petition is not assigned as error.

The amount of crop damage is not challenged as to amount, provided plaintiffs are entitled to recover at all.

We affirm the judgment of the trial court.

We hereafter use the term plaintiffs as owners of the land.

The land to the north of plaintiffs' land is rolling and hilly. Some of that surface condition is on the north of plaintiffs' land. The elevation flattens out to the southern portion of plaintiffs' land.

The pond here involved is described as covering some 50 acres of land. Two-thirds of that area is on defendants' land. The shore line of the pond on defendants' land is abrupt and high so that it is relatively permanent. The shore line on plaintiffs' land does not have that containing elevation. It advanced and receded as the water level in the pond increased or decreased.

The pond has been a permanent body of water through the years, except that in periods of drought it "dried up" on occasion. Witnesses testified that it had been there for many years, and that they had boated, hunted, and skated on it. The pond was shallow; however, it is a fair conclusion that it was deeper on defendants' land.

In a state of nature surface water came upon plaintiffs' land in fairly defined waterways from the northwest, near and at the north line; from the north about the center of plaintiffs' land; and from the north and northeast at the northeast portion of plaintiffs' land. These waters in a state of nature flowed across plaintiffs' land and ultimately came to rest in the pond. There the water remained except as it sank into the soil or evaporated.

Many years ago, sometime before 1937, a road was graded along the line east and west between the two pieces of land and through the ponded area. We find no evidence that that road materially interfered with the movement of water from the ponded area on the north to the ponded area on the south. In 1952 the road was again graded and the elevation raised. A 3-foot culvert was placed in the road to permit water to flow from the north portion of the pond to the south por-

tion. The roadway blocked the flow of water between the two areas except at the culvert.

In 1946 plaintiffs placed an irrigation well on their land at a high point west of the center of the land at the north line, and in connection therewith built laterals and dams to which we shall refer in some detail. They built a lateral to the west and then southwest to their west line. Here it served as a dam to divert waters entering their land and flowing across it in small amounts. They also built a ditch for about one-eighth of a mile from their northwest corner south along the fence line where it connected with an old drainageway to the pond. It appears that it was designed to take care of moderate amounts of water that might reach their lands in that area. Then, east of their west line, they built three terraces running north and south. These were designed to accept greater volumes of water and carry it down the corn rows between the terraces so as to serve irrigation purposes. The runoff from these operations all reached the pond on plaintiffs' land. There is no showing of a substantial increase of water in volume reaching the pond from this operation.

In times of high runoff of storm water, the greatest volume of water entered plaintiffs' land in a well-defined watercourse at about the center of the north line. In a state of nature, it then flowed south in an irregular course in a defined channel to about the center of the farm. There it flowed in a diffused course, which in time of heavy rainfall was sometimes 100 yards wide, into the pond on plaintiffs' land.

Plaintiffs placed a dam across this waterway on the north to carry an irrigation lateral to the east. They placed a flume in the dam to admit the passage of the waters coming from the north. This washed out, in part, in 1948. It has not been fully replaced and it is not necessary to do so for irrigation operations. The evidence is that the remaining portion of this dam in

nowise interferes with or accelerates water coming from the north.

Plaintiffs back-furrowed two ridges, 10 corn rows apart, running directly south from this waterway where it entered plaintiffs' land. Floodwaters washed out the soil between those rows so that there was a new drainageway created in place of the natural one. In the years since, silt in the lower end has been removed and put upon the banks and, as of the time of trial, this drainageway extended to within 200 feet of plaintiffs' south line. There it empties water into the pond. There is evidence that water, restricted in the width of flow, would result in less sinking into the soil. No witness undertook to say that there was an appreciable increased amount of water reaching the pond as a result of this artificial drain.

In times of excessive rainfall, water coming upon plaintiffs' land from the northeast flooded the area of their buildings. Plaintiffs built a dam and ditch to divert this water around the buildings. The testimony is that part of this water was used for irrigation. A part was diverted into a road ditch where it flowed south along the east side of plaintiffs' land. Plaintiffs' evidence is that it later went back across plaintiffs' land upon an alfalfa field and pasture and that ultimately the excess went into the pond. Defendants' expert witness, from elevations of the land which he had determined, testified that this water followed the roadway to the southeast end of the land, then followed a road ditch west into the pond on plaintiffs' land. In any event, this water of undisclosed amount ultimately reached the pond on plaintiffs' land. There is no showing that this diversion increased the volume of water flowing into the pond.

When plaintiffs began to irrigate their land they changed the method of farming so as to run corn rows north and south. There was an effort to show that irrigation water reached the pond and increased the volume

of water there. That effort failed. Plaintiffs testified that there was no flow-off of irrigation water into the pond. One witness for defendants testified that he saw water ponded on plaintiffs' land in 1954. He assumed it was irrigation water. He did not testify to having seen irrigation water enter the pond.

We find no sustaining evidence to the effect that a greater amount of water reached the pond as a result of plaintiffs' alteration of the natural waterways or as a result of irrigation.

If we were to assume that more water from irrigation or decreased absorption in the soil reached the pond, the fact remains that no one undertook to determine the relative amount of water from those sources in comparison with the total waters reaching the pond, or to determine the effect of such waters, if any, on the water level of the pond or the waters remaining in the pond.

It may be that the water reached the pond in greater velocity than it would in its natural state. It is clear that whatever its velocity, it entered the pond on plaintiffs' land. The presence of the road grade, particularly after the elevation of it in 1952, caused the water to pond on plaintiffs' land. From that point there is no evidence of increased velocity in the flowage onto defendants' land nor of damage thereto as a result.

Defendants contend that the pond on plaintiffs' land is gradually filling with silt and thus forcing defendants' land to take an increasing burden of the water. There is evidence to that effect. One witness testified, without contradiction, that the silt was raising the level of plaintiffs' land at least 25 years ago and that it had continued since. That was long before any of the changes in the watercourses by plaintiffs. Another witness testified to silt flowing onto plaintiffs' land in the water from the north and particularly in 1948 when large quantities of soil were eroded onto plaintiffs' land and into the pond. There is evidence that soil eroded from the artificial drain down the center of the plaintiffs' land. The amount

so eroded is purely speculative. The evidence is that in the natural state those drains eroded and silted the pond. There is no showing of silting from irrigation water. The silt from whatever source was deposited on plaintiffs' land both by the check of velocity when the water reached the pond, and by the effect of the highway elevation.

In the fall of 1953 and the spring of 1954, defendants built a dike along the north side of their land. This began at high ground at the west, and went half a mile east and then south at the east line to high ground there. It effectively prevented any of the waters ponded on plaintiffs' land from reaching the defendants' land south of the dike. In the summer of 1954, the runoff of a heavy rain to the north of and on plaintiffs' land ponded on plaintiffs' land and in the roadway ditches. None of it reached the defendants' land. Plaintiffs' crop damage was caused by that water.

Defendants have thus relieved their land from the entire burden of ponding these runoff waters.

It is against the maintenance of that dike that plaintiffs complain.

Defendants here seek a reversal of the trial court's decree and a decree determining their right to maintain the dike on their land. This argument is premised on the contention that the waters in the pond are surface waters and that the rules as to the right to protect against surface waters apply.

The pond here involved is of a permanent nature. It exists in a natural depression in the earth's surface. It serves as a receptacle for waters draining into it from plaintiffs' land and other lands to the north. It has so served for many years.

"The term 'lake,' as used in the Restatement of this Subject, comprehends a reasonably permanent body of water substantially at rest in a depression in the surface of the earth, and also the depression, both depression and body of water being of natural origin or a part

of a watercourse. * * * A distinction is sometimes made between lakes and ponds; the term 'lake' connoting a large body of water and the term 'pond' connoting a small body of water ordinarily containing considerable aquatic growth. But since this distinction is based mainly on the size of the body of water, it is not essential for legal purposes, and the term 'lake' as here defined includes both large and small bodies of water. * * * a lake is distinguished from a stream by the fact that in the former the body of water is substantially at rest while in the latter it has a perceptible flow. * * * To constitute a lake, a body of water must have a reasonably permanent existence. Many lakes have a permanent body of water. But the body of water need not be permanent in order to constitute a lake. Thus a body of water which occasionally dries up in periods of drought is still a lake. On the other hand bodies of water, even though of considerable size, which collect only in times of heavy rain, flood or melting snow, and which soon dry up, are not lakes within the meaning of that term as here defined." Restatement, Torts, § 842, p. 324.

Accordingly the rules with reference to waters in lakes apply here.

The question then comes: Do the waters that enter a lake and become a part of the body of water in the lake retain the character of surface waters? We have held that they do not. In Lackaff v. Bogue, 158 Neb. 174, 62 N. W. 2d 889, it was stated: "Surface waters comprehend waters from rains, springs, or melting snows which lie or flow on the surface of the earth but which do not form part of a watercourse or lake."

Defendants rely on the language quoted immediately following the above from 67 C. J., Waters, § 286, p. 863: " 'Surface waters cease to be such when they empty into and become part of a natural stream or lake, but they do not lose their character as such by reason of their flowing from the land on which they first make

their appearance onto lower land in obedience to the law of gravity, or by flowing into a natural basin from which they normally disappear through evaporation or percolation, * * *.'"

Defendants argue that the waters here are waters "flowing into a natural basin from which they normally disappear through evaporation or percolation," and hence do not lose their character as surface waters although they "become part of a natural * * * lake."

As construed by defendants the rule is self-contradictory.

Basin is a word of general and quite variable meaning. How is it used here? The text from which the quote was taken relies upon Thompson v. Andrews, 39 S. D. 477, 165 N. W. 9. The holding of the court was that "water (sic) did not lose their character as surface waters simply because they remained ponded in a basin for a time until they disappeared through evaporation or percolation, leaving the bottom of the basin dry. Surface waters are surface waters and permanent waters are permanent waters, whether situate in a state recognizing the rights of drainage to be an easement or in one treating surface waters as a 'common enemy,' * * *. That normally the drainage into this basin was so limited as to soon disappear and leave the soil suited for cultivation is undisputed. The normal, and not the abnormal, conditions must determine the rights and burdens attaching to lands. Whether waters are of a nature to be treated as 'surface waters' for the purposes of drainage must, in each case, be a question of fact to be determined from the evidence."

The distinction then is in the fact of the permanency of the body of water in the lake.

Here the waters in the pond clearly come within the classification of permanent waters in a lake. The rules as to the right to defend against surface waters do not apply.

The question then is: Do the defendants have the

right to dam the lake so as to prevent its use by waters under the facts disclosed by this record?

The rules applicable here are those rules that apply to obstructions placed in natural watercourses. Although there was no outlet to the pond on defendants' land, that pond did furnish a natural outlet to waters flowing into it on plaintiffs' land. Defendants have closed that outlet.

In discussing a similar situation, the Supreme Court of North Dakota held: "The Parker slough has been and is a permanent body of water. It has there existed for a period of over thirty-five years. It does not and did not during all of these years drain off naturally through this draw. The only method of draining it is by this tile construction or by some similar artificial construction. Although its source of water supply comes from surface waters running down upon adjacent territory through the winter snows or spring or other rains, nevertheless such waters, when they reached this slough, even in a state of nature, there remained except when the slough was overflooded in seasons of unusual moisture. There they remained for purposes of evaporation or seepage in the soil, and there a pond was constituted. As such these waters in such slough lost their characteristics as surface waters. They became waters of such pond, and the principles of law applicable thereto are similar to those applicable to watercourses; the principal distinction being that in a pond or lake the waters are substantially at rest, while in a stream or watercourse they are in motion." Froemke v. Parker, 41 N. D. 408, 171 N. W. 284.

In Krueger v. Crystal Lake Co., 111 Neb. 724, 197 N. W. 675, with reference to overflow waters going into a "cut-off" lake, we held: "There is no more right to divert or obstruct such waters flowing in an accustomed channel than there is to divert or obstruct the waters of the stream flowing at their usual level in their natural channel."

In Ricenbaw v. Kraus, 157 Neb. 723, 61 N. W. 2d 350, we restated the established rule that where water is impounded upon land by natural conditions whereby a pond is formed, the owner of such land has no lawful right to remove an impediment to its flowage and thereby cause such water to flow upon the land of another to his damage.

This case is largely decided by Pospisil v. Jessen, 153 Neb. 346, 44 N. W. 2d 600. In that case plaintiff by artificial means drained a pond of a temporary character so that the waters flowed onto and across lands of the defendant in a natural course of drainage. Defendant then constructed a dike across his land so as to obstruct the natural flow of water from plaintiff's land and caused it at times to back up and spread out over plaintiff's land. We held: "As to the dike which defendant constructed it was in the natural course of drainage for water coming down from plaintiff's land. It was constructed for no other purpose than to prevent the flow of this water over his land and on down over a natural course to ultimately empty into a creek some miles away. The dike diverted the water from its natural course and caused it to back up and inundate plaintiff's land.

"This under the principles announced he had no right to do. The plaintiff was entitled unqualifiedly to have the dike removed to the extent that it interferes with the free flow of water in the natural course of drainage and to an injunction restraining its maintenance or reconstruction."

In Davis v. Londgreen, 8 Neb. 43, we held: "The owner of a natural pond or reservoir wherein the surface water from the surrounding land accumulates, and from which it has no means of escape except by evaporation or percolation, cannot lawfully, by means of a ditch, discharge such water upon the land of his neighbor, to his injury."

This rule has been consistently followed in this state

down to and including Skolil v. Kokes, 151 Neb. 392, 37 N. W. 2d 616.

In the situation here we see no essential difference between discharging water upon a neighbor by a ditch or by a dike. Either means accomplishes the unlawful result.

In Mapes v. Bolton, 89 Neb. 815, 132 N. W. 386, we stated this rule: "A lower proprietor may not unnecessarily obstruct a natural drain upon his own premises without the upper proprietor's consent, so as to collect surface water and cast it back upon his neighbor's farm where it would not appear but for that obstruction, and to injury of his neighbor's crops and land." We cited this language with approval in Town of Everett v. Teigeler, 162 Neb. 769, 77 N. W. 2d 467. The rule has application here.

In Graham v. Pantel Realty Co., 114 Neb. 397, 207 N. W. 680, we quoted, with approval, this language from Boyd v. Conklin, 54 Mich. 583, 20 N. W. 595, 52 Am. R. 831: "A rural land owner has no right to put up such artificial barriers as will flood his neighbor's land with water that would otherwise escape over his own, for the mere purpose of reclaiming the bed of a pond that has always been on his premises, and of getting rid of the inflow."

Threaded through defendants' brief here is the contention that because of the silting this pond is gradually filling up with soil on plaintiffs' side of the land so as to put more and more of the burden of this water on defendants' land. We have heretofore reviewed the evidence as to that matter. The rule is stated in Krueger v. Crystal Lake Co., *supra*: "A riparian owner is entitled to any additions made to his land by imperceptible degrees which are caused by the operation of natural forces, or even produced by the operation of third parties with whom he is not in privity, has no causative or collusive connection, or whose purposes he in no wise aids, abets or procures."

The judgment of the district court is affirmed.

AFFIRMED.

ELIZABETH PHILLIPS, APPELLANT, V. MARY PHILLIPS, ALSO KNOWN AS MRS. HOWARD PHILLIPS, APPELLEE.
79 N. W. 2d 420

Filed November 23, 1956. No. 33995.

Declaratory Judgments. It is well-settled law that the statute authorizing a declaratory judgment is applicable only where all interested persons are made parties to the proceeding.

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

Jack E. Lyman and *Paul E. Rhodes*, for appellant.

Robert J. Bulger, *Neighbors & Danielson*, and *James L. Macken*, for appellee.

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

WENKE, J.

This is an appeal from the district court for Morrill County. The action was brought by Elizabeth Phillips against Mary Phillips seeking a declaratory judgment to ascertain the rights of plaintiff and defendant in and to certain real estate in Morrill County of which William O. Phillips died seized. The district court found the plaintiff was not entitled to the possession of the premises and entered a decree accordingly. Her motion for a new trial having been overruled, plaintiff appealed to this court.

The basic facts are not in dispute. William O. Phillips died on December 24, 1941, seized of the real estate of which the right to possession is here in controversy. At the time of his death William O. Phillips left surviving him his widow, appellant here, and four children.

The children were three sons, Howard, Charles, and Patrick, and one daughter, Hazel Balka. Decedent left a last will and testament which, on January 24, 1942, was allowed and admitted to probate by the county court of Garden County, Nebraska. This will provided for the disposition of all his property as follows:

"I give, devise and bequeath unto my wife Elizabeth Phillips the use, benefits, and income from the remainder of my real and personal property, of which I may die possessed, to the extent of Six Hundred Dollars of net income annually from the said remaining personal and real property, to have and hold the same during her natural life, that is to say all net income of every nature from my remaining estate not in excess of Six Hundred Dollars ($600.00) per year; and all of said remaining real and personal property to be disposed of, upon her death as hereinafter set forth. Any amounts of net income in excess of Six Hundred Dollars per year from my estate, shall be divided annually to my four children, namely, Hazel Balka, Charles Phillips, Patrick Phillips, and Howard Phillips.

"Upon the death of my wife Elizabeth Phillips, I give, devise and bequeath to my one daughter, Hazel Balka, and to my three sons, Charles Phillipa, Patrick Phillips, and Howard Phillips, all of the remainder of my estate, said four children to share equally in the balance of said estate. Any amounts that may be owing to my estate by any of my said children shall be deducted from their share of this bequest."

The son, Howard Phillips, died on October 2, 1953. He left a last will and testament which was admitted and allowed to probate by the county court of Morrill County, Nebraska, on November 4, 1953. Howard's widow, appellee, was the sole beneficiary under this will and thus she became the owner of all of Howard's interest in the property he inherited from his father.

At the time of his death Howard and his wife, appellee, were in possession, either exclusively or in conjunction

with Patrick Phillips, of the lands here in controversy and, since his death, appellee has continued in possession thereof on the same basis. On February 4, 1954, appellant and Charles R. Phillips, Patrick Phillips, and Hazel Balka caused to be served on appellee a notice to terminate such occupancy as of March 1, 1955, on the theory that appellee was in possession under them on the basis of a tenancy from year to year. The question which appellant here seeks to have answered is: Does she, under the provisions of the will of her decedent husband, have such an interest in the real property of which he died seized as to give her the exclusive right to the possession thereof?

An action seeking the construction of a will and a declaration of rights thereunder is authorized by section 25-21,150, R. R. S. 1943.

However, we have often held that: "It is well-settled law that the statute authorizing a declaratory judgment is applicable only where all interested persons are made parties to the proceeding." Wood Realty Co. v. Wood, 132 Neb. 817, 273 N. W. 493. See, also, Haynes v. Anderson, *ante* p. 50, 77 N. W. 2d 674; Graham v. Beauchamp, 154 Neb. 889, 50 N. W. 2d 104; Redick v. Peony Park, 151 Neb. 442, 37 N. W. 2d 801; Miller v. Stolinski, 149 Neb. 679, 32 N. W. 2d 199; Southern Nebraska Power Co. v. Village of Deshler, 130 Neb. 133, 264 N. W. 462; Dobson v. Ocean Accident & Guarantee Corp., 124 Neb. 652, 247 N. W. 789. Such an action requires that all interested parties shall be before the court and no matter what may be the wishes of the parties who are in court the court will not entertain and render a decree which, for want of necessary parties, cannot fully adjudicate the question presented. See Dobson v. Ocean Accident & Guaranty Corp., *supra*.

It is apparent, from the quoted language of the last will and testament of William O. Phillips, that Charles Phillips, Patrick Phillips, and Hazel Balka were given the same interest in the property of which he died

seized as Howard Phillips, to whose rights therein appellee has succeeded. They are as much concerned with and interested in the construction of this will as are the parties now before this court. Without their being made parties the question here presented cannot be fully and completely adjudicated.

Applicable to the situation here is the following language from Southern Nebraska Power Co. v. Village of Deshler, *supra:* "Therefore, this action cannot be maintained under the uniform declaratory judgments act, as all interested persons are not made parties, * * *."

Also the following is applicable from Updike Investment Co. v. Employers Liability Assurance Corp., 128 Neb. 295, 258 N. W. 470: "An action to secure a declaration of rights is designed to terminate a controversy so far as it relates to the parties and facts giving rise thereto, and courts should, under most circumstances, dismiss such an action without prejudice, whenever all parties, whose claims gave rise to the controversy and whose rights upon such claims would be adjudicated by the declaration sought, had they been a party to the action, have not been impleaded."

In view of the foregoing we reverse the judgment of the district court and remand the cause to it with directions that it dismiss the action without prejudice to appellant's right to bring another action for the same purpose.

Section 25-21,158, R. R. S. 1943, provides: "In any proceeding under this act the court may make such award of costs as may seem equitable and just."

In view of the fact that appellant has been unsuccessful in both the district court and this court, we direct all costs to be charged to her.

REVERSED AND REMANDED WITH DIRECTIONS.

EUGENE F. FITZGERALD, APPELLANT, V. HERMAN E. KUPPINGER, ELECTION COMMISSIONER OF DOUGLAS COUNTY, NEBRASKA, ET AL., APPELLEES.
79 N. W. 2d 547

Filed December 3, 1956. No. 34108.

1. **Elections.** By section 32-514, R. S. Supp., 1955, a filing for nomination for the office of judge of the district court by a candidate not the holder of another and different elective office was during 1956 required to be made not less than 40 days before the primary election.
2. ———. By section 32-503, R. S. Supp., 1955, a filing for nomination for the office of judge of the district court by a candidate who was the holder of another and different elective office was during 1956 required to be made not less than 50 days before the primary election.
3. **Officers.** The office of county attorney is a legislatively created office in consequence of which it is to be treated as a legislative office as distinguished from a constitutional office.
4. **Constitutional Law: Officers.** The Legislature is without power to provide for the removal of a constitutional officer where the Constitution creates the office, fixes the term, and the grounds and manner of removal.
5. ———: ———. It was intended by the Legislature that section 32-503, R. S. Supp., 1955, should have application and reference to constitutional as well as statutory elective offices.
6. **Statutes.** Where the intent of the Legislature in the enactment of legislation is clearly expressed the courts are in duty bound to accept that expression.
7. ———. It is not within the province of the courts to read a meaning into a statute which is not warranted by the legislative language.
8. **Constitutional Law: Statutes.** In the legislative domain and within constitutional bounds the Legislature is supreme.
9. **Statutes.** Where a legislative enactment is clear, explicit, and unambiguous in the expression of intent and meaning, resort may not be had to contemporaneous construction or information to ascertain the intent of the Legislature.
10. **Constitutional Law: Officers.** The portion of section 32-503, R. S. Supp., 1955, under attack is unconstitutional as to constitutional officers.
11. **Constitutional Law: Statutes.** If a portion of a legislative act is unconstitutional and the portion of the act cannot be separated from the other portion or portions and the latter enforced

independent of the former, and it further appears that the unconstitutional part constituted such an inducement to the passage of the other parts that they would not have been passed without it, the entire act will fail.

12. ———: ———. It was intended by the Legislature that the legislation should affect alike constitutional and statutory elective officers and that thus by a disclosed inseparable intention an inducement which invalidated the entire provision was present.

13. ———: ———. If an act of the Legislature is constitutional in part and unconstitutional in part, the part which is constitutional may not be enforced unless it may be separated in such manner as to leave an independent statute capable of enforcement.

14. Statutes: Officers. Section 32-503, R. S. Supp., 1955, to the extent stated in this opinion, is invalid and incapable of enforcement as to statutory elective officers.

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

August Ross, Norman Denenberg, and *Robert C. McGowan,* for appellant.

Swarr, May, Royce, Smith & Story, Alfred E. May, Gaines, Spittler & Gaines, and *John T. Grant,* for appellees.

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

YEAGER, J.

This is an action by Eugene F. Fitzgerald, plaintiff and appellant, who has in his petition designated himself petitioner, against Herman E. Kuppinger, election commissioner of Douglas County, Nebraska, Joseph R. Moore, and Thomas P. Kelley, defendants and appellees, the primary purpose of which is to determine whether or not the plaintiff shall be the county attorney of Douglas County, Nebraska, on January 3, 1957, and so remain until January 8, 1959.

The defendants Moore and Kelley filed separate answers to the petition of the plaintiff and Moore also filed a cross-petition. As to them nothing need be said except that they joined issue on the question of whether

or not the plaintiff would be and remain the county attorney from January 3, 1957, to January 8, 1959.

The case was tried to the court and a judgment was duly rendered wherein the relief prayed by plaintiff was denied. A motion for new trial was duly filed and overruled. From the judgment and the order overruling the motion for new trial the plaintiff has appealed.

The basic facts in the case are not in dispute. In the year 1954 the plaintiff became the duly elected county attorney of Douglas County, Nebraska, for the term beginning in January 1955 and ending January 8, 1959. On February 8, 1956, while acting as county attorney, he duly perfected his filing for nomination for the office of judge of the district court of the Fourth Judicial District of Nebraska, which is an elective office. By this filing he became a candidate to be voted upon at the primary election on May 15, 1956.

Thereafter the defendants Joseph R. Moore and Thomas P. Kelley, and two others, filed as candidates for nomination for the office of county attorney subject also to the primary election to be held on May 15, 1956. The theory of these filings was that the effect of the filing by the plaintiff for the office of judge of the district court was to vacate the office of county attorney as of January 3, 1957. At the primary election Moore and Kelley became the nominees of their respective parties for the office of county attorney and accordingly were given due notice of nomination by the election commissioner.

The filings of Moore and Kelley were made and the primary election as to them was held in pursuance of the provisions of section 32-503, R. S. Supp., 1955, as follows: "* * * If the candidate for an elective office is the incumbent of another partisan or nonpartisan elective office, the filing of the requisite nomination papers of such incumbent for any other partisan or nonpartisan elective office shall be perfected at least fifty days prior to the date of such primary, * * *. The filing of the re-

quisite nomination papers, perfected as aforesaid, shall create a vacancy in the elective office which such candidate then holds as of the date of the commencement of the term of the office or as of the date such vacancy is filled by the election for which he filed or for which he accepted filing. Candidates may file for the unexpired term of the office which becomes vacant, as provided in this section." This provision is amendatory of section 32-503, R. R. S. 1943, which was in effect at the time the plaintiff became county attorney but the substance of the section as amended is not different in any material respect from what it was as it appeared in the 1943 revision.

The statutory section contains other provisions but they in nowise amount to a limitation of the application of the quoted portion to county attorneys filing for other elective offices, hence they have not been quoted and no further reference will be made to them.

On March 23, 1956, before the primary election, the plaintiff withdrew his filing for nomination for the office of judge of the district court. This was 53 days before the primary election.

It is pointed out here that a filing for the office of judge of the district court by a candidate not a holder of another and different elective office was, during 1956, required to be made not less than 40 days before the primary election. § 32-514, R. S. Supp., 1955. It is also pointed out that a filing for the office of judge of the district court by a candidate who is the holder of another elective office was during 1956 required to be made not less than 50 days before the primary election. § 32-503, R. S. Supp., 1955.

The purpose of this action insofar as the election commissioner was concerned was to enjoin him from placing the names of Moore and Kelley as candidates for county attorney on the ballot for the general election for 1956.

The substantial theory on which this purpose was predicated was, first, that section 32-503, R. S. Supp.,

1955, to the extent that it provided for vacation of an elective office by filing and perfecting of nomination papers for another elective office and the provision that candidates could file for the unexpired term of the vacated office was unconstitutional and therefore void, in consequence of which the plaintiff was and would remain the duly elected and qualified county attorney until January 8, 1959; and, second, that even if the statute was constitutional it could not affect the right of plaintiff to continue in office as county attorney in view of the fact that he withdrew his filing more than 50 days before the primary election.

The purpose of the action as to Moore and Kelley is to obtain a declaratory judgment that the office of county attorney of Douglas County did not become vacant by the filing of the plaintiff for nomination for the office of judge of the district court.

The theory of the action as to these defendants and the ground upon which the plaintiff contends that he is entitled to the declaratory relief prayed is substantially the same as that interposed as the ground for injunction against the election commissioner, that is, that section 32-503, R. S. Supp., 1955, to the extent that it purports to affect the right of plaintiff to occupy the office of county attorney until January 8, 1959, is unconstitutional.

Before proceeding further it appears that it should be pointed out that the names of Moore and Kelley were duly placed on the ballot in conformity with the adjudication of the district court and at the election held on November 6, 1956, Kelley received the largest number of votes. Thus unless the statutory provision is held unconstitutional he will be entitled to occupy the office of county attorney from and after January 3, 1957, until January 8, 1959.

In the light of events as they have become apparent the appeal as to the defendant Kuppinger has become moot, in consequence of which no action on the part of this court is called for on the issues as to the plaintiff

and this defendant. All that remains therefore is the issue whereon the plaintiff seeks declaratory relief against the other defendants, or more particularly now against the defendant Kelley.

The plaintiff as a basis for his contention that the statutory provision in question is unconstitutional asserts that it is repugnant to Article III, section 14, and Article III, section 23, of the Constitution of the State of Nebraska.

He contends that the statute by its language and expressed purpose and intent is unconstitutional as to constitutional offices, and being so unconstitutional as to constitutional offices it is likewise unconstitutional as to legislative offices.

It is pointed out here that the office of county attorney was legislatively created and because thereof it is to be treated as a legislative office as distinguished from a constitutional office. § 32-308, R. R. S. 1943.

Article III, section 23, of the Constitution is the following: "All offices created by this Constitution shall become vacant by the death of the incumbent, by removal from the State, resignation, conviction of a felony, impeachment, or becoming of unsound mind. And the Legislature shall provide by general law for the filling of such vacancy, when no provision is made for that purpose in this constitution."

It must be taken as true that if it was the purpose and intent of the Legislature by the enactment of the provision in question to affect or impair the right of the holder of a constitutional office contrary to the provisions of Article III, section 23, then to that extent the provision is unconstitutional and void.

This court has held that the provisions of Article III, section 23, as to removal and vacation are exclusive as to constitutional offices and the Legislature has no power to add other or different grounds.

In Conroy v. Hallowell, 94 Neb. 794, 144 N. W. 895, a case wherein that question was directly passed upon,

it was said: "Having provided, fully, by section 20, art. III, and section 5, art. V, the grounds upon which a constitutional office may become vacant, we do not think it is within the power of the legislature to add any other or additional grounds; and, having provided the manner in which the office shall be declared vacant, viz., by impeachment of its incumbent, it is not within the power of the legislature to provide for any other or different method of removal."

Article III, section 20, of the Constitution of 1875 is the same as the present Article III, section 23. As is already apparent this section defines the grounds for vacation of a constitutional office. Article V, section 5, of the Constitution of 1875 is the same as the present Article IV, section 5. It prescribes the method whereby the holder of a constitutional office may be removed. As pointed out therein the removal shall be by impeachment.

In Laverty v. Cochran, 132 Neb. 118, 271 N. W. 354, it was said: "It is beyond the power of the legislature to provide for the removal or suspension of a constitutional officer, where the Constitution creates the office, fixes it terms, and the grounds and manner of removal." Numerous citations of authority supporting this statement of principle are to be found in the opinion and accordingly they will not be repeated here.

In the light of the clear and explicit language of the statutory provision, the only reasonable conclusion to be reached is that it was intended by the Legislature that section 32-503, R. S. Supp., 1955, should have application and reference to constitutional as well as statutory elective officers.

The language is clear and specific beyond peradventure and it contains no exceptions or reservations. Nothing in the statement is obscured. It is, on its face, capable of but a single meaning and intent.

Where, as in this situation, the intent of the Legis-

lature is clearly expressed the courts are in duty bound to accept that expression.

In State ex rel. Marrow v. City of Lincoln, 101 Neb. 57, 162 N. W. 138, it was said: "It is the duty of the court to discover, if possible, the legislative intent from the language of the act. It is not the court's duty, nor is it within its province, to read a meaning into a statute that is not warranted by the legislative language. In the legislative domain, and within constitutional bounds which it is bound to follow, the legislature is supreme." See, also, Wessel v. City of Lincoln, 145 Neb. 357, 16 N. W. 2d 476; Mook v. City of Lincoln, 146 Neb. 779, 21 N. W. 2d 743; Ledwith v. Bankers Life Ins. Co., 156 Neb. 107, 54 N. W. 2d 409; Lang v. Sanitary District, 160 Neb. 754, 71 N. W. 2d 608.

When a legislative enactment is clear, explicit, and unambiguous in the expression of intent and meaning, resort may not be had to contemporaneous construction or information to ascertain the intent of the Legislature. It is only where the statute by its terms gives room for doubt or uncertainty as to its application that courts may resort to historical facts or general information to aid them in interpreting its provisions. Brown v. Easterday, 110 Neb. 729, 194 N. W. 798; Shamp v. Landy Clark Co., 134 Neb. 73, 277 N. W. 802; City of Lincoln v. First Nat. Bank, 146 Neb. 221, 19 N. W. 2d 156; Vanous v. City of Omaha, 148 Neb. 685, 28 N. W. 2d 560; Placek v. Edstrom, 148 Neb. 79, 26 N. W. 2d 489, 174 A. L. R. 856.

It must be said therefore that it was intended by the Legislature that the provision should affect the rights of elective constitutional officers to hold office. For that reason it must be said that as to them it was and is unconstitutional and void.

The next point for consideration is the contention of the plaintiff that since the provision is unconstitutional as to constitutional officers it is also unconstitutional as to statutory officers. The theory of the plaintiff in

this respect is twofold. The first is that it is evident that the intent to include constitutional officers as well as statutory officers was the inducement to the legislation, and with its failure as to constitutional officers the legislation must fail as to statutory officers. The second is that with the striking down of the provision as to constitutional officers no valid and complete act relating to statutory officers remains, the effect of which is to render it unconstitutional and void as to statutory officers.

A well-settled rule of statutory interpretation is the following: "If a portion of a legislative act is unconstitutional and it can be separated from other portions of the act and the latter enforced independent of the former, and it further appears that the unconstitutional part did not constitute such an inducement to the passage of the other parts of the law that they would not have been passed without it, the former may be rejected and the latter upheld.

"The same rule obtains in relation to parts of the sections of a statute, and that which is unconstitutional may, under the operation of the foregoing rule, be rejected from a section or sections of a law and what remains be sustained, unless they are inseparably connected in substance." State ex rel. Wheeler v. Stuht, 52 Neb. 209, 71 N. W. 941. This pronouncement was quoted with approval in State ex rel. Johnson v. Consumers Public Power Dist., 143 Neb. 753, 10 N. W. 2d 784, 152 A. L. R. 480. See, also, Nelson v. Tilley, 137 Neb. 327, 289 N. W. 388, 126 A. L. R. 729; Midwest Popcorn Co. v. Johnson, 152 Neb. 867, 43 N. W. 2d 174.

Inducement as contemplated by the decisions of this court has not been clearly defined. It is thought that it may not be accurately defined but that it must depend upon the character and quality of the action of the Legislature as it appears in the legislation under scrutiny.

In the instance here the expressed intent is clear.

That intent was to declare vacant all elective offices, constitutional and statutory, by the filing by the incumbent for another elective office. The intent as expressed was not severed or severable. If the intent was not severed or severable it does not appear that the inducement could be any less than entire.

The holding therefore is that the portion of the provision already pointed out as being unconstitutional was an inducement of such a character as to render the entire provision unconstitutional.

In addition to this it appears that the provision is unconstitutional on the second ground of plaintiff's contention, that is, if the application of the provision is stricken down as to constitutional officers no valid and complete act relating to statutory officers remains.

Under the settled rule of statutory interpretation quoted herein, it is pointed out that in an instance where a part of a statutory provision is held unconstitutional the remainder must likewise be held unconstitutional unless the unconstitutional portion can be separated from the provision, leaving the remaining portion or portions independently enforceable.

In State ex rel. Ragan v. Junkin, 85 Neb. 1, 122 N. W. 473, 23 L. R. A. N. S. 839, it was said: "Even if the unconstitutional provisions were not the inducing cause of the legislation, the entire act must fall, unless the valid and invalid parts can be separated in such a way as to leave an independent statute capable of enforcement. The intent of the legislature must be expressed by written language." This statement of principle has been approved in the following cases: Smithberger v. Banning, 129 Neb. 651, 262 N. W. 492, 100 A. L. R. 686; State ex rel. O'Connor v. Tusa, 130 Neb. 528, 265 N. W. 524.

In the light of these decisions it becomes obvious that with the declaration of unconstitutionality of the statutory provision as to constitutional officers it cannot be upheld as to statutory officers. Accordingly on this

ground also it is declared unconstitutional as to statutory officers.

The plaintiff has advanced other grounds of attack upon the provision but in the light of the conclusions reached on the questions considered it is not deemed necessary to discuss them.

The action as to the defendant Kuppinger having become moot, no adjudication is made herein as to it. The declaratory judgment as to the defendants Moore and Kelley is reversed and section 32-503, R. S. Supp., 1955, to the extent that its constitutionality is attacked herein, as well as like portion of section 32-503, R. R. S. 1943, of which it is amendatory, is declared unconstitutional, null, and void, the effect of which is to say that the plaintiff did not vacate the office of county attorney of Douglas County, Nebraska, by filing for nomination for the office of the judge of the district court.

REVERSED.

CARRY A. DEWEY, A WIDOWER, ET AL., APPELLANTS, V. IVAN DEWEY ET AL., APPELLEES, IMPLEADED WITH EDWIN E. DEWEY ET AL., APPELLANTS.
79 N. W. 2d 578

Filed December 7, 1956. No. 33959.

1. **Limitations of Actions.** The accrual of a cause of action means the right to maintain and institute a suit, and whenever one person may sue another, a cause of action has accrued and the statute begins to run, but not until that time. So whether at law or in equity, the cause of action arises when, and only when, the aggrieved party has a right to apply to the proper tribunal for relief.
2. **Trusts: Limitations of Actions.** Laches and the statute of limitations will generally begin to run between a trustee and beneficiary of an express or voluntary trust when the trust terminates by its own limitations or the trustee repudiates the trust by the assertion of an adverse claim to or ownership of the trust property.

3. ———: ———. In that connection, such repudiation may be proved either by actual knowledge by or notice thereof to the beneficiary, or by open, notorious, and unequivocal facts and circumstances from which a beneficiary who is not under any recognized disability would be put on notice that the trust has been repudiated and require him to timely assert his equitable rights.
4. ———: ———. Whether or not such facts and circumstances are consistent with continuance of the trust or indicate an intent to repudiate and claim adversely is a question of fact for determination by the court in each individual case.
5. **Equity.** Independently of any limitation for the guidance of courts of law, equity may, in the exercise of its own inherent powers, refuse relief because of laches where it is sought after undue and unexplained delay, and when injustice would be done in the particular case by granting the relief asked.
6. ———. Laches does not grow out of the mere passage of time. It is founded upon the inequity of enforcing a claim where there has been a change in the condition or relations of the property or parties.

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

Hines & Hines and *Jack H. Hendrix*, for appellants.

Russell & Colfer, for appellees.

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

CHAPPELL, J.

This action was originally brought by plaintiffs, Carry A. Dewey, a widower, Dora V. Scott, a widow, and William F. Dewey and Fanny Dewey, his wife, seeking to require defendants, Ivan Dewey and Nila Dewey, his wife, to comply with certain contracts hereinafter discussed and reconvey to plaintiffs their alleged respective undivided shares in a described 480-acre farm in Hitchcock County, subject to a duly recorded mortgage of the Federal Land Bank of Omaha. Other named parties allegedly claiming an interest in the land as owners of undivided shares were also made defendants. They will be hereinafter designated as codefendants or

by name. Plaintiffs prayed for a determination of the interest of the various claimants; for a proportionate allocation or partition of the land; for an accounting of rents and profits; and for general equitable relief.

Ivan Dewey and Nila Dewey, hereinafter called defendants, filed an answer and cross-petition admitting the execution of contracts relied upon by plaintiffs and codefendants but denying generally and factually alleging repudiation by defendants in 1937 of the voluntary trust created by such contracts, which facts were known or could have been discovered by reasonable diligence and barred plaintiffs' and codefendants' right of recovery by reason of laches, adverse possession, and the statute of limitations. Defendants prayed for dismissal of plaintiffs' petition and rendition of a decree quieting title to the land in them.

Plaintiffs' answer and reply was a general denial. Subsequently certain codefendants who were heirs of Eliza Fleming, deceased, answered, admitting the allegations of plaintiffs' petition but denying the allegations of defendants' answer and cross-petition and claiming a one twenty-fourth interest in the land. In the meantime, plaintiff Carry A. Dewey having died, the action was revived in the names of his heirs-at-law and the administrator of his estate.

Subsequently an amended answer and cross-petition was filed by defendants, which included some omitted allegations but concededly did not change the cause of action, and it was stipulated that the answers originally filed should apply thereto. At pretrial, it was also stipulated that abstracts of title to the land and the contracts involved might be admitted without foundation; that the burden of proof was upon defendants; that the first issue to be determined was their rights by reason of defendants' claim of adverse possession and statute of limitations; and that no evidence of accounting should be offered until such issues had been fully determined.

Thereafter, upon application, a guardian ad litem was

appointed for codefendant Clem S. Fleming, husband of Eliza Fleming, deceased, and he answered, admitting the allegations of plaintiffs' petition; denying the allegations of defendants' cross-petition; and praying for a decree finding and adjudging that he, together with his named codefendant children, owned a one twenty-fourth interest in the land. In that connection, it was stipulated that Clem S. Fleming was committed to Hastings State Hospital April 14, 1951, and that all other parties were competent and under no disability. However, there was no competent evidence, and there is no contention here, that Clem S. Fleming was mentally incompetent within the statutory period of limitations if applicable, and his guardian ad litem did not appeal.

Thereafter, codefendants Edwin E. Dewey and Iva Dewey, his wife, who had by warranty deed dated January 21, 1928, and duly recorded January 28, 1928, transferred all of their undivided interest in the land to Timothy G. Dewey for a recited consideration of $1,200, filed an answer. Therein they admitted the allegations of plaintiffs' petition, denied the allegations of defendants' cross-petition, and alleged that their deed aforesaid was obtained by fraud and without consideration. They joined in the prayer of plaintiffs' petition and prayed that Edwin E. Dewey should be found to be the owner of a one-sixth interest in the land. Plaintiffs then filed an amended answer and reply to defendants' answer and cross-petition, alleging among other things improvements by defendants in lieu of rentals and an existing confidential relationship.

After trial by the court upon the issues thus presented, a judgment was rendered finding and adjudging in effect that plaintiffs' and codefendants' rights of action were barred by the statute of limitations and laches; and that defendant Ivan Dewey had acquired the entire title to the land by adverse possession. The judgment quieted title thereto in him.

Motions for new trial were overruled, whereupon

plaintiffs and codefendants Edwin E. Dewey and Iva Dewey, his wife, Alice M. Brott and Willis Brott, her husband, Susan R. Eskew and Virgil M. Eskew, her husband, Gladys Thumser and Edward Thumser, her husband, and Neva Myers and Arvene Myers, her husband, who appear herein as sole appellants, appealed to this court, assigning that the judgment was not sustained by the evidence and was contrary to law. We conclude that the assignment should not be sustained.

The relevant and material evidence is not in dispute. As shown by abstracts of title and other relevant evidence, it was agreed that the record title to the land at the time of execution of the contracts involved herein was as follows: Ivan Dewey, one-fourth; Carry A. Dewey, one-sixth; William F. Dewey, one-sixth; Dora V. Scott, one-sixth; Estate of Eliza Fleming, one twenty-fourth; George Dewey, one-eighth; and Timothy G. Dewey, one-twelfth, all in trust to William F. Dewey. Beginning in 1922, although William F. Dewey was trustee, the land was thereafter concededly managed and rentals therefrom were collected by Timothy G. Dewey until 1937. Defendant Ivan Dewey became a tenant on the land in 1929 and as such paid rentals therefor to Timothy G. Dewey, his father, until the year 1937.

On or about November 4, 1933, the land had become encumbered by mortgages and tax liens in the sum of about $3,500. Being desirous of expediting and obtaining a loan from the Federal Land Bank of Omaha or elsewhere in order to pay such encumbrances, it was orally agreed by the parties, including William F. Dewey as trustee, that the shares of all the other joint owners in the land should be deeded to defendant Ivan Dewey so that he would possess the full title for that purpose. That was done by warranty deeds duly executed, delivered, and recorded. In that connection, on January 17, 1934, defendants duly signed, acknowledged, and delivered a written agreement made with the then other joint owners which provided in part: "AND WHEREAS,

the said owners of said property have agreed to convey said property to the said Ivan Dewey, so that he can make application for said loan, and obtain the same, and pay off the present liens against said property from the proceeds of said loan:

"NOW THEREFORE, in consideration of such conveyance, the said Ivan Dewey hereby agrees that he will make application for said loan, and obtain the same as soon as the same can be done, and that *as soon as said loan is completed,* that he will reconvey to the other parties above named, subject to such mortgage or mortgages as it may be necessary for him to give to obtain such loan, an undivided seven-eights interest in the said property; that no liens of any kind will be given by him on said property except such as will be necessary to obtain sufficient funds to pay off the present liens against said property; that in the event he is unable to obtain a loan of sufficient amount to discharge such liens as are now on said property, that he will reconvey said premises to the parties as above mentioned, subject to the present liens against the premises, and the accrued interest and taxes thereon." (Italics supplied.) A copy thereof was also executed on September 15, 1934, because another party wanted one. It will be noted that on January 17, 1934, the parties were confused with regard to the extent of their respective shares in the land, but that is of no consequence here.

Thereafter, on July 16, 1934, defendants obtained a mortgage loan on the land from the Federal Land Bank of Omaha, for $3,500 at 4 percent, due and payable in 72 semi-annual installments beginning March 1, 1935. Timothy G. Dewey and an attorney agreeably handled the entire transaction, including payment of the encumbrances then on the land out of the loan. Although the agreement of January 17, 1934, provided that defendants should reconvey the land "as soon as said loan is completed," plaintiffs on cross-examination adduced some evidence of an oral agreement made by defendants with

Timothy G. Dewey in the presence of George Dewey sometime after the deeds were delivered to defendants that the land was to be owned solely by defendants after 3 years from January 17, 1934, unless in the meantime defendants had been paid back the money they had invested therein. Be that as it may, from 1934 to 1937, the land was dry, blowing, and worth only about $4,000, and defendants in possession did not reconvey but paid rentals to Timothy G. Dewey until 1937. For that year and continuously thereafter, defendants, being in exclusive possession and openly claiming to be sole owners, made the land their home, paid no rentals, paid all the taxes together with accrued principal and interest on the mortgage, took all the income and profits, kept up the improvements, subsequently improved the land beyond that ordinarily proper for full enjoyment and use thereof, and contracted of record with regard to the land in every manner in their own names as sole owners.

In that respect, on January 17, 1934, the improvements were located in the southwest corner of Section 12 on a side hill south of a creek. They consisted of a small, old dwelling house, having no foundation, unpainted, and in poor repair; an old barn, having no foundation, unpainted, and in poor repair; an old granary, having no foundation, unpainted, and in poor repair; a hen house, in fair condition, but unpainted; a well and windmill, with an old wooden tower; and fences in poor repair, having rotten posts and wires.

Beginning in March or April, 1937, believing and claiming that they were sole owners of the land, defendants moved some of the improvements and began construction of new improvements in a different location north of the creek in the northwest corner of Section 12. There, beginning in 1937, they constructed a new four-room dwelling house, costing $2,000, put down a new well, and improved the yard by constructing a wall and fence and setting out trees. In 1939 defendants rebuilt the fences, enclosing the land with creosote posts

and wire at a cost of $300. In 1942 they built an addition on the house costing $500. In 1943 they built a new granary costing $220. In 1944 they built a brooder house costing $220, and a barn costing $1,000. In 1948 they built a combined garage and wash house, costing $2,000, and installed electricity in the house, costing $225. In 1951 they installed a power water system, costing $733, and wired the out buildings for electricity, costing $194. In 1952 they built another addition on the house, costing $4,500, and in 1953 they installed electric wiring therein, costing about $133. In the meantime, defendants kept all improvements in repair and insured them at their own expense in their own names as owners from and after 1937. Commencing in 1938, the land was farmed by defendants under the government soil conservation program in defendants' names as owners, and defendants were paid the benefits thereof as owners. They contoured the land, of which 211 acres were tillable, stopped its blowing, and greatly improved it for crop raising. They made all accruing principal and interest payments on the Federal Land Bank mortgage, and paid all taxes for all years after 1936. In 1938 and 1941, as owners, they leased the land for oil and gas, which leases were duly recorded, and they kept the rentals received therefrom.

Concededly, defendants never did give the interested plaintiffs and codefendants actual formal notice that they claimed title to the land or had repudiated the trust, but defendants were not required to do so because, contrary to plaintiffs' and codefendants' contention, they and their predecessors at all times had notice and knowledge of defendants' repudiation from all the attending open, notorious, and unequivocal facts and circumstances heretofore recited. Concededly, they had severally visited defendants on the land upon numerous occasions between 1937 and September 1953. They then and there saw the improvements and knew that defendants were paying no rentals and were taking the income and

profits, but they made no demand for an accounting thereof. They knew that defendants were contracting with regard to the land as owners and were making the great expenditures for improvements and otherwise aforesaid, to wit, in an amount more than three times as much as the land was worth between 1934 and 1937. However, they never reimbursed or offered to reimburse defendants for any of them, and none of plaintiffs or codefendants or their predecessors ever claimed any interest whatever in the land or made any demand whatever for any accounting or reconveyance until early in September 1953, some 19 years after 1934, and some 16 years after 1937, at a time when the land as improved by defendants was concededly worth $25,000 to $30,000.

In that connection, sometime after the first part of September 1953, Edwin E. Dewey, who had already conveyed his interest in the land to Timothy G. Dewey in 1928, and who did not participate in or take any part in the transaction when the land was conveyed to defendants, was the first person since 1934 who ever made any claim to any interest whatever in the land or requested reconveyance, which defendants refused to do. After such undue and unexplained delay and change in the condition and relations of the property and parties, this action was filed September 14, 1953.

This court has held that: "The accrual of a cause of action means the right to maintain and institute a suit, and whenever one person may sue another, a cause of action has accrued and the statute begins to run, but not until that time. So whether at law or in equity, the cause of action arises when, and only when, the aggrieved party has a right to apply to the proper tribunal for relief." Bend v. Marsh, 145 Neb. 780, 18 N. W. 2d 106.

A rule applicable here is that laches and the statute of limitations will generally begin to run between a trustee and beneficiary of an express or voluntary trust

when the trust terminates by its own limitations or the trustee repudiates the trust by the assertion of an adverse claim to or ownership of the trust property.

Such repudiation may be proved either by actual knowledge or notice thereof, or by open, notorious, and unequivocal facts and circumstances from which a beneficiary who is not under any recognized disability would be put on notice that the trust has been repudiated and require him to timely assert his equitable rights. In that respect, whether or not such facts and circumstances are consistent with continuance of the trust or indicate an intent to repudiate and claim adversely is a question of fact for determination by the court in each individual case. Reed v. Fairmont Creamery Co., 37 F. 2d 332; Bend v. Marsh, *supra;* Stianson v. Stianson, 40 So. Dak. 322, 167 N. W. 237, 6 A. L. R. 280; Bogert, The Law of Trusts and Trustees, Vol. 4, Pt. 2, § 951, pp. 202, 206, and 207; 54 C. J. S., Limitations of Actions, § 182b, pp. 169, 171, and 173; 90 C. J. S., Trusts, § 456, p. 881; 1 Am. Jur., Adverse Possession, § 72, p. 835.

With reference to "Laches of the Beneficiary," it is said in Restatement, Trusts, § 219, p. 627: "(1) The beneficiary cannot hold the trustee liable for a breach of trust if he fails to sue the trustee for the breach of trust for so long a time and under such circumstances that it would be inequitable to permit him to hold the trustee liable.

"(2) The beneficiary is not barred merely by lapse of time from enforcing the trust, but if the trustee repudiates the trust to the knowledge of the beneficiary, the beneficiary may be barred by laches from enforcing the trust." In comment on Subsection (1) a, the factors to be considered in determining whether or not the beneficiary of a trust is precluded by laches from holding the trustee liable for breach of trust are set forth at length. They need no repetition here. As stated in Comment on Subsection (1) b: "The length of time necessary to bar the beneficiary from holding the trustee

liable for breach of trust depends upon the circumstances. In the absence of special circumstances the beneficiary is barred if the period of the Statute of Limitations applicable to actions at law in analogous situations has run."

Also, as stated in Comment on Subsection (2) g: "Although the beneficiary may be barred by laches from holding the trustee liable for breach of trust, he does not lose his interest in the trust property merely because of the lapse of time, however great; if, however, the trustee has repudiated the trust to the knowledge of the beneficiary and the beneficiary fails to bring suit, he may be barred by laches from enforcing the trust. Such repudiation need not be in specific words; it may consist of conduct on the part of the trustee inconsistent with the existence of the trust." See, also, Restatement, Trusts, Nebraska Annotations, § 219, p. 111, too numerous to cite here.

As held in Bend v. Marsh, *supra*: "Independently of any limitation for the guidance of courts of law, equity may, in the exercise of its own inherent powers, refuse relief where it is sought after undue and unexplained delay, and when injustice would be done in the particular case by granting the relief asked." In that opinion, it is said: " 'Laches does not grow out of the mere passage of time. It is founded upon the inequity of enforcing a claim where there has been a change in the condition or relations of the property or parties.' Platte Valley Bank v. Lemke, 141 Neb. 218, 3 N. W. 2d 396. See In re Guardianship of Protsman, 136 Neb. 192, 285 N. W. 494."

It is also true that: "The defense of laches prevails only when it has become inequitable to enforce the claimant's right, and is not available to one who has caused or contributed to the cause of delay or to one who has had it within his power to terminate the action." Bors v. McGowan, 159 Neb. 790, 68 N. W. 2d 596. However, defendants herein did not cause the delay in

bringing this action by any acts or conduct, concealment or misrepresentation by them, and contrary to the contention of plaintiffs and codefendants, the latter part of such rule does not bar the application of laches.

Further, plaintiffs and codefendants argued that they were tenants in common with an existing blood relationship to defendants, which, being confidential in character, precluded defendants from taking advantage of them without their actual notice, knowledge, or consent. The contention has no merit. No authority is cited or found which sustains that contention under facts and circumstances comparable with those presented herein.

In Unick v. Saint Joseph Loan & Trust Co., 146 Neb. 789, 21 N. W. 2d 752, where comparable contentions were made, this court, citing and distinguishing several authorities from this jurisdiction, held: "An ouster, in the law of tenancy in common, is defined as the wrongful dispossession or exclusion by one tenant in common of his cotenant or cotenants from the common property of which they are entitled to possession.

"The possession of real property by a tenant in common is ordinarily the possession of all cotenants and before their ouster arises notice or knowledge of acts causing their ouster must be brought home to them in some plain and unequivocal manner.

"The notice or knowledge out of which ouster of cotenants arises need not be actual but may be constructively inferred from acts and circumstances attending adverse possession which are open, notorious, and unequivocal in their character and import, and where notice or knowledge, actual or constructive, is shown, the ignorance or mistake of cotenants as to their rights will not affect the operation of the statute of limitations in the absence of fraudulent concealment or misrepresentation.

"Where one tenant in common enters upon the whole estate, substantially improves it beyond that ordinarily

proper for the full enjoyment or use of the estate as a tenant in common, takes all the rents and profits, pays all the taxes, makes it his home and openly claims the whole for more than the period of the statute of limitations, an ouster of his cotenants will be presumed although not otherwise proved.

"Statutes of limitations governing actions to recover land, as applied to ousted cotenants, begin to run from the time of such ouster, and, if action is not brought within the statutory period, operate both to bar recovery of the land and to vest title in the disseizor." Such rules refute the contention of plaintiffs and codefendants.

We conclude that plaintiffs and codefendants were barred from any recovery by the statute of limitations and laches and that the judgment of the trial court was correct. It should be and hereby is affirmed. All costs in this court are taxed to named appellants.

AFFIRMED.

BILL E. BURNS, APPELLANT, V. COMMONWEALTH TRAILER SALES, A CORPORATION, ET AL., APPELLEES.
79 N. W. 2d 563

Filed December 7, 1956. No. 33991.

1. **Conversion.** One who takes possession of a chattel and claims the title and ownership thereof through a purchase from a person having no authority from the owner to dispose of it is guilty of a conversion of the chattel.
2. **Agency.** A power of attorney must be construed in accordance with the rules governing the interpretation of written instruments.
3. ———. Where the intention of the parties appears from the language employed in a power of attorney, that intention should prevail and a strained interpretation should never be given to defeat it.
4. **Automobiles.** A purchaser who receives possession of a motor vehicle without obtaining the certificate of title thereto, as required by statute, acquires no title or ownership therein.

5. ———. The possession of a certificate of title to a motor vehicle, although necessary to convey title, is not conclusive of ownership.
6. ———. One who accepts a certificate of title to a motor vehicle from an agent of the owner is not an innocent purchaser for value where it appears that the purchaser had notice of the agent's want of authority to transfer the certificate of title or to sell the motor vehicle.
7. **Officers.** The liability of a county clerk, if any, for erroneously issuing a certificate of title to a motor vehicle under the provisions of section 60-106, R. S. Supp., 1955, is for a failure to exercise due diligence in ascertaining if the facts recited in the application for a certificate of title are true.
8. **Conversion.** In the absence of fraud, conspiracy, or bad faith, a county clerk who has erroneously issued a certificate of title to a motor vehicle may not properly be joined as a party defendant in an action for its conversion, even though it facilitated the conversion in some manner.
9. **Trial.** Where a joint motion for a directed verdict is made by a plaintiff against several defendants, the motion should be overruled if the motion is not good as to any one of the defendants.

APPEAL from the district court for Cheyenne County: ISAAC J. NISLEY, JUDGE. *Affirmed in part, and in part reversed and remanded.*

Clinton & McNish, for appellant.

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

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

CARTER, J.

This in an action for conversion by the defendant Commonwealth Trailer Sales, a corporation, of a house trailer alleged to belong to the plaintiff, Bill E. Burns. The defendant I. L. Pindell is alleged to have contributed to the conversion by wrongfully issuing, as county clerk of Cheyenne County, Nebraska, a certificate of title to the house trailer to Commonwealth Trailer Sales, thereby facilitating the conversion. The trial court denied a

motion for a directed verdict for the plaintiff and sustained a similar motion for the defendants. The cause of action was thereupon dismissed and the plaintiff appeals.

On March 30, 1953, plaintiff was the owner of the house trailer involved in this action. He purchased the house trailer in October 1951 for approximately $5,480. He paid $2,000 in cash and gave a mortgage for the balance, which with interest, insurance, and finance charges amounted to $3,876. On March 30, 1953, the mortgage had been reduced to $2,340. During the month of March 1953, plaintiff was in the county jail at Stockton, Kansas, and was about to commence the serving of a sentence in the state penitentiary. Because of this fact, plaintiff desired to make some disposition of the house trailer. Negotiations were commenced with Paul D. Hixson, the husband of plaintiff's niece. The record shows that Hixson was unable to purchase the house trailer and, because of the shortness of time, a transaction was entered into which brought about the present litigation.

Plaintiff authorized his brother, A. B. Burns, to consult with a lawyer about the matter. The lawyer prepared a power of attorney which he gave to the plaintiff, who executed it. It provided in part: "BE IT KNOWN THAT I, * * *, Bill E. Burns, of Plainville, Kansas, hereby appoint Paul D. Hixson, of Plainville, Kansas, my attorney in fact, for me and in my name and stead to rent, sub-let, move, care for, maintain, collect rent, keep up insurance and collect for any damages to my property or trailer house located in Plainville, Kansas, and to make the payment on same when due and to do anything and all things necessary in regard to said property and trailer house, * * *. Also, that my said attorney in fact shall have the right and authority to buy trailer tags and register said trailer for me and in my behalf as fully as though I could so do; and in fact shall have the authority to do and perform all acts necessary in the

execution of the powers hereby granted, as fully as I might do if personally present."

The power of attorney was delivered to Hixson on March 30, 1953, together with the manufacturer's statement of origin. The plaintiff executed the second assignment on the back of the latter instrument at the same time that he signed the power of attorney and as a part of the same transaction. The monthly payments on the house trailer were $110 per month, which Hixson paid up to and including July 1954. On or about September 14, 1953, Hixson procured a certificate of title to the house trailer from the county treasurer at Stockton, Kansas, in the name of Bill E. Burns as owner, by Paul D. Hixson, under the authority of the power of attorney. The evidence shows that on August 14, 1954, the title to the house trailer was assigned to the defendant, Commonwealth Trailer Sales, Sidney, Nebraska, such assignment being executed by "Bill E. Burns by Paul D. Hixson. Power of Att. (Seller)." Commonwealth Trailer Sales made application to I. L. Pindell, the county clerk of Cheyenne County, Nebraska, for a certificate of title, based on the certificate of title issued by the county treasurer at Stockton, Kansas, and the power of attorney held by Hixson. The certificate of title was issued.

The evidence shows that in July 1954, Hixson discovered that there was a balloon payment in the amount of $617.33 due on the house trailer in addition to a monthly payment of $110. He was informed by the holder of the mortgage that the balance due on the mortgage would not be renewed. Hixson stated that he could not raise the money and that he traded in the house trailer on a new one, the balance of the mortgage on the house trailer being included in the mortgage on the new house trailer. The old mortgage, on which $821 was due, was paid off by Commonwealth Trailer Sales. The evidence shows that Hixson paid $6,395 for the new trailer. He was allowed $3,825 for the old

trailer. The amount due on the old mortgage, together with interest, insurance, and finance charges, fixed the amount of the mortgage on the new house trailer at $4,400, no cash payment other than the trade-in value of the old trailer having been made. Hixson took the title to the new trailer in his own name and claims to be its sole owner.

It is the contention of the plaintiff that he did not convey the title to the house trailer to Hixson and that the power of attorney clearly shows that he did not purport to do so. The Commonwealth Trailer Sales contends that the second assignment on the manufacturer's statement of origin and the power of attorney placed the title in Hixson and there was not, therefore, a conversion of the house trailer by it. The defendant Pindell contends that he properly issued a certificate of title to Commonwealth Trailer Sales based on the Kansas certificate of title and the power of attorney held by Hixson. In addition thereto, Hixson contends that he purchased the house trailer from the plaintiff for $500, which he admits has not been paid. If this was the fact, we fail to see any necessity for the power of attorney. Hixson also states that he did not know the amount due on the mortgage lien when he took the purported title on March 30, 1953. He says that he was informed by the plaintiff that if he made the payments of $110 per month until October 1954, he would own the house trailer free of the mortgage lien. He says that the purpose of the power of attorney was to permit him to keep the title in plaintiff's name, this for the reason that plaintiff did not want the mortgage lienholder to know about the transfer as it would injure his credit. It is shown by the record that all parties connected with the transactions here described were at all times familiar with the power of attorney and its contents. The plaintiff pleads the statutory and case law of the State of Kansas purporting to show that the Kansas title was void. Plaintiff pleads further that the issuance of a title to the Commonwealth Trailer

Sales by the county clerk of Cheyenne County, Nebraska, was contrary to the laws of Nebraska, and that the purported title was wholly void.

The power of attorney hereinbefore quoted shows clearly by its own terms that the title to the house trailer was to remain in the plaintiff. Authority was given Hixson to rent, sublet, move, care for, maintain, collect rent, keep up insurance and collect for any damages to his property or house trailer, and to make the payments on same when due. It gave Hixson the right and authority to buy trailer tags and register the house trailer for the plaintiff, and to do and perform all acts necessary in the execution of the powers granted. Nowhere does it authorize a sale of the house trailer. As we have heretofore said, the power of attorney would have been unnecessary if Hixson became the owner on March 30, 1953. Since the power of attorney accompanied the purported assignment and was in fact treated by all concerned as the extent of Hixson's authority, we are required to hold that all parties had notice of Hixson's lack of authority to sell the house trailer. With reference to the construction to be given to a power of attorney, this court has said: "A power of attorney must be construed in accordance with the rules for the interpretation of written instruments generally. * * * Where the intention of the parties appears from the language employed in the power of attorney, that intention should prevail, and a strained interpretation should never be given to defeat it. * * * The object of the parties must always be kept in view, and where the language will permit that conclusion must be carried out that will support instead of defeat the purpose of the instrument. Indeed, according to the established rule, powers of attorney will be given a narrow and restricted construction, and will be held to grant only those powers which are expressly specified and such others as are essential to carry into effect the expressed powers. Every general power implies every particular power necessary to its

exercise, or performance." Graham Ice Cream Co. v. Petros, 127 Neb. 172, 254 N. W. 869.

The record shows that the manufacturer's statement of origin was issued to Brooks Trailer Sales, Oklahoma City, Oklahoma, by Sportsman Industries, Inc., Hammond, Indiana. Brooks Trailer Sales, a dealer, assigned the manufacturer's statement of origin to the plaintiff, Bill E. Burns, as the purchaser of a new unregistered house trailer therein described, subject to a lien of $3,876. By written assignment appearing on the back of the manufacturer's certificate of origin, plaintiff assigned the statement of origin and house trailer to Hixson. It appears that under the law of the State of Kansas plaintiff could transfer title to the house trailer only by certificate of title. Plaintiff had not obtained a certificate of title in his own name and it appears clear to us that he gave the power of attorney to Hixson to obtain such title in the name of the plaintiff. The Kansas certificate of title was issued to plaintiff, the only person entitled to obtain a certificate of title on the assigned manufacturer's statement of origin. § 8-135, General Statutes of Kansas, 1949. It appears that the certificate of title was properly issued to the plaintiff, Bill E. Burns, in the State of Kansas, although we do not think that question is important in the present litigation.

The record shows, therefore, that at the time of the transaction between Hixson and the defendant Commonwealth Trailer Sales, the title to the house trailer was in the plaintiff, Bill E. Burns. Hixson purported to transfer the title to the house trailer to Commonwealth Trailer Sales, exhibiting the power of attorney as his authorization to act for Burns. But, as we have said, the power of attorney executed by Burns did not authorize Hixson to transfer the title or sell the house trailer. It is clear therefore that Commonwealth Trailer Sales accepted the purported transfer of title with knowledge of Hixson's want of authority to transfer the title or sell the house trailer. The purported transfer of the

title by Hixson and his purported sale of the house trailer were wholly void. The statutes regulating the issuance of certificates of title to motor vehicles were enacted for the protection of owners and lienholders, and the public, against fraud. Securities Credit Corp. v. Pindell, 153 Neb. 298, 44 N. W. 2d 501; Snyder v. Lincoln, 150 Neb. 580, 35 N. W. 2d 483. It is provided in part by section 60-105, R. S. Supp., 1955, as follows: "No person, * * * acquiring a motor vehicle, * * * from the owner thereof, * * * shall acquire any right, title, claim, or interest in or to such motor vehicle, * * * until he shall have had issued to him a certificate of title to such motor vehicle, * * * or delivered to him a manufacturer's or importer's certificate for the same; nor shall any waiver or estoppel operate in favor of such person against a person having possession of such certificate of title or manufacturer's or importer's certificate for such motor vehicle, * * * for a valuable consideration. No court in any case at law or in equity shall recognize the right, title, claim, or interest of any person in or to any motor vehicle, * * * sold or disposed of, or mortgaged or encumbered, unless evidenced by a certificate of title * * * duly issued, in accordance with the provisions of this act."

In Loyal's Auto Exchange, Inc. v. Munch, 153 Neb. 628, 45 N. W. 2d 913, this court said: "A purchaser who receives possession of an automobile without obtaining the certificate of title thereto, as required by our statute, acquires no title or ownership therein. A subsequent purchaser for value of the automobile, who obtains the certificate of title by complying with the statutory requirements relating thereto, obtains the title and ownership thereof. His title and ownership are superior to any rights the first purchaser may have."

The record shows that plaintiff held a valid certificate of title under the Kansas law. Hixson purported to assign such title to Commonwealth Trailer Sales under the authorization contained in the power of attorney.

The Commonwealth Trailer Sales accepted this evidence of Hixson's authority to transfer the certificate of title. It presented the assignment of the certificate of title, the power of attorney, and other documents to the county clerk of Cheyenne County and induced the issuance of a certificate of title to itself. It is now contended that Commonwealth Trailer Sales had a valid certificate of title which was conclusive of its ownership and right to possession of the house trailer. Such a contention is without merit. The possession of a certificate of title, though necessary to convey title to a motor vehicle, is not conclusive evidence of ownership. To hold that a certificate of title procured by theft, forgery, fraud, or misrepresentation was conclusive would operate to defeat the very purpose of the legislation. The act contemplates that a valid certificate of title is required to transfer title to a motor vehicle.

The defendant Commonwealth Trailer Sales contends that it is a purchaser for value. This is undoubtedly true, but it is not an innocent purchaser for value. It accepted an assignment of the certificate of title to the house trailer by one not authorized to assign the title or sell the house trailer. The want of authority was apparent from the power of attorney which it had in its possession. With knowledge of Hixson's want of authority, it consummated the transaction and procured a wrongful issuance of a certificate of title to itself by which it sold and converted the property of the plaintiff.

It is further argued by the Commonwealth Trailer Sales that plaintiff put the indicia of ownership of the house trailer in the hands of Hixson and that plaintiff cannot assert any rights against the purchaser brought about by the misplaced confidence in his agent. We are here dealing with a specific class of property, motor vehicles, which the Legislature has seen fit to subject to strict regulation with reference to the transfer of title. The plaintiff did not place the indicia of ownership required by statute in the possession of Hixson. Common-

wealth Trailer Sales accepted an unauthorized title with knowledge of the want of authority. It knowingly accepted a defective title. As between plaintiff and Commonwealth Trailer Sales, it was the act and omission on the part of the latter that occasioned plaintiff's loss. It constituted an unlawful conversion of plaintiff's house trailer and the trial court should have so held as a matter of law.

The defendant I. L. Pindell is alleged to have contributed to the conversion of the house trailer by wrongfully issuing, as county clerk of Cheyenne County, a certificate of title to the house trailer to Commonwealth Trailer Sales. At the close of all the evidence the defendant Pindell moved for a directed verdict, which the trial court sustained. The plaintiff contends this was error.

The duty of a county clerk with reference to the issuance of a certificate of title to a motor vehicle is set out in section 60-106, R. S. Supp., 1955. That section states in part: "(3) If a certificate of title has previously been issued for such motor vehicle in this state, the application for a new certificate of title shall be accompanied by such certificate of title duly assigned, unless otherwise provided for in this act. If a certificate of title has not previously been issued for such motor vehicle in this state, such application, unless otherwise provided for in this act, shall be accompanied by a manufacturer's or importer's certificate, as provided for in this act, a duly certified copy thereof, a certificate of title, a court order issued by a court of record, a manufacturer's certificate of origin, or an assigned registration certificate, if the law of the other state from which such motor vehicle was brought into this state does not have a certificate of title law. The county clerk shall retain the evidence of title presented by the applicant and on which the certificate of title is issued. (4) The county clerk shall use reasonable diligence in ascertaining whether or not the statements in the application for

a certificate of title are true by checking the application and documents accompanying the same with the records of motor vehicles in his office. If he is satisfied that the applicant is the owner of such motor vehicle and that the application is in the proper form, the county clerk shall issue a certificate of title over his signature and sealed with his seal, but not otherwise."

The duty of the county clerk is to use reasonable diligence in ascertaining whether or not the facts in the application are true. The liability of the county clerk, if any, is for a failure to exercise due diligence in accordance with the requirements of the foregoing section. The fact that the improper issuance of a certificate of title may have assisted some person in consummating a conversion of a motor vehicle does not make such county clerk guilty of a conversion in the absence of fraud, conspiracy, or bad faith. His liability, if any, is by direct action for a tortious failure to perform his duty, resulting in damage to the injured party. Consequently, a county clerk is not liable in conversion under the circumstances here shown. Such county clerk is not a proper party defendant in the present litigation, and a verdict was properly directed in his favor for that reason.

At the close of defendants' evidence plaintiff moved for a directed verdict on all issues except the amount of damages. Separate motions as to each defendant were not made. The motion was properly overruled. The rule is: Where a joint motion for a directed verdict is made by the plaintiff at the close of defendants' evidence against multiple defendants and the motion is not good as to one of them, the motion should be overruled. Consequently, the trial court did not err in overruling plaintiff's motion for a directed verdict.

At the close of all the evidence defendants moved for a directed verdict on behalf of each defendant. The trial court properly sustained the motion as to the defendant Pindell. The court erred in directing a verdict for the defendant Commonwealth Trailer Sales.

The judgment of the district court is affirmed as to the defendant Pindell and it is reversed and the cause remanded for a new trial as to the defendant Commonwealth Trailer Sales.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED.

IN RE APPLICATION OF RUAN TRANSPORT CORP. OF NEBRASKA.

RUAN TRANSPORT CORP. OF NEBRASKA, APPELLEE, V. PEAKE, INC., NOW R. B. "DICK" WILSON, INC., OF NEBRASKA, APPELLANT.

79 N. W. 2d 575

Filed December 7, 1956. No. 34006.

1. **Public Service Commissions: Appeal and Error.** By the provisions of section 75-406, R. R. S. 1943, the procedure to obtain reversal, modification, or vacation of any order of the Nebraska State Railway Commission is governed by the provisions in force with reference to appeals from the district courts to the Supreme Court.
2. ———: ———. By the provisions of section 75-406, R. R. S. 1943, where a motion for rehearing has been filed, the time for appeal runs from the date of the ruling of the Nebraska State Railway Commission on the motion for rehearing.
3. ———: ———. By the provisions of section 75-405, R. R. S. 1943, the time for appeal from the orders and rulings of the Nebraska State Railway Commission to the Supreme Court is limited to 1 month from the date of the entry of the order or ruling to which complaint is made.
4. **Statutes.** Section 25-2221, R. R. S. 1943, provides that the time within which an act is to be done as therein provided shall be computed by excluding the first day and including the last; if the last be Sunday, it shall be excluded.
5. ———. Section 25-2221, R. R. S. 1943, establishes a uniform rule applicable alike to the construction of statutes and to matters of practice.
6. ———. The term calendar month, whether employed in statutes or contracts, and not appearing to have been used in a different sense, denotes a period terminating with the day of

the succeeding month numerically corresponding to the day of its beginning, less one. If there be no corresponding day of the succeeding month, it terminates with the last day thereof.

7. **Appeal and Error.** The filing of the notice of appeal and the payment of the docket fee within the time prescribed by section 25-1912, R. R. S. 1943, are jurisdictional requirements.
8. ———. If the appeal is not timely perfected within 1 month from the date of the entry of the order to which complaint is made, then this court has no jurisdiction.

APPEAL from the Nebraska State Railway Commission. *Appeal dismissed.*

Viren, Emmert & Hilmes and *G. M. Gunderson,* for appellant.

J. Max Harding, for appellee.

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

SIMMONS, C. J.

This matter originated before the Nebraska State Railway Commission, hereinafter referred to as the commission, by an application of Ruan Transport Corp. of Nebraska for a certificate of convenience and necessity. Peake, Inc., filed a protest. Later pleadings were filed by R. B. "Dick" Wilson, Inc., of Nebraska, formerly Peake, Inc. For convenience we refer to the pleadings as those of the protestant. There were other parties befor the commission. They are not involved in this appeal.

The matter was referred to an examiner who held hearings and made his report to the commission. The protestant filed exceptions to the report. The commission entered an order overruling the exceptions and granting in part the application. Protestant filed a motion for rehearing and reconsideration.

On January 13, 1956, the commission entered an order overruling the motion for rehearing and reconsideration.

On February 14, 1956, protestant filed notice of ap-

peal from the order entered on November 4, 1955, and from the order of January 13, 1956, denying protestant's motion for rehearing and reconsideration.

In the orders complained of, the commission ruled upon the question of the protestant's interest in the proceeding. It is that ruling that protestant desires to have reviewed here. Whether or not the certificate of public convenience and necessity should have been granted is not a question which protestant presents here.

The crucial dates here are January 13, 1956, when the order denying the motion for rehearing and reconsideration was made and entered, and February 14, 1956, when the notice of appeal was received and filed by the commission. They go to the question of the jurisdiction of this court to consider the appeal.

By the provisions of section 75-406, R. R. S. 1943, the procedure to obtain reversal, modification, or vacation of any order of the commission is governed by the provisions in force with reference to appeals from the district courts to the Supreme Court. See In re Application of Airline Ground Service, Inc., 151 Neb. 837, 39 N. W. 2d 809.

By the provisions of section 75-406, R. R. S. 1943, where a motion for rehearing has been filed, the time for appeal runs from the date of the ruling of the commission on the motion for rehearing. By the provisions of section 75-405, R. R. S. 1943, the time for appeal from the orders and rulings of the commission to the Supreme Court is limited to 1 month from the date of the entry of the order or ruling to which complaint is made. See In re Application of Chicago, B. & Q. R. R. Co., 154 Neb. 281, 47 N. W. 2d 577.

Section 25-2221, R. R. S. 1943, provides: "The time within which an act is to be done as herein provided shall be computed by excluding the first day and including the last; if the last day be Sunday, it shall be excluded."

February 14, 1956, was on a Tuesday.

In State ex rel. Smith v. Nebraska Liquor Control Commission, 152 Neb. 676, 42 N. W. 2d 297, we held: "Section 25-2221, R. R. S. 1943, establishes a uniform rule applicable alike to the construction of statutes and to matters of practice."

Section 49-801, R. R. S. 1943 (enacted in 1947, Laws 1947, c. 182, § 1, p. 601), provides: "Unless the context is shown to intend otherwise, words and phrases in the statutes of Nebraska hereafter enacted are used in the following sense: * * * (15) 'Month' means calendar month."

Sections 75-405 and 75-406, R. R. S. 1943, were enacted in 1949. See Laws 1949, c. 218, p. 618.

In McGinn v. State, 46 Neb. 427, 65 N. W. 46, 50 Am. S. R. 617, 30 L. R. A. 450, we defined calendar month as follows: "The term 'calendar month,' whether employed in statutes or contracts, and not appearing to have been used in a different sense, denotes a period terminating with the day of the succeeding month numerically corresponding to the day of its beginning, less one. If there be no corresponding day of the succeeding month, it terminates with the last day thereof."

Tested by these rules it appears that the time for filing of a notice of appeal had expired before protestant filed its notice herein. As we held in the early case of Glore v. Hare, 4 Neb. 131: "We can no more extend the time one day than six months."

It also appears from the transcript that the $20 docket fee was paid to the commission on February 14, 1956.

The filing of the notice of appeal and the payment of the docket fee within the time prescribed by section 25-1912, R. R. S. 1943, are jurisdictional requirements. See Moritz v. State Railway Commission, 147 Neb. 400, 23 N. W. 2d 545.

In re Application of Chicago, B. & Q. R. R. Co., *supra*, was an appeal from the commission to this court. We there held: "* * * if the appeal * * * is not * * * timely perfected within one month from the date of the entry of

the order to which complaint is made, then this court has no jurisdiction."

The appeal is accordingly dismissed.

APPEAL DISMISSED.

FRED ARTHUR EDMONDS, PLAINTIFF IN ERROR, V. STATE OF NEBRASKA, DEFENDANT IN ERROR.
79 N. W. 2d 453

Filed December 7, 1956. No. 34012.

1. **Criminal Law: Appeal and Error.** The admission or rejection of cumulative evidence is ordinarily within the trial court's discretion, and its ruling thereon will not be held erroneous by the Supreme Court unless abuse of such discretion clearly appears.
2. ———: ———. In a case where the main fact has been proved and is not disputed the exclusion of other evidence in support of that fact may not be regarded as prejudicial error.
3. **Homicide.** Manslaughter is a crime of violence within the meaning of section 29-2620, R. R. S. 1943, and on conviction of this crime the imposition of an indeterminate sentence by the trial court is erroneous.
4. **Homicide: Appeal and Error.** An indeterminate sentence imposed in the case of a conviction for manslaughter, although erroneous, does not entitle the party convicted to a new trial. The proper procedure is to remand the cause to the district court for the imposition of a proper sentence.

ERROR to the district court for Douglas County: JAMES T. ENGLISH, JUDGE. *Reversed and remanded with directions.*

Schrempp & Lathrop, for plaintiff in error.

Clarence S. Beck, Attorney General, and *Homer L. Kyle,* for defendant in error.

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

YEAGER, J.

This is a criminal action wherein Fred Arthur Edmonds and Gerald Carter, as defendants, were charged

in an indictment with the crime of manslaughter. By the indictment it was charged that they did unlawfully kill and slay G. W. DuBose. Fred Arthur Edmonds was tried separately to a jury on the charge and was convicted. From the conviction he filed a motion for new trial, which was overruled, whereupon he was sentenced to serve a term of not less than 6 nor more than 8 years in the State Reformatory for Men.

For the purpose of obtaining a reversal of the conviction and sentence he has brought the case here for review by petition in error. He is plaintiff in error but will for convenience hereinafter be referred to as the defendant. The State of Nebraska is defendant in error but it will be referred to as the State.

The only question presented to this court by the defendant's assignments of error is that of whether or not the trial court erred in the exclusion of evidence offered on behalf of the defendant. No question of the sufficiency of the evidence of the State to sustain the conviction is presented. This is specifically declared in the brief of the defendant as follows: "However, in line with counsel's feeling that one clear-cut reversible error is better than a multiplicity of close legal questions the sufficiency of the State's evidence is not raised herein."

The evidence summarized to the extent necessary to relate it here supporting the verdict of the jury is as follows: On September 8, 1954, at about 11:30 p. m., G. W. DuBose was standing beside an automobile which was stopped a short distance north of Twenty-first and Locust Streets in East Omaha, Nebraska, in front of a tavern known as Givens Bar when the defendant herein and Gerald Carter approached DuBose and knocked, threw, or pushed him to the ground or pavement, kicked him, moved him a short distance, and then got into another automobile and drove away. The evidence does not disclose clearly whether the fall of DuBose was on a dirt or paved surface. There was no altercation be-

fore the attack and no offer or threat of resistance or of offensive action on the part of DuBose. The evidence does not disclose any movement of DuBose after his placement by the defendant and Carter after the attack. There is evidence from eye-witnesses that at the time DuBose was in an intoxicated condition. A short time after the attack some one called the office of the sheriff of Douglas County, Nebraska, and a deputy sheriff responded to the call. He went to the scene and found DuBose, examined his pulse, and arrived at the opinion that he was dead.

Thereafter the body was removed to the University of Nebraska Medical College Hospital where an autopsy was conducted by a competent and qualified pathologist. This was started about 5:30 a. m. September 9, 1954. The visual examination disclosed some coagulated blood mixed with dirt about the mouth, a laceration about one-half inch long beneath the lower lip, a small amount of blood in the center about the gums, and a few superficial bruises or abrasions scattered on the body surface.

Inside the cranial cavity and beneath what was termed the arachnoid membrane there was found a hemorrhage or free blood in an amount estimated to be 40 to 50 cubic centimeters or 2 ounces. The free blood or hemorrhage, which was found, caused the death because of its passage into the brain stem in which were the centers of control leading to the heart, thus producing pressure and destroying the functioning of the brain and producing heart stoppage.

After the pathologist had described the condition which had been found and had given his opinion as to the immediate cause of death, a hypothetical question was propounded to him containing the essentials of the testimony as to what had been visited upon DuBose immediately before his death. The witness was asked to assume the truth of the hypothesis, couple with it his findings, and give his opinion as to the cause of the death. The opinion given was that the trauma de-

scribed produced the condition which was the cause of death.

As already pointed out the defendant does not contend that this evidence was not sufficient to sustain a verdict. The point advanced, as we interpret it, is that evidence was rejected from which, if it had been admitted, a conclusion could be reached that the hemorrhage which caused the death flowed from a cause or causes other than the attack upon DuBose which was described.

There are two assignments of error. By the first, the argument, and a reference to the testimony of the pathologist whose testimony has been reviewed herein, it appears that the defendant is contending that certain evidence rejected coupled with that of the pathologist would support a conclusion that the hemorrhage which caused the death was produced by intoxication which in its turn produced an aneurysm rather than trauma.

The answer to one phase of this is that the evidence of the State clearly and unequivocally disclosed that DuBose was intoxicated in a high degree. The evidence in this respect came in in an irregular manner but no objection was taken to the method or means by which it came into the evidence. It would have been cumulative on a subject proved and not in dispute, and therefore even if it was admissible it was not error to reject it.

The rule is well established that the admission or rejection of cumulative evidence is ordinarily within the trial court's discretion, and its ruling thereon will not be held erroneous by the Supreme Court unless abuse of such discretion clearly appears. Young v. Kinney, 85 Neb. 131, 122 N. W. 679; Horky v. Schroll, 148 Neb. 96, 26 N. W. 2d 396; O'Dell v. Goodsell, 152 Neb. 290, 41 N. W. 2d 123; Klinginsmith v. Allen, 155 Neb. 674, 53 N. W. 2d 77.

The cases cited are all civil actions but as evidenced by what was said in Kelly v. State, 51 Neb. 572, 71 N. W. 299, as follows, the rule is the same in criminal cases:

"The main fact had been proved by other witnesses and was not disputed; hence the rights of plaintiff in error were not prejudiced by the exclusion of the testimony, and there was no available error."

Another inferable phase is that this was offered as foundation for proof of an aneurysm. The answer to this other phase is that it could not be regarded as the rejection of evidence foundational for proof that the hemorrhage was caused by an aneurysm and not by trauma since there was no proof or offer of proof that the hemorrhage was thus caused. The only evidence offered or adduced on this subject was the testimony of the pathologist and his testimony was to the contrary.

The defendant urges that under the following stated proposition of law in his brief that this offered evidence was admissible and that the rejection of it was error: "Any factual testimony, the effect, tendency or design of which, when presented to the mind, is to produce a persuasion either affirmative or disaffirmative of its existence is relevant and admissible testimony." Cited in support of the proposition are 20 Am. Jur., Evidence, § 247, p. 241, and 31 C. J. S., Evidence, § 158, p. 866.

The statement is apparently a paraphrase of language appearing in the section referred to in American Jurisprudence. As such however it omits an important element contained in the statement in the text. The omitted element declares that the evidence of the fact must have the " 'effect, tendency, or design * * * to produce a persuasion concerning the existence of some other matter of fact * * *.' "

In the state of the record as it has come to this court this offered evidence did not come within the bounds of this test.

The second assignment of error relates to refusal to admit evidence of irritability of DuBose 6 or 7 hours before his death in surroundings and under circumstances having no relationship to the incidents involved in his death. In argument it is urged substantially that this

was symptomatic evidence of mounting pressure from a brain hemorrhage prior to the occurrence which caused the death of DuBose and that the jury had the right to consider it in that light.

It appears that nothing further needs to be said as to this assignment except that the determination made upon the first assignment is equally appropriate here for the reasons which were stated there. Both of the assignments of error are without merit.

An error not assigned in the brief was called to the attention of the court at the time the case was heard which requires consideration.

As pointed out the sentence imposed was for not less than 6 nor more than 8 years. This was an indeterminate sentence within the meaning of section 29-2620, R. R. S. 1943. Manslaughter is a crime of violence within the meaning of this section. Also within the meaning of the section an indeterminate sentence imposed is erroneous. Strong v. State, 106 Neb. 339, 183 N. W. 559; Larson v. State, 125 Neb. 789, 252 N. W. 195; Fisher v. State, 154 Neb. 166, 47 N. W. 2d 349.

As is made clear in Strong v. State, *supra*, the imposition of an indeterminate sentence does not invalidate the conviction. The only effect is to require that the cause shall be remanded to the district court for the imposition of a proper sentence.

On the record herein the conclusion reached is that there is no error necessitating a new trial, but the judgment is reversed and the cause remanded with directions to the trial court to impose a sentence of a definite term.

REVERSED AND REMANDED WITH DIRECTIONS.

RUDI HAUFE, APPELLANT, V. AMERICAN SMELTING & REFINING CO., APPELLEE.

79 N. W. 2d 570

Filed December 7, 1956. No. 34033.

Workmen's Compensation. The rules of law which are applicable and controlling in this case appear in Feagins v. Carver, 162 Neb. 116, 75 N. W. 2d 379.

APPEAL from the district court for Douglas County: PATRICK W. LYNCH, JUDGE. *Affirmed.*

Herbert F. Spielhagen, Alfred A. Fiedler, and *Joseph V. Benesch,* for appellant.

Fraser, Crofoot, Wenstrand, Stryker & Marshall and *Robert G. Fraser,* for appellee.

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

CHAPPELL, J.

On April 27, 1955, plaintiff, Rudi Haufe, filed his petition in the Nebraska Workmen's Compensation Court, seeking a compensation award. His petition alleged in substance that on April 23, 1954, while employed as a laborer by defendant, American Smelting & Refining Co., he sustained disabling injuries to his head which were caused by an accident arising out of and in the course of his employment.

The accident and injuries were alleged to have occurred in the following manner: "While plaintiff was working on a kettle of hot lead, a crane struck a shovel which hit the upper part of plaintiff's legs, throwing him to the floor." Defendant's answer thereto admitted that plaintiff sustained some personal injuries while employed by defendant on April 23, 1954. Defendant then denied generally and expressly denied that plaintiff sustained an accident as defined and determined under the provisions of the Nebraska workmen's compensation law, and prayed for dismissal of plaintiff's petition.

After a hearing upon such issues by one judge of the compensation court, it was found and adjudged that the evidence adduced was inconsistent with the allegations of plaintiff's petition and failed to show the occurrence of any such accident as alleged; that the evidence failed to show that the injuries about which plaintiff complained were caused by an accident arising out of plaintiff's employment; that the evidence failed to establish a compensable status in plaintiff; and that his petition should be dismissed.

Thereafter plaintiff filed an application for rehearing before the compensation court en banc and a motion for leave to amend his petition by interlineation to allege that the accident and injuries occurred in a different manner, as follows: "While plaintiff was working near a kettle of lead, a shovel knocked the plaintiff to the floor, causing him severe injuries." Over objections of defendant, leave was granted plaintiff to so amend, and after a hearing en banc, plaintiff's petition was dismissed upon the ground "That the plaintiff has failed to meet the burden of proof required to establish by a preponderance of the evidence that the injuries of which he complains resulted from an accident arising out of and in the course of his employment by the defendant * * *."

Therefrom plaintiff appealed to the district court where, after a hearing, judgment was rendered which affirmed the judgment of dismissal rendered by the compensation court on rehearing en banc, and dismissed plaintiff's petition on appeal.

Plaintiff's motion for new trial was overruled and he appealed to this court, assigning that the findings and judgment of the trial court were not sustained by the evidence but were contrary thereto. We do not sustain the assignments.

The sole question presented is whether or not plaintiff established by a preponderance of the evidence that his claimed personal injuries were caused by an accident arising out of and in the course of his employment

by defendant. We conclude that he did not.

In Feagins v. Carver, 162 Neb. 116, 75 N. W. 2d 379, this court recently reaffirmed that: "An appeal to this court in a workmen's compensation case is considered and determined de novo upon the record.

"A compensable injury within the Workmen's Compensation Act is one caused by accident arising out of and in the course of the employment.

"An accident within the Workmen's Compensation Act is an unexpected and unforeseen event happening suddenly and violently and producing at the time objective symptoms of injury.

"In order to recover, the burden of proof is upon the claimant in a compensation case to establish by a preponderance of the evidence that personal injury was sustained by the employee by an accident arising out of and in the course of his employment.

"An award of compensation under the Workmen's Compensation Act may not be based on possibilities, probabilities, or speculative evidence.

"The rule of liberal construction of the Workmen's Compensation Act applies to the law, not to the evidence offered to support a claim by virtue of the law. The rule does not dispense with the necessity that claimant shall prove his right to compensation within the rules above set forth nor does it permit a court to award compensation where the requisite proof is lacking." See, also, Jones v. Yankee Hill Brick Manufacturing Co., 161 Neb. 404, 73 N. W. 2d 394; Chiles v. Cudahy Packing Co., 158 Neb. 713, 64 N. W. 2d 459.

In the light of such applicable and controlling rules we have examined the record, which fairly discloses as follows: Plaintiff, 34 years old at time of trial en banc, is a German who came from Selacia. He had served 3 years in the German army. During that service he was shot and wounded in his left shoulder by a Russian patrol. He was thereafter hospitalized for a year and discharged. Because of such wound he could not lift

his left arm higher than his shoulder, but he was able to do heavy work. He had an eighth-grade education in Germany, and although he could speak English fairly well, his testimony was adduced through an interpreter. He had lived in Omaha 3 years and had been employed by defendant since October 7, 1952.

On April 23, 1954, the date of his injuries, plaintiff was paired with another employee of defendant, who for brevity will be called partner. On that date they were working with and about press kettle No. 6 in defendant's plant on the night shift, 11 p. m. to 7 a. m. At about 4 a. m. plaintiff was injured while he and his partner were changing shovels from kettle No. 5 to kettle No. 6 and attempting to hook such shovel up to the chain on a jib crane suspended over it. The shovel, used to skim off lead, is a heavy tool about 15 feet long, with a spoon-like ladle on one end and a handle on the other. It is attached to the jib crane by inserting a hook on the end of a vertical chain dangling from the jib crane into an eye located on the shovel about one-fourth the distance from the ladle to the handle. The shovel was heavy enough and the chain short enough so that it required two men to hook it up.

Plaintiff's testimony with regard to the alleged accident, which was confusing, conflicting, and speculative in several material respects, tended to establish as follows: In order to hook up the shovel, carried over from kettle No. 5 to kettle No. 6, the ladle was placed on the rim of kettle No. 6, and plaintiff held it up by the handle on the other end while his partner attempted to hook the chain through the eye of the shovel. The shovel belonging to kettle No. 6 had been taken therefrom because it was fouled with lead. A press was then down inside kettle No. 6 about 2 or 2½ feet, and was located therein about one-half foot from the right side of such kettle, so plaintiff and his partner placed the tip end of the shovel down under the rim of the press, which left about two-thirds or 10 feet of the

heavy part of the shovel resting against the edge in the corner of kettle No. 6, where the shovel extended at an angle into the air about 3 feet above and just to the right of plaintiff's head. While trying to hook up the shovel from kettle No. 5 to the jib crane at kettle No. 6, plaintiff changed his position in order to get out of the way of an 8,000-pound dipper suspended from heavy monorail overhead crane No. 4 which was moving fast across and above the floor. At that time the press started vibrating and swinging, which caused the shovel so inserted in kettle No. 6 to slip and strike plaintiff on the right side of his head, knocking him unconscious to the floor, and causing him serious and permanent injuries to his head.

With regard to the alleged accident, a workman who was peeved and disgruntled because he had not been given plaintiff's assignment that night and who was no longer in defendant's employ at time of trial, admitted that he was probably 40 or 50 feet away from plaintiff and his partner at the time of the incident, but claimed to have seen it, and substantially corroborated plaintiff's version aforesaid with regard to the manner and cause of plaintiff's injuries. However, several other witnesses who were working or waiting nearby did not remember seeing such witness there on duty that night.

Right after plaintiff was injured, he was taken to and treated at Methodist Hospital in Omaha, where he remained 9 days. Although plaintiff testified that he had never before had any fainting spells or dizziness, and that he was unconscious for 6 days after the injury, the hospital and medical records refute that contention. They show that plaintiff "Recovered consciousness on evening of 4/25" and had "uneventful convalescence since." They also show that on April 26, 1954, plaintiff stated in his history given to an attending physician that "as a child he had 2-3 episodes of 'unconsciousness' suggestive of epilepsy and that during the war he also had 2-3 episodes." Further, in prognosis notes made

by an attending physician on May 2, 1954, it is stated: "patient fell at work 4/23/54 striking back of head on concrete floor. Witnesses state that he suddenly stopped work, clenched his fists at his side & then fell backward ~~e~~ his body rigid. Questionable history of two previous seizures suggestive of grand mal."

Upon leaving the hospital plaintiff went home where he stayed 3 weeks, after which time he started back to work regularly for defendant and continued to do so until sometime in April 1955 when he quit because he claimed headaches, pain in his legs, weakness, and dizziness. In the meantime, plaintiff was examined by four eminent physicians. Plaintiff remembered giving a history to one of them, who reported that: "The history strongly suggests that the patient fell spontaneously from some cause within himself. The fact that he stiffened and fell rigid strongly suggests an epileptic attack. If the history he previously gave at the Methodist Hospital is correct, he has had previous episodes of loss of consciousness, this also would strongly suggest a diagnosis of idiopathic epilepsy. * * * There is no indication that there will be any permanent disability."

In that connection, there is no question that plaintiff and his partner were attempting to hook the shovel up to the jib crane at kettle No. 6 at the time plaintiff was injured, but the evidence is overwhelming that his injuries were not caused by any accident arising out of and in the course of his employment by defendant.

In that connection, the testimony of plaintiff's partner was in all material respects contrary to that adduced by plaintiff. In such respect, he testified that the ladle of the shovel taken from kettle No. 5 was resting on a projection of the press beam and not on the rim of kettle No. 6 as plaintiff held up the handle end of the shovel while his partner, with his back to plaintiff about 4 feet away, grabbed the chain to hook it up in the eye of the shovel; that the shovel, taken from kettle No. 6, was lying on the floor on the other side of kettle

No. 6 and never was wedged under a press inside such kettle; and that no overhead crane ever came by them at all prior to plaintiff's injury. He did not see plaintiff fall to the floor, but knew that plaintiff dropped his end of the shovel, and, turning, saw him lying injured on the floor.

An eyewitness, who was only about three steps from plaintiff and watching the operation when plaintiff was injured, testified that at that time no shovel was wedged under the press in kettle No. 6 as claimed by plaintiff, but that the shovel taken from kettle No. 6 was lying on the floor between kettles Nos. 5 and 6; that no overhead cranes were moving at that time; and that plaintiff simply stiffened, let loose the end of the shovel, and rigidly fell backwards, fast and heavy like in a spasm, hitting his head on the concrete floor.

Another eyewitness, who was standing about 20 feet from plaintiff and watching the operation at the time plaintiff was injured, testified that no overhead cranes were operating at the time and that no shovel was wedged down in kettle No. 6 as claimed by plaintiff, but that the shovel taken therefrom was lying over behind that kettle on the floor; and that all at once plaintiff simply let his hands go down, dropped the shovel, and fell back fast, flat on his back on the concrete floor.

There were four heavy overhead monorail cranes in defendant's plant. In that connection, however, the head crane operator assigned to operate overhead crane No. 4 on that date, 11 p. m. to 7 a. m., and another overhead crane operator assigned to crane No. 2, both testified that no such cranes were operating at all at the time plaintiff was injured; that crane No. 4 was from 200 to 300 feet away from plaintiff and had not been moving for about 15 minutes; that crane No. 3 was 50 or 60 feet away from plaintiff and had not been moving for about 15 minutes; that crane No. 2 was about 100 feet away from plaintiff and had not been moving for about 20 minutes; and that crane No. 1 had not been operating

at all that night. Thus plaintiff's version that overhead crane No. 4 or any other overhead crane moved across the floor and set up a vibration which loosed a shovel pressed down at an angle in kettle No. 6, causing it to strike plaintiff on the head and injure him, was completely refuted.

We conclude that plaintiff failed to meet the burden of proof required to establish by a preponderance of the evidence that the injuries of which he complained were caused by an accident arising out of and in the course of his employment by defendant. Rather, a preponderance of the evidence clearly establishes that plaintiff's injuries were caused by some physical reaction within himself which suddenly felled him backward and down, causing his head to strike the concrete floor.

For reasons heretofore stated, the judgment of the trial court which affirmed the judgment of the Nebraska Workmen's Compensation Court en banc and dismissed plaintiff's petition on appeal, should be and hereby is affirmed. All costs are taxed to plaintiff.

AFFIRMED.

LAURA BOWMAN, APPELLANT, V. RAY BOWMAN, APPELLEE.
79 N. W. 2d 554

Filed December 7, 1956. No. 34035.

1. **Divorce: Appeal and Error.** An appeal from a judgment modifying a decree of divorce by authority of section 42-324, R. R. S. 1943, is considered and decided by this court de novo upon the record made in the trial court.
2. **Divorce.** An alimony award, which is not a definite sum in gross, made in a decree of absolute divorce may be modified as to future installments upon adequate showing of changed circumstances since the decree was rendered.
3. ———. A material change in the condition of the parties since the rendition of the decree of divorce is a prerequisite to a modification of the decree.
4. **Marriage.** The making of a common-law marriage in this state

is prohibited by section 42-104, R. R. S. 1943, which prohibition was enacted in 1923.

5. **Marriage: Divorce.** A provision for termination of alimony upon remarriage of the recipient contemplates and requires a valid remarriage.
6. **Marriage.** An indispensable requisite of a common-law marriage is a mutual agreement presently to become man and wife by persons qualified under the law to make such a compact and it must contemplate a permanent marital relationship of the parties to the exclusion of all others.
7. ———. A requirement of a common-law marriage is that the parties must hold themselves out as husband and wife in the community where they reside.
8. **Divorce.** If a decree of absolute divorce awards alimony, the subsequent improper conduct, however gross, of the woman is no cause for discharging the former husband from such alimony because after the decree the woman no longer owes any duty of proper conduct to her former husband and violates no duty to him by her unseemly behavior.

APPEAL from the district court for Thomas County: ERNEST G. KROGER, JUDGE. *Reversed and remanded with directions.*

William B. Quigley and *Davis, Healey, Davies & Wilson,* for appellant.

Evans & Evans, for appellee.

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

BOSLAUGH, J.

Appellee, who had been divorced because of his extreme cruelty toward appellant, seeks to modify the award of alimony made in the divorce decree on the grounds that his financial condition has been impaired since the decree; that appellant is able to support herself; and that she has been, as appellee asserts, living and cohabiting with Roy W. Mason and such conduct constitutes remarriage within the meaning of the decree terminating alimony on that contingency.

The parties, by their respective pleadings in the divorce case, asked the court, in the event a divorce was

awarded to appellant, to approve an agreement they had made in writing as a settlement of their property rights. The trial court sustained the petition of appellant, awarded her a divorce, approved the property settlement of the parties, and found and decreed that the property and income rights of the parties should be and were adjusted and determined in accordance with the property settlement of the parties which was made by incorporation therein a part of the decree. There was no appeal from that adjudication and it became final November 5, 1952. The pending proceedings were commenced on June 14, 1954.

The agreement of the parties recited that it was and should be, in the event of a divorce between them, approved by the court as a complete settlement of all their rights in the property then owned by them and as fair alimony to appellant; that described personal property was awarded to appellant as her separate and absolute property; that appellee should pay to appellant $100 per month alimony and support money commencing on the date of the agreement and continuing until the remarriage or death of appellant or the death of the appellee if he predeceased her; that appellant released all interest she had in the personal estate of appellee and all interest in any future-acquired property of appellee; and that appellee released all his interest in property then owned or subsequently acquired by appellant.

Appellant on May 15, 1954, filed a praecipe for the issuance of an execution against appellee for the collection of $900 alleged delinquent alimony payments. The petition of appellee to modify the divorce decree was filed June 14, 1954, and an amended petition was subsequently filed which contained the following statements:

The decree required appellee to pay appellant $100 per month until she contracted another marriage. She had been living and cohabiting with Roy W. Mason,

hereafter called Mason, as his wife. Appellee does not know whether they have contracted a legal marriage or whether they are consorting as man and wife without wedlock. It was the intention of the property settlement, made a part of the decree of divorce, that the $100 payment to appellant should continue only so long as she was unmarried. She is not dependent for support on appellee because of her association with Mason. The financial condition of appellee has changed since May 5, 1952, and he is unable to make the payments exacted by the decree. Appellant has good health, is an experienced cook and waitress, and is able to support herself.

The answer of appellant admitted the $100 per month awarded her was, by the terms of the decree, to continue until she remarried, denied the other allegations made by appellee, and alleged: That the claims of misconduct by her made by appellee were false and were intended by him to defame her character for the purpose of attempting to escape payment of the decreed and adjudicated alimony; that she, by her efforts during their marriage relationship, contributed materially to the accumulation of property by appellee; and that the property settlement approved by the decree represented her share of the family property and was in lieu of a lump sum award to her.

The proceedings at the hearing had of the matters presented by the pleadings consisted of testimony produced by appellee and findings by the court that appellant was living and cohabiting with Mason under circumstances which would constitute a common-law marriage if the same were permissible under the law of Nebraska; that the occurrence contemplated by the parties and set forth in the settlement agreement existed; and that the decree of divorce should be and it was modified to relieve appellee from payment of $100 per month to appellant from and after June 27, 1955. This appeal is from that order of the trial court.

The argument of appellee, that if a party moves to dismiss or demurs to the evidence of the other party at the close of the evidence, the question presented to the court for the purpose of the motion is whether or not the evidence is sufficient to sustain a judgment for the other party, is inapplicable to this appeal. If the district court had sustained the demurrer of the appellant to the evidence, the question for review would have been whether the evidence, with reasonable inferences therefrom, was or was not sufficient to have legally justified a decision for appellee. That is what occurred in the cases cited by appellee for his contention. In this case the demurrer of appellant to the evidence of appellee was denied. Appellant rested and a judgment in favor of appellee was rendered upon the entire record made at the trial. This appeal from the judgment must be tried de novo upon the record made at the trial. Peterson v. Peterson, 152 Neb. 571, 41 N. W. 2d 847; Holmes v. Holmes, 152 Neb. 556, 41 N. W. 2d 919; McNamee v. McNamee, 154 Neb. 212, 47 N. W. 2d 383; Schwarting v. Schwarting, 158 Neb. 99, 62 N. W. 2d 315.

An alimony award, unless it is an allowance of a definite sum in gross, may be modified as to future payments upon adequate showing of changed circumstances even though the award is, at least in part, a division of property of the parties accumulated during the marriage. A material change in the condition of the parties since the rendition of the decree of divorce is a prerequisite to such a modification. In Dunlap v. Dunlap, 145 Neb. 735, 18 N. W. 2d 51, it is said: "In the absence of such judgment (an unqualified allowance of alimony in gross) the court, upon proper petition and showing thereon, has power to revise and alter its awards of alimony as to future payments under the provisions of section 42-324, R. S. 1943. * * * The basis for changing such payments in the future must be founded upon new facts which have occurred since the decree was entered, and, in the absence of such facts, the matter is deemed to be

res adjudicata between the parties." See, also, § 42-324, R. R. S. 1943; McIlwain v. McIlwain, 135 Neb. 705, 283 N. W. 845; Morris v. Morris, 137 Neb. 660, 290 N. W. 720.

Appellee asserted as a basis of modification of the decree three things: That appellant was living and cohabiting with Mason as his wife but appellee did not know whether or not they had contracted a legal marriage and that by virtue thereof appellant was not dependent upon appellee for support; that the financial condition of appellee was impaired; and that appellant is experienced as a cook and waitress and able to support herself.

There was a total failure to establish that appellant was able to support herself. The reference to her employment as a waitress was made incidentally as a background for an answer to a question on an unrelated issue. It is more important, however, that by a declaration of appellee appellant was acting as a waitress at the time the divorce case was tried. It was a fact existing at the time of the decree and the fact therefore is res judicata in this proceeding. It is important also that there was a failure to prove or any attempt to show regularity of the engagement or the earnings appellant received. Consequently there was no basis in this respect for modification of the award of alimony. Morris v. Morris, *supra*. A further reason why any employment of appellant was not a reason for modification is that the monthly payments were, under the decree, a repayment to her for property and assets contributed to the marriage and accumulated thereto by her efforts and not solely a provision for support. Any evidence of her employment without competent proof of inability of appellee to respond to the financial requirements of the decree is not material in this proceeding for modification. Morris v. Morris, *supra*.

The claims of appellee that his financial condition has become materially unfavorable since the decree of di-

vorce was rendered and that he does not have money, property, or earning ability to meet the payments to appellant and because thereof they are unjust and inequitable are unimportant because there is no proof of the truth of any of them. Appellee was a witness at the hearing but he made no claim of a decline in his financial position after the decree of divorce was granted. There is no issue in this appeal of altered financial ability of appellee.

The record is certain that the basis on which the trial court modified the divorce decree was the charges of wrongful association of appellant with Mason. The evidence concerning this is all that appellee can rely upon to support his contention of changed circumstances since the divorce case was decided. The single basic issue is thus squarely presented. That issue is whether or not the acts attributed to appellant by the proof are sufficient to sustain the adjudication herein terminating the monthly alimony payments to appellant. The reason of the court for discontinuing alimony to her was that she was consorting with Mason "under circumstances which would constitute a common-law marriage" if such a marriage were permissible under the substantive law of the State of Nebraska and that this is equivalent to remarriage which, by the terms of the decree of divorce, is a ground for discontinuing alimony to appellant. These conclusions are each incorrect.

The finding of the district court herein that the contingency of remarriage of appellant, provided as a basis of terminating alimony to her, had occurred is without support by either pleading or proof. Appellee in his petition says that he does not know that appellant has married since the decree of divorce. He did not attempt to say in his testimony, neither did he produce any other evidence, that she had remarried. The making of a common-law marriage in this state is prohibited by section 42-104, R. R. S. 1943, which prohibition was enacted in 1923. Collins v. Hoag & Rollins, 122 Neb. 805,

241 N. W. 766; Scott v. Scott, 153 Neb. 906, 46 N. W. 2d 627, 23 A. L. R. 2d 1431; Ragan v. Ragan, 158 Neb. 51, 62 N. W. 2d 121; Binger v. Binger, 158 Neb. 444, 63 N. W. 2d 784.

The effect of the record is to deny that appellant has entered into a legally valid marital relationship since the decree of divorce and of course it cannot be correctly said that she has remarried. A provision for termination of alimony upon remarriage of the recipient requires a valid remarriage and the reason this is true is that it is unjust that a woman should have support or an equivalent from each of two men during the same period. This is well stated in 17 Am. Jur., Divorce and Separation, § 610, p. 475: "Aside from positive unseemliness, it is illogical and unreasonable that she should have the equivalent of an obligation for support by way of alimony from a former husband and an obligation from a present husband for an adequate support at the same time. It is her privilege to abandon the provision made by the decree of the court for her support under sanctions of the law for another provision for maintenance which she will obtain by a second marriage; and when she has done so, the law will require her to abide by her election since there is no reason why she should not do so." See, also, Sleicher v. Sleicher, 251 N. Y. 366, 167 N. E. 501; Gaines v. Jacobsen, 308 N. Y. 218, 124 N. E. 2d 290, 48 A. L. R. 2d 312.

The state has an interest in insisting that the legal obligation of the husband to pay alimony to his divorced wife is not improperly terminated and this is intensified when the divorce resulted from the fault of the husband and the payments, as in this case, represent, in whole or in part, repayment to the wife for her material contributions to the marriage and to the assets of the husband. The court said in Christiano v. Christiano, 131 Conn. 589, 41 A. 2d 779, 6 A. L. R. 2d 853: "* * * it is definitely recognized that the state has not only a social but a financial interest in making effective provisions

for alimony awarded a divorced wife. That interest grows out of the fact that the state or its subdivisions should not be called upon to make expenditures on account of a woman whose former husband, divorced for his misconduct, ought to support her."

The reason for the discontinuance of alimony allowance upon the recipient contracting another marriage is that, in that event, the legal obligation of the second husband supplants that of the first. There has been no marriage of anyone interested in this case capable of imputing a legal obligation to anyone but appellee. The law of the state that no marriage shall exist unless a license has been issued and a solemnization of marriage rites has been observed prevents a conclusion that the remarriage of appellant has occurred. The record is silent as to both of the conditions the law mandatorily exacts.

The trial court concluded that appellant was living and cohabiting with Mason under circumstances which would constitute a common-law marriage if the law of the state permitted such a marriage. This finding has no support in the record. An indispensable requisite of a common-law marriage is a mutual agreement presently to become man and wife between persons qualified under the law to make such a compact and it must contemplate a permanent marital relationship to the exclusion of all others. Abramson v. Abramson, 161 Neb. 782, 74 N. W. 2d 919. Evidence is entirely lacking of an agreement or mutual understanding between appellant and Mason to assume the present obligation of the status of husband and wife or that they mutually bound themselves permanently to whatever relationship they presently have. There is no proof that either of them considered herself or himself as having any interest in the property or affairs of the other which is incidental to a marriage relationship or that Mason contributed or does contribute to the support of appellant. A fair inference is that the sources of the support of appellant are the alimony pay-

ments, the amounts paid her by persons who room at her rooming house, and any remuneration she receives from work she does in a cafe.

A requirement of common-law marriage is that the parties must hold themselves out in the community where they live as husband and wife. Ragan v. Ragan, *supra.* The witnesses referred in their testimony invariably to Laura Bowman and Mason. None of them spoke of these persons as the Masons or Mr. and Mrs. Mason. Several times in the record it was testified that the rooming house was operated by Laura Bowman. There is nothing in the record that indicates that appellant and Mason introduced themselves or that they were introduced by others as husband and wife. Persons who testified to happenings intended to indicate that they had sustained intimate relationship were those who had an association with appellant close enough to be visitors in her home. This is not sufficient to indicate that they had the reputation of such relationship in the community. So far as the general community knew, appellant ran a rooming house in which Mason was one of the roomers. The testimony of the witnesses indicates that though they may have suspected improper relationship, they considered it to be meretricious rather than marital. Such an association is not consistent with the existence of a common-law marriage. Abramson v. Abramson, *supra.* The conclusion is irresistible that whatever the association of appellant and Mason was it was not marital.

Appellee asserts that the argument of appellant that she has no duty to her former husband of virtuous conduct different from that owed by her to the public is unrealistic and fantastic and he then inquires: Will a court of equity enforce an agreement for appellant that gives judicial approval and encouragement to the continuance of an offense against public morals? The implication of the latter is as erroneous as the assertion of the former. It is not the function of the court in this civil proceeding to attempt to serve as an agency for the moral re-

generation of appellant. The doctrine applicable and controlling under the circumstances of this case is that when an allowance has been made to a wife, neither she nor her husband has a right to complain of the subsequent conduct of the other. The failure of the wife to lead a chaste life affords no ground for depriving her of alimony as previously fixed and awarded nor does the failure of the husband to conduct himself properly afford a legal reason for increasing the award made to the wife. After a final divorce the wife has no duty to her former husband, the nonperformance of which will forfeit her right to the alimony granted her. A case on this subject often referred to is Cole v. Cole, 142 Ill. 19, 31 N. E. 109, 34 Am. S. R. 56, 19 L. R. A. 811. In the proceedings presented to that court an ex-husband sought modification of his alimony payments, charging that his ex-wife had been constantly guilty of acts of adultery and had led an immoral, unchaste, and adulterous life. The lower court sustained a demurrer to the petition for modification. The Supreme Court affirmed that action of the trial court. In deciding the case the court said: "In case of divorce the courts look at the standing of the parties, the conduct of each and from whence the estate is derived, and, having due regard to the living of each, will make such allowance to the wife as is reasonable and just. When the allowance has been thus made neither has the right to complain of the subsequent conduct of the other, and the failure of the wife to lead a chaste life will afford no ground for depriving her of her alimony as previously fixed, nor will the failure of the husband to conduct himself properly afford ground for increasing her allowance." It is further said in the decision of that case: "The question presented in this case therefore is, whether the adultery of the wife subsequently to divorce and allowance of alimony, as set forth in the petition, will authorize the interposition of the court to alter, modify or set aside the decree for alimony. The allowance was to the wife alone. It

appears by the original decree, which is in the record, that the divorce was granted at the suit of the wife, for the willful misconduct of the husband. * * * Conceding the general duty she owes society, what right does it give the husband to property justly hers, if she violates that duty? The husband owes a like duty to lead a moral and virtuous life. If he fails to perform it, could it be contended that it would give her a right to additional property, or that there should be an increase in her allowance in consequence? Manifestly not. In Forest v. Forest, 3 Bosw. 661, it is held, that after the divorce the wife owes no duty to the husband, and subsequent adultery is no cause for making a change in the allowance of alimony." See, also, Suozzo v. Suozzo, 16 N. J. Misc. 475, 1 A. 2d 930; Cariens v. Cariens, 50 W. Va. 113, 40 S. E. 335, 55 L. R. A. 930; Christiano v. Christiano, *supra;* Pauley v. Pauley, 280 Ky. 66, 132 S. W. 2d 512; Hayes v. Hayes, 220 N. Y. 596, 115 N. E. 1040; 17 Am. Jur., Divorce and Separation, § 652, p. 498; Keezer, Marriage and Divorce (3d ed.), § 658, p. 718.

The indulgence of living together and cohabiting by an unmarried man and a woman is a criminal offense but this is not a criminal case to protect the interest of society and the state in public morality and virtuous conduct. If it were, the accused would be entitled to all the safeguards of the criminal law. This is a civil proceeding by one who as a result of absolute divorce has no greater interest in the conduct of appellant than any other member of society and is not entitled to rely on any irregularity in her conduct, however grievous, to defeat his contractual and adjudicated obligation. It is not the province of appellee to attempt to protect the interests of society for his financial advantage. It is the exclusive prerogative of the sovereign to enforce its mandates for the protection of the public and its agencies and services therefor are abundantly sufficient. The conclusion is that appellee neither pleaded nor proved

a legal reason justifying a modification of the decree of divorce.

The trial court allowed the sum of $100 to be taxed as part of the costs to be paid by appellee as compensation of counsel for appellant. The services rendered by counsel for her as shown by the record are: Filing a praecipe for execution to enforce collection of delinquent payments of alimony in the sum of $900; filing a demurrer to the petition of appellee seeking modification of the decree; arguing and submitting demurrer to the petition; filing answer to the petition; filing praecipe for execution to collect delinquent installments of alimony in the sum of $500 and showing that appellee was in contempt of court because of his default and seeking the assistance of the court to compel payment; filing demurrer to amended petition of appellee for modification; attending to matters resulting from issuance of restraining order procured by appellee enjoining appellant from collecting the unpaid installments of alimony; arranging for the trial of right to an injunction at the time the petition for modification was heard by the court; securing order of court for payment to appellant of $100 each month until disposition of the proceedings to modify the decree; arguing demurrer to the amended petition of appellee; appearing in court and conducting hearing on behalf of appellant as to the issue of modification of decree of divorce; conducting proceedings necessary to appeal from the order of the trial court modifying the decree; and completing the appeal to this court. The services of counsel of appellant were rendered in the period from May 15, 1954, to March 30, 1956.

The amount allowed in such a situation should adequately compensate for the services performed. Specht v. Specht, 148 Neb. 325, 27 N. W. 2d 390. In deciding the amount to be allowed it is proper to consider the amount involved, the nature of the litigation, the time and effort required, the skill required, the responsibility

assumed, the diligence exhibited, the result obtained, the character and standing of the counsel, and the charge usually made for similar services. Lippincott v. Lippincott, 152 Neb. 374, 41 N. W. 2d 232. The allowance made by the district court is inadequate. It should be and is increased for services of counsel for appellant in the district court by the sum of $200 or to a total of $300 which should be and is directed to be taxed as costs in the district court and collected from appellee.

The judgment modifying the decree of divorce relieving and discharging appellee from paying alimony of $100 per month from and after June 27, 1955, should be and it is reversed and the cause is remanded with directions to the district court for Thomas County to dismiss the proceedings to modify the decree of divorce at the costs of appellee.

Appellant should be and she is allowed the sum of $300 as compensation of her counsel for services rendered in this court and it is ordered to be taxed as costs in this court and that all costs in this cause should be and are taxed to appellee.

REVERSED AND REMANDED WITH DIRECTIONS.

MARTIN L. GABLE, APPELLEE, V. THE PATHFINDER IRRIGATION DISTRICT, APPELLANT.
79 N. W. 2d 708

Filed December 14, 1956. No. 33993.

1. **Judgments.** A fundamental principle of jurisprudence is that material facts or questions which were in issue in a former action, and were there admitted or judicially determined, are conclusively settled by a judgment therein, and such facts or questions become res judicata and may not again be litigated in a subsequent action.
2. **Appeal and Error.** The findings on a first appeal become the law of the case on a retrial of the same case unless on a second trial the facts are materially and substantially different.
3. ———. The burden of showing that the facts on a second trial

are materially and substantially different from those adduced on an earlier trial from which an appeal was taken and in which findings were made by this court is upon the party making such claim.

4. **Damages: Appeal and Error.** The fixing of the amount of damages is a function of the jury and unless it has been shown that the amount fixed is so exorbitant as to indicate passion, prejudice, mistake, or a complete disregard of the law and the evidence its verdict will be sustained.

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

Herman & Van Steenberg, for appellant.

Mothersead, Wright & Simmons and *Robert M. Harris,* for appellee.

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

YEAGER, J.

This is an action for damages by Martin L. Gable, plaintiff and appellee, against The Pathfinder Irrigation District, defendant and appellant. The action was tried to a jury at the conclusion of which a verdict was returned in favor of the plaintiff for $4,053.79. A motion for judgment notwithstanding the verdict or in the alternative for a new trial was filed which was overruled and judgment was rendered on the verdict. From the judgment and the order overruling the alternative motion for judgment notwithstanding the verdict or for a new trial the defendant has appealed.

This is the second appearance of this case in this court. It previously appeared as Gable v. Pathfinder Irr. Dist., 159 Neb. 778, 68 N. W. 2d 500. In that appearance as in this one Martin L. Gable was plaintiff and appellee and The Pathfinder Irrigation District was defendant and appellant. The issues which were presented to the district court from the determination of which the former appeal was taken were the same as those presented on the trial from which this appeal has

been taken. As a result of the former appeal the judgment of the district court was reversed and the cause remanded for a new trial.

The pertinent parts of the pleadings as they came to this court were summarized in the former opinion, and in view of the fact that there has been no substantial or material change it is not deemed necessary to repeat that summary. It will accordingly be adopted herein by reference.

In the case on the former appeal the assignments of error in substance were the following: (1) The court erred in assuming by instructions that the defendant owed a duty to keep the run-off surface water off of plaintiff's land; (2) the court erred in refusing to sustain defendant's motion for a directed verdict; (3) the verdict is not sustained by the evidence and is contrary to law; (4) the court erred in giving the instructions relative to the measure of damages; (5) the court erred in not requiring plaintiff to segregate or allocate the damages sustained by reason of the negligence of the defendant and those sustained by reason of water flowing across the land from other causes; (6) the court erred in giving instructions relative to the defense of act of God; (7) the court erred in allowing the plaintiff to amend the prayer of his petition by increasing the acreage to which he contended that damage to crops extended; and (8) the court erred in the admission of rebuttal evidence.

In the former opinion the adjudication upon all of the assignments except the third was adverse to the contentions of the defendant.

The adjudication contained in the former opinion upon the material facts which were in issue to which the seven assignments of error in the former appeal referred is conclusive and is res judicata on this appeal unless the facts on the second trial have been shown to be materially and substantially different from those on the former trial. Also the burden of showing that

the facts were materially different on the second trial rested upon the defendant.

In Callahan v. Prewitt, on rehearing, 143 Neb. 793, 13 N. W. 2d 660, it was said: "It is a fundamental principle of jurisprudence that material facts or questions which were in issue in a former action, and were there admitted or judicially determined, are conclusively settled by a judgment rendered therein, and that such facts or questions became res judicata and may not again be litigated in a subsequent action."

In the same case it was said: "The rule that the findings of this court on a first appeal become the law of the case on a retrial of the same issues is not available where on a second trial the facts are materially and substantially different."

Again in the same case it was said: "Where on appeal findings of fact are made which become the law of the case and there is a remand for a new trial, on such retrial, such findings are binding on the parties, the trial court and this court, unless on the retrial the facts relating to the issues upon which the findings were made are materially and substantially different from those adduced on the former trial, and the burden of showing a difference shall rest upon the party making the claim." The conclusions reached in that case have been reiterated in Benedict v. Eppley Hotel Co., 161 Neb. 280, 73 N. W. 2d 228.

The defendant contends here that the evidence on the retrial upon the issues presented by the pleadings was, as to the questions presented by seven assignments of error assigned on the former appeal, materially different from that adduced on the former trial.

Whether or not this is true may not become known from an appropriate consideration of the record which has been presented for review. As has been pointed out, the burden of showing the difference is upon the party claiming it. As to how it may be shown this court said in Callahan v. Prewitt, *supra:* "In order to avoid con-

fusion in the future we deem it advisable to say here that the burden is evidentiary and is for determination by the court and not the jury. As to methods, of course, the introduction of the bill of exceptions of the first trial or pertinent parts thereof would be the most satisfactory but there should be no such limit on method. The right to present this question should not be denied if for some reason the bill of exceptions is not available." See, also, Benedict v. Eppley Hotel Co., *supra.*

In this case the defendant wholly failed by any method suggested in the foregoing or by any other method to bring proof to this court that there was a change.

It is true that defendant did offer the former bill of exceptions for the purpose of showing a difference. The plaintiff however objected to the offer. The objection was as follows: "Objected to as incompetent, irrelevant and immaterial; it necessarily encumbers the record. I see no reason for it at all." The ruling by the court was as follows: "The objection will be sustained."

The defendant has not either directly or by implication assigned this ruling as error. Under no theory and for no purpose therefore is the former bill of exceptions before this court for consideration.

It must be said therefore that, unless there are assignments of error on the second trial relating to matters which were not presented by the assignments of error on the first appeal, there is nothing for this court to do at this time but to adhere to the decision on the former appeal.

The assignments of error on this appeal are in substance as follows: (1) The court erred in holding that "the law of the case" rule was applicable in the instance here; (2) the court erred in holding that the defendant was under a duty or obligation to protect the plaintiff from injury; (3) the verdict is not sustained by sufficient evidence; (4) the court erred in not requiring the plaintiff to allocate the damages for which the defendant was liable from those sustained by water for which

the defendant was not liable; (5) the court erred in not instructing the jury upon defendant's theory as to allocation of damages; (6) the court erred in excluding material competent evidence relative to the intensity of the storm of June 14, 1953; (7) the court erred in giving instruction No. 8; and (8) the verdict is contrary to the evidence.

It is observable by comparison of the assignments that nothing was presented by any of these assignments except Nos. 1, 3, 6, 7, and 8, which was not presented by the assignments of error on the former appeal. A comparison of instructions on the two appeals discloses also that No. 7 was also disposed of since instruction No. 8 is identical with instruction No. 8 given on the former trial.

It follows then from what has been said that under the stated rules as to the law of the case these four assignments can avail the defendant nothing on this appeal.

Likewise the first and sixth assignments of error can avail the defendant nothing. The effectual holding that "the law of the case" rule is applicable disposes of these assignments of error adversely to the defendant.

This leaves for consideration the third and eighth assignments of error. These two are in essentials the same and they will be regarded for the purposes of this opinion as one.

In order that the verdict may be sustained as against the attack made by these two assignments of error evidence must be found from which it may be said that plaintiff was damaged and the amount thereof agreeable to the rule laid down in the former case.

In that case the following rule was declared: "The measure of damages where a crop is injured but not rendered entirely worthless as a result of acts or omissions of another is the difference between the value at maturity of the probable crop if there had been no injury and the value of the actual crop at the time injured less

the expense of fitting for market that portion of the probable crop which was prevented from maturing."

As to the manner of applying the rule in that case it was said: "In determining the damage to farm products consideration should be given to the circumstances which conditioned the probability or improbability of the maturing of the crops in the absence of injury, and all other facts and circumstances tending to establish such value, which would properly include those arising before, at the time of, and after injury."

Examination discloses that the proof of plaintiff as to damage and the amount thereof conformed to this rule and the declared proper application of it. There was without question proof of damage.

The fixing of the amount of the damage was a function of the jury and unless it has been shown that the amount fixed is so exorbitant as to indicate passion, prejudice, mistake, or a complete disregard of the law and the evidence its verdict will be sustained. Shields v. County of Buffalo, 161 Neb. 34, 71 N. W. 2d 701; Benedict v. Eppley Hotel Co., *supra;* Fridley v. Brush, 161 Neb. 318, 73 N. W. 2d 376. We are unable to say that under this rule the verdict of the jury was not sustained by sufficient evidence or that it was contrary to the evidence or to law.

The determination upon all of the assignments of error is adverse to the defendant and accordingly the judgment of the district court is affirmed.

AFFIRMED.

LILLIAN E. PADDACK, APPELLEE, V. WILLIAM R. PATRICK, APPELLANT.
79 N. W. 2d 701

Filed December 14, 1956. No. 34016.

1. **Automobiles.** A driver of a motor vehicle should have his car under such reasonable control as will enable him to avoid colli-

sion with other vehicles, assuming that the drivers thereof will exercise due care.

2. ———. "Reasonable control" by drivers of motor vehicles is such as will enable them to avoid collision with other vehicles operated without negligence in streets or intersections, and with pedestrians in the exercise of due care; but "complete control" such as will only prevent a collision by anticipation of negligence or illegal disregard of traffic regulations, in absence of notice, warning, or knowledge, is not required by the laws of Nebraska.

3. **Automobiles: Highways.** A driver of a motor vehicle about to enter a highway protected by stop signs must stop as directed, look in both directions, and permit all vehicles to pass which are at such a distance and traveling at such a speed that it would be imprudent to proceed into the intersection.

4. ———: ———. Where a motorist on a nonfavored street stops at an intersecting arterial highway when the intersection is clear of traffic, looks to the right and left for approaching vehicles, acting as a reasonably prudent person in the exercise of due care would act in the belief that he has time and opportunity to safely cross, he is not liable for negligence merely because he attempts to do so.

5. ———: ———. Upon properly complying with the foregoing duties the driver, upon entering the intersection, does not have an absolute right-of-way which permits him to proceed without looking but must continue to maintain a proper lookout for the safety of himself and others traveling upon the streets.

6. ———: ———. Where the driver of a motor vehicle approaching a through street or highway stops and looks and sees an approaching vehicle on the favored street or highway but erroneously judges its speed or distance or for some other reason assumes he can proceed with safety and not have a collision, the question of whether or not his conduct in doing so makes him guilty of contributory negligence is usually one for the jury.

7. ———: ———. A person traveling a favored street protected by a traffic signal, of which he has knowledge, may properly assume that oncoming traffic will obey it.

8. ———: ———. A user of the highways may assume, unless and until he has warning, notice, or knowledge to the contrary, that other users of the highways will use them in a lawful manner, and until he has such warning, notice, or knowledge, he is entitled to govern his actions in accordance with such assumption.

9. **Trial: Damages.** When it appears from the record that the verdict in a case is so clearly exorbitant or excessive as to indicate that it was the result of passion, prejudice, or mis-

take, or some means not apparent in the record, or it is clear that the jury disregarded the evidence or rules of law, then it is the duty and power of the trial court and of this court to set aside a verdict for damages so large that it does not find support in the evidence.

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

Fraser, Crofoot, Wenstrand, Stryker & Marshall and *Robert G. Fraser,* for appellant.

Rice & Adams and *Schrempp & Lathrop,* for appellee.

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

WENKE, J.

Lillian E. Paddack brought this action in the district court for Sarpy County against William R. Patrick. She therein claims a car accident, in which she was involved while driving her car, was caused by negligence of the defendant in driving his car and resulted in damage to her car and injuries to her person for which she seeks to recover. A jury awarded her a verdict of $5,000 from which defendant appeals, his motion for a new trial having been overruled.

The first question raised by appellant is, was the evidence, as a matter of law, sufficient to sustain the verdict? The question of appellant's negligence, if any, and the contributory negligence of appellee, if any, and the effect thereof were the issues tried and submitted to the jury. In considering this question we review the evidence under the often-stated principle applicable when one of the parties has obtained a verdict. See Pospichal v. Wiley, *ante* p. 236, 79 N. W. 2d 275, for a full statement thereof.

The accident happened shortly after 5 p. m. on Thursday, June 2, 1955, when a car being driven by appellant ran into and against the side of a car being driven by appellee. It occurred in the southwest corner of the

intersection of Highway No. 131 and Avery Road, the intersection being in Sarpy County, Nebraska. Highway No. 131 is a state highway which runs almost due north and south, being level north of the intersection but sloping upgrade toward the south. It has a paved traveling surface about 22 feet wide with a line marked down the center to indicate two lanes for travel, one for travel in each direction. It is a through highway, being protected from intersecting roads by stop signs, there being one on the south side of Avery Road 24 feet west of the west edge of the paved surface of Highway No. 131. The maximum speed authorized on Highway No. 131 at this point was 45 miles an hour. Avery Road is a graveled county road, although not "a finished job," running east and west. Where it intersects Highway No. 131 the corners are rounded. At the northwest corner of the intersection is a frame building referred to by the witnesses as the Avery Bar. It sets back 29 feet from the west edge of the paved surface of Highway No. 131, thus leaving room for cars or trucks to park between it and the highway. At the time here involved a dump truck was parked in this area facing south and parallel with, but 4 or 5 feet west of the paved surface of Highway No. 131 with the front end some 35 to 40 feet north of the north edge of Avery Road. Both drivers were familiar with the intersection, the weather was good, there was plenty of light, they were each driving alone, the highway was dry, driving conditions were good, and, at the time, no other vehicles were approaching the intersection.

Appellee worked as a waitress for the Jack and Jill restaurant in the Hill Hotel in downtown Omaha. She lived in Bellevue with her family which consisted of her husband and a son 7 years old. At the time of the accident she had left her work and was driving a 1953 Chevrolet coach, which she owned jointly with her husband, south on the right side of Highway No. 131 toward her home. Appellant lives east and north of Avery

Station but has his office in Papillion. At the time of the accident he was driving his car, a 1953 Pontiac, from his office toward his home, intending to turn south on Highway No. 131 at the Avery intersection. As a result of the accident the left front fender, bumper, and headlight of appellant's car were damaged, and dirt and part of the headlight of his car lay on Highway No. 131 just in front of his car. His car came to a stop in the southwest corner of the intersection with its front wheels some 3 to 4 feet onto the paved surface thereof. After the collision appellee's car crossed Highway No. 131 and stopped just south of the southeast corner of the intersection astride the cement block of a culvert located there, with its front end down into a ditch. It had been damaged on the right side just back of the door. As a result of the impact appellee was thrown from her car. She was found under the back end thereof, where it had come to a stop, lying on a ridge of gravel located just to the east of the paved surface of Highway No. 131. This gives a general picture of the conditions and circumstances surrounding the accident. A more detailed discussion of the evidence relating to the conduct of both drivers leading up to and at the time of the impact will be set forth after we have announced the principles here applicable.

As stated in Spomer v. Allied Electric & Fixture Co., 120 Neb. 399, 232 N. W. 767, and approved in Ficke v. Gibson, 153 Neb. 478, 45 N. W. 2d 436:

" 'A driver of an automobile should have his car under such reasonable control as will enable him to avoid collision with other vehicles, assuming that the drivers thereof will exercise due care.' Thrapp v. Meyers, 114 Neb. 689; De Griselles v. Gans, 116 Neb. 835.

" 'Reasonable control' by drivers of motor vehicles is such as will enable them to avoid collision with other vehicles operated without negligence in streets or intersections, and with pedestrians in the exercise of due care; but 'complete control' such as will only prevent a colli-

sion by anticipation of negligence or illegal disregard of traffic regulations, in absence of notice, warning or knowledge, is not required by the laws of Nebraska."

As to appellant, who was approaching a through highway protected by a stop sign, section 39-724, R. R. S. 1943, provides in part: "All motor vehicles entering or crossing such state highways on which stop signs are erected shall come to a full stop as near the right of way line as possible, before driving onto such state highway, and, regardless of direction, shall give the right of way to vehicles upon said highway."

In regard thereto we have often held: "A driver of a motor vehicle about to enter a highway protected by stop signs must stop as directed, look in both directions, and permit all vehicles to pass which are at such a distance and traveling at such a speed that it would be imprudent to proceed into the intersection." Dorn v. Sturges, 157 Neb. 491, 59 N. W. 2d 751. See, also, Simcho v. Omaha & C. B. St. Ry. Co., 150 Neb. 634, 35 N. W. 2d 501; Styskal v. Brickey, 158 Neb. 208, 62 N. W. 2d 854; Meyer v. Hartford Bros. Gravel Co., 144 Neb. 808, 14 N. W. 2d 660; Borcherding v. Eklund, 156 Neb. 196, 55 N. W. 2d 643.

Or, as stated in Meyer v. Hartford Bros. Gravel Co., *supra*: "A driver of a vehicle about to enter a highway protected by stop signs must stop as directed, look in both directions and permit all vehicles to pass which are at such a distance and traveling at such a speed that it would be obviously dangerous for him to proceed across the intersection. See Schrage v. Miller, 123 Neb. 266, 242 N. W. 649."

And, as stated in Styskal v. Brickey, *supra*: "Bearing in mind that Railroad Avenue is a state highway carrying U. S. Highways Nos. 73 and 75 it would ordinarily, because of the stop sign, be the duty of any driver of a vehicle approaching it to come to a full stop as near the curb line as possible before driving onto it and give the right-of-way to vehicles upon the highway until such

time, after stopping, as he could drive onto the highway without interfering with the traffic thereon. See §§ 39-724 and 39-754, R. R. S. 1943." See, also, Schrage v. Miller, 123 Neb. 266, 242 N. W. 649.

And in Dorn v. Sturges, *supra*, we quoted the following from 5 Am. Jur., Automobiles, § 303, p. 668, with approval: "* * * it is his duty to look both to right and left; and if a vehicle is approaching on the main or arterial highway, it is his duty to wait until such vehicle has passed, unless a prudent person would have reasonable ground to believe that such other vehicle proceeding at a lawful speed is so far distant from the intersection that he could safely cross in advance thereof." See, also, Borcherding v. Eklund, *supra*.

As stated in Borcherding v. Eklund, *supra*:

" '* * * Where a motorist on a nonfavored street stops at an intersecting arterial highway when the intersection is clear of traffic, looks to the right and left for approaching vehicles, acting as a reasonably prudent person in the exercise of due care would act in the belief that he has time and opportunity to safely cross, he is not liable for negligence merely because he attempts to do so.' McCulley v. Anderson, 119 Neb. 105, 227 N. W. 321."

"Upon properly complying with the foregoing duties the driver, upon entering the intersection, does not have an absolute right-of-way which permits him to proceed without looking but must continue to maintain a proper lookout for the safety of himself and others traveling upon the streets."

"Where the driver of a car approaching a through street or highway stops and looks and sees an approaching vehicle on the favored street or highway but erroneously judges its speed or distance or for some other reason assumes he can proceed with safety and not have a collision, the question of whether or not his conduct in doing so makes him guilty of contributory negligence is usually one for the jury."

As to the duties of appellee, who was traveling on the through highway, the following are applicable:

"An automobile driver should have his car under such control that upon entering an intersection he can avoid a collision with another car which is operated with due care." Woracek v. Schuehart, 130 Neb. 260, 264 N. W. 670.

" 'A person traveling a favored street protected by a traffic signal, of which he has knowledge, may properly assume that oncoming traffic will obey it.' Angstadt v. Coleman, 156 Neb. 850, 58 N. W. 2d 507." Styskal v. Brickey, *supra*. See, also, Riekes v. Schantz, 144 Neb. 150, 12 N. W. 2d 766.

"A user of the highways may assume, unless and until he has warning, notice, or knowledge to the contrary, that other users of the highways will use them in a lawful manner, and until he has such warning, notice, or knowledge, he is entitled to govern his actions in accordance with such assumption." Angstadt v. Coleman, 156 Neb. 850, 58 N. W. 2d 507.

" 'The right of way established by municipal ordinance in favor of vehicles using certain streets is not an exclusive privilege, and it must be exercised with due regard to the right of other vehicles to use the intersecting streets.' Vance v. Poree, 5 La. App. 109." McCulley v. Anderson, 119 Neb. 105, 227 N. W. 321.

"The right of a motorist on an arterial highway to assume that a motor-cycle (here car) on a nonfavored intersecting street will be brought to a stop before entering the intersection does not permit him to * * * claim the right of way when too far from the intersection to be entitled thereto." McCulley v. Anderson, *supra*.

Since some of the quotes refer to streets instead of highways we call attention to the fact that: "The duties and obligations which attend a motorist when he approaches a stop sign erected pursuant to city ordinance are the same as those which attend when he approaches

one erected pursuant to statute or statutory rules of the road." Borcherding v. Eklund, *supra.*

From the evidence a jury could have found that appellee, as she approached the Avery intersection, noticed the dump truck parked to the west of the highway in front of the Avery Bar; that, because of the dump truck, she could not see to the west; that as the front of her car approached within a few feet of the rear end of the parked dump truck she, for the first time, saw appellant's car coming from the west on Avery Road and approaching and entering onto Highway No. 131 and into the intersection; that she was then traveling between 30 and 35 miles an hour; that she immediately put on her brakes and skidded her tires up to the point of impact, a distance of 46 feet; and that she attempted to turn her car to the left but was not able to do so sufficiently to avoid the accident. On the other hand the jury could have found that appellant stopped his car at the stop sign, some 24 feet from the west edge of the paved surfaced of Highway No. 131; that he was driving east on the south part of the driving surface of Avery Road; that he then proceeded, without stopping again, into the intersection and onto the paved highway some 4 to 6 feet, having started to turn to the south, when the impact occurred; that, as he approached the highway, he looked both to the north and south, but did not have a good clear view to the north because of the parked dump truck; that he was just entering onto the pavement when he first saw appellee's car coming from the north as it was passing the truck; and that his car proceeded into and against the side of appellee's car. What happened to the cars, after the impact, has already been related.

Under this situation we think the following, quoted from Bohnen v. Gorr, 234 Minn. 71, 47 N. W. 2d 459, has particular application to appellant's driving under the circumstances here shown: "A stop sign is intended to warn motorists of the presence of a through or arterial

highway. Our statute requires the driver of a vehicle approaching a through highway to stop at the entrance to such highway. Stop signs are usually erected some distance from the entrance to the through highway, in order to afford approaching motorists an opportunity to stop before they reach the highway. Where the view of a highway is obstructed at the point where a stop sign is erected, it may not be sufficient to stop where the sign is erected in order to comply with the statute requiring a motorist to stop at the entrance to the highway."

Considering all of the factors involved we think it presents a jury question both as to whether or not appellant was negligent and also whether or not appellee was contributorily negligent and, if so, the degree thereof as it might affect her right to recover.

We come then to the other question raised by appellant. It is, was the verdict of $5,000 so excessive that it can be said it must have been rendered due to passion and prejudice? We have often announced the rule applicable but of course the ultimate answer to the question must always be one of fact. As stated in Dunn v. Safeway Cabs, Inc., 156 Neb. 554, 57 N. W. 2d 75: "When it appears from the record that the verdict in a case is so clearly exorbitant or excessive as to indicate that it was the result of passion, prejudice, or mistake, or some means not apparent in the record, or it is clear that the jury disregarded the evidence or rules of law, then it is the duty and power of the trial court and of this court to set aside a verdict for damages so large that it does not find support in the evidence."

But, as stated in Rueger v. Hawks, 150 Neb. 834, 36 N. W. 2d 236: "In an action sounding in damages merely where the law furnishes no legal rule for measuring them, the amount to be awarded rests largely in the discretion of the jury, and with their verdict the courts are reluctant to interfere."

And in Sutton v. Inland Construction Co., 144 Neb.

721, 14 N. W. 2d 387, we said: "No method of exact computation can be devised in determining compensatory damages in cases of this kind. We think the evidence was such that the jury could properly arrive at the amount determined upon by them. We can find no yardstick whereby we can say as a matter of law that the verdict was excessive. Under such circumstances this court may not substitute its judgment for that of the jury, even if it be assumed that this court would determine that a lessor amount would constitute adequate compensation for the injuries sustained."

As has already been stated herein, appellee was thrown out of her car by the impact. She was found in an unconscious condition on the ground underneath the back end of her car where it came to a stop. She received numerous bruises and some abrasions to various parts of her body, particularly the right side of her head and the lower part of her back. She was taken to the Offutt Air Base Hospital in an ambulance and there examined. Her scratches and bruises were medically treated. She remained at the hospital about an hour for that purpose. The blow on the right side of her head and to her lower back had apparently been the most severe as they resulted in her having very severe headaches and acute pains in the lower back area. Some 2 or 3 days after the accident appellee went to Dr. Longo, her family doctor. He suggested she take hot baths, remain quiet, and not overdo. Within the next 2 weeks she went back to the Offutt Air Base Hospital on three different occasions, at which time X-rays were taken of her back. On two of these visits she consulted with Dr. Harris B. Graves, a member of the hospital staff. Dr. Graves concluded, from an examination of one of the X-rays taken, that appellee had suffered a minor fracture of the second lumbar vertebra which he described as the transverse process thereof. He testified that fact indicated considerable force had been applied to the lower back area. He also testified that it would probably heal without

treatment in 12 to 14 weeks and might even do so within a month. He testified appellee complained to him of very severe pains in her lower back so he directed that heat be applied thereto and that she rest, prescribing that certain sedatives should be taken to relieve these pains so that she would be able to relax. On June 24, 1955, appellee went to Dr. Joseph F. Gross, an orthopedic specialist, who gave her a complete examination. From this examination and her history of the injuries she suffered in the accident, he diagnosed her condition as an acute lumbar strain which he thought should improve with time but was then causing her quite a bit of difficulty. She had told Dr. Gross of the pain in her back and lumbar area, which she described as more or less constant and the severity of which depended upon how much activity she engaged in.

Appellee, who was 33 years of age at the time, testified she had been working regularly all winter, up until the time of the accident; that in the accident she suffered a severe bruise behind her right ear which caused her to have very severe headaches for about 2 weeks; that she has suffered severe backaches since the accident, primarily in the lower lumbar region; that she can now do the normal household work for her family, her husband being in Japan, but if in doing so she overdoes or works too long, the pain in her back gets so severe she has to go to bed; that she will also get these severe backaches if she stays on her feet too long; that she still treats herself with hot baths; that she was not able to return to her job as waitress at the Hill Hotel, where she was earning $130 a month; and that she has only worked one afternoon as a waitress and three evenings at a soda fountain since the accident and up to the time of trial, which was on January 25 and 26, 1956, or about 8 months thereafter. The evidence also shows the damage to appellee's car was $430.69 and that she had medical expenses of $38, there being none for her care and treatment at the Offutt Air Base Hospital because her hus-

band is in the service. We think, if the foregoing was believed by the jury, the verdict is not excessive. It is true that appellant produced evidence to the contrary, particularly that of Dr. Frank J. Iwersen who examined appellee on September 21, 1955, and said he found she was then completely normal and had made a complete recovery, but the jury was not required to believe what he testified to.

We have come to the conclusion that the contentions of appellant are without merit and therefore affirm the order of the lower court denying him a new trial.

AFFIRMED.

GEORGE W. ORD, APPELLEE, v. VERN BENSON, APPELLANT.
79 N. W. 2d 713

Filed December 14, 1956. No. 34020.

1. **Frauds, Statute of.** It is the general rule that the memorandum in writing required by the statute of frauds, section 69-404, R. R. S. 1943, must refer to the essential terms of the oral contract entered into.
2. **Sales: Frauds, Statute of.** The time of delivery of the goods and the time of payment, if agreed upon in the oral contract, must be referred to in the memorandum in writing required by the statute of frauds.
3. ———: ———. Where time of delivery of the goods and the time of their payment are not referred to in the oral agreement, the memorandum in writing required by the statute is sufficient without reference to such missing terms since the law implies the time of delivery and payment under the terms of the oral agreement and the memorandum as well.
4. **Sales: Damages.** Where a buyer wrongfully neglects or refuses to accept and pay for goods, the seller may maintain an action for damages for nonacceptance, and, generally, the measure of damages is the difference between the contract price and the market value, if there is a market value, at the time fixed in the contract, or the refusal to accept. It is a statutory rule contained in section 69-464, R. R. S. 1943, of the Uniform Sales Act.

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

Ginsburg, Rosenberg & Ginsburg and *Raymond B. Morrissey,* for appellant.

Robert S. Finn and *Leslie H. Noble,* for appellee.

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

CARTER, J.

This is an action at law to recover damages for breach of contract in the sale of a farm tractor. A jury was waived and a trial had to the court. The trial court found for the plaintiff in the sum of $365.92 and entered judgment for that amount. The defendant appeals.

The plaintiff was engaged in the implement business at Beatrice, Nebraska. The defendant was engaged in farming. The evidence shows that on May 31, 1952, defendant came to plaintiff's place of business where he observed a new Ferguson tractor. After some negotiations the plaintiff filled out an order for a new Ferguson 30 tractor, No. T081084. The trade-in of a 1943 Ford Ferguson tractor was noted on the order "subject to look at Ford Ferguson tractor." The difference to be paid was noted as $1,500. The order was signed by the defendant with his full name and by the plaintiff with his initials. The next day plaintiff went to the home of defendant, examined the old tractor, and accepted it as satisfactory. The defendant agreed to come to plaintiff's place of business the next day which was Monday, June 2, 1952, to close the deal. The defendant refused to go through with the transaction. The $1,500 was not paid and the new tractor was not delivered. This action was instituted by the plaintiff for the loss of profit sustained by defendant's breach of contract. The defendant's answer was a general denial. The defense made at the trial was that the transaction was in violation of the statute of frauds and that the deal was never fully consummated. The defendant alleges that the trial court erred in failing to hold that the transaction contra-

vened the statute of frauds and in finding that the evidence sustained a judgment for the plaintiff in the amount of $365.92.

We point out that the action was one at law in which a jury was waived. Under such circumstances, the findings of the trial court are equivalent to the verdict of a jury. If there is a conflict in the evidence this court in reviewing the judgment rendered will presume that controverted facts were decided by the trial court in favor of the successful party and the findings will not be disturbed unless clearly wrong. Wallace v. Insurance Co. of North America, 162 Neb. 172, 75 N. W. 2d 549; Grant v. Williams, 158 Neb. 107, 62 N. W. 2d 532. We necessarily conclude that the conflicts in the oral testimony offered at the trial must be resolved in favor of the plaintiff.

It is contended by the defendant that the statute of frauds is a defense to the present action. This defense was properly raised by a general denial. Benes v. Reed, 158 Neb. 128, 62 N. W. 2d 320. The statute of frauds provides in part: "(1) A contract to sell or a sale of any goods or choses in action of the value of five hundred dollars or upwards shall not be enforceable by action unless the buyer shall accept part of the goods or choses in action so contracted to be sold or sold, and actually receive the same, or give something in earnest to bind the contract or in part payment, or unless some note or memorandum in writing of the contract or sale be signed by the party to be charged or his agent in that behalf." § 69-404, R. R. S. 1943. The order for the purchase of the tractor was admittedly signed by the defendant, the person to be charged. The only question here presented is the sufficiency of the signed order to constitute a note or memorandum in writing as required by the statute.

The sufficiency of a memorandum in writing to make enforceable a contract within the statute is set forth in Restatement, Contracts, section 207, page 278, as follows:

"A memorandum, in order to make enforceable a contract within the Statute, may be any document or writing, formal or informal, signed by the party to be charged or by his agent actually or apparently authorized thereunto, which states with reasonable certainty, (a) each party to the contract either by his own name, or by such a description as will serve to identify him, or by the name or description of his agent, and (b) the land, goods or other subject-matter to which the contract relates, and (c) the terms and conditions of all the promises constituting the contract and by whom and to whom the promises are made." The memorandum in writing in the present case designates with certainty the parties to the contract and the subject matter to which the contract relates. The defendant asserts that it does not include all of the essential terms and conditions of the sale in that it does not set forth the date of delivery, the date of settlement, and who was to make the delivery. We think the memorandum is sufficient in this respect since the omitted statements are only what the law would imply in such a contract stated in the memorandum. The law implies a delivery by the seller within a reasonable time and that the price will be paid on delivery of the subject matter. Restatement, Contracts, § 207, Comment a, Illustration 12, p. 282. The memorandum in writing required by the statute of frauds is not the contract, but only written evidence of an oral contract. The requirement of a memorandum in writing presupposes the existence of such a contract. The memorandum must contain a statement of the essential terms of the oral contract. If the time of delivery of the goods and the time of their payment is an integral part of the oral contract, they must be set out in the written memorandum. But if, as here, they are not agreed upon in the oral contract, the law implies that the delivery was to be made in a reasonable time and that payment would be made upon delivery. The rule is stated in Berman Stores Co. v. Hirsh, 240 N. Y. 209, 148 N. E. 212, as

follows: "If the parol agreement fixed no time for delivery the memorandum evidencing the contract is sufficient under the statute since it contains all the terms which have been agreed on. In such case the law supplies the missing term and requires delivery within a reasonable time. If, on the other hand, the time was fixed by the parties the memorandum is insufficient." We conclude from the foregoing authorities that as the oral contract did not provide for the time of delivery and payment, the law supplies the missing terms and the written memorandum meets the requirements of the statute of frauds.

The defendant complains that the evidence was insufficient to sustain the amount of the judgment rendered. The evidence shows that the new tractor cost the plaintiff $1,413.49. The retail list price was shown to be $1,779.41. It is evident that the trial court entered judgment for the difference amounting to $365.92. There is no evidence in the record as to the market value of the new tractor at the time of the sale. The market value of the old tractor traded in by the defendant is not shown.

The Uniform Sales Act provides in part: "(1) Where the buyer wrongfully neglects or refuses to accept and pay for the goods, the seller may maintain an action against him for damages for nonacceptance. (2) The measure of damages is the estimated loss directly and naturally resulting, in the ordinary course of events, from the buyer's breach of contract. (3) Where there is an available market for the goods in question, the measure of damages is, in the absence of special circumstances, showing proximate damage of a greater amount, the difference between the contract price and the market or current price at the time or times when the goods ought to have been accepted, or, if no time was fixed for acceptance, then at the time of the refusal to accept." § 69-464, R. R. S. 1943. See, also, Jobbers Overall Co. v. Deputy Co., 109 Neb. 703, 192 N. W. 210. There is no

evidence in the record as to the market value of the new tractor. The retail price of the tractor is a speculative price and not proper to be here considered under the measure of damages fixed by the statute. The measure of damages applied by the trial court is not the proper one. There is no evidence in the record to sustain a judgment for any amount other than nominal damages. The market value of the 1943 tractor is not shown. It is evident therefore that there is no evidence in the record showing the contract price or the reasonable market value of the new tractor. There is no evidence in the record properly to be considered which supports the trial court's finding. The judgment is therefore clearly wrong. The evidence being wholly insufficient to sustain the judgment of the trial court, it cannot stand. The judgment of the trial court is therefore reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

STATE OF NEBRASKA, APPELLEE, V. VALDEMAR A. NIELSEN, APPELLANT, BERN R. COULTER, INTERVENER-APPELLEE.
79 N. W. 2d 721

Filed December 14, 1956. No. 34027.

1. **Waters.** By statute, all appropriations for water must be used for some beneficial or useful purpose, and when the appropriator or his successor in interest ceases to use it for such purpose, the right ceases.
2. ———. The Department of Roads and Irrigation has the authority to cancel a water appropriation where the same has not been used for some beneficial or useful purpose, or having been so used at one time has ceased to be used for such purpose for more than 3 years.
3. ———. Irrigation rights may be lost by abandonment or nonuser of such rights for the period of statutory limitations relating to real estate.
4. **Limitations of Actions.** By statute, an action for the recovery of the title or possession of lands, tenements, or hereditaments can only be brought within 10 years after the cause of action shall have accrued.

5. **Abandonment.** "Abandonment" is the relinquishment of a right by the owner thereof, without any regard to future possession by himself or any other person, but with the intention to forsake or desert his right.
6. **Waters.** Nonuser must be continued for a time equal to the statutory limitation upon actions to recover the possession of real property in order to lose the right of appropriation.
7. **Estoppel.** "Estoppel" means the preclusion of a person from asserting a fact, by previous conduct inconsistent therewith, on his own part or the part of those under whom he claims, or by an adjudication upon his rights which he cannot be allowed to call in question.
8. ———. To constitute an estoppel, in the absence of false representations by the party sought to be estopped, he must have been guilty of such conduct as to have given the person pleading the estoppel reason to believe that a state of facts existed inconsistent with those now asserted against him and in reliance on which he acted.
9. ———. When a person knowing his rights takes no steps to enforce them until the condition of the other party has, in good faith, become so changed that he cannot be restored to his former state, if the right be then enforced, delay becomes inequitable and operates as an estoppel against the assertion of the right.
10. **Injunctions.** Evidence examined and held sufficient to sustain the permanent injunction judgment.

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

Paul Rhodes and *Heaton & Heaton*, for appellant.

Clarence S. Beck, Attorney General, *Robert V. Hoagland*, and *Robert J. Bulger*, for appellee.

Mothersead, Wright & Simmons, for intervener-appellee.

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

MESSMORE, J.

This is an action brought by the State of Nebraska as plaintiff, against Valdemar A. Nielsen as defendant, in the district court for Morrill County. The purpose

of the action was to permanently enjoin the defendant from appropriating, diverting, or taking water from Pumpkinseed Creek for irrigation or any other purpose, and to permanently enjoin the defendant from interfering with or preventing the access of officers, agents, and employees of the Department of Roads and Irrigation to the dam, headgate, and irrigation works alleged to be owned by the defendant in the performance of their official duties. One Bern R. Coulter was granted leave to intervene in the action. The trial court found generally in favor of the plaintiff and the intervener and against the defendant, and permanently enjoined the defendant from interfering with or preventing the access of the employees of the Department of Roads and Irrigation to the dam, headgate, and irrigation works belonging to the defendant in the performance of their official duties, and from appropriating, diverting, or taking water from Pumpkinseed Creek for irrigation or any other purpose. The defendant filed a motion for new trial which was overruled. The defendant thereafter perfected his appeal to this court.

For convenience we will refer to the State of Nebraska as the State; the Department of Roads and Irrigation as the department; Valdemar A. Nielsen as defendant or Nielsen; Bern R. Coulter, intervener, as intervener; Pumpkinseed Creek, in some instances, as the creek; the State Department of Irrigation, Highways, and Drainage, as the State Board or State Board of Irrigation; and other names applied to state agencies shown by the record by the names used therein.

The record shows that Nielsen owns all of Section 30, Township 19 North, Range 52 West of the 6th P. M., in Morrill County, and other lands which he farms; that Justin S. Smith and Albert Langford were the record owners of part of Section 30 above described, subject to a mortgage; that they purchased this land in 1921, and Smith moved onto the land in 1921; and that thereafter the mortgage was foreclosed and the defendant acquired

his present ownership of the land by virtue of foreclosure proceedings, the conveyance to the defendant being dated March 1, 1932, when he moved onto the land. He also acquired other parts of Section 30 by deed in 1939 from other parties. He has farmed the land at all times since moving upon it. Pumpkinseed Creek is a natural stream of the State which flows through defendant's land.

The intervener owns land adjoining Nielsen's land, that is, all of Section 29, Township 19 North, Range 52 West of the 6th P. M., in Morrill County immediately east of Nielsen's home section. He also owns land in Sections 18 and 19 to the north of the Nielsen land, and other lands. He completed the purchase of said lands in 1939. Pumpkinseed Creek runs across Section 29.

The record further discloses that on June 24, 1895, P. P. Waitman, also known as Price P. Waitman, made claim for an appropriation of irrigation water from Pumpkinseed Creek to water part of Section 30 and other lands in Township 19 North, Range 52. On July 14, 1896, hearing was had on this claim which resulted in approval of the claim on April 24, 1897, and identified as docket No. 847. This docket provided for irrigation on both the north and south sides of the creek, and two canals are shown on the plat accompanying the claim. This adjudication involved lands now owned by the defendant. The testimony of P. P. Waitman at the hearing was to the effect that he succeeded to the canal of Dick Brown. This canal is referred to in the record at times as the Dickie Brown canal which had carried water in 1887. Waitman's priority was dated March 12, 1891. On July 10, 1900, Price P. Waitman filed a petition for a permit to relocate the headgate shown in docket No. 847. This permission was granted July 14, 1900.

On October 11, 1923, the Department of Public Works commenced proceedings for the cancellation of docket No. 847, and set a hearing to be held in the courthouse

at North Platte at 9 a. m., November 20, 1923, to show cause why said appropriation should not be canceled in part or in whole, in accordance with section 8428, Comp. St. 1922. Notice of the hearing was sent by registered mail to the landowners as shown by the records of the county clerk of Morrill County. Notice was also published in the Bridgeport News-Blade in Morrill County. On November 20, 1923, hearing was had pursuant to said notice. No one appeared to protest the cancellation of the appropriation. The order of cancellation was dated December 31, 1923, and there have been no proceedings to reopen or set aside this order.

A field report dated September 26, 1923, shows the headgate of the Waitman canal in Section 30 to be practically useless; that there was no sign of a dam; that the canal had grown full of grass and weeds; and that there was nothing left of the old flume that crossed the creek.

At the time of the cancellation proceedings, Albert Langford was deceased. Justin S. Smith testified that the land was pasture and hay land, and some farm land; that there was a ditch on the north side of the creek which ran east from the Banner County line to the north line of Section 30, for probably half a mile; that there was also a ditch on the south side of the creek which ran from the northwest to the southeast; that both of these ditches were filled with grass and weeds; that there was an old flume on the north side of the ditch which had been washed out or torn down and was in no condition to carry water; and that he did no work on the ditches or flume, nor did he attempt to do any irrigating through those ditches while he occupied the land.

Smith's son-in-law testified that he worked on the land in 1926 and 1927, and harvested on the land in July of 1928, 1929, and 1930. He had been over all of the land and observed no irrigation work going on, nor irrigation water running.

Waitman's son testified that he had trapped on the creek near the old flume on the irrigation project from 1912 to 1914; and that at that time the flume was rotted down and not in condition to carry water.

The intervener testified that in the fall of 1939, he and Nielsen drove up near the northwest corner of Section 30 to look at the old dam and the ditches to ascertain what the possibilities were of repairing the irrigation works and taking water from the creek. They discussed repairing some of the irrigation works, and in the fall of 1939 started to construct a wooden dam across the creek on the west side of Section 30, which was completed in 1940. The flume was located in the same place as the old flume. The fills on both sides of the creek were used. The west fill was concreted. After the work was completed, the intervener used both sides of the creek for irrigation purposes and has continued to do so since 1940. The intervener testified further that he talked to Nielsen about the time he made his first application for appropriation of water, with reference to joint irrigation works, and explained that he had talked to the chief of the Bureau of Irrigation and Drainage and was told that they could not proceed or continue to run the water without first obtaining an appropriation for the same. He asked Nielsen to go in with him and make a joint application for the appropriation of water for all of their lands on the north side of the creek. Nielsen said he was not interested at all; that he was not going to make any application for appropriation; that the creek ran through his land and he had the right to use whatever he wanted to; and that he was not going to ask the State when he could use the water.

The intervener further testified that he had expended a total of $4,230.70 since 1941 in connection with the irrigation works in Section 29 on both sides of Pumpkinseed Creek. He did not know that Nielsen claimed any rights under the Waitman appropriation until Nielsen filed his amended answer setting up such rights.

The intervener and Nielsen used the wooden dam which they had built up until 1947. It was in bad shape and had to be repaired every time it was used. Later Nielsen and his son built a concrete dam a little farther up the creek and used the same canal to divert water. At that time the intervener was using a concrete dam also. The intervener holds appropriations for water from Pumpkinseed Creek to use on his land in Section 29. He holds an appropriation from the State for water from Pumpkinseed Creek to irrigate land on the north side of the creek in Section 29, which was granted in June 1941. After he purchased the balance of the Waitman land in Section 29, he made application to the State for an appropriation for water to be used on the south side of the creek in Section 29, which was granted.

A hydrographer employed by the Bureau of Irrigation testified that he made an investigation of the Nielsen land in 1950. He talked to Nielsen on July 31, 1950, and Nielsen questioned him about taking boards out of the dam. Nielsen told him that the department had no authority to control the water running through his place for the reason that he did not have an application on file with the State, and that if he did have an application on file with the State, then there would be authority for the State to control the water running through his place. This witness did not get to the headgate because there was a sign posted warning employees of the Department of Roads and Irrigation to stay out unless they had the consent of the owner, and Nielsen denied him admittance.

A witness for the defendant testified that he was acquainted with the land owned by Nielsen; that his folks moved into that vicinity in 1895, and at that time he lived on the county line and was raised on Section 31, which is directly south of Nielsen's Section 30; that the Banner County line lies along the west edge of Section 30; that the school he attended was near the northeast corner of Section 25, perhaps 200 yards either

way from Section 25 in Banner County; and that while he was attending school in 1898, there was a dam where water was being diverted from Pumpkinseed Creek. The dam was in Banner County. He lived on the county line until he was 26 years of age, and discerned the boundary of the county line by location of a fence.

On October 9, 1950, after this suit was started, the defendant made claim, docket No. 1055, for an irrigation appropriation from Pumpkinseed Creek for his land under a Dick Brown canal priority of 1886 for parts of the north half and southeast quarter of Section 30, and other lands. The plat showed lands lying south of Pumpkinseed Creek. Objections were filed, and a hearing had resulting in an order denying the claim. The order was dated October 1, 1951. No appeal was taken from this order.

The defendant filed application No. 6811 on November 15, 1954, for appropriation of water from Pumpkinseed Creek for irrigation of his lands with the department, requesting the right to irrigate lands in all four corners of Section 30 on the south side of Pumpkinseed Creek. This application was approved January 31, 1955. In this connection, the defendant filed a plat showing the location of the lands sought to be irrigated. Comparing the plat filed with docket No. 1055 and this plat, the identity of the canals and the lands lying north of the canal and south of the creek in both appropriation applications are the same, with the exception that application No. 6811 includes additional lands south and above the canal, the reason being that there is a pump to be used under this appropriation. These plats show that no part of the southeast quarter of Section 30 lies north of Pumpkinseed Creek, therefore the allowance of water in docket No. 847 for lands in the southeast quarter was for lands south of the creek and identical with lands in application No. 6811.

The defendant contends that the Department of Roads and Irrigation has exclusive jurisdiction over all matters

pertaining to the granting or cancellation of water rights in this state as provided for in section 46-209, R. R. S. 1943.

Section 46-208, R. R. S. 1943, provides: "The Department of Roads and Irrigation shall exercise the powers and perform the duties formerly assigned to the state board of irrigation, highways and drainage."

Section 46-226, R. R. S. 1943, provides: "The Department of Roads and Irrigation shall make proper arrangements for the determination of priorities of right to use the public waters of the state, and determine the same. The method of determining the priority and amount of appropriation shall be fixed by the department."

The defendant makes reference to sections 46-227 to 46-232, R. R. S. 1943, as setting forth matters pertaining to adjudication of water rights, and to sections 46-229.03 to 46-229.05, R. R. S. 1943, as setting forth the procedure for the department to cancel an appropriation. In addition, we deem the following sections of the statute important in determining this appeal.

Section 46-229, R. R. S. 1943, provides: "All appropriations for water must be for some beneficial or useful purpose, and when the appropriator or his successor in interest ceases to use it for such purpose the right ceases."

Section 46-229.02, R. R. S. 1943, provides: "If it shall appear that any water appropriation has not been used for some beneficial or useful purpose, or having been so used at one time has ceased to be used for such purpose for more than three years, the department shall appoint a place and time of hearing, and shall serve notice upon the owners of such water appropriation or such ditch, canal or other diverting works to show cause by such time and at such place why the water appropriation owned by such person should not be declared forfeited and annulled, and shall also serve such

notice upon the landowners under such water appropriation, ditch or canal."

The procedure referred to in sections 46-229 to 46-229.05, R. R. S. 1943, has to do with cancellation of irrigation rights and is not exclusive. The courts of this state have recognized two methods of loss of irrigation rights independent of statutory procedure for cancellation by the department of such rights. These two methods may be classified as abandonment of water rights, or nonuser of such rights for the period of statutory limitations relating to real estate. This statute, section 25-202, R. R. S. 1943, provides in part: "An action for the recovery of the title or possession of lands, tenements or hereditaments, * * * can only be brought within ten years after the cause of action shall have accrued; * * *."

"Abandonment" is defined in State v. Oliver Bros., 119 Neb. 302, 228 N. W. 864, as follows: " ' "Abandonment" is the relinquishment of a right by the owner thereof, without any regard to future possession by himself or any other person, but with the intention to forsake or desert the right.' "

The defendant Nielsen claims rights under docket No. 847 as a successor in title to Justin S. Smith. Smith lived on the place in question and farmed it from 1921 until Nielsen took possession in 1932. During the period that Smith occupied the premises, he did no work on any of the irrigation works that had formerly been on the place. He did not irrigate the farm during that period which constituted 11 years. He received a notice of the cancellation proceedings affecting docket No. 847. He paid no attention to it and showed no interest in such proceedings. It is apparent from the evidence that Smith intended to abandon any irrigation rights existing under docket No. 847. There was a complete nonuser of the irrigation rights by Smith. Such abandonment is binding upon the defendant, since he claims title to the property and the water rights appurtenant to it under Smith and his co-owner Langford.

"Nonuser must be continued for a time equal to the statutory limitation upon actions to recover the possession of real property, in order to lose the right of appropriation." Farmers Canal Co. v. Frank, 72 Neb. 136, 100 N. W. 286.

A case in point, that cancellation proceedings as provided for by statute are not exclusive, is Kersenbrock v. Boyes, 95 Neb. 407, 145 N. W. 837. In this case Kersenbrock made application after the law of 1911 became effective to adjudicate rights he claimed he acquired under the 1895 law. Objections were filed to his application on the general ground, among others, that more than 10 years had elapsed and claimant, Kersenbrock, had failed to perfect his irrigation claim by development of the right. The State Board of Irrigation canceled both appropriations which was affirmed by the district court and this court. The statute providing for cancellation by the state board for 3 years nonuser went into effect on April 10, 1911. Kersenbrock asserted that his right could not be canceled except under this statute, and that he had 3 years after the effective date of the law in which to perfect his beneficial use of the water. This court said: "For a period of more than ten years before plaintiff was cited to appear before the state board, the dam was not in a condition to generate power for the beneficial uses of pumping water for irrigation or for running a grist-mill. The evidence shows clearly that plaintiff did not comply with statutory conditions or make a beneficial use of public water under either application. * * * Under any construction of the act, plaintiff did not have over ten years to comply with statutory conditions." See, also, Kinnan v. France, 113 Neb. 99, 202 N. W. 452.

In the instant case the evidence shows nonuser of irrigation rights for more than the statutory period of 10 years, which results in a clear loss of any right of appropriation under docket No. 847 independent of any

cancellation proceedings. The defendant's contention cannot be sustained.

The defendant contends that an order of cancellation of a water appropriation by the Department of Roads and Irrigation is void where the department fails to serve proper notice on the owners of an appropriation.

The defendant cites and quotes section 8428, Comp. St. 1922, which was in effect at the time of the issuance of notice given by the department and at the time of the hearing in North Platte in 1923. We make reference to the notice to be served as required by the statute. The statute requires that a notice shall be served upon the owners of such water appropriations, and the department shall also serve such notice upon the landowners under such water appropriations, ditch, or canal. In addition, such notice shall be served at least 30 days before the date of hearing upon those owning or controlling the water appropriation and the ditch, canal, or reservoir for the purpose of using or storing water for any purpose whatsoever, if they are known to the Department of Public Works to be the owners thereof and maintain an office within the State of Nebraska, and if they do not maintain an office within the State of Nebraska, then such notice shall be served by the publication thereof in some legal newspaper in the county in which the place of diversion of said water appropriated is located. In addition, a copy of such notice shall further be served personally or sent by registered mail to all persons appearing from the records of the county clerk or register of deeds to be landowners under such appropriations.

In connection with this contention, the defendant states that on October 11, 1923, when the notice of the proposed hearing for the cancellation of water appropriation under docket No. 847 was issued by the department, and on November 20, 1923, when the hearing was held at North Platte, Albert Langford was the owner of an undivided interest in the fee title of the land covered

by the appropriation. At that time he was deceased, having died in 1922, and his estate was under probate in Scotts Bluff County. No notice was served upon any representative of his estate or his heirs. On the same day, Gold-Stabeck Company held a valid, recorded first mortgage lien on said land and was not served with any notice of hearing for cancellation. The headgates of the canal were in Banner County, and the notice was published in Morrill County. The defendant asserts that the above-mentioned statute requires the service of notice on the owners of such appropriation and publication of the notice in the county where the headgates or diversion is located. In support of this contention the defendant cites several cases to the effect that a judgment rendered by a court without jurisdiction of the parties is absolutely void. See, Omaha Nat. Bank v. Robinson, 73 Neb. 351, 102 N. W. 613, 104 N. W. 1070, 119 Am. S. R. 903; Ehlers v. Grove, 147 Neb. 704, 24 N. W. 2d 866; Board of Trustees of York College v. Cheney, 160 Neb. 631, 71 N. W. 2d 195.

The defendant, in the light of the foregoing, asserts that the order of cancellation made by the State Board of Irrigation dated November 20, 1923, and the water appropriation known as docket No. 847 is still valid and a subsisting property right belonging to the defendant by failure on the part of the State Board of Irrigation to comply with the provisions of the statute existing at the time of the issuance of the notice and the time of hearing.

In analyzing the above-cited statute, it contemplates the owners of water appropriations shall be served personally where the owner is known to the department and if the owner maintains an office within this state. If the owner of the appropriation does not maintain an office within this state, then the notice is to be served by publication in the county where the diversion of the appropriation is located. In the instant case the appropriation was originally taken out by Price P. Waitman,

known also as P. P. Waitman, and it appears from the records of the department that he was the owner of the appropriation. P. P. Waitman died in 1919, so obviously he could not maintain an office in this state. Therefore, the provisions with reference to publication of notice became pertinent. The notice was published in Morrill County and not in Banner County. The defendant contends that the headgate of the canal was located in Banner County, and submits the testimony of Glen Hascall to the effect that there was a diversion dam in Banner County in 1898. The defendant then makes reference to the application to relocate a headgate in Banner County made and approved in 1900. The application to relocate the headgate does not constitute proof of its location, but is proof of an approval to locate the same in Banner County. This type of evidence has no probative value as to whether or not the dam was located in Banner County at the time of the cancellation of docket No. 847. The time that is material as to the location of the diversion works is the time of the cancellation hearing on November 20, 1923. The evidence relied upon by the defendant is removed in time from the cancellation order by at least 23 years, and offers no proof of conditions existing at the time of the cancellation order. The record does disclose evidence as to the time and does furnish proof of the location of the headgate in 1923. Exhibit 16 contains a record of A. E. Johnson, a representative of the Department of Public Works, who inspected the location on September 26, 1923, and placed the location as being in Section 30 in Morrill County. The testimony of Justin S. Smith, the defendant's predecessor in title, stated that there was only one headgate and it was located in Morrill County.

It is apparent that as to the owner of the appropriation, the notice could not be served personally and therefore notice was published in the proper county where the diversion of the canal was located at that time. While there is some disparity in the evidence as to the

location of the headgate, the intervener, by his testimony, explained that the creek, in times of high water, washed out some of the smaller dams and irrigation works along the creek.

With reference to the notice as to the landowners, the statute specifies that a copy of the notice shall be served either personally or by registered mail on "all persons appearing from the records of the county clerk or register of deeds to be landowners under such appropriation." § 46-229.03, R. R. S. 1943. The record discloses that the State, in the cancellation proceedings, secured from the county clerk of Morrill County a certificate of the persons appearing from the records of his office as being owners of land as described thereon. Notice was sent to all parties named in the certificate. The Legislature specified that notice was to go to the party appearing of record to be the owner.

With reference to the interest of Albert Langford, the interest he had in the appropriation appeared of record in his name and not in the names of his heirs. This service of notice was sufficient under the statute.

An underlying principle of the irrigation law is that an irrigation right to be retained must be applied to a beneficial use. The owner of land who personally, or through his agents, operates an irrigated farm is the person who can keep an irrigation right alive by beneficial application of the water and is the person to be notified in the event it is contended the right has not been beneficially used. A mortgagee of property is not entitled to operate the real estate as long as the mortgage continues only as a security document. The mortgagee without foreclosure is not entitled to take over the management of an irrigated farm and apply its water to beneficial purposes unless there is an agreement to that effect, which does not appear in this case.

We hold that the department complied with the statute with regard to notice and the service thereof.

Neilsen asserts there is no inconsistency under the

claim of right evidenced by docket No. 847 and the claim under application No. 6811 on the basis that docket No. 847 applied only to lands north of the creek and application No. 6811 applied only to lands on the south side of the creek. The original plat filed with docket No. 847 shows two canals, one on the south side and one on the north side of the creek. Waitman took over the Dick Brown ditch, and it is admitted by the parties that the Dick Brown ditch was on the south side of the creek. The opinion in connection with the granting of docket No. 847 shows that the appropriation was granted for the southeast quarter of Section 30, among other lands. The claim in docket No. 1055 also shows a portion of the southeast quarter of Section 30 as affected by that claim, which is borne out by the plat submitted therewith. Application No. 6811 lists 30 acres in the southeast quarter, and the plat submitted therewith shows the lands to be irrigated including a part of the southeast quarter of Section 30. All of the southeast quarter of Section 30 lies south of the creek, and no part of the southeast quarter of Section 30 lies north of the creek. It therefore follows that when Waitman was granted the right to irrigate part of the southeast quarter his rights included canals on both the north and south sides of the creek. The evidence also shows that there is an identity between part of the lands included in application No. 6811 and the lands evidenced by docket No. 847.

Subsequent to the cancellation proceedings in docket No. 847, a large number of appropriations have been granted, including the appropriation of the intervener. The defendant asserted no claim to a revitalization of the Waitman appropriation prior to the time of filing his answer on October 11, 1950. Nielsen purchased and entered into possession of the land covered by docket No. 847. He never asserted a claim to rights under docket No. 847 until 18½ years later. Just prior to the time that the intervener made his first application

for appropriation in 1941, the defendant advised him that he had no appropriation with the state and claimed as a riparian owner only. The intervener spent more than $4,200 in development of his irrigation appropriation. Should Nielsen's rights under docket No. 847 be revitalized, then the appropriation granted to the intervener by the department would be valueless.

The record shows that insofar as the State and the intervener are concerned Nielsen stood idly by, but he did make an express representation that he claimed no rights under any appropriation. The intervener relied upon this representation in making his application for appropriation and proceeded to develop the same. Nielsen had knowledge of the application of the intervener for an appropriation of water, and the work and the expense incurred by the intervener in the construction of his irrigation system. He made no protest nor gave any warning that he intended to claim any part of the waters of Pumpkinseed Creek. We believe that under such circumstances the following are applicable.

In State v. Smith, 135 Neb. 423, 281 N. W. 851, estoppel is described as follows, quoting from Graham Ice Cream Co. v. Petros, 127 Neb. 172, 254 N. W. 869: " 'Estoppel means "the preclusion of a person from asserting a fact, by previous conduct inconsistent therewith, on his own part or the part of those under whom he claims, or by an adjudication upon his rights which he cannot be allowed to call in question." Bouvier's Law Dictionary.' " * * * " 'To constitute an "estoppel," in the absence of false representations by the party sought to be estopped, he must have been guilty of such conduct as to have given the person pleading the estoppel reason to believe that a state of facts existed inconsistent with those now asserted against him and in reliance on which he acted.' "

In Carson v. Greeley, 107 Neb. 609, 187 N. W. 47, the court said that when a person knowing his rights takes no steps to enforce them until the condition of the other party has, in good faith, become so changed that he can-

not be restored to his former state, if the right be then enforced, delay becomes inequitable and operates as an estoppel against the assertion of the right. See, also, Kinnan v. France, *supra.*

In Enterprise Irrigation Dist. v. Tri-State Land Co., 92 Neb. 121, 138 N. W. 171, the court said: "It would be manifestly inequitable and unjust to allow the plaintiffs, after the works were practically finished and the money expended, to insist upon claims which, had they been asserted in good time, would at least have put the defendants upon their guard and have given them cause to pause and hesitate in their expenditures until the validity of their title had been determined." The court held that the parties were estopped to assert the claim later.

Apparently the defendant does not contest the right of the representatives of the department to enter upon the lands of the appropriators of water in the performance of their duties as provided for by statute.

We conclude that the Waitman appropriation was effectively canceled by the proceedings of the Department of Public Works in 1923; that abandonment of the water rights under docket No. 847 for more than 10 years resulted in the loss of such rights; that the trial court had jurisdiction to determine the validity of the claim of defendant Nielsen to the Waitman appropriation and the rights of the intervener; and that the doctrine of estoppel applies due to Nielsen's failure to make claim or give any warning to the intervener until the intervener had obtained an appropriation of water from Pumpkinseed Creek at large expense and constructed an irrigation system on his land.

For the reasons given herein, the permanent injunction granted by the trial court is affirmed.

AFFIRMED.

TILLIE LINCOLN, APPELLANT, V. STARLING BURTON KNUDSEN, APPELLEE.
79 N. W. 2d 716

Filed December 14, 1956. No. 34030.

1. **Trial.** A motion for directed verdict must be treated as an admission of the truth of all material and relevant evidence submitted on behalf of the party against whom the motion is made, and such party is entitled to have every controverted fact resolved in his favor and to have the benefit of every inference which can reasonably be deduced from the evidence.
2. **Automobiles: Negligence.** An essential element necessary to be proved to entitle a passenger in an automobile to recover damages from the host on the ground of negligence less than gross is that he is a passenger for hire.
3. **Trial.** The burden of proof means the duty resting on one party or the other to establish by a preponderance of the evidence an issue essential to recovery.
4. ———. In this sense the burden of proof never shifts nor changes from the first to the last where it is placed by the pleadings or the substantive law of the case.
5. **Automobiles: Negligence.** The substantive law of the case required that plaintiff prove that she was a passenger for hire, and not an invited guest, as a condition of the right to recover on account of negligence of the defendant less than gross.
6. **Negligence.** Gross negligence within the meaning of section 39-740, R. R. S. 1943, means great or excessive negligence. It indicates the absence of slight care in the performance of duty.
7. **Negligence: Trial.** Ordinarily, the question of gross negligence is one of fact for a jury, but if the evidence respecting it is not in conflict or is so conclusive that ordinary minds may not draw different conclusions therefrom the question is one of law for the court.

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

Richard A. Dier, Neil R. McCluhan, and *Kindig & Beebe, for* appellant.

Luebs & Elson, for appellee.

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

YEAGER, J.

This is an action for damages for personal injuries by

Tillie Lincoln, plaintiff and appellant, against Starling Burton Knudsen, defendant and appellee. It was tried to a jury in Hall County, Nebraska. At the conclusion of the evidence on behalf of plaintiff, the defendant made a motion for a directed verdict in his behalf which was sustained, whereupon judgment was rendered in his favor. Thereafter a motion for new trial was duly filed. This motion was overruled.

From the judgment and the order overruling the motion for new trial the plaintiff has appealed.

The brief contains four assignments of error as grounds for reversal of the judgment, however by them only one question is presented, namely, that of whether or not the evidence of negligence on the part of the defendant was sufficient for submission to a jury for determination. The effect of the judgment of the court was to say that the evidence was insufficient to sustain a right of recovery by plaintiff against the defendant.

The plaintiff as ground for recovery pleaded, to the extent necessary to state herein, that on or about November 29 (1952), she was riding as a passenger in an automobile owned and operated by the defendant in a westerly direction on U. S. Highway No. 30 in Hall County, Nebraska, and that at a point about seven-tenths of a mile west of the city limits of Wood River, Nebraska, the defendant operated the automobile in a negligent manner against an automobile operated by one John A. DeWulf, thus causing injury and damage to the plaintiff. The specifications of negligence are that the defendant failed to operate his automobile in the right or north lane of traffic; that he failed to yield one-half of the traveled portion of the highway to DeWulf; that he failed to maintain control of his own automobile; that he failed to keep a proper lookout; that he failed to yield the right-of-way to DeWulf; and that he operated his automobile at a high and excessive rate of speed. To the extent necessary to state it here the answer denied the allegations of the petition.

To support the allegations of her petition the plaintiff adduced evidence as follows: Prior to November 29, 1952, for a period of about 2 weeks, she had been a baby-sitter in the home of defendant for which as compensation, but without any agreement as to the rate, she was paid $8 a week. The plaintiff talked with the wife of defendant about a proposed trip to Kearney, Nebraska, to visit her son. The wife of defendant discussed with the plaintiff the prospect of the defendant taking plaintiff to Kearney, Nebraska, and stated or suggested that if the trip was made that plaintiff would not be paid for 1 week of service. The defendant was not a witness to the conversation and there is no evidence that he knew of it or that he ever assented to the proposal. There is no evidence of any agreement or arrangement between plaintiff and defendant covering a trip to Kearney, Nebraska.

After this conversation and early in the morning on November 29, 1952, the parties to the action, together with the wife of defendant and his two children, started on their trip to Kearney, Nebraska. The trip was without unusual incident until after they had passed through Wood River. The weather was fair. West of Wood River the paved highway was clean, straight, and level. On the shoulders there was snow.

John A. DeWulf, also referred to in the testimony as John E. DeWolf, was coming from the west in his automobile on his right side of the highway at a speed of from 55 to 60 miles an hour. He was followed by another automobile. The automobile which was following passed and pulled back into the lane ahead of DeWulf. About that time DeWulf saw an automobile which was headed west on the north shoulder of the highway about 200 yards to the east. This was the automobile of the defendant. The automobile of defendant came off the shoulder back onto the highway and into the path of DeWulf where it was struck by the automobile of DeWulf. The front end of DeWulf's automobile struck

defendant's automobile on its right side. It was this collision which produced the injuries and damages of which the plaintiff complains. Before the collision DeWulf applied his brakes but was unable to avoid striking defendant's automobile.

Evidence of a Nebraska Safety Patrolman disclosed skid marks made by DeWulf's automobile. They extended 50 feet west of the scene of the collision. They were all south of the center line of the highway. The defendant's automobile left the paving and went onto the north shoulder 136 feet east of the scene of the collision, traveled on the shoulder for 80 feet, and then came back on and across the highway to the point of the collision.

There is no direct evidence to that effect, but it appears inferentially and quite conclusively that the defendant left the paving and went onto the shoulder to avoid a collision with the automobile coming from the west which passed DeWulf. There is no explanation in the record as to the reason why the defendant in his return to the paving crossed the center line and into the path of DeWulf's automobile.

What has been said here, it is believed, fairly reflects essentially the pleadings and the evidence at the time the motion for directed verdict was made.

Thereafter but before the ruling was made, the plaintiff was allowed to and did amend the petition. By the petition as amended it was charged that the negligence complained of was gross.

After the petition was amended two theories of recovery were presented for consideration. The effect of the motion for directed verdict was to say that neither theory was sustained by the evidence.

The first theory is that the plaintiff was a passenger for hire in defendant's automobile and in consequence of this she was entitled to recover on proof of ordinary negligence. She contends that the evidence was sufficient in proof of ordinary negligence for submission to a jury.

The other theory is that, assuming that she was not a passenger for hire but was a guest within the meaning of section 39-740, R. R. S. 1943, the evidence was sufficient for submission to a jury for the reason that it was adequate as proof of gross negligence within the meaning of that section.

The defendant insists that the evidence is insufficient for submission to a jury upon either theory.

A rule to be observed in an approach to the determination of the questions presented by this appeal, which is so well settled that no citation is required to support it, is that a motion for directed verdict must be treated as an admission of the truth of all material and relevant evidence submitted on behalf of the party against whom the motion is made, and such party is entitled to have every controverted fact resolved in his favor and to have the benefit of every inference which can reasonably be deduced from the evidence.

Reverting now to the question of whether or not there is evidence to sustain the first theory it must be said that there is no evidence to support a finding that there was any agreement or understanding that the plaintiff was being transported to Kearney, Nebraska, for hire within the meaning of section 39-740, R. R. S. 1943.

The plaintiff theorizes in effect, as we interpret, that the services performed and to be performed by plaintiff for defendant and his wife were necessaries of life for which the wife could contract and by so contracting obligate the defendant to pay for them, and further that she could and in this instance did without defendant's knowledge contract also the manner of payment which was the transportation of plaintiff for hire to Kearney, Nebraska.

To support the theory plaintiff cites section 42-201, R. R. S. 1943; 26 Am. Jur., Husband and Wife, § 388, p. 987; 41 C. J. S., Husband and Wife, § 62, p. 531; In re White's Estate, 150 Neb. 167, 33 N. W. 2d 470; Mooney v. McMahon, 83 N. J. L. 120, 83 A. 504. In these cited

cases and texts nothing is found to support the theory and we have found nothing to support it.

The cited statute is limited to a declaration of the liability of a wife for the necessaries of life for the family. The cases and the texts point out that the husband is liable for the necessaries of life of the family and measurably define what are necessaries of life. They do not declare a principle the effect of which is to say that a husband is bound without his assent to a contract made by the wife related to a subject other than necessaries of life.

The evidence showed that the plaintiff was a passenger in defendant's automobile. There was no competent evidence to show that she was other than a "passenger or person riding in such motor vehicle as a guest or by invitation and not for hire."

An essential element necessary to be proved to entitle plaintiff to have a recovery from the defendant on proof of negligence less than gross was that she was a passenger for hire. The restriction of section 39-740, R. R. S. 1943, by its terms makes this so. This became an element of proof necessary for recovery under this theory by reason of the fact that it was made by the statute or in other words the substantive law of the case.

The applicable definitive principle is the following: "The burden of proof means the duty resting on one party or the other to establish by a preponderance of the evidence an issue essential to his recovery. In this sense the burden of proof never shifts nor changes but remains from the first to the last where it is placed by the pleadings or the substantive law of the case." Kucaba v. Kucaba, 146 Neb. 116, 18 N. W. 2d 645. See, also, Fitzsimons v. Frey, 153 Neb. 124, 43 N. W. 2d 531.

It becomes apparent therefore that the court did not err in its conclusion that the evidence of plaintiff failed to sustain a cause of action on her first theory.

The question of whether or not the evidence of plaintiff was sufficient for submission to a jury on the second

theory must be determined in a manner agreeable to the following statement of principle: "Ordinarily the question of gross negligence is one of fact for a jury, but if the evidence respecting it is not in conflict or is so conclusive that ordinary minds may not draw different conclusions therefrom the question is one of law for the court." Johnson v. Jastram, 155 Neb. 376, 52 N. W. 2d 245. See, also, Pavlicek v. Cacak, 155 Neb. 454, 52 N. W. 2d 310; Paxton v. Nichols, 157 Neb. 152, 59 N. W. 2d 184; Cunning v. Knott, 157 Neb. 170, 59 N. W. 2d 180; Ottersberg v. Holz, 159 Neb. 239, 66 N. W. 2d 571.

The court has said: "Gross negligence within the meaning of section 39-740, R. S. 1943, means great or excessive negligence. It indicates the absence of slight care in the performance of a duty." Johnson v. Jastram, *supra*. See, also, Pavlicek v. Cacak, *supra*.

The evidence upon which this court must determine whether or not the case should have been submitted has been fully and fairly summarized and it will not be repeated.

This evidence does not directly disclose the reason why the defendant left the paving and drove onto the shoulder to the north, however, the only reasonable inference to be drawn is that it was to avoid a collision with the automobile which passed DeWulf. In such a movement no negligence by defendant was involved or claimed.

If there was evidence of gross negligence it was in the return and what immediately followed. A reasonable inference and the only one favorable to plaintiff, we think, is that the defendant by some type of inadvertence lost control of his automobile and that because thereof it crossed over into the path of DeWulf's automobile. Within the meaning of the decisions of this court interpreting and applying section 39-740, R. R. S. 1943, a large number of which have been reviewed in Born v. Estate of Matzner, 159 Neb. 169, 65 N. W.

2d 593, this was not evidence of gross negligence sufficient for submission to a jury.

This being true the trial court did not err in sustaining the motion for directed verdict as regards the theory contained in the petition as amended.

The judgment of the district court is affirmed.

AFFIRMED.

DORAN NEWBERRY, APPELLANT AND CROSS-APPELLEE, V. CHET YOUNGS, DOING BUSINESS AS TRI STATE LIVESTOCK COMMISSION COMPANY, APPELLEE AND CROSS-APPELLANT.
80 N. W. 2d 165

Filed December 14, 1956. No. 34088.

1. **Workmen's Compensation.** The term continuous employments in section 48-126, R. S. Supp., 1955, relates to the contract of hiring and is applicable to those situations where the relationship of employer and employee is a continuing one.
2. ———. Section 48-120, R. R. S. 1943, making the employer liable for reasonable medical and hospital services, includes the cost of travel incident to and reasonably necessary for obtaining such services.
3. ———. The burden placed upon the employer by section 48-120, R. R. S. 1943, is designed to relieve or cure the physical injuries suffered by the employee.

APPEAL from the district court for Red Willow County: VICTOR WESTERMARK, JUDGE. *Affirmed in part, and in part reversed and remanded with directions.*

Morrison, Lyons & Starrett, for appellant.

Charles E. McCarl, for appellee.

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

SIMMONS, C. J.

This is a compensation case in which plaintiff ap-

peals and defendant cross-appeals. The appeal presents two questions:

Was the plaintiff's contract of hire such as to cause compensation to be calculated on the formula prescribed by section 48-126, R. S. Supp., 1955, for a continuous employment relationship? The trial court held that it was, and we affirm that holding.

Was the plaintiff entitled to recover the reasonable cost of transportation from his home to the doctor's office and to the hospital for medical care and treatment? The trial court denied the claim. We find it to be an allowable claim under the provisions of section 48-120, R. R. S. 1943.

The cross-appeal presents the contention that the trial court erred in allowing recovery of the cost of eyeglasses and shoes under the provisions of section 48-120, R. R. S. 1943. We find that the claim for eyeglasses should have been denied and the claim for shoes allowed in part.

The contract of hire was verbal. It is not in serious dispute. The defendant conducts a livestock sale barn at McCook. Sales are normally held every Saturday. On occasion special sales are held on other days.

Plaintiff testified that in April 1955, he worked for defendant 2 hours as a cattle sorter and was paid therefor in cash. The following Saturday he returned and sought work and none was available.

On May 21, 1955, plaintiff again asked for work, was employed by defendant, and agreed to work regularly thereafter on Saturdays, unless notified otherwise, which he did each Saturday down to and including August 13, 1955, the date of the accident involved here. The agreed pay was to be $1 an hour for the number of hours worked. The hours varied depending on the volume of the sales. Plaintiff was paid at the close of each day he worked. He received a total payment of $70 for the period so employed.

Plaintiff went to the defendant's sale barn each Sat-

urday and went to work without reporting to the defendant and without other contract of hire. He knew where he was supposed to work, and he went there and did the work. He was to continue to do that at every regular sale until further notice or agreement.

Plaintiff was required to work on other days for special sales, if called upon. It does not appear that such work was required during the period involved.

The above in substance recites the contract of hire and the compensation paid.

The trial court held that the plaintiff had been continuously employed to work for defendant from May 21, 1955, to August 13, 1955, and calculated the amount of compensation based on the provision of section 48-126, R. S. Supp., 1955, which provides in part: "In continuous employments, if immediately prior to the accident the rate of wages was fixed by the day or hour or by the output of the employee, his weekly wages shall be taken to be his average weekly income for the period of time ordinarily constituting his week's work, and using as the basis of calculation his earnings during as much of the preceding six months as he worked for the same employer."

The question presented here is the correctness of the determination of continuous employment. The amount of the award is not challenged if that determination is found to be correct. We have applied this statute in a number of cases.

The plaintiff cites here and relies upon Davis v. Lincoln County, 117 Neb. 148, 219 N. W. 899; Carlson v. Condon-Kiewit Co., 135 Neb. 587, 283 N. W. 220; Weitz v. Johnson, 143 Neb. 452, 9 N. W. 2d 788; and Gruber v. Stickelman, 149 Neb. 627, 31 N. W. 2d 753.

Defendant cites and relies on Johnsen v. Benson Food Center, 143 Neb. 421, 9 N. W. 2d 749, and Redfern v. Safeway Stores, Inc., 145 Neb. 288, 16 N. W. 2d 196.

It does not appear that we have undertaken directly

to define the term "continuous employments" except in Davis v. Lincoln County, *supra,* where we held that it existed "only when service or labor required in the performance of the contract service is substantially continuous." We there related the term to the contract of hiring but left the meaning of continuous rather indefinite.

Applicable here is the definition in United States v. Morris, 14 Peters 464, 10 L. Ed. 543: "To be 'employed' in anything, means not only the act of doing it, but also to be engaged to do it; to be under contract or orders to do it."

Romig v. Champion Blower & Forge Co., 315 Pa. 97, 172 A. 293, was a workmen's compensation case. There the statute provided: "In continuous employments, if immediately prior to the accident the rate of wages was fixed by the day or hour, or by the output of the employee, his weekly wages shall be taken to be five and one-half times his average earnings at such rate for a working day, and using as a basis of calculation his earnings during so much of the preceding six months as he worked for the same employer * * *."

The language of the act is the same as section 48-126, R. S. Supp., 1955, except as to the method of calculating the weekly wage.

In that case the employee worked 2 days a week. The court held: "The employment is continuous in that the status of employer and employee persists between the parties even though no work is done on a particular day. Claimant worked only two days a week, and was paid by the day, but a new contract of hiring was not created each week. In other words, the employee was not discharged after each day's work and reemployed when the foundry resumed operation. He was simply paid each week on the basis of the number of days on which the plant was operated. His employment was continuous, although the days on which work was per-

formed were broken in sequence through no fault of his own."

In Garnsky v. Metropolitan Life Ins. Co., 232 Wis. 474, 287 N. W. 731, 124 A. L. R. 1489, the court said: "When we reach the term 'continuous employment' it is the natural assumption that this refers to employment that has not been terminated or interrupted during the prescribed period, and that layoff does not, of itself, so interrupt or terminate."

In Restaino v. Board of Commissioners, 16 N. J. Misc. 266, 198 A. 765, it was held that employment implied the relationship of master and servant. In that case the court held that where the paintiff had not voluntarily quit his employment and had not been discharged his employment was continuous although the actual physical working by the hour or day had been interrupted by seasonal slack periods.

In In re Monroe's Executors, 132 Misc. 279, 229 N. Y. S. 476, the court held: " 'Continuously' does not necessarily mean working every day. A person may have 'continuous' use of a stream of water—it is not necessary to use it every hour or every day. A corporation may have paid dividends 'continuously' for many years, and the payment may have been once, twice or four times per annum. So a person may work for another 'continuously' three days a week, four days a week, or all the week. It means a continuous period of employment, continuous character of service—not consecutive days of labor."

Accordingly we hold that the term continuous employments in section 48-126, R. S. Supp., 1955, relates to the contract of hiring and is applicable to those situations where the relationship of employer and employee is a continuing one. It does not depend in its application on the number of hours an employee works in a day or the number of days an employee works in a week. Those questions go to the matter of the per-

formance of the contract and not to the nature of the contract.

Although it does not appear that we have heretofore so stated the rule, it does appear that as our decisions have progressed we have followed that rationale and construction in applying the statute.

In Redfern v. Safeway Stores, Inc., *supra*, we had a contract for part-time services where the contract was continuous under the above rule. We applied the statute after reviewing our former decisions.

In Gruber v. Stickelman, *supra*, we had a case where the employee was hired for a day at a time when help was needed. We held that it was not continuous employment.

Plaintiff points out that under the contract of hiring he was required to work on days other than Saturday for special sales, if called upon. That situation existed in the Redfern case. It was a provision of the contract of hiring. It did not change the continuous employment nature of the contract.

Accordingly we hold that the trial court did not err in applying the formula in the statute here involved in determining the compensation rate.

Plaintiff argues further that the result is inequitable and unjust. It often happens that the result of following a statutory plan of compensation has that effect upon one or the other of the parties. The remedy, however, is legislative and not judicial. It is axiomatic that plaintiff's right to recover at all depends on bringing his cause within the provisions of the act.

As a result of the accident plaintiff had the bones in his lower left leg broken. The injury, occurring on August 13, 1955, was severe. Plaintiff was taken to the hospital where "traction" was put on the leg. On August 24, 1955, an "open reduction" of the fracture was made, a plate was put in, and the leg placed in a cast. He was discharged from the hospital September 19, 1955. He returned to the hospital on September

21 for a dressing of the leg through a window put in the cast. Thereafter the doctor saw the plaintiff at "frequent intervals," the last time being on April 14, 1956. The doctor does not testify as to the dates or number of the "frequent" calls. The plaintiff testified, without contradiction, that because of the difficulty in climbing steps to the doctor's office, he quite often went to the hospital for dressings.

The leg was still in the cast on November 18, 1955, when it was examined by a specialist. It was then measured for a brace which plaintiff was wearing on January 5, 1956. At that time there was swelling in the left foot and restricted motion of the foot and ankle. It was then determined that the bone plate could be removed. The plate and screws were removed in January. The patient was wearing the brace on March 19, 1956, and at that time quite a bit of swelling remained and there was irritation about the operative area and some drainage from the incision. We recite this history to show the continuing need of medical care.

Defendant paid travel expense of the plaintiff to Lincoln on two occasions to secure specialist attention.

Plaintiff lives 11 miles from McCook. He testified that on occasions when his wife was unable to drive or their car was unavailable he hired a neighbor to take him to McCook to the doctor and to the hospital for the purpose of having his leg treated and dressed. He testified that he made in all 29 or 30 trips. He claimed compensation at $3 a trip for 29 trips, which the evidence shows without dispute were made. It also appears without dispute that $3 a trip was a reasonable charge.

Section 48-120, R. R. S. 1943, provides: "The employer shall be liable for reasonable medical and hospital services and medicines as and when needed, subject to the approval of the compensation court, not, however, to exceed the regular charge made for such service in similar cases * * *."

The compensation court allowed the claim for cost of transportation for $87.

The trial court denied recovery.

Defendant urges a denial of these expenses on the authority of Goliat v. Butler Consolidated Coal Co., 155 Pa. Super. 254, 38 A. 2d 727. In that case the facts as to the necessity of the travel were quite different from those here. Also the Pennsylvania statute had originally specifically required the payment of transportation costs and that part of the act had been repealed.

In Huhn v. Foley Bros., Inc., 221 Minn. 279, 22 N. W. 2d 3, the court construed a statute requiring the employer to furnish medical and other care. The court held that the purpose of the statute would be defeated if the employee were denied reimbursement for expenses incurred in travel reasonably necessary to make medical service available. See, also, Scruggs Bros. & Bill Garage v. State Industrial Comm., 94 Okl. 187, 221 P. 470.

Accordingly we hold that section 48-120, R. R. S. 1943, making the employer liable for reasonable medical and hospital services, includes the cost of travel incident to and reasonably necessary for obtaining such services.

Although the dates of the trips and the services performed on each trip do not appear, the record clearly sustains a finding that the travel was reasonably necessary to obtain medical service for which defendant was liable.

The trial court should have allowed plaintiff's recovery in the claimed amount and erred in not doing so.

This brings us to defendant's cross-appeal.

It also involves section 48-120, R. R. S. 1943. At the time of plaintiff's accident his eyeglasses fell to the ground and were broken. There is no claim that he suffered an eye or a head injury in the accident. He did not immediately replace the eyeglasses. Headaches developed. He was examined and no skull or eye injury was found. He purchased new eyeglasses at a

cost of $29. He claimed payment for the eyeglasses and the trial court ordered defendant to pay for them.

Need for eyeglasses is not the test. The burden placed upon the employer by section 48-120, R. R. S. 1943, is designed to relieve or cure the physical injuries suffered by the employee. We see no more reason to require the defendant to pay for eyeglasses under the circumstances here than there would be to pay the cost of cleaning or repairing clothing soiled or torn in an accident. The trial court erred in allowing the claim for the eyeglasses which were destroyed.

As a result of the injury plaintiff's left ankle and foot swelled appreciably. That condition continued into the time when the doctors desired that he begin to use the foot to restore the proper functioning of the foot and leg. It was also necessary that he have a shoe of soft leather and that the prescribed leg brace be attached to it. It was also necessary to build the heel up five-eighths of an inch to relieve pain. Plaintiff's old shoe would not fit and was not suitable. At the doctor's instruction he purchased a pair of shoes in order to get one suitable for use on the left foot. It was fitted with the brace and heel. He also bought a second pair of shoes in order to get a different size shoe for the right foot. The shoes cost $41.90. The trial court ordered the defendant to pay the cost of the two pairs of shoes.

The new shoe for the left foot was deemed necessary by the doctors to relieve and assist in the cure of the physical injuries suffered by the employee. We think the trial court should have and did properly allow the cost of the one pair of shoes. From the evidence here we must conclude that that cost was $20.95. There is no evidence that plaintiff required a new shoe for the right foot for any reason connected with his injury. The second pair was required for the purpose of plaintiff having a matching shoe for the right foot. That may be a quite proper purpose but the statute puts no burden on the defendant to pay the cost. The item

for shoes should have been allowed only in the sum of $20.95.

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

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

C. W. FOOTE, FOR HIMSELF AND ALL OTHER TAXPAYERS OF ADAMS COUNTY, NEBRASKA, APPELLANT, V. COUNTY OF ADAMS, NEBRASKA, ET AL., APPELLEES.

80 N. W. 2d 179

Filed December 21, 1956. No. 34025.

1. **Statutes.** In construing statutes and ascertaining the intent of the legislative branch of the government, the courts will take into consideration the settled practices of a legislative body.
2. ———. Courts should give to statutory language its plain and ordinary meaning.
3. **Officers.** The statutes of this state requiring official bonds of elected county officials require individual official bonds.
4. ———. A blanket bond purporting to cover all elected county officers does not meet the standards required by the statutes.

APPEAL from the district court for Adams County: EDMUND P. NUSS, JUDGE. *Reversed and remanded with directions.*

Bert L. Overcash, Bruckman & Brock, and *Woods, Aitken & Aitken,* for appellant.

Webb, Kelley, Green & Byam, Melvin K. Kammerlohr, and *Kirby, Simons, McDonnell & Kirby,* for appellees.

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

SIMMONS, C. J.

In this action plaintiff is a taxpayer suing for himself and all other taxpayers of Adams County. The

defendants are the County of Adams and the seven members of the county board of supervisors. The defendants will hereinafter be referred to as the county or the county board, as the case may be.

Plaintiff seeks to enjoin the county from purchasing and paying for a blanket bond from Western Surety Company covering any person elected to county office who is required by statute to furnish an official bond. The Western Surety Company will hereinafter be referred to as the company.

Other issues presented need not be determined in this appeal.

The defendants by answer alleged that the blanket bond involved complied with the statutes and furnished complete protection to the county. They pleaded other matters not involved in the question determined here.

The trial court held that the blanket bond when approved by the appropriate officers constituted a good and sufficient bond for each of the officers participating therein, and rendered judgment for the defendants.

Plaintiff appeals.

We reverse the judgment of the trial court and direct a judgment in accord with this opinion.

On July 7, 1954, the county board by motion provided that "we purchase the $5000.00 Blanket Position Bond from the Western Surety Co., * * * on all officials and employees with an excess" on certain official positions "at a four year price of $2181.87."

The bond bearing the original date of July 27, 1954, is in evidence. It carries a rider that its date shall be changed to read December 24, 1954. This rider, apparently filed with the bond, was countersigned December 28, 1954, at Sioux Falls, South Dakota.

The bond on its face provides:

"KNOW ALL MEN BY THESE PRESENTS:

"That the WESTERN SURETY COMPANY, a corporation duly licensed to do business in the State of Nebraska as Surety, does hereby indemnify County of

Adams, State of Nebraska as Obligee, for the use and benefit of County of Adams, State of Nebraska as Insured, against any loss, the amount of indemnity as to each officer or Employee not to exceed Five Thousand and no/100 ($5,000.00) DOLLARS, (and in such additional amount as to any Officer or Employee or Position as endorsed on the back of this bond as Additional Indemnity Endorsement, or as hereafter added or changed by Rider signed by the Surety and accepted by the Obligee or Insured), caused by any Officer or Employee of the Insured as herein stated:

"Section 1. If the Officer or Employee is required by law to furnish a bond in the position with the Insured, any loss caused through the failure of such Officer or Employee to faithfully perform his duties or to account properly for all moneys and property received by virtue of his position.

"Any and all provisions required by statute, law, rule or regulation as provisions of the bond of each such Officer or each such Employee, are hereby incorporated herein and made a part hereof.

"Section 2. If the Officer or Employee is not required by law to furnish a bond in the position with the Insured, any loss caused through any act of fraud, larceny, forgery, theft, embezzlement, wrongful abstraction, willful misapplication or willful misappropriation, or other fraudulent or dishonest acts committed by such Officer or Employee,

"SUBJECT, HOWEVER, TO THE FOLLOWING CONDITIONS AND LIMITATIONS:

"Section 3. The term of this bond begins with the 6th day of January, 1955.

"Section 4. Regardless of the number of years this bond shall continue in force and the number of premiums which shall be payable or paid, the liability of the Surety under this bond on account of any one Officer or Employee as specified in Section Two hereof shall not be cumulative in amount from year to year or from

period to period. As to any one Officer or Employee specified in Section One hereof, the coverage shall be cumulative as to each elected or appointed term.

"Section 5. This bond shall be deemed canceled as to any Officer or Employee: (a) as to Officers or Employees specified in Section One, in the manner provided by statute; (b) as to Officers or Employees specified in Section Two, when so stated in a written notice served by the Obligee or the Insured upon the Surety; or at twelve o'clock night upon the effective date specified in a written notice served by the Surety upon the Obligee and the Insured by registered mail. Such date shall not be less than thirty days after the date borne by the sender's registry receipt.

"Section 6. If the bond is canceled as an entirety, the Surety shall, on request, refund to the Obligee or the Insured the unearned premium computed pro rata.

"Section 7. Any oath of office attached to this bond signed by an official to be covered under this bond is a part of this bond in the same manner as if it were contained herein.

"RIDERS

"Section 8. The liability of the Surety hereunder is subject to the following terms and conditions or to the terms and conditions of the following Riders attached hereto:"

The positions as to additional amounts endorsed on the back of the bond are the county treasurer, sheriff, deputy sheriff, deputy treasurer, and county judge.

Attached to the bond are four pages whereon the following in typewriting appears: "I accept the foregoing bond and submit the same to the Board of Supervisors of Adams County, Nebraska, as my official bond for the office of ———————— of Adams County, Nebraska, for my term beginning January 6, 1955." This is repeated 20 times. Nineteen of the statements are signed. Fourteen statements have the name of the office inserted in writing. In five statements the name of the

office remains in blank. These statements do not show when they were signed, nor does it appear when they were attached to the bond. Some light on that problem is shown by the fact that the first five parties whose names appear on these statements verified their oath of office on January 6, 1955; the next eleven verified their oath of office on December 24, 1954; the next two verified their oath of office on December 28, 1954; and the last one verified his oath of office on January 6, 1955.

On December 24, 1954, the county board of supervisors adopted a motion reciting that the county officers having presented their blanket bond, and it having been found sufficient, it "is hereby approved * * * and ordered filed in the office of the County Clerk and County Judge * * *."

Also attached to the bond are 21 separate oaths of office. Of these oaths of office 11 are shown to have been verified on December 24, 1954. The oath of the county clerk and the deputy county clerk are shown to have been verified on December 28, 1954. Six of the oaths are shown as verified on January 6, 1955. The oath of the deputy county assessor is shown to have been verified on January 10, 1955, and that of the deputy county attorney on February 8, 1955. The last two officials do not appear to have signed the "accept" and "submit" form.

In the order in which these oaths are attached to the bond, the first two were verified January 6, 1955; the next four were verified December 24, 1954; the next one was verified January 6, 1955; the next three were verified December 24, 1954; the next one was verified February 8, 1955; the next one was verified December 24, 1954; the next one was verified January 10, 1955; the next three were verified January 6, 1955; the next three were verified December 24, 1954; and the last two were verified December 28, 1954.

We mention these things because they illustrate the conditions that are spawned where officials fail to follow

the clear provisions of the applicable statutes to which we refer later herein.

The petition herein was filed January 4, 1955. The cause was decided October 19, 1955. The motion for a new trial was overruled March 8, 1956. This appeal followed.

Plaintiff's assignments of error here are:

"1. The Court erred in entering judgment in favor of defendants and against the plaintiff.

"2. The Court erred in finding that a blanket bond would comply with the statutes of Nebraska.

"3. The Court erred in failing to find that the statutes contemplate and specify that elected county officials shall execute and furnish individual qualification bonds with either corporate or personal surety.

"4. The Court erred in failing to find that a blanket bond fails to comply with statutory requirements that an official bond must be executed and delivered by the officer as a joint and several contract.

"5. The Court erred in failing to find that a blanket bond fails to comply with statutory requirements that official bonds must be permanently filed and approval thereof endorsed on each individual bond.

"6. The Court erred in failing to find that a blanket bond fails to comply with statutory requirements as to full indemnity coverage applicable to each official position.

"7. The Court erred in failing to enjoin the purchase of a blanket bond since there is no statute authorizing such purchase.

"8. The Court erred in concluding that plaintiff could not raise an issue as to whether defendants forced county officers to accept a blanket bond.

"9. The Court erred in concluding that acquiescence of officers in a blanket bond constituted the furnishing of a bond as required by law."

As we view this record the question here is not: Can the county buy this bond as additional security to the

bond required by statute for county officers? Likewise the question is not: Would the company and an official be liable on this bond in the event of a default of a particular officer?

The question is: Does this bond, together with the acceptances, submissions, and oaths of office referred to, measure up to the requirements of the statutes?

The original act here involved regarding official bonds and oaths of office was enacted in 1881. Laws 1881, c. 13, p. 94. Basically the provisions have remained substantially unchanged through the years, although there have been amendments and new provisions subsequently enacted.

In State ex rel. Jones v. Clausen, 78 Wash. 103, 138 P. 653, the court held: "It has been, and it well should be, the policy of the courts in construing statutes, to ascertain the intent of the legislative branch of the government. No surer search light can be found than the settled practice of the legislative body, for a habit, if tolerated and acquiesced in for a period of years by the people, and if it in no way offends against any provision of the constitution, becomes a quasi custom; and of custom, it is said there can be no higher law."

This decision was followed in O'Connor v. Murtagh, 225 Iowa 782, 281 N. W. 455, in which the court used this language: "In construing statutes, and ascertaining the intent of the legislative branch of the government, the courts will take into consideration the settled practices of a legislative body."

The statement quoted in State ex rel. Berge v. Lansing, 46 Neb. 514, 64 N. W. 1104, 35 L. R. A. 124, is still quite applicable: "* * * it is an excellent idea for courts to give to statutory language its plain and ordinary meaning."

The settled practice of the Legislature for the last 75 years has been to require individual bonds from individual county officials. This is abundantly clear in an analysis of the various statutory provisions.

All sections referred to herein are found in R. R. S. 1943. All emphasis is supplied by us.

Section 11-101 requires that the oath shall be endorsed "upon their *respective* bonds. * * * If *any* such officer is not required to give *bond,* the oath shall be filed in the office of the Secretary of State, or of the clerk of the county, city, village, or other municipal subdivision of which he shall be an officer."

Section 11-103 provides: *"All official bonds* of county * * * officers must be in form joint and several, and made payable to the county in which the *officer* giving the same shall be elected or appointed, * * *."

Section 11-105 provides: "Official *bonds,* with the oath endorsed thereon, * * *."

Section 11-107 provides: "The official *bonds* of all county * * * officers shall be approved by the county board, except the official *bonds* of the county commissioners or supervisors, which shall be approved by the county judge. * * *." Clearly, more than one bond is contemplated here.

Section 11-108 provides: *"Each official bond* of a state officer shall be executed by the officer * * *."

The companion section for county officials is section 11-109. It provides: "All official bonds of county * * * officers shall be executed by the *principal* named in such bonds and by at least two sufficient sureties * * * or *any* official *bond* of a county * * * officer may be executed by the *officer* as principal and by a * * * bonding company as surety * * *. Only such companies as are legally authorized to transact business in this state shall be eligible to suretyship on the *bond* of *a* county * * * *officer.*"

Section 11-110 provides: "The officers with whom any official *bonds* are required by law to be filed shall carefully record and preserve the same in their respective offices, * * *."

Section 11-111 provides: "The approval of *each* official bond shall be endorsed upon such *bond* * * *."

Section 11-115 provides: "If any person elected or appointed * * * shall neglect to have *his official bond* executed and approved as required by law, * * * his office shall thereupon ipso facto become vacant, * * *."

Section 11-117 provides: "When the incumbent of an office is re-elected or reappointed *he* shall qualify by taking the oath and giving the *bond* as above directed, but * * * *his bond* shall not be approved * * *."

Section 11-118 provides: "No person shall be surety for the same *officer* * * *."

Section 11-119 provides: "The following named officers shall execute *a bond* * * *." Beginning with subsections (29) to (38), inclusive, is the provision for the amount of the bond required of "each" county official named.

Section 11-121 provides: "Any *officer* or *person* who is entrusted with funds * * * shall be responsible for the same upon *his bond*. When * * * there is no provision of law requiring *him* to give a *bond* * * * he shall give *bond* * * *. No warrant shall be issued or money paid over to such *officer* or person until said *bond* is filed * * *."

Section 11-122 authorizes the county board under certain circumstances to require "an additional *bond*" from a county treasurer; it refers to the penalty "in the previous *bond*," and sets out the conditions under which a vacancy in the office occurs for failure to "give such additional * * * *bond*."

Section 11-125 provides that whenever "any" of the county officers named therein furnishes "*a bond* executed by a surety company" and the bond is approved, "then in each and every case the county may pay the premium for such *bond*" and where the stated term of the *bond* is "reduced * * * by reason of death, resignation or removal from office of *such official* for a cause not imposing liability on his bond, the obligor shall refund * * * the unearned portion of the premium * * * of *said bond*, * * *."

Section 11-126 provides: "Whenever any *deputy* or employee * * * shall be required * * * to supply *bond,* and such deputy or employee shall furnish *a bond* by a surety company, which *bond* shall be approved by the county board, the county may pay the premium for such bond."

Section 11-127 provides: "Upon the execution and approval of the *bonds* * * *."

Section 11-130 provides: "It shall be lawful for any person of whom *a bond* * * * is required, to agree with *his* surety or sureties" as to the deposit for safekeeping and withdrawal of funds and that such agreement shall not release from or change the liability of the principal or sureties "of the bond."

Section 23-207 provides that where counties adopt township organization the appointed supervisors "shall duly qualify and file *their* oath of office and *bond.*"

Section 23-1204.04 provides that "The deputy county attorney * * * shall file *a bond* * * *," and by section 23-1204.05 "each of such deputies shall be required to give a *bond.*"

Section 23-1304 provides that the county clerk shall keep a record of all official bonds filed in his office, "giving the name of the office, amount and date of *bond,* names of sureties, and date of filing."

Section 23-1505 provides for a deputy or deputies for the register of deeds and states their powers "upon giving *bond.*"

Section 23-1616 provides that where clerks are employed as cashiers, "said *clerks* shall give *bond.*"

Section 24-507 provides for the appointment of a substitute county judge "who shall give *a bond*" and for "*one* bond for the entire period of such appointment" and when "*a bond* is furnished with corporate surety the county shall pay the premium "for such *bond.*"

Section 32-1038 refers to "an official *bond*" of an official in military or naval service.

Section 39-503 provides that the county highway commissioner shall "execute * * * *a bond.*"

Section 77-401 provides that the *county assessor* "shall execute *a bond.*"

Section 77-1704 deals with the collection of taxes by the county treasurer and refers to liability *"on his bond."*

Section 77-1711 refers to the county treasurer and *"he* and *his bondsmen* shall be liable."

Section 77-1737 refers to the liability of certain officials "on *their* official bonds."

Section 77-1760 refers to the liability of the county treasurer "upon *his bond.*"

Section 77-1817 refers to the liability of the county treasurer "and *his bondsmen.*"

Section 77-1847 refers to the liability of the county treasurer "upon *his official bond.*"

Section 77-2211 refers to the treasurer and "civil action on *his official bond.*"

Section 80-101 refers to the county service committee and they "shall *each give bond.*"

Section 84-801 refers to certain county officials appointing deputies from whom they "shall require *a bond.*"

Section 86-406 refers to a telephone chief who "shall give *bond.*"

We think it quite patent from the above statutory provisions that the uniform practice of the Legislature over the years has been to require each county official or employee to furnish a bond covering the requirements of his position. He is to execute it as principal. He is to select the surety and have the surety execute the bond. He is to submit it to the approving authority and secure approval. He is to file the bond in the required office or with the required person. See Holt County v. Scott, 53 Neb. 176, 73 N. W. 681, wherein we held: "The law contemplates that the officer will have the bond approved and afterward filed and recorded."

The procedure involved here is the reverse of that process. Here the county prepares the bond. Here the

county selects the surety and has the surety execute the bond. Here the county submits the bond to the officers for their acceptance. Here the county board directs the filing of the bond. The official bond plan here followed takes from the elected official his right to perfect his title to the individual office.

The plan of furnishing a blanket bond such as we have here is not in accord with the legislative intent and requirements as to official bonds of county officials and employees.

There are other considerations and requirements of the statutes that compel the same conclusion.

Section 11-101 requires an oath of office of county officers "which shall be endorsed upon their respective bonds." Here the oaths of office are stapled to the blanket bond. We need not determine whether that constitutes an endorsement on the bond. If they were stapled to the blanket bond in the order in which they were filed with the county clerk, then it is patent that the first oath was not submitted earlier than January 6, 1955, for that is the date of the verification of the first oath so attached. The county board, however, approved the bond December 24, 1954. We held in State ex rel. Baird v. Slattery, 108 Neb. 415, 187 N. W. 899, that the evident purpose of the Legislature was to preserve the oath and bond together and that to approve a bond without the oath endorsed thereon "would be a patent disregard of the law."

However, if we are to assume that oaths of office were submitted with the bond and not attached thereto when the county board approved the bond on December 24, 1954, and that that is sufficient, then it is patent that only 11 of them were so submitted for the others were verified subsequent to that date. It necessarily follows that any attempt of the county board to approve the bond as to officers whose oaths were to be endorsed on the bond subsequently would be a patent disregard of the law. If a blanket bond is to be used, such as we

have here, then to meet the requirements of the act, each time a county officer or employee is required to give bond subsequent to the date the bond is approved, the law would require that the oath of office be endorsed on the bond and the bond then approved as to that officer.

Section 11-111 requires that "The approval of each official bond shall be endorsed upon such bond * * * and no bond shall be filed and recorded until so approved." We find no approval of the blanket bond involved here endorsed upon the bond.

We are concerned with the procedures which the Legislature contemplated should be followed. It may be said that this provision can be met, if need be, by having the bond withdrawn and approved and the endorsement placed thereon as to officers and employees subsequently undertaking to make it their bond.

There are statutory difficulties in the way of that procedure.

The statute also requires that the bond be filed by the officer. As we held in Holt County v. Scott, *supra*: "The law contemplates that the officer will have the bond approved and afterward filed * * *."

In the instant case the bond was approved and filed before eight of the officers who had stated "I accept * * * and submit" the bond had verified their oath of office.

But it may be said that, if necessary, the blanket bond already on file may have the oath of office attached, tendered for approval, and filed. But as to that, again there are statutory difficulties.

Section 11-105 requires that official bonds with the oath endorsed thereon shall be filed in the proper office.

Section 11-110 provides: "The officers with whom any official bonds are * * * to be filed shall carefully record and preserve the same in their respective offices, * * *."

Construing what is now section 11-115 in Paxton v. State, 59 Neb. 460, 81 N. W. 383, 80 Am. S. R. 689, we

held: "Section 15, chapter 10, Compiled Statutes, 1899, contemplates that an official bond, after its approval by the proper officer, shall be returned to the person presenting it, and be by him filed in the proper office for record."

How can a bond that is required by law to be filed in the county clerk's office, for instance, be carefully preserved in that office and be at the same time "returned to the person presenting it" for approval and be by him retained until by him filed for record? No solution is suggested to that problem. But that problem has its complications and additional statutory difficulties.

Section 11-107 requires that certain official bonds shall be filed in the office of the county clerk and that those of the county clerk and the members of the county board shall be filed in the office of the county judge. The question then would come: How can a blanket bond be filed in the office of the county clerk and be carefully preserved there and at the same time be filed in the office of the county judge and be carefully preserved there? The obvious answer is that the Legislature never contemplated the use of such a blanket bond.

We return to the matter of the statutory requirement of bond approval.

Section 11-107 requires that the official bonds of all officers shall be approved by the county board except those of the county board, which shall be approved by the county judge.

The blanket bond here involved was approved by the county board and ordered filed in the office of the county clerk and the county judge. It was filed in the office of the county clerk where it must be carefully preserved. It does not appear that it ever was filed with the county judge, or that the county judge ever approved it as the bond of the county board. The same question arises here as to the right of the officials to remove it from the files of the county clerk's office and tender it to the

county judge for his approval and filing and careful preservation.

Section 11-122 authorizes the county board under certain circumstances to require the county treasurer to give aditional surety or sureties. We find no authority which permits the county treasurer to withdraw this blanket bond from the files of the county clerk's office in order to furnish the additional surety.

By various provisions of the statutes the term of office of officials begins and ends at variable times. Some have indefinite and optional tenure and some have different requirements as to the amount of the bond.

We refer to some of the provisions: By section 11-117 when an incumbent is re-elected or reappointed he is required to give bond.

By section 23-1204.04 the deputy county attorney is required to give bond and is removable at the pleasure of the county attorney.

By section 23-1204.05 certain deputy county attorneys are required to give bond, the amount to be fixed and approved by the judges of the district court.

By section 23-1505 a deputy register of deeds may be appointed when authorized by the county board and is required to give bond.

By section 24-507 a substitute county judge is required to give bond. The appointment is revocable by the county board at its pleasure.

By section 39-501 the county highway commissioner is an appointive officer and by section 39-503 he is required to give bond.

By section 80-101 the terms of the members of the county service committee are staggered. They are required to give bond.

By section 84-801 certain officials are authorized to appoint deputies whose appointment is revocable by the principal. They are required to give bond.

By the provisions of sections 23-268 and 32-312 county supervisors are elected for 4-year terms, but every 2

years part of them are elected. They are required to give bond. Some interesting questions can arise as to just how the supervisors elected in 1958 in Adams County could comply with the statutory requirements as to bonds, using this blanket bond as a vehicle to meet their obligations in that regard. The questions are suggested herein and will not be repeated.

The above provisions may be readily complied with by the use of individual bonds. Compliance is rendered quite difficult, if not impossible, by the use of a blanket bond.

Section 11-109 requires an official bond to be executed by the principal "named in such bonds" and by either freeholders or a bonding company as surety. This requirement contemplates clearly two things: The principal shall execute the bond. The bond here in nowise in form contemplates an execution by the principal. It is in form a contract between the county and the company as principals. We need not determine whether or not the execution of the riders attached is sufficient to comply with the law in the event of a default of the officer. The language of the statute is "principal" not principals. It is pointed out here as indicative of a legislative intent that there shall be a separate bond for each officer. This construction is strengthened by a reference to section 11-108 which requires "Each official bond of a state officer shall be executed by the officer as principal * * *." We find no basis for a contention that the Legislature contemplated individual bonds for state officers and a blanket bond for county officers.

Section 11-109 contains another provision that points directly to a legislative intent that individual bonds are contemplated. That is the provision for the use of "freeholders" as surety. This provision would be easily operable in the case of an individual bond where the official selects his surety. We anticipate it would be

quite difficult for a county to secure qualified freeholders as sureties on a blanket bond.

Section 11-125 authorizes the county to pay for official bonds under certain circumstances. Included among the officers are the county clerk and other individual officers. However, it includes also "county commissioner or supervisor." The singular is used, indicating an individual bond whereas it is obvious that if a blanket bond were contemplated as to the commissioners or supervisors the plural word would have been used. This conclusion is strengthened by the reference in section 11-125 to section 32-1038. The latter section provides that when an official is in military or naval service "such person shall not be * * * required to keep and maintain an official bond in force * * *." Obviously if a blanket bond were within the Legislature's intent, then this provision would be surplusage.

We have pointed out that by section 11-107 the bonds of the county commissioners shall be approved by the county judge and that the bonds of the county clerk and the county board shall be filed and recorded in the office of the county judge. The blanket bond here involved is submitted as the bond of the clerk and supervisors. As to those supervisors the bond here is not shown to have been approved by the county judge. As to the clerk and supervisors it is not shown to have been filed in the office of the county judge. The approval and filing is an essential part of the furnishing of the bond. Without those steps being taken the county would be without authority to pay for the bond of those officials. Plaintiff prays that such a payment be enjoined. However, we do not rest our reversal of the trial court on that restricted basis alone. It is pointed out here that the statute is operative without difficulty if individual bonds are used, but here again difficulties are presented to the use of a blanket bond.

The defendants suggest that if the bond here involved is insufficient as to any officer, that a "rider" could be

attached to the bond to cover the deficiency. It may be that some of the matters which we have discussed herein could be so handled insofar as fixing liability on the bond is concerned. However, again we find nothing in the statutes that indicates a legislative intent that an official bond is to be draped and encumbered by a series of acceptances, riders, endorsements, oaths of office, approvals, and filings.

Section 11-110 requires an officer with whom an official bond is filed to give certified copies thereof and to receive pay therefor. Such a provision presents no difficulty in application in the case of an individual bond. It presents difficulties in the case of a blanket bond. In the instant case the blanket bond has 19 individual "accept" and "submit" statements attached to it. It has 21 oaths of office attached to it. If a purchaser desired a copy of the official bond of the clerk of the district court, would the county clerk be required to certify this bond with all the endorsements and oaths that are presently attached to it, and would the purchaser be required to pay for all of that material that has no reference to the clerk of the district court?

We shall not assume a legislative intent to create problems of this character. In one form or another they will arise throughout the act were we to hold a legislative intent to authorize the use of a blanket official bond.

Plaintiff in his petition prays for relief only as to the bonds of elective county officials. Nevertheless we have combed the statutes as they apply to elective and appointive county officials and employees. From beginning to end the entire statutory scheme points to a legislative intent and purpose that each official shall furnish his individual bond, subject to the terms and conditions applicable to his individual office. It is that kind of a bond that the Legislature contemplated would be furnished, approved, and filed.

During the many years these statutes have been in

force, multiplied thousands of county officers have complied therewith without difficulty. These statutes have required a minimum of judicial construction. We find nothing in the act that points to a legislative intent that blanket official bonds were contemplated or authorized. The many provisions above pointed out negative such a conclusion.

Having clearly and explicitly enacted a complete system of individual official bonds, we see no necessity for the Legislature to negative by direct language an intent to authorize blanket bonds. The negative intent to authorize a blanket bond is inherent in the affirmative authorization of individual bonds.

Accordingly we hold that the statutes requiring official bonds of elected county officers are intended to require individual official bonds. A blanket bond purporting to cover all elected county officers does not meet the standards required by the statutes.

The judgment of the district court is accordingly reversed and the cause remanded with directions to enjoin the county from purchasing and paying for the bond here involved insofar as it purports to be a bond in lieu of the required individual bonds of the elected county officials.

REVERSED AND REMANDED WITH DIRECTIONS.

ELSIE FRIES, APPELLANT, V. EVERETT GOLDSBY, APPELLEE.
80 N. W. 2d 171

Filed December 21, 1956. No. 34028.

1. **Negligence.** Whether or not a certain course of conduct is negligence must be determined by the standards fixed by law without regard to any private rules of the party charged therewith.
2. **Trial: Appeal and Error.** The proof in a trial of a jury case must be confined to legal evidence tending to prove or disprove an issue made by the pleadings, and the admission of improper evidence is prejudicial error if it may have influenced the verdict.

3. ———: ———. If it does not appear from the record that evidence wrongfully admitted in the trial of a jury case did not affect the result of the trial unfavorably to the party against whom it was admitted, its reception must be considered prejudicial error.
4. **Automobiles.** The operator of a motor vehicle in backing same into a street or highway must exercise reasonable care by looking backward not only before he begins his operation but also while he is in the act of backing, and he must give a timely signal of his intention to back when a reasonable necessity for it exists in order that he may yield the right-of-way to and not collide with or injure those lawfully using such street or highway.
5. **Negligence.** Ordinarily, contributory negligence is a question for the jury; but, where there is no basis in the evidence for a finding of contributory negligence, it is error to instruct on the subject and thereby to submit to the jury an issue which is outside the evidence.
6. **Trial: Appeal and Error.** The court should submit to the jury only such issues as find some support in the evidence, and where an issue is submitted without support in the evidence which is calculated to mislead the jury in the consideration of the facts to the prejudice of the complaining party, the judgment must be reversed.
7. **Witnesses.** A duly licensed and practicing chiropractor is competent to testify as an expert witness within the scope of his knowledge according to his qualifications in the field of chiropractics, and the weight of his testimony is a question for the jury.
8. **Evidence: Witnesses.** When appropriate foundation is laid, X-ray pictures are admissible in evidence and subject to interpretation by an expert witness for the purpose of showing the condition of the internal tissues of the body.
9. **Evidence.** Generally, in order to predicate error upon a ruling of the court refusing to permit a witness to testify or to answer a specific question, the record must show an offer to prove the facts sought to be elicited. However, when the condition of the record and the form of the question itself show that it is relevant, material, and competent, no offer of proof is necessary.

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

Ginsburg, Rosenberg & Ginsburg, for appellant.

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

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

CHAPPELL, J.

Plaintiff, Elsie Fries, brought this action seeking recovery for personal injuries alleged to have been proximately caused by negligence of defendant, Everett Goldsby, on July 20, 1953, when, without giving any signal or keeping a proper lookout, he suddenly backed his unlawfully-parked Chevrolet truck out from a west curb into the car being driven south by plaintiff. Plaintiff alleged that as a result thereof she was jolted and her body twisted causing her to sustain a fracture of the transverse process of the thoracic vertebrae and soft tissue contusions in the upper and lower vertebral region and a mild concussion syndrome, from which she suffered nervous shock, pain, and disability requiring extensive medical care and treatment.

For answer defendant admitted that an accident occurred at or about that time, but denied generally and alleged that the collision and resulting damages, if any, were proximately caused and contributed to by plaintiff's negligence in operating her car without reasonable control, without keeping a proper lookout, without heeding a warning given by defendant, and in driving at a speed in excess of 30 miles an hour contrary to the city ordinance of Tecumseh.

Upon trial to a jury, it returned a verdict for defendant and judgment was rendered thereon. Thereafter plaintiff filed a motion for new trial, alleging in substance that the verdict was not supported by the evidence but was contrary thereto and contrary to law, and was not supported by the law applicable in the case; that the trial court erred in refusing to admit evidence offered by plaintiff, and erred in the admission of evidence over objections of plaintiff; and that there were errors of law occurring at the trial. Such motion was overruled, and plaintiff appealed, assigning in substance

that: (1) The trial court erred in sustaining any issue of plaintiff's alleged contributory negligence because it was not supported by any evidence; and (2) the trial court erred in the exclusion of certain evidence offered by plaintiff, and in the admission of certain evidence offered by defendant. We sustain the assignments.

The record fairly discloses the following: The accident occurred on July 20, 1953, at about 10 a. m., on Third Street in Tecumseh. Third Street extends north and south, west of the courthouse square. Such street has a parking area on the west side where cars driving south park into the curb at a sloping angle. It has a parking area on the east side where cars driving north park into the curb at an angle. It also has a parking area in the center with a one-way driving lane east thereof for cars driving north, and a one-way driving lane west thereof for cars driving south.

Defendant's 1½ or 2-ton Chevrolet truck, with which he hauled trash and garbage, was parked at an angle at the west curb. Concededly and knowingly, it was so parked in violation of Tecumseh Ordinance No. 346, section 5 (b), which provides in part: "All trucks of a capacity of over one ton shall be parked parallel within the markings in a space provided therefor * * * on the East side of Third Street between its intersections with Clay Street and the C. B. & Q. R. R. right-of-way, and at no other places on the streets around the Court House Square * * *." In that connection, despite all-inclusive general objections interposed by plaintiff, the defendant was permitted without any ruling thereon or making any reservation thereof, which was the equivalent of overruling the objection, to testify that he had talked to the chief of police and was granted permission to park as he did if his truck was not left longer than it took to do his job of trash and garbage hauling.

In that connection, relying upon Rueger v. Hawks, 150 Neb. 834, 36 N. W. 2d 236, which is clearly distinguishable from the situation presented here, defend-

ant argued that plaintiff could not now complain about the admission of such evidence because she did not subsequently renew the objection or move to strike such testimony, and in any event that plaintiff's brief did not comply with Rules of the Supreme Court, sections 8 a 2 (5) and (7). In such light we have examined plaintiff's brief, bearing in mind that the rules of this court are designed to assist the parties and the court in determining the issues to be considered, and are not designed to prevent determination of the issues by a technical construction thereof such as defendant would have us here apply. Redick v. Peony Park, 151 Neb. 442, 37 N. W. 2d 801.

In O'Dell v. Goodsell, 152 Neb. 290, 41 N. W. 2d 123, we held: "A general objection, if overruled, cannot avail the objector on appeal. The only modification of this broad rule is that if on the face of the evidence, in its relation to the rest of the case, there appears to be no purpose whatever for which it could be admissible, then a general objection, though overruled, will be deemed to have been sufficient." The propriety of the admission of such evidence was clearly reviewable by this court, and defendant's contention has no merit.

The rule applicable and controlling here appears in Koehn v. City of Hastings, 114 Neb. 106, 206 N. W. 19, a case almost identical in principal with that at bar, wherein we said: "The rule is well stated in the case of Fonda v. St. Paul City R. Co., 71 Minn. 438, wherein it is said:

" 'But a person cannot, by the adoption of private rules, fix the standard of his duty to others. That is fixed by law, either statutory or common. Such rules may require more, or they may require less, than the law requires; and whether a certain course of conduct is negligent, or the exercise of reasonable care, must be determined by the standard fixed by law, without regard to any private rules of the party.'

"Other cases supporting this view are Hamilton v.

Chicago, B. & Q. R. Co., 145 Ia. 431; Hansell-Elcock Foundry Co. v. Clark, 214 Ill. 399; Beidler v. Branshaw, 200 Ill. 425; McCartney v. City of Washington, 124 Ia. 382; Polmatier v. Newbury, 231 Mass. 307; Stewart v. Cushing, 204 Mass. 154, 27 R. C. L. 194, sec. 39.

"The admission of evidence as to the rules, usages and customs, adopted by defendant, regulating the parking of its motor truck, would naturally impress the jury with the idea that it was proper for them to consider it in determining the issues of fact. Its effect could not be otherwise than prejudicial to plaintiff."

See, also, Borden v. General Insurance Co., 157 Neb. 98, 59 N. W. 2d 141, holding that: "The proof in a trial in a jury case must be confined to legal evidence tending to prove or disprove an issue made by the pleadings and the admission of improper evidence is prejudicial error if it may have influenced the verdict.

"If it does not appear from the record that evidence wrongfully admitted in the trial of a jury case did not affect the result of the trial unfavorably to the party against whom it was admitted its reception must be considered prejudicial error." We conclude that the admission of the evidence aforesaid was prejudicially erroneous.

The record discloses that at the time and just prior to the accident plaintiff was alone in her husband's 1953 4-door Chrysler sedan, driving south in the west lane of Third Street at no more than 15 miles an hour in strict compliance with Tecumseh Ordinance No. 346, section 2, and not in violation of any pertinent statute. Evidence adduced in plaintiff's behalf discloses that as she turned south on Third Street she saw defendant's truck parked at the curb on her right about one-third the distance from the north end of the block. She noticed it because its rear end had a body box on it, the top of which was about 30 inches higher than the bed of the truck which extended out into the street farther than other vehicles parked at the west curb nearby.

Plaintiff heard no warning and saw no signal given by defendant, and observed no movement of his truck until plaintiff's front bumper was parallel with the rear of defendant's truck and her car had entered the line of his backing. He then backed out fast, whereupon plaintiff had no time to stop and no opportunity to turn left and avoid the accident because cars were parked to her left in the center of the street. Thereupon the left corner of the box on defendant's truck hit plaintiff's car with great force immediately ahead of the windshield at about the level of the door handle or glass. It then raked the entire length of her car to the back window, denting or caving in its body 2 or 3 inches, crushing the frames in its right doors, breaking the windshield and all glass on the right side, and throwing plaintiff against the door and arm rest, which caused her pain and injuries to her spine, requiring medical care and treatment. A few days after the accident plaintiff did make a statement that no one was hurt in the accident, but in that regard she claimed that the extent of her injuries did not appear and were unknown until later.

After the accident plaintiff stopped her car 3 or 4 feet beyond defendant's truck, then drove her car forward and into the center parking area while defendant's truck went back into the curb and parked again. It is not clear whether he drove it back or whether it rolled back after the impact.

The sheriff was then called and investigated the accident, whereat defendant said that he did not see plaintiff's car until after the impact, and nothing was said about defendant honking his horn.

Defendant testified in substance as follows: That on the morning of July 20, 1953, he had parked his truck at an angle on the west side of Third Street in front of a barber shop while he served some customers in that neighborhood. He admitted knowing that his truck was so parked in violation of the city ordinance but

claimed that permission to do so had been granted by the chief of police, as heretofore discussed. Defendant's truck was equipped with a rear view mirror on the left door, but he was admittedly unable thereby to see back of his truck and never did see plaintiff's car until after the impact. Before the accident defendant completed delivery of trash and garbage to his truck, then got in the cab thereof, started the motor, placed the clutch down, went into reverse, tooted his horn, looked out of the mirror or window 3 or 4 seconds, and, seeing nothing but continuing to look, he started to back into the street, when, after he had moved about 3 feet, the impact occurred that second. In that connection, as provided by Tecumseh Ordinance No. 346, section 4 (t), defendant was required: "To sound horn and give approaching car the right of way when backing out of a * * * parking space."

Also, as held in Taulborg v. Andresen, 119 Neb. 273, 228 N. W. 528, 67 A. L. R. 642: "The operator of a motor vehicle in backing the same onto a street or highway must look backward, not only before he begins his operation, but also while he is in the act of backing, and must give a signal of his intention to back when a reasonable necessity for it exists, in order that he may not collide with or injure those lawfully using such street or highway." See, also, Annotation, 67 A. L. R. 655; Chew v. Coffin, 144 Neb. 170, 12 N. W. 2d 839.

In Annotation, 29 A. L. R. 2d 112, it is said, citing many authorities from this and other jurisdictions: "In cases dealing with injury or damage resulting from the movement of a motor vehicle which had been parked at the curb of a street * * * the courts have concurred in recognizing that the operator of such a parked car is under a duty of yielding the right of way in the travelled portion of the street * * * to * * * other motor vehicles which are moving thereon at the time, and that before moving into traffic the operator of the parked car must exercise reasonable care to look for

other users of the street, and must refrain from moving his own vehicle until he ascertains that such a movement is consonant with the safety of others."

Also, as held in Angstadt v. Coleman, 156 Neb. 850, 58 N. W. 2d 507: "A user of the highways may assume, unless and until he has warning, notice, or knowledge to the contrary, that other users of the highways will use them in a lawful manner, and until he has such warning, notice, or knowledge, he is entitled to govern his actions in accordance with such assumption."

In the light of the foregoing rules and the evidence heretofore recited, we find no competent evidence from which it could be reasonably inferred that plaintiff was guilty of contributory negligence either because she did not have her car under reasonable control, or failed to maintain a proper lookout or heed any warning of defendant, or drove her car at an unlawful speed. With regard to warning, if it had been given as claimed by defendant, the plaintiff under the circumstances presented herein would not have thereafter had either time or opportunity to have avoided the accident.

Nevertheless, such issues of alleged contributory negligence were erroneously submitted to the jury in one form or another throughout the instructions given by the trial court. In that connection, defendant argued that plaintiff was in no position to complain because in motion for new trial she did not specifically assign as error the giving of such instructions. That contention has no merit. In such respect, there is a difference between giving instructions, the substance of which is allegedly erroneous, and the alleged erroneous failure to submit pleaded issues supported by evidence or the alleged erroneous submission of pleaded issues which have not been supported by any evidence.

As assigned and argued by plaintiff, the instructions given herein erroneously submitted issues of pleaded contributory negligence which were not supported by any evidence, and we sustain that contention.

In Harsche v. Czyz, 157 Neb. 699, 61 N. W. 2d 265, the trial court failed to submit the pleaded issue of statute of limitations which had been supported by evidence. In that opinion we said: "The plaintiff contends that the defendant failed to make objection and assign as error in her motion for a new trial that the trial court should have instructed the jury on the statute of limitations. The motion for new trial and the amended motion for new trial were in compliance with section 25-1144, R. R. S. 1943, which provides in part: 'It shall be sufficient, however, in assigning the grounds of the motion to assign the same in the language of the statute and without further or other particularity.' See, also, McCullough v. Omaha Coliseum Corp., 144 Neb. 92, 12 N. W. 2d 639.

"Both the motion for new trial and the amended motion for new trial set forth that the verdict and decision were not sustained by sufficient evidence and were contrary to law, and, in addition thereto, that errors of law occurred at the trial. We conclude that the motion for new trial and the amended motion for new trial were sufficient to raise the issue contended for by the defendant." By analogy, that statement has application here.

In that connection, in Bay v. Robertson, 156 Neb. 498, 56 N. W. 2d 731, the trial court erroneously submitted the issue of contributory negligence which was not supported by any evidence. Therein plaintiff simply assigned that the trial court erred in submitting any issue of contributory negligence, and we reversed upon the ground that such submission was prejudicial error. In doing so, we held: "The mere fact that contributory negligence may be pleaded as a defense does not justify the submission of that issue to the jury where there is no evidence to support it.

"Ordinarily, contributory negligence is a question for the jury; but, where there is no basis in the evidence for a finding of contributory negligence, it is error to

instruct on the subject and thereby to submit to the jury an issue which is outside the evidence."

Further, as held in Fuss v. Williamson, 159 Neb. 525, 68 N. W. 2d 139: "It is reversible error for the court to include, in its instructions to the jury, allegations of fact found in the pleadings but which have not been supported by any evidence.

"The court should submit to the jury only such issues as find some support in the evidence, and where an issue is submitted without support in the evidence and is calculated to mislead the jury in the consideration of the facts to the prejudice of the complaining party, the judgment must be reversed." See, also, Shields v. County of Buffalo, 161 Neb. 34, 71 N. W. 2d 701.

A graduate of the Nebraska College of Chiropractory, who was a duly licensed chiropractor, having practiced his profession in Nebraska City for 30 years, and who was a member of the National Chiropractic Roentgenologist Association and certified in reontgenology, testified by deposition as a witness for plaintiff. He took a history from plaintiff with regard to the accident here involved, and examined her on August 7, 1953, after the accident. He took X-rays of her spine, diagnosed her injuries, and prescribed care and treatment. The chiropractor thereafter also advised that a brace should be worn by plaintiff to support her back. She obtained such a brace at a surgical supply company in Omaha and thereafter wore it. He also gave plaintiff chiropractic adjustments at intervals until September 29, 1954, at which time X-rays taken by him showed her then condition.

In that connection, after the foregoing foundation with regard to the chiropractor had first been laid, it was stipulated that he might testify from records and notes which were a part of his permanent records in plaintiff's case. They were produced and identified in open court as exhibits Nos. 1A and 1B as requested by defendant, "so we'll know what we're talking about."

Nevertheless, when the chiropractor was asked to relate the history given to him by plaintiff and her condition when he examined her the first time, objections thereto by defendants were sustained. Twice, but in different form, plaintiff's counsel asked such witness to explain his findings with regard to plaintiff's condition, but objections thereto by defendant were sustained. Four X-ray pictures of plaintiff's spine, taken by the chiropractor during his care and treatment of her, were identified as exhibits, and proper foundation was laid with regard to the taking thereof. However, when he was asked to interpret them, objection thereto by defendant was sustained. Thereafter the witness was permitted to testify that one such X-ray showed a compression on the left of the body of the 12th dorsal vertebra, but on motion of defendant such answer was stricken. Interpretations and explanations of the witness with regard to the other X-ray pictures were objected to by defendant and also refused admission, and when all four of such exhibits were offered in evidence, their admission was likewise refused. Plaintiff assigned and argued that the refusal to admit such evidence was prejudicially erroneous, and we sustain that contention.

In Inter-Ocean Oil Co. v. Marshall, 166 Okl. 118, 26 P. 2d 399, the court concluded that a duly licensed and practicing chiropractor is competent to testify as an expert witness within the scope of his knowledge according to his qualifications in the field of chiropractics, and the weight of his testimony is a question for the jury. See, also, Hard v. Spokane International Ry. Co., 41 Idaho 285, 238 P. 891.

Viewed in such light, the following is applicable. As stated in Watkins v. Brunswick Restaurant Co., 123 Neb. 212, 242 N. W. 439: "The defendant also argues that the expert opinion of a physician, based upon the history of the case submitted to him by the patient, is not admissible in evidence. The history of the case may be considered so far as it relates to the treatment of a

patient based upon complaints made to the physician at the time. * * * We think the evidence of the plaintiff's physicians, based upon observation and an examination of the plaintiff and upon the assumption of the truth of the evidentiary facts related by her, is clearly admissible." See, also, 20 Am. Jur., Evidence, § 866, p. 728.

Also, as said in McNaught v. New York Life Ins. Co., 145 Neb. 694, 18 N. W. 2d 56: " 'When a physician examines a patient to ascertain his ailment and to prescribe for it, a portion of his reasons for action must be the patient's own statements. To exclude testimony not wholly independent of this foundation for opinion is, in strictness, to exclude almost always medical testimony based on a personal examination. * * * Any attempt to draw the line in rulings, and to exclude a physician's testimony because his diagnosis is based in part on such statements, is unpractical, and defies the usual processes of medical thought. Hence it should be avoided.' 3 Wigmore, Evidence (3d ed.) sec. 688, p. 4.

"The approved rule in regard to physician securing a history from the patient to enable him to properly treat the patient is announced in annotation, 65 A. L. R. 1223, as follows: 'The opinion of a physician or surgeon as to the condition of an injured or diseased person is not rendered incompetent by the fact that it is based upon the history of the case given by the patient to the physician or surgeon on his examination of the patient, when the examination was made for the purpose of the treatment and cure of the patient.' This rule is supported by opinions there cited from many states."

Further, in City of Geneva v. Burnett, 65 Neb. 464, 91 N. W. 275, 101 Am. S. R. 628, 58 L. R. A. 287, cited with approval in Chicago, B. & Q. R. R. Co. v. Upton, 194 F. 371, this court concluded that when appropriate foundation is laid, X-ray pictures are admissible in evidence and subject to interpretation by an expert witness for the purpose of showing the condition of the

internal tissues of the body. See, also, note appended to City of Geneva v. Burnett, *supra,* at page 466, citing many authorities; Annotation, 51 L. R. A. N. S., subsection X, p. 858, citing such case and many authorities; 20 Am. Jur., Evidence, § 822, p. 691.

In that connection, defendant's contention that plaintiff cannot now complain because she made no offers of proof with relation to the chiropractor's testimony when it was excluded has no merit under the circumstances presented here.

In Johnson v. Griepenstroh, 150 Neb. 126, 33 N. W. 2d 549, this court reaffirmed that: "Generally, in order to predicate error upon a ruling of the court refusing to permit a witness to testify or to answer a specific question, the record must show an offer to prove the facts sought to be elicited. However, when the condition of the record and the form of the question itself show that it is relevant, material, and competent, no offer of proof is necessary." See, also, In re Estate of Johnson, 100 Neb. 791, 161 N. W. 429; Gormley v. Peoples Cab, 142 Neb. 346, 6 N. W. 2d 78. Defendant's contention comes squarely within and is controlled by such rules.

The record also indicates that objections to such evidence of the chiropractor were sustained partly upon the ground that the findings of and interpretations by him as reflected by the identified exhibits showed a condition of bodily injuries at variance with that alleged in plaintiff's petition which we have heretofore recited. In the light thereof such a conclusion was untenable and erroneous.

Plaintiff also offered in evidence identified exhibits Nos. 1A and 1B, the chiropractor's permanent records and notes with regard to plaintiff's history, examination, diagnosis, care, and treatment, but upon objection the offer was refused. Plaintiff argued that such exhibits were admissible under the Uniform Business Records as Evidence Act, sections 25-12,108 to 25-12,111, R. R. S. 1943.

In doing so, plaintiff relied upon County of Hamilton v. Thomsen, 158 Neb. 254, 63 N. W. 2d 168, which is clearly distinguishable. Rather, Higgins v. Loup River Public Power Dist., 159 Neb. 549, 68 N. W. 2d 170, is controlling here. Plaintiff's contention has no merit. The chiropractor testified as a witness. As such it is elementary that he had a right to refresh his memory from his own records and notes and to appropriately testify at length with regard to plaintiff's history, examination, diagnosis, and treatment, together with an interpretation of the X-rays taken by him, which were admissible in evidence. Viewed in such light, his record and notes would ordinarily be only cumulative evidence.

For reasons heretofore stated, the judgment of the trial court should be and hereby is reversed and the cause is remanded. All costs are taxed to defendant.

REVERSED AND REMANDED.

ARTHUR H. HAFEMAN, APPELLEE, V. GEM OIL COMPANY ET AL., APPELLANTS, IMPLEADED WITH DEAN TERRILL ET AL., APPELLEES.

ARTHUR H. HAFEMAN, APPELLEE, V. GEM OIL COMPANY ET AL., APPELLEES, IMPLEADED WITH DEAN TERRILL, APPELLANT.

ARTHUR H. HAFEMAN, APPELLANT, V. GEM OIL COMPANY ET AL., APPELLEES.

80 N. W. 2d 139

Filed December 28, 1956. Nos. 34017, 34018, 34023.

1. **Mines and Minerals.** If the signers of a division order are cotenants of the oil, they do not thereby contract with each other but a signer of it admits that he owns the amount of oil set apart to him therein and expresses no intention to convey or transfer any oil to any other person.
2. ———. The signer of a division order is generally not estopped from asserting his rights against his cotenants who are not entitled to the royalties which were paid to them.
3. **Estoppel.** The creation of an estoppel requires that the party

against whom it is claimed acted with knowledge of his rights; that the party claiming the estoppel was without knowledge of the facts on which he bases his claim of estoppel; that he was influenced by and relied on the conduct of the other person; and that he changed his position in reliance thereon to his injury.

4. **Contracts.** The doctrine of expressio unius est exclusio alterius means that the expression in an instrument of one or more things of a class implies the exclusion of all not expressed.
5. ———. In the absence of fraud, mistake, or ambiguity a written agreement is the only competent evidence of the contract of the parties and it is not subject to interpretation or construction.
6. ———. The intention of the parties to an unambiguous written contract must be determined from its contents.
7. **Mines and Minerals.** If a tract of land upon which an oil and gas lease has been given is subsequently divided into different ownerships, the owners of separate mineral interests are only entitled, in the absence of specific agreement to the contrary, to royalties accruing from production on the particular tract to which their ownership attached, but this does not preclude inclusion of an entirety clause providing that if the leased premises were thereafter owned in severalty or separate tracts they could be developed and operated as an entirety and royalties should be paid to each separate owner in the proportion that his acreage bore to the entire leased area.
8. ———. An entirety clause in an oil and gas lease constitutes a restriction on the right of the lessor, for the duration of the lease, to alienate his mineral interests in the leased premises contrary to its provisions.
9. **Tenancy in Common.** The fact of cotenancy alone does not create a fiduciary relationship as to the property owned by the cotenants; but if one cotenant has possession of property or funds belonging to his cotenant, he becomes trustee thereof and stands in a fiduciary relationship to a cotenant with respect thereto to the extent of the interest of the cotenant who may compel an accounting.
10. **Tenancy in Common: Mines and Minerals.** A tenant in common of oil underlying land which has been extracted by a cotenant is entitled to an accounting from the cotenant who produced the oil for the value of the ownership of the tenant in common in the oil.
11. **Actions.** A moot case is one which seeks to determine an abstract question which does not rest on existing facts or rights.
12. ———. If a concrete case of fact or right is exhibited, there is no principle or policy of law which deprives a party of a

determination because his motive in the assertion of such right is to secure such a determination.

13. ———. Several actions may be brought and more than one judgment recovered against different wrongdoers for the injury done by them but only one satisfaction may be had.

14. **Mines and Minerals.** A covenant in an oil and gas lease to pay rent or royalties is not personal or collateral but runs with the land.

15. ———. One who acquires by assignment the entire interest of the lessee in a distinct part of the leased land is as to such part in privity with the lessor and liable to him for rent for or royalty from that part.

16. ———. The assignment of an oil and gas lease by the lessee divests him of a privity of estate and transfers it to his assignee who thereafter holds in privity of estate with the lessor.

17. ———. The assignee of a lease of land for oil and gas production who acquires all the estate of the lessee is liable to the lessor for the payment of rent or royalties which accrue while he holds an assignment of the lease; and this is likewise true as to any subsequent assignee of the lease.

18. ———. Implicit in an obligation to pay royalties is the duty to pay the correct amount to the rightful owner.

19. ———. An assignee of an oil and gas lease is obligated to perform a covenant of the lease for the payment of royalties to the lessor to the extent of his ownership of them if the lease by its terms extends the obligation to the assignee.

APPEAL from the district court for Kimball County: JOHN H. KUNS, JUDGE. *Affirmed in part, and in part reversed and remanded with directions.*

Martin, Davis & Mattoon, for appellants.

Torgeson, Halcomb & O'Brien and *John D. Knapp*, for *appellee.*

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

BOSLAUGH, J.

This action seeks a determination and adjudication of the rights of the parties to royalty of the landowner payable by the terms of the base oil and gas lease of two noncontiguous quarter sections of real estate owned

by Arthur H. Hafeman, an accounting of the royalty he claims is due him because of the production of oil from the land, a judgment in his favor for the amount thereof, and general equitable relief.

The parties are numerous and will, when appropriate, be designated herein as follows: Arthur H. Hafeman, plaintiff in the district court, as appellee; and the defendants in that court, including Dean Terrill who is an appellee in case No. 34017, as appellants. The parties do not have a common status or identical and equal interests. They may be classified as follows: Appellee, who owned the land when the lease thereon was executed and delivered and who has a mineral interest therein; appellants who own only a mineral interest in one quarter section of the land will be sometimes referred to herein as mineral owners; appellants who own only a working interest in the lease as to the one quarter section of the land will be sometimes referred to herein as leasehold owners; Gem Oil Company and Dean Terrill are individually mineral owners and they each have a working interest in the lease. They will be sometimes referred to respectively as Gem Oil Company and Terrill.

The pleadings are quite voluminous and involved. There is no controversy concerning them. They join issue on questions pertinent to the litigation. Additional statements as to their contents will be made when appropriate. The parties concede, and the record verifies the correctness of their conclusion, that there is no issue of fact in the case. The controversy relates to the interpretation, meaning, and significance of the proof which principally consists of instruments and writings.

Appellee was the owner of the northeast quarter of Section 23 and the southeast quarter of Section 12, Township 14 North, Range 55 West, Kimball County, Nebraska. The land in Section 23 is referred to as Tract 1 and the land in Section 12 as Tract 2. Appellee

and his wife on October 1, 1949, executed and delivered an oil and gas lease of the land to Magnolia Petroleum Company and thereby leased the land to it for oil and gas exploration and production. The lease contained provisions for its assignment by either party, in whole or in part, and an entirety clause. The lease was filed for record in the office of the register of deeds of that county on December 2, 1949, and it was in force at all times important to this litigation.

The lessee by letter proposed a farmout and assignment of the base lease, to the extent it affected Tract 1, to Eddie Fisher. The proposal was accepted by him on March 16, 1954. The terms of it were that if he commenced the drilling of a well on a designated location and prosecuted it with due diligence to a depth sufficient to test certain formations or until production in paying quantities was obtained and completed the work in a specified time, the lessee would assign to Eddie Fisher the lease as to Tract 1. The letter concerned two leases and contained this language: "Reference is here made to said leases and the record thereof for this and all other purposes."

Appellee and his wife on April 12, 1954, conveyed by mineral deed to Eddie Fisher for a consideration of $4,000 an undivided ½ interest in and to the oil, gas, and other minerals in and under and that may be produced from Tract 1, subject to the oil and gas lease of October 1, 1949. This deed recites that it is the intention of the grantor to convey 80 mineral acres. The grantee in the deed was, by agreement acknowledged April 22, 1954, changed from Eddie Fisher to Gem Oil Company. Appellee and his wife on May 15, 1954, conveyed by mineral deed to Dean Terrill for a consideration of $2,500 an undivided ¼ interest in and to the oil, gas, and other minerals in and under and that may be produced from Tract 1, subject to the oil and gas lease of October 1, 1949. This deed recites it was the inten-

tion to convey and transfer approximately 40 mineral acres out of said tract.

The commercial production of oil was established May 15, 1954, by the test well drilled on Tract 1 in accordance with the farmout letter. The lessee of the base lease assigned it as to Tract 1 to Eddie Fisher on June 9, 1954. In the period of May 8, 1954, to June 22, 1954, both inclusive, he assigned to other persons all the leasehold interest in Tract 1 which he acquired from the original lessee.

The Gem Oil Company was the lease operator. It caused a division order, dated June 15, 1954, to be prepared. It was directed to the oil company. It was signed by the owners of royalty and working interests, including appellee. It described 32 separate fractional interests. The interest of appellee was therein designated as "¼ of ⅛ R.I." The interest of Gem Oil Company was designated as "3/32 of ⅛ R. I." and "67/128 of ⅞ W. I." The interest of Dean Terrill was described as "¼ of ⅛ R. I." and "1/64 of ⅞ W. I." The interest of Dean Terrill, Trustee, was described as "1/16 of ⅞ W. I." Appellee by the terms of the division order certified and guaranteed that he was the owner of "¼ of ⅛ R. I." of the oil produced from Tract 1 and he authorized Gem Oil Company to receive all money from oil produced therefrom according to instructions set forth in the order. The amount received from the sale of oil was specified to be paid to the parties designated therein severally in the proportions named. The order provided it could be terminated by any party in interest by giving 30 days' notice. The division order was not for or to the purchaser of the crude oil produced because of the lease. There is no proof that anyone was misled or was induced to act by the fact that it represented the interest of appellee as appellants claim it should be. The division order was prepared by the Gem Oil Company, addressed to it, and it was for that company. The fractional interests of the owners and

the fractional breakdown in the division order were determined by the representatives of Gem Oil Company. It did not secure and had no division order title opinion. The crude oil from Tract 1 was from the time of first production until April 5, 1955, sold to Western Crude Marketers. The total purchase price thereof was paid by it to and was distributed by Gem Oil Company. George Fisher, the secretary and treasurer of that company, actually handled the sale of the crude oil.

The Gem Oil Company made a detailed monthly oil-run report to appellee which exhibited his interest in the production as set forth in the division order and the net royalty due him on that basis. He accepted and retained payments made to him monthly as royalty due him as shown by the division order from the first production to April 5, 1955, in the total sum of $12,463.69. This case was commenced March 30, 1955. A royalty payment of $839.50 was made to him April 27, 1955, and the last royalty paid him was May 27, 1955, in the sum of $121.65.

Appellee signed a statement, dated June 24, 1954, and addressed to Magnolia Petroleum Company, as follows: "Mr. Steinauer was her (here) to see me in regard to the ½ interest purchased for the Gem Oil Co. on the N. E. ¼-23-14-55. I am willing to sign any papers stating that this meets my approval." A writing designated STIPULATION OF INTEREST AND AGREEMENT, prepared by the Gem Oil Company, was executed during the month of July 1954 by appellee, his wife, Gem Oil Company, and Dean Terrill. It was contemplated that Magnolia Petroleum Company should also execute it. The writing expressly provided it should not be binding on the Magnolia Petroleum Company until it was executed by Hafeman, his wife, Dean Terrill, and Gem Oil Company, recorded in the proper records of Kimball County, and after a certified or photostatic copy of the record of the instrument was delivered to Magnolia Petroleum Company. The writ-

ing was sent to the Magnolia Petroleum Company. It did not sign but returned the writing with the information that the management of the company required the signatures of all working-interest owners in addition to those who had signed it. This writing recited that the mineral deeds to Gem Oil Company and Dean Terrill were subject to the base lease given Magnolia Petroleum Company; that the lease provided that the royalties accruing thereunder should be treated as an entirety; that it was the desire of the parties to the deeds that the royalty conveyed by them should apply only to the production from the tract covered by the deeds; and that the grantees in the deed should receive their respective share as set forth in the deeds of royalties payable under the lease on production from the tract described in the deeds. The writing stated that it was agreed by the parties thereto that the interest conveyed to the grantees in the mineral deeds in and to royalties payable under the lease was from production from the specific tract described in the mineral deeds and from no other tract covered by the oil and gas lease; that nothing contained in the writing should be construed as modifying or changing any provision of the oil and gas lease other than to require the lessee to separately account to the grantors in the mineral deeds for the royalties payable under the oil and gas lease on production from the specific tract described in the mineral deeds and to the extent of the interest acquired by the grantees in said tract; and that by virtue of the mineral deeds the vendees therein "are entitled to receive their proportionate share of the rentals that might be paid under the terms and provisions of said Oil and Gas Lease." When this writing was returned to the Gem Oil Company by the Magnolia Petroleum Company on August 10, 1954, it was placed in its files and nothing further was done with it. At the time of the trial it was traced to the files of the Gem Oil Company but it could not be found there and the original of it was not produced at the trial.

A second writing designated STIPULATION OF INTEREST AND AGREEMENT was prepared by Gem Oil Company and between September 1, 1954, and October 19, 1954, it was signed by appellee, his wife, Gem Oil Company, Dean Terrill, and the leasehold owners. It was sent by Gem Oil Company to Magnolia Petroleum Company on October 25, 1954, for execution. It returned it on November 8, 1954, because it was not signed by the royalty owners. A supplement to the writing was made and signed by other persons designated royalty owners, not including appellee, between November 24, 1954, and December 20, 1954. The instrument was then sent by the Gem Oil Company to Magnolia Petroleum Company on December 24, 1954, for its execution. It was returned unsigned by the Magnolia Petroleum Company with comments concerning it, including the following: "The instrument furnished us which we are returning herewith, excepts and removes from the entirety clause the three-fourths interest in the NE¼ of Section 23, as covered by the two mineral deeds referred to, but the remaining one-fourth interest in said quarter, as well as the entire SE¼ of Section 12, remains under the entirety clause. This would have the practical effect of leaving this royalty in a confused state, particularly so if production is obtained on the SE¼ of Section 12." This instrument was received by the Gem Oil Company and placed in its files. Nothing further was done with it and it was abandoned. It was traced to the files of the Gem Oil Company at the trial. It could not be found there and the original was not produced at the trial.

The Gem Oil Company was a family organization. Ruth Fisher, the wife of Eddie Fisher, was its president; Eddie Fisher was its vice president and it may fairly be said that he was the alter ego of the corporation; and George Fisher was its secretary and treasurer. The three persons named as officers were the only stockholders of the company. They or any of them did

not attend or testify at the trial. Dean Terrill was present at the trial but was not used by appellants as a witness. An employee of Magnolia Petroleum Company testified that he talked to appellee in June 1954 concerning his sale of minerals in Tract 1. He said he asked appellee if he intended to sell the mineral rights under Tract 1 and he answered that that was the agreement. This was the only person who talked with appellee concerning the sale of minerals so far as the record shows.

The gross production from Tract 1 to April 5, 1955, was 169,361.9 barrels of oil. The gross receipts from the sale thereof were $436,008.74. Appellee was paid as royalty $12,463.69. Appellee has made no conveyance specifically describing Tract 2 since the execution of the base lease. There has been no production from any well drilled on Tract 2.

Appellants do not assail the detailed findings of fact made by the trial court. The court stated numerous conclusions of law many of which are excepted to by appellants. The number and length of the conclusions of law prevent them from being set out. The substance of some of them is as follows:

The evidence does not show that mutual mistake of fact caused the execution and acceptance of the mineral deeds or equitable grounds for their rescission or reformation. The language of each of the deeds is clear and unambiguous and extrinsic matters may not be considered to change the clear meaning of them. The grantees in the deeds were charged with notice of the provisions of the base lease by the recording of it and by the terms of the deeds.

The legal effect of the entirety clause in the base lease is that the royalty provided for therein is vested in the mineral owners of the land leased in the proportion that the mineral interest owned by each bears to the entire leased acreage of 320 acres. Gem Oil Company and Terrill, in negotiating for and securing the mineral

deeds, failed to take in account the legal effect of the entirety clause in the base lease notwithstanding they were each charged with notice of it and the meaning thereof. The deeds vested mineral ownership in the respective grantees in the exact terms of each of the deeds but during the term of the base lease the right to royalties from the lands leased thereby is fixed by the provisions of the lease. Appellee is not estopped to make the claim stated in his petition in this case because there is no proof of any concealment or misrepresentation or any reliance thereon or change of position by any of the other parties owning mineral interests.

The interest of appellee in royalties accruing from production from any part of the leased premises is 200/320 or 5/8. The interest of Gem Oil Company and its transferees is 80/320 or 1/4. The interest of Terrill is 40/320 or 1/8.

Appellee is entitled to receive as his share of royalty of production from the date it was first established to April 5, 1955, 5/8 of $50,884.52 or $31,802.80 of which amount there has been paid to him $12,463.69, leaving a balance due and owing to him of $19,339.11 which balance, except $257.50, was paid to various royalty-interest owners in proportion to their several interests. Appellee is entitled to recover from the adverse parties named in paragraph 7 of his petition in this case who owned royalty interests in Tract 1 during the period of first production of oil therefrom to April 5, 1955, the sum of $19,081.70, with interest thereon at 6 percent per annum on the respective amounts of the royalty wrongfully paid to them and from the respective dates of the payment. The parties owning royalty interests last described are liable for the said payments in proportion to their respective ownership of royalty interests.

Appellee is the owner of and entitled to 5/8 of the royalty accruing to April 5, 1955. If production is obtained during the term of the lease from Tract 2, the right to royalties is fixed in the parties in accordance

with the findings and judgment in this case.

The Gem Oil Company and other appellants owning only a working interest in the leasehold estate with reference to Tract 1 are not as such liable to appellee for the amount of royalty payments erroneously made to the royalty-owner appellants between the first production and April 5, 1955.

The judgment rendered in this case is in accordance with the findings of fact and conclusions of law and includes the following:

Appellee is entitled to an adjudication determining the rights of the parties in and to the oil, gas, and other minerals produced from the real estate involved in this case by virtue of the terms of the oil and gas lease recorded in Book 1, page 341, of the Oil and Gas Records of Kimball County.

Appellee is the owner of an undivided ¼ interest in and to the oil, gas, and other minerals in and under Tract 1 and a 4/4 interest in the oil, gas, and other minerals in and under Tract 2 subject to the oil and gas lease. Dean Terrill is the owner of an undivided ¼ interest and Gem Oil Company and its assigns are the owners of an undivided ½ interest in and to the oil, gas, and other minerals in and under Tract 1 subject to the oil and gas lease.

Appellee is the owner of and is entitled to have and receive 200/320, Dean Terrill is the owner of and is entitled to receive 40/320, and Gem Oil Company and its assigns are the owners of and they are entitled to receive 80/320 of the royalty share of the oil, gas, and other minerals produced, saved, and marketed from the real estate involved herein under the terms and provisions of the oil and gas lease.

Appellee is entitled to have an accounting made by Gem Oil Company and the appellant mineral owners as to the time and amounts by which the 3/5 of the royalty becoming due by virtue of production of oil from Tract 1 until April 5, 1955, were paid and received erroneously

and appellee is entitled to have and receive said amounts so erroneously paid and received with interest thereon at 6 percent per annum from the respective dates of said payments from the persons receiving the same. In the event appellee and the various appellants are unable to agree upon the accounting required to be made, appellee may make application to the district court for further relief.

The judgment and denial of motions for a new trial constitute the occasion of this appeal.

Appellants assert that appellee is estopped to have the royalty accruing by the production of oil from the leased real estate apportioned and paid in the method and manner provided by the terms of the lease. The answer of appellants alleges as a basis of this that appellee and his wife executed a division order dated June 15, 1954, by which they certified and guaranteed that they were the owners of ¼ of ⅛ royalty interest in the oil produced from Tract 1; that they authorized Gem Oil Company to pay the royalty as is provided in the division order; that payments from such production were made to, received, and accepted by appellee as the division order provided for all production through April 5, 1955; and that appellee is estopped to deny that his royalty ownership is other than as certified by him in the division order or from claiming any other or additional rights to royalty from such production. The disclosure of the record concerning the division order and what was done because of it have been herein detailed.

Appellants argue that the law is that the execution of a division order setting out the interests of all claimants to the oil and the acceptance of benefits thereunder estops a signer thereof from claiming a greater interest as against the other parties thereto unless and until the order is modified or withdrawn. Appellants do not claim that the division order contains words of grant or conveyance. Contrary thereto they expressly disclaim any contention that it is equivalent to a transfer, assign-

ment, or conveyance of the interest held by the parties executing it. However, appellants strenuously urge the conclusion that the execution of the division order and the acceptance of royalty benefits thereunder by appellee bar him from having or claiming a greater interest in the royalty for production of oil prior to April 5, 1955, than that specified in the division order.

The exhibit in the record referred to as a division order is a composite copy of a division order addressed to Gem Oil Company compiled from counterparts each with some of the signatures referred to and each person whose name is typewritten below a signature line on the exhibit actually signed a counterpart of the exhibit. This practice and what results from it is discussed in Sullivan, Handbook on Oil and Gas Law, page 140, in this language: "It is a misnomer to speak of it as an instrument because it is not unusual to have a number of division orders executed—one by each of the parties who has an interest in production, viz., the lessee, the lessor, and owners of fractional interests carved out of either the working or the royalty interest. Consequently, even though it may constitute a contract between the sellers on the one hand and the purchasers on the other, it is not necessarily a contract between the sellers themselves."

Hershey v. Hershey, 3 Ill. App. 2d 307, 122 N. E. 2d 69, is in several important respects quite similar to the present case. The individual parties to that action executed a division order which incorrectly stated their respective interests in the oil royalties on a tract of land. The error was not discovered by Albert Hershey, one of the royalty owners and the plaintiff in the action, for about 6 years after the execution of the division order. He then advised the pipe line purchaser of the oil, Ashland Oil and Refining Company, one of the defendants, and all further royalty payments were withheld. The royalty owners who were overpaid refused to voluntarily return to plaintiff the amount of the over-

payment previously made. The trial court granted the complaint of plaintiff for an accounting and decreed that appellants return the amount of the overpayment. The syllabus in that case states: "Where the signers of a division order are cotenants of the oil there seems to be no basis for saying they are contracting with each other, and by signing a division order it would seem that a person admits the amount of oil set apart to him therein but expresses no intention to convey or transfer any portion thereof to any other person."

The opinion contains this: "It is the contention of appellants in this court, in brief, that since all the parties signed the division order, while plaintiff is entitled to secure his proper interest in oil production after the error was discovered and notice given, that he could not require repayments from the codefendants for royalty oil which was taken and paid for under the terms of the division order. The theory of appellants is that the division order constituted a binding agreement among the co-owners. * * * The decree of the trial court was entered in support of plaintiff's theory. We believe that such decree was proper and should be affirmed, principally, because the co-owners can hardly be considered in a status of being innocent purchasers for value. * * * As stated by Professor Summers in his work on Oil and Gas (Vol. 3, at page 423), where the signers of a division order are cotenants of the oil, 'there seems to be no basis for saying they are contracting with each other.' The author goes on to state that by signing a division order it would seem that a person admits the amount of oil set apart to him therein, but expresses no intention to convey or transfer any portion thereof to any other person. It is apparent to us that it would be improper to permit the cotenants to profit by a mistake made by the Oil Company in preparation of a division order, or by the plaintiff's failure to discover the mistake before signing the order. It is true that plaintiff would be estopped from asserting a claim as against

the Oil Company, but he certainly was not estopped from asserting his rights as against his cotenants, who were not entitled to the royalties which were being paid to them. Plaintiff was entitled to an accounting from them. Barring plaintiff from recovering as against the cotenants would be grossly unfair, and not justified by any precedents in this State."

The circumstances considered in Dale v. Case, 217 Miss. 298, 64 So. 2d 344, 37 A. L. R. 2d 811, were that Case executed a mineral deed of an undivided interest to Dale subject to the limitation that "This deed shall not participate in present oil and gas lease, * * *." Dale conveyed his interest to three other persons subject to the quoted limitation. Production of oil was obtained under the original lease by Stanolind Oil & Gas Company, assignee of the lease. It circulated division orders stating the name of Dale and his fractional interest. Case, Dale, and others signed the division orders and Dale collected royalties for about 2 years when Case brought suit asking that the purchasing company be required to reimburse him for the royalty paid to Dale and the grantees of Dale. The latter by cross-bill asked that the deed be reformed so as to provide that rentals only and not royalties were reserved by Case by the limitation in the mineral deed he gave Dale. The court discussed the matter in this way: "Finally, the appellants' attorneys contend that, when Case and his wife signed the division orders, and failed to register a protest on account of the failure of the division orders to show Case's ownership of the royalty rights under the lease in the mineral interest conveyed to Dale, they thereby assented to Dale's interpretation of the reservation clause in the mineral deed. But, as we have already stated, in our opinion the meaning of the reservation in the mineral deed which Dale accepted is clear, and Dale was not entitled to the royalty payments to be made under the existing lease. Dale acquired no greater rights as a result of Case's signing of the division orders. Dale

was not entitled to profit by the mistakes made by the operating companies in the preparation of the division orders or by Case's failure to discover the mistakes before signing the orders. * * * Case, after signing the division orders, was estopped from asserting a claim against the oil companies for the amounts paid to Dale prior to the filing of the bill of complaint, but Case was not estopped from asserting his rights against Dale and his grantees who were not entitled to the royalties which were being paid to them."

The court, in Stanolind Oil & Gas Co. v. Terrell (Tex. Civ. App.), 183 S. W. 2d 743, considered an oil and gas lease which provided that the lessor should receive a $64,000 oil payment without any deduction of any kind for any purpose. A division order executed later by the lessor provided with unclouded clarity that the purchaser of the oil should deduct from the payment the gross production tax imposed by the state on the lessor's share of the oil. The purchaser of the oil deducted the tax from the payment due lessor by the terms of the lease. The lessor sued for the amount deducted. The purchaser contended that the terms of the oil payment provisions of the lease were modified by subsequent contract of the parties, that is, the division order addressed to the appellant and signed by the lessor. The judgment for plaintiff was affirmed. The court therein said: "A 'division order' is ordinarily the contract under which production of oil or gas is purchased or accepted for transportation by pipe line company. * * * Where lessor, who was entitled under oil lease to one-eighth of proceeds of oil produced without deduction for production tax, executed division order to lessee relating only to sale of oil production lessor owned by virtue of terms of lease, lessor did not change her rights under lease requiring production tax to be paid by lessee notwithstanding she consented in such order that lessee in its capacity as first buyer should deduct such tax from purchase price." The opinion

states: "A division order is ordinarily a contract under which the production is purchased or accepted for transportation by the pipe line company. * * * The division order signed by the lessors * * * and the subsequent like division order signed after Roy Terrell's death, had for its predominant purpose the sale of the production to appellant. We find no basis whatever for holding that it evidenced, or provided for, any change in the purchase price or consideration which the lessee was obligated to pay the lessors by the terms of the lease. It recites that appellant is the owner of the 7/8 working-interest, subject to the $64,000 oil-payment, 2/3 to Terrell and 1/3 to Hulen. It further recites that Terrell owns 2/3 of the 1/8 royalty interest, and Hulen 1/3 of the 1/8 royalty interest. There is nothing contractual in these recitations, they merely reflect the interest of the parties as created by the lease. The provision of the division order, so strongly relied on by appellant, relates only to the sale of the production which the lessors owned in virtue of the terms of the lease. We here repeat such provision: 'Settlements and payments shall be made monthly for oil received and purchased during the preceding month * * * to the respective parties, respectively, less any taxes required by law to be deducted and paid by you (Stanolind) as purchaser.' It is not intended by such provision in the division order to affect appellant's obligation as lessee." See, also, Tilley v. Allied Materials Corp., 208 Okl. 433, 256 P. 2d 1110; Snider v. Snider, 208 Okl. 231, 255 P. 2d 273.

Sullivan, Handbook of Oil and Gas Law, p. 142, states this conclusion: "A division order does not supersede the lease by operating as a novation as to the royalty."

In 3 Summers, Oil and Gas (Perm. Ed.), § 590, pp. 423 and 424, respectively, the comment is made: "But ordinarily where the signers of a division order are strangers and at most cotenants of the oil, there seems no basis for saying that they are contracting with each other," and "By signing a division order it would seem

that a person admits that he owns the amount of oil set apart to him therein, but expresses no intention to convey or transfer the remainder to signers or to the purchasing company."

In 1 Oil and Gas Reporter, p. 1175, the following is stated: "Acquiescing in royalty payments to the wrong party is not enough to create an estoppel against the real owner of royalties. The usual requirement of a change of position by the one asserting estoppel which would render it inequitable for the real owner to assert title is applicable."

The doctrine in this jurisdiction is that to create an estoppel by the acceptance of benefits it is essential that the party against whom the estoppel is claimed should have acted with knowledge of his rights; that the party claiming the estoppel was without knowledge or means of knowledge of the facts on which he bases his claim of estoppel; that he was influenced by and relied on the conduct of the person sought to be estopped; and that he changed his position in reliance thereon to his injury. This doctrine is for innocent people and only they may invoke it. Sedlak v. Duda, 144 Neb. 567, 13 N. W. 2d 892, 154 A. L. R. 490; In re Estate of Lee, 137 Neb. 567, 290 N. W. 437; Shelby v. Platte Valley Public Power & Irr. Dist., 134 Neb. 354, 278 N. W. 568; Rea v. Pierson, 114 Neb. 173, 206 N. W. 760.

The information in the record concerning appellee is meager. It consists substantially of the fact that he owned two tracts of land of 160 acres each in Kimball County subject to an indebtedness of considerable amount, payment of which was secured by a mortgage on the land. His principal concern was to get the debt paid and the mortgage discharged. The intensity of his desire relative to this is indicated by the sale of ½ of the minerals in and from Tract 1 a very short time before the discovery of oil and the sale of ¼ of the minerals in and from the land on the day an oil well was brought in. It is a fair inference that appellee knew

he was, by virtue of the oil and gas lease he executed, entitled to 1/8 of any oil produced from the land; that he conveyed 3/4 of the oil in and under Tract 1; and that he had retained 1/4 of the oil, gas, and other minerals in and under the land. There is no evidence that appellee had the slightest knowledge or even a suspicion that he owned any greater interest in the oil, gas, or other minerals. The conviction is not difficult that appellee had no information or knowledge of the actual quantity of his ownership in the oil produced. It required a very considerable knowledge of and proficiency in mathematics and more than slight technical training to determine this from the mineral deeds and the long and involved provisions of the base lease. The authors of the division order were experienced in the oil-producing business. They misstated the true interest of appellee in the royalty. They either did not know what it was or if they did know they intended to deal unjustly with appellee. The fractional interests set forth in the division order could well have confused and frustrated appellee. The statement of the court in Dale v. Case, *supra,* concerning the difficulty in a similar situation is appropriate: "The fractions appearing on the reverse side of the division orders which Case signed might have puzzled the mind of a bank president * * * who was accustomed to dealing in figures of that kind * * *." The record is barren of anyone in any of the numerous contacts made with appellee on behalf of Gem Oil Company, Fisher, Terrill, and Magnolia Petroleum Company stating, suggesting, or even hinting to appellee that he owned or might be entitled to a greater proportion of the oil production from the land. The conclusion is justified that the first time appellee had the faintest idea that he might be entitled to a larger or additional interest was when he was solicited to execute the instrument prepared by Magnolia Petroleum Company dated January 26, 1955. His response was that he would not act in reference to it until he

consulted his lawyer. He did not sign the instrument. He soon thereafter commenced this litigation. Prior to that time it cannot be found that appellee acted in reference to any of the matters concerned in this case with knowledge of his actual interest in the oil produced.

Appellants have not made it certain by what acts they claim appellee asserted rights inconsistent with those subsequently claimed by him. The argument seems to be that because appellee signed the two writings called STIPULATION OF INTEREST AND AGREEMENT, neither of which was completed as to execution because Magnolia Petroleum Company refused to sign either and both were so completely abandoned that the original of neither could be produced at the trial notwithstanding they were in the custody and files of Gem Oil Company when they were last seen; because appellee signed the division orders, one directed to Gem Oil Company and the other addressed to Stanolind Oil Purchasing Company; and because appellee accepted remittances sent him by Gem Oil Company for less than he was entitled to receive, he is making claims inconsistent with what he previously asserted. It is proper to say that appellee acquiesced in what the appellants, especially Eddie Fisher, Gem Oil Company, and Dean Terrill, undertook to set up. Appellee unwittingly signed papers which were intended by their authors to deprive appellee of more than one-half of what his legal interest was but appellee was not thereby proposing anything or asserting any rights or claims. He was riding along on what had the appearance of being matters of red tape to meet the requirements of Magnolia Petroleum Company. The agreements of interest did not become effective for any purpose. Dean Terrill, experienced oil man and Chicago attorney, properly appraised the situation and expressed the requirements to make them effective but this was never accomplished. He, in his letter of July 1, 1954, to Gem Oil Company, with a copy thereof to Eddie Fisher, suggested that "* * *

inasmuch as the lease provision that occasions the difficulty is one inserted for the benefit of the lessee, that Magnolia * * * and Eddie (Fisher), as lessee of the 160 acre tract, concur in the instrument." Dean Terrill, Eddie Fisher, Gem Oil Company, and others were seeking to accomplish their desire in some manner which would prevent appellee from knowing what it was all about. Dean Terrill characterized what they wanted when he wrote as part of the same letter: "Of course, anything favorable indicative of the true interest of the parties would be helpful in the event of a contest." That is, anything that Magnolia Petroleum Company would accept and that would not alert appellee that he was thereby being deprived of more than half of what he owned would be helpful to appellants. The record fails to show that appellee asserted particular rights inconsistent with those subsequently claimed.

The record denies that appellants were without knowledge or means of knowledge of the facts; that is, that they did not know or did not have the means of informing themselves as to the quantity of interest of appellee. The base lease and the mineral deeds contained the information; the lease was of record more than 4 years before the mineral deeds were made; and the deeds, by the provisions in each of them, were made subject to the lease. The farmout proposal to Eddie Fisher was expressly made subject to the base lease. Fisher examined the records as to appellee's ownership of the royalty but he "completely overlooked the entirety clause which was of record in the lease to Magnolia." Appellants were charged with knowledge of the quantity of the ownership by appellee of the oil produced. The record fails to show that appellants relied upon anything appellee did or omitted or that appellants changed their position in reliance thereon to their prejudice or injury. The record fails to show any of the indispensable requirements for an estoppel of appellee to exist in this case.

Appellants strenuously insist that the writings of July —, 1954, and September 1, 1954, each entitled STIPULATION OF INTEREST AND AGREEMENT effectively amended the base lease and removed the entirety clause therefrom as to Tract 1 because they were signed by Eddie Fisher, Gem Oil Company and its leasehold assigns, and appellee. This is tantamount to saying that assignment of a portion of the lease worked a division of the entirety clause so that each unit was thereafter to be treated as though leased separately in the first instance. The thesis of appellants in this respect may not appropriately be pursued until it is determined whether or not either of the writings on which it is based became effective for any purpose.

The idea of securing a writing destroying the effectiveness of the entirety clause as to Tract 1 apparently originated with Gem Oil Company in late June as expressed in a letter to Dean Terrill. He was an experienced oil man, practicing lawyer in Chicago, and had a royalty deed for ¼ of the minerals in and under Tract 1. He replied to the letter of Gem Oil Company on July 1, 1954, with a copy of the letter to Eddie Fisher, in this manner: "I take it from your letter of June 30 that it is contemplated the Hafemans will execute an instrument that will clearly provide for the division of the royalty production (or the cash proceeds thereto) from the 160 acre tract upon which the wells are located in the proportions of one-half to Eddie Fisher, one-fourth to them and one-fourth to me. May I suggest, inasmuch as the lease provision that occasions the difficulty is one inserted for the benefit of the lessee, that Magnolia * * * and Eddie, as lessee of the 160 acre tract concur in the instrument." The writing of July —, 1954, was prepared by Eddie Fisher, vice president of Gem Oil Company, dictated to its office manager, and written by her. It, by its form and contents, was intended to be executed by and be the contract of appellee and his wife, Gem Oil Company, Dean Terrill, and Mag-

nolia Petroleum Company. It contained the language following the "Whereas" clauses: "NOW, THEREFORE, the undersigned parties hereto have agreed as follows:" It was signed by appellee, his wife, Gem Oil Company, and Dean Terrill. It was sent by Gem Oil Company to the Magnolia Petroleum Company. It refused to sign and the writing was returned to Gem Oil Company. The second writing, dated September 1, 1954, was prepared by Gem Oil Company. It was identical with the first one except it contained two additional "Whereas" clauses. One concerned the assignment of the base lease as to Tract 1 to Eddie Fisher and the other related to the assignments of different interests in the lease by him to various parties. It was signed by appellee, his wife, Gem Oil Company, and Dean Terrill. Afterwards there was an addenda attached to the writing and it was signed by the owners of the working interests. The writing was sent by Gem Oil Company to Magnolia Petroleum Company. It refused to sign it and returned it to the sender with the comment that it "* * * would have the practical effect of leaving this royalty in a confused state, particularly so if production is obtained on the SE¼ of Section 12." The Magnolia Petroleum Company refused to sign either of the writings. The last thing known of them was that they were in the office of Gem Oil Company. They were so completely discarded by appellants that the original of neither of them could be found when search was made for them. It is a justifiable inference that as each was objected to by Magnolia Petroleum Company, a new writing was prepared and the preceding one was discarded and destroyed. This is indicated by a letter from Eddie Fisher to Dean Terrill in which he said: "Later on when this situation became apparent and ever since that time we have been trying to secure a waiver in such a form that would be signed by both Magnolia and Hafeman." The instrument dated January 26, 1955, prepared by the Magnolia Petroleum Company, was not signed by appellee.

When it was proposed to him he refused to take any action until he consulted with his lawyer. It was soon thereafter that this action was commenced. After the advent of this litigation a letter was written by Eddie Fisher to Dean Terrill which contains convincing proof that the intention was that none of the writings should be complete or effective until all the parties had signed and this was especially true as to appellee and the Magnolia Petroleum Company. The letter was concerning the dilemma of the appellants in this lawsuit. The statement is: "The whole thing is that we have no copies of a stipulation signed by both Hafeman and Magnolia * * *." The conclusion is inescapable that the writings were drawn and intended as mutual agreements by and between the parties named therein and were to be effective only when signed by each of them.

It is argued by appellants that the assignment provisions in the lease with express assumption of lease obligations in the assignment have the effect of discharging the rights and duties of the original lessee as to the entirety clause covenant insofar as it pertains to the assigned tract and to transfer all rights and duties inherent in that covenant to the partial assignee as to the assigned tract. The effect of the lease provisions concerned is to make the covenant to pay rent and royalties divisible upon assignment of a portion of the premises by the lessee. The incidence that one covenant is specifically made divisible by the terms of the lease does not require a conclusion that all other covenants of the lease are likewise divisible. A venerable rule of construction dictates an opposite conclusion. The doctrine of expressio unius est exclusio alterius applies. Ledwith v. Bankers Life Ins. Co., 156 Neb. 107, 54 N. W. 2d 409; Calvary Baptist Church v. Coonrad, *ante* p. 25, 77 N. W. 2d 821; Southern Coast Corp. v. Sinclair Refining Co., 181 F. 2d 960; Bischoff v. Francesa, 133 W. Va. 474, 56 S. E. 2d 865. If the parties had intended the entirety clause to be divisible, they could easily and should have so provided

by appropriate language in the lease. They did not but they did say that the covenant to pay rent and royalties is divisible. The correct interpretation of the lease under the rule referred to above is that the entirety clause was not intended to be and is not divisible.

The liability to pay royalties and the method of allocating royalties are not identical. By assignment of a portion of the leasehold the liability for payment of royalties accruing because of production from the assigned tract passes by virtue of the terms of the lease from the original lessee to his assignee. The relevant part of the lease is: "In the event of an assignment of this lease as to a segregated portion of said land, the rentals payable hereunder shall be apportioned as between the several leasehold owners ratably according to the surface area of each * * *. An assignment of this lease, in whole or in part, shall, to the extent of such assignment, relieve and discharge lessee of any obligations hereunder * * *." It is impossible to understand how these provisions can be authority for the splitting of the entirety clause upon assignment of a part of the leasehold with the result that the divided clause shall then attach to the parcels of the leasehold pro tanto. The obligation to pay royalties of necessity includes the duty to pay them as required by the entirety clause. This duty is extended, not divided, by an assignment of a portion of the leasehold. The remark of the court in Wilson v. Texas Company, 147 Kan. 449, 76 P. 2d 779, is pertinent: "The lease contract did provide for assignment, but it also expressly provided that its covenants were extended (not enlarged or decreased) to the assigns of the parties." If the appellants are correct in this regard, the reason for the existence of the entirety clause, the elimination of hardships prevalent under the nonapportionment rule, is defeated and the lessor is deprived thereunder without notice or recourse by the unilateral act of the lessee in making an assignment of part of the lease-

hold. The proper interpretation of the assignment provisions of the lease is that they provide for a division of liability for payment of rent and royalties but they also provide for an extension or continuation of the method of allocating royalties. Language in the first sentence of the assignment provision of the lease is convincing that the parties intended the extension rather than the divisibility of the entirety clause. The language is: "The rights of either party hereunder may be assigned in whole or in part and the provisions hereof shall extend to the * * * assigns * * *."

It is asserted in the pleadings of appellants that the parties to the mineral deeds mutually intended and agreed that royalty interests were being conveyed only as to the lands described in the deeds notwithstanding any provision of the oil and gas lease or the deeds to the contrary and that if the deeds were subject to the pro rata royalty provision in the lease, it was the result of a mutual mistake of fact of the parties to the deeds and reformation of the deeds should be granted to carry out the agreements of the parties which were inadvertently disfigured by a mistake in the deeds. The trial court after the reception of evidence offered by appellants, on motion of appellee, required appellants to elect between relying on the mineral deeds as made or relying on their request for reformation of the deeds. Appellants chose to rely on the deeds as made. The ruling of the court is challenged by appellants and they appeal to this court to give effect to the intention of the parties, grant the royalty owners the relief they demand based upon nonapportionment of the royalties, and reform the mineral deeds. They speak of reformation of the mineral deeds but what would be required to rescue them from the situation would be the elimination of the entirety clause in the oil and gas lease. Harley v. Magnolia Petroleum Co., 378 Ill. 19, 37 N. E. 2d 760, 137 A. L. R. 900. The lease was made and recorded in 1949. The transaction did not concern any of the appel-

lants but the record of the lease was notice of its contents to anyone dealing in any way with the land described in it. The lease contains this provision: "If the leased premises shall hereafter be owned in severalty or in separate tracts, the premises, nevertheless, shall be developed and operated as one lease, and all royalties accruing hereunder shall be treated as an entirety and shall be divided among and paid to such separate owners in the proportion that the acreage owned by each such separate owner bears to the entire leased acreage." Each of the mineral deeds was by provision therein made subject to the lease. There is no claim of ambiguity in the deeds or fraud in the transaction resulting in their existence. The basis claimed for reformation is mutual mistake. The record is without proof of any mistake, much less mutual mistake, inducing the execution and acceptance of the deeds. It is not even claimed that either of the deeds does not truthfully and precisely express exactly what the true transaction was that eventuated in it. There was delivery and acceptance of delivery of the deeds as effective conveyances. It has long been the law of this state that if persons to a transaction put their engagement in writing in such terms as to import a legal obligation without uncertainty of object or extent of the engagement, it is conclusively presumed that the entire engagement of the parties and the extent and manner of their undertaking have been reduced to writing. In Barkalow Bros. Co. v. English, 159 Neb. 407, 67 N. W. 2d 336, this court said: "In the absence of fraud, mistake, or ambiguity a written agreement is not only the best evidence but the only competent evidence as to what is the contract of the parties." It is stated in Frentzel v. Siebrandt, 161 Neb. 505, 73 N. W. 2d 652, that: "A preponderance of evidence sufficient to justify reformation of a written instrument requires proof that is clear, convincing, and satisfactory. * * * The law presumes that a person who makes a contract understands its meaning and effect and that he has the

intention which its terms manifest. * * * A written contract expressed by clear and unambiguous language is not subject to interpretation or construction. * * * The intention of the parties to a written contract expressed by clear and unambiguous language must be determined from its contents." See, also, Hansen v. Bruce, 162 Neb. 759, 77 N. W. 2d 458. Instruments and conveyances of minerals and mineral rights are subject to these principles of law. Meeks v. Harmon, 207 Okl. 459, 250 P. 2d 203; McNeill v. Shaw, —— Okl. ——, 295 P. 2d 276; Remuda Oil Co. v. Wilson (Tex. Civ. App.), 264 S. W. 2d 192; Hoffman v. Sohio Petroleum Co., 179 Kan. 84, 292 P. 2d 1107; 24 Am. Jur., Gas and Oil, § 22, p. 533.

The remedy of reformation has no application to this case. The lease and the mineral deeds must be accepted and enforced, to the extent they are important to this case, as they are written. The entirety clause of the base lease is set out above.

The Supreme Court of Kansas within the present year decided an entirety clause case, Hoffman v. Sohio Petroleum Co., *supra,* which involved the circumstances that appellees acquired by deed the northwest quarter and appellants acquired by deed the northeast quarter of the same section of land after both tracts had been leased together by an instrument containing the entirety clause. Each of the deeds recited it was made subject to the oil and gas lease on the land. Oil was produced from the northwest quarter but no oil was produced from the northeast quarter. The owners of the latter claimed one-half of the oil royalty by virtue of the entirety clause. The owners of the northwest quarter claimed they were the owners of such production because it was produced from their land. The court sustained the claim of the owners of the northeast quarter because of the entirety clause which the court said was a valid, enforceable contract provision. The decision contains this: "In the face of the record the incon-

trovertible facts are that appellees, and * * * the appellants, acquired the respective tracts of real estate * * * (by) deeds specifically reciting that each tract of real estate was being sold and conveyed subject to the terms and provisions of such oil and gas lease. That * * * meant that when they accepted their respective deeds they made them contracts in writing whereby they not only took, but agreed to take, their particular tracts with whatever benefits or burdens might eventually come to them under the terms of such lease. Included in the benefits and burdens of that instrument were those imposed by the terms of the entirety clause * * *. Having agreed to accept its terms and conditions neither appellees nor appellants can now be heard to dispute or deny that during its existence royalties accruing from the entire acreage of the land covered by the terms of the basic oil and gas lease shall be paid to them as separate owners in the proportion that the acreage now owned by them bears to the entire leased area."

Rauner v. Jones, 159 Neb. 385, 67 N. W. 2d 347, determined: "In the absence of an express agreement or controlling valid governmental regulations the owner of the mineral interests under a portion of land subject to an oil and gas lease is entitled to all of the rents and royalties accruing from the production of oil or gas from that land even though the lease may cover other tracts. * * * By the terms of an entirety clause, such as is here contained in the gas and oil lease, the parties thereto agree that in the event the mineral interests under the leased premises become separately owned that the royalties shall nevertheless be treated as an entirety, the separate owners to participate pro rata. * * * This voluntary provision in a lease has the effect of placing a restriction upon the power of the lessor to alienate his mineral interests therein contrary thereto as long as the lease containing this clause remains in force and effect."

The extended discussion of appellants directed to their

contention that this court should interpret or restate the decision made in the Rauner case or at least modify or restrict its application has been examined and considered. The conclusion from this study is that the Rauner case is unambiguous, sound, and desirable; that this case contains nothing that justifies any less than the affirmance of what is said in the Rauner case; and that the impact of it to the extent it is applicable to this case is decisive of it.

Appellee by cross-appeal insists that Gem Oil Company and Dean Terrill are liable for the amount of royalty wrongfully withheld from appellee on account of the oil production from Tract 1 through April 5, 1955. The appellants insist that the cross-appeal is moot and should be denied.

The district court found that Arthur H. Hafeman was entitled to recover from the defendants owning royalty interests in Tract 1 during the period between the time of first production therefrom to April 5, 1955, the sum of $19,081.70. The judgment debtors are identified as the persons named in paragraph 7 of the petition in the case in the district court. Supersedeas bonds were filed and approved by the persons against whom the judgment was rendered in the sum of $20,500 conditioned as the statute requires. All royalties have been retained by the purchaser of Tract 1 since April 5, 1955.

The argument is that if the judgment is affirmed, it will be paid to the judgment creditor because it is secured and guaranteed by supersedeas bonds. Consequently any additional adjudication of liability to the judgment creditor would be of no advantage to him and because of this the cross-appeal is moot. There is no effort made by any party to establish when a cause, in a legal sense, is moot.

In the decision of State v. First Catholic Church of Lincoln, 88 Neb. 2, 128 N. W. 657, there is the following: "In Adams v. Union R. Co., 21 R. I. 134, 44 L. R. A. 273, it is said: 'A moot case is one which seeks to

determine an abstract question, which does not rest upon existing facts or rights. Where a concrete case of fact or right is shown, we know of no principle or policy of law which will deprive a party of a determination simply because his motive in the assertion of such right is to secure such determination. It is a matter of common practice.' "

In State ex rel. Kennedy v. Broatch, 68 Neb. 687, 94 N. W. 1016, 110 Am. S. R. 477, this court declared: "Abstract questions of law can not be made the subject of litigation. There must be real parties and a res in dispute that will become res judicata when the litigation is determined." See, also, Lincoln National Bank & Trust Co. v. Grainger, 129 Neb. 451, 262 N. W. 11; McCarter v. Lavery, 101 Neb. 748, 164 N. W. 1054; In re Application of Gering & Co., 88 Neb. 192, 129 N. W. 430; State v. Savage, on rehearing, 64 Neb. 702, 91 N. W. 557; Black's Law Dictionary (De Luxe Ed.), Moot, p. 1159.

It is evident that the demands of the parties in the matters presented are adverse. They rest upon existing facts and rights and affect the subject matter of litigation. The fact that the judgment creditor has recovered one judgment and its payment has been assured by bonds, if judgment is sustained, is not the whole answer. Several actions may be brought and as many judgments recovered against various wrongdoers although but one satisfaction may be had. Fitzgerald v. Union Stock Yards Co., 89 Neb. 393, 131 N. W. 612, 33 L. R. A. N. S. 983; Luikart v. Mains, 130 Neb. 907, 267 N. W. 168. The matter presented by the cross-appeal is not moot.

The cross-appeal is based on the hypothesis that a trust relationship existed between Gem Oil Company and Dean Terrill, hereafter called appellants, on the one hand, and Arthur H. Hafeman, appellee, on the other and that because thereof appellee is entitled to judgment against the appellants for the whole of the amount

of the royalty owned by appellee which was distributed and paid to others as found and determined by the district court.

Gem Oil Company was the lease owner, lease operator, and mineral-interest owner. All appellant mineral owners secured their interests from Gem Oil Company. Its acts involved in this case were invariably conceived and directed by Eddie Fisher and generally he was the person who performed them for it as its most active officer and representative. When Gem Oil Company was made grantee in the mineral deed, supplanting Eddie Fisher therein, on April 22, 1954, it and appellee became cotenants and by the agreement of May 14, 1954, and the execution and delivery of the mineral deed pursuant to it on the next day Dean Terrill, grantee therein, became a cotenant of the minerals in and under Tract 1 with Gem Oil Company and appellee. Prairie Oil & Gas Co. v. Allen, 2 F. 2d 566, 40 A. L. R. 1389; Earp v. Mid-Continent Petroleum Corp., 167 Okl. 86, 27 P. 2d 855, 91 A. L. R. 188; Callahan v. Martin, 3 Cal. 2d 110, 43 P. 2d 788, 101 A. L. R. 871; New Domain Oil & Gas Co. v. McKinney, 188 Ky. 183, 221 S. W. 245; 3 Summers, Oil and Gas, § 609.1, p. 297, 1956 Cum. Pocket Parts.

Eddie Fisher on June 22, 1954, transferred leasehold interest to appellants. These transfers gave appellants possession, control, and operation of the leasehold and mineral estates. This resulted in the common property of the cotenancy, the minerals and the proceeds therefrom, and the distribution of the proceeds of the royalty oil being controlled by two of the cotenants to the exclusion of the third, the appellee. The fact of cotenancy alone did not create a fiduciary relationship as to the estate owned by the cotenants. Sharples Corp. v. Sinclair Wyoming Oil Co., 62 Wyo. 341, 167 P. 2d 29; Bunger v. Rogers, 188 Okl. 620, 112 P. 2d 361. However, there were additional facts. Two of the cotenants, by virtue of their multiple ownerships, acquired the possession, op-

eration, and control of the property of the cotenancy to the exclusion of appellee who was the third cotenant. It was while this condition existed, and probably because of it, that the proceeds of the royalty oil were improperly distributed by Gem Oil Company to the prejudice and injury of appellee. A cotenant having control of the common property has been said to be a trustee for his cotenant to the extent of the interest of the cotenant and he may have and compel an accounting. In Rice v. Peters, 128 App. Div. 776, 113 N. Y. S. 40, it was held: "A tenant in common receiving the common property, either wrongfully or by consent, holds it as trustee for his co-tenant to the extent of the interest of the cotenant, who may compel an accounting."

In Twyford v. Sonken-Galamba Corp., 177 Okl. 486, 60 P. 2d 1050, it is said: "We have here a situation where parties have knowingly dealt with trust property. A tenant in common in possession holds the common property in trust for his cotenant."

Appellants deny this and say there were no fiduciary obligations involved in any of the matters concerned in this litigation but only an obligation of good faith, the performance of which should be discharged with ordinary care and diligence. The contention of appellants in this regard will be noticed further hereafter. However, with or without fiduciary obligations, it may not successfully be contended that a tenant in common of oil in place who develops and sells the oil must not truly account to a cotenant for the value of his share of the oil less, of course, the reasonable expense of producing it.

The court declared in Prairie Oil & Gas Co. v. Allen, *supra:* "Tenant in common of oil underlying land, which has been extracted by lessee of a cotenant, is entitled to an accounting from lessee for market value of oil produced, less reasonable and necessary expense of developing, extracting and marketing * * *." See, also, Earp v. Mid-Continent Petroleum Corp., *supra;* Silver

King Coalition Mines Co. v. Conkling Mining Co., 255 F. 740.

In Carter Oil Co. v. Crude Oil Co., 201 F. 2d 547, Grisso, the owner of two noncontiguous tracts of 80 acres and 40 acres, leased them for oil and gas by one lease which contained an entirety clause. Thereafter Grisso conveyed to Gast an undivided one-fourth interest in oil and gas in the 80-acre tract. Carter Oil Company procured the lease by assignment and produced oil on the 40-acre tract. Gast conveyed his interest to Crude Oil Company. It, by the entirety clause, was entitled to one-sixth of one-eighth royalty from the production on the 40-acre tract but for many years all of the royalties were paid by Carter Oil Company to Grisso. Crude Oil Company brought suit against Carter Oil Company for its share of the royalties. The court decided there was no fiduciary relationship between Carter Oil Company and Crude Oil Company but because the former paid the royalties to Grisso with knowledge that Crude Oil Company was entitled to a share thereof as cotenant of Grisso, it was charged as a matter of law with knowledge that Grisso became a trustee of such payments as to the Crude Oil Company; and since Carter Oil Company had sufficient information to put it on notice that Grisso was misappropriating the royalty payments made to him, Carter Oil Company was liable to Crude Oil Company for the royalty paid by it to Grisso. The opinion of the court in that case contains these statements: "It seems clear from the record that at the time of the assignment of the mineral interest to Gast neither he nor Grisso comprehended the legal effect of the entirety clause of the lease and that both labored under the erroneous impression that the assignment conveyed only a mineral interest in the 80 acre tract. * * * It is, however, obvious that thereafter Grisso learned that the entirety clause gave Gast an interest in the production from the 40 acres not included in the assignment to Gast. * * * While there is no

fiduciary relationship between tenants in common, if one co-tenant comes into possession of funds belonging to his co-tenant, he becomes trustee of such funds and stands in fiduciary relationship to his co-tenant with respect thereto."

Gem Oil Company and Terrill were not only in possession of the royalties accruing to the cotenants as was Grisso in the Carter Oil Company case but were also by virtue of being mineral owners and leaseowners in complete control of that from which the royalties flowed, that is, the mineral estate in which they were cotenants with Hafeman. All of the proceeds from the sale of the oil were paid to Gem Oil Company. It allocated and distributed the proceeds. When it paid out erroneous shares of the proceeds to itself, to Terrill, and others it was in the exact position of Carter Oil Company in the case above quoted and also in the position of Grisso. Gem Oil Company not only knowingly paid royalties in erroneous proportions as did Carter but it also knowingly received and held such erroneous payments for its benefit and enrichment just as Grisso did in the last case quoted. Terrill's position is identical with what Grisso's position was in the Carter Oil Company case, that is, knowingly receiving and holding misappropriated royalties and by virtue of his leasehold ownership he was charged with the correct payment of royalties and hence also stands in the position in which Carter Oil Company found itself. Appellants did not heed and observe the standard of conduct stated by Justice Cardozo in Meinhard v. Salmon, 249 N. Y. 458, 164 N. E. 545, 62 A. L. R. 1, frequently referred to and quoted: "A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior. As to this there has developed a tradition that is unbending and inveterate. Uncompromising rigidity has been the attitude of courts of equity when petitioned to undermine the rule of undivided loyalty

by the 'disintegrating erosion' of particular exceptions * * *."

The public records were checked by Eddie Fisher in April 1954 as to the ownership of royalty by appellee. The base lease was a part of the records. It contained the information as to the part of the royalty oil appellee owned. Terrill contracted to purchase minerals in Tract 1 from appellee on May 14, 1954, and the deed to him is dated the next day. Eddie Fisher and Gem Oil Company were engaged in the oil-producing activity. Terrill was a Chicago lawyer and had practiced his profession for about 25 years. He had been in the oil business for approximately 18 years. Each of the instruments made after the lease was expressly made subject to the lease. Appellee was the owner of the equity of redemption of the land described in the lease. There is no indication that he had any previous experience concerning leasing land for exploration or production of oil or with the production of oil. There is no indication in the record that appellee could by himself have determined his true ownership in the oil royalty.

There is evidence that as early as June 1954 the Gem Oil Company communicated with Terrill concerning securing a writing from appellee barring him from claiming that he was the owner of more than ¼ of ⅛ of the royalty oil. It is a permissible inference that it then, and probably much earlier, knew of the entirety clause in the lease and the true interest appellee owned in the royalty. Appellants knew of it then because Terrill referred to it in the letter he wrote July 1, 1954, "as the lease provision that occasions the difficulty is one inserted for the benefit of the lessee" and he counseled that an instrument should be secured from the Hafemans, Eddie Fisher, and Magnolia Petroleum Company clearly fixing the division of the royalty or the proceeds of it from Tract 1 in the proportions of ½ to Eddie Fisher, ¼ to Hafeman, and ¼ to Terrill. He added that such an instrument would be "helpful in the event of a con-

test." They unsuccessfully continued their efforts in that respect until shortly before the inception of this litigation.

The record is convincing that appellants had actual knowledge of the true interest of appellee in the royalty before any of the proceeds of the royalty oil were allocated and paid by the Gem Oil Company. However, they had the means of knowledge and were charged with it before any of the royalty was distributed and paid. They boldly disregarded what they were bound to know and misappropriated more than half of what appellee owned of the royalty. Appellants were each enriched thereby and cannot be heard to say that they are not liable for the whole amount of the misappropriation. Appellants have failed by a wide margin of meeting the standard they claim, that is, "good faith, the performance of which should be discharged with ordinary care and diligence." The cross-appeal is well taken and should be sustained.

The problem in case No. 34023, Arthur H. Hafeman v. Gem Oil Company et al., is whether or not the owners of a leasehold estate under an oil and gas lease are liable to the lessor for royalties. The relief sought is a reversal of the conclusion of the district court that the lease owners had no liability for the erroneous payment of the royalties and a direction to that court to render a judgment in favor of Arthur H. Hafeman and against the lease owners for the amount of royalties improperly diverted from Hafeman and paid to others.

The oil and gas lease was made by Hafeman and his wife to Magnolia Petroleum Company and it assigned the lease as to Tract 1 to Eddie Fisher. He assigned the lease and all his rights because of it to various persons identified in the record as the ones named in exhibit 4 on different dates commencing with May 8, 1954, and continuing through June 22, 1954. Each of them received an undivided fractional part of the lease assigned by the lessee to Eddie Fisher.

The consideration for the lease was $10, the royalties therein provided, and the agreements of the lessee as therein stated. It leased the land for the purpose of exploring for and producing oil from it. The royalties required to be paid by lessee on oil were 1/8 of that produced from the land and saved at the well, delivered free of cost at the well or to the credit of the lessor in the pipe line to which the well may be connected. The lease authorized the rights of either party because of it to be assigned in whole or in part and it provided that "the provisions hereof shall extend to the * * * successors, and assigns * * *." An entirety clause was contained in the lease and it described two noncontiguous quarter sections of land.

A covenant to pay rent or royalty is not personal or collateral but runs with the land. Hogg v. Reynolds, 61 Neb. 758, 86 N. W. 479, 87 Am. S. R. 522; Fennell v. Guffey, 139 Pa. 341, 20 A. 1048; Mound Valley Vitrified Brick Co. v. Mound Valley Natural Oil & Gas Co., 258 F. 936; Annotations, 41 A. L. R. 1370, 79 A. L. R. 499, 102 A. L. R. 784; 3 Summers, Oil and Gas, § 553, p. 297; Thornton, Oil and Gas, § 336, p. 611; 2 American Law of Property, § 9.4, p. 341.

The circumstances of the case of Hogg v. Reynolds, *supra*, were that Hogg owned and leased a section of land to Frey and Kirkpatrick as individuals. The lessees made a division between them of the demised premises and Frey, to whom was assigned the west half of the section, made an assignment of his interest in and to the lease to Reynolds, the defendant in the case. Reynolds paid to plaintiff, the owner of the land, one-half of the entire rent as provided by the original lease as it came due. Kirkpatrick, who had exclusive possession of the east half of the section, failed to pay his share of the last installment of rent due to the owner of the land and he sued Reynolds for it on the basis that he had by the assignment succeeded to the rights and assumed the liability of Frey. The court therein said: "The doctrine

of the authorities undoubtedly is that where a lessee assigns his whole estate in all the demised premises, the assignee is liable to the lessor for the whole of the rent reserved in the lease. The covenant to pay rent runs with the land, and the assignee, being in privity of estate with the landlord, is directly liable to him for the installments accruing while that relation exists. * * * Whether a person claiming an interest in real property under a lessee is liable upon the covenant to pay rent, or upon other covenants running with the land, depends upon the existence of privity of estate between such person and the lessor. * * * Frey, by the arrangement between himself and Kirkpatrick, became possessed of the entire interest of both lessees in the west half of the section; and the assignment of this interest to the defendant established between him and the plaintiff a privity of estate as to a distinct part of the land. * * * Being possessed of the whole estate of both lessees in part of the land the defendant was liable to the plaintiff for a proportionate share of the rent."

The "proportionate share of the rent" for which Reynolds, the assignee of Frey, one of the original lessees, became liable was one-half of the rent as required by the original lease. Likewise in this case the assignees of Eddie Fisher, who was the assignee of Magnolia Petroleum Company, the original lessee, by its assignment of the lease as to Tract 1, became liable to Hafeman for the rent and royalties as to Tract 1 according to the terms of the original lease. The status of Fisher was like that of Frey after Kirkpatrick had assigned his interest in the west half of the section. The owners of the leasehold as to Tract 1 by undivided fractional interests are in this case legally in the same status as Reynolds was after the assignment to him by Frey in the case quoted above. The owners of the leasehold estate in Tract 1 being possessed of the entire leasehold estate in part of the land are liable to Hafeman, the lessor, for the rent and royalties as to Tract 1 as provided in the lease. The

liability of the person claiming interest in real property under a lease upon the covenant to pay rent or other covenants running with the land depends upon the existence of privity of estate between such person and the lessor. The assignment by the lessee of the whole of his interest under a lease divests him of his privity of estate with the lessor and transfers it to his assignee who thereafter holds in privity of estate with the lessor. In Mayer v. Dwiggins, 114 Neb. 184, 206 N. W. 744, 42 A. L. R. 1102, it is said: "A lessee, during his occupancy of the demised premises, holds both by privity of estate and of contract. Assignment of the lease by the lessee divests him of this privity of estate and transfers it to his assignee, who thereafter holds in privity of estate with the lessor." See, also, State ex rel. Johnson v. Commercial State Bank, 142 Neb. 752, 7 N. W. 2d 654; Annotation, 52 L. R. A. N. S. 980 and 984.

In Fennell v. Guffey, *supra,* the court declared: "The defendant contends, however, that, as assignee of the lessee, he is not liable; that the suit should have been brought against his assignor. But the covenant was in the nature of a covenant to pay rent, and runs with the land. It is settled law that covenants to pay rent or royalty run with the land, and that the assignee of the lease is liable for the payment of all rents or royalties which accrued while he held the assignment of the lease * * *."

In Burton v. Forest Oil Co., 204 Pa. 349, 54 A. 266, this subject is discussed in this manner: "The assignee of the lease is liable for the rental of the premises by reason of the privity of estate existing between him and the lessor. The same is true of any subsequent assignee of the lease. Here the defendant company denies its liability for the one half of the rental, because, as it claims, the undivided one half interest in the lease was assigned to the Chartiers Oil Company by the assignee of the lessees. We are not called upon to determine the right of the lessor to recover against the Chartiers Oil

Company for any part or all of the gas rental due the plaintiff. * * * The possession and beneficial enjoyment of the premises for gas purposes by the defendant company were as complete and exclusive as the lessees were entitled to under the terms of the lease. The defendant enjoyed all the benefits conferred by the covenants of the lessor. It took possession and operated the gas well under the assignment from the lessee's assignee, 'subject to all royalties, rents and covenants of the lessee therein contained, to be rendered, paid and performed on and after November 8, 1890.' It therefore held and operated the well under the covenant in the lease to pay the entire gas rental which, by reason of the privity of contract, the lessor could have collected from the lessees."

The author says in Mills and Willingham, Law of Oil and Gas, § 146: "* * * the assignee of an undivided interest in the entire lease becomes a tenant in common and as such jointly and severally liable for the performance of the covenants. He is, therefore, liable for all the delay rentals and for all the royalty, although he may in turn have a remedy against his joint obligor." See, also, Pierce Fordyce Oil Assn. v. Woodrum (Tex. Civ. App.), 188 S. W. 245; Edmonds v. Mounsey, 15 Ind. App. 399, 44 N. E. 196; Bradford Oil Co. v. Blair, 113 Pa. 83, 4 A. 218, 57 Am. R. 442; Heller v. Dailey, 28 Ind. App. 555, 63 N. E. 490; Jackson v. O'Hara, 183 Pa. 233, 38 A. 624; 2 Thornton, Oil and Gas, § 336, p. 611; 1 American Law of Property, § 3.61, p. 310.

The lease owners have not asserted that the payment of royalties to persons not entitled thereto would or should absolve them of liability to the rightful royalty owner. It seems axiomatic that the duty to pay royalties implies the obligation to pay them correctly. In 2 Thornton, Oil and Gas, § 375, p. 671, it is asserted: "If a lessee fail or refuse to deliver the lessor his share of the oil reserved as royalty he will be liable for the actual market value of the oil at the date of refusal to deliver, with interest from that date." The next section of that

work (§ 376, p. 671) says: "It is the duty, of course, of the lessee or his assignee, to deliver the royalty oil to the lessor or his grantee or assignee; and if he did not he will be liable for its value."

The owners of the leasehold as to Tract 1 by accepting assignments of the lease contracted to pay the lessor the rental and royalties. The lease authorized an assignment of it in which event the provisions thereof as to the payment of rent and royalties should extend to the assignees. The obligation to pay royalties to Hafeman, the lessor, to the extent of his ownership of them was a provision of the lease which the assignees became bound to satisfy. The case of Kimball v. Hardy, 124 Neb. 80, 245 N. W. 261, decided: "Where a lessee vacated certain leased premises and transferred his interest therein to a third party who procured tenants and collected the rentals and agreed to 'observe all the covenants in the lease of said premises to the said second party (the lessee) given by the owners thereof, and to save the second party harmless with reference thereto,' held, that such agreement constituted the third party an assignee of the lease and that he is liable for any unpaid rentals due the plaintiff lessor." The owners of the base lease as to Tract 1, identified in the record as the parties named in exhibit 4, are as such liable to Arthur H. Hafeman for the amount of the royalty payments erroneously made to the other royalty owners between the commencement of production and April 5, 1955, in the amount as found by the district court.

The judgment should be and is affirmed except as to the determination of the district court that the owners of a leasehold estate in Tract 1 are not as such liable to Arthur H. Hafeman for the amount of royalty payments erroneously made to the royalty owners other than Arthur H. Hafeman between the commencement of production of oil from said tract and April 5, 1955, which determination should be and it is reversed and the cause is remanded with directions that the district court for

Kimball County render a judgment in this case in favor of Arthur H. Hafeman and against Gem Oil Company, Dean Terrill, and the said owners of the leasehold estate in Tract 1, and each of them, for the amount of royalty payments erroneously made as aforesaid in the period from the commencement of the production of oil until April 5, 1955, in the amount of such payments as found by the district court in this cause, to wit: $19,081.70, with interest thereon at 6 percent per annum on the respective amounts of royalty wrongfully paid from the respective dates of the payments.

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

IN RE ESTATE OF LYDIA F. EVANS, DECEASED.
JOHN P. JENSEN ET AL., APPELLANTS, V. MARTHA E. PRIEBE ET AL., APPELLEES.
80 N. W. 2d 127

Filed December 28, 1956. No. 34037.

1. **Appeal and Error.** Error alleged in the substance of an instruction given to the jury must be called to the attention of the trial court in motion for a new trial before it will be considered by this court.
2. **Wills: Appeal and Error.** Issues of fact in will contest cases are determined in this court by the sufficiency of the evidence under the law to sustain the verdict of the jury or the findings of the district court, and where the evidence in a case tried to the jury is conflicting, issues of fact are questions for its determination.
3. **Trial.** In testing the sufficiency of the 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.

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

Munro & Parker, for appellants.

Joseph C. Tye and *Stewart & Stewart*, for appellees.

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

CHAPPELL, J.

Lydia F. Evans, a resident of Kearney, Buffalo County, Nebraska, died June 25, 1954, when she was almost 86 years old. She left an estate consisting of real and personal property appraised at $117,686.21. On July 3, 1954, John P. Jensen, as named executor, filed her purported will and codicil thereto, together with a petition seeking probate thereof in the county court. Thereto Franklin F. Evans, Galen Evans, and Martha E. Priebe, who were the only children and sole heirs at law of Lydia F. Evans, filed objections, together with a purported revocation of such will and codicil. After hearing in the county court a decree was rendered, finding and adjudging that the will and codicil had been duly executed as required by law at a time when testatrix had testamentary capacity, but that likewise while having testamentary capacity and without undue influence, she had thereafter duly executed a revocation thereof, and died intestate.

Therefrom John P. Jensen and Maurice F. May, a nephew of testatrix, hereinafter designated as proponents or by name, appealed to the district court where new pleadings were filed, to wit: Proponent's petition seeking probate of the purported will and codicil; the answer of contestants, denying generally and alleging at length a subsequent revocation thereof by Lydia F. Evans, hereinafter called testatrix; and proponents' reply denying generally and alleging that such "revocation was executed by said testatrix by reason of *improper and undue influence* exerted upon the mind of the testatrix by Franklin F. Evans," hereinafter called Franklin, and that testatrix lacked testamentary capacity at the time of its execution. (Italics supplied.)

Thereafter, upon trial to a jury, it returned a verdict

for contestants, finding that the revocation was the true and valid revocation of testatrix, and judgment was rendered in conformity therewith. Proponents' motion for new trial was overruled, and they appealed to this court, assigning that: (1) The verdict was not supported by the evidence but was contrary thereto and contrary to law; (2) the court erred in the admission and exclusion of certain evidence; and (3) the court erred in giving instructions Nos. 5 and 9. We conclude that the assignments have no merit.

In that connection, proponents also assigned and argued that the substance of the rule of law contained in instruction No. 10 was erroneous because it was incomplete, and that instruction No. 18 was erroneous because the substance of the informative rules of law contained therein was duplicitious and misleading. However, proponents' motion for new trial did not assign that such instructions were erroneous, and they will not be reviewed by this court. In Muller v. Jensen, 144 Neb. 1, 12 N. W. 2d 80, we held: "Error alleged in an instruction to the jury must be called to the attention of the trial court, in the motion for a new trial, before it will be considered by this court."

In In re Estate of Kaiser, 150 Neb. 295, 34 N. W. 2d 366, we held: "Issues of fact in will contest cases are determined in this court by the sufficiency of the evidence under the law to sustain the verdict of the jury or the findings of the district court, and where the evidence in a case tried to the jury is conflicting, issues of fact are questions for its determination."

In Remmenga v. Selk, 150 Neb. 401, 34 N. W. 2d 757, reaffirmed on rehearing in Fuss v. Williamson, 160 Neb. 141, 69 N. W. 2d 539, we held that: "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 there-

from." See, also, In re Estate of Farr, 150 Neb. 615, 35 N. W. 2d 489.

In that respect, the record conclusively shows and it is undisputed that on January 22, 1951, Jensen, a lawyer at Kearney, drew the last will and testament for testatrix, then 82 years old. Such will was then duly executed and attested as provided by law at a time when testatrix had testamentary capacity.

Item X of the will nominated and appointed Jensen as executor with full power at his discretion to do any and all things necessary for complete administration of her estate, including the power to sell at public or private sale and without order of court any real or personal property belonging to her estate and to execute and deliver a good and sufficient deed or bill of sale thereto. It further empowered him to compound, compromise, or otherwise settle or adjust any and all claims, charges, debts, and demands whatsoever against or in favor of her estate, as fully as she could do if living.

Item II directed the executor to sell at public or private sale, at any price deemed sufficient to him, and deliver deeds to the purchaser of certain described lands. Out of such proceeds he was directed to pay $1,000 to a named church college at McPherson, Kansas; $1,000 to a named biblical seminary in Chicago; $1,000 to a named hospital in Chicago; and $1,000 to the board of foreign missions of a church in Elgin, Illinois. All such institutions were related in some form to Church of the Brethern of which testatrix was a sustaining member. It also provided that if the proceeds of such sale were not sufficient to pay all of such sums, then such respective bequests were ordered decreased proportionately. If a surplus remained after paying such bequests, the remainder thereof was directed to be paid one-half to the Church of the Brethern of Kearney, and one-half to the Nebraska Conference of the Church of the Brethern Camp.

Item III devised certain described lots and a house

owned by her in Kearney to her nephew, Samuel M. Forney, who was the minister of her Church of the Brethern in Kearney and who was present when the will was made. Item IX thereof also devised and bequeathed to him all the residue of her estate.

Item IV devised a described 121.68 acres of land to her three named children, share and share alike. They were contestants herein.

Item V devised certain described lands to her 11 named grandchildren, share and share alike, with provision that in the event of the death of any of them prior to her death, and leaving issue, then such issue should take the share of their deceased parent, otherwise their share should lapse and go to her surviving named grandchildren.

Item VI devised a described house and lots in Kearney to Paul Forney and Stella Forney, his wife, as tenants in common. Paul Forney was an adopted brother of Samuel M. Forney.

Item VII devised her described home to Maurice May, a nephew, who is an appellant herein.

Item VIII provided that certain cash bequests and legacies should remain a lien on all of her estate, and gave the executor like additional powers of sale if the personal property or cash in her estate was insufficient to pay same.

The record is conclusive and undisputed that on February 8, 1951, just 17 days after testatrix had executed her will, Jensen drew the codicil thereto for her. Such codicil was then duly executed and attested as provided by law at a time when testatrix had testamentary capacity. It confirmed and ratified her will in every respect except so far as any part of it was inconsistent with her codicil. Paragraph Second thereof directed that Item II of her will should be changed to direct her executor, Jensen, to sell the same described real estate in the same manner as provided in Item II, and pay from the proceeds thereof $500 to the Church of the Brethern

of Kearney and $500 to the Nebraska Conference of the Brethern Camp, and pay any surplus remaining, after payment of said amounts and payment of the expenses of administration of her estate, to her three named children, share and share alike.

On June 4, 1951, testatrix filed her petition in the county court, alleging that she was 82 years of age and by reason of age and health she was unable to handle all of her business affairs, to wit, the collection of rents and management of her property without having a conservator appointed to advise with her and act for her in such matters. Therein she named her three children, all of age, recited that she owned unencumbered real estate, an automobile, and had about $3,000 in a named Kearney bank. She alleged that her son Franklin was a suitable person to act as conservator, and prayed for his appointment. In such proceeding she was represented by the law firm of which Jensen was a member, and a law firm of which M. H. Worlock was a member. Franklin was appointed conservator as requested and served as such until May 20, 1952, when, at the request of testatrix, the conservatorship was terminated, the conservator's accounts and final report were approved, he was released as such, and his bondsman was discharged upon a showing that a balance of $9,866.59 owing to testatrix had been paid and receipted for. In that connection, Jensen testified that he never had any notice of termination of the conservatorship, but it is admitted that on December 3, 1952, Worlock mailed Jensen's law firm a check for $150, same being one-half of the attorney's fees finally collected in that proceeding, and Jensen's firm cashed the check and kept its share of the fee.

In the meantime, the will and codicil of testatrix had permissively remained for a while in Jensen's office. Thereafter, she decided that she wanted to destroy her will and codicil and leave all of her property to her three children. However, despite repeated requests and demands made by Franklin while conservator, by testa-

trix personally, and by another attorney employed by her, Jensen refused to deliver them to her upon the pretext that it was his duty to protect the rights of other persons interested therein.

Finally, on September 14, 1951, after she had previously consulted Worlock who had represented her in some other matters, they went to Jensen's office, where testatrix and her attorney both requested and demanded delivery of the will and codicil to her, but delivery was refused.

Thereafter, on September 15, 1951, by prearrangement, testatrix returned to the office of Worlock where at her request he drew a "Revocation of Last Will and Testament and Codocil Thereto of Lydia F. Evans" for her. The revocation, having all the formalities of a will, recited: "That I, Lydia F. Evans, a resident of Kearney, Buffalo County, Nebraska, and being of sound mind and memory and having heretofore and in January 1951 signed and executed an instrument as my then last Will and Testament and having, in February 1951, made a Codicil thereto, do now on this 15 day of September, 1951 irrevocably cancel and revoke said last Will and Testament and the Codicil thereto and it is now my (will) and desire, and I do hereby direct that upon my death all of my property, both real, personal and mixed and wheresoever the same may be situated, shall descend to and vest in my heirs at law in accordance with the statutes of descent and distribution of the State of Nebraska and in the same manner and (as) though I died intestate."

The record is conclusive and undisputed that such revocation was then duly executed and attested as provided by law at a time when testatrix had testamentary capacity.

Thereafter, on May 21, 1952, testatrix executed separate warranty deeds of all her respectively described real estate except two lots to her three named children. Each deed recited a consideration of love and affection

and reserved a life estate in grantor. Each of such deeds was duly recorded on May 24, 1952. They were simply factual circumstances tending to establish the determined and continuous intention of testatrix to see that her property went to her children, two of whom were never charged with any undue influence. Such deeds are not otherwise directly involved in this appeal.

Proponents concede in their brief that the question involved is: "whether the instrument entitled 'Revocation of Last Will and Testament and Codicil thereto of Lydia F. Evans' executed September 15, 1951, was executed by the testatrix by reason of *improper and undue influence* exerted upon the mind of the testatrix by Franklin F. Evans." (Italics supplied.)

In that connection, instruction No. 5 told the jury that: "You are instructed that the due execution and Attestation of the will of Lydia F. Evans dated January 22nd, 1951, and the codicil thereto dated February 8th, 1951, and the fact that she was possessed of testamentary capacity at said times, have been established by the evidence.

"You are instructed that the due execution and attestation of the purported revocation of said will dated September 15th, 1951, and the fact that the said Lydia F. Evans possessed sufficient mental capacity and competency to make such purported revocation at said time, have been established by the evidence.

"You are instructed that you will accept the above facts as proven."

In that respect, proponents assigned and argued that use of the words "due execution" in instruction No. 5 was prejudicially erroneous because it may have been tantamount to an instruction that the jury must find the revocation had been executed without any undue influence. The contention has no merit. As a matter of fact, the first sentence of instruction No. 6, immediately following, told the jury: "You are instructed that the only issue which is submitted to you for your determina-

tion is whether or not the purported revocation was obtained by reason of undue influence." Thereafter followed a clear statement setting forth the respective contentions of both proponents and contestants with regard to undue influence in connection with execution of the revocation. An examination of all instructions given, which must be considered together as instructed by the trial court in instruction No. 22, makes it crystal clear that the jury could not have been misled in any manner by instruction No. 5.

Instruction No. 9, among other things about which no complaint is made, set forth the four essential elements of undue influence as follows:

"1. That the deceased, Lydia F. Evans, was a susceptible person.

"2. Another's opportunity to exert it.

"3. Disposition to do so for an improper purpose, and,

"4. A result clearly showing the effect of such influence."

Proponents assigned and argued that such use of the words "susceptible person" and "disposition to do so for an improper purpose" were erroneous and prejudicial to them. The contention has no merit.

The opinions in In re Estate of Bainbridge, 151 Neb. 142, 36 N. W. 2d 625, and In re Estate of Bowman, 143 Neb. 440, 9 N. W. 2d 801, both set forth and approved the essential elements of undue influence by use of language identical with that used in instruction No. 9 about which proponents complain. Some of our opinions have used the word "subject" instead of "susceptible" but they mean one and the same thing. Some have left out the words "for an improper purpose" but all such opinions have said as much in arriving at decision. The very words "undue influence" mean "wrong influence" which is the antithesis of right influence. Black's Law Dictionary (3d ed.), p. 1777.

As matter of fact, proponents took that very position

not only in their reply to contestants' answer but also in the very first sentence of their brief filed in this court, which stated the question involved. An examination of all instructions given clearly discloses that the jury was otherwise fully and fairly instructed on the issue and elements of undue influence and could not have been misled by instruction No. 9 as argued by proponents. In that connection, In re Estate of Keup, 145 Neb. 729, 18 N. W. 2d 63, referring to the four essential elements of undue influence, held that: "While the four elements must be established by the evidence to make a case sufficient to submit the issue to a jury and to sustain a verdict based thereon, however, it is not necessary that the court give an instruction setting forth the four elements separately provided they are sufficiently contained in the instructions given." See, also, In re Estate of Farr, *supra*.

In In re Estate of Fehrenkamp, 154 Neb. 488, 48 N. W. 2d 421, we held that: "Undue influence cannot be inferred alone from motive or opportunity. There must be evidence, direct or circumstantial, to show that undue influence not only existed, but that it was exercised at the very time the will was executed.

"Mere suspicion, surmise, or conjecture is not enough to warrant a finding of undue influence. There must be a solid foundation of established facts upon which to rest an inference of its existence.

"There may be influences directing the will-maker's attention to proper obligations which it might be thought ought to be satisfied by testamentary provisions. Such influences may be persuasive and effective, but, so long as not coercive, they are not undue. Circumstances often arise where such conduct is wholly justifiable.

"In order to invalidate a will, undue influence must be of such a character as to destroy the free agency of the testator and substitute another person's will for his own." See, also, In re Estate of Thompson, 153 Neb. 375, 44 N. W. 2d 814.

The evidence with relation to alleged undue influence or the absence thereof in connection with execution of the revocation is voluminous. In that connection, there is ample competent evidence adduced by several witnesses who knew the facts, from which it could reasonably be concluded that testatrix was not a susceptible person. There is ample competent evidence that she was a handsome, competent, intelligent, religious old lady who loved her three children with whom she had a close, informative, and trustworthy family relationship. She was a strong-minded woman. She had a mind of her own and could not be easily influenced. She lived alone, and, although her eyesight was gradually failing the last part of her life, she generally looked after her own business affairs either alone or with some assistance from her children, particularly Franklin, who generally kept her informed with relation thereto. Her nephew, Samuel M. Forney, who was her pastor and a substantial beneficiary in her will, frequently visited with her at church and in her home up to the time when she went to the hospital 2 weeks before her death, testified as a witness for proponents. He testified that he never saw her when she was incompetent; that she was a strong-minded woman and had a mind of her own; that her mind and expressions were clear; and that she knew what she wanted. When asked on redirect as to whether or not testatrix was susceptible to influence by her son Franklin, he answered: "Well, as I said awhile ago, she had a mind of her own; and oftentimes her opinions and Franklin's clashed, and they didn't always agree in everything; but, I think he would have had a little difficulty in persuading her verbally to change her mind very much."

Franklin testified that he never tried to influence his mother to make the revocation; and that she had been wanting her will and had asked him for it many times, insisting that he get it. She told him to sue Jensen to get it, so he talked to Worlock whose suggestion was,

" 'Well, tell her to make another will and that will cancel the other one.' " He thereupon told his mother that she could make another will and that would cancel the first one which Jensen had, and she said, "I don't want a will." Franklin also testified that all he did was to take her down to Jensen's and Worlock's offices when she requested him to do so.

Her son Galen G. Evans testified that sometimes testatrix would ask Franklin for help and he would help her, and that she was not under the influence of Franklin but had a mind of her own. He testified that he never saw Franklin try to influence his mother; that his mother never told him that Franklin ever tried to influence her; and that testatrix would talk about the will Jensen had drawn and on as many as 50 or 75 or more occasions she said she wished she could get it back. She wanted him to help get it for her so that everything would go to her children, but he told her that he thought Franklin was doing about all he could to protect her interests.

Martha Priebe testified that testatrix, her mother, was not easily influenced but had a will of her own; that she was trying to do too much for a lady of her age and would be worried because she could not get her will back from Jensen, so she would ask Franklin to help her; that she had never seen Franklin try to influence his mother; and that her mother never complained about the way Franklin handled her affairs. She testified that many times, quite frequently, her mother would say, " 'Mr. Jensen won't give me that will. I want that will back,' " which fact upset and worried her mother.

As in most cases Franklin had ample opportunity to exert undue influence and a motive for doing so, since he had seen a copy of the will, but that alone is not enough. Testatrix had a car, but others drove it for her, or her children took her about in her car or their own when she requested it. On January 27, 1951, within 5 days after making her will, Franklin at her request

took her to Jensen's office. Jensen was not there so she told his secretary that she wanted her will. She was told that the secretary could not give it to her, but to wait for Jensen. She waited but he did not come to his office, and she finally left.

A week or so later she went again to Jensen's office where Franklin came in later. However, Jensen was not in, so she told another member of his firm that she wanted her will, whereupon he prepared and gave her a copy of it, but refused to give her the original when she said, " 'I want the signed copy.' "

On September 14, 1951, she again went to Jensen's office and demanded her will. Franklin took her there at her request, where Jensen again refused to deliver it. He did call Worlock with whom she had previously consulted about the matter, whereupon Worlock came over to Jensen's office and asked Jensen, " 'Why don't you give Mrs. Evans her will; she is entitled to it; it is her will, and you should give it to her,' " but Jensen refused, upon the pretext that " 'I have the rights of these other people to protect, and if I gave you this will you would destroy it, and I am not going to give it to you.' " In that connection, Jensen was her attorney, without any obligation to protect the rights of other persons. She had testamentary capacity at that time and such a reason as that given by Jensen would not prevent her or anyone duly authorized by her from demanding and receiving possession of her will and codicil from him. If under no disability, she had a right to intentionally destroy, alter, or revoke her will and codicil thereto. See, sections 30-201, 30-204, and 30-209, R. R. S. 1943, which prescribe the manner of doing so.

In conformity therewith, on September 15, 1951, Worlock prepared the revocation as requested by testatrix. He testified that while she was alone with him in his private office, and, having a mind of her own, she duly executed it, saying that she did not want a will, that she wanted her property to go to her children. He testi-

fied that she was then competent, which is undisputed; that she did not appear to be under any restraint or influence; and that Franklin, who brought her to his office, had nothing to do with the contents or execution of the revocation. Worlock and his secretary were the attesting witnesses. The secretary verified by her own testimony that testatrix was then competent and appeared to be under no restraint or influence.

During the summer of 1951 testatrix told two unrelated friends, who testified for contestants, that she wanted her will that Jensen had made for her but he refused; that he was trying to give her property to everybody other than her children; or that she was having trouble with Jensen about getting her will. On January 1, 1953, she told another friend that she would feel better if she could get what belonged to her, meaning her will, that Jensen had in his possession.

As late as January 17, 1952, some 4 months after execution of her revocation, she wrote out the following in her own words and handwriting: "Kearney Nebr Jan 17 1952 Mr. John Jensen I'd like to have my will. It belongs to me. You said I could have it any time I would ask you for it. You refused to give it to me when I asked you for it. Lydia F. Evans Kearney Nebr House No 716 St E 27." She never sent it to Jensen, but subsequently handed it to Franklin who produced it in this trial where, over objection, it was admitted in evidence. Without citing any authority, proponents assigned and argued that its admission was prejudicially erroneous. The contention has no merit. It was admissible for the purpose of tending to prove the condition of her mind and unbiased inclination in the disposition of her property as a material element in determining whether or not undue influence was actually exerted at the time of execution of her revocation. It also corroborated the oral testimony of numerous witnesses to the effect that testatrix continuously wanted to obtain possession of her will in order that her children could surely get all

of her property. See, Dame, The Law of Probate and Administration (3d ed.), § 158, p. 165; In re Estate of Johnson, 100 Neb. 791, 161 N. W. 429.

There was ample competent evidence from which it could have been reasonably concluded that Franklin as a son was attempting to assist his mother and was not disposed to exercise undue influence upon her for an improper purpose. It follows also that the jury could reasonably have concluded that the revocation executed by testatrix in order that her children could get her property was only the natural desire of a loving and thoughtful parent and that such result did not clearly show the effect of undue influence.

We deem it unnecessary to recite here the evidence adduced by proponents conflicting with that of contestants upon the issue of undue influence. It is sufficient to say that such issue was properly submitted to the jury and by it determined in favor of contestants. Such actions are not for trial de novo here, but we are bound by the jury's verdict where as here the verdict and judgment were not clearly wrong because there was sufficient competent evidence to sustain it. In re Estate of Keup, *supra.*

There remains only the question of whether or not the trial court erred in excluding certain evidence offered by proponents. It appears that on April 26, 1948, testatrix executed a will which she subsequently destroyed. A copy of such will was offered by proponents and received in evidence over objection of contestants. In that connection, proponents also offered in evidence an alleged statement of testatrix made by her on April 23, 1948, in an alleged conversation with Jensen regarding the execution of such will. Its admission was refused upon the ground that it was too remote and without any bearing upon the issues presented for determination. Without citing any authority, proponents assigned and argued that such refusal was prejudicial error. The contention has no merit. Such conversation occurred 3

years, 4 months, and 22 days before the execution of the revocation involved. It could only have a tendency to establish that testatrix had testamentary capacity at that time, which was at all times undisputed or conclusively established, and never an issue for the jury. The statement had nothing whatever to do with the will executed January 22, 1951, or the codicil thereto executed February 8, 1951, or the revocation here involved which was executed September 15, 1951. The trial court did not err by excluding it.

Proponents also offered in evidence a petition for appointment of a guardian for testatrix, filed in the county court of Buffalo County by Franklin on April 23, 1948, and the answer thereto, filed by Jensen's firm April 26, 1948, but their admission was refused as too remote, incompetent, irrelevant, and immaterial. However, proponents were previously permitted to show that such a petition and answer had been so filed and that the proceeding had been subsequently dismissed without appointment of a guardian or any other action having been taken therein. Without citing any authority, proponents assigned and argued that refusal to admit the record of such proceedings was prejudicial error. The contention has no merit. As was said with respect to related matters in Carter v. Gahagan, 102 Neb. 404, 167 N. W. 412: "We conclude the record should have been excluded."

For reasons heretofore stated, we conclude that the judgment of the trial court should be and hereby is affirmed. All costs are taxed to proponents John P. Jensen and Maurice F. May.

AFFIRMED.