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REPORTS OF CASES

DECIDED BETWEEN

MARCH 5, 1960 and AUGUST 19, 1960

IN THE

Supreme Court of Nebraska

JANUARY TERM 1960

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WALTER D. JAMES

OFFICIAL REPORTER

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By WALTER D. JAMES, REPORTER OF THE SUPREME COURT

For the benefit of the State of Nebraska

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CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

JANUARY TERM, 1960

EVELYN NATHAN, APPELLANT, V. BERNARD M. MCKERNAN ET AL., APPELLEES.

101 N. W. 2d 756

Filed March 11, 1960. No. 34558.

1. **Fraud.** The defense on the ground of fraud may be shown by parol, not to contradict or vary but to destroy the legal and binding effect of a written instrument.
2. **Actions: Limitations of Actions.** The defense of recoupment or reduction of plaintiff's claim must arise out of the same transaction as plaintiff's claim, and survives as long as plaintiff's cause of action exists, even if affirmative legal action upon the subject of recoupment is barred by the statute of limitations.
3. **Sales.** As a general rule there is an entire failure of consideration where the property is entirely worthless, but there is not entire failure of consideration if the property has any substantial value, although less than the consideration paid, as where, by reason of unsoundness or imperfection, it is merely diminished in value.
4. ———. Where there is a total failure of consideration and defendant has derived no benefit from the contract, or none beyond the amount of money which he has already advanced, such failure of consideration may be shown in bar of the action.
5. **Fraud.** The asking of a certain price for an item of property is not a representation of its value.
6. ———. A representation to be fraudulent must be made either with knowledge of its falsity or without such knowledge as a positive statement of a known fact.
7. ———. The rule is that fraud must relate to a present or preexisting fact and may not be generally predicated on a

representation concerning an event in the future or acts to be done in the future.

8. ———. Where one is put upon inquiry, he is charged with notice of all of such facts as he would have learned by reasonable inquiry.

9. ———. A defrauded party must be diligent and prudent in his effort to detect the fraud and means of knowledge thereof are equivalent to knowledge.

10. **Sales.** In an action upon a contract for the sale of chattels, evidence by the purchaser that after the delivery of the subject matter he inspected, retained, and used it as a whole, shows both an acceptance and a waiver of any objection that the quality was not such as the contract required.

11. **Fraud.** A right of action for fraud may be waived. Thus, while the defrauded party may retain what he received, stand to his bargain, and recover for the loss occasioned by the fraud, he cannot do so where, having full knowledge, he does an act or acts indicating his intention to waive the fraud.

APPEAL from the district court for Douglas County: JAMES M. PATTON, JUDGE. *Reversed and remanded with directions.*

Paul I. Manhart, for appellant.

Shrout & Brown, Collins & Collins, Abrahams & Kaslow, Finlayson, McKie & Kuhns, Francis A. McLane, and *Garrotto, Doerr & Nanfito,* for appellees.

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

CHAPPELL, J.

On March 2, 1956, plaintiff, Evelyn Nathan, filed a petition in the district court for Douglas County against defendant Bernard M. McKernan, his wife Margaret A. McKernan, and other named defendants, seeking foreclosure of a second mortgage alleged to have been duly executed and delivered to plaintiff by defendants McKernan on described real estate owned by them in Douglas County, the consideration for which was allegedly the sale by plaintiff to said defendants of a York-type locker plant in Bellevue, Nebraska. The

mortgage, dated November 14, 1951, was allegedly given to secure a promissory note of even date for $8,499, payable in nine annual installments of $850 each with interest at 4 percent commencing December 1, 1952, plus one final payment of $849 with interest at 4 percent on December 1, 1961. Both the note and mortgage, and also the bill of sale to the plant, executed by the parties and delivered to said defendants, contained an acceleration clause. Plaintiff alleged that no part of the principle and interest on the note and mortgage had been paid by defendants McKernan and that $8,499 with interest at 4 percent from November 14, 1951, plus $108 which plaintiff was obligated to and did expend to insure the mortgaged property in order to protect her interests, was due and payable to plaintiff by said defendants.

Admittedly, the real property was subject to a first mortgage in favor of defendant Packers National Bank, and defendant Gerald Nathan had a judgment lien which was prior to plaintiff's second mortgage. Admittedly, all other named defendants each had either a mortgage lien or a judgment lien on the property, each of which were allegedly junior and inferior to plaintiff's mortgage. Plaintiff sought to have defendants, other than defendants McKernan, set forth their respective liens, and prayed that defendants be foreclosed of all equity of redemption or other interest in said mortgaged premises, which should be sold according to law; that plaintiff should be adjudged the amount due her on said note and mortgage; and that she should be awarded a deficiency judgment against defendants McKernan for any amount thereof which remains unpaid upon applying the proceeds of the sale to the liens according to their determined priority, and equitable relief. In that connection, admittedly the judgment lien of defendant First National Bank of Omaha, of which defendant United States of America was assignee, and the judgment lien of defendant John M. Messner, had thereto-

fore been paid and satisfied in full. Also, plaintiff alleged that defendant C. A. Jenks, assignee, had a judgment against defendants McKernan and that said judgment was a lien on their real property for $64 costs and interest, which was junior and inferior to plaintiff's mortgage, but that the amount unpaid on said judgment was unknown. In that connection, defendant C. A. Jenks filed no pleadings and the trial court made no determination with regard to said lien, and no complaint is made here with regard thereto.

Defendant Packers National Bank filed an answer and cross-petition denying generally, except that after describing a note and mortgage on defendants' real property allegedly executed and delivered by defendants McKernan on March 10, 1947, and duly recorded, said defendant alleged that defendants McKernan were in default of certain payments as required; alleged that the whole amount unpaid was due and owing as provided by the acceleration clause of said mortgage; and prayed for foreclosure of said mortgage as a first lien, and for general equitable relief.

Defendant Gerald Nathan, assignee, filed an answer and cross-petition describing an unpaid judgment against defendant Bernard M. McKernan of which defendant Gerald Nathan was assignee. He alleged that said judgment was a second lien on defendants' real property, and prayed that upon a marshalling of liens, there should be a foreclosure of all equity of redemption or other interest in said property, which should be sold according to law; that out of the proceeds he should be paid the amount of his judgment, interests, and costs; and that if there was any deficiency, he should be given judgment therefor against defendant Bernard M. McKernan, and equitable relief.

Defendant Midwest Packing Company filed an answer and cross-petition denying generally, except that after describing a note and mortgage on defendants McKernans' real property allegedly executed and delivered

by them on February 15, 1952, and duly recorded, said company alleged that no part thereof had been paid and said defendants were in default; and prayed for an accounting of the amount due, foreclosure of said mortgage, and equitable relief.

Admittedly, one John Brinjak, doing business as Town and Country Heating Company, filed a petition in intervention claiming to have a mechanic's lien on defendants McKernans' real property, effective as of October 7, 1957, for $310.50, and interest, for which he prayed foreclosure and equitable relief.

Defendant Bernard M. McKernan filed an answer and counterclaim against plaintiff. He denied generally the allegations of plaintiff's petition and alleged in substance that the note and mortgage sought to be foreclosed were given for the purchase of a locker plant in Bellevue which was worthless; that said instruments were given without consideration; and that they had been fraudulently obtained by certain alleged material concealments and various alleged false representations made by plaintiff with regard to the condition, operation, and profits of the plant. Defendant then prayed for a dismissal of plaintiff's petition. As a counterclaim, said defendant included the allegations of his answer without repetition, and alleged that as a result of said alleged concealments and false representations, defendant was induced to quit his profitable employment as an automobile salesman in order to operate the locker plant, and was compelled to expend substantial sums attempting to repair the plant. He then prayed for $10,000 damages. Defendant Margaret A. McKernan also filed a comparable answer to plaintiff's petition and prayed for dismissal of plaintiff's petition.

Thereafter, plaintiff filed replies traversing defendants McKernans' answers and an answer traversing defendant Bernard M. McKernan's counterclaim, the affirmative material substance of which is hereinafter pointed out. Plaintiff also filed a reply to the answers,

and answers to the cross-petitions of defendants other than McKernan. Therein she denied generally but admitted that defendant Packers National Bank had a valid first mortgage lien on defendants' real property; that defendant Gerald Nathan, assignee, had a valid judgment lien thereon which was second in priority; that defendant Midwest Packing Company had a valid mortgage lien thereon but said lien was inferior to that of defendant Packers National Bank, Gerald Nathan, and plaintiff, which in effect would give defendant Midwest Packing Company a lien fourth in priority; that defendant Omaha Steak Company had a valid judgment lien thereon which, under the circumstances, in effect would give said defendant a lien fifth in priority; and that all of said defendants aforesaid were entitled to an accounting of the respective amounts due and unpaid, and to the equitable relief for which they respectively prayed. We find no merit in plaintiff's contention that she was entitled to judgment on the pleadings.

The record discloses that the cause was heard on the merits, whereat evidence was adduced by the parties and the cause was taken under advisement. Thereafter, a judgment was rendered which in substance refused foreclosure of plaintiff's second mortgage; ordered it stricken from the record; held it for nil; and cancelled plaintiff's note which the mortgage was given by defendants McKernan to secure. The judgment then dismissed said defendants' counterclaim about which no complaint is made in this appeal by cross-appeal, so it will not be otherwise discussed herein except to affirm such dismissal. The judgment then concluded that defendant Packers National Bank had a first mortgage lien on defendants McKernans' real property for $3,642.23 with interest at 4 percent from June 7, 1957, and ordered a foreclosure thereof as provided by law; and that defendant Gerald Nathan had a judgment lien on said property second in priority for the sum of $187 with interest and costs, in accord with the transcript of

said judgment on file. In that connection, no complaint is made here with regard to such portion of the judgment.

Thereafter, the judgment concluded that defendant Midwest Packing Company had a mortgage lien on defendants McKernans' real property for $1,699.27 with interest from October 25, 1957, which lien was *third* in priority; that defendant Omaha Steak Company had a judgment lien on defendants McKernans' real property for the sum of $79.01 with interest, which lien was *fourth* in priority; and that intervener John Brinjak, doing business as Town and Country Heating Company, had a mechanic's lien on said property for $310.57 with interest, which lien was *fifth* in priority; and ordered foreclosure, sale of the property, and equitable relief prayed by said defendants. No complaint is made here about conclusions reached in this paragraph except as to the italicized priorities of said liens, which, if plaintiff is entitled to the relief prayed by her, each should be found to be inferior to plaintiff's mortgage lien and respectively *fourth, fifth,* and *sixth,* in priority. As hereinafter observed, we conclude that plaintiff was entitled to such relief.

After plaintiff's motion for new trial, or in the alternative for judgment on the pleadings and evidence, was overruled, she appealed, assigning 43 alleged errors. Some 16 of such assignments related to claimed erroneous admissions of certain evidence which are disposed of, contrary to plaintiff's contentions, by Pierce v. Fontenelle, 156 Neb. 235, 55 N. W. 2d 658. As far as important here, the substance of all other assignments of error made by plaintiff is: (1) That the trial court erred in failing to sustain plaintiff's motion for judgment on the pleadings; (2) that the trial court erred in excluding certain evidence; and (3) that the judgment was not sustained by the evidence and was contrary to law. We sustain the last assignment.

Plaintiff's first assignment of erroneous exclusion of

evidence refers to the cross-examination of John Bressman, Jr., a witness for defendants McKernan, which allegedly appears in the bill of exceptions on pages 221 to 225, inclusive. In that connection, we find no exclusion of any evidence until pages 223 and 224 are reached. At that time, plaintiff offered two paragraphs in an affidavit made by the witness and delivered to plaintiff's counsel on August 21, 1957. The witness had denied that the second such paragraph truly reflected the facts, and such paragraphs were admitted without objection "for impeachment purposes," for which they were admissible. Plaintiff's second assignment of erroneous exclusion of evidence refers to the deposition of John Bowers, a refrigeration expert, read and offered by plaintiff and appearing in the bill of exceptions at pages 386 to 389, inclusive, and pages 394 to 399, inclusive. After careful examination of that portion of the record, we find that none of such evidence was eventually excluded. The answer to a question asked by plaintiff's counsel at page 401, which called for a "Yes" or "No" answer, which was answered as "Yes," was excluded after a general objection was made to the question. We think that the answer should have been admitted, but conclude that the exclusion was not prejudicial to plaintiff in any event because at page 432 another expert who originally installed the plant involved new in 1947 was permitted, over a like objection, to answer the same question in a more comprehensive manner favorable to plaintiff. We find no prejudicial error with regard to exclusions of evidence.

We turn then to the question of whether or not the judgment was sustained by the evidence or was contrary to law. In a determination of that question, the cause will be tried de novo in this court in conformity with the general rule reaffirmed in Town of Everett v. Teigeler, 162 Neb. 769, 77 N. W. 2d 467, and other applicable and controlling rules hereafter discussed.

The record is voluminous and we can only summarize

the material evidence. In doing so, Evelyn Nathan will be called plaintiff; Bernard M. McKernan and Margaret A. McKernan will be called defendants when referring to both; when referring to defendant Margaret A. McKernan separately, she will be designated by name; and when referring to defendant Bernard M. McKernan separately, he will be called defendant.

The locker plant was installed new by the York Corporation in 1947. Plaintiff purchased the plant in September 1948 for $10,000. In enlarging and remodeling the locker room a short time later, there was a leakage of ammonia from the pipes, which ordinarily are serviceable for many years. The reason for such leakage is not made clear, but it may be inferred that it was caused by some accidental means during the progress of such work. The condition was immediately remedied and there has been no leakage of ammonia since that time. In that connection, defendants contend that plaintiff failed to disclose that such leakage had occurred, and attempt to predicate fraud upon such concealment. We believe that such concealment was not material in point of time, but in any event the facts with regard thereto were generally known in the neighborhood, and defendants learned about such facts right after they took possession of the plant, began operation thereof, and continued to do so without any objection or complaint thereof made to plaintiff from November 16, 1951, to September 4, 1953.

The evidence discloses that plaintiff operated the plant successfully with two or three hundred customers until about July 20, 1949, when there was a fire in the locker room of the plant. As a result there was smoke damage and the beaver board which held the insulation in the ceiling pulled out through the nail holes caused by water sprayed thereon by the fire department. Also, water had accumulated in the basement where the motor and compressor were located on a cement foundation about 18 inches above the basement floor. The amount

of such water is in dispute as well as whether or not the plant was operating after the fire was put out. Be that as it may, there is competent expert evidence that in any event such water would damage only the electrical portion of such equipment which could be readily repaired. There is competent evidence that after the insurance companies had adjusted the fire loss and litigation had arisen with regard thereto in the district court for Douglas County, plaintiff and her employees cleaned up the plant, repaired the insulation, checked the equipment, put a new modern wooden ceiling in the plant, and plaintiff claimed that the plant was then in condition to be operated properly again. Also, there is competent evidence by an expert that the plant was in good working order as checked, oiled, and regulated by him as late as March 1951.

However, in the meantime, plaintiff had purchased such a plant at Fullerton, Nebraska, and moved there where her sons operated it. Therefore, she ceased to operate the plant here involved and put it up for sale after the fire and the plant had been cleaned and repaired. In that connection, defendants' contention is that plaintiff failed to disclose that such a fire had occurred and the extent of the damages caused thereby, and defendants attempt to predicate fraud upon such concealment. In such respect, plaintiff contends that she told defendants about the fire, and it is clear that it was well known in the neighborhood that such a fire had occurred. Defendants learned such fact right after they took possession of the plant, began operation thereof, and continued to do so without complaint or objection made to plaintiff from November 16, 1951, to September 4, 1953.

In July 1951, defendant was an automobile salesman for an automobile and garage firm in Omaha. He first met plaintiff in July 1951, when she came to said garage to have a car serviced. Defendants were anxious to get into business for themselves and defendant so in-

formed plaintiff, whereupon she told him that she had the locker plant here involved for sale; that it was a money-making business; and the only reason she was not operating it was that she had bought another plant at Fullerton where she then resided, and she had no one to manage the plant at Bellevue. Thereafter, plaintiff and defendants met some six different times between July 1951, and November 14, 1951, by prearrangement, and talked at length about defendants purchasing the plant. At one of such times defendants' lawyer was present, and upon another occasion defendants went out to the plant with plaintiff, where they were shown and inspected every part of it. At that time, as stated by defendant, the plant looked "bad" and "Actually, it looked crummy," but defendants claimed that plaintiff said she guaranteed the plant would work; that it was in good working condition and operated automatically on thermostatic impulse. Defendants noticed at that time that the lockers were chipped and rusted, but plaintiff said all they would have to do would be to put some paint on them and they would be all right, which defendants expected to do.

It was finally agreed that defendants would buy the plant from plaintiff for $8,500. In that connection, the plant was clear of encumbrances and plaintiff desired to take a mortgage back on the plant to secure defendants' note, but defendants, who were without any capital on which to operate the plant, wanted it to be without encumbrance, so they could obtain credit thereon in their business. Therefore, as proposed by defendants, plaintiff agreed to take a second mortgage on defendants' real property to secure payment of the purchase price of the plant. Thus, by prearrangement, the parties appeared on November 14, 1951, at the office of plaintiff's lawyer, where he prepared defendants' promissory note for $8,499, payable to plaintiff, the mortgage on defendants' described real property to secure payment of the note, and an itemized bill of sale to the

machinery and equipment, same being "personal property known as the Bellevue Locker Plant." Such instruments were dated November 14, 1951, at the same time and place. Plaintiff was then paid $1 in cash, and each of said instruments was signed, executed, and delivered by and to the respective parties for the purpose of completing the sale. As in Blum v. Poppenhagen, 142 Neb. 5, 5 N. W. 2d 99, citing Thompson v. Jost, 108 Neb. 778, 189 N. W. 169, such instruments will be considered as one instrument and read and construed together. At the start of the trial herein, it was stipulated that such instruments had been so executed and delivered without prejudice to defendants' plea of failure of consideration and that they were obtained by misrepresentations. In that connection, contrary to plaintiff's contention, "The defense on the ground of fraud may be shown by parol, not to contradict or vary but to destroy the legal and binding effect of a written instrument." Paper v. Galbreth, 121 Neb. 454, 237 N. W. 582.

On November 16, 1951, defendants took possession of the plant and one of plaintiff's sons, who was an experienced operator of such plants and had worked in the plant involved from November 1948 to May 1949, and had inspected it as late as October 1949, showed defendants how to start and shut off the refrigeration and supervised its operation for 3 or 4 days, beginning November 17, 1951. He testified that the plant operated normally and properly while he was there. However, defendant testified that plaintiff's son operated the plant only a short time, and did not run the machinery or equipment long enough to see whether or not it operated to produce the required temperatures for refrigeration. He testified that he learned at once that the plant did not operate automatically but had to be operated manually by pulling a switch off and on again; that he had no customers until about the middle of the next week; that if run continuously, the plant would not

reach a low enough temperature for purposes of refrigeration; and that he had spoilage of meat and other foods for which defendants were liable. Thus, being without funds, defendant got a job outside of the plant, and about Thanksgiving time defendants hired an experienced locker man to manage the plant while defendant's wife and his nephew worked part time in the plant. Also, in December 1951, defendants hired a plant repair company to work on the plant 3 or 4 days and it operated some better for a period of time, but in about a month the motor and compressors burned out and the control piston started to knock, although they ran the plant 4 hours on and 2 hours off around the clock to keep such machinery cool. Defendants elaborated upon the almost continuous spoilage aforesaid, complaints by customers, and the fact that they had the expense of paying customers for such spoilage and for the making of repairs upon the plant. Defendant claimed that he called plaintiff on the telephone several times to tell her about his troubles but she would not answer, and that in January 1952, he wrote plaintiff about his difficulties and she replied that he should see her lawyer. However, plaintiff denied that defendant ever called her or that she refused to talk to him or that such letters were written, which seems to be true because defendants never went to see plaintiff's lawyer and they knew at all times where plaintiff lived but never went there to see her. In that connection, about May or June 1952, plaintiff and defendants met at Packers National Bank by prearrangement. There, an unsuccessful attempt was made by the defendants to sell plaintiff the very property which defendants had mortgaged to her, because they needed funds to operate the plant. However, no complaint was made there by defendants about the condition of the plant; no contention was made there that they had been defrauded; and they never offered to return the property at any time. Also, it will be noted that although plaintiff sent de-

fendants notices when payments on their note and mortgage were due, they never answered such notices or paid any sums whatever thereon. In that connection, "It is not the duty of a creditor to seek out his debtor—it is the duty of the debtor to seek his creditor." Meier v. Geldis, 148 Neb. 234, 26 N. W. 2d 813.

Defendants testified that they tried to obtain customers from a customer card file furnished by plaintiff, as recited in the bill of sale, but that the plant continually failed to operate as it should, and their hired manager left in about 4 months because defendants could not afford to pay him and, as testified by him, he quit because payments on his salary checks were being stopped. In that connection, such manager testified that during that period, defendants had continuous difficulty with refrigeration because they could not keep the temperature down where the plant would refrigerate properly. However, he testified that at first several of his friends followed him to the plant and the first 2 weeks defendants took in about $725, but when he left they had only a few customers. Be that as it may, defendants' landlord testified that he was in the plant regularly to collect the rent from defendants from November 14, 1951, to September 4, 1953, when defendants simply locked the door and abandoned the plant after he had served an eviction notice upon them because they had paid no rent for a year. He also testified that defendants had listed the plant for sale with him as a real estate operator, and that defendants' manager aforesaid had talked with him about buying it. In that connection, such manager admitted in an affidavit given plaintiff's attorney on August 21, 1957, that defendants took in about $714 from sales and locker rentals the first week he was manager; that the business continued to favorably hold its own while he was there; and that during the summer of 1952 he and another named person offered defendants $7,000 for the plant but they would not sell.

In any event, defendants kept right on operating the plant from November 16, 1951, until September 4, 1953. During that period they exchanged part of the equipment purchased from plaintiff for new equipment; kept whatever money they could get from customers; went into debt for plant obligations and paid but little if any thereof; and then listed the plant for sale with realtors. In September 1953, allegedly having only eight or nine customers who could be located, defendants took everything out of their customers' rented lockers; put it in another refrigeration plant; and then, "We just turned the key and walked away." Thereupon, defendants' landlord and other creditors were permitted, without plaintiff's knowledge or consent, to dismantle and take out of the plant and salvage whatever equipment they desired.

With regard to defendants' claim that they had only eight or nine customers whose products were transported to another plant, a copartner thereof produced a list of 42 customers of defendants dated September 4, 1953, when defendants brought the frozen food and products of such customers from their plant. She testified that the foods were in good condition, and that each of such customers had unexpired time coming for locker rentals and defendants agreed to pay for such unexpired time, which came to a total of $254.75 at defendants' rates, no part of which defendants ever paid. The copartner testified that some other customers also came over from defendants' plant and renewed contracts there, and that the products of some others, who had only a short time left on locker rentals, were simply put and kept in a room with only ledger charges made therefor. In the foregoing situation, defendants made no complaint or claim against plaintiff, and took no action seeking redress for alleged damages for fraud until May 16, 1956, after plaintiff had filed this action on March 2, 1956, a period of more than 4 years after knowledge of plaintiff's alleged fraud.

Plaintiff herein pleaded and argued that defendants' defense was barred by the statute of limitations. In that connection, defendants' answers were in effect a defense of recoupment. In Oft v. Dornacker, 131 Neb. 644, 269 N. W. 418, and again in Mettlen v. Sandoz, 131 Neb. 625, 269 N. W. 98, this court concluded that the defense of recoupment or reduction of plaintiff's claim must arise out of the same transaction as plaintiff's claim, and survives as long as plaintiff's cause of action exists, even if affirmative legal action upon the subject of recoupment is barred by the statute of limitations. Therefore, plaintiff's contention with regard to the statute of limitations barring defendants' claim has no merit.

As stated in 77 C. J. S., Sales, § 22, p. 626: "As a general rule there is an entire failure of consideration where the property purchased is entirely worthless * * * there is not a failure of consideration if the property is not entirely worthless, or if it has any substantial value, although less than the consideration paid * * * as where, by reason of some unsoundness or imperfection, it is merely diminished in value, * * *."

In Cotner College v. Estate of Hester, 155 Neb. 279, 51 N. W. 2d 612, we held: "Where there is a total failure of consideration and defendant has derived no benefit from the contract, or none beyond the amount of money which he has already advanced, such failure of consideration may be shown in bar of the action." In the light of evidence heretofore summarized, we conclude that defendants' contention that there was an entire failure of consideration because the plant was worthless, is entirely fallacious and has no merit. If the plant ever was worthless, it finally became so because of defendants' own affirmative acts and negligent conduct, for which they were entirely responsible.

In Boettcher v. Goethe, 165 Neb. 363, 85 N. W. 2d 884, we held that: "The asking of a certain price for an item of property is not a representation of its value." In the case at bar, the retired manager of York Corpora-

tion, which installed the plant involved new in 1947, testified that in 4 years it would generally have a 28 to 30 percent depreciation, and that on November 14, 1951, $8,500 would be a fair and reasonable price for the plant.

Also, in Boettcher v. Goethe, *supra,* this court said: "In Cook Livestock Co., Inc. v. Reisig, 161 Neb. 640, 74 N. W. 2d 370, this court referred to the elements of fraud including the one that a representation to be fraudulent must be made either with knowledge of falsity or without such knowledge as a positive statement of known fact and continued: 'In addition to the above, the general rule * * * is that fraud must relate to a present or preexisting fact, and cannot ordinarily be predicated on representations or statements which involve mere matters of futurity or things to be done or performed in the future. * * * It is a general rule that fraud must relate to a present or preexisting fact, and cannot be ordinarily predicated on unfulfilled promises or statements as to future events. * * * False representations, in order to found an action in the nature of deceit, must not consist merely of promises to be performed in the future, and generally not merely of expressions of opinion by a vendor as to the quality of his goods. They must be representations of known existing facts.'" In that connection, defendants had inspected the entire plant before purchasing it. They said that it looked bad. Nevertheless, we may assume that plaintiff told defendants that the plant would work; that it was in good working condition; and that it contained a "self contained unit arranged for automatic control" as stated in the bill of sale; and that such representations were false in material respects. However, under the circumstances in this case, defendants by their own affirmative acts and conduct have waived fraud as a defense.

In Hollenbeck v. Guardian Nat. Life Ins. Co., 144 Neb. 684, 14 N. W. 2d 330, this court held that: "Where

one is put upon inquiry, he is charged with notice of all of such facts as he would have learned by reasonable inquiry." See, also, Abels v. Bennett, 158 Neb. 699, 64 N. W. 2d 481, wherein we held that: "A defrauded party must be diligent and prudent in his effort to detect the fraud and means of knowledge thereof are equivalent to knowledge."

In that connection, if there was any fraud, as defendants contend, they became aware of it and had full knowledge thereof at all times from and after the week of November 16, 1951. However, defendants took no steps to return the property or to call plaintiff's attention to the defects thereof, but they affirmatively proceeded to ratify and perform the contract until the plant was dismantled and destroyed by the affirmative acts and conduct of defendants who are responsible therefor, and they are estopped to claim otherwise. See State v. Nielsen, 163 Neb. 372, 79 N. W. 2d 721, wherein we held: "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."

Plaintiff has pleaded estoppel and waiver of defendants' alleged fraud, if any. In that connection, as early as Hazen v. Wilhelmie, 68 Neb. 79, 93 N. W. 920, this court held that: "In an action upon a contract for the sale of chattels, evidence by the purchaser that after the delivery of the subject matter he inspected, retained and used it as a whole, shows both an acceptance and a waiver of any objection that the quality was not such as the contract required."

As recently as Dargue v. Chaput, 166 Neb. 69, 88 N. W. 2d 148, citing authorities, we held: "A right of action for fraud may be waived. Thus, while the defrauded party may retain what he received, stand to his bargain, and recover for the loss occasioned by the

fraud, he cannot do so where, having full knowledge, he does an act indicating his intention to waive the fraud.

"It is, however, difficult and perhaps hazardous to formulate or to apply general rules as to what will constitute such a waiver, and each case in which the question arises must be considered and disposed of on its own special facts, the underlying question being one of intent.

"Accordingly acts in affirmance of the contract amount to a waiver of the fraud only where they are done with full knowledge of the fraud and of all material facts and with the intention clearly manifested of abiding by the contract and waiving all right to recover for the deception." See, also, 56 Am. Jur., Waiver, § 5, p. 106; Restatement, Contracts, § 484, p. 924. If there ever was a case wherein defendants waived the fraud and were estopped to claim damages by way of recoupment or otherwise, this is one of them.

For reasons heretofore stated, we conclude that the trial court erred in refusing to foreclose plaintiff's mortgage and in cancelling plaintiff's note. Therefore, the judgment of the trial court should be and hereby is reversed and the cause is remanded with directions to render a judgment determining the amount due and unpaid on plaintiff's note and mortgage executed and delivered to plaintiff by defendants on their described real property, and foreclosing said mortgage as a third lien. Also, the judgment shall fix the respective priorities of the liens of other defendants heretofore mentioned, and grant the relief as prayed for by them, in conformity with this opinion. All costs are taxed to defendants McKernan.

REVERSED AND REMANDED WITH DIRECTIONS.

SIMMONS, C. J., not participating.

ROBERT PATRAS, A MINOR, BY LLOYD PATRAS, HIS FATHER AND NEXT FRIEND, APPELLEE, V. MILTON J. WALDBAUM, DOING BUSINESS AS MILTON J. WALDBAUM & CO., ET AL., APPELLANTS, IMPLEADED WITH DOBSON-ROBINSON, INC., APPELLEE.

101 N. W. 2d 465

Filed March 11, 1960. No. 34695.

1. **Trial: Damages.** In an action for damages for loss of future earnings it is the duty of the court to instruct the jury that the amount thereof shall be reduced to present worth or value.
2. ———: ———. In the absence of request the court is not required to instruct as to a basis for determination of present worth or value of future damages.
3. ———: ———. If the court either on request or on its own motion attempts to define a method of arriving at present worth or value of future damages, and the instruction fails to contain a legal or comprehensive definition, it is prejudicially erroneous.
4. **Trial: Appeal and Error.** Photographs are admissible in evidence where they may be regarded as instructive upon a question for determination, but if they are not so instructive it is error to admit them.

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

Leo A. Capesius and *Joseph H. McGroarty,* for appellants.

Frederick M. Deutsch and *William I. Hagen,* for appellee.

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

YEAGER, J.

This is an action for damages by Robert Patras, a minor, by Lloyd Patras, his father and next friend, plaintiff and appellee, against Milton J. Waldbaum, doing business as Milton J. Waldbaum & Co., and Wayne Norman, defendants and appellants, and Dobson-Robinson, Inc., defendant and appellee, growing out of an

accident wherein the plaintiff was injured and damaged, as is admitted to be true, by the negligence of defendant Norman, which negligence was attributable also to the defendant Waldbaum, Norman's employer. Dobson-Robinson, Inc., was made a party defendant because of the fact that the plaintiff was employed by it, the purpose of course being to protect it as employer in the area of workmen's compensation in the event of recovery of damages by plaintiff against the other defendants. No further mention of this defendant will be required herein, therefore when the term defendant or defendants is employed it will refer to Waldbaum and to Norman. The case was tried to a jury and a verdict was returned in favor of the plaintiff for $35,000. Judgment was rendered on the verdict after which a motion for new trial was filed. The motion was overruled. From the judgment and the order overruling the motion for new trial the defendants by appeal seek a reversal of the judgment. After the case came to this court on appeal Lloyd Patras died. On this account Ivadelle Patras was substituted for Lloyd Patras.

Assignments of error urged as grounds for reversal appear in the brief. These, or such of them as require consideration, will be referred to herein following a summary of the pertinent facts.

On August 14, 1957, the plaintiff, then of the age of 18 years, was an employee of Dobson-Robinson, Inc., which company was engaged in highway construction on U. S. Highway No. 20 in the vicinity of Osmond in Pierce County, Nebraska. At a point about 4 miles west of Osmond the highway was closed to traffic by a barricade. At about 6:30 a.m. on that date the plaintiff was engaged in the performance of his duties east of the barricade. At that time defendant Norman was proceeding in an easterly direction on the highway in a truck owned by the defendant Waldbaum. He negligently drove the truck through the barricade into an automobile which was parked just east of the barricade

and caused the automobile to be propelled against the plaintiff, as a result of which the plaintiff received personal injuries and suffered damages. With regard to these facts, as has been indicated, there is no dispute. The only factual dispute on the trial related to the extent of injuries received and the amount of damages sustained.

There is but little dispute as to the findings of injuries at or about the time of the accident or thereafter. The real dispute is as to what the plaintiff's condition was at the time of trial and as to whether his then condition flowed from the accident and injuries or, in whole or in part, from congenital causes, and the amount of future damages to which he was entitled, if any.

As a result of the accident he suffered pain which continued down to the time of the trial; he had a severe laceration of his lip; teeth were broken, one of which was lost; his left thumb was fractured; he had a dislocated hip; and he sustained bruises and lacerations. In addition to all of this he had medical and hospital treatment and the expense thereof, and lost time from work. There is no factual dispute in the evidence as to injuries sustained except as to a condition in the lower back which the plaintiff contends flowed from the accident and which the defendants contend was a congenital condition.

By assignment of error the defendants assert that the verdict is excessive. The effect of another assignment is to say that the excessiveness was brought about because of impropriety of instructions to the jury relating to the amount of damages to be awarded to the plaintiff.

By instruction No. 5 the court instructed the jury that the verdict should be in an amount which would fairly and reasonably compensate the plaintiff for his pecuniary damage or financial loss which would include reasonable value of medical attention and hospital care, value of pain and suffering, inconvenience sustained,

disfigurement, and damage caused by impaired earning capacity. By this instruction the jury was told that the pecuniary damage for pain and suffering was incapable of precise measurement by any certain rule of law, but that from its nature it must depend largely upon the sound judgment and discretion of the jury governed by the circumstances of the case. This instruction and no other informed the jury as to what would or could be the basis for an award for future damages. The instruction concluded as follows: "Any amount you award to the plaintiff for future damages, should be reduced to their present worth or value."

The defendants do not contend that this instruction contains any improper statement of legal principle. They contend substantially that this instruction was and the instructions as a whole were, in the light of the evidence, insufficient to apprise and properly inform the jury of its duty in relation to the fixation of damages, and particularly with reference to future damages.

In all of these respects except one the attack is general and without sufficient particularity to justify extended comment herein. The matter to which particular attention is directed is instruction No. 9 which was given, the express purpose of which was to inform the jury as to its duty in arriving at its verdict as to future damages, if any, which the plaintiff sustained as a result of the accident and his resultant injuries. The instruction, of course, referred to the last sentence of instruction No. 5 which has been quoted herein. Instruction No. 9 is as follows: "By 'present worth or value' of amounts awarded to plaintiff for future damages, if any, is meant such slightly reduced sum, after allowance of the legal rate of interest per annum, for his use and benefit of sums now awarded for future damages, until such time or times as such damages are actually sustained by plaintiff within his expected lifetime."

It is asserted substantially that the instruction is an incorrect statement of the proper method of ascertain-

ing the present worth or value of future damages, and further that the meaning is so obscure that it is not capable of comprehension and application.

It must be said that the instruction does fail to define the proper method of arrival at the present worth or value of future damages. It is contrary to the definitions declared by the decisions of this court.

In Chambers v. Chicago, B. & Q. R. R. Co., 138 Neb. 490, 293 N. W. 338, this court, in a case under the federal employers' liability act, held that the measure of damages for future loss of earnings should be in the amount thereof reduced to present worth and that the jury should be so instructed. It was further held that a more explicit instruction was not required in the absence of request.

This court, in Borcherding v. Eklund, 156 Neb. 196, 55 N. W. 2d 643, followed the definitive holding in Chambers v. Chicago, B. & Q. R. R. Co., *supra*. It however departed from the holding that a more explicit instruction in the absence of request was not required, and held that it was the duty of the court to instruct fully on the proper basis for the assessment of damages. In this case it was indicated that a method of arriving at the present worth or value of future damages was required.

In Jacobsen v. Poland, 163 Neb. 590, 80 N. W. 2d 891, the definitive holding of the case of Borcherding v. Eklund, *supra,* was commented on with general approval. However the question of whether or not it is necessary to prescribe or define a method of arriving at present worth or value was not involved. It was pointed out that when the court attempts to prescribe or define a method it must do so within certain limitations or restrictions.

In Wolfe v. Mendel, 165 Neb. 16, 84 N. W. 2d 109, this court again approved the definitive holding of Chambers v. Chicago, B. & Q. R. R. Co., *supra,* and returned to the rule that an instruction that the measure of dam-

ages for future loss of earnings should be in the amount thereof reduced to present worth was sufficient in the absence of request for more specific instruction.

In the light of this it is clear that instruction No. 5, in view of the fact that neither party requested more specific instruction, was sufficient on the question of future damages, and except for instruction No. 9, given by the court of its own motion, there could be no valid claim of error because of failure to instruct as to the method for arrival at present worth or value.

Instead of this, however, the trial court gave instruction No. 9 the evident purpose of which was to define the method or a method of ascertaining present value. In this attempt it was its duty to do so correctly and of course comprehensively. In this respect the defendants say that there was failure.

In Hickman-Williams Agency v. Haney, 152 Neb. 219, 40 N. W. 2d 813, it was said: "Where an instruction is so worded as necessarily to leave the jury to uncertain conjecture as to the meaning, and therefore liable to lead the jury astray in their consideration of the case, it is good ground for new trial." See, also, City of Crete v. Childs, 11 Neb. 252, 9 N. W. 55.

In Langdon v. Loup River Public Power Dist., 144 Neb. 325, 13 N. W. 2d 168, it was said: "The purpose of an instruction is to furnish guidance to the jury in their deliberations, and to aid them in arriving at a proper verdict; and, with this end in view, it should state clearly and concisely the issues of fact and the principles of law which are necessary to enable them to accomplish the purpose desired." See, also, Platte Valley Public Power & Irr. Dist. v. Armstrong, 159 Neb. 609, 68 N. W. 2d 200.

Instruction No. 9 fails, in the light of what this court has said with regard to fixation of present worth or value of future damages, to conform with these pronouncements with relation to the true office of instructions to a jury. The court attempted by this instruction

to declare a standard to be followed by the jury in arriving at the present worth or value of plaintiff's future damages.

From an examination of the standard or standards declared by the instruction it appears that it fails to conform to the pronouncements contained in the opinion in Jacobsen v. Poland, *supra*. It is true that in this opinion no fixed and all-inclusive standards appear. It is however clear that what is said there is a negation of what is found in instruction No. 9. From what is said therein directly by this court and what has been quoted therein with approval from the pronouncements of the courts of other jurisdictions it would appear that this court has indicated that when a jury is instructed as to present worth or value of future damages and the trial court goes beyond that declaration and attempts to define the method of arriving at the amount, a fixed formula should not be given which the jury is required to follow. It should receive only an explanatory or illustrative one to aid it in arriving at its verdict.

The giving of tables of expectancy and illustrative tables of the earning value of money is proper as an aid to the jury. These however are to be construed as merely explanatory to the jury and not binding upon it and not impairing its discretion.

Also the fixing of interest rates and returns upon money is not a matter on which instruction should be given. While formulas in this area are proper for submission the jury is not bound thereby in arriving at the present value of future damages. The indicated proper manner of submitting the elements of present worth or value, assuming that such request is made or it is done by the court on its own motion, is to submit the matter on all of the facts and circumstances as disclosed by the evidence together with a formula for guidance but not control of the jury for the fixation of present value of money, which formula shall not exact any particular rate of interest, but shall permit the jury in the light

of its functions and its presumed common knowledge and intelligence to arrive at its own conclusion and decision.

Because of the uncertainty of the meaning of instruction No. 9 it is not clear whether it does or does not run counter to all of the negations which flow directly or by reasonable inference from Jacobsen v. Poland, *supra,* but it is clear that it runs counter to the positive directives of that opinion to which directives reference has been made.

The meaning of the instruction, as indicated, is uncertain. The attempts which have been made to find the meaning have ended in futility. No further attempt will be made herein.

It follows that this instruction to the jury did not conform to proper legal principles and was so worded as necessarily to leave the jury uncertain as to its meaning. Accordingly the giving of the instruction was ground for a new trial.

By the appeal the defendants seek to have the verdict set aside on the ground that it is excessive. In view of the fact that the verdict will be set aside on the ground of error in instructions to the jury it is not deemed proper to consider the matter of the size or amount of the verdict. With the reversal the verdict in all of its aspects becomes nonexistent. The question of the amount of damages should be left to a jury under proper instructions entirely uninfluenced by anything which might be said in this opinion.

On the trial an exhibit consisting of two photographs of the automobile which struck the plaintiff was admitted in evidence over objection of the defendants. It is apparent that the photographs were adduced to show the force and effect of the act which produced plaintiff's injury and damage. The defendants contend that the admission of this exhibit was error. They contend that negligence having been admitted, thus leaving only the question of the character and amount of damage as

the subject of consideration, this exhibit was not admissible for the reason that it had no probative value on the question of damages.

A general rule as to admissibility of photographs is that if they will be practically instructive as evidence they are admissible, but if they are irrelevant and immaterial they should be excluded. See 32 C. J. S., Evidence, § 709, p. 611. The exhibit admitted had no value as instructive evidence and was immaterial in the light of the question for determination, and therefore it was erroneously received in evidence.

For the reasons herein set forth the conclusion is reached that the judgment of the district court should be and it is reversed and the cause is remanded for a new trial.

REVERSED AND REMANDED.

IMOGENE MICHELSON ET AL., APPELLEES, IMPLEADED WITH ORA I. WAGNER, APPELLANT, V. CLARENCE B. WAGNER ET AL., APPELLEES.

101 N. W. 2d 498

Filed March 11, 1960. No. 34718.

1. **Judicial Sales.** A successful bidder at a judicial sale becomes a party to the proceedings, may appear and urge confirmation, and may appeal from an order setting the sale aside.
2. **Partition: Judicial Sales.** Every person who buys from a referee takes with knowledge that the contract of sale is not binding on the referee until the entire transaction is properly presented to and approved by the court.
3. ———: ———. In partition proceedings it is the duty of referees and trial courts to endeavor to secure the highest possible price for property sold for the benefit of those persons lawfully entitled to the proceeds of the same.
4. **Judicial Sales.** It is the general rule that confirmation of judicial sales rests largely within the discretion of the trial court, and will not be reviewed except for manifest abuse of such discretion. The discretion to be exercised is not arbitrary, however, but should be one which is sound and equitable in

view of all the circumstances. The court must act in the interest of fairness and prudence, and with a just regard to the rights of all concerned and the stability of judicial sales.

5. **Partition: Judicial Sales.** Substantially increased offers to a referee for property sold by him, made before confirmation of the sale to the highest bidder, are sufficient evidence to support a finding of the trial court in the exercise of its judicial discretion that confirmation should be denied and a new sale ordered.

6. **Judicial Sales.** An upset bid, made after the judicial sale has been held and prior to its confirmation by the court, is relevant only to the extent that it bears upon the fairness of the sale and the adequacy of the highest bid at the advertised judicial sale.

APPEAL from the district court for York County: JOHN D. ZEILINGER, JUDGE. *Reversed and remanded with directions.*

John E. Dougherty, for appellant.

R. E. Lunner and *Gerald F. Beaver*, for appellees.

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

WENKE, J.

This is an appeal from the district court for York County. It involves a partition action. The question raised by the appeal is whether or not the trial court abused its discretion by ordering the referee appointed therein to make a public resale of the land being partitioned.

On May 19, 1959, the trial court rendered a decree in this action finding and confirming the interests of the several parties thereto in and to 360 acres of land located in York County, which is fully described therein; ordered partition to be made thereof accordingly; and appointed a referee for that purpose. The trial court's decree established the ownership of the land to be in 11 people, 9 of whom each owned a 1/10th interest while the other 2 owned a 1/20th interest. The referee reported that the real estate could not be advantageously divided into the requisite number of parcels with-

out great prejudice to the several owners thereof and recommended that it be sold. This report the trial court approved, ordering the real estate to be sold at public sale at the place therein specified, same to be for cash with a deposit of 15 percent of the bid to be made with the referee at time of the sale.

On June 22, 1959, the referee filed his report, saying that on June 19, 1959, he had sold the lands to Ora I. Wagner and Myrtle Wagner, husband and wife, for $48,000, and that the amount bid was the "highest bid obtainable." We shall hereinafter refer to Ora I. and Myrtle Wagner as the Wagners. Thereafter, on July 3, 1959, Cecil W. Wagner, an owner of a 1/10th interest in the land being partitioned, filed objections to the sale made by the referee being confirmed and requested a resale thereof on the ground "that the highest bid is unreasonable and insufficient; that a considerably higher bid has been submitted for said real estate." We shall hereinafter refer to Cecil W. Wagner as the objector. On the same day Henry C. Bjerrum filed an "Offer" with the clerk of the court of $49,000 for the 360 acres to which he attached his certified check in the sum of $5,145. The Wagners filed an answer to the objections. A hearing was had thereon and on July 15, 1959, the trial court found "that said offer of Henry C. Bjerrum is a substantial increase over the high bid at the sale; that a resale of said property will produce substantially more money for the owners of the property than the sale reported by the referee; that it is to the best interest of the owners of the property that the sale conducted by the referee be denied confirmation and that the property be resold at public auction with the $49,000.00 offer of Henry C. Bjerrum as the opening bid on the resale; * * * and that the Clerk of the Court should retain the certified check of Henry C. Bjerrum for $5,145.00 until further order of the court." Based on such findings the court, after sustaining the objections filed and refusing confirmation of the sale had, ordered the referee

to proceed to resell the real estate at public sale at the same place as before and upon the same terms, stating: "* * * with the opening bid to be the $49,000.00 offer of Henry C. Bjerrum." The Wagners filed a motion for new trial and have perfected this appeal from the overruling thereof.

"A successful bidder at a judicial sale becomes a party to the proceedings, may appear and urge confirmation, and appeal from an order setting the sale aside." Siekert v. Soester, 144 Neb. 321, 13 N. W. 2d 139, 152 A. L. R. 527. See, also, Knouse v. Knouse, 157 Neb. 748, 61 N. W. 2d 388; County of Lancaster v. Schwarz, 152 Neb. 15, 39 N. W. 2d 921.

"* * * every person who buys from a referee takes with knowledge that the contract of sale is not binding on the referee until the entire transaction is properly presented to and approved by the court." Siekert v. Soester, *supra*. See, also, Knouse v. Knouse, *supra;* County of Lancaster v. Schwarz, *supra*.

"In partition proceedings, it is the duty of referees and trial courts to endeavor to secure the highest possible price for property sold for the benefit of those persons lawfully entitled to the proceeds of the sale." Knouse v. Knouse, *supra*. See, also, Siekert v. Soester, *supra*.

"It is the general rule that confirmation of judicial sales rests largely within the discretion of the trial court, and will not be reviewed except for manifest abuse of such discretion. The discretion to be exercised is not arbitrary, however, but should be one which is sound and equitable in view of all the circumstances. The court must act in the interest of fairness and prudence, and with a regard to the rights of all concerned, and the stability of judicial sales." 30A Am. Jur., Judicial Sales, § 122, p. 971. See, also, 50 C. J. S., Judicial Sales, § 52 c, p. 671, § 28 d (4), p. 617; 68 C. J. S., Partition, § 193 b, p. 318. As stated in County of Lancaster v. Schwarz, *supra*: "If the sale was fairly con-

ducted and the property sold for a reasonable and fair value under the circumstances, the court is ordinarily required in the exercise of its judicial discretion to confirm the sale. Inadequacy of price is not of itself sufficient to warrant a resale unless it appears that such resale would probably produce a higher price. Due regard must be given to the rights of the successful bidder and the stability of judicial sales generally." See, also, 30A Am. Jur., Judicial Sales, § 122, p. 971.

Apparently there were two contentions made by the objector in the district court as to why the sale made by the referee should not be confirmed and a resale ordered, although the first of these is not too well pleaded. The first is that, considering the bid received by the referee, the land did not sell for a sufficient amount in view of its fair and reasonable value. That such is a proper basis upon which a resale may be ordered is evidenced by our opinion in Knouse v. Knouse, *supra*. The only witness who attempted to testify for the objector as to the value of the land was the objector himself. He has lived on this land, and farmed it, since 1919 with the exception of about 10 months when he was in the armed forces of his country. He described the land, about 80 acres of which were pump irrigated, the crops growing thereon, the yield thereof, and the improvements. That he was qualified to testify as to the fair and reasonable value thereof is evidenced by our holdings in Borden v. General Insurance Co., 157 Neb. 98, 59 N. W. 2d 141, and Knouse v. Knouse, *supra*. But no attempt was made to establish the fair and reasonable market value of the land at the time of sale by this witness. All he testified to in that regard is that "it should bring better than $50,000." We do not think this is evidence upon which to base any finding as to the fair and reasonable market value of the land, but assuming that it is we do not think it is sufficient to establish that the land did not bring its fair and reasonable market value, especially when we consider

the fact that the referee, who was appointed by the court and who was familiar with the land, testified that he thought it had brought its fair and reasonable value.

The objector also set out that a considerably higher bid had been submitted for the real estate; that being the offer of Henry C. Bjerrum in the amount of $49,000. That a substantially increased offer can be the basis for a trial court ordering a resale is evidenced by our holdings in Siekert v. Soester, *supra;* First Nat. Bank v. First Trust Co., 145 Neb. 147, 15 N. W. 2d 386; and Knouse v. Knouse, *supra.* As stated in Siekert v. Soester, *supra*: "Substantially increased offers to a referee for property sold by him, made before confirmation of the sale to the highest bidder, are sufficient evidence to support a finding of the trial court in the exercise of its judicial discretion that confirmation should be denied and a new sale ordered." In Siekert v. Soester, *supra,* the upset bid was an increase of 7.8 percent; in First Nat. Bank v. First Trust Co., *supra,* 8 percent; and in Knouse v. Knouse, *supra,* 5.4 percent.

However, as we said in County of Lancaster v. Schwarz, *supra*: "An upset bid, made after the judicial sale has been held and prior to its confirmation by the court, is relevant only to the extent that it bears upon the fairness of the sale and the adequacy of the highest bid at the advertised judicial sale. * * * The upset bid to be effective must be substantial and material, and not merely nominal; otherwise it would not tend to establish fraud or unfairness at the judicial sale or the inadequacy of the highest bid procured at such sale. Whether such a bid is sufficient to warrant a resale or a reopening of the bidding is largely a discretionary matter with the trial court. It follows that the discretion of the court to reject the high bid at the judicial sale gains latitude as the upset bids become larger. * * * The mere fact that a higher upset bid has been received is not a sufficient reason of itself to refuse to confirm a judicial sale. The court will not

ordinarily refuse to confirm a sale which has been regularly held and fairly conducted. An upset bid should be considered only when it affords convincing proof that the property was sold at an inadequate price and that a just regard for the rights of all concerned and the stability of judicial sales permit its acceptance. * * * In determining whether an upset bid is sufficient to sustain a finding that the price obtained at judicial sale was inadequate, the court must exercise the discretion vested in it in accordance with established legal principles." The court therein goes on to say: "If upset bids were permitted and accepted under any and all circumstances, the holding of judicial sales would become only a means of bidding on the property instead of an opportunity to purchase it. Bidders would naturally pass up the judicial sale and place their bids with the court immediately prior to the hearing on confirmation and thereby eliminate the risk of loss by depreciation in the value of the property pending confirmation. Such procedure seeks to deprive a purchaser at judicial sale of the property if the bidder making the upset bid thinks the purchase an advantageous one and leaves it to the buyer if he thinks the purchase unwise. The effect of such a procedure would be to chill the bidding at judicial sales and would largely eliminate the purpose for which they are held."

The sale was widely advertised by the referee, not only by the required legal notice but by display advertising in newspapers having local circulation as well as in those having state-wide circulation and by distribution of handbills in the neighboring towns. In the neighborhood of $150 was expended by the referee for that purpose. Some 24 or 25 people attended the sale, including both the objector and Bjerrum. There appears to have been spirited bidding by those present as evidenced by the number of bids received by the referee. The 360 acres were offered for sale by the referee as a unit and in two tracts, one of 120 acres and the other

of 240 acres. The objector bid as high as $37,000 on the 240-acre tract, which was apparently the improved home place, while Bjerrum testified he bid as high as $46,600 on the entire tract. The sale was opened at 2 p.m., and was held open for about 2½ hours. The referee sold the land as a unit to the Wagners. Both the objector and Bjerrum were present when the sale was closed and the objector, when asked by the referee if he should close the sale on the $48,000 bid of the Wagners, told him to "Sell it." The referee, who testified he thought the land sold for its fair and reasonable value, then closed the sale, having accepted the $48,000 bid of the Wagners. The Wagners thereupon paid the sum of $7,200 to the referee, that being 15 percent of their accepted bid.

There is no question but what the sale was well advertised, well attended, and fairly conducted, and resulted in spirited bidding. The increased offer of Bjerrum is only a 2.1 percent increase over the final bid received and accepted by the referee and if we consider the $150 expended by the referee for advertising, without considering any increase in expense because of additional fees that may be allowed because of a resale, the increase is only about 1.8 percent. Such increase is not substantial and, as suggested in County of Lancaster v. Schwarz, *supra,* to permit such a small increase to upset a judicial sale fairly had and at which everyone present was given ample opportunity to bid would be to chill the bidding at judicial sales and largely eliminate the purpose for which such sales are held.

We have come to the conclusion that the trial court abused its discretion in refusing confirmation, sustaining the objections filed, and ordering a resale. We therefore reverse its order doing so and remand the cause to the district court with directions to overrule the objections filed to the referee's sale; to reject the offer of Henry C. Bjerrum to increase the bid to $49,000; to approve the referee's report; to confirm the sale made

by him to the Wagners as shown by his report filed on June 22, 1959; and for such other and further orders as may become necessary to fully complete the referee's sale and the distribution of the proceeds resulting therefrom. All costs of this appeal are taxed to the objector.

REVERSED AND REMANDED WITH DIRECTIONS.

CARTER, J., dissenting.

The cases cited in the majority opinion correctly state the law on the issues raised in them. My dissent is directed to the fact that they have no application to the present case.

In the instant case the judicial sale produced a bid of $48,000. After the sale and before the hearing on confirmation an additional bid of $1,000, which I shall hereafter refer to as a jump bid, was guaranteed if a resale of the property was permitted. The trial court refused to confirm the sale and ordered a new sale. It is my contention that the granting of a resale under these circumstances is wholly within the discretion of the trial court and not subject to review.

This court has uniformly held that, where a jump bid has been made, a resale is within the discretion of the trial court. The rules announced in the majority opinion have been applied only where the trial court confirmed the sale and an appeal was taken therefrom. We stated the rule in Siekert v. Soester, 144 Neb. 321, 13 N. W. 2d 139, 152 A. L. R. 527, as follows: "According to the third doctrine (See 11 A. L. R. note, pp. 417 to 419, inclusive), where there has been an advanced bid before confirmation, the entire matter of confirmation of judicial sales is left with the trial court, to be confirmed or not according to its judicial discretion. This doctrine is the one heretofore approved and adopted by this court. True, in several cases it has been held by this court that a judicial sale will not be set aside on account of mere inadequacy of price, unless such inadequacy is so gross as to make it appear that it was the result of fraud or mistake, or to shock the conscience of the

court. But in these cases there was no evidence that others were willing to pay more." Other cases to this effect are: State Bank v. Green, 11 Neb. 303, 9 N. W. 36; Prudential Real Estate Co. v. Hall, 79 Neb. 805, 113 N. W. 243; Crews v. Alberts, 124 Neb. 671, 247 N. W. 602; State ex rel. Sorenson v. Denton State Bank, 126 Neb. 486, 253 N. W. 670; First Nat. Bank v. First Trust Co., 145 Neb. 147, 15 N. W. 2d 386; County of Nance v. Thomas, 146 Neb. 640, 20 N. W. 2d 925; County of Gage v. Beatrice Nebraska Water Co., 147 Neb. 236, 22 N. W. 2d 696; Ehlers v. Campbell, 147 Neb. 572, 23 N. W. 2d 727; Knouse v. Knouse, 157 Neb. 748, 61 N. W. 2d 388. The opinion of the majority overrules the holdings of the foregoing cases without doing so in terms. I have not found a single case in this state which reverses an order of the trial court in refusing to confirm a sale and ordering a new sale where a jump bid assures a higher bid on the resale. In Siekert v. Soester, *supra,* the highest bid was $3,525 and the jump bid $3,800, an increase of $275. This court refused, under the foregoing rule, to interfere with the discretion of the trial court in denying confirmation and granting a resale. In First Nat. Bank v. First Trust Co., *supra,* this court sustained the action of the trial court in setting aside a confirmation already entered and ordering a new sale on an assured jump bid of $1,000. I submit that the order of the trial court directing a new sale in the present case should be affirmed under the foregoing authorities.

It is the duty of the trial court to secure the highest possible price for property sold at judicial sale. In accomplishing this result the trial court has a broad discretion in determining whether or not a sale should be confirmed. If the trial court confirms the sale, the rules cited by the majority will be applied on appeal. If a resale is granted after a larger bid is assured on resale, the discretion of the trial court has not, previous to this case, been subject to review. I submit that the

rule heretofore existing is the proper one if trial courts are to follow the injunction imposed on them to obtain the highest price possible for property sold at judicial sale. In many instances, particularly in times of economic stress, judicial sales do not produce adequate bids, or any bids at all. To take from trial courts the discretion to refuse confirmation and grant a resale where an increased bid has been assured does not appear to be in the public interest.

The duty of an appellate court to protect its own jurisdiction and powers is no greater than its duty to protect the jurisdiction and powers of the courts inferior to it. I disagree with the action of this court in arrogating to itself the right to review the action of the district court in a matter that has been traditionally the exclusive prerogative of the district courts.

CHAPPELL, J., dissents separately.

FAE E. ADOLF, APPELLANT, V. UNION NATIONAL LIFE INSURANCE COMPANY, A CORPORATION, APPELLEE.
101 N. W. 2d 504

Filed March 11, 1960. No. 34720.

1. **Insurance.** Insurance is a contract by which one party assumes specified risks of the other party for a consideration, and promises to pay him or his beneficiary an ascertainable sum of money on the happening of a specified contingency.
2. ———. A contract of insurance which is plain and unambiguous as to its meaning must be enforced according to its terms the same as any other contract.
3. ———. When an application or conditional receipt provides that insurance shall be effective as of the date of the application or conditional receipt, subject to the approval of the application or its acceptance by the insurer, no protection is afforded the applicant until the application is approved or accepted.
4. ———. While an applicant is entitled to have indefinite and ambiguous provisions of an insurance contract construed in his favor, nevertheless, plain and unambiguous provisions cannot be disregarded because they were not read or understood by the applicant.

5. **Contracts: Evidence.** Parol evidence is not admissible to vary the terms of a written contract of insurance.
6. **Insurance.** A provision in a contract of insurance that the insurer will not be bound by statements or promises made by an agent unless the same are reduced to writing, submitted to the company at its home office, and made a part of the contract, is a limitation upon the authority of the agent, and agreements made by the agent not in compliance therewith have no binding effect on the insurer.

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

Wellensiek & Weaver, Healey, Wilson & Barlow, and *Patrick W. Healey,* for appellant.

Perry, Perry & Nuernberger and *Edwin C. Perry,* for appellee.

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

CARTER, J.

This is an action on an alleged contract of insurance to recover the sum of $20,000. At the close of all the evidence the trial court directed a verdict for the defendant, and the plaintiff has appealed.

The plaintiff testifies that on March 27, 1952, the insurance company entered into a contract of insurance with Calvin G. Boyd by which the life of Boyd was insured for $20,000. Plaintiff at that time was the wife of Boyd and the named beneficiary in the alleged contract of insurance. A formal policy of life insurance was never issued by the insurance company. The applicant, Calvin G. Boyd, died in an automobile accident on June 9, 1952. The plaintiff as beneficiary brings the action to recover $20,000 under the terms of the alleged insurance contract.

The evidence shows that E. A. Sommerville was a soliciting agent for the insurance company. Some time prior to March 27, 1952, the agent solicited Boyd to purchase a policy of life insurance. On March 27, 1952,

his solicitation culminated in an application for life insurance in the amount of $20,000. A written application was completed and signed by Boyd. On the oral representation of the agent that the insurance would be immediately in force if he paid the first annual premium in cash, Boyd gave the agent his check for $128, which was admittedly the full amount of the first annual premium. The agent thereupon issued a receipt to Boyd, which together with the application is alleged to constitute a contract with the insurance company for temporary insurance.

The evidence shows that the agent arranged for Boyd to have a medical examination by Dr. Donal H. Morgan at McCook on April 1, April 14, May 7, and May 19, all in 1952. An appointment was also made with Dr. Robert T. Jones for a Sunday in May subsequent to May 19 and prior to Boyd's death. Boyd failed to keep any of these appointments and at no time submitted to a medical examination. The evidence shows that the insurance company advised the agent on several occasions that the report of the medical examination was required before the company could act on the application. The agent testifies that he repeatedly talked with Boyd about the necessity of his submitting to a medical examination. On May 12, 1952, the company wrote Boyd direct in which it said: "We are writing to you about completing your medical examination so that we may take action upon your application for insurance in our company." An acceptance of the application was never indicated, and a formal policy was never issued by the company. The company retained the premium, however, and tendered it back after the death of Boyd.

The plaintiff testifies that she heard the agent tell the applicant that the insurance would be immediately effective if the first annual premium was paid. The agent denies that he made this statement, but we shall consider the case as if the statement was made. We

think this evidence on the part of the plaintiff should have been excluded for two reasons. First, it was an attempt to vary the terms of the written contract. Second, it was outside the scope of the authority of the soliciting agent to thus bind the company under the very terms of the application which provided: "This application * * * and any policy or policies issued in consequence thereof shall constitute the entire contract of insurance and the Company shall not be bound by any statements, promises or information made or given by or to any agent or other person unless the same be reduced to writing, submitted to the Company at its Home Office, and made a part of such contract."

The plaintiff relies upon Whitehall v. Commonwealth Casualty Co., 125 Neb. 16, 248 N. W. 692, and Echols v. Mutual Life Ins. Co., 106 Neb. 409, 184 N. W. 58. The Whitehall case involved a policy of accident insurance. The application was signed, the premium paid, and the policy issued, although there was a question as to whether or not it had been actually delivered to the applicant before the accident occurred for which suit was brought. It was held that the soliciting agent and a general agent of the company, who was present when the application was taken, had authority to make an oral contract of insurance. There is no evidence in the instant case that the soliciting agent had any authority to vary the terms of the application and conditional receipt contrary to the quoted provision of the application. In the Echols case a waiver of the time of payment of the first premium was shown which was expressly concurred in by the general agent of the company. The policy was issued and not delivered promptly by the soliciting agent through no fault of the applicant. We fail to see how these cases are pertinent to the situation in the case at bar. The plaintiff is clearly bound by the provisions of the application signed by the applicant. It is a part of the contract, if it can be said that a contract of insurance was actually made. Muhlbach v.

Omaha Life Ins. Co., 107 Neb. 206, 185 N. W. 447. There is no indication of a waiver by the company of any of the provisions of the application or the conditional receipt. In the absence of a proper waiver, such provisions are an effective part of the proposed insurance contract.

The controlling question is whether or not there was a contract of insurance in existence between the defendant and the applicant at the time of the latter's death. The only competent evidence of a contract of insurance is the application signed by the applicant, a receipt signed by the soliciting agent on a form provided by the company, and the payment of the first annual premium. The retention of the first annual premium by the defendant does not prejudice the rights of the insurance company when it is retained under a provision of the receipt, as here, that if no insurance is issued the premium will be returned upon demand and the surrender of the receipt. Muhlbach v. Omaha Life Ins. Co., *supra.*

It is the contention of plaintiff that the acceptance of the premium, and the issuance of the receipt containing the provisions that it did, created a valid and existing contract of temporary insurance which was in full force until a formal policy was issued or until the application was rejected and the return of the premium tendered during the lifetime of the applicant. The provisions of the receipt therefore become a controlling consideration in the case.

The application appears on a regular form furnished by the insurance company. A blank form of receipt was attached to the application blank which was detachable by means of a perforated line. The soliciting agent filled in the blanks in the receipt, detached it from the application, and gave it to the applicant when the first annual premium was paid. Across the top of the receipt is the following: "Receipt To Be Given Applicant When Settlement Toward First Premium Is Made

At Time of Application." Across the end of the receipt in heavy type are the words: "CONDITIONAL RECEIPT." The pertinent part of the body of the receipt provides: "If the entire first premium called for in the proposed policy has been paid at the time of making such application, the insurance applied for shall take effect on the date of this receipt provided the application be completed as agreed therein and unconditionally accepted by the Company at its Home Office and provided also the applicant is on this date a risk acceptable to the Company under its rules, limits and standards on the plan and for the amount applied for and at the standard rate of premium in accordance with the published rates of the Company; otherwise the payment evidenced hereby will be returned upon demand and surrender of this receipt."

The heading on the receipt does not indicate a provision for temporary insurance, and the words in heavy type across the end clearly indicate that the receipt was conditional. The quoted portion of the receipt is clear and explicit, and cannot be said to be ambiguous. It provides that liability exists if certain conditions are fulfilled before a formal policy is issued. These conditions were not fulfilled. The plaintiff does not contend otherwise.

It is the contention of plaintiff that the quoted portion of the receipt would indicate to an unsuspecting and untutored applicant that he had temporary insurance while the insurance company was considering his application; that, while the real nature of the receipt might well be understood by underwriters, it should be read in the light of the fact that it was to be submitted to persons unacquainted with the niceties of life insurance; and while a person must read what he signs and is chargeable if he does not, yet where insurers seek to impose upon words of common speech an esoteric significance intelligible only to their craft, they must bear the burden of any resulting confusion. The following

cases, among others, are cited in support of this contention: Liberty Nat. Life Ins. Co. v. Hamilton, 237 F. 2d 235; Metropolitan Life Ins. Co. v. Grant, 268 F. 2d 307; Hart v. Travelers Ins. Co., 236 App. Div. 309, 258 N. Y. S. 711; Gaunt v. John Hancock Mut. Life Ins. Co., 160 F. 2d 599.

Under the law of this state the acquiring of insurance has always been a matter of contract. Insurance is a contract by which one party assumes specified risks of the other party for a consideration, and promises to pay him or his beneficiary an ascertainable sum of money on the happening of a specified contingency. It is true, however, that an insurance contract will be construed against the insurance company when the contract or policy is indefinite or ambiguous because it drafted the contract or policy and is responsible for any indefiniteness or ambiguity therein. But where the contract is plain and unambiguous in its meaning the contract will be enforced according to its terms. Unless this be the law, the attaching of liability on an insurance company, contrary to the plain meaning of the contract, would be nothing less than a rewriting of the liability provisions of the contract. It appears to us that it would be a dangerous innovation of contract law to hold that one is not bound by what he signs, and that that which he fails to read or understand should be read out of the contract. We dealt with this subject in Reid v. Bankers Life Co., 148 Neb. 604, 28 N. W. 2d 542, wherein we said: "It seems to me that some courts, of the very highest respectability and learning, have taken judicial notice of matters which they were not by law authorized to judicially know, and have gone so far in holding insurance companies liable as to result in the application of different rules of contract law to them than would have been applied to individuals under the same circumstances. I cannot agree that this may rightfully be done."

In the last case cited we quoted the following with

approval from Lumber Underwriters v. Rife, 237 U. S. 605, 35 S. Ct. 717, 59 L. Ed. 1140: "Of course if the insured can prove that he made a different contract from that expressed in the writing he may have it reformed in equity. What he cannot do is to take a policy without reading it and then when he comes to sue at law upon the instrument ask to have it enforced otherwise than according to its terms. The court is not at liberty to introduce a short cut to reformation by letting the jury strike out a clause."

The applicant in the instant case agreed to submit to a physical examination if the company did not consider his statements in the application sufficient. The evidence shows that a medical examination was required, not only by the evidence of the soliciting agent, but by a letter from the home office to the applicant under date of May 12, 1952. The applicant failed to comply with this part of his agreement. The record shows that the applicant was 27 years of age, 6 feet 3 inches in height, and weighed 270 pounds. It is not disputed that the applicant was overweight and not entitled to insurance at standard rates under the Build Chart used by the defendant and commonly used by underwriters. He was not within the conditions set forth in the conditional receipt on this point. It is clear that the application was never approved nor accepted by the insurance company as required by the terms of the conditional receipt. He was not a risk acceptable to the company under its rules, limits, and standards existing at the time as established by the evidence, and this constitutes a noncompliance with a condition contained in the conditional receipt. The application provided that the company should have 60 days to consider the application, and if a policy was not delivered within 60 days the application was to be considered as declined by the company. While this provision appears to have been waived, the fact remains that the applicant, by his failure to submit to a medical examination,

delayed the consideration beyond the specified 60 days. On June 9, 1952, the date of the death of the applicant, the company rejected the application.

Under this state of the record the applicant had no contract for temporary insurance because the conditions precedent necessary to the attaching of liability, as set forth in the conditional receipt, were never met. Since no liability for temporary insurance ever attached, and a formal insurance policy was never issued, the insurance company assumed no liability and it could properly reject the application as it did.

The trial court concluded that no contract for temporary insurance was entered into as a matter of law and directed a verdict against the plaintiff. We think the trial court was correct in so doing, and the judgment is affirmed.

AFFIRMED.

LORIN R. SUMMERVILLE, APPELLEE, V. NORTH PLATTE VALLEY WEATHER CONTROL DISTRICT, A CORPORATION, ET AL., APPELLANTS.

LORIN R. SUMMERVILLE, APPELLEE, V. P. COOPER ELLIS, COUNTY TREASURER OF SCOTTS BLUFF COUNTY, APPELLEE, NORTH PLATTE VALLEY WEATHER CONTROL DISTRICT, A CORPORATION, INTERVENER-APPELLANT.

101 N. W. 2d 748

Filed March 11, 1960. No. 34721.

1. **Statutes.** In determining whether any legislation is valid, it is proper to examine and ascertain what may be done or accomplished pursuant to said legislation.
2. **Constitutional Law: Statutes.** If the statutes, when fairly construed, authorize and sanction the taking of private property without just compensation, or deprive persons of their property without due process of law, then such legislation is invalid.
3. **Municipal Corporations: Statutes.** It is a rule of general recognition that the formation of municipal corporations, such as counties, cities, villages, school districts, or other subdivisions, and the fixing of the boundaries are legislative functions.

4. **Constitutional Law: Statutes.** The Legislature may authorize the organization of districts for public purposes by other governmental bodies, and the proceeding may be proposed or initiated by private individuals.
5. ———: ———. Where it is authorized to be initiated by private individuals, there must be some provision for determining whether the particular district is for the public health, convenience, or welfare, and a means by which an aggrieved property owner, whose property is injuriously affected, may have his rights judicially determined.
6. ———: ———. The Legislature may not delegate legislative functions to private persons.
7. ———: ———. Article III, section 27, of the Constitution of Nebraska, provides in part that no act shall take effect until 3 calendar months after the adjournment of the session at which it was passed, unless in case of emergency, to be expressed in the preamble or body of the act, the Legislature shall by a vote of two-thirds of all members otherwise direct.
8. **Judgments.** A case must be determined on the law as it stands when judgment is rendered therein.

APPEAL from the district court for Scotts Bluff County: RICHARD VAN STEENBERG, JUDGE. *Affirmed.*

Marvin L. Holscher and *Jack E. Lyman,* for appellants.

Atkins & Ferguson, Clark G. Nichols, W. H. Kirwin, and *Straight Townsend,* for appellees.

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

MESSMORE, J.

The plaintiff, Lorin R. Summerville, filed a petition in the district court for Scotts Bluff County against the North Platte Valley Weather Control District, a corporation, hereinafter referred to as the district, Dave Dillman, George Sato, Harry Webber, Evert Thomas, Henry Sands, Benjamin F. Roberts, Jr., Frank E. Berquist, Jerry Hays, C. C. Hendrickson, and P. Cooper Ellis, defendants, praying for judgment determining and declaring L. B. 539 enacted into law by the Sixty-eighth Session of the Nebraska Legislature in 1957, now sections 2-2410 to 2-2427, R. S. Supp., 1957, to be unconsti-

tutional, and restraining P. Cooper Ellis, county treasurer of Scotts Bluff County, from levying, assessing, collecting, or attempting to collect taxes under authority of such law. Defendant P. Cooper Ellis demurred to the petition because of a misjoinder of several causes of action and a defect of parties defendant. By order of the court the action was dismissed as to defendant P. Cooper Ellis, county treasurer, by reason of a misjoinder of the parties defendant.

Thereafter plaintiff filed an amended petition against all defendants except P. Cooper Ellis, county treasurer of Scotts Bluff County, praying for judgment determining and declaring that L. B. 539 enacted into law by the Sixty-eighth Session of the Nebraska Legislature in 1957, now sections 2-2410 to 2-2427, R. S. Supp., 1957, to be unconstitutional, and restraining said defendants and each of them from collecting any funds paid to the county treasurer of Scotts Bluff County; from disbursing said funds or obligating them in any way; from creating any debts or obligations chargeable to said district which could result in any levy on property for payment thereof; and from entering into any contract or contracts for the expenditure of any funds raised by the 1-mill levy either in the hands of the defendants, or any of them, or in the hands of the county treasurer of Scotts Bluff County.

On the same day the plaintiff filed a petition in the same court against P. Cooper Ellis, county treasurer of Scotts Bluff County, defendant, to enjoin the defendant from disbursing to said district, any of its officers, or any person any of the funds paid into his office by reason of the 1-mill levy, from collecting from the property of the plaintiff and those similarly situated any of the unpaid tax created by the 1-mill levy which had not been paid to him, and to declare the act as above described to be unconstitutional.

The North Platte Valley Weather Control District filed a petition in intervention in the latter case by leave

of court, praying that plaintiff's petition be dismissed.

By stipulation of the parties and order of the court, the two above-mentioned cases were consolidated for the purpose of trial and all purposes thereafter.

The trial court rendered judgment granting the injunctions prayed for by the plaintiff against the defendants. The court also made a finding that sections 2-2410 to 2-2427, R. S. Supp., 1957, known as the Weather Control Act of Nebraska, were unconstitutional and void for the reason, among others, that the act provided for an unwarranted and unlawful delegation of legislative authority to private individuals.

In the case brought by the plaintiff against P. Cooper Ellis, defendant, the court's decree was substantially the same as in the case against the other defendants, except that the defendant district's petition in intervention therein was dismissed, the defendant P. Cooper Ellis, county treasurer, was enjoined from disbursing to the district any of the funds collected for said district, and the court retained jurisdiction of the cause for the purpose of determining distribution of any funds collected and in the hands of P. Cooper Ellis, county treasurer of Scotts Bluff County, or any such funds received by him in the future.

The district, as intervener, filed a motion for new trial which was overruled.

The district and other defendants, except P. Cooper Ellis, county treasurer of Scotts Bluff County, filed a motion for new trial which was overruled.

The district and all defendants named by the plaintiff except P. Cooper Ellis, county treasurer of Scotts Bluff County, perfected appeal to this court.

The plaintiff in his amended petition, insofar as necessary to consider here, alleged the formation of the district under the provisions of the Weather Control Act of Nebraska, sections 2-2410 to 2-2427, R. S. Supp., 1957; that the act attempted to deprive persons of their property without due process of law, attempted to take

property without just compensation, and attempted to delegate to private persons legislative functions; that the act failed to establish any tribunal or court for the determination of the legality of the tax or the inclusion or exclusion of the property subject to taxation; and that the tax levied by the district was for an illegal and unauthorized purpose. Plaintiff prayed for judgment declaring the act unconstitutional and void, and for injunctive relief as previously mentioned.

The plaintiff's petition in the case wherein P. Cooper Ellis, county treasurer of Scotts Bluff County, was made the defendant was substantially the same as in the case of the other defendants, and the prayer was for injunctive relief as heretofore mentioned.

The answer of P. Cooper Ellis to the plaintiff's petition set forth his duties as county treasurer relating to taxes collected from the taxpayers of Scotts Bluff County in the district, and prayed that the plaintiff's petition be denied.

The answer of the district and the other defendants contained a general denial of the allegations of the plaintiff's amended petition; alleged that the district was created in accordance with the act; set forth the business of the district after its inception; and alleged that the district as created was a valid district and a subsisting public corporation of the state authorized and empowered to conduct and transact business as provided for in the act.

The defendant district's petition in intervention alleged substantially the same facts as set forth in the answer of the defendants.

The plaintiff's answer to the petition of intervention of the district was a general denial.

The plaintiff's reply to the defendants' answer to his amended petition was a general denial of the allegations contained therein not admitted.

The defendants' assignments of error deemed necessary to a determination of this appeal are as follows:

(1) The trial court erred in declaring the Weather Control Act of Nebraska, sections 2-2410 to 2-2427, R. S. Supp., 1957, unconstitutional; and (2) the trial court erred in failing to find that section 23, L. B. 633, Sixty-ninth Session of the Nebraska Legislature, legalized and validated all proceedings taken and acts done in the organization and creation of the district.

The facts were stipulated by the parties and show that the district was formed in compliance with the provisions of L. B. 539, enacted by the Sixty-eighth Session of the Legislature of Nebraska, which act, hereinafter called the act, now appears as sections 2-2410 to 2-2427, R. S. Supp., 1957. At all times mentioned Dave Dillman, George Sato, Harry Webber, Evert Thomas, Henry Sands, Benjamin F. Roberts, Jr., Frank E. Berquist, and C. C. Hendrickson were the board of directors of the district. The defendant Jerry Hays submitted his resignation on August 11, 1958, as one of the directors of the district. His resignation was accepted by the board of directors of the district on August 12, 1958, and the vacancy created by said resignation was not filled. Defendant P. Cooper Ellis was at all times involved in this action the duly elected, qualified, and acting county treasurer of Scotts Bluff County. The petition for organization of the district was filed with the Secretary of State of Nebraska on April 4, 1958. On April 8, 1958, the Secretary of State found that the petition contained the required number of signatures and met the requirements of the act, and ordered that the question of the organization of the district be submitted to a vote on May 13, 1958, of the electors living within the proposed district. A copy of the order was delivered to the county clerks of Scotts Bluff, Morrill, Sioux, and Banner Counties. Pursuant to the order of the Secretary of State, notices of the special election and ballots were duly published as provided by law. On May 26, 1958, the Secretary of State, after tabulation of the ballots cast in such election, found the total

voting for organization of the proposed district exceeded 55 percent of those voting in such election, and since in excess of 55 percent of those voting in such election voted in favor of the organization of the proposed district, he determined that the said district was fully organized pursuant to the laws of the State of Nebraska. On June 30, 1958, bonds in the penal sum of $5,000 were filed with and approved by the Secretary of State for each of the defendant directors. On July 1, 1958, an organizational meeting was held by the directors and a president, vice president, secretary, and treasurer were elected. The district certified a 1-mill levy to the county clerks of Scotts Bluff, Morrill, Sioux, and Banner Counties on July 1, 1958. Prior to such certification the board of directors adopted a budget in the amount of $55,000 for a hail suppression program to be conducted during the summer of 1959, and $5,000 for expenses incident to carrying on the project as provided for by the act. Since July 1, 1958, by and through its board of directors, the district had conducted and was conducting business as authorized by the act by expending funds of the district, and had entered into contracts with the Colorado State University at Fort Collins, Colorado, to conduct research on hail suppression, and with Weather Engineers, Inc., of Loomis, California, whereby said engineers agreed to conduct for the district a hail suppression program in such district for the period from May 10, 1959, to and including September 30, 1959.

We deem it unnecessary to set out other facts as contained in the record.

Section 2-2427, R. S. Supp., 1957, provides that the act may be cited as the Weather Control Act of Nebraska. We hereafter use the term "act."

We set forth only the sections of the statute relating to the act which are necessary in determining this appeal.

Section 2-2411, R. S. Supp., 1957, provides: "Proceedings for the establishment of a weather control dis-

trict may be initiated only by the filing of a petition with the Secretary of State. The petition shall be signed by not less than fifteen resident owners of land in each of a majority of the precincts lying wholly or partly within the proposed district."

Section 2-2412, R. S. Supp., 1957, provides in part: "(1) The petition, referred to in section 2-2411, shall set forth: (a) The proposed name of the district; (b) a description of the territory to be included in the district, together with the proposed boundaries of such district and the divisions thereof for the purpose of election of directors, and a map showing such boundaries; (c) the number and terms of directors that the district shall have if formed, together with the name, address, term of office, and division to be represented of each of the proposed directors, who shall serve until their successors are elected and qualified, designating their terms so that not more than one-third shall terminate every two years; (d) where the offices of such proposed district are to be maintained; and (e) a prayer that the organization of the district be submitted to a vote of the landowners as provided by sections 2-2410 to 2-2417."

Section 2-2413, R. S. Supp., 1957, provides: "The Secretary of State shall examine the petition and, if he finds that it bears the requisite number of signatures and otherwise meets the requirements of sections 2-2410 to 2-2427, he shall order that the question of the organization of such district be submitted to a vote of the electors living within the proposed district. He shall also fix the date of such election, which may be held either as a special election or at any general election. Such election shall be so scheduled that the notice required by section 2-2414 can be given."

Section 2-2414, R. S. Supp., 1957, provides: "The Secretary of State shall give notice of the scheduling of such election to the election commissioners, or county clerks in those counties not having an election commis-

sioner, of each county to be embraced in whole or in part within such district. Such notice shall contain a statement of the question to be submitted at such election, the area in which such election is to be held, and the date thereof."

Section 2-2423, R. S. Supp., 1957, provides: "The board of directors may levy and collect each year the taxes necessary to finance the activities of such district to the amount of not more than one mill on the dollar of the assessed value of all taxable property except intangible property within such district. It shall, on or before the first day of August in each year, certify its mill levy to the county clerks of the counties wholly or partially within the district, who shall extend the same on the county tax list, and the same shall be collected by the county treasurer in the same manner as state and county taxes. It shall be the duty of the board to apply for and to receive from the county treasurers all money to the credit of the district. The county treasurer shall disburse the same on the order of the treasurer of the district."

Section 2-2424, R. S. Supp., 1957, provides: "All claims against weather control districts may be paid by warrants or orders, duly drawn on the treasurer of such district, signed by the president and countersigned by the secretary. When such warrants or orders have been issued and delivered, they may be presented to the treasurer of the district, and if such be the fact, endorsed 'not paid for want of funds.' Such warrants or orders shall be registered by the treasurer in the order of presentation, shall draw interest at the rate of seven per cent per annum from the date of registration thereof, and shall be received by the county treasurer in payment of weather control district taxes levied pursuant to section 2-2423."

Section 2-2426, R. S. Supp., 1957, provides: "If there are no debts outstanding, the board of directors may, on its own motion, or on the written request of twenty-

five electors, request of the Secretary of State that the question of dissolution of such district be submitted to the electors of the district, and the Secretary of State shall fix the date of such election, notice of which shall be given and which shall be conducted in the same manner as elections for the formation of such districts. If a majority of those voting on such question vote in favor of dissolution, the Secretary of State shall so certify to the board of directors, which shall thereupon stand dissolved. The question of dissolution shall not be submitted more often than once every twelve months. In case a district is dissolved the funds on hand or to be collected shall be held by the treasurer, and the directors shall petition the district court of the county in which the main office is located for an order approving the distribution of funds to the taxpayers of the district on the same basis as collected."

In determining the defendants' first assignment of error relating to the constitutionality of the act we consider only one ground which we believe discloses that the act is unconstitutional. The following authorities are applicable.

In determining whether or not any legislation is valid, it is proper to examine and ascertain what may be done or accomplished pursuant to said legislation. See Rowe v. Ray, 120 Neb. 118, 231 N. W. 689, 70 A. L. R. 1056.

In Elliott v. Wille, on rehearing, 112 Neb. 86, 200 N. W. 347, this court had under consideration the constitutionality of an act authorizing the formation of a district for the distribution of electric light, heat, and power. This court said: "If the statutes, when fairly construed, authorize and sanction the taking of private property without just compensation, or deprive persons of their property without due process of law, then such legislation must be held invalid." The court further said: "* * * when a petition praying for the formation of a district for the purpose of distributing light, heat or power by the use of electric current, and for the

election of three directors of such proposed district, setting forth the boundaries of the proposed district, the estimated cost of the distribution system and the method proposed for raising necessary funds, whether by bonds or special tax, and signed by not less than 10 per cent of the freeholders of the proposed district, is filed with the county board, it then becomes the duty of such board to order a special election within the proposed district. At this election all who are electors under the general election laws and reside in the proposed district may vote, and, if a majority of the votes cast at such special election is in favor of the proposed district, it then becomes a district. The district may then, through its officers, proceed to construct a distribution system and to levy taxes or issue bonds to defray the cost of the system. * * * The statutes in question make no provision for a tribunal to determine whether any lands have been unjustly included in or excluded from the district, or whether the organization of a particular distribution district will be for the public convenience or welfare, save and except the action of the petitioners and their self-selected electorate. * * * Where a legislative act permits the organization of districts, for the construction of a public improvement, by private individuals, to be paid for by a tax on all the property in the district, and no provision is made for a hearing by any tribunal as to the right of property owners who may be injuriously affected or wrongfully included within the district, it may result in the taking of private property for a public purpose without just compensation, and in the taking of private property without due process of law." In the light of the above language, the legislation involved in Elliott v. Wille, *supra,* was declared unconstitutional.

The similarity of the sections of the statutes involved in Elliott v. Wille, *supra,* and the case here involved, insofar as the constitutional issues are involved, is noted. There appears to be no significant difference.

Under the act here involved, a person living outside the district but owning property within the proposed boundaries of the district has no voice in the forming of the district. Such owner is not accorded the opportunity to protest the inclusion of his property within the district. Under the act here involved, a landowner has no opportunity to be heard by a competent tribunal on the question of whether the proposed district will benefit the public health, welfare, and convenience, or upon the question of whether his property has been arbitrarily or unjustly included within the boundaries of the district, regardless of whether the landowner lives within or without the boundaries of the district.

It will be observed by reading the sections of the act heretofore set forth that it contains all of the defects found to be involved in the case of Elliott v. Wille, *supra,* that is, that the act authorizes individuals to create and fix boundaries of a district for a public improvement to be paid for by taxation levied upon property within the district, without containing any provision for determination by a competent tribunal of whether the creation of the district and the construction of the public improvement will promote public health, convenience, or welfare, and without any provision for determining whether the owners of property have been arbitrarily and unjustly included within the district, or whether the property will receive any benefit from the proposed district.

As we view the act, it violates Article I, section 3, of the Constitution of Nebraska, which provides: "No person shall be deprived of life, liberty, or property, without due process of law." It also violates Article I, section 21, of the Constitution of Nebraska, which provides: "The property of no person shall be taken or damaged for public use without just compensation therefor."

Another case which we believe decisive of the constitutionality of the act here involved is Nickel v. School

Board of Axtell, 157 Neb. 813, 61 N. W. 2d 566. This was an action to enjoin certain officials, whose duty it was to do so, from assessing and levying a tax against plaintiffs' lands located in school district R-1 for the support thereof. The district had been established under the Reorganization of School Districts Act, Laws 1949, c. 249, p. 673. The constitutionality of the act was involved. The court, quoting from Rowe v. Ray, *supra,* said: "'It is a rule of general recognition that the formation of municipal corporations, such as counties, cities, villages, school districts, or other subdivisions, and the fixing of the boundaries of such municipal corporations are legislative functions. Among the decisions of this court which recognize this rule are: City of Wahoo v. Dickinson, 23 Neb. 426; State v. Dimond, 44 Neb. 154; City of Hastings v. Hansen, 44 Neb. 704; Bisenius v. City of Randolph, 82 Neb. 520; Winkler v. City of Hastings, 85 Neb. 212; Elliott v. Wille, on rehearing, 112 Neb. 86.'"

The appellants in the case of Nickel v. School Board of Axtell, *supra,* contended the act was unconstitutional because it permitted complete freedom of choice by a county committee in the selection of boundaries of any proposed school district and thus permitted it, by gerrymandering, to discriminate between persons and property. In taking up this phase of the case the court quoted from Elliott v. Wille, *supra,* as follows: "'The fixing of boundaries of a political subdivision of a state into counties or districts for public purposes is a legislative function. The legislature may authorize the organization of districts for public purposes by other governmental bodies, and the proceeding may be proposed or initiated by private individuals. Where the latter course is pursued, there must be some provision for determining whether the particular district is for the public health, convenience or welfare, and a means by which an aggrieved property owner, whose property is injuriously affected, may have his rights judicially

determined. The legislature may not delegate to private individuals either legislative or judicial functions. Where a legislative act permits the organization of districts, for the construction of a public improvement, by private individuals, to be paid for by a tax on all the property in the district, and no provision is made for a hearing by any tribunal as to the right of property owners who may be injuriously affected or wrongfully included within the district, it may result in the taking of private property for a public purpose without just compensation, and in the taking of private property without due process of law.' "

The defendants contend the trial court erred in failing to find that section 23, L. B. 633, Sixty-ninth Session of the Nebraska Legislature, 1959, legalized and validated all proceedings taken and acts done in the organization and creation of the district.

The Nebraska Legislature in its Sixty-ninth Session enacted L. B. 633, which appears in chapter 9, page 107, Laws 1959, the subject matter being weather control districts. It was titled: "AN ACT relating to weather; to provide for weather control districts; to provide for their organization; to provide the procedures, powers, and duties thereof; to provide for the dissolution thereof; to provide for jurisdiction of the courts as prescribed; to provide that such districts shall have power to tax as prescribed; to make certain acts unlawful; to provide penalties; to provide how this act may be cited; to provide a savings clause for districts organized under a prior law; and to repeal sections 2-2410 * * * (to) 2-2427, Revised Statutes Supplement, 1957." This law was approved June 25, 1959. It is in fact a new law relating to the subject of weather control districts.

Article III, section 27, of the Constitution of Nebraska, provides in part: "No act shall take effect until three calendar months after the adjournment of the session at which it passed, unless in case of emergency, to be expressed in the preamble or body of the act, the

Legislature shall, by a vote of two thirds of all the members * * * otherwise direct."

Neither the preamble nor body of L. B. 633 above described contains an expression of an emergency. Consequently, L. B. 633 did not take effect until 3 calendar months after the adjournment of the Sixty-ninth Session of the Nebraska Legislature, or on September 28, 1959.

The motions for new trial in this case were filed under date of June 11, 1959, and overruled on July 15, 1959. The notice of appeal in this case was given by the defendants on August 14, 1959, and jurisdiction of the case was lodged in this court prior to September 28, 1959, the effective date of L. B. 633 which purports to validate the proceedings taken under the act involved in the instant case.

It is obvious from what has been said above that the trial court did not have an opportunity during the trial of the case here considered to pass upon the validity of L. B. 633. All the proceedings relating to the case here involved had been heard by the trial court and judgment rendered as previously stated. In the light of what has been said above on this phase of the case, the defendants are in no position to raise the validity of L. B. 633 as being a constitutional act passed by the Legislature and curing the defects appearing in the act here considered.

In the case of City of Fremont v. Dodge County, 130 Neb. 856, 266 N. W. 771, we said that a case must be determined on the law as it stands when judgment is rendered therein. See, also, Preisendorf Transp., Inc. v. Herman Bros., Inc., 169 Neb. 693, 100 N. W. 2d 865.

The defendants' contention is without merit.

Other issues raised by the plaintiff as to why the act here involved may be considered unconstitutional need not be determined.

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

AFFIRMED.

MARY LANNING MEMORIAL HOSPITAL, A CORPORATION, APPELLANT, V. CLAY COUNTY, NEBRASKA, APPELLEE.

101 N. W. 2d 510

Filed March 11, 1960. No. 34726.

1. **Paupers: Counties.** There is no common-law liability upon a county to support poor and indigent persons. Any liability must arise by statute imposing such duty upon the county and prescribing the manner of its discharge.
2. **Counties.** The extent of the liability of a county must be found in the legislation creating the duty.
3. **Paupers: Counties.** The county board of each county is the overseer of the poor and is vested, by statute, with the entire and exclusive superintendence thereof in such county, whether such poor persons be residents or nonresidents.
4. ———: ———. Whether a person comes within the purview of the pauper statutes, so as to be entitled to the relief therein provided, is a question of fact to be determined by the county board in each particular case.
5. **Counties.** The powers of a county are limited to those prescribed by statute, and a county board can discharge a statutory obligation only by the statutory means provided by the Legislature.
6. **Paupers: Counties.** An obligation against a county for services rendered in relieving a poor person who is entitled by law to be so relieved can only be incurred in the manner indicated by the statutes specifically providing the method for doing so.
7. **Statutes.** All statutes relating to the same subject should be construed and considered together for the purpose of giving effect to the legislative intent.
8. **Paupers: Counties.** Our opinion in Marshall v. County of Nance, 163 Neb. 252, 79 N. W. 2d 417, clarified.

APPEAL from the district court for Clay County: EDMUND NUSS, JUDGE. *Affirmed.*

Stiner & Boslaugh, for appellants.

J. T. Massie, for appellee.

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

WENKE, J.

This is an appeal from the district court for Clay

County. It involves the disallowance of a claim filed by Mary Lanning Memorial Hospital of Hastings, Nebraska, against the relief fund of Clay County, Nebraska, for various hospital services rendered to Oscar F. Freytes. The background out of which this claim arose is as follows:

On Tuesday evening, July 1, 1958, Oscar F. Freytes was injured when he was hit by an automobile while on foot on highway No. 6 in Clay County, Nebraska. He was thereupon taken to and received by the Mary Lanning Memorial Hospital in Hastings, Nebraska. Freytes was a nonresident of Nebraska, being a resident of the State of California. His then economic status brought him within the class to which section 68-114, R. R. S. 1943, has application. Freytes' injuries were critical and needed immediate attention to prevent his death. Because of this emergency situation Dr. Robert Smith, who was on the staff of the hospital, gave Freytes immediate attention. Freytes survived his injuries and stayed in the hospital until after October 31, 1958. The charges of the hospital for his care, which are admittedly the fair and reasonable value thereof, total $1,766.39 from July 1 through October 31, 1958. A claim for this amount, on a form furnished to the hospital by the director of public welfare of Clay County, was filed with the county clerk of Clay County on November 29, 1958. This is the first direct contact the hospital made with any Clay County authorities who, under the statute, are authorized to deal with services of this character. The Clay County board of supervisors rejected the claim on December 2, 1958. Appeal from the disallowance thereof by the board of supervisors was taken to the district court for Clay County. Trial was had therein on March 19, 1959, jury being waived. The court, on July 21, 1959, found generally for the defendant and rendered a judgment accordingly. The hospital filed a motion for new trial and took this appeal from the overruling thereof. We have and will hereinafter re-

fer to appellant Mary Lanning Memorial Hospital as the hospital; to appellee Clay County, Nebraska, as Clay County; and to the Clay County Board of supervisors as the county board.

Within a day or two following Freytes' entry into the hospital James W. Kenney, administrator thereof, and Dr. Robert Smith, who was then on the staff of the hospital, each separately called Addie Storrs, the then director of public welfare of Clay County, and advised her about Freytes, and the fact that he had been injured in an accident in Clay County and was in the hospital. Both the administrator and doctor thereafter talked to Addie Storrs on several different occasions while Freytes was in the hospital. They testified that during these conversations the director, although she denies doing so, indicated to them that Clay County would be responsible for Freytes' care and, from these conversations, they were under the impression that Clay County would take care of Freytes' bill and relied thereon. However, they both admitted the director had never absolutely said that Clay County would do so. Although the director contacted the county board shortly after the administrator of the hospital called her the first time and advised them of what the manager had told her, the record shows that no one from or for the hospital ever directly contacted the county board in regard thereto until this claim was filed on November 29, 1958.

A jury having been waived, ordinarily the following principle would be controlling: "Where a jury is waived by the parties to an action at law in the district court, the findings of the trial judge on issues of fact are equivalent to the verdict of a jury and will not be reversed on appeal, if supported by sufficient evidence." Neill v. Dakota County, 140 Neb. 26, 299 N. W. 294. See, also, Miller v. Banner County, 127 Neb. 690, 256 N. W. 639. However, the material facts here controlling are not in dispute and the case presents one of law.

The question presented is, does the hospital, under the factual situation here established, have a right to recover from Clay County the fair and reasonable value of the various hospital services which it rendered to Oscar F. Freytes, a nonresident poor person, who was injured in Clay County?

Our search of the statutes fails to disclose any provision therein giving the director of public welfare of Clay County authority to bind Clay County for this type of service, even if she had tried to do so, which she denies, and none is pointed out by counsel for the hospital. In the absence thereof she was without authority to do so. See, Marshall v. County of Nance, 163 Neb. 252, 79 N. W. 2d 417; Hamilton County v. Meyers, 23 Neb. 718, 37 N. W. 623.

In order to get the situation clearly before us as it existed at the time these services were rendered it would be well to go over the law on this subject from the very beginning. At common law the county would not be liable for the relief of the poor for there is no common law liability upon any governmental unit to support poor and indigent persons. The liability, if any, must arise by virtue of statutes making it the duty of the county to do so. See, Marshall v. County of Nance, *supra;* Neill v. Dakota County, *supra;* State ex rel. Boxberger v. Burns, 132 Neb. 31, 270 N. W. 656; Cerro Gordo County v. Boone County, 152 Iowa 692, 133 N. W. 132, 39 L. R. A. N. S. 161; Patrick v. Town of Baldwin, 109 Wis. 342, 85 N. W. 274, 53 L. R. A. 613. As stated in Marshall v. County of Nance, *supra:* "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."

This state, from its inception, has had laws pertaining to the care of paupers. See Chapter 40, Paupers, Sections 1 to 23, R. S. 1866, which is now Chapter 68, article 1, Paupers, R. R. S. 1943. It deals with both non-

residents and those having legal settlement in the various counties of this state.

The Legislature has the power to impose upon a county the burden of relief of the poor and destitute and to prescribe the method of discharging that duty unless such power is limited by the Constitution. Our Constitution has no prohibition against such legislation. State ex rel. Boxberger v. Burns, *supra.* The extent of the liability of a county must be found in the legislation creating the duty. Marshall v. County of Nance, *supra.* The liability of the county is purely statutory. Cerro Gordo County v. Boone County, *supra.*

The county board of each county is the overseer of the poor and is vested, by statute, with the entire and exclusive superintendence thereof in such county, whether such poor persons be residents or nonresidents. Miller v. Banner County, 135 Neb. 549, 283 N. W. 206.

Whether a person comes within the purview of the pauper statutes, so as to be entitled to the relief therein provided, is a question of fact to be determined by the county board in each particular case. See, Marshall v. County of Nance, *supra;* State ex rel. Boxberger v. Burns, *supra.* When the statutes, such as ours, expressly make it the duty of the county to provide for poor persons it is mandatory, subject, however, to such limitations as are provided in other statutes relating thereto. Marshall v. County of Nance, *supra;* State ex rel. Boxberger v. Burns, *supra.*

We said early in the history of the state that: "The law must be so construed as to make it effective, otherwise it would be in the power of the authorities having charge of the poor to neglect or refuse to relieve the destitute." Gage County v. Fulton, 16 Neb. 5, 19 N. W. 781. See, also, Sayre v. Madison County, 127 Neb. 200, 254 N. W. 874, 93 A. L. R. 896. And, as stated in Marshall v. County of Nance, *supra:* "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." See, also, Patrick v. Town of Baldwin, *supra;* Cerro Gordo County v. Boone County, *supra.*

Prior to 1947 the statutes dealing with the subject of paupers had no express provisions providing for the manner of county boards discharging their duties in regard to the subject matter herein involved except the authority to employ a county physician or physicians. See § 68-104, R. S. 1943. Generally we have held, in the absence of such express provisions, that when there is opportunity to consult local authorities, previous authorization for rendering such services must be secured from those who have authority to dispense such charities in order to have a valid claim therefor. See, Marshall v. County of Nance, *supra;* Neill v. Dakota County, *supra;* Hamilton County v. Meyers, *supra.* However, we have either indicated or held that no such previous authorization is required in emergency cases, such as herein involved, holding in such cases that if the necessary services are rendered the law imposes an obligation upon the county to pay the reasonable value thereof. See, Burnham v. Lincoln County, 128 Neb. 47, 257 N. W. 491; Miller v. Banner County, 127 Neb. 690, 256 N. W. 639; Hamilton County v. Meyers, *supra.* There are, however, cases which hold that although an emergency existed it was either not controlling or would not permit recovery. See, Miller v. Banner County, 135 Neb. 549, 283 N. W. 206; State ex rel. Boxberger v. Burns, *supra;* Sayre v. Madison County, *supra.*

With this situation before it the 1947 Legislature amended section 68-104, R. S. 1943, which section designated the county board of each county in the state as overseers of the poor therein, which would include both nonresident and those having settlement therein, and vested such county board with the entire and exclusive superintendence of such poor. The 1947 legislation added to section 68-104, R. S. 1943, the following

language: "In providing medical and hospital care for the poor, the county board shall make use of any existing facilities, including tax supported hospitals and charitable clinics so far as the same may be available. *The county board shall have authority to arrange or contract for medical, surgical and hospital services* at such rates as may be determined *and the county shall not be liable for any such services not expressly authorized by the county board.*" See Laws 1947, c. 218, § 1, p. 705. (Emphasis ours.) As amended, this statute is now section 68-104, R. R. S. 1943.

"The powers of a county are limited to those prescribed by statute, and a county board can discharge a statutory obligation only by the statutory means provided by the legislature." State ex rel. Boxberger v. Burns, *supra.* See, also, Marshall v. County of Nance, *supra.* An obligation against a county for services rendered in relieving a poor person who is entitled by law to be so relieved can only be incurred in the manner indicated by the statutes specifically providing the method for doing so. See Patrick v. Town of Baldwin, *supra.* Where a statute contemplates that certain liabilities for the support of the poor shall rest on contract that is the exclusive and only way of incurring them. See, Patrick v. Town of Baldwin, *supra;* Cerro Gordo County v. Boone County, *supra.* We said as early as Hamilton County v. Meyers, *supra,* that: "Whatever may have been the moral duties of the county, we must deal alone with its legal obligations." Then, in State ex rel. Boxberger v. Burns, *supra,* we said: "If the emergency must be met, the legislature within constitutional limits under our system of government should take cognizance of it." And, as stated in Cerro Gordo County v. Boone County, *supra:* "Doubtless some provision for emergencies exacting quick action should be made, but that is a matter for the Legislature and not the courts." Unless the amendment was intended to cover all situations dealing with the subject therein covered, in-

cluding emergencies, it would serve little or no purpose in view of our former holdings. We find the requirements of section 68-104, R. R. S. 1943, have application and are controlling.

But the hospital contends, in effect, that the amendment to section 68-104, R. S. 1943, by the 1947 Legislature should not be so construed as to defeat the rights of a nonresident to those benefits to which he is entitled under section 68-114, R. R. S. 1943, and which, as it claims, it was the duty of the county board to furnish to Freytes under the circumstances here established. We think the following principles have application here:

"All statutes relating to the same subject should be construed and considered together for the purpose of giving effect to the legislative intention." State ex rel. Menard v. Nichols, 167 Neb. 144, 91 N. W. 2d 308.

"All statutes in pari materia must be taken together and construed as if they were one enactment, and, if possible, effect given to every provision." Chicago & N. W. Ry. Co. v. City of Seward, 166 Neb 123, 88 N. W. 2d 175.

Sections 68-103 and 68-105, R. R. S. 1943, impose upon the several counties of the state certain obligations as to poor persons having legal settlement therein and the duty of the county board of each county in regard thereto, whereas, section 68-114, R. R. S. 1943, imposes certain obligations upon a county as to nonresident poor under circumstances therein set forth, and duties upon the county board of such counties when such nonresidents become sick or in distress therein and likely to suffer because thereof. Section 68-104, R. R. S. 1943, as already stated herein, vests in the county board of each county in the state, who are therein made the overseers of the poor, the entire and exclusive superintendence of the poor of such county which, under the entire act relating to paupers, would include both resident and nonresident poor persons. Therefore in apply-

ing the provisions of section 68-104, R. R. S. 1943, they should be considered as applying to both resident and nonresident poor persons in each county. To hold otherwise would make a different rule applicable in case of an emergency, depending upon whether the poor person entitled to relief was a resident or nonresident, a condition which we are sure the Legislature did not intend and which we are not free to judicially impose. Insofar as medical, surgical, and hospital services for poor persons in the county are concerned we think the requirements in regard thereto as provided by the 1947 Legislature has application to both resident and nonresident poor persons who, under the statutory provisions, are entitled thereto.

But the hospital contends that we have recognized the emergency rule as being in effect since the 1947 amendment to section 68-104, R. S. 1943, by reason of our holding in Marshall v. County of Nance, *supra*. It is true that therein we referred to our holding in Miller v. Banner County, 127 Neb. 690, 256 N. W. 639, in case of an emergency and went on to say: "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." No emergency was involved in Marshall v. County of Nance, *supra*, and we did not therein consider the amendment to section 68-104, R. S. 1943, by the 1947 Legislature, and the effect thereof. The most that can be said of the foregoing quoted language is that it was dicta and not here controlling.

Having come to the conclusion that the hospital did not comply with the requirements of section 68-104, R. R. S. 1943, as it relates to medical, surgical, and hospital services, it cannot, under the circumstances here disclosed, hold Clay County liable therefor even though an emergency existed as to the need therefor by Freytes at the time he entered the hospital after he was injured and, because of that fact, the judgment of the trial court

denying the hospital claim should be and is affirmed.

The hospital undoubtedly could have avoided most of the difficulty it now finds itself in if, at the very first opportunity after Freytes was admitted, it had presented the matter directly to the county board for if the county board had arbitrarily refused to perform the mandatory duty imposed upon it by section 68-114, R. R. S. 1943, appropriate legal remedies could have been taken to enforce that duty.

AFFIRMED.

PHYLLIS L. SUNDERMAN, APPELLANT, V. BEATRICE WARDLAW, APPELLEE.
101 N. W. 2d 848

Filed March 18, 1960. No. 34684.

1. **Automobiles.** A guest by the terms of section 39-740, R. R. S. 1943, is a person who accepts a ride in a motor vehicle without compensation therefor.
2. **Trial.** If the evidence is undisputed, or such that minds of men could not reasonably arrive at any other conclusion, the question is one for decision by the court as a matter of law; otherwise, it is a question for the jury to decide as other issuable facts in the case.
3. **Automobiles.** The question of whether a person riding in a motor vehicle is a guest, or engaged in a joint enterprise, or other relationship, is generally one for determination in the individual case. It must be ascertained from the facts establishing the identity of the persons advantaged by the carriage, the relationship between the parties, and the purposes to which the transportation is incident.
4. ———. The phrase "without giving compensation therefor" as contained in section 39-740, R. R. S. 1943, indicates an intention on the part of the Legislature not to limit compensation to persons specifically paying for transportation in cash or equivalent, or to require that it pass exclusively from the passenger to the driver.
5. ———. A person riding in a motor vehicle is a guest if his carriage confers only a benefit upon himself and no benefit upon the owner or operator except such as is incidental to hospitality, social relations, companionship, or the like, as a mere

gratuity. However, if his carriage contributes such tangible and substantial benefits as to promote the mutual interests of both the passenger and the owner or operator, or is primarily for the attainment of some tangible and substantial objective or business purpose of the owner or operator, he is not a guest.

6. ———. A benefit to the owner or operator of a motor vehicle sufficient to remove an occupant riding in it from the provisions of the guest statute must be a tangible and substantial one and a motivating influence for his furnishing the transportation.

APPEAL from the district court for Gage County: ERNEST A. HUBKA, JUDGE. *Affirmed.*

John J. Wilson, Healey, Wilson & Barlow, and *Patrick W. Healey,* for appellant.

Fred Vette, Vasey & Rist, and *Cline, Williams, Wright & Johnson,* for appellee.

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

WENKE, J.

This is an appeal from the district court for Gage County. It involves an action by Phyllis L. Sunderman against Beatrice Wardlaw for the purpose of recovering compensation for damages which she claims she suffered by reason of injuries sustained in a car accident. Plaintiff alleges the accident which resulted in her injuries was caused by negligence of the defendant in operating her car while plaintiff was riding therein as a passenger. Trial was had to a jury and, at the conclusion of all the evidence, the trial judge found that plaintiff was not riding in defendant's car as a passenger but as a guest and submitted the case to the jury accordingly. See § 39-740, R. R. S. 1943. The jury returned a verdict for defendant. Plaintiff filed a motion for new trial and this appeal was taken from the overruling thereof.

Two questions are raised by the appeal. The first is, was the trial court in error by holding, as a matter of law, that the appellant was, under all the evidence adduced, a guest rather than a passenger while riding

in appellee's car? The second is, does the record present an issue of fact as to whether appellant was riding with appellee as a guest or as a passenger?

The accident in which appellant was injured happened about 6:45 a. m., on Thursday, October 25, 1956, at a point on U. S. Highway No. 30 about 15 miles west of Omaha, Nebraska, and just east of where One Hundred Eightieth Street crosses that highway on what we shall herein refer to as the Dodge Road. At the time of the accident appellee was driving her car, a 1954 Chevrolet sedan, east on Dodge Road, which is a four lane surfaced highway. Riding with her were appellant and four other ladies from Beatrice, Nebraska, all of whom were members of the Beatrice chapter of the Does. As appellee was driving east on Dodge Road she approached and passed a "jalopy" and then a truck, doing so by driving on the inner lane for eastbound traffic. Shortly after she had passed the truck appellee endeavored to return to the outer lane for eastbound traffic but as she was doing so the rear end of her car swerved or fishtailed, then spun completely around, and went over the shoulder to the right or south side of the highway, down a 25 to 50 foot embankment, and into a cornfield at the base thereof. As a result of the accident appellant was very seriously and permanently injured.

The Does, which is an auxiliary of the Elks, is a nonprofit fraternal organization which engages in secret ritualistic work. There is a local chapter of the Does in Beatrice, Nebraska, and, at the time, it had a drill team which participated in the secret ritualistic work of the lodge for which the members received no compensation. All six ladies riding in appellee's car at the time of the accident were members of this drill team, appellant being an "attendant" and appellee a "flag bearer." They were all going to Omaha for the sole purpose of attending the state meeting of the Does and to participate in secret ritualistic work as members of the Beatrice chapter's drill team.

State meetings of the Does are held periodically and some of the chapters are asked to exemplify some aspects of the secret ritualistic work of the order at these meetings in order to perfect it, that is, the work done is criticized and corrections suggested for the purpose of improving the work of the members of the drill teams participating, both individually and collectively. Such a meeting was called for October 25, 1956, to be held in Omaha, Nebraska, and the Beatrice chapter was advised it was to participate therein and exemplify some phase of the ritualistic work by demonstration or drill. It should be stated that the officers of the lodge and members of a drill team, when asked to participate in such work, are expected to go as part of their loyalty to the lodge but are not required to go if business or family obligations prevent them from doing so. If a member cannot go someone is substituted in her place.

When the local lodge was advised it was to participate in the work at the Omaha meeting the officers and drill team prepared to do so, having practice sessions for that purpose. However, no transportation was provided by the lodge for those who expected to attend nor were any arrangements made by the lodge for that purpose; that is, everyone was left to provide her own means of transportation for getting to the state meeting in Omaha. The lodge did, however, make arrangements to pay the registration fee of each one attending, which included a lunch and banquet dinner. Some of the officers and members of the drill team planned to go up to Omaha the night before the meeting but appellee planned to drive up early the morning of the day of the meeting and come back the same night after the banquet. Appellant learned of this fact and asked appellee if she could ride with her. Appellee told her she was welcome to go. No arrangements or suggestions of any kind were made that appellant was to pay for the ride. Appellee picked up the ladies riding in her car early on the morning of October 25, 1956, leaving Beatrice about

4:45 a. m., after doing so. The car proceeded on U. S. Highway No. 77 to Lincoln, then on U. S. Highway No. 6, until they reached and entered onto U. S. Highway No. 30, or the Dodge Road at a point about 1 mile west of where the accident occurred.

Section 39-740, R. R. S. 1943, insofar as herein material, provides: "The owner or operator of a motor vehicle shall not be liable for any damages to any passenger or person riding in such motor vehicle as a guest or by invitation and not for hire, unless such damage is caused by the driver of such motor vehicle * * * because of the gross negligence of the owner or operator in the operation of such motor vehicle. For the purpose of this section, the term guest is hereby defined as being a person who accepts a ride in any motor vehicle without giving compensation therefor, * * *."

It is necessary in this case, in order to arrive at a decision herein, to determine the status of appellant while she was riding in appellee's car, that is, was she a guest or a passenger? The burden of establishing her status as a passenger was on appellant. Lincoln v. Knudsen, 163 Neb. 390, 79 N. W. 2d 716.

In Born v. Estate of Matzner, 159 Neb. 169, 65 N. W. 2d 593, we said: "A guest by the terms of section 39-740, R. R. S. 1943, is a person who accepts a ride in a motor vehicle without compensation therefor." See, also, Eilts v. Bendt, 162 Neb. 538, 76 N. W. 2d 623.

Was there an issue of fact for the jury on this question? We said in Van Auker v. Steckley's Hybrid Seed Corn Co., 143 Neb. 24, 8 N. W. 2d 451, that: "If the evidence is undisputed, or such that minds of men could not reasonably arrive at any other conclusion, the question is one for decision by the court as a matter of law; otherwise, it is a question for the jury to decide as other issuable facts in the case." Here the evidence on this material issue is not in dispute and clearly presents an issue for decision by the court as a matter of law.

But appellant contends when, as here, the carriage

promotes the mutual interests of both the rider and the operator and the purpose of both in making the trip is identical then the court should hold the rider is a passenger and not a guest. We have heretofore set forth certain rules whereby the question of whether or not the rider has given compensation for the trip such as to make her a passenger instead of a guest can be determined.

"The question of whether a person riding in a motor vehicle is a guest, or engaged in a joint enterprise, or other relationship, is generally one for determination in the individual case. It must be ascertained from facts establishing the identity of the persons advantaged by the carriage, the relationship between the parties, and the purposes to which the transportation is incident." Van Auker v. Steckley's Hybrid Seed Corn Co., *supra*. See, also, Paxton v. Nichols, 157 Neb. 152, 59 N. W. 2d 184.

"The phrase 'without giving compensation therefor' (Comp. St. Supp. 1939, section 39-1129, now section 39-740, R. R. S. 1943) indicates an intention not to limit compensation to persons specifically paying for transportation in cash or equivalent, or to require that it pass exclusively from the passenger to the driver." Van Auker v. Steckley's Hybrid Seed Corn Co., *supra*. See, also, Born v. Estate of Matzner, *supra*.

"A person riding in a motor vehicle is a guest if his carriage confers only a benefit upon himself and no benefit upon the owner or operator except such as is incidental to hospitality, social relations, companionship, or the like, as a mere gratuity. However, if his carriage contributes such tangible and substantial benefits as to promote the mutual interests of both the passenger and the owner or operator, or is primarily for the attainment of some tangible and substantial objective or business purpose of the owner or operator, he is not a guest." Van Auker v. Steckley's Hybrid Seed Corn Co., *supra*. See, also, Gunn v. Coca-Cola Bottling Co., 154

Neb. 150, 47 N. W. 2d 397; Paxton v. Nichols, *supra;* Born v. Estate of Matzner, *supra.*

"A benefit to the owner or operator of a motor vehicle sufficient to remove an occupant riding in it from the provisions of the guest statute must be a tangible and substantial one and a motivating influence for his furnishing the transportation." Born v. Estate of Matzner, *supra.*

That the trip to Omaha was motivated solely by the fact that the appellee, as well as the other five ladies riding in her car, wished to go to Omaha to attend the state meeting of the Does and there take part in a demonstration of secret ritualistic work by the officers and drill team of the Beatrice chapter of Does and that certain benefits could flow to them individually or collectively therefrom, is established by the evidence but we do not think the benefits flowing therefrom, if any, are of such a tangible and substantial character as to remove appellant from the status of a guest to that of a passenger. Rather, we think, the benefits conferred, if any, are incidental to the social and fraternal interests and companionship of members of the chapter and not such as to provide compensation within the meaning of the statute so as to make appellant a passenger.

Both appellant and appellee have cited cases from other jurisdictions based on comparable or somewhat similar fact situations under comparable or similar statutes. Some of the cases cited would support the result herein reached while others would not. However, we see no useful purpose in citing and discussing these cases because, as we have already stated, each case must stand on its own facts and those facts must be gauged by the standards which we have heretofore determined should be applied thereto. That different courts apply different standards to similar or comparable statutes and thus reach different results under similar or comparable fact situations is fully evidenced by the text of 4 Blashfield, Cyclopedia of Automobile Law and Prac-

tice (Perm. ed.), § 2292, p. 305, on the subject of "Who are Guests within Operation of Guest Statutes" and the cases cited thereunder, as well as the cases cited by the parties in their briefs. Under the standards we have set forth as herein controlling, we think the evidence establishes, as a matter of law, that appellant was riding in appellee's car as a guest.

The case was submitted to the jury on that basis and a verdict was rendered for appellee. In view thereof, we do not find it necessary to determine the question of whether or not the evidence as to appellee's negligence, if any, was sufficient on which to base a finding of gross negligence. We do not pass on that question and consequently do not set out the facts relating thereto.

AFFIRMED.

IN RE ASSESSMENT AND VALUATION OF CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY.
CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, APPELLANT, V. STATE BOARD OF EQUALIZATION AND ASSESSMENT OF THE STATE OF NEBRASKA, APPELLEE.

101 N. W. 2d 856

Filed March 18, 1960. No. 34713.

1. **Taxation: Appeal and Error.** An appeal from an assessment of railroad property by the State Board of Equalization and Assessment is required to be considered and decided de novo on the record presented to this court.
2. **Taxation: Railroads.** The Legislature has not defined a specific method by which railroad property in the state shall be valued for taxation by the State Board of Equalization and Assessment and it may, within legal limitations and restrictions, resort to any appropriate method by which a reasonable and just determination of actual value of such property can be ascertained.
3. **Taxation: Trial.** Generally, there is a presumption that when an assessing authority values property for taxation purposes it acts fairly and according to law upon sufficient evidence to sus-

tain its conclusion but the presumption disappears if there is evidence to the contrary and thereafter the reasonableness and legality of the valuation made by the assessing authority is one of fact to be decided from evidence, unaided by presumption, and the burden of establishing an illegal assessment is upon the complaining party.

4. **Taxation: Railroads.** It was the duty of the State Board of Equalization and Assessment in 1959 to value railroad property in the state at its actual value and to assess it at 35 percent thereof, and any substantial departure therefrom was a disregard of the legislative mandate and constituted an arbitrary valuation and assessment of the property.
5. **Taxation.** A formula for determining the value of tangible property for taxation purposes must be appropriate to produce the result required by statute; and if an arbitrary basis is used which is not uniformly applied to all tangible property, the result is an arbitrary one and will not sustain a valuation for taxation purposes.
6. **Taxation: Railroads.** It is an unlawful discrimination, prohibited by the Constitution and the statutes of the state, to assess the property of a railroad at 47½ percent of its actual value when all other tangible property is assessed at not more than 35 percent of its actual value.
7. **Taxation: Constitutional Law.** Taxing authorities may not withdraw any property from the principle of uniformity of taxation as provided by the Constitution and statutes of the state and one owner of property cannot be compelled to pay a greater proportion of taxes according to the value of his property than another property owner of the same class is required to pay.
8. **Estoppel.** A litigant who knowingly and deliberately assumes a particular position in a judicial proceeding is generally estopped to take a position inconsistent therewith to the prejudice of an adverse party.

APPEAL from the State Board of Equalization and Assessment. *Order reversed. Judgment of assessment rendered.*

J. W. Weingarten and *Eldon Martin,* for appellant.

Clarence S. Beck, Attorney General, and *Homer G. Hamilton,* for appellee.

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

BOSLAUGH, J.

This controversy concerns the assessment of the property of appellant in Nebraska by appellee for the purpose of all ad valorem taxes, except municipal taxes, for the year 1959. Appellant made a return or schedule of its property as of March 31, 1959, to appellee in all respects as required by the statute. § 77-603, R. R. S. 1943. Appellant appeared at a hearing before appellee on May 4, 1959, and produced evidence relative to the value of its property. Appellee on July 15, 1959, found and determined that the actual value of the property of appellant in Nebraska subject to assessment for taxation purposes by appellee was $153,326,173 and it assessed the property, after deducting locally assessed property of appellant, at the sum of $52,744,745.

The complaint of appellant concerning the assessment made by appellee alleged in substance the following: The true, actual value of the property of appellant in Nebraska in 1959 did not exceed $112,974,922, it should be assessed at 35 percent thereof or not to exceed $38,-621,807 after deduction of locally assessed property, and $14,122,938 of the assessment made by appellee was in excess of the lawful and just assessment of the property of appellant in Nebraska. The property was assessed by appellee at not less than 46 percent of the true, actual value thereof and substantially all other taxable property in Nebraska in 1959 was assessed at not to exceed 35 percent of its actual value. The assessment of the property of appellant was unlawful, discriminatory, in violation of the constitutional requirement of the state that taxes shall be levied by valuation uniformly and proportionately upon all property and franchises, and in violation of the statutory mandate that the property of appellant shall be assessed on the identical basis as other tangible property. The assessment appropriates the property of appellant without due process of law, denies the equal protection of the law, and

takes its property for public use without compensation in violation of provisions of the Constitution of Nebraska. The assessment of $52,744,745 was contrary to the evidence produced at the hearing before appellee, was unlawful and discriminatory, was capriciously made by the use of erroneous methods and fundamentally wrong principles, and was accomplished by arbitrarily increasing the true, actual value of the property of appellant to $153,326,173 before assessing it at 35 percent of actual value. The complaint asked appellee to set aside the assessment of the property of appellant and to determine the assessed value thereof for 1959 to be $38,621,807 as required by law.

A hearing was held by appellee on July 28, 1959, at which time additional evidence was introduced by appellant. Its complaint was that day denied and the original assessment of the property of appellant was affirmed by appellee. This appeal is a challenge of the legality of the recited actions of appellee.

The authority of this court in a proceeding of this character is by legislative mandate to hear and determine the matter in controversy de novo upon the record. § 77-617, R. R. S. 1943.

Appellee is charged with the obligation of assessing property of railroads and railroad corporations in the state except designated items outside of right-of-way and depot grounds. § 77-601, R. R. S. 1943. The Legislature has not defined any method by which railroad property in the state shall be valued for taxation by appellee. The Legislature has directed that specified things shall be considered but it has not prescribed any definitive formula for ascertaining value. That is committed to the judgment and discretion of appellee to be exercised fairly within legal limitations and restrictions. Appellee may resort to any method by which a substantially just and correct determination of the value of such property can be reached if it includes consideration of the things which the statute requires.

This court in Chicago, R. I. & P. Ry. Co. v. State, 111 Neb. 362, 197 N. W. 114, remarked: "There are no settled or infallible rules for the ascertainment of the actual value of railroad property for the purpose of taxation. * * *." The opinion in that case states: "The subject of the valuation of railroads is a difficult one. Neither railroad commissioners, nor taxing authorities, nor courts have as yet arrived at settled or infallible rules or criteria for the ascertainment of actual value of such property."

In Great Northern Ry. Co. v. Weeks, 297 U. S. 135, 56 S. Ct. 426, 80 L. Ed. 532, it is said: "In determining the amount of the assessment the board was not bound by any formula, rule or method, but for guidance to right judgment it was free to consider all pertinent facts, estimates and forecasts and to give to them such weight as reasonably they might be deemed to have." See, also, State ex rel. Bee Building Co. v. Savage, 65 Neb. 714, 91 N. W. 716; Chicago, St. P., M. & O. Ry. Co. v. State Board of Equalization, 133 Neb. 640, 276 N. W. 391; Rowley v. Chicago & N. W. Ry. Co., 293 U. S. 102, 55 S. Ct. 55, 79 L. Ed. 222; Northern P. Ry. Co. v. State, 71 N. D. 93, 299 N. W. 696.

Appellee determined the actual value, referred to by it as system value, of the railroad property of appellant by a consideration of three factors: 5-year, 1955-1959, average value of the stocks and bonds; 5-year, 1954-1958, average of net operating income capitalized at 6 percent; and investment in transportation property less depreciation. Each factor was given equal weight and this resulted in an average value of the railroad property of appellant of $451,177,807. This was the actual value of the railroad of appellant for assessment purposes as determined by appellee. Appellee then decided the proportion or share of this value that should be allocated to Nebraska because of the part of the property of appellant therein. This was determined by

a consideration of four factors referred to by appellee as allocation factors: Current track mileage, car and locomotive miles, traffic units, and gross earnings or operation revenue in Nebraska compared with the same factors in other states where the property of appellant is located. The component average of the four factors was 25.04 percent. This, applied to the total value of the railroad, designated system value by appellee, of $451,177,807, produced $112,974,922 described as the value allocated to Nebraska. This was the actual value of the property of appellant in Nebraska in 1959 subject to taxation as determined by appellee but it did not take 35 percent of $112,974,922, the value allocated to Nebraska by it. Instead it reduced that amount by 5 percent or to $107,326,175, multiplied that figure by 1.4286 thereby increasing the amount to $153,326,173, and labeled it "actual value." Appellee then took 35 percent of that amount or $53,664,160, deducted the amount of local assessment of $919,415, which resulted in $52,744,745, and that was made by appellee the 1959 assessment of the property of appellant in Nebraska. The assessment described above from which this appeal was taken is exhibited by the following:

I SYSTEM VALUE

a. 5-year average value stocks and bonds

1955	$ 373,633,444	
1956	360,350,195	
1957	391,482,791	
1958	397,774,657	
1959	372,538,031	
	5)$1,895,779,118	$379,155,823

b. 5-year average net operating income capitalized at 6%

1954	27,748,529
1955	26,490,403
1956	25,542,287

1957	21,001,392	
1958	23,672,803	
	5)$ 124,455,415	
	24,891,083	
	.06	414,851,383
c. Investment in transportation property less recorded depreciation, $688,859,609, less 10%, less 5%, less 5%		559,526,216
	3)	$1,353,533,422
Average System Value		$ 451,177,807

II ALLOCATION FACTORS

a. Current track mileage	28.21%
b. Car and locomotive miles	24.03%
c. Railway traffic units	24.60%
d. Operating revenue	23.33%
Average	25.04%

III ALLOCATION OF COMPUTED VALUE

Average system value $451,177,807 x 25.04%= $112,974,922 value allocated to Nebraska

IV ASSESSMENT

In 1957 and 1958 the allocated computed value less 5% equals "basic value" or 70% of actual value. Therefore, the allocated computed value in 1959 less 5% equals 70% of actual value. Therefore, $112,974,922 less 5% equals $107,326,175.

$107,326,175 x 1.4286=$153,326,173 actual value

35% statutory percent

	$ 53,664,160
Less local assessment	919,415
1959 State Board assessment	$ 52,744,745

The evidence in this case was all introduced in the record by appellant. There was no evidence offered by or on behalf of appellee. There is a presumption that when an assessing authority values property for taxation purposes it acts fairly and legally upon sufficient evidence to sustain its action but the presumption disappears if there is evidence to the contrary and thereafter the reasonableness and legality of the valuation made by the assessing authority is one of fact to be determined from evidence, unaided by presumption, and the burden of showing an improper assessment is upon the complaining party. State ex rel. Bee Building Co. v. Savage, *supra;* Baum Realty Co. v. Board of Equalization, 169 Neb. 682, 100 N. W. 2d 730; Omaha Paxton Hotel Co. v. Board of Equalization, 167 Neb. 231, 92 N. W. 2d 537; Ahern v. Board of Equalization, 160 Neb. 709, 71 N. W. 2d 307.

There is undisputed evidence of the actual value of the entire property of appellant in 1959 as shown by the market value of its stocks and bonds, its capitalized earning power, and its investment in transportation property less depreciation. It is not true, as appellee asserts, that there is no showing by appellant that actual value of the property is different than that determined by appellee. There is no evidence or legal justification to warrant the increase from $112,974,922 to $153,326,173 in the actual value of the property of appellant as was done by appellee as shown by section IV entitled "Assessment" of the order of appellee of July 15, 1959. The resort to the device of the multiplier or conversion factor of 1.4286 was occasioned by statutory change from assessment of tangible property at full value to 50 percent thereof in 1953, to 50 percent of what was termed basic value in 1956, and to 35 percent of actual value in 1957. The 50 percent of full value law applied to all tangible property in 1953, 1954, and 1955. The 50 percent of basic value law governed assessments in 1956 and 1957. The law requiring assessment of tangible

property at 35 percent of actual value became and has been effective since September 20, 1957. It governed 1958 and 1959 assessments. § 77-201, R. S. Supp., 1953; § 77-201, R. S. Supp., 1955; § 77-201, R. S. Supp., 1957.

In each of the years 1953, 1954, and 1955 appellee found the system value of the property of appellant by use of the identical three factors used in 1959, determined the actual value of the Nebraska property by allocating to it a percent of the system value in the same manner as it did in 1959, and fixed the assessment each year at 50 percent thereof. It is clear that in each of those years appellee determined the actual value of the property of appellant by use of the identical three factors or elements of value used by appellee in 1959 in arriving at what it labeled system value.

Appellee on July 11, 1956, declared by resolution "that the basic value of all tangible property and real property assessed in the State of Nebraska for 1956 has been determined to be 70 per cent of actual or market value." The value of the railroad system of appellant for 1956 was determined by appellee as it had been in the years 1953, 1954, and 1955 by the average of three factors: Stocks and bonds, capitalized net operating income, and the investment account less depreciation; and by allocating 25.23 percent thereof, the average of the four factors used in previous years, the value of the Nebraska property of $118,353,152 was obtained which appellee termed allocated value and which was no greater or different than actual value. Instead of taking 70 percent of that amount in accordance with the resolution noted above, appellee declared the basic value of the property of appellant in Nebraska to be $112,435,495 which was exactly 95 percent of the allocated value.

In 1957 appellee, by the same items and procedure, determined what it termed in its order "system value" of the property of appellant in the amount of $468,361,700 and an "allocated value (Nebraska)" of the Nebraska property of appellant in the amount of $117,746,130. Ap-

pellee then stated the basic value was $111,858,825. That was 95 percent and not 70 percent of the $117,746,130 as the law required to arrive at basic value. This is obviously admitted by the reference in section IV of the 1958 assessment order of appellee in which it is said: "1957 Computed Value - 5%=Basic Value." This was clearly saying that 5 percent was deducted from the allocated value of 1957 which was the actual value of the Nebraska property for that year and the balance, 95 percent, was treated as basic value. The 1957 assessment was made on that erroneous basis. It is not important that appellee designated the $117,746,130 as allocated value because the factors used clearly show it was actual value.

Appellee substantially concedes that the basic value used in 1956 and 1957 was 95 percent of what is labeled by it as allocated value. Appellee could hardly do otherwise because simple arithmetic demonstrates it. The factors employed in composing allocated value establish that it was the actual value of the Nebraska property of appellant in the years 1956 and 1957. The market value of stocks and bonds, the earning power of the property, and the cost as shown by the investment account less proper depreciation evidence actual value. Appellee recognizes and, in fact, argues this in its brief when it says: "We submit that the authorities support the use of a cost factor, along with other factors in the determination of the value of a railroad for tax purposes."

There was no attempt by appellee in either 1956 or 1957 to state in the assessment order how or why it arbitrarily determined that the basic value was 95 percent of what was clearly the actual value of the Nebraska property of appellant while basic value of all other tangible property was established by the resolution of appellee at 70 percent of actual or market value. The omission was an obvious disregard and violation of the statute which required that appellee in making an

assessment of railroad property "shall set forth the manner in which it arrived at the assessment, the several items included in the total assessment and the manner of arriving at the several items and the total." § 77-609, R. R. S. 1943.

The value of the railroad system of appellant in 1958 was determined by appellee by the average of the same factors of value used in the preceding years as discussed above. Twenty-five percent thereof was allocated by the identical method formerly used for that purpose. That resulted in the sum of $113,548,106, designated by appellee as computed value for the Nebraska property and that was the same character of finding arrived at by the same method as had previously been considered and treated as the actual value of the Nebraska property of appellant. Appellee reduced that figure by 5 percent, multiplied the remainder by 1.429, and obtained $154,147,230 which it called actual value. At the time the assessment was made on July 8, 1958, appellee adopted a resolution which contained a recitation that "the method of determining the actual value of real estate and tangible personal property for the year 1958 used by all County Assessors is to convert 'basic value' for 1957 to actual value by multiplying the basic value by 1.429." Ironically, appellee also recited in the resolution that it was "convinced that railroad property should be valued at 35% of actual value as is all other tangible property" and at the identical time, as shown by the resolution, appellee valued and assessed the property of appellant in Nebraska at very much more than 35 percent of actual value because this property had not been valued and assessed at 70 percent of actual value in 1957 but at 95 percent of actual value and, notwithstanding this important fact, the conversion factor of 1.429 was applied to the value of the Nebraska property of appellant in 1958 as found by appellee to arrive at what it called actual value.

The 1959 assessment by appellee of the railroad of

appellant was made by the same method as the 1958 assessment was accomplished. The identical factors were employed for finding system value and for allocating 25.04 thereof, the average of the four factors used in previous years, which produced $112,974,922 which appellee called value allocated to Nebraska. Appellee reduced that amount by 5 percent or to $107,326,175 and multiplied that by 1.4286, 100 divided by 70 carried to the fourth decimal instead of 1.429 used by it in 1958, which resulted in $153,326,173 which appellee called actual value. The 35 percent statutory rate was applied to the last amount which produced, after deducting locally assessed property, an assessment for 1959 of the Nebraska property of appellant of $52,744,745.

The authority and obligation of appellee were to assess the property of appellant on the same basis as other tangible property is required to be assessed. §§ 77-601 and 77-604, R. R. S. 1943. All tangible property was required to be valued at its actual value and to be assessed for 35 percent of such actual value. § 77-201, R. R. S. 1943. Actual value as used in the revenue statute is defined by section 77-112, R. R. S. 1943. Appellee, by the procedure exhibited by the first three sections of the assessment order of 1959, substantially observed the requirements of this section of the statute. Section I a found the system value as evidenced by the selling price of the stocks and bonds of appellant, which responds to item (6) of the statute, "market value in the ordinary course of trade." Section I b found system value as evidenced by capitalizing the net operating railroad income, which is item (1), "earning capacity of the property." Section I c found system value as shown by investment account less deduction for physical and economical obsolescence, which appellee agrees is in lieu of item (4), "reproduction cost less depreciation." The remaining three items of the statute, "(2) relative location; (3) desirability and functional use"; and "(5) comparison with other properties of known or recog-

nized value," may be considered as included in market value and earning capacity to the extent they are applicable.

The assumption and the result of each of the three sentences of section IV of the assessment order of 1959 made by appellee are incorrect factually and are contrary to law. The 1957 or 1958 allocated value less 5 percent did not equal basic value or 70 percent of actual value as that formula assumed and stated. In the 1957 assessment instead of appellee taking 70 percent of allocated value as basic value it took 95 percent of allocated value as basic value. That error, resulting in over-assessment, was repeated and given effect by appellee to the prejudice of appellant as hereinbefore noted in the assessment of 1958. The error of the first sentence inheres in each of the other sentences of section IV.

There was no necessity of fact or justification of law for the resort by appellee to a reduction of 5 percent of the amount of the valuation allocated by it in 1959 to Nebraska or for the use by it of a multiplier or conversion factor in ascertaining the actual value of the property of appellant in Nebraska. The use of these was arbitrary and a violation of the statute defining actual value. The use of them disregarded the undisputed evidence that the actual value of the Nebraska property of appellant did not exceed $112,974,922, the amount appellee found and described as value allocated to Nebraska. Appellee found that the system value of appellant was $451,177,807. Included in this amount was every possible value of the railroad of appellant, including its franchise or its right to exist. Appellee made no attempt to demonstrate that there was any omission of anything of value from the schedule of the property of appellant furnished to appellee in 1959. It was accepted, acted upon without objection, and everything therein was valued and included in what appellee termed system value in its assessment order. Appellee belatedly now says in this court that the statute requires

it to assess railroad property "together with franchises"; that the record does not show that it made a separate valuation of franchises; and that it may be presumed it considered the element of franchise rights in arriving at actual value. This may be accepted if appellee means by actual value $112,974,922, designated as value allocated to Nebraska. Otherwise it is incorrect because franchise value was included in the assessment by use of the factors used by appellee to reach what is termed system value. The following from State ex rel. Bee Building Co. v. Savage, *supra,* fully explains the matter of franchise value in making such an assessment: "Where the property of a railroad corporation is assessed by the state board of equalization as a unit, and in fixing the value thereof the board takes into consideration the fact that the property is being used for effectuating the objects of the corporation, is earning an income in the transportation of passengers and carrying of freight for hire, and that such corporation is exercising the rights, powers and privileges of corporations organized for the purpose of engaging in business as common carriers, such assessment, so made, would include and cover the intangible as well as the tangible property of the corporation, and would be an assessment of its franchise."

The system value fixed by appellee of $451,177,807 is and must be accepted as the 1959 actual value of the entire railroad property of appellant. Any contention otherwise is only a play on words without evidentiary integrity or legal justification. The practice by appellee of reducing the value assigned to appellant in Nebraska by 5 percent originated in 1957. It is not set out or expressed in the assessment order of that year except as it results from the finding that the Nebraska property had a value for that year of $117,746,130 and that the basic value thereof was $111,858,825, or exactly 5 percent less than the total value first stated above. This practice and error reoccurred in 1958 and 1959. The deduc-

tion of 5 percent of the value assigned to Nebraska in each of those years was arbitrary and without explanation or any reason therefor given in the respective orders of assessment of appellee for those years. The reason suggested in this litigation by appellee that the allocated value "was 5% more than basic value" is not convincing. Appellee had fixed basic value at 70 percent of actual value of all tangible property for taxation purposes. The allocated value assigned to the Nebraska property was a finding of actual value of the property by all the applicable evidence in the record. If it was not, the appellee did not in any of these years find what the actual value of the property was in which event it had no basis for finding the basic value of it. Appellee deducted 5 percent of the value allocated to Nebraska and called it basic value when it should have deducted 30 percent to arrive at basic value according to the order fixing the ratio of basic value to actual value. The indulgence of appellee in making an unexplained 5 percent deduction from the value of the property to be assessed and in resorting to such terms as "system value," "computed allocated value," and to an inappropriate and incorrect conversion factor when its primary inquiry mandated by the Legislature was only to find actual value of the property to be assessed was a resort to fictions. A fiction is not allowed to obscure the facts when the facts become important. The important facts which the fictions tended to obscure in 1958 and 1959 were that in 1956 and 1957 appellee took 95 percent of the actual value of the Nebraska property of appellant for basic value rather than 70 percent, which the law required, and based the assessment of the property thereon. Appellee then applied to the incorrect amounts found for those years a conversion factor of 1.429 in 1958 and 1.4286 in 1959 which was in any event only permissible when the actual basic value of the property had been fixed at 70 percent of actual value and thereby appellee added in 1959 a nonexistent amount of

more than $40 million to the actual value of the property of appellant in this state.

Appellee assigned 25.04 percent of the total value of the railroad as found by it of $451,177,807 to the Nebraska property of appellant. This allocation is uncontested. The amount of it is $112,974,922. That is the actual value of the property in 1959 concerned in this litigation and the duty of appellee was to assess it at 35 percent. §§ 77-201 and 77-604, R. R. S. 1943.

The action of appellee in inflating the value of the Nebraska property of appellant to $153,326,173 by the devices it used was arbitrary and unreasonable. It is conceded by the parties that 25.04 percent was the value of the railroad system in Nebraska. On the basis of those figures, when properly projected, there is produced an actual value of more than $612 million for the entire railroad. This is more than $225 million in excess of what appellee found all of the outstanding stocks, bonds, and equipment obligations were worth at market prices. The assessment is in defiance of that recognized standard of value. This court has said that a consideration of the value of the stocks and bonds of a solvent railroad is a fair method of ascertaining its value. Chicago, St. P., M. & O. Ry. Co. v. State Board of Equalization, *supra*. It is about $200 million in excess of the valuation found by appellee by capitalizing $24,891,083, the net operating income of appellant averaged for 5 years, as prescribed by the Interstate Commerce Commission. The earnings of a railroad are evidence of a most important character in determining the value of the railroad. State ex rel. Bee Building Co. v. Savage, *supra;* Chicago, R. I. & P. Ry. Co. v. State, *supra*.

The three items or factors used by appellee to arrive at the total value of the railroad property produced an actual value of $112,974,922 for the Nebraska property and that is more than $40 million less than the alleged actual value upon which the assessment is based. Appellee destroyed any trace of reasonableness or

realism by deducting 5 percent from that amount and multiplying the remainder by 1.4286 to produce a value of $153,326,173 which appellee called the actual value of the Nebraska property.

The original assessment order of July 15, 1959, was adopted by only two members of the board voting for it. One member voted against it, one member abstained from voting, and one member was absent. The use of the matter contained in section IV of the order of assessment was not a mistake, an inadvertence, or because of insufficient information. It was done advisedly and arbitrarily. The Tax Commissioner of the state advised against the use of it and presented a proposed order of assessment wholly eliminating that formula. The Tax Commissioner advised appellee that the facts and the law required a reduction in railroad valuations for assessment purposes. One of the members who voted for the assessment order as it exists for 1959 said in a voluntary, formal statement he would never be a party to extending the type of relief suggested to any special interest at the unavoidable tax expense of Nebraska farmers, main street merchants, and homeowners. However, the same statement tacitly conceded that railroad property had been overassessed and this was illustrated by a reference to 1955 when the "valuation should have declined because of the change in base, it actually increased 5 million dollars." The other member who supported the 1959 assessment order said he opposed any concessions to any special interest group when the average taxpayer would have to make up the difference from his own pocket. Neither of these members mentioned anything concerning the value of the property to be assessed nor did they undertake to show where the judgment of the Tax Commissioner was wrong. After the views of the two members were expressed as indicated above the Tax Commissioner stated that appellee had no right to consider such an effect among taxpayers and that its only right and duty were to make an as-

sessment of railroads at the same level as all other assessments. He said if appellee was to refuse to reduce values because other taxpayers will make up the difference, then no taxpayer, whatever his status or station, could ever get relief from unjust taxation. The observations in Cumberland Coal Co. v. Board of Revision of Tax Assessments, 284 U. S. 23, 52 S. Ct. 48, 76 L. Ed. 146, are appropriate: "The case is not one of mere errors in judgment in following a proper method, * * * but one where the challenged discrimination resulted from a plan of assessment which was none the less systematic and intentional because of belief in its validity." The record justifies the conclusion that the 1959 assessment of the Nebraska property of appellant is, in the respects discussed above, arbitrary and capricious.

Laflin v. State Board of Equalization & Assessment, 156 Neb. 427, 56 N. W. 2d 469, contains the following: "It is the duty of the Board to fix the value of farm lands and improvements at their actual value at the time they are appraised for assessment purposes. Any attempt to depart from this provision of the statute * * * constitutes a noncompliance with legislative direction. * * * The record shows on its face that the Board did not value farm lands and improvements for assessment in the various counties on the basis of the actual value, their value in the market * * *. This being so, the final orders of the Board are in violation of the positive directions of applicable statutes * * *. We are of the opinion that appellant's appealable interest lies in the fact that the record shows that farm lands and improvements in the various counties in the state are not assessed at actual value as defined by the statute and that there has been no uniformity of assessment between the various counties of the state under the formula used by the Board even if such formula could be assumed to correctly represent the actual value of this class of property throughout the state. Under such circumstances the final order of the Board is not in compliance with law

and must be deemed to be an arbitrary valuation of this class of property."

K-K Appliance Co. v. Board of Equalization, 165 Neb. 547, 86 N. W. 2d 381, presented a situation similar to this. The assessor in that case raised the value of the stock of merchandise a substantial amount. The basis for the raise was a count made of the various appliances involved and an examination of advertisements in certain newspapers. No attempt was made to ascertain the model, quality, or other pertinent facts for comparative purposes. The order of assessment was set aside. The opinion states: "If it be shown that the method employed was in fact arbitrary or speculative, having no real relation to the value of the property being assesssed, it will not sustain the valuation thus fixed, and renders any raise in the assessment based exclusively thereon entirely void. * * * A casual examination of the method employed by the county assessor in fixing the actual value of plaintiff's stock of merchandise shows its want of reasonableness in the accomplishment of this result. The yardstick employed was purely an arbitrary one which lacked many vital elements for determining actual value. Any resemblance to actual value resulting from its use would be nothing more than sheer coincidence. Valuations of property for tax purposes cannot be supported by such evidence. We necessarily hold that the raising of the basic value of the property contained in plaintiff's inventory is arbitrary and void, and cannot be sustained."

In Matzke v. Board of Equalization, 167 Neb. 875, 95 N. W. 2d 61, the contested assessment was based on an actual valuation of $28,685. The evidence of the owner established an actual value of $15,500. The assessment was arrived at by taking 52 percent of the replacement cost of $94,881 or $45,542, from which 40 percent was deducted for functional depreciation, leaving a balance of $27,325 as the actual value of the building and $1,360 for the land. The useful life of the building was 50

years. In condemning this method of assessment this court said: "There is no showing in the record to explain or justify a physical depreciation of only 52 percent on a 43-year-old building with a useful expectancy of 50 years. The physical depreciation of the building by 52 percent was the result of arbitrary action by the county board of equalization. * * * The only basis in the record on which the building could be depreciated on account of age produces a depreciated value, under the formula employed, which would result in an actual value less than $15,500, the actual value established by the plaintiffs. * * * In Newman v. County of Dawson, *supra* (167 Neb. 666, 94 N. W. 2d 47), we approved a formula for determining the value of tangible property for taxation purposes where it was shown to comply substantially with section 77-112, R. S. Supp., 1955 * * *. But where the formula applied requires the use of an arbitrary figure to arrive at a result, the result is as arbitrary as the figure itself. * * * A formula for determining the value of tangible property for taxation purposes must tend to produce the result required by section 77-112, R. S. Supp., 1955, when applied uniformly and impartially. Where it appears that an arbitrary basis is used which is not uniformly applied to all tangible property the result is an arbitrary one. It will not sustain a valuation for tax purposes."

In Adams v. Board of Equalization, 168 Neb. 286, 95 N. W. 2d 627, this court accepted evidence of value presented by the taxpayer as actual value of the property involved because the evidence showed that the assessment was based on a computation of 74 percent of replacement cost less 6 percent as basic value when the basic value had been determined to be 70 percent of actual or market value. The assessment was set aside. The opinion contains the following: "He said he applied to the replacement cost the depreciation listed in the manual which was 6 percent, a purely arbitrary percentage, and this resulted in a figure of $30,360 which

was described as the physical value. The result was necessarily an arbitrary one. There is no evidence to justify the deduction or depreciation of 6 percent of the alleged replacement cost. That deduction supports an inference that the replacement cost was neither the actual nor fair market value."

The method employed by appellee in assessing the property of appellant in Nebraska as exhibited by section IV of its assessment order of 1959 resulted in the assessment of the property at 47½ percent of its actual value as found by appellee and described in the order as value allocated to Nebraska. The facts of the assessment may be correctly and simply stated as follows:

Actual value	$112,974,922
Assessment	47½%
	53,664,160
Less local assessment	919,415
1959 State Board assessment	$ 52,744,745

All tangible property has since September 20, 1957, been required to be valued at its actual value and to be assessed at 35 percent of such actual value. § 77-201, R. R. S. 1943. The evidence establishes that all tangible property except railroad property was assessed at not more than 35 percent of its actual value. It is not important in the circumstances of this litigation that some tangible property other than railroad property was assessed for less than 35 percent of its actual value. The Constitution provides that taxes shall be levied by valuation uniformly and proportionately upon all tangible property, subject to exceptions not important to this case. Art. VIII, § 1, Constitution of Nebraska.

State ex rel. Bee Building Co. v. Savage, *supra*, contains this language: "And this rule of uniformity applies not only to the rate of taxation but as well to the valuation of property for the purposes of raising revenue. * * * From the foregoing it is altogether clear

that in the discharge of the duties incumbent on the state board of equalization as an assessing board it was the duty of the members thereof, or a majority of them, to, in the manner and by the methods pointed out by the legislature, ascertain the fair and reasonable value of all of the properties of whatsoever kind owned by the corporations subject to taxes in this state, which it was their duty to assess, and to value such properties for the purposes of taxation so that the owners thereof should be required to pay a tax in proportion to the value of their property uniform, so nearly as was practicable, with the standard of values generally placed on all other species of property throughout the state, which is assessed by the different assessing officers selected for that purpose in the manner provided by law. It would be unfair to the railroad corporations to assess their properties in this state at a greater valuation than that which prevails in the assessment of property generally * * *."

In Chicago, R. I. & P. Ry. Co. v. State, *supra,* this court said: "To assess one class of property at 68 per cent. to 75 per cent. of its actual cash value, and to value the property of another taxpayer at 100 per cent. of its actual cash value, constitutes an unlawful discrimination, which is prohibited by the Constitution and statutes of the state."

Laflin v. State Board of Equalization & Assessment, *supra,* in speaking of the function of the State Board of Equalization and Assessment, said: "In so doing (assessing property at its actual value), the objective is not only to assess taxable property at its actual value but also to secure a uniform and proportionate valuation for taxation purposes as required by Article VIII, section 1, Constitution of Nebraska."

Greene v. Louisville & I. R. R. Co., 244 U. S. 499, 37 S. Ct. 673, 61 L. Ed. 1280, Ann. Cas. 1917E 88, states: "Discrimination resulting from an assessment of the intangible property of a railroad corporation by the

Board of Valuation and Assessment at 75 per cent. of its actual value while the property of individuals and other classes of corporations, taxed at the same rate, is generally and systematically assessed * * * at not more than 60 per cent. of actual value, is violative of the provisions of the Kentucky Constitution requiring uniform taxation in proportion to value and an identical rate as between corporate and individual property * * *; and this has been recognized by the Supreme Court of the State."

The court said in City Ry. Co. v. Beard, 283 F. 313: "Where a state Constitution provides that all taxable property shall be assessed by a uniform rule at its true value in money, if that rule is not observed, and the basis of valuation is 60 per cent., or any per cent. less than 100, the courts will grant relief to those whose property is rated in excess of the adopted percentage."

Sioux City Bridge Co. v. Dakota County, 260 U. S. 441, 43 S. Ct. 190, 67 L. Ed. 340, 28 A. L. R. 979, reversed the determination of this court (105 Neb. 843, 182 N. W. 485) that a taxpayer whose property was assessed at 100 percent of its value and property generally was assessed substantially at less value, had no remedy except to urge upon public authorities the duty of raising the other property valuation up to the level of the complainant. It is therein stated: "This Court holds that the right of the taxpayer whose property alone is taxed at 100 per cent. of its true value is to have his assessment reduced to the percentage of that value at which others are taxed even though this is a departure from the requirement of statute. The conclusion is based on the principle that where it is impossible to secure both the standard of the true value, and the uniformity and equality required by law, the latter requirement is to be preferred as the just and ultimate purpose of the law."

Cumberland Coal Co. v. Board of Revision of Tax Assessments, *supra,* referred to the case last quoted and said: "In applying this principle, the fact that a uni-

form percentage of assigned values is used, cannot be regarded as important, if, in assigning the values to which the percentage is applied, a system is deliberately adopted which ignores differences in actual values so that property in the same class as that of the complaining taxpayer is valued at the same figure (according to the unit of valuation, as, for example, an acre) as the property of other owners which has an actual value admittedly higher. Applying the same ratio to the same assigned values, when the actual values differ, creates the same disparity in effect as applying a different ratio to actual values when the latter are the same."

Schleman v. Connecticut General Life Ins. Co., 151 Fla. 96, 9 So. 2d 197, states: "Valuations for taxation must have a just relation to real value of the assessed property, and there must be no substantial inequality in valuation in various kinds of taxable property, and if steps required to be taken in making valuations are not actually taken in good faith, the valuations are shown to be essentially unequal, abstractly or relatively, the assessment is invalid."

It is said in People ex rel. McDonough v. Illinois C. R. R. Co., 355 Ill. 605, 190 N. E. 82: "Where taxing authorities in assessing property for taxation take an assessed value below the actual cash value of the property the constitutional rule of uniformity in taxation must be observed, and the tax commission, having knowledge of the percentage of actual value taken for assessment purposes throughout the State, cannot assess the property of a railroad company at a greater per cent of its actual value than that at which other property is assessed."

In Pacific Telephone & Telegraph Co. v. Wooster, 178 Wash. 180, 34 P. 2d 451, the court said: "* * * the evidence is conclusive that the so-called equalized valuation will raise the assessed valuation of each of respondent's parcels of real estate * * * seventeen per cent above the assessed valuation of land similarly situated * * *

throughout the county. It seems too plain for argument that to pick out the property of a particular owner and raise the assessed valuation of his property substantially above the assessed valuation of property of a like character similarly situated, violates the uniformity and equality provision of article VII, § 2, of the state constitution. * * * If the basis of valuation is the true market value of the property, then that basis must be applied to all alike. If the basis is a certain per cent of the true market value, the same percentage must be applied to all alike."

In People ex rel. Miller v. Chicago B. & Q. R. R. Co., 300 Ill. 399, 133 N. E. 325, the court said: "It has been held by this court that taxing authorities have no justification in withdrawing any property from the protection of the constitutional principle of uniformity of taxation, as uniformity of taxation is required under the constitution, and that a person cannot be compelled to pay a greater proportion of taxes, according to the value of his property, than another property owner. * * * While it is true that error in the exercise of an honest judgment in fixing the value of property will not invalidate the tax, it is also true that an arbitrary violation of the rule of uniformity is an invasion of constitutional right and will not be tolerated * * *."

The difference between 47½ percent and 35 percent when applied to the very large valuation involved in this case is not substantial or approximate uniformity as contended by appellee and as required by the Constitution and the applicable statute of the state. Appellee applied the percentage of 1.4286 to 95 percent of the actual value of the railroad property and to 70 percent of the actual value of other tangible property. The fact that a uniform percentage was used is not important. The discrimination between railroad property and other tangible property and the overvaluation of the former resulted from the deliberate act of appellee refusing to apply the conversion factor to the same basic valuation.

As a result of such discrimination in the use of the conversion factor alone, apart from any other formula error, the property of appellant is assessed at 47½ percent of its actual value and other tangible property is assessed at or not more than 35 percent of its actual value. The circumstances of this case, as discussed in the foregoing, characterize the assessment of the Nebraska property of appellant for 1959 as arbitrary, unreasonable, and discriminatory.

An assignment by appellant is that appellee erred in its computation of the value of the system property of appellant as evidenced by the investment account by deducting less than 20 percent therefrom for physical and economic obsolescence resulting in the sum of $559,526,-216 for the system property when the evidence establishes without dispute that not less than 40 percent should be deducted because of obsolescence; that would result in a value based on the investment account of $413,315,765 for the system railroad property; and that appellee was wrong in using the larger amount in its computation of the value of the Nebraska property of appellant.

This challenge is not available to appellant in this case. The complaint of appellant objecting to the assessment of its 1959 property in Nebraska by appellee alleged that by accepted, recognized, lawful, and proper methods the total actual value of the property of appellant was computed by appellee and a fair and just proportion of such system value resulted in the sum of $112,974,922 as the value of the Nebraska property of appellant; and that instead of appellee fixing the assessed value of the property at 35 percent of the value assigned to Nebraska as required by law, which would have resulted in an assessment of $38,621,807 after deduction of locally assessed property, appellee arbitrarily, unreasonably, and erroneously deducted 5 percent therefrom and multiplied the remainder by 1.4286 to obtain the sum of $153,326,173 which it termed the actual value of the

property in Nebraska. This resulted in an unlawful and discriminatory assessment of $52,744,745 after deduction of locally assessed property when it should have been assessed in the sum of $38,621,807. The assessment made by appellee was $14,122,938 in excess of a lawful, just, and proper assessment. Appellant by its complaint asked appellee to set aside its assessment and fix the assessed value of the property of appellant in Nebraska for 1959 in the sum of $38,621,807 as required by law. This was in compliance with the requirements of the statute that the assessment could be contested by appellant filing with appellee a complaint stating wherein it complained the assessment was unjust, stating the amount appellant claimed it should be, the excess therein, and asking appellee for an adjustment in the assessment. § 77-612, R. R. S. 1943.

A prerequisite of an appeal by appellant was a notice within 10 days of the assessment to appellee stating that an appeal was to be taken to this court from the assessment, the amount appellant claimed the assessment should be, and the amount of the excess. § 77-613, R. R. S. 1943. The notice of appeal of appellant said the assessment of its property in Nebraska ought to be the sum of $38,621,807 and the assessment thereof by appellee was $14,122,938 in excess of that amount.

An assignment of error in this court by appellant is that appellee erred in not vacating its assessment of $52,744,745 of the 1959 Nebraska property of appellant and in not assessing the property in the sum of $38,621,-807, which, obviously, would have required a valuation of the Nebraska property in the sum of $112,974,922.

The taking of an appeal by appellant required appellee to make a return to the respective county clerks of the counties in which any portion of the railroad property was located, stating the amount of the assessment made by appellee and the amount appellant claimed it was in excess of the true value. Thereupon the taxing boards of the respective counties were authorized to

levy and collect taxes under the assessment against the railroad property upon the uncontested value of the assessment. § 77-619, R. R. S. 1943. Appellant stated at the submission of this case that levies are being extended and taxes collected on the uncontested part of the assessment of $38,621,807.

Appellant, as is obvious from the foregoing, repeatedly asserted that its Nebraska property in 1959 had an actual value of $112,974,922. Included in the computation by which that value was ascertained was the amount of investment in transportation property as depreciated. Appellant by its statements and acts above referred to agreed that the procedure of appellee was correct in that respect and that it produced a correct result. It was only the increased amount produced by deducting 5 percent from the actual value of the property and using the conversion factor to which appellant objected. Appellant may not now claim inconsistently with its previous position that the use of the investment account as one factor in arriving at the Nebraska property was wrong and thereby attempt to secure an additional reduced valuation of its Nebraska property.

Jensen v. Omaha Public Power Dist., 159 Neb. 277, 66 N. W. 2d 591, contains the following: "The rule seems to be: 'Subject to modifications and limitations which will appear (none of which are present in the present case), it is a well established principle that a party who has knowingly and deliberately assumed a particular position in judicial proceedings is estopped to assume a position inconsistent therewith to the prejudice of the adverse party. * * *' 31 C. J. S., Estoppel, § 117, p. 372."

It is also stated in 31 C. J. S., Estoppel, § 117, p. 375: "It is frequently held that estoppel against inconsistent positions in judicial proceedings will operate where the position first assumed has been successfully maintained. * * * It follows that there may be an estoppel

where there has been no judicial determination of the merits of the initial position. Thus, before any determination has been reached as to the position first taken, and while still relying thereon, a party cannot also rely on an inconsistent position * * *." See, also, Cozad Ditch Co. v. Central Nebraska Public Power & Irr. Dist., 132 Neb. 547, 272 N. W. 560; Peterson v. Strayer, 121 Neb. 587, 237 N. W. 667, on rehearing, 121 Neb. 866, 239 N. W. 213; In re Estate of Nilson, 126 Neb. 541, 253 N. W. 675; Blid v. Blid, 82 Neb. 294, 117 N. W. 700; Kirkendall v. Weatherley, 77 Neb. 421, 109 N. W. 757, 9 L. R. A. N. S. 515; 19 Am. Jur., Estoppel, § 50, p. 650, § 72, p. 704.

The findings of appellee contained in sections I, II, and III of its assessment order of July 15, 1959, concerning the property of appellant are correct and they are each adopted by this court.

The assessment of the 1959 property of appellant in Nebraska as contained in section IV of the assessment order of appellee of July 15, 1959, should be and it is hereby reversed.

It should be and is adjudged that the actual value of the property of appellant for 1959 in Nebraska is the sum of $112,974,922; that from 35 percent thereof or $39,541,222 there should be deducted the value of the locally assessed property of appellant the sum of $919,415; and that the 1959 assessment of the property of appellant in Nebraska should be and is $38,621,807.

ORDER REVERSED. JUDGMENT OF ASSESSMENT RENDERED.

IN RE ASSESSMENT AND VALUATION OF CHICAGO AND NORTH WESTERN RAILWAY COMPANY.
CHICAGO AND NORTH WESTERN RAILWAY COMPANY, APPELLANT, V. STATE BOARD OF EQUALIZATION AND ASSESSMENT, APPELLEE.

101 N. W. 2d 873

Filed March 18, 1960. No. 34714.

1. **Taxation: Appeal and Error.** An appeal from an assessment of railroad property by the State Board of Equalization and Assessment is required to be considered and decided de novo on the record presented to this court.
2. **Taxation: Railroads.** The Legislature has not defined a specific method by which railroad property in the state shall be valued for taxation by the State Board of Equalization and Assessment and it may, within legal limitations and restrictions, resort to any appropriate method by which a reasonable and just determination of actual value of such property can be ascertained.
3. **Taxation: Trial.** Generally there is a presumption that when an assessing authority values property for taxation purposes it acts fairly and according to law upon sufficient evidence to sustain its conclusion but the presumption disappears if there is evidence to the contrary and thereafter the reasonableness and legality of the valuation made by the assessing authority is one of fact to be decided from evidence, unaided by presumption, and the burden of establishing an illegal assessment is upon the complaining party.
4. **Taxation: Railroads.** It was the duty of the State Board of Equalization and Assessment to value railroad property in Nebraska in 1959 at its actual value and to assess it at 35 percent thereof and any departure therefrom was a noncompliance with the legislative mandate and constitutes an arbitrary valuation and assessment of the property of appellant.
5. **Taxation.** A formula for determining the value of tangible property for taxation purposes must be appropriate to produce the result required by statute; and if an arbitrary basis is used which is not uniformly applied to all tangible property, the result is an arbitrary one and will not sustain a valuation for taxation purposes.
6. **Taxation: Railroads.** It is an unlawful discrimination, prohibited by the Constitution and the statutes of the state, to assess the property of a railroad at not less than 47½ percent of its actual value when all other tangible property is assessed at not more than 35 percent of its actual value.

7. **Taxation: Constitutional Law.** Taxing authorities may not withdraw any property from the principle of uniformity of taxation as provided by the Constitution and statutes of the state and one owner of property cannot be compelled to pay a greater proportion of taxes according to the value of his property than another property owner of the same class is required to pay.
8. **Taxation: Railroads.** It is generally permissible for assessment authorities in ascertaining the value of the interstate operating property of a railroad for taxation purposes to consider its investment in transportation property determined, according to the rules of the Interstate Commerce Commission, in conjunction with the average value of its stocks and bonds during a reasonable period antecedent to the time of the valuation of the property and the capitalization at a reasonable rate of the average net operating income of the railroad during a like period, and it was not arbitrary or unreasonable for the State Board of Equalization and Assessment to do so in its 1959 assessment of railroad property.
9. ———: ———. The assessing authorities in determining the proportion of the value of the entire operating property of an interstate railroad allocable to its interstate property in a single state may consider the percentage that the intrastate traffic units, gross earnings, car locomotive mileage, and current mileage bear to the total railroad system.
10. ———: ———. A computation of system value based upon average market price of stocks and bonds and a computation based upon a capitalization of net earnings reflect the effect, upon actual value, of obsolescence, of the competition of other means of transportation, and of all factors affecting earnings.
11. ———: ———. The capitalization by the State Board of Equalization and Assessment of the average net income of a railroad for a 5-year period immediately antecedent to the time of the assessment of the property of the railroad at the rate of 6 percent as one factor in ascertaining the value of the entire property of the railroad for taxation was not arbitrary or unreasonable.

APPEAL from the State Board of Equalization and Assessment. *Order reversed. Judgment of assessment rendered.*

Gaines, Spittler, Neely, Otis & Moore, Carl McGowan, and *George Hollander,* for appellant.

Clarence S. Beck, Attorney General, and *Homer G. Hamilton,* for appellee.

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

BOSLAUGH, J.

This litigation concerns assessment of the property of appellant in Nebraska by appellee for the purpose of all ad valorem taxes, except municipal taxes, for the year 1959. Appellant made a return or schedule of its property as of March 31, 1959, to appellee in all respects as required by the statute. § 77-603, R. R. S. 1943. Appellant appeared at a hearing before appellee on May 4, 1959, and evidence was produced on behalf of and by appellant relative to the value of its property. Appellee on July 15, 1959, found and determined that the actual value of the property of appellant in Nebraska subject to assessment for taxation purposes by appellee was $20,422,068 and it assessed the property, after deducting locally assessed property of appellant, at the sum of $7,065,723.

The complaint of appellant concerning the assessment was in substance the following: The assessment of $7,065,725 was unjust, discriminatory, and unlawful because it was not less than 62½ percent of the actual value of the property in 1959 and all other tangible property in Nebraska was assessed at not to exceed 35 percent of the actual value thereof. Thirty-five percent of the actual value of the Nebraska property of appellant in 1959 did not exceed the sum of $3,722,170. The finding of appellee that the property of appellant in 1959 had an actual value of $15,047,540 was contrary to and was not sustained by the evidence. The 1959 assessment thereof was made by the use of erroneous and unlawful methods, formulas, and devices. The item or factor of "Investment in transportation property" used by appellee in computing the actual value of the property was erroneous and unlawful because it represents the estimated original cost as determined by the Interstate Commerce Commission as of June 30, 1917,

plus subsequent additions and betterments at cost, less retirements since that date without any allowance for depreciation on about $230 million or 40 percent of such investment at December 31, 1958, which is subject to wear and tear. The historical cost bears no relation to and is not legal evidence of the actual value of the property. The effect of the obsolescence of the branch lines of appellant which comprise a large portion of the railroad system of appellant in Nebraska and the development of other forms of transportation and the effect thereof on traffic carried and revenue earned by appellant in relation to the effect upon the value of the railroad property of appellant are not reflected or recognized in the investment account. This item or factor was first used by appellee in 1954 in deciding the actual value of railroad property for assessment purposes and its use has resulted in unreasonable and illegal discrimination in favor of all tangible property other than railroad property. The value of the property involved results from the use thereof by the public. The earnings produced by the use and the value of the property are measured and determined solely by the selling prices of its stocks and bonds and its earnings, and the net income should be capitalized at not less than 8 percent instead of 6 percent. Appellee in 1958 ascertained what it termed computed value which in fact was actual value of the property, deducted 5 percent from it, and purported to convert the remainder or 95 percent of the computed value into actual value of the property by multiplying it by 1.4286 as a conversion factor. The application of the conversion factor to a base of 95 percent of actual value instead of a base of 70 percent of actual value as applied to all other tangible property, resulted in the valuation of the property of appellant at 135.75 percent of actual value. The equalization by appellee of 35 percent of the purported actual value as determined by it resulted in a final assessment of the property of appellant at 47.5

percent of the actual value thereof while all other tangible property in the state was assessed at not to exceed 35 percent of its actual value. The major portion of the property of appellant in Nebraska, because of the lack of traffic density in the state, was below 500,000 net tons per mile of road which is indicative of economic obsolescence. As a result thereof, as compared to traffic handled in other states in which appellant operates, the use of all track miles as an allocation factor in computing and determining the actual value of the Nebraska property of appellant imports value into Nebraska which cannot be sustained by an equitable appraisal of the railroad property and results in an unjust, inequitable, and discriminatory assessment of the actual value of the property of appellant in Nebraska. The prayer of the complaint was that the 1959 assessment of the property be set aside and that it be valued and assessed for purposes of taxation at the same proportion of its actual value as all other tangible property was assessed in 1959 for taxation purposes but not in excess of $3,722,170.

A hearing was held by appellee on July 28, 1959, at which time additional evidence was introduced on behalf of appellant. Its complaint was that day denied and the original assessment of the property of appellant was affirmed by appellee. This appeal is a challenge of the legality of the recited actions of appellee.

The authority of this court in a proceeding of this character is by legislative mandate to hear and determine the matter in controversy de novo upon the record. § 77-617, R. R. S. 1943.

Appellee is charged with the obligation of assessing property of railroads and railroad corporations in the state except designated items outside of right-of-way and depot grounds. § 77-601, R. R. S. 1943. The Legislature has not defined any method by which railroad property in the state shall be valued for taxation by appellee. The Legislature has directed that specified

things shall be considered but it has not prescribed any definitive formula for ascertaining value. That is committed to the judgment and discretion of appellee to be exercised fairly within legal limitations and restrictions. Appellee may resort to any method by which a substantially just and correct determination of the value of such property can be reached if it includes consideration of the things which the statute requires.

This court in Chicago, R. I. & P. Ry. Co. v. State, 111 Neb. 362, 197 N. W. 114, remarked: "There are no settled or infallible rules for the ascertainment of the actual value of railroad property for the purpose of taxation. * * *." The opinion in that case states: "The subject of the valuation of railroads is a difficult one. Neither railroad commissioners, nor taxing authorities, nor courts have as yet arrived at settled or infallible rules or criteria for the ascertainment of actual value of such property."

In Great Northern Ry. Co. v. Weeks, 297 U. S. 135, 56 S. Ct. 426, 80 L. Ed. 532, it is said: "In determining the amount of the assessment the board was not bound by any formula, rule or method, but for guidance to right judgment it was free to consider all pertinent facts, estimates and forecasts and to give to them such weight as reasonably they might be deemed to have." See, also, State ex rel. Bee Building Co. v. Savage, 65 Neb. 714, 91 N. W. 716; Chicago, St. P., M. & O. Ry. Co. v. State Board of Equalization, 133 Neb. 640, 276 N. W. 391; Rowley v. Chicago & N. W. Ry. Co., 293 U. S. 102, 55 S. Ct. 55, 79 L. Ed. 222; Northern P. Ry. Co. v. State, 71 N. D. 93, 299 N. W. 696.

Appellee determined the actual value, referred to by it as system value, of the entire railroad property by a consideration of three factors: 5-year average value of stocks and bonds, 5-year average of net operating income capitalized at 6 percent, and investment in transportation property. Each factor was given equal weight and this resulted in an average value of the railroad

property of appellant of $224,506,367. It then decided the proportion or share of the system value that should be allocated to Nebraska on account of the part of the property of the appellant therein. This was determined by what appellee termed were allocation factors: Traffic units, gross earnings, car and locomotive miles, and current track mileage in Nebraska, compared with the same factors in other states where property of appellant was located. The component average of the four factors was 6.7025 percent. This, applied to the actual value of the operating property of the railroad as found by appellee of $224,506,367, resulted in $15,047,539. This was the actual value of the Nebraska property of appellant in 1959 subject to taxation as found by appellee but it did not take 35 percent thereof. Instead it reduced that amount by 5 percent to $14,295,162 and multiplied the remainder by 1.4286, thereby increasing the amount to $20,422,069, and labeled it actual value. Appellee then took 35 percent of that amount or $7,147,723, deducted the locally assessed property of $82,000, which resulted in $7,065,723, and that was the 1959 assessment of the property of appellant in Nebraska.

The assessment described above from which this appeal was taken is exhibited by the following:

I	SYSTEM VALUE	
	a. 5-year average net value stocks and bonds	$159,279,000
	b. 5-year net railroad operating income capitalized at 6%	28,474,000
	c. Investment in transportation property, ICC Report Page 200	485,766,102
		3)673,519,102
	Average System Value	$224,506,367
II	ALLOCATION FACTORS	
	Average 6.7025	

III ALLOCATION OF COMPUTED VALUE
$224,506,367 x 6.7025%=$15,047,539
IV ASSESSMENT
In 1957 and 1958 allocated value less 5%= basic value or 70% of actual value. Therefore the allocated computed value for 1959 less 5%=70% of actual value. $15,047,539 less 5%=$14,295,162. $14,295,162 x 1.4286=$20,422,069

$20,422,069	Actual Value
35%	Statutory Percent
$ 7,147,723	
82,000	Local Assessment
$ 7,065,723	State Board Assessment for 1959

The issue on this phase of the appeal is: Does the undisputed evidence establish that the actual value of the 1959 Nebraska property of appellant did not exceed $15,047,539 designated in the assessment order of appellee as allocation of computed value, and was the increase thereof by appellee to $20,422,069 arbitrary, discriminatory, and contrary to law?

The evidence was produced by or on behalf of appellant. There was no evidence by or on behalf of appellee. There is a presumption that when an assessing authority values property for taxation purposes it acts fairly and legally upon sufficient evidence to sustain its action but the presumption disappears if there is evidence to the contrary and thereafter the reasonableness and legality of the valuation made by the assessing authority is one of fact to be determined from the evidence, unaided by presumption, and the burden of showing an improper assessment is upon the complaining party. Baum Realty Co. v. Board of Equalization, 169 Neb. 682, 100 N. W. 2d 730; Omaha Paxton Hotel Co. v. Board of Equalization, 167 Neb. 231, 92 N. W. 2d 537; Ahern v. Board of Equalization, 160 Neb. 709, 71 N. W. 2d 307.

There is undisputed evidence of the actual value of the entire operating property of appellant in 1959 as established by the market value of its stocks and bonds, its capitalized earning power, and its investment in transportation property less depreciation. It is not true, as appellee asserts, that there is no proof by appellant that the actual value of the property is different from that determined by appellee. There is no proof or legal justification to sustain the increase of the 1959 actual value of the Nebraska property of appellant from $15,047,539 to $20,422,069 as was done by appellee as shown by section IV entitled "Assessment" of the order of appellee of July 15, 1959. The resort to the fiction of deducting 5 percent from the value of the Nebraska property and multiplying the remainder by the conversion factor of 1.4286 was induced by changes in the revenue statutes of the state. The 50 percent of full value law applied to all tangible property in 1953, 1954, and 1955. The 50 percent of basic value law governed assessment of tangible property in 1956 and 1957. The amendment requiring assessment of property of that kind to be valued at actual value and assessed at 35 percent thereof became effective September 20, 1957, and it applied to 1958 and 1959 assessments. § 77-201, R. S. Supp., 1953; § 77-201, R. S. Supp., 1955; § 77-201, R. S. Supp., 1957.

In each of the years 1953, 1954, and 1955 appellee found the value of the entire operating property of appellant by use of the identical three factors used for that purpose in 1959 and called it system value. It determined the value of the Nebraska property of appellant by allocating to it a percent of the system value by the same method it did in 1959; referred to the amount thereof in each of the years 1953 and 1955 as allocated value 100 percent and for the year 1954 as "allocated actual value" of the Nebraska property; and fixed the assessment for each of those years at 50 percent of that value. The record is definite that in

each of those years appellee determined the value of the property of appellant by the use of the same three factors or elements of value used by appellee in 1959 in arriving at what it called system value but which was the actual value of the property of appellant. This is true or appellee did not in any of those years find the actual value of the property as the statute required. There is no showing or explanation in the record of appellee why system value should mean actual value in those years but should not have that meaning in 1959.

Prior to the enactment of the 35 percent of the actual value assessment law all tangible property was valued at its basic value and assessed at 50 percent thereof and the ratio of basic value to actual value was by mandate of the Legislature fixed by appellee. It determined the basic value to be 70 percent of actual value and when the statutory assessment rate of 50 percent was applied, it resulted in a statutory level assessment of 35 percent if basic value had been properly determined in the first instance. The basic value law was amended effective September 20, 1957. The basic value element was eliminated and all tangible property not exempt from taxation was required to be valued at actual value and assessed at 35 percent thereof. §§ 77-112 and 77-201, R. R. S. 1943. Thereafter 100 percent of actual value of property which had been assessed at 70 percent could be, if its value had not changed, readily ascertained by multiplying the assessment of the previous year by the resultant of 100 divided by 70 or 1.4286.

The value of the railroad system of appellant for 1956 was ascertained by appellee as it had been in the previous years discussed above by the average of the identical three factors and the value of Nebraska property was determined by allocating the average of the four factors used in previous years or 6.705 percent. The value of the Nebraska property was thereby pro-

duced as $15,036,635 which appellee termed allocated value but which was no greater or different than but was in fact actual value. Instead of taking 70 percent of that amount in accordance with the resolution fixing the ratio of basic value to actual value, appellee declared the basic value of the Nebraska property of appellant to be $14,284,803 which was exactly 95 percent of the allocated value.

Appellee by the same items and procedure determined in 1957 what it stated was the system value of the property of appellant and allocated 6.683 percent thereof or $14,276,560 as the value of the Nebraska property which was no greater or different than but was in fact the actual value of the property. Appellee then stated the basic value was $13,562,730. That was 95 percent, not 70 percent, of $14,276,560 as the law required to arrive at basic value. The insertion in section IV of the 1958 assessment order of appellee of the Nebraska property of appellant of: "(1957 Computed value 5% = Basic Value)" is an admission of what is said above concerning the 1957 assessment. This is made certain by the immediately following item in the 1958 assessment order: "1958 Computed value 5% = $13,489,047" which is precisely 5 per cent less than the 1958 computed value of $14,198,997. The 1957 assessment of the Nebraska property of appellant was made on that erroneous basis. It is not important that appellee designated the $14,276,560 as allocated value because the factors used and the evidence definitely show it was actual value.

Appellee substantially concedes that basic value used in the 1956 and 1957 assessments was 95 percent of what was labeled by it as allocated value. It could not be otherwise because simple arithmetic demonstrates the factors employed in composing allocated value establish that it was actual value of the Nebraska property of appellant in each of those years. A consideration of market value of stocks and bonds, the earning power of the railroad, and the investment account less depre-

ciation evidences actual value. There was no attempt by appellee in either 1956 or 1957 to disclose by its assessment order or otherwise why it arbitrarily said basic value was 95 percent of what was obviously the actual value of the Nebraska property when basic value of all tangible property was established by the resolution of appellee at 70 percent of actual value. This omission was a disregard and violation of the statute which required that appellee in making an assessment of railroad property "shall set forth the manner in which it arrived at the assessment, the several items included in the total assessment and the manner of arriving at the several items and the total." § 77-609, R. R. S. 1943.

The value of the entire property of appellant in 1958 was determined by the average of the same factors as used in the previous years discussed above and 6.525 percent thereof was assigned by the method used in previous years to the Nebraska property. That resulted in the sum of $14,198,997, designated by appellee as allocation of computed value to Nebraska. That was the same character of finding arrived at by the same method as had been previously considered and treated as actual value of that property. Appellee reduced that amount by 5 percent, multiplied the remainder by 1.429, and produced $19,275,848 which was described as 1958 actual value. The statutory percentage of 35 percent was applied and it resulted in an assessment of $6,746,546. The day of this assessment appellee adopted a resolution which recited that the method of determining the actual value of tangible property for 1958 used by all county assessors is to convert basic value for 1957 to actual value by multiplying the basic value by 1.429. Ironically, appellee also recited in the resolution that it was "convinced that railroad property should be valued at 35% of actual value as is all other tangible property." Its expressed and recorded conviction was not enough to control its action because that identical day, as shown by the same resolution, appellee valued

and assessed the property of appellant in Nebraska at very much more than 35 percent of actual value resulting from the fact that the property had not been valued at 70 percent of actual value in 1957 but at 95 percent of actual value; and, notwithstanding this important fact, the conversion factor of 1.429 was applied to the value of the Nebraska property of appellant in 1958 as found by appellee to arrive at what it called actual value. The conversion factor of 1.429 had no relation to the situation presented by the 1958 assessment. Its use was arbitrary and it produced an equally arbitrary result.

The 1959 assessment of appellant was made by the same method as the 1958 assessment was accomplished. The identical factors were employed for finding system value and the same items were used to ascertain the percentage of the system value that should be assigned to Nebraska which was determined to be 6.7025 percent. It produced $15,047,539 and appellee reduced that amount by 5 percent and multiplied the remainder by 1.4286, 100 divided by 70 carried to the fourth decimal instead of 1.429 used by it in 1958. The result was $20,422,069. The statutory rate of 35 percent was applied to the last amount stated above and that produced, after deducting locally assessed property, an assessment of the Nebraska property of appellant of $7,065,723.

The authority and obligation of appellee were to assess the property of appellant on the same basis as other tangible property was required to be assessed. §§ 77-601 and 77-604, R. R. S. 1943. All tangible property was required to be valued at its actual value and to be assessed at 35 percent of such actual value. § 77-201, R. R. S. 1943.

The hypothesis and result of each part of section IV of the assessment order of 1959 made by appellee are incorrect factually and are contrary to law. The 1957 or 1958 allocated value less 5 percent did not equal basic value or 70 percent of actual value as that formula as-

sumed and stated. In making the 1957 assessment instead of appellee taking 70 percent of allocated value as basic value, it treated 95 percent of allocated value as basic value. That error resulted in overassessment, was repeated, and was given effect by appellee to the prejudice of appellant as hereinbefore noted in the assessment of 1958. The error of the first sentence inheres in each of the following parts of the formula.

There was no necessity of fact or jusification of law for the resort by appellee to a reduction of 5 percent of the amount of the valuation assigned by it in 1959 to Nebraska or for the use by it of the conversion factor in ascertaining the actual value of the property of appellant in Nebraska. The use of these was arbitrary and in violation of the statute defining actual value. The use of them disregarded the undisputed evidence that the actual value of the Nebraska property of appellant did not exceed $15,047,539, the amount of the allocation by appellee to Nebraska. Appellee found that the system value of appellant was $224,506,367. Included in this amount was every possible value of the railroad of appellant including its franchise or its right to exist. Appellee made no attempt to demonstrate that there was any omission of anything of value from the schedule of property of appellant furnished appellee in 1959. It was accepted, acted upon without objection, and everything therein was valued and included in what appellee termed system value in its assessment order. Appellee belatedly now says in this court that the statute requires it to assess railroad property "together with franchises"; that the record does not show that it made a separate valuation of franchises; and that it may be presumed it considered the element of franchise rights in arriving at actual value. This may be accepted if appellee means by actual value $15,047,539, the value assigned to Nebraska. Otherwise it is incorrect because franchise value was included in the assessment by use of the factors used by appellee to reach what it termed

system value. The following from State ex rel. Bee Building Co. v. Savage, *supra,* fully explains the matter of franchise value in making such an assessment: "Where the property of a railroad corporation is assessed by the state board of equalization as a unit, and in fixing the value thereof the board takes into consideration the fact that the property is being used for effectuating the objects of the corporation, is earning an income in the transportation of passengers and carrying of freight for hire, and that such corporation is exercising the rights, powers and privileges of corporations organized for the purpose of engaging in business as common carriers, such assessment, so made, would include and cover the intangible as well as the tangible property of the corporation, and would be an assessment of its franchise."

The system value fixed by appellee of $224,506,367 is and must be accepted as the 1959 actual value of the entire railroad property of appellant. Any contention otherwise is only a play on words without evidentiary integrity or legal justification. The practice by appellee of reducing the value assigned to appellant in Nebraska by 5 percent originated in 1957. It is not set out or expressed in the assessment order of that year except as it results from the finding that the Nebraska property had a certain value for that year and that the basic value thereof was exactly 5 percent less than the total value assigned to Nebraska. This practice reoccurred in 1958 and 1959. The deduction of 5 percent of the value assigned to Nebraska in each of those years was arbitrary and without reason therefor given in the respective orders of assessment of appellee. The reason suggested in this litigation by appellee that the allocated value was 5 percent more than basic value is not convincing. Appellee had fixed basic value at 70 percent of actual value of all tangible property for taxation purposes. The allocated value assigned to the Nebraska property was a finding of actual value of the property by all the applicable evidence in the record.

If it was not, then appellee did not in any of those years find what the actual value of the property was in which event it had no basis for finding the basic value of it. The indulgence of appellee making an unexplained 5 percent deduction from the value of the property to be assessed and resorting to an inappropriate and incorrect conversion factor when its primary inquiry mandated by the Legislature was to find actual value of the property to be assessed, was a resort to fictions. A fiction is not allowed to obscure the facts when the facts become important. The important facts which the fictions tended to obscure in 1958 and 1959 were that in 1956 and 1957 appellee took 95 percent of the actual value of the Nebraska property of appellant for basic value rather than 70 percent, which the law required, and based the assessment of the property thereon. Appellee then applied to the incorrect amounts found for those years a conversion factor in 1958 of 1.429 and in 1959 of 1.4286 which was in any event only permissible when the basic value of the property was fixed at 70 percent of actual value and thereby appellee added in 1959 more than $5 million to the actual value of the property of appellant in this state.

Appellee assigned 6.7025 percent of the total value of the railroad property in 1959 to the Nebraska property of appellant which was $15,047,539. That is the actual value of the property in 1959 concerned in this litigation and the duty of appellee was to assess it at 35 percent. Appellee destroyed any trace of reasonableness or realism by deducting 5 percent from that amount, multiplying the remainder by a conversion factor, and calling the result the actual value of the Nebraska property. The action of the appellee in inflating the value of the Nebraska property of appellant by the devices it used was arbitrary, unreasonable, and contrary to law.

The original assessment order of July 15, 1959, was adopted by only two members of the board voting for it. One member voted against it, one member ab-

stained from voting, and one member was absent. The use of the matter contained in section IV of the order of assessment was not a mistake, an inadvertence, or because of insufficient information. It was done advisedly and arbitrarily. The Tax Commissioner of the state advised against the use of it. He presented a proposed order of assessment wholly eliminating that formula. He advised that the facts and the law required a reduction in railroad valuations for assessment purposes. One of the members who voted for the assessment order said in a voluntary, formal statement he would never be a party to extending the type of relief suggested to any special interest at the unavoidable tax expense of Nebraska farmers, main street merchants, and homeowners. However, the same statement tacitly conceded that railroad property had been overassessed and this was illustrated by a reference to 1955 when, as asserted in the statement, the "valuation should have declined because of the change in base, it actually increased 5 million dollars." The other member who supported the 1959 assessment order said he opposed any concessions to any special interest group when the average taxpayer would have to make up the difference from his own pocket. Neither of these members mentioned anything specific concerning the value of the property to be assessed nor did they undertake to show where the judgment of the Tax Commissioner was wrong. The Tax Commissioner stated that appellee had no right to consider such an effect among taxpayers and that its only right and duty were to make an assessment of railroads at the same level as all other assessments. He appropriately said if appellee was to refuse to reduce values because other taxpayers will make up the difference, then no taxpayer, whatever his status or station, could ever get relief from unjust taxation. The observations in Cumberland Coal Co. v. Board of Revision of Tax Assessments, 284 U. S. 23, 52 S. Ct. 48, 76 L. Ed. 146, are appropriate: "The case is not one of mere

errors in judgment in following a proper method, * * * but one where the challenged discrimination resulted from a plan of assessment which was none the less systematic and intentional because of belief in its validity."

The method employed by appellee in assessing the property of appellant in Nebraska as exhibited by section IV of its assessment order of 1959 resulted in the assessment of the property at not less than 47½ percent of its actual value as found by appellee and described in its order as allocation of computed value. The facts of the assessment may be correctly and simply stated as follows:

Actual value	$15,047,539
Assessment	47.5009%
	$ 7,147,723
Less local assessment	82,000
	$ 7,065,723

All tangible property has since September 20, 1957, been required to be valued at its actual value and to be assessed at 35 percent of such actual value. § 77-201, R. R. S. 1943. The evidence establishes that all tangible property except railroad property was assessed at not more than 35 percent of its actual value. The Constitution provides that taxes shall be levied by valuation uniformly and proportionately upon all tangible property, subject to exceptions not important to this case. Art. VIII, § 1, Constitution of Nebraska.

Chicago, B. & Q. R. R. Co. v. State Board of Equalization & Assessment, *ante* p. 77, 101 N. W. 2d 856, is decisive of the conclusion that the 1959 assessment of the Nebraska property of appellant by use of the formula in section IV of the assessment order is arbitrary, discriminatory, and contrary to law. Therein it is said: "It was the duty of the State Board of Equalization and Assessment in 1959 to value railroad property in the state at its actual value and to assess

it at 35 percent thereof, and any substantial departure therefrom was a disregard of the legislative mandate and constituted an arbitrary valuation and assessment of the property. * * * A formula for determining the value of tangible property for taxation purposes must be appropriate to produce the result required by statute; and if an arbitrary basis is used which is not uniformly applied to all tangible property, the result is an arbitrary one and will not sustain a valuation for taxation purposes. * * * It is an unlawful discrimination, prohibited by the Constitution and the statutes of the state, to assess the property of a railroad at 47½ percent of its actual value when all other tangible property is assessed at not more than 35 percent of its actual value. * * * Taxing authorities may not withdraw any property from the principle of uniformity of taxation as provided by the Constitution and statutes of the state and one owner of property cannot be compelled to pay a greater proportion of taxes according to the value of his property than another property owner of the same class is required to pay."

The difference between not less than 47½ percent and 35 percent when applied to the large valuation involved in this case is not substantial or appropriate uniformity as contended by appellee and as required by the Constitution and the applicable statute of the state. Appellee applied the factor of 1.4286 to 95 percent of the actual value of the railroad property and to 70 percent of the actual value of other tangible property. The fact that a uniform percentage was used is not important. The discrimination between railroad property and other tangible property and the overvaluation of the former resulted from the deliberate act of appellee refusing to apply the conversion factor to the same basic valuation. As a result of such discrimination in the use of the conversion factor alone, apart from any other formula error, the property of appellant was assessed at not less than 47½ percent of its actual value and other tan-

gible property was assessed at not more than 35 percent of its actual value. The circumstances of this case as discussed in the foregoing characterize the assessment of the Nebraska property of appellant for 1959 as arbitrary, unreasonable, and discriminatory.

Appellant assigns error in the assessment because appellee used investment in transportation property as one factor in determining the value of the property of appellant in Nebraska in that it represents the original cost as decided by the Interstate Commerce Commission as of June 30, 1917, without any allowance for depreciation on about 40 percent of such investment at December 31, 1958, which is subject to wear and tear and it does not reflect the obsolescence inherent in the entire account due to the sharp decline in traffic carried and revenue earned by appellant.

The argument of appellant emphasizes in support of the assignment substantially the following matters: The record establishes a gross overvaluation of the property of appellant because appellee gave full weight to historical or investment cost without proper allowance for obsolescence and in the face of an extreme disparity between cost figures and commercial values as shown by the market value of its securities and its capitalized earnings. The three factors from which the system value of the railroad was determined were a 5-year average value of stocks and bonds, the capitalization at 6 percent of the average of net earnings during a 5-year period, and the investment in transportation property. The cost figure used by appellee was $485,766,102 which is three times that of the 5-year average of the stocks and bonds value of $159,279,000 and more than sixteen times greater than the 5-year average of net operating income capitalized at 6 percent amounting only to $28,474,083. The relationship of the cost factor to securities value and capitalized income is not as disproportionate to railroads generally as it is to appellant because of its greater degree of obsolescence experienced

by it. The use of the cost factor, without substantial debasement thereof for obsolescence, inherently discriminates in favor of railroads with a lesser degree of obsolescence and against railroads with a greater degree of obsolescence, of which appellant is a prime example. The traffic density for the year 1958 of appellant was less than 500,000 net revenue tons per mile of line, and this indicates a complete obsolescence of railroad properties according to the evidence. The evidence of the net return on investment for six standard railroads and appellant showed a return of less than 1 percent for appellant and an average of 6½ percent for the other six. The return on the investment of appellant was 81 percent below that of the other railroads. This indicates that it would be improper to use any cost figures in an inquiry concerning the value of the property of appellant without a debasement up to 80 percent of such figure. There was evidence, not contradicted, of the use of the property of appellant compared to six other standard railroads. Using five factors, it was disclosed that appellant was about 60 percent under that of all the other railroads. This would require at least a substantial debasement in arriving at the fair market value of the property. There is evidence that if cost is to be accorded any consideration in deciding market value, there should be a minimum of 60 percent for obsolescence. There is evidence, not disputed, that the use of investment cost to determine market value of the property of appellant was arbitrary and it should be given little if any weight without making a full and realistic allowance for obsolescence as established by the proof. It was shown that there was no net operating income from the property of appellant in Nebraska for 1958 but there was a loss of $1,377,629. This evidence of the condition of appellant so far as the Nebraska property is concerned clearly convinces, appellant asserts, that a different measuring rule or method must be used for appellant if market value of its operating

property in this state is to be established as the law requires. The cost of transportation property is relatively undesirable evidence of value for many railroads. Value looks to the future, being the present worth of future income expectations; while cost is based entirely on experience. Past investment has relevance in the determination of present worth only to the extent that it provides a clue to earning prospects. If the cost factor is not debased to reflect the degree of obsolescence, it being the impairment of the earning power of property, no clue is provided by such cost factor as to earning prospects.

A railroad operating in this state is required to make a comprehensive and detailed schedule of all its property each year on or before April 1 to appellee in conformity to the instructions and forms prescribed by it. The schedule must show the kind, extent, and value of the property of the railroad; its earnings and net income; the value of its stocks and bonds; the amount of its secured and unsecured indebtedness, except expenses of operations; the description and value of its physical property, real and otherwise; and other elaborate information relative to its property, operations, and condition. § 77-603, R. R. S. 1943. Appellee is required to consider the values given in the schedule in arriving at the true value of railroad property and its franchises. The schedule is not conclusive of the value of the property. Appellee from all information it can obtain must find the true value of the property and assess it on the same basis as all other property is required to be assessed. § 77-604, R. R. S. 1943. Appellee, commencing with the year 1953, found the system value of each railroad by consideration of the 5-year average value of stocks and bonds, a 5-year average of net operating income capitalized at 6 percent, and the investment account of the railroad showing the amount invested in transportation property as depreciated according to Interstate Commerce Commission regulations and addi-

tional deductions of 10 percent, 5 percent, and 5 percent.

The use of the investment account of appellant in the 1959 assessment is the basis of this challenge. It is quite immaterial in the consideration of this contention of appellant whether reference to the investment account is made as historical cost less depreciation or as reproduction cost less depreciation. The statute states that actual value of property for taxation shall mean the value that is ascertained by using, as far as applicable, a designated formula including "reproduction cost less depreciation." § 77-112, R. R. S. 1943. The reproduction cost less depreciation as the statute states or historical cost less depreciation as it is sometimes expressed has frequently been considered and approved by the courts as a permissible factor in conjunction with other factors in determining the actual value of the property of a railroad company.

State ex rel. Bee Building Co. v. Savage, *supra,* states: "As to just what will determine the value of the entire railroad property, a part of which is to be assessed in any one state or taxing jurisdiction, the courts themselves are not in entire accord. There are, doubtless, many elements and factors which conduce to a correct determination of the true value, and may properly be considered, which have received the approval of the courts generally. * * * Whether it be for the purpose of fixing reasonable rates for the transportation of passengers and carrying of freight, or for the purpose of taxation, the rule to be applied in ascertaining the value of the property should be the same. * * * In the case of Smyth v. Ames, 169 U. S., 466, 546, * * * Mr. Justice Harlan, who wrote the opinion of the court, says with reference to the reasonableness of rates to be charged * * *, that the basis of all calculations 'must be the fair value of the property being used by it for the convenience of the public. And in order to ascertain that value, the original cost of construction, the amount expended in permanent improvements, the amount and market

value of its bonds and stocks, the present as compared with the original cost of construction, the probable earning capacity of the property * * *, and the sum required to meet operating expenses, are all matters for consideration, and are to be given such weight as may be just and right in each case. We do not say that there may not be other matters to be regarded in estimating the value of the property.' "

It is said in Chicago, St. P., M. & O. Ry. Co. v. State Board of Equalization, *supra:* "There are various standard methods of valuation of railroads for taxation purposes. For examples: The ad valorem method, by which the property is appraised the same as other property in the state; the capitalized income method, under which the net income is ascertained and the amount thus derived is capitalized at some fair rate of return; and the stock and bonds method, by which the value of the stocks, bonds and other outstanding indebtedness is considered with other property values with a view of arriving at a market value. These are not all the methods, but they suffice to show at a glance some of the more customary methods of valuation."

In Chicago & N. W. Ry. Co. v. Department of Revenue, 6 Ill. 2d 278, 128 N. E. 2d 722, the court said: "Throughout its brief plaintiff refers to capitalized earnings and market value of securities as the 'statutory standards,' and appears to argue that the statute does not permit consideration of reproduction cost in determining the assessed value of railway properties. * * * The physical value of property, shown either by reproduction cost or historical cost, has been held to be an important factor in fixing values for taxation purposes. * * * In our opinion the authorities do not warrant ignoring the physical value of railroad property in determining its assessed value under ordinary circumstances, nor do they indicate that an undue weight was given to that factor in this case. The two factors pressed upon us by plaintiff are not without deficiencies as yardsticks of

value. In the case of ordinary property, the income which a particular owner is able to realize from it is not considered relevant in determining value. * * * It is admissible here not because of its intrinsic reliability, but by necessity. Nor is it realistic to regard as conclusive the values which the securities market indicates. Many factors, unrelated to the values of particular property, may play a part in determining the price of securities."

St. Louis-S. F. Ry. Co. v. Arkansas Public Service Commission, 227 Ark. 1066, 304 S. W. 2d 297, contains the following: "Is this method—of cost value, capitalized earnings value, and stock and debt value—a fair 'yardstick' to determine the system value of Frisco's property? Frisco claims that the cost value is overweighted and that it should be given little, if any consideration * * *. We hold that the 'yardstick' used by the Commission in determining the system value of Frisco in this case is fair and not arbitrary. It is undenied that such a 'yardstick' has been used by the Commission heretofore, and that such a 'yardstick' is used in other states. One such case is that of Chicago & Northwestern Ry. Co. v. Department of Revenues, 6 Ill. 2d 278, 128 N. E. 2d 722 * * *. This is not the only 'yardstick' that could be used, but it is fair and equitable."

Kansas City So. Ry. Co. v. Arkansas Commerce Commission, —— Ark. ——, 323 S. W. 2d 193, states: "The Railroad contends that 25% should be deducted from the RCN-D value because of functional and economic obsolescence. * * * Undoubtedly functional and economic obsolescence is reflected in both the stock-plus-funded-debt method and the capitalized earnings method of valuation. In both of these methods the Railroad received the benefit of both functional and economic obsolescence. * * * And in Bailey v. Megan, 8 Cir., 102 F. 2d 651, 655, it is said: 'A computation of system value based upon average market price of stocks and bonds

and a computation based upon a capitalization of net earnings reflect the effect, upon actual value, of obsolescence, of the competition of other means of transportation, and of all factors affecting earnings.' "

People ex rel. McDonough v. Grand Trunk Western R. R. Co., 357 Ill. 493, 192 N. E. 645, declares: "The factors of reproduction costs and historical cost, or original cost plus the cost of betterments, are important factors to be considered, although not necessarily controlling, in determining the fair cash market value of railroad property."

In Northern P. Ry. Co. v. State, 71 N. D. 93, 299 N. W. 696, the court said: "The members of the Board were justified, and it was their duty, to take into consideration all facts which go to make up the actual value of the railroad property in this state. The stock and bond method and the capitalization of earnings and a composite of these methods based upon a period of time likely to reflect the market value of the property, were doubtless proper matters to be considered by the Board; but the Board was not restricted to these. The value of the physical elements, the cost of construction and of replacement, the present and prospective earning capacity at rates that are reasonable * * * were also matters that the State Board of Equalization properly might consider, giving such weight to the different facts as in their judgment, fairly and honestly exercised, they deemed them to be entitled to receive."

In Fargo v. Hart, 193 U. S. 490, 24 S. Ct. 498, 48 L. Ed. 761, it is said: "On the other hand, it (the state) can tax property permanently within its jurisdiction although belonging to persons domiciled elsewhere and used in commerce among the States. And when that property is part of a system and has its actual uses only in connection with other parts of the system, that fact may be considered by the State in taxing, even though the other parts of the system are outside of the State. The sleepers and rails of a railroad * * * are worth more

than the prepared wood and the bars of steel or coils of wire, from their organic connection with other rails or wires and the rest of the apparatus of a working whole. This being clear, it is held reasonable and constitutional to get at the worth of such a line in the absence of anything more special, by a mileage proportion. The tax is a tax on property, not on the privilege of doing the business, but it is intended to reach the intangible value due to what we have called the organic relation of the property in the State to the whole system."

In Harris Trust & Savings Bank v. Earl, 26 F. 2d 617, it was contended that valuation of railroad property for taxation should be determined, if not altogether at least most largely, from a consideration of the earning capacity of the property. The court said: "But it is not the law that the valuation of railroad or other property for taxation purposes is to be determined from any single factor. As bearing upon the proper result, many facts have evidential value. Certainly, among others, are to be considered original cost, cost of reproduction less depreciation, bonded indebtedness, current market value of stock and bonds, and earning capacity. Of these the two last named are of the greatest significance. * * * Even if it be conceded that a close and scientific inquiry demonstrates that during a period of two years (1924 and 1925) earnings disappeared entirely * * * that fact by itself does not make the valuations fixed unquestionably and beyond all bounds excessive * * *."

City of Jersey City v. State Department of Taxation, 136 N. J. L. 353, 56 A. 2d 479, asserts: "Furthermore, the failure to operate at a profit is not in and of itself conclusive evidence that the assessment of its property is unreasonable, nor does it operate to relieve the railroad from paying its proportion of the public tax burden."

Appellant refers to the statements in Chicago & N. W. Ry. Co. v. Eveland, 13 F. 2d 442, that: "* * * the

net earnings of the property and the market value of its stocks and bonds for a reasonable period antecedent to the making of the assessment constitute the most reliable and influential evidence of that value," and "In determining the value of the property of a railway company * * * the value of the use of such property * * * and its net revenue from such use, and * * *the current market value of its stocks and bonds are among the most persuasive and authoritative—far more so than the cost of the property or the cost of its reproduction new in cases in which the property is in operation and has been for many years" in support of its contention that the historical cost as depreciated was given too much weight in the assessment and its conclusion that the court in that case rejected the doctrine that costs should be taken into consideration in deciding the value of railroad property. The court which decided that case said concerning it in the later case of Harris Trust & Savings Bank v. Earl, *supra:* "The case cited (13 F. 2d 442) by no means holds that earning capacity is completely to overshadow other factors. Indeed, in that very case other factors were given such consideration as that a $29,000,000 valuation was inferentially held fair on railroad property producing substantially no net earnings whatsoever."

Bailey v. Megan, 102 F. 2d 651, is urged as an authority for rejecting a valuation based on costs. That litigation concerned the valuation of the property of appellant in the State of South Dakota for the year 1935 and considered a special and unfortunate situation of such gravity that the railway company was involved in a bankruptcy proceeding. The case was brought and prosecuted by the trustee for the property of the railway company. However, the court, notwithstanding the unfavorable condition of the railway company, its property, and its earnings, sustained an assessment of the property in South Dakota to the extent of 65 percent of it in an amount in excess of $15 million. The method

used by the taxing authorities in deciding the 1935 value of the property was not disclosed. The court in that case made this significant statement: "A computation of system value based upon average market price of stocks and bonds and a computation based upon a capitalization of net earnings reflect the effect, upon actual value, of obsolescence, of the competition of other means of transportation, and of all factors affecting earnings * * *."

Appellant includes in its argument a quote from the opinion in State Railroad Tax Cases, 92 U. S. 575, 23 L. Ed. 663, to the effect: "* * * that, when you have ascertained the current cash value of the whole funded debt, and the current cash value of the entire number of shares, you have * * * ascertained the true value of the road, all its property, its capital stock, and its franchises * * *." That case concerned the valuation of three railroad properties in Illinois. The court recited that the capital stock of one of the carriers was sunk, was of no value, and that its funded debt had no present market value. It was argued that the meager earnings and low market value of the securities of the railroad company were conclusive as to the valuation of the property. The opinion in that case contains the quotation from it by appellant but immediately following that language appears this important statement: "This would of itself be, perhaps, the fairest basis of taxation for the State at large, if all railroads were solvent and paid the interest promptly on their funded debt. * * * If taxes were assessable alone on the value of the capital stock and franchises of the corporation, cases might be found where these were worth nothing, and such companies would pay no tax even for their real estate and personal property. And this is precisely the main argument of counsel for the Toledo, Peoria, and Warsaw Railroad Company, in opposition to the law and to the rule of the board of equalization. But individuals do not escape taxation on their real and personal property

because they are insolvent. * * * No State has ventured to establish the principle of permitting its visible, tangible property to escape taxation, relying solely on a tax imposed on the individual on the basis of his estimated wealth in excess of his debts."

This case does not present a situation in which depreciated historical cost was considered by itself as a measure or element of true value of railroad property. Average value for a 5-year period of securities of appellant, capitalized average net income for a like period, and depreciated historical cost were considered together in reaching a conclusion as to system value. All railroads operating in the state were subjected to the identical items and method. The use of a cost factor in conjunction with appropriate additonal factors in ascertaining value of railroad property for taxation purposes has been generally sustained by the courts. The authorities are substantially in agreement that it is not ordinarily unreasonable, arbitrary, or contrary to law for an assessing authority to use and consider depreciated historical cost in connection with other recognized and approved factors in determining the value of railroad property. The assignment of appellant in this respect cannot be sustained.

Appellant assails the 1959 assessment of its Nebraska property because appellee in finding the value to be taxed in Nebraska used as one of the allocation factors current track mileage, meaning the proportion of the mileage in Nebraska to the entire mileage of the system. The basis of the objection is that the proof establishes that the part of the railroad in Nebraska is inferior to and much less valuable than the parts of it in other states; that an apportionment of values on a mileage basis is because thereof arbitrary and unreasonable; and that it results in bringing into this state a value located in other states. The mileage factor was not the only one employed in the 1959 allocation. The proportion of the system value assigned to this state was the percent-

ages that the Nebraska traffic units, 4.87 percent; gross earnings, 5.28 percent; car and engine mileage, 6.23 percent; and current track mileage, 10.43 percent, bore to the system total. These, except the last, would reflect obsolescence affecting appellant.

Rowley v. Chicago & N. W. Ry Co., *supra,* considered an issue concerning the amount of system value of an interstate railway that should be assigned to the State of Wyoming. The assessing authority had utilized four factors in making the allocation in question. The court said in sustaining the value assigned to the State of Wyoming the following: "Where, as in this case, the evidence requires a finding that the railroad in one of the States reached by the system is clearly shown to be worth much less than the average value per mile of the system, an apportionment on mileage necessarily assigns an excessive amount to that State, and the use of that basis as the sole measure for apportionment must be condemned as arbitrary. * * * In arriving at the relation between value in Wyoming and system value, the State board did not confine its calculations to relative mileage. That percentage combined with the other ratios used in the calculation produced 2.1% finally adopted. * * * We find no substantial support in the findings of the district court or in the evidence for the conclusion that the use that the state board made of relative mileage to ascertain the value of respondent's Wyoming railroad property was arbitrary or unreasonable * * *."

In Pleasant v. Missouri-K.-T. R. R. Co., 66 F. 2d 842, the court said: "That state Tax Commission, in determining percentage of value of interstate railroad system allocable to intrastate property, considered, besides main track mileage, factors reflecting use and usefulness of railroad property within state, held not to render commission's method fundamentally erroneous." In the opinion it is said: "In making this allocation the evidence is that the Commission viewed the property

in Kansas, and considered the main track mileage, the all-track mileage, the gross earnings, car and locomotive mileage, and traffic units, of Kansas as compared with the system * * *. In the Norfolk and Western R. Co. case, *supra* (3 F. Supp. 791), the Commission used the same factors used by the Commission here, and that court held that 'We do not see how a fairer method could have been used.' * * * In Louisville & Nashville R. Co. v. Greene, 244 U. S. 522, 543, 37 S. Ct. 683, 61 L. Ed. 1291, Ann. Cas. 1917E, 97, it was held that a statute requiring the Tax Commission to consider track mileage in allocation did not prohibit it from also considering gross revenues. Without attempting to exhaust the authorities, it seems clear to us that a railroad carrying a large volume of traffic is of more value than one with little traffic; that such useful value should be considered; that in order to consider it, resort must be had to those facts which reflect use—gross earnings, traffic units, or train miles—or some of them."

In Cleveland, C. C. & St. L. Ry. Co. v. Backus, 154 U. S. 439, 14 S. Ct. 1122, 38 L. Ed. 1041, the court said: "If an assessing board, seeking to assess for purposes of taxation a part of a railroad within a State, the other part of which is in an adjoining State, ascertains the value of the whole line as a single property and then determines the value of that within the State, upon the mileage basis, that is not a valuation of property outside of the State; and the assessing board, in order to keep within the limits of state jurisdiction, need not treat the part of the road within the State as an independent line, disconnected from the part without, and place upon that property only the value which can be given to it if operated separately from the balance of the road."

Bailey v. Megan, *supra,* states: "It is very apparent from the cases of Rowley v. Chicago & Northwestern Railway Co., 293 U. S. 102, 55 S. Ct. 55, 79 L. Ed. 222, and Great Northern Railway Co. v. Weeks, 297 U. S. 135, 56 S. Ct. 426, 80 L. Ed. 532, that there can be no

definite rule established by the courts for the ascertainment of the maximum allocation factor which may be used by state authorities in apportioning the value of a railroad system."

It is contended by appellant that in deciding system value by the use of factors, one of which was the capitalization of net income, appellee should have used a rate of at least 8 percent. This is not supported by judicial determination.

In Chicago, R. I. & P. Ry. Co. v. State, *supra,* this court said: "Again, the net railway operating income for 1922 is in evidence. The value of the property may in one sense be considered to be the amount of capital investment which will produce that amount of income at the rate of 5¾ per cent. per annum, which is considered by the interstate commerce commission to be a fair rate of return on such an investment, or at 6 per cent. which we consider to be a fair rate."

St. Louis-S. F. Ry. Co. v. Arkansas Public Service Commission, *supra,* declares: "The use of 6% by which to capitalize earnings value of railroad held neither arbitrary nor confiscatory."

In the recent case of Kansas City So. Ry. Co. v. Arkansas Commerce Commission, *supra,* the court said: "Appellant next argues that 5.75% should not be used as a capitalization rate. In the Frisco case, a 6% capitalization rate was approved, and this was before taxes. Here, the 5.75% rate is after taxes. If 6% before taxes was reasonable in the Frisco case, certainly it cannot be said that in the case at bar 5.75% after taxes is not justified."

Pleasant v. Missouri-K.-T. R. R. Co., *supra,* says on this subject: "The Commission capitalized the net revenues furnished to it by the company on a 6 per cent. basis. The master used 7 per cent. Both percentages are in the zone of reason * * *. Six per cent. is the rate of interest on judgments in Kansas; it is considered a good return on non-speculative investments * * *."

See, also, Chicago & N. W. Ry. Co. v. Department of Revenue, *supra;* Louisville & Nashville R. R. Co. v. Greene, 244 U. S. 522, 37 S. Ct. 683, 61 L. Ed. 1291, Ann. Cas. 1917E 97.

The findings of appellee in sections I, II, and III of its assessment order of July 15, 1959, concerning the property of appellant are correct and are adopted by this court.

The assessment of the 1959 property of appellant in Nebraska as contained in section IV of the assessment order of appellee of July 15, 1959, should be and it is hereby reversed.

It should be and is adjudged that the actual value of the property of appellant for 1959 in Nebraska is the sum of $15,047,539; that from 35 percent thereof or $5,-266,638 there should be deducted the value of the locally assessed property of appellant the sum of $82,000; and that the 1959 assessment of the property of appellant in Nebraska should be and is $5,184,638.

ORDER REVERSED. JUDGMENT OF ASSESSMENT RENDERED.

IN RE ASSESSMENT AND VALUATION OF UNION PACIFIC RAILROAD COMPANY.

UNION PACIFIC RAILROAD COMPANY, APPELLANT, V. STATE BOARD OF EQUALIZATION AND ASSESSMENT OF THE STATE OF NEBRASKA, APPELLEE.

101 N. W. 2d 892

Filed March 18, 1960. No. 34715.

1. **Taxation: Appeal and Error.** An appeal from an assessment of railroad property by the State Board of Equalization and Assessment is required to be considered and decided de novo on the record presented to this court.
2. **Taxation: Railroads.** The Legislature has not defined a specific method by which railroad property in the state shall be valued for taxation by the State Board of Equalization and Assessment

and it may, within legal limitations and restrictions, resort to any appropriate method by which a reasonable and just determination of actual value of such property can be ascertained.

3. **Taxation: Trial.** Generally, there is a presumption that when an assessing authority values property for taxation purposes it acts fairly and according to law upon sufficient evidence to sustain its conclusion but the presumption disappears if there is evidence to the contrary and thereafter the reasonableness and legality of the valuation made by the assessing authority is one of fact to be decided from evidence, unaided by presumption, and the burden of establishing an illegal assessment is upon the complaining party.
4. **Taxation: Railroads.** It was the duty of the State Board of Equalization and Assessment in 1959 to value railroad property in the state at its actual value and to assess it at 35 percent thereof, and any substantial departure therefrom was a disregard of the legislative mandate and constituted an arbitrary valuation and assessment of the property.
5. **Taxation.** A formula for determining the value of tangible property for taxation purposes must be appropriate to produce the result required by statute; and if an arbitrary basis is used which is not uniformly applied to all tangible property, the result is an arbitrary one and will not sustain a valuation for taxation purposes.
6. **Taxation: Railroads.** It is an unlawful discrimination, prohibited by the Constitution and the statutes of the state, to assess the property of a railroad at 47½ percent of its actual value when all other tangible property is assessed at not more than 35 percent of its actual value.
7. **Taxation: Constitutional Law.** Taxing authorities may not withdraw any property from the principle of uniformity of taxation as provided by the Constitution and statutes of the state and one owner of property cannot be compelled to pay a greater proportion of taxes according to the value of his property than another property owner of the same class is required to pay.

APPEAL from the State Board of Equalization and Assessment. *Order reversed. Judgment of assessment rendered.*

F. J. Melia, James H. Anderson, and *George C. Holdrege,* for appellant.

Clarence S. Beck, Attorney General, and *Homer G. Hamilton,* for appellee.

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

BOSLAUGH, J.

This controversy concerns the assessment of the property of appellant in Nebraska by appellee for the purpose of all ad valorem taxes, except municipal taxes, for the year 1959. Appellant made a return or schedule of its property as of March 31, 1959, to appellee in all respects as required by the statute. § 77-603, R. R. S. 1943. Appellant appeared at a hearing before appellee on May 4, 1959, and evidence was produced relative to the value of its property. Appellee on July 15, 1959, found and determined that the actual value of the property of appellant in Nebraska subject to assessment for taxation purposes by appellee was $210,597,729 and it assessed the property, after deducting locally assessed property, at the sum of $70,015,144.

The complaint of appellant concerning the assessment made by appellee, in substance, alleged, in the respects necessary to be noted here, the following: The assessment was discriminatory, unreasonable, and unlawful. It was not based upon a valuation and assessment of 35 percent of actual value as provided by law but the assessment was not less than 47½ percent while all other tangible property subject to taxation in Nebraska, except railroad property, was assessed and taxed for 1959 at not to exceed 35 percent of its actual value. The basic value statute was amended in 1957 to provide that all tangible and real property in Nebraska should be valued at its actual value and should be assessed at 35 percent of such actual value. It was not available for taxation until 1958. In that year appellee resorted to the device of using a multiplying or conversion factor of 1.42, the use of which was erroneous and resulted in an assessment of appellant's property in the amount of not less than 47 percent of actual value. In 1959 appellee by use of such conversion factor assessed

the property of appellant in Nebraska at not less than 47½ percent of actual value; and because all other property than railroad property subject to assessment by appellee in 1959 was taxed at not to exceed 35 percent of actual value, the action of appellee in assessing the property of appellant resulted in an unjust, unlawful, and discriminatory taxation in violation of Article VIII, section 1, of the Constitution of Nebraska; it was a violation of the statute of Nebraska requiring all tangible and real property to be valued at 100 percent of its actual value and assessed at 35 percent of such value; and it violated the statute which provides that railroad property shall be assessed on the same basis as all other property. The actual value of the property of appellant in Nebraska within the jurisdiction of appellee for assessment in the year 1959 was not in excess of $155,174,172 which at 35 percent thereof, after deducting locally assessed property found by appellee to be properly deductible, would have produced a lawfully assessed value of not to exceed $50,616,899. The prayer of the complaint was that the assessment made by appellee in the amount of $70,015,144 be set aside and that appellee find and determine the assessed value of the property of appellant in Nebraska to be the sum of $50,616,899.

A hearing was held by appellee on July 28, 1959, at which time additional evidence was introduced on behalf of appellant. Its complaint was that day denied and the original assessment of the property of appellant was affirmed by appellee. This appeal is a challenge of the legality of the recited actions of appellee.

The authority of this court in a proceeding of this character is by legislative mandate to hear and determine the matter in controversy de novo upon the record. § 77-617, R. R. S. 1943.

Appellee is charged with the obligation of assessing property of railroads and railroad corporations in the state except designated items outside of right-of-way

and depot grounds. § 77-601, R. R. S. 1943. The Legislature has not defined any method by which railroad property in the state shall be valued for taxation by appellee. The Legislature has directed that specified things shall be considered but it has not prescribed any definitive formula for ascertaining value. That is committed to the judgment and discretion of appellee to be exercised fairly within legal limitations and restrictions. Appellee may resort to any method by which a substantially just and correct determination of the value of such property can be reached if it includes consideration of the things which the statute requires.

This court in Chicago, R. I. & P. Ry. Co. v. State, 111 Neb. 362, 197 N. W. 114, remarked: "There are no settled or infallible rules for the ascertainment of the actual value of railroad property for the purpose of taxation. * * *" The opinion in that case states: "The subject of the valuation of railroads is a difficult one. Neither railroad commissioners, nor taxing authorities, nor courts have as yet arrived at settled or infallible rules or criteria for the ascertainment of actual value of such property."

In Great Northern Ry. Co. v. Weeks, 297 U. S. 135, 56 S. Ct. 426, 80 L. Ed. 532, it is said: "In determining the amount of the assessment the board was not bound by any formula, rule or method, but for guidance to right judgment it was free to consider all pertinent facts, estimates and forecasts and to give to them such weight as reasonably they might be deemed to have." See, also, State ex rel. Bee Building Co. v. Savage, 65 Neb. 714, 91 N. W. 716; Chicago, St. P., M. & O. Ry. Co. v. State Board of Equalization, 133 Neb. 640, 276 N. W. 391; Rowley v. Chicago & N. W. Ry. Co., 293 U. S. 102, 55 S. Ct. 55, 79 L. Ed. 222; Northern P. Ry. Co. v. State, 71 N. D. 93, 299 N. W. 696.

Appellant does not in this case contest the method adopted by appellee for ascertaining the 1959 value of the total operating property of appellant, that is $706,-

621,911 or the value of the part thereof in this state which is $155,174,171 as shown by sections I, II, and III of the assessment order of appellee. Appellant does contest the validity and legality of the increase of the last amount stated above to $210,597,729 by the method and process recited in section IV of the 1959 assessment order of appellee.

Appellee determined the actual value, referred to by it as system value, of the railroad property of appellant by a consideration of three factors: 5-year, 1954-1958, average value of the stocks and bonds; 5-year, 1954-1958, average of net operating income capitalized at 6 percent; and investment in transportation property less recorded depreciation. Each factor was given equal weight and this resulted in an average value of the railroad property of appellant of $706,621,911. This was the actual value of the railroad of appellant as determined by appellee. Appellee then decided the proportion or share of this value that should be allocated to Nebraska because of the part of the property of appellant therein. This was determined by a consideration of four factors referred to by appellee as allocation factors: Traffic units, gross earnings, car and locomotive miles, and current track mileage in Nebraska compared with the same factors in other states where the property of appellant is located. The component average of the four factors was 21.96 percent. This, applied to the actual value of the railroad as found by appellee of $706,621,911, produced $155,174,171. This was the actual value of the Nebraska property of appellant in 1959 subject to taxation as determined by appellee but it did not take 35 percent thereof. Instead it reduced that amount by 5 percent or to $147,415,462 and multiplied that figure by 1.4286 thereby increasing the amount to $210,597,729 and labeled it actual value. Appellee then took 35 percent of that amount or $73,709,205, deducted the amount of the locally assessed property as found by appellee of $3,694,061, which re-

sulted in $70,015,144, and that was made by appellee the 1959 assessment of the property of appellant in Nebraska.

The assessment described above from which this appeal was taken is exhibited by the following:

I SYSTEM VALUE

a. 5-year average value stocks and bonds

1954	$ 603,355,083		
1955	672,344,689		
1956	608,351,744		
1957	410,040,320		
1958	467,935,345		
	5)2,762,027,181	Average	$552,405,436

b. 5-year average net operating income capitalized at 6 percent

1954	29,561,550	
1955	43,739,492	
1956	42,137,162	
1957	38,818,024	
1958	43,461,084	
	5)197,717,312	
	.06) 39,543,462	659,057,700

c. Investment in transportation property ICC Report page 200, line 16, less 5%, less 5%, less 5% 908,402,598

Average System Value $706,621,911

II ALLOCATION FACTORS

Traffic units	24.05%
Gross earnings	23.54%
Car and locomotive miles	25.23%
Current track mileage	15.02%
Average	21.96%

III ALLOCATION TO NEBRASKA
$706,621,911 × 21.96% = $155,174,171

IV ASSESSMENT
In 1957 and 1958 the allocated computed value less 5% = Basic Value or 70% of actual value.
Therefore the allocated computed value in 1959 less 5% = 70% of actual value
$155,174,171 less 5% = $147,415,462
$147,415,462 × 1.4286 = 210,597,729 Actual Value
35% Statutory %

	$ 73,709,205
Local assessment	3,694,061
State Board Assessment for 1959	$ 70,015,144

Appellant exhibited in the return or schedule of its property for 1959 furnished to appellee various bases for the valuation of the property of appellant on the unitary theory and various bases for allocation to Nebraska for its share of the total valuation. Likewise the basic figures forming the value of the entire property of appellant are shown by that return or schedule. The order of appellee in its procedure to value the property as shown by section I a, b, and c of the assessment order of July 15, 1959, adopted the highest figure set forth in the return or schedule of appellant for that year.

The issue on this appeal is: Does the undisputed evidence establish $155,174,171, designated in the assessment order of appellee as allocation to Nebraska, as the actual value in 1959 of the property of appellant in Nebraska and was the increase thereof by appellee to $210,597,729 arbitrary, discriminatory, and contrary to law?

The evidence in this case was introduced in the record on behalf of or by appellant. There was no evidence offered by or on behalf of appellee. There is a

presumption that when an assessing authority values property for taxation purposes it acts fairly and legally upon sufficient evidence to sustain its action but the presumption disappears if there is evidence to the contrary and thereafter the reasonableness and legality of the valuation made by the assessing authority is one of fact to be determined from evidence, unaided by presumption, and the burden of showing an improper assessment is upon the complaining party. Baum Realty Co. v. Board of Equalization, 169 Neb. 682, 100 N. W. 2d 730; Omaha Paxton Hotel Co. v. Board of Equalization, 167 Neb. 231, 92 N. W. 2d 537; Ahern v. Board of Equalization, 160 Neb. 709, 71 N. W. 2d 307.

There is undisputed evidence of the actual value of the entire operating property of appellant in 1959 as established by the market value of its stocks and bonds, its capitalized earning power, its investment in transportation property less depreciation, and by the testimony produced by appellant to that effect. It is not true, as appellee asserts, that there is no proof by appellant that the actual value of the property is different from that determined by appellee. There is no proof or legal justification to sustain the increase of the 1959 actual value of the Nebraska property of appellant from $155,174,171 to $210,597,729 as was done by appellee as shown by section IV entitled "Assessment" of the order of appellee of July 15, 1959. The resort to fiction of deducting 5 percent from the value of the Nebraska property and multiplying the remainder by the conversion factor of 1.4286 was induced by changes in the revenue statutes of the state. The 50 percent of full value law applied to all tangible property in 1953, 1954, and 1955. The 50 percent of basic value law governed assessment of tangible property in 1956 and 1957. The amendment requiring assessment of property of that kind to be valued at actual value and assessed at 35 percent thereof became effective September 20, 1957, and it applied to 1958 and 1959 assessments. § 77-201,

R. S. Supp., 1953; § 77-201, R. S. Supp., 1955; § 77-201, R. S. Supp., 1957.

In each of the years 1953, 1954, and 1955 appellee found the value of the entire operating property of appellant, hereafter referred to as property of appellant, by use of the identical three factors used for that purpose in 1959 and called it system value. It determined the value of the Nebraska property of appellant by allocating to it a percent of the system value by the same method it did in 1959; referred to the amount thereof as the allocated actual value, 100 percent, of the Nebraska property; and fixed the assessment for each of those years at 50 percent of that value. The record is definite that in each of those years appellee determined the actual value of the property of appellant by use of the same three factors or elements of value used by appellee in 1959 in arriving at what it labeled system value but which was the actual value of the property of appellant. This is true or appellee did not in any of those years find the actual value of the property as the statute required. There is no showing or explanation in the record of appellee why system value should mean actual value in those years but should not have that meaning in 1959.

Prior to the enactment of the 35 percent of actual value assessment law all tangible property was valued at its basic value and assessed at 50 percent thereof, and the ratio of basic value to actual value was by mandate of the Legislature fixed by appellee. It determined the basic value to be 70 percent of actual value and when the statutory assessment rate of 50 percent was applied, it resulted in a statutory level assessment of 35 percent if basic value had been properly determined in the first instance. The basic value law was amended effective September 20, 1957. The basic value element was eliminated and all tangible property not exempt from taxation was required to be valued at actual value and assessed at 35 percent thereof. §§ 77-112 and 77-201,

R. R. S. 1943. Thereafter 100 percent of actual value of property which had been assessed at 70 percent could be, if its value had not changed, readily ascertained by multiplying the assessment of the previous year by the resultant of 100 divided by 70 or 1.4286.

The value of the railroad system of appellant for 1956 was ascertained by appellee as it had been in the previous years discussed above by the average of the identical three factors and the value of the Nebraska property was determined by allocating the average of the four factors used in previous years or 22.04 percent. The value of the Nebraska property was thereby produced as $151,909,288 which appellee termed allocated value which was no greater or different than but was in fact actual value. Instead of taking 70 percent of that amount in accordance with the resolution of appellee fixing the ratio of basic value to actual value, appellee declared the basic value of the Nebraska property of appellant to be $144,313,823 which was exactly 95 percent of the allocated value.

Appellee by the same items and procedure determined in 1957 what it stated was the system value of the property of appellant and allocated 21.97 percent thereof or $155,989,437 as the value of the Nebraska property which was no greater or different than but was in fact the actual value of such property. Appellee then stated the basic value was $148,189,965. That was 95 percent, not 70 percent, of $155,989,437 as the law required to arrive at basic value. The insertion in section IV of the 1958 assessment order of appellee of the property of appellant: "(1957 Computed Value 5% = Basic Value)" is an admission of what is said above concerning the 1957 assessment. This is made certain by the immediately following item in the 1958 assessment order: "1958 Computed Value 5% = $142,854,317" which is precisely 5 percent less than the 1958 computed value of $150,372,966. The 1957 assessment of the Nebraska property of appellant was made on that errone-

ous basis. It is not important that appellee designated the $155,989,437 as allocated value because the factors used and the evidence definitely show it was actual value.

Appellee substantially concedes that basic value used in the 1956 and 1957 assessments was 95 percent of what was labeled by it as allocated value. It could not be otherwise because simple arithmetic demonstrates the factors employed in composing allocated value establishes that it was actual value of the Nebraska property of appellant in each of these years. A consideration of market value of stocks and bonds, the earning power of the railroad, and the investment account less depreciation evidences actual value. There was no attempt by appellee in either 1956 or 1957 to disclose by its assessment order or otherwise why it arbitrarily said basic value was 95 percent of what was obviously the actual value of the Nebraska property when basic value of all tangible property was established by the resolution of appellee at 70 percent of actual value. This omission was a disregard and violation of the statute which required that appellee in making an assessment of railroad property "shall set forth the manner in which it arrived at the assessment, the several items included in the total assessment and the manner of arriving at the several items and the total." § 77-609, R. R. S. 1943.

The value of the entire property of appellant in 1958 was determined by the average of the same factors as used in the previous years discussed above and 21.90 percent therof was assigned by the method used in previous years to the Nebraska property. That resulted in the sum of $150,372,966, designated by appellee as computed value for the Nebraska property. That was the same character of finding arrived at by the same method as had been previously considered and treated as actual value of that property. Appellee reduced that amount by 5 percent, multiplied the remainder by 1.429, and produced $204,138,818 which was described as 1958

actual value. The statutory percentage of 35 percent was applied and it resulted in an assessment of $71,448,-586. The day of this assessment appellee adopted a resolution which recited that the method of determining the actual value of tangible property for 1958 used by all county assessors is to convert basic value for 1957 to actual value by multiplying the basic value by 1.429. Ironically, appellee also recited in the resolution that it was "convinced that railroad property should be valued at 35% of actual value as is all other tangible property." Its expressed and recorded conviction was not enough to control its action because that identical day, as shown by the same resolution, appellee valued the property of appellant in Nebraska at very much more than 35 percent of actual value resulting from the fact that the property had not been valued at 70 percent of actual value in 1957 but at 95 percent of actual value and notwithstanding this important fact the conversion factor of 1.429 was applied to the value of the Nebraska property of appellant in 1958 as found by appellee to arrive at what it called actual value. The conversion factor of 1.429 had no relation to the situation presented by the 1958 assessment. Its use was arbitrary and it produced an equally arbitrary result.

The 1959 assessment of appellant was made by the same method as the 1958 assessment was accomplished. The identical factors were employed for finding system value and the same items were used to ascertain the percentage of the system value that should be assigned to Nebraska, which was 21.96 percent. It produced $155,174,171 and appellee reduced that amount by 5 percent and multiplied the remainder by 1.4286, 100 divided by 70 carried to the fourth decimal instead of 1.429 used by it in 1958. The result was $210,597,729 which appellee designated actual value. The statutory rate of 35 percent was applied to the last amount stated above and that produced, after deducting locally as-

sessed property, an assessment of the Nebraska property of appellant of $70,015,144.

The authority and obligation of appellee were to assess the property of appellant on the same basis as other tangible property was required to be assessed. §§ 77-601 and 77-604, R. R. S. 1943. All tangible property was required to be valued at its actual value and to be assessed at 35 percent of such actual value. § 77-201, R. R. S. 1943. The Legislature has defined actual value as used in the revenue statute. § 77-112, R. R. S. 1943. Appellee by its assessment order substantially followed the statute until it found and stated the amount of the system value that was represented by the Nebraska property of appellant which was $155,174,171. Section I a of the assessment order found the system value as evidenced by the selling price of the stocks and bonds of appellant, which responds to item (6) of the statute, "market value in the ordinary course of trade." Section I b found system value as evidenced by capitalizing the net operating railroad income, which is item (1), "earning capacity of the property." Section I c found system value as shown by investment account less deduction for physical and economic obsolescence, which appellee concedes is equivalent to item (4), "reproduction cost less depreciation." The remaining three items of the statute: "(2) relative location; (3) desirability and functional use"; and "(5) comparison with other properties of known or recognized value," may be considered as included in market value and earning capacity to the extent there applicable.

The hypothesis and result of each part of section IV of the assessment order of 1959 made by appellee are incorrect factually and are contrary to law. The 1957 or 1958 allocated value less 5 percent did not equal basic value or 70 percent of actual value as that formula assumed and stated. In making the 1957 assessment instead of appellee taking 70 percent of allocated value as basic value, it treated 95 percent of allocated value

as basic value. That error resulted in overassessment, was repeated, and was given effect by appellee to the prejudice of appellant as hereinbefore noted in the assessment of 1958. The error of the first sentence inheres in each of the following parts of the formula.

There was no necessity of fact or justification of law for the resort by appellee to a reduction of 5 percent of the amount of the valuation assigned by it in 1959 to Nebraska or for the use by it of the conversion factor in ascertaining the actual value of the property of appellant in Nebraska. The use of these was arbitrary and in violation of the statute defining actual value. The use of them disregarded the undisputed evidence that the actual value of the Nebraska property of appellant did not exceed $155,174,171, the amount of the allocation by appellee to Nebraska. Appellee found that the system value of appellant was $706,621,911. Included in this amount was every possible value of the railroad of appellant including its franchise or its right to exist. Appellee made no attempt to demonstrate that there was any omission of anything of value from the schedule of property of appellant furnished appellee in 1959. It was accepted, acted upon without objection, and everything therein was valued and included in what appellee termed system value in its assessment order. Appellee belatedly now says in this court that the statute requires it to assess railroad property "together with franchises"; that the record does not show that it made a separate valuation of franchises; and that it may be presumed it considered the element of franchise rights in arriving at actual value. This may be accepted if appellee means by actual value $155,174,171, the value assigned to Nebraska. Otherwise it is incorrect because franchise value was included in the assessment by use of the factors used by appellee to reach what it termed system value. The following from State ex rel. Bee Building Co. v. Savage, *supra,* fully explains the matter of franchise value in making such

an assessment: "Where the property of a railroad corporation is assessed by the state board of equalization as a unit, and in fixing the value thereof the board takes into consideration the fact that the property is being used for effectuating the objects of the corporation, is earning an income in the transportation of passengers and carrying of freight for hire, and that such corporation is exercising the rights, powers and privileges of corporations organized for the purpose of engaging in business as common carriers, such assessment, so made, would include and cover the intangible as well as the tangible property of the corporation, and would be an assessment of its franchise."

The system value fixed by appellee of $706,621,911 is and must be accepted as the 1959 actual value of the entire railroad property of appellant. Any contention otherwise is only a play on words without evidentiary integrity or legal justification. The practice by appellee of reducing the value assigned to appellant in Nebraska by 5 percent originated in 1957. It is not set out or expressed in the assessment order of that year except as it results from the finding that the Nebraska property had a certain value for that year and that the basic value thereof was exactly 5 percent less than the total value assigned to Nebraska. This practice reoccurred in 1958 and 1959. The deduction of 5 percent of the value assigned to Nebraska in each of those years was arbitrary and without reason therefor given in the respective orders of assessment of appellee for those years. The reason suggested in this litigation by appellee that the allocated value was 5 percent more than basic value is not convincing. Appellee had fixed basic value at 70 percent of actual value of all tangible property for taxation purposes. The allocated value assigned to the Nebraska property was a finding of actual value of the property by all the applicable evidence in the record. If it was not, the appellee did not in any of these years find what the actual value of the property was in

which event it had no basis for finding the basic value of it. The indulgence of appellee making an unexplained 5 percent deduction from the value of the property to be assessed and resorting to an inappropriate and incorrect conversion factor when its primary inquiry mandated by the Legislature was to find actual value of the property to be assessed, was a resort to fictions. A fiction is not allowed to obscure the facts when the facts become important. The important facts which the fictions tended to obscure in 1958 and 1959 were that in 1956 and 1957 appellee took 95 percent of the actual value of the Nebraska property of appellant for basic value rather than 70 percent, which the law required, and based the assessment of the property thereon. Appellee then applied to the incorrect amounts found for those years a conversion factor in 1958 of 1.429 and in 1959 of 1.4286 which was in any event only permissible when the basic value of the property was fixed at 70 percent of actual value and thereby appellee added in 1959 more than $55 million to the actual value of the property of appellant in this state.

Appellee assigned 21.96 percent of the total value of the railroad property in 1959 to the Nebraska property of appellant. This allocation is uncontested. The amount of it was $155,174,171. That is the actual value of the property in 1959 concerned in this litigation and the duty of appellee was to assess it at 35 percent. Appellee destroyed any trace of reasonableness or realism by deducting 5 percent from that amount and multiplying the remainder by 1.4286 to produce a value of $210,597,729 which appellee called the actual value of the Nebraska property. The action of appellee in inflating the value of the Nebraska property of appellant by the devices it used was arbitrary, unreasonable, and contrary to law.

The original assessment order of July 15, 1959, was adopted by only two members of the board voting for it. One member voted against it, one member abstained

from voting, and one member was absent. The use of the matter contained in section IV of the order of assessment was not a mistake, an inadvertence, or because of insufficient information. It was done advisedly and arbitrarily. The Tax Commissioner of the state advised against the use of it. He presented a proposed order of assessment wholly eliminating that formula. He advised that the facts and the law required a reduction in railroad valuations for assessment purposes. One of the members who voted for the assessment order said in a voluntary, formal statement he would never be a party to extending the type of relief suggested to any special interest at the unavoidable tax expense of Nebraska farmers, main street merchants, and homeowners. However, the same statement tacitly conceded that railroad property had been overassessed and this was illustrated by a reference to 1955 when, as asserted in the statement, the "valuation should have declined because of the change in base, it actually increased 5 million dollars." The other member who supported the 1959 assessment order said he opposed any concession to any special interest group when the average taxpayer would have to make up the difference from his own pocket. Neither of these members mentioned anything concerning the value of the property to be assessed nor did they undertake to show where the judgment of the Tax Commissioner was wrong. The Tax Commissioner stated that appellee had no right to consider such an effect among taxpayers and that its only right and duty were to make an assessment of railroads at the same level as all other assessments. He appropriately said if appellee was to refuse to reduce values because other taxpayers will make up the difference, then no taxpayer, whatever his status or station, could ever get relief from unjust taxation. The observations in Cumberland Coal Co. v. Board of Revision of Tax Assessments, 284 U. S. 23, 52 S. Ct. 48, 76 L. Ed. 146, are appropriate: "The case is not one of mere errors in judgment in following a proper meth-

od, * * * but one where the challenged discrimination resulted from a plan of assessment which was none the less systematic and intentional because of belief in its validity."

The method employed by appellee in assessing the property of appellant in Nebraska as exhibited by section IV of its assessment order of 1959 resulted in the assessment of the property at 47½ percent of its actual value as found by appellee and described in its order as allocation to Nebraska. The facts of the assessment may be correctly and simply stated as follows:

Actual value	$155,174,171
Assessment	47½%
	73,709,205
Less local assessment	3,694,061
1959 State Board Assessment	$ 70,015,144

The difference between 47½ percent and 35 percent of the actual value of the property when the very large valuation involved is considered is not substantial or approximate uniformity as contended by appellee or as required by the Constitution and applicable statutes of the state.

All tangible property has since September 20, 1957, been required to be valued at its actual value and to be assessed at 35 percent of such actual value. § 77-201, R. R. S. 1943. The evidence establishes that all tangible property except railroad property was assessed at not more than 35 percent of its actual value. The Constitution provides that taxes shall be levied by valuation uniformly and proportionately upon all tangible property, subject to exceptions not important to this case. Art. VIII, § 1, Constitution of Nebraska.

Chicago, B. & Q. R. R. Co. v. State Board of Equalization & Assessment, *ante* p. 77, 101 N. W. 2d 856, is decisive of the conclusion that the 1959 assessment of the Nebraska property of appellant by use of the

formula in section IV of the assessment order is arbitrary, discriminatory, and contrary to law. Therein it is said: "It was the duty of the State Board of Equalization and Assessment in 1959 to value railroad property in the state at its actual value and to assess it at 35 percent thereof, and any substantial departure therefrom was a disregard of the legislative mandate and constituted an arbitrary valuation and assessment of the property. * * * A formula for determining the value of tangible property for taxation purposes must be appropriate to produce the result required by statute; and if an arbitrary basis is used which is not uniformly applied to all tangible property, the result is an arbitrary one and will not sustain a valuation for taxation purposes. * * * It is an unlawful discrimination, prohibited by the Constitution and the statutes of the state, to assess the property of a railroad at 47½ percent of its actual value when all other tangible property is assessed at not more than 35 percent of its actual value. * * * Taxing authorities may not withdraw any property from the principle of uniformity of taxation as provided by the Constitution and statutes of the state and one owner of property cannot be compelled to pay a greater proportion of taxes according to the value of his property than another property owner of the same class is required to pay."

Appellee argues in support of the assessment that there is no proof that actual value of the property is different than that determined by it. The evidence of actual value was all produced by appellant and it was adopted by appellee in arriving at what was designated system value. Testimony was produced and not contradicted that system value was actual value and that allocated value of the Nebraska property was actual value. The proceedings of appellee from 1940 to 1955, when the statute was amended from requiring assessment of actual value to basic value, show that for 12 years appellee first found system value of the property

of appellant by using the market value of the stocks and bonds and the value ascertained by capitalizing its net income at 6 percent and in later years by the addition of historic or book value. The system value was allocated to Nebraska by the formula with minor variations used by appellee for that purpose in the 1959 assessment. In each of the years 1940 to 1955 system value and Nebraska allocated value were found by appellee to be the 100 percent actual value of the railroad and the 100 percent actual value of the property allocated to Nebraska, respectively. The record or the argument of appellee yields no solution of the problem of how a method by which appellee produced actual value for so many years suddenly in 1959 produced something different.

Appellee vaguely suggests that the difference in the figure of $155,174,171, allocation to Nebraska in the 1959 assessment order, and the inflated figure of $210,597,729 produced by the use of the conversion factor could have been considered by appellee "* * * the other statutory elements which the Board is found (bound) to follow * * *" or "* * * that economic and other conditions were taken into account in arriving at assessed value." The statute is mandatory that the record of the assessment must clearly show the basis of the assessment of the railroad property, how it was arrived at, the items included, and the total of the items. § 77-609, R. R. S. 1943. This the record of the 1959 assessment of appellant does. Appellee cannot now be heard to say something undisclosed by the record was valued and included. In Fargo v. Hart, 193 U. S. 490, 24 S. Ct. 498, 48 L. Ed. 761, the court said: "We may add that it appears * * * that 'the minutes of said state board of tax commissioners' are in evidence. This means the complete minutes. It must be assumed that the minutes show all that took place in the proceedings, and therefore that we have before us all the evidence that was put in as well as a report of what was said." The effect of what appellee says is that an assessment by it can be

sustained even though there is no evidence to support it or that the proof presented to appellee is in fact contrary to the assessment if appellee recites that a certain figure is the actual value of the property. This is contrary to the plain requirements of the statute and the decisions of this court. It is obvious that the statute in this respect was made detailed and specific to prevent that very procedure in making an assessment of property.

The findings of appellee contained in sections I, II, and III of its assessment order of July 15, 1959, concerning the property of appellant are correct and they are each adopted by this court.

The assessment of the 1959 property of appellant in Nebraska as contained in section IV of the assessment order of appellee of July 15, 1959, should be and it is hereby reversed.

It should be and is adjudged that the actual value of the property of appellant for 1959 in Nebraska is the sum of $155,174,171; that from 35 percent thereof or $54,310,960 there should be deducted the value of the locally assessed property of appellant the sum of $3,694,061; and that the 1959 assessment of the property of appellant in Nebraska should be and is $50,616,899.

ORDER REVERSED. JUDGMENT OF ASSESSMENT RENDERED.

IN RE FERDINAND ANANIA.

FERDINAND ANANIA, APPELLEE, V. CITY OF OMAHA, A MUNICIPAL CORPORATION, ET AL., APPELLANTS, ROBERT P. SAMARDICK, INTERVENER-APPELLANT.

102 N. W. 2d 49

Filed March 25, 1960. No. 34665.

1. **Appeal and Error.** A petition in error in a district court to test the validity of a final order of an inferior tribunal is an inde-

pendent proceeding the object of which is to obtain a reversal of the order presented for review.

2. ———. The requirement of section 25-1905, R. R. S. 1943, that the plaintiff in error shall file with his petition a transcript of the proceedings containing a final judgment or order sought to be reversed, vacated, or modified is mandatory.

3. ———. In the absence of a transcript as the statute requires, the court in which a petition in error is filed has no jurisdiction to proceed further than to dismiss the petition in error.

4. ———. If the judgment of a district court in a proceeding in error to reverse the final order of an inferior tribunal is sought to be reviewed in this court, the transcript in this court must contain the final order of the inferior tribunal and such other proceedings as are presented for review and correction.

5. ———. The jurisdiction of the district court to consider and set aside a final order of an inferior tribunal does not attach until there is presented to it with the petition in error a duly authenticated transcript of the proceedings containing the final order of which complaint is made.

6. ———. The words "a transcript of the proceedings" as employed to designate what shall be filed with the petition in error include within their meaning duly authenticated copies of the original papers, pleadings, and final order of the inferior tribunal which it is sought to present to the attention and for the action of the appellate court.

7. ———. Appellate jurisdiction of a case cannot be conferred upon a court by action of the parties thereto and the absence of such jurisdiction may be asserted at any time during the pendency of the litigation.

8. ———. An appellate court may not consider or decide a case within its appellate jurisdiction unless its authority to act is invoked in the manner prescribed by law.

9. ———. If a district court was without jurisdiction of the subject matter of litigation, this court does not acquire jurisdiction thereof by an appeal to it from a final order of the district court therein.

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

Herbert M. Fitle, Bernard E. Vinardi, Irving B. Epstein, Frederick A. Brown, Benjamin M. Wall, and *Edward M. Stein,* for appellants.

Gross, Welch, Vinardi, Kauffman & Schatz, for intervener-appellant.

Crawford, Garvey, Comstock & Nye and *Webb, Kelley, Green & Byam,* for appellee.

Kennedy, Holland, DeLacy & Svoboda, amici curiae.

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

BOSLAUGH, J.

The chief of police of the city of Omaha informed appellee, a member of the police department of the city, in writing that he was accused of violating rules and regulations of the Omaha police department, the civil service commission, and its successor, the personnel board of the city, as follows: By falsely making an official report to the chief of police of the city on February 3, 1958, regarding a Smith-Corona portable typewriter No. 2Y3261 to the effect that appellee did not sell it to Patrolman Morris K. Fanger sometime in the year 1957 when in fact appellee did sell the machine to the named patrolman; by conduct unbecoming a member of the police department consisting of a report on February 4, 1958, to the chief of police in the presence of another officer of the police department that appellee did not take or steal the typewriter above described, the property of Leonard Stoller, on or about January 30, 1951, when in fact appellee did take or steal it; and by stealing the said typewriter and three sets of costume jewelry on or about January 30, 1951, which typewriter was the property of Leonard Stoller. Appellee was directed in writing by the chief of police to appear before him at a specific time and show cause why appellee should not be suspended or dismissed from the police force of the city for the violations above charged against him. Hearing was had before the chief of police and he found that each of the charges was true and that it was for the best interests of the police department that appellee be dismissed from it. An order of dismissal of appellee as a member of the police

department of the city was rendered effective February 21, 1958.

Appellee took an appeal from the order of the chief of police to the personnel board of the city of Omaha. A hearing of the matter was had before it which resulted in a finding that each of the accusations made against appellee by the chief of police was established by the evidence; that appellee had conducted himself in such a manner that his value to the police department had been destroyed; that his presence on the police force would not be in the best interests of the police department; that the order of the chief of police should be affirmed; and that appellee should be dismissed from the department as provided in the order of the chief of police. The personnel board affirmed the order of the chief of police.

Appellee by petition in error filed in the district court for Douglas County alleged that the accusations made concerning him by the chief of police were based on ordinances, rules, and regulations which had been previously repealed by the home rule charter of Omaha adopted by the electors thereof which became effective May 27, 1957; that the rules appellee was accused to have violated did not in fact exist; that the proceedings had before the chief of police concerning appellee were unauthorized by any provision of law; that there was no valid order of the chief of police that could have been reviewed by the personnel board; that no rules for procedure before it were adopted or in effect; and that the findings and orders of the chief of police and of the personnel board were, respectively, not supported by but were contrary to the evidence and contrary to law. Appellee asked that the order of his dismissal as a policeman from the police department of Omaha be reversed and vacated. The answer of appellants was in effect a general denial of the statements contained in the petition in error.

The district court found that none of the charges

made against appellee were established by evidence; that the order of dismissal of appellee as a policeman from the police department of Omaha made by the chief of police was not sustained by evidence; that the order of the personnel board affirming the order of the chief of police was not sustained by evidence; that the order of each of them should be reversed and set aside; and that appellee should be restored to his position as a member of the police department of Omaha as of the date of the purported dismissal of him therefrom by order of the chief of police. A judgment was rendered in harmony with the findings. The motion for a new trial was denied and this appeal was taken.

Appellants filed a pleading herein which states that they dismiss their appeal. Thereafter Robert P. Samardick made application to intervene in the cause and to prosecute the appeal. Authority therefor was granted him by order of this court. The intervener argues that the district court did not obtain jurisdiction of the subject matter of this cause for the reason that plaintiff in error did not file an authenticated transcript containing the final order sought to be reversed and vacated with his petition in error in the district court. The record is silent as to the filing of such transcript at any time herein.

A petition in error in the district court to test the validity of an order of an inferior tribunal is an independent proceeding the object of which is to obtain reversal of the order presented for review. From v. Sutton, 156 Neb. 411, 56 N. W. 2d 441.

The relevant part of section 25-1905, R. R. S. 1943, states: "The plaintiff in error shall file with his petition a transcript of the proceedings containing the final judgment or order sought to be reversed, vacated or modified." That language was code section 586, R. S. p. 497, and it has since been continued. Section 25-1906, R. R. S. 1943, is as follows: "Judges of county courts, justices of the peace and other judicial tribunals

having no clerk, and clerks of every court of record, shall, upon request and being paid the lawful fees therefor, furnish an authenticated transcript of the proceedings, containing the judgment or final order of said courts, to either of the parties to the same, or to any person interested in procuring such transcript." That was code section 587, R. S. p. 497, and it has since been retained.

In Saussay v. Lemp Brewing Co., 64 Neb. 429, 89 N. W. 1048, it is said: "When the judgment of a district court, in a proceeding in error to review the judgment of a justice of the peace, is sought to be reviewed in this court, the transcript in this court must contain the judgment of the justice of the peace and such other process and proceedings as are sought to be reviewed or corrected." The opinion in that case recites: "The requirement of section 586 of the Code, that 'the plaintiff in error shall file with his petition a transcript of the proceedings containing the final judgment or order sought to be reversed, vacated, or modified,' applies equally to proceedings in error in the district court and in this court, and in the absence of such a transcript the court has no jurisdiction to proceed further than to dismiss the petition in error. Zink v. Westervelt, 52 Nebr., 90."

In Fike v. Ott, 76 Neb. 439, 107 N. W. 774, the court said: "The jurisdictional feature of a transcript filed in this court is the 'judgment, decree or final order sought to be reversed, vacated or modified.' Sections 586 and 675 of the code."

New Home Sewing-Machine Co. v. Thornburg, 56 Neb. 636, 77 N. W. 86, declares: "The jurisdiction of the district court to review and reverse the judgment or final order of an inferior court, board, or other body exercising judicial functions does not attach until there is presented to it a duly authenticated transcript of the record containing the judgment or final order complained of."

Ritchey v. Seeley, on rehearing, 68 Neb. 129, 97 N. W. 818, contains this: "Repeated decisions of this court hold that in order to entitle an aggrieved party to a review of the record of the trial had in the district court, the requirements of the statute providing for a review by error proceedings must be complied with—that is, that the error proceedings must be begun within the time limited; that a petition in error must be filed in the reviewing court, accompanied by a duly authenticated transcript of the record which it is sought to have reviewed as a basis for the obtaining of such rewiew (review); that thereupon a summons in error may issue, and service be had, and the adverse party thus brought into court and subjected to its jurisdiction. * * * We have decided repeatedly that a summons in error can not issue until after the filing of a petition in error with a transcript of the record of the district court, and that these preliminary steps were necessary in order to give the court jurisdiction."

Slobodisky v. Curtis, 58 Neb. 211, 78 N. W. 522, states: "* * * It is indispensable to jurisdiction that there should be filed with the petition in error, and within the time fixed by statute, a transcript of the proceedings of the district court containing the final judgment sought to be reviewed."

In In re Estate of Greenamyre, 133 Neb. 693, 276 N. W. 686, it is stated: "In the case at bar, the first transcript filed contained no final order, and a summons in error issued on such a record was void. And a later transcript of additional action taken by the county court could not give jurisdiction by virtue of the summons in error issued and served before any final order had been entered in the county court."

From v. Sutton, *supra,* states: "Section 25-1905, R. R. S. 1943, requires that a transcript be filed with the petition containing the final order sought to be reversed, vacated, or modified."

Jurisdiction of the subject matter of the cause did

not attach in the district court because there was no transcript filed in that court of the proceedings before the personnel board containing the final order sought to be reversed and vacated.

It is mandatory that the transcript be properly authenticated and timely filed to vest the appellate court with jurisdiction of the subject matter.

In Brockman Commission Co. v. Sang, 52 Neb. 506, 72 N. W. 856, the court said: "This court does not acquire jurisdiction of a cause brought here on appeal or error, where the transcript of the judgment, or final order sought to be reviewed, has not been properly authenticated by the clerk of the district court."

It is stated in Melcher v. Haley, 58 Neb. 729, 79 N. W. 707: "A petition in error will be dismissed when the final judgment or order assailed is not authenticated by the certificate of the clerk of the trial court." See, also, Rooney v. Farrell, 62 Neb. 611, 87 N. W. 338; New Home Sewing-Machine Co. v. Thornburg, *supra;* Slobodisky v. Curtis, *supra.*

The words "a transcript of the proceedings" designate what shall be filed with the petition in error and they include in their meaning duly certified copies of the original pleadings, papers, and orders in the proceeding before the court or body which it is alleged committed the error sought to be presented to the appellate court for consideration and decision. The production of the original pleadings, papers, and orders in lieu of an authenticated transcript is not contemplated and will not suffice. There is no substitute for an authenticated transcript of the proceedings which will cause jurisdiction of the subject matter of the cause by the appellate court to exist. Royal Trust Co. v. Exchange Bank, 55 Neb. 663, 76 N. W. 425, asserts: "The words, 'A transcript of the proceedings,' as employed in section 586 of the Code of Civil Procedure to designate what shall be filed with a petition in error, include within their meaning duly certified copies of the original papers

and pleadings in the trial court, which it is sought to present to the attention of the appellate court. The filing of the original papers and pleadings is not contemplated, and will not fulfill the requirements of the statute."

In Moore v. Waterman, 40 Neb. 498, 58 N. W. 940, it is said: "The filing of a transcript authenticated by the clerk is jurisdictional. Surely it would not be contended that an appeal from a justice of the peace to the district court could be effected by the parties getting possession of the justice's docket and by stipulation filing his docket in the district court instead of a certified transcript of the entries thereon. This case stands in no better light."

In Lee v. State, 124 Neb. 165, 245 N. W. 445, it is stated: "It is to be remembered that the necessity of having a proper record of the action complained of is not merely enforced by the wording of the controlling statute, but emphasizes a jurisdictional fact. * * * The words 'a transcript of the proceedings,' as employed * * * to designate what shall be filed with the petition in error, include within their meaning duly certified copies of original papers and pleadings * * * which it is sought to present to the attention of the appellate court. The filing of the original papers and pleadings is not contemplated and will not fulfil the requirement of the statute." See, also, School Dist. No. 49 v. Cooper, 44 Neb. 714, 62 N. W. 1084; Smith v. Delane, 74 Neb. 594, 104 N. W. 1054; Brabham v. Custer County, 3 Neb. (Unoff.) 801, 92 N. W. 989.

Appellee argues that appellants appeared generally in the case and tried it on the theory that there was a proper transcript and that the district court had jurisdiction; and that because of the participation and acts of appellants and the failure to raise an issue as to the lack of jurisdiction of the district court of the subject matter until the cause was in this court, appellants cannot now complain in that regard and neither can the

intervener who has no better right to do so. This argument is faulty. Barney v. Platte Valley Public Power & Irr. Dist., 144 Neb. 230, 13 N. W. 2d 120, contains the following: "The appellate jurisdiction of a court is contingent upon timely compliance with constitutional or statutory methods of appeal. Failure to comply with the required conditions terminates the potential power of an appellate court to acquire thereafter any jurisdiction to review the judgment below. * * * Appellate jurisdiction of a case cannot be conferred upon a court by any action of the parties. The want of such jurisdiction may be taken advantage of at any stage of the proceedings. An appellate court cannot pass on the merits of a case falling within its appellate jurisdiction unless its jurisdiction is invoked in the manner prescribed by constitution or statute." See, also, From v. Sutton, *supra;* Roberts v. City of Mitchell, 131 Neb. 672, 269 N. W. 515; Moore v. Waterman, *supra.*

Appellee to sustain his argument places much reliance upon Coleman v. Spearman, Snodgrass & Co., 68 Neb. 28, 93 N. W. 983, and Whitcomb v. Chase, 83 Neb. 360, 119 N. W. 673, which employed language to the effect that if an unauthenticated transcript was filed in the district court and the litigation was contested therein to a determination without objection because of the deficiency and its effect, the jurisdiction of the district court could not be assailed for the first time after the case reached this court. These cases were distinguished in Fromholz v. McGahey, 85 Neb. 205, 122 N. W. 879, and therein inferentially the doctrine of them in the regard noted above was disapproved by this language: "We have uniformly held that filing an unauthenticated transcript of a judgment of the district court did not give us jurisdiction of the controversy, but that the terms of the statute must be observed and a certified transcript of the judgment filed within the time limited by law." It should also be noted that in Whitcomb v. Chase, *supra,* the opinion says: "It is argued that the

district court has no original jurisdiction in cases of this kind; that it only obtains jurisdiction by appeal, and if the appeal is not properly perfected that court has no jurisdiction. In support of this proposition many cases are cited which hold that jurisdiction of the subject matter of an action cannot be conferred by consent. That this is the well-established rule cannot now be questioned; but we are of opinion that it has no application to the facts of this case."

There are five motions pending herein which were submitted at the time of the argument and submission of the appeal. What has been and is hereafter said makes it unnecessary to dispose of them separately. The conclusion of the opinion as to the appeal makes the motions meaningless.

The district court acquired no jurisdiction of the subject matter of this litigation and the judgment it rendered was void and did not in any way affect the order of the personnel board or its affirmance of the order of the chief of police dismissing appellee as a policeman from the police department of the city of Omaha. Likewise, the appeal did not vest jurisdiction of the subject matter of the litigation in this court and this appeal should be and it is hereby dismissed. All costs on appeal taxed to appellee Anania.

APPEAL DISMISSED.

RICHARD E. FINNERN, APPELLEE, V. HARRY E. BRUNER, JR., APPELLANT, IMPLEADED WITH ARVELLA D. BRUNER ET AL., APPELLEES.

101 N. W. 2d 905

Filed March 25, 1960. No. 34680.

1. **New Trial: Appeal and Error.** A district court has the same power to hear and determine a petition for a new trial on the ground of newly discovered evidence after an appeal to the Supreme Court as it would have if no appeal had been taken.

2. **New Trial.** A petition for a new trial under section 25-1142, R. R. S. 1943, must show that the grounds alleged could not have been discovered, in the exercise of due diligence, prior to the trial of the case.
3. ———. The alleged newly discovered evidence must relate to the issues joined in the original case. It must be material, competent, and credible, and not merely cumulative.
4. ———. Newly discovered evidence must be of such a substantial nature as to make it appear that if such evidence had been received in the original trial the judgment would probably have been substantially different.
5. ———. Whether or not a party seeking a new trial on the ground of newly discovered evidence exercised due diligence to procure the evidence at the trial must be determined from the facts of each case in which the issue is raised.

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

Frost, Meyers & Farnham and *James E. Fellows,* for appellant.

Haney & Walsh, for appellee.

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

CARTER, J.

This is an action which originated by the filing of a petition for a new trial on the ground of newly discovered evidence. The trial court found that the newly discovered evidence was sufficient to warrant a new trial and entered a final order granting a new trial of the case. The defendant Harry E. Bruner, Jr., has appealed.

The case was previously before this court. Finnern v. Bruner, 167 Neb. 281, 92 N. W. 2d 785. We shall not review the facts and holdings in that case except as they become important to a disposition of the present case.

The former suit was brought to quiet title to Lot 25, Block 2, Ak-Sar-Ben Hill Addition in Omaha, Douglas County, Nebraska. Plaintiff has been the record

title owner of the property since December 28, 1956. The purpose of the suit was to have the title thereto quieted with reference to the lien of a judgment for child support rendered in a divorce decree on March 7, 1922, in favor of Bessie May Bruner and against Harry E. Bruner, Sr., who was the record title owner of the property at a time when the child-support judgment properly became a lien thereon. The amount of the judgment lien at the time the original suit was filed was in excess of $10,000. The decree did not provide that the child-support payments were to be paid into court.

It was contended throughout the former trial that plaintiff was entitled to have the title quieted as against the lien of the child-support judgment on the grounds of the statute of limitations, laches, equitable estoppel, and payment. This court finally determined that the statute of limitations, laches, and equitable estoppel had no application and that the evidence did not sustain a finding that the judgment had been paid. The judgment on the mandate of this court was duly rendered on February 3, 1959. The petition for a new trial alleges new evidence bearing solely upon the question of payment of the child-support judgment.

The new evidence asserted as the basis for a new trial is substantially as follows: On June 15, 1942, the Conservative Savings and Loan Association loaned Harry E. Bruner the sum of $550, which was secured by a real estate mortgage on the property here involved which was duly placed of record. On August 17, 1943, the Conservative Savings and Loan Association made a second loan to Harry E. Bruner in the amount of $750 which included the unpaid balance of the first loan. This mortgage was also secured by a real estate mortgage on the property involved in this suit and was duly placed of record. These real estate mortgages were fully paid and released of record on May 28, 1945.

The evidence further shows that on March 2, 1959, a

Mr. and Mrs. Thomas F. Sheehan, the parents of Thomas J. Sheehan who had sold and warranted the title of the property to plaintiff, called at the office of the Conservative Savings and Loan Association. They discussed with the secretary of the association the difficulties their son was having as a result of the lien of the child-support judgment. The secretary of the association recalled the mortgage transaction with Harry E. Bruner and upon an examination of its files discovered an instrument signed and sworn to by Bessie May Bruner Blake, formerly Bessie May Bruner, which constitutes the new evidence relied on in the present case. The instrument is headed: "IN THE DISTRICT COURT OF DOUGLAS COUNTY, NEBRASKA Bessie May Bruner, plaintiff, versus Harry E. Bruner, defendant. STATE OF NEBRASKA, DOUGLAS COUNTY, ss." The instrument then recites the following facts, among others: "Affiant further states that the said Harry E. Bruner made each and all of the payments to the undersigned for the support and maintenance of the said children 'until the said Catherine Bruner shall have attained the age of 16 years' in the manner and at the times as required by the provisions of the decree entered in the above entitled action, and that the said Harry E. Bruner paid the attorneys' fees as ordered by the terms of said decree and also paid the costs taxed in said action." The foregoing was sworn to by Bessie May Bruner Blake before a notary public on June 13, 1942. The evidence shows that at the time of the first trial both Harry E. Bruner and Bessie May Bruner Blake were deceased.

The attorney for the plaintiff who commenced and tried the quiet-title suit testified as follows: Before commencing the suit in 1957 he checked the records of the clerk of the district court in the divorce action for any record of payment. He checked the probate proceedings in the estates of Harry E. Bruner, Bessie May Bruner Blake, and William Albin Blake, the second husband of Bessie May Bruner. He checked the real estate

records in the office of the register of deeds. He checked the records of the intervening holders of the title to the property. He checked with neighbors in areas of the city where the Bruners had lived before and after their divorce. He testified that for a month before filing the suit he spent much time in searching for some evidence of payment of the child-support judgment without uncovering any tangible evidence that it had been paid.

It is fundamental that a district court has the same power to hear and determine a petition for a new trial on the ground of newly discovered evidence after an appeal to the Supreme Court as it would have if no appeal had been taken. Smith v. Goodman, 100 Neb. 284, 159 N. W. 418; Ward v. Geary, 115 Neb. 58, 211 N. W. 208.

The law does not, however, favor new trials on the ground of newly discovered evidence. A petition for a new trial on the ground of newly discovered evidence must be filed within the terms and in the manner prescribed by sections 25-1143 and 25-1145, R. R. S. 1943. The newly discovered evidence must be of such a nature that if offered and admitted at the former trial it probably would have produced a substantial difference in result. Such evidence must be competent, material, and credible, and not merely cumulative. It must involve something other than the credibility of witnesses who testified at the former trial. It must appear that the unsuccessful party had no knowledge of the newly discovered evidence at the previous trial and could not have discovered it by the exercise of reasonable diligence. Smith v. Goodman, *supra.*

The defendant Harry E. Bruner, Jr., first contends that plaintiff's petition did not state a cause of action in that it did not allege that the new evidence could not have been discovered by the exercise of reasonable diligence prior to the former trial. While this precise language is not used in plaintiff's petition, it does allege that great

effort and diligence was employed prior to the trial of the former case by examining the records of the register of deeds and the records of the county and district courts, and in interviewing neighbors for evidence of payment. It further alleges that the instrument alleged to constitute new evidence, a copy of which was attached to plaintiff's petition, was buried in the old files of the Conservative Savings and Loan Association without any knowledge on the part of the plaintiff until it was accidently discovered on March 2, 1959. The allegations as to the exercise of due diligence were clearly sufficient. It is the facts constituting due diligence which must be alleged. Davies v. DeLair, 148 Neb. 395, 27 N. W. 2d 628.

The new evidence discovered was clearly admissible as bearing on the question of payment of the child-support judgment. Whether it was intended as a satisfaction of the child-support judgment, a release as to the specific property upon which the Conservative Savings and Loan Association held a mortgage, or as a protection to the mortgagee as an inducement to the making of the loan, are not for determination in this proceeding. Our only concern here is whether or not a new trial should be granted. It is clear that plaintiff had no knowledge of the instrument at the first trial. The case resolves itself into a question of whether or not the plaintiff could have discovered the instrument in the exercise of due diligence.

The evidence does not show, nor is it contended, that any public record gave an indication of the existence of the instrument. It was retained in the files of the loan company at all times subsequent to its execution. The mortgages were given in 1942 and 1943 and released of record in 1945. We do not think the exercise of due diligence would require a party to interview the former holders of mortgages long since paid off and satisfied in seeking evidence of payment of a judgment. Such an interview would more likely be dictated by mere chance than by logical reasoning. Due diligence as here

used is that diligence which parties ordinarily pursue in preparing for the trial of important litigation. It seems to us that to require the amount of diligence for which defendant contends, in order to obtain a new trial on the ground of newly discovered evidence, would impose too great a burden upon a party to an action.

Whether or not reasonable diligence has been exercised must be determined from the facts of each case in which that issue is involved. Erwin v. Watson Bros. Transfer Co., 129 Neb. 64, 260 N. W. 565. In the instant case the evidence shows that the new evidence came to the plaintiff since the first trial and was not available to him previous to that trial. The plaintiff, under the facts disclosed by the record, exercised due diligence prior to the trial and failed to uncover the instrument asserted as newly discovered evidence. We are of the opinion that the trial court properly concluded that plaintiff was entitled to a new trial on the ground of newly discovered evidence on the issue of the alleged payment of the child-support judgment.

AFFIRMED.

FREDERICK L. DELL ET AL., APPELLANTS, V. CITY OF LINCOLN, NEBRASKA, A MUNICIPAL CORPORATION, APPELLEE.
102 N. W. 2d 62

Filed March 25, 1960. No. 34736.

1. **Deeds.** From the standpoint of time, the law in effect at the time of the execution of a deed generally governs its validity and interpretation.
2. **Municipal Corporations.** The city of Lincoln, by the annexation of the village of Havelock, as to rights, obligations, liabilities, and duties imposed upon or possessed by the latter, whether actual or contingent, tortious or on contract, whether already accrued or thereafter to accrue, became, in all respects, the successor of the latter, and subject to the same and identical conditions that were binding upon the village of Havelock.

3. ———. The acknowledgment and recording of a plat laying out land into lots and blocks and showing thereon the streets and alleys, under section 17-417 or 15-106, R. R. S. 1943, operates as a dedication which is equivalent to a deed in fee simple to such portions of the premises platted as is on such plat set apart for streets and alleys for public use to the municipality.

4. ———. Under section 17-558 or 15-701, R. R. S. 1943, whenever any avenue, street, alley, or lane shall be vacated the same shall revert to the owners of adjacent real estate, one-half on each side thereof.

5. ———. A plat made and recorded in statutory form since the enactment of sections 17-417 and 15-106, R. R. S. 1943, is subject to the provisions of section 17-558 or 15-701, R. R. S. 1943, which must be considered in pari materia.

6. ———. While the equivalent to a deed in fee simple to the streets and alleys on a plat is vested in a municipality under section 17-417 or 15-106, R. R. S. 1943, such fee is a qualified, base, or determinable fee which may be continued forever if the streets and alleys be devoted to the public use, and such fee is determined by the vacation of streets and alleys by the municipality as provided for in section 17-558 or 15-701, R. R. S. 1943.

7. ———. The title to a street vested in a city of the primary class or in a city of the second class or village is not generally a fee simple absolute but is a qualified base or determinable fee and it is held in trust for the purposes to which the street is dedicated.

8. ———. That vacation proceedings are had by a village board or a city council at the instance and request, and primarily for the benefit, of certain owners whose property would be benefited by such vacation, is not ground for declaring the vacation ordinance void.

9. **Estates.** An estate in fee simple determinable is created by any limitation which, in an otherwise effective conveyance of land, (a) creates an estate in fee simple; and (b) provides that the estate shall automatically expire upon the occurrence of a stated event. Such stated event can be either the happening or the non-happening of a specified occurrence, which can be either certain or not certain to happen, and the conveyor has a possibility of reverter despite the absence of specific words creating any interest in him.

10. **Municipal Corporations.** Also, the right of an owner of property abutting on a street to ingress and egress to and from his premises by way of such street is a property right in the nature of an easement in the street which the owner of the property has, not in common with the public generally, and of which he

cannot be deprived without due process of law and compensation for his loss.

11. **Statutes.** A legislative act will operate only prospectively and not retrospectively, unless the legislative intent and purpose that it should operate retrospectively is clearly disclosed.

12. ———. A legislative act will not be permitted, even if an attempt so to do is disclosed, to operate retrospectively where it will have the effect to invalidate or impair the obligation of contracts or interfere with vested rights.

13. **Municipal Corporations.** A municipal corporation is a creature of the law established for special purposes, and its corporate acts must be authorized by its charter and other acts applicable thereto. It therefore possesses no power or faculties not conferred upon it, either expressly or by fair implication, by the laws which created it or by other laws, constitutional or statutory, applicable to it.

14. ———. Under the provisions of Article XI, section 2, of the Constitution of this state, a home rule charter must be consistent with and subject to the Constitution and laws of this state.

15. ———. Under a home rule charter, a city may provide for the exercise of every power, not contravening constitutional inhibitions, connected with the proper and efficient government of the municipality.

16. ———. Where the Legislature has enacted a law affecting municipal affairs, but which is of state-wide concern, such law takes precedence over any action taken by a home rule city under its charter.

17. ———. The preservation of order, the enforcement of law, the protection of life and property, and the suppression of crime are attributes of state sovereignty and matters of state-wide concern, and when the Legislature enacts a general law upon any of these subjects with respect to cities of a particular class, such law applies to all cities of the class, including home rule cities.

18. ———. Cities which have adopted a home rule charter, as authorized by the Constitution, are subject to the general laws of the state, except as to municipal matters of strictly local concern.

19. ———. Whether or not an act of the Legislature pertains to a matter of state-wide or strictly local concern becomes a question for the courts when a conflict of authority arises.

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

Rollin R. Bailey, for appellants.

Ralph D. Nelson and *Henry L. Holst,* for appellee.

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

CHAPPELL, J.

Plaintiffs, Frederick L. Dell and Jacquelyn Dell, husband and wife, brought this action against defendant, city of Lincoln, seeking to quiet title to one-half of Sixty-ninth Street, which is within the limits of the city and adjacent to described real property belonging to plaintiffs. Such street had been vacated by a city ordinance, No. 6523, wherein defendant attempted to retain title to the street.

Defendant's answer denied generally; and admitted the allegations of plaintiffs' petition in paragraphs 1, 2, and 4 thereof, which need not be repeated here because of a stipulation of facts hereinafter set forth. Defendant further alleged that defendant is a city of the primary class operating under a home rule charter duly adopted under the Constitution and laws of this state; that at the time of the enactment of ordinance No. 6523, the charter of said city, Article VIII, section 1, as amended May 6, 1947, gave defendant's mayor and city council power by ordinance to vacate any street within the limits of the city, and provided that: " 'whenever any street * * * shall be vacated the same shall revert to the owners of the adjacent real estate, one-half on each side thereof, unless the city reserves title thereto in the ordinance so vacating such a street * * * or land. In the event title is retained by the city, such property may be leased for a period of not to exceed twenty-five years, or may be sold as provided in Article II, subparagraph 5 of Section 1 of this Charter.' " Defendant also alleged that it had two objects in enacting ordinance No. 6523, to wit, the vacation of said street and the reservation of title thereto by defendant, which are

not separable; and that defendant was the owner in fee simple of the tract of land which was formerly Sixty-ninth Street, including the portion thereof adjacent to and west of the real estate owned by plaintiffs. Defendant prayed for dismissal of plaintiffs' petition. Plaintiffs' reply was in the nature of a general denial. The case was tried in the district court upon a stipulation of facts, and the trial court rendered a judgment dismissing plaintiffs' action with prejudice, at plaintiffs' costs. Thereafter, plaintiffs' motion for new trial was overruled, and they appealed, assigning in substance that the judgment was contrary to the evidence and law. We sustain plaintiffs' assignment.

The stipulated facts are that on January 14, 1918, Woods Brothers Silo and Manufacturing Company, hereinafter called Woods Brothers, being the owners of: "Lots Six (6), Seven (7), Eight (8) and Nine (9) of Irregular Tracts in Section Nine (9), Township Ten (10), Range Seven (7), East of the 6th P. M., Lancaster County, Nebraska," which land was then within the limits of the village of Havelock, duly caused the above-described property to be platted and dedicated as Woods Brothers Second Addition to Havelock. Such plat and dedication was on that same date filed with the register of deeds of Lancaster County and on January 18, 1918, was duly accepted by said village.

On November 13, 1918, Woods Brothers, being the owners of Outlot A of said Woods Brothers Second Addition to Havelock, subdivided the north 942 feet of Outlot A into streets, lots, and blocks, they being designated as Blocks 18, 19, and 20, Woods Brothers Second Addition to Havelock, and on that same day such plat and dedication thereof was duly filed in the office of the register of deeds of Lancaster County. On June 29, 1920, Woods Brothers, still being the owners of all of the above-described real estate, renumbered Blocks 18 and 20, so that Block 18 became Block 20, and Block 20 became Block 18, and did file a plat renumbering

said blocks with the register of deeds on the same date. That thereafter, all real estate within Blocks 18, 19, and 20, Woods Brothers Second Addition to Havelock, has been designated for the purpose of clarity only as "Replat of Blocks Eighteen (18), Nineteen (19) and Twenty (20), Woods Brothers Second Addition to Havelock."

Subsequently, in 1930, the city of Lincoln, defendant herein, annexed the village of Havelock, including all of the real estate here in question. On April 3, 1956, plaintiffs, husband and wife, became the owners of Lot 8, Block 18, Replat of Blocks 18, 19, and 20, Woods Brothers Second Addition to Havelock. Such lot is 50 feet wide east and west, 142 feet long north and south, and lies to the east of and adjacent to Sixty-ninth Street. Sixty-ninth Street is 60 feet wide, runs north and south, and is adjacent to and west of the real estate owned by plaintiffs. Sixty-ninth Street, from Fremont Street north 3 blocks to Seward Avenue, has never been opened, maintained, or used as a street or for any other purpose by the public or by the city of Lincoln.

On July 1, 1956, plaintiffs joined in a petition with others requesting defendant to vacate Sixty-ninth Street from the north edge of Fremont Street to the south edge of the alley between Seward Avenue and Colfax Avenue. Thereafter, the city of Lincoln did, by ordinance No. 6523, so vacate Sixty-ninth Street: "* * * subject to title to said street so vacated remaining in the city of Lincoln." Defendant claimed the right to do so under the provisions of Article VIII, section 1, of the charter of the city of Lincoln, as amended May 6, 1947, which we have heretofore quoted.

Plaintiffs claim that by virtue of Sixty-ninth Street being vacated, they became the owners of that part of Sixty-ninth Street lying adjacent to their property, and they filed this action against the city of Lincoln to quiet title to the same. Plaintiffs argued that in 1918, when Woods Brothers platted and dedicated the described real estate involved, it was located in the village of Havelock;

that the title to the area designated as a street was at that time governed by what is now sections 17-417, 17-418, 17-419, 17-420, 17-421, and 17-558, R. R. S. 1943, which have remained without amendment affecting the question here involved. In that connection, section 17-558, R. R. S. 1943, gives second-class cities and villages authority to vacate any street within the limits of the city or village, and provides in part that: "Whenever any * * * street * * * shall be vacated, the same shall revert to the owners of the adjacent real estate, one half on each side thereof." Also, section 15-701, R. R. S. 1943, as it existed during all times here involved, gave cities of the primary class like authority to vacate streets, and contained a provision identical with that just heretofore quoted.

Also, section 17-417, R. R. S. 1943, provided that: "The acknowledgment and recording of such plat is equivalent to a deed in fee simple of such portion of the premises platted as is on such plat set apart for streets or other public use, * * *." See, also, section 15-106, R. R. S. 1943, which is identical in material substance.

In that connection, as stated in 16 Am. Jur., Deeds, § 11, p. 444, the general rule is that: "From the standpoint of time the law in effect at the time of the execution of a deed governs its validity and interpretation." See, also, 26 C. J. S., Deeds, § 11, p. 596. In Norris v. Tower, 102 Neb. 434, 167 N. W. 728, we said: "Generally speaking, the laws in force when a contract is entered into form a part of it and enter into its obligation."

In such light, the only statutory or charter provisions which have been enacted or amended since the property and street here involved were platted and dedicated in 1918 and which may affect the issue involved, are the enactment of section 15-113, R. R. S. 1943, which authorized defendant city to annex the village of Havelock, and the amendment of May 6, 1947, to the city's charter, same being Article VIII, section 1, thereof, upon which the city primarily relies. All other pertinent legislative

or charter provisions have remained the same, unless reference is inferentially made to Laws of Nebraska, 1959, Chapter 44, page 225, which is hereinafter discussed.

In 1930, pursuant to sections 15-111 to 15-113, R. R. S. 1943, defendant city annexed the village of Havelock. In that respect, section 15-113, R. R. S. 1943, provides in part: "Upon such consolidation taking effect in the manner herein provided, the charter, laws, ordinances, powers, and government of such cities of the primary class, shall at once extend over the territory embraced within any such city or village so consolidated with it; and such city of the primary class shall succeed to all the property and property rights of every kind, contracts, obligations, and choses in action of every kind held by or belonging to the city or village consolidated with it; and it shall be liable for and assume and carry out all valid contracts, obligations, franchises, and licenses of any such city or village so consolidated with it."

In Enyeart v. City of Lincoln, 136 Neb. 146, 285 N. W. 314, we interpreted such annexation statute, and held: "The city of Lincoln, by the annexation of the city of University Place, as to rights, obligations, liabilities, and duties imposed upon or possessed by the latter, whether actual or contingent, tortious or on contract, whether already accrued or thereafter to accrue, became, in all respects, the successor of the latter, and subject to the same and identical conditions that were binding upon the city of University Place."

In 62 C. J. S., Municipal Corporations, § 76, p. 184, referring to streets and public highways, it is said, citing authorities: "On the other hand, the municipality takes such public ways in trust for the public, subject to established grades and rights reserved by a dedicator, and there are imposed on it the same municipal duties and liabilities as to streets, highways, and bridges in the annexed territory as rest on it with respect to those in the original territory."

By virtue of section 15-113, R. R. S. 1943, defendant city succeeded "to all the property and property rights of every kind * * * held or belonging to the city or village consolidated with it * * *." In other words, despite such annexation statute and interpretation thereof, defendant now proposes that we interpret and apply the statutes existing at the time of the plat and dedication of the property in 1918, and the charter amendment adopted in 1947, some 17 years after annexation, in such manner as to enable defendant city by ordinance to claim a greater legal interest in the street involved than that possessed by the annexed village of Havelock. We do not agree with that proposal.

Be that as it may, if we assume that upon the annexation of the village of Havelock in 1930, the area platted and dedicated as a street became subject to the laws of a primary city as they then existed, we arrive at the same result in determining the right, title, and interest of plaintiffs and defendant city.

In that connection, defendant was then governed by section 15-106, Comp. St. 1929, now section 15-106, R. R. S. 1943, section 15-701, Comp. St. 1929, now section 15-701, R. R. S. 1943, and Article VIII, section 1, of the defendant city's charter for 1920. Section 15-106, R. R. S. 1943, still provides in part: "The proprietor of any land within the corporate limits or contiguous thereto may lay out such land into lots, blocks, and public ways, * * *. When such plat is so made, acknowledged and certified, and is approved by the mayor and council, the same shall be filed and recorded in the office of the register of deeds of the county. It shall thereupon be equivalent to a deed in fee simple to the city, from the proprietor, of all streets * * * and of such portion of the land as is therein set apart for public use * * *."

Section 15-701, Comp. St. 1929, then provided in part: "The mayor and council shall have power by ordinance, to * * * vacate * * * any street * * *. Whenever any street * * * shall be vacated the same shall revert to the

owners of the adjacent real estate, one-half on each side thereof."

Also, Article VIII, section 1, charter of the city of Lincoln for 1920, then provided: "The City Council shall have power by ordinance, to * * * vacate * * * any street * * * within the limits of the city, * * *; Provided, further, whenever any street * * * shall be vacated, the same shall revert to the owners of the adjacent real estate, one-half on each side thereof." As we view it, such provisions relate to the same subject, are in pari materia, and should be construed together.

In such respect, also, sections 17-417 and 17-558, R. R. S. 1943, controlling cities of the second class and villages, sections 15-106 and 15-701, R. R. S. 1943, controlling cities of the primary class, and Article VIII, section 1, Lincoln city charter for 1920, were materially identical in force and effect, when the village of Havelock was annexed by defendant in 1930. Be that as it may, the legal force and effect of platting and dedicating real property in cities of the second class and villages, and the vacation of streets therein, should be and is binding upon cities of the primary class upon annexation by it of cities of the second class and villages.

As recently as Belgum v. City of Kimball, 163 Neb. 774, 81 N. W. 2d 205, 62 A. L. R. 2d 1295, citing authorities, we held: "The acknowledgment and recording of a plat laying out land into lots and blocks and showing thereon the streets and alleys, under section 17-417, R. R. S. 1943, operates as a dedication which is equivalent to a deed in fee simple to such portions of the premises platted as is on such plat set apart for streets and alleys for public use to the municipality.

"Under section 17-558, R. R. S. 1943, whenever any avenue, street, alley, or lane shall be vacated the same shall revert to the owners of adjacent real estate, one-half on each side thereof.

"A plat made and recorded in statutory form since the enactment of sections 17-417 and 17-558, R. R. S. 1943,

is subject to the provisions of both sections which must be considered in pari materia.

"While the equivalent to a deed in fee simple to the streets and alleys on a plat is vested in a municipality under section 17-417, R. R. S. 1943, such fee is a qualified, base, or determinable fee which may be continued forever if the streets and alleys be devoted to the public use, and such fee is determined by the vacation of streets and alleys by the municipality as provided for in section 17-558, R. R. S. 1943." The same rules apply to sections 15-106 and 15-701, R. R. S. 1943. See, also, Hillerege v. City of Scottsbluff, 164 Neb. 560, 83 N. W. 2d 76, which involved a city of the first class. Therein we held, citing authorities, that: "The title to a street vested in a city is not generally a fee simple absolute but is a qualified base or determinable fee and it is held in trust for the purposes to which the street is dedicated."

As early as Village of Bellevue v. Bellevue Improvement Co., 65 Neb. 52, 90 N. W. 1002, this court held: "Where a village board, acting by virtue of subdivision 27, section 69, chapter 14, article 1, Compiled Statutes, vacates a street, avenue, alley or lane, the land within such street or alley reverts to the owners of the adjacent real estate, one-half on each side thereof.

"That vacation proceedings are had by a village board at the instance and request, and primarily for the benefit, of certain owners whose property would be benefited by such vacation, is not ground for declaring the vacation ordinance void." In that case, such cited statute contained a provision that: "'whenever any * * * street * * * shall be vacated, the same shall revert to the owners of the adjacent real estate, one-half on each side thereof.'" See, also, State ex rel. City of Lincoln v. Chicago, R. I. & P. Ry. Co., 93 Neb. 263, 140 N. W. 147, and Dell v. City of Lincoln, 168 Neb. 174, 95 N. W. 2d 336, the same case as that at bar, wherein in a former appeal we pointed out that the charter provision upon which defendant city relied in support of its contention

that it superseded the statutes, was not presented in the record. In any event, we pointed out in that opinion that section 15-701, R. R. S. 1943, empowered the mayor and council of a city of the primary class by ordinance to vacate any street within the limits of the city, but that the same section provided that when any street is so vacated, the same shall revert to the owners of the adjacent real estate, one-half on each side thereof. Such is the universal rule under comparable statutes.

Plaintiffs now argue that the greatest possible interest which defendant city could possess after it annexed the village of Havelock, including Sixty-ninth Street, was a fee simple determinable title, subject to being determined or diverted upon vacation of the street by defendant, which has occurred, and that plaintiffs are owners in fee simple absolute of one-half such street adjacent to their real property. We agree. On the other hand, defendant city contends that Article VIII, section 1, of the city charter as amended May 6, 1947, which has been heretofore quoted, has superseded relevant provisions of the foregoing original statutes, sections 17-558 and 15-701, R. R. S. 1943, because it was a matter of strictly local municipal concern, and that, having reserved title to such street in ordinance No. 6523, which vacated same, defendant has now increased its title to the vacated street from a fee simple determinable to an absolute fee simple title thereto. We do not agree.

As said in Restatement, Property, § 44, p. 121: "An estate in fee simple determinable is created by any limitation which, in an otherwise effective conveyance of land, (a) creates an estate in fee simple; and (b) provides that the estate shall automatically expire upon the occurrence of a stated event." Also, contrary to defendant's contention, as stated in "Comment on Clause (b)," p. 124: "The 'stated event,' within the meaning of that term * * * can be either the happening, or the non-happening, of a specified occurrence, and can be either certain, or not certain, to happen." Also, see Comment

f, p. 125. Also, the conveyor "has a possibility of reverter despite the absence of specific words creating any interest in him." See illustration, p. 122.

In Hillerege v. City of Scottsbluff, *supra,* we held that: "The right which an owner of abutting property possesses in a street is different in kind from that possessed by one whose interest is only that of a right-of-way along the street.

"The right of an owner of property abutting on a street to ingress and egress to and from his premises by way of such street is a property right in the nature of an easement in the street which the owner of the property has, not in common with the public generally, and of which he cannot be deprived without due process of law and compensation for his loss." See, also, 64 C. J. S., Municipal Corporations, § 1701, p. 96; 25 Am. Jur., Highways, § 154, p. 448, citing many authorities from this and other jurisdictions.

In such respect, it will be noted that to sustain defendant's contention under the circumstances presented here would deprive plaintiffs of their property rights in the street without compensation therefor, in violation of Article I, section 21, Constitution of Nebraska, which provides that: "The property of no person shall be taken or damaged for public use without just compensation therefor," and Article I, section 3, Constitution of Nebraska, which provides that: "No person shall be deprived of life, liberty, or property, without due process of law," which neither the state nor the city has any authority to do. In that connection, such issues were evidently not raised in Van Valkenberg v. Rutherford, 92 Neb. 803, 139 N. W. 652. Therein the city had deeded the vacated portions of the street to the adjacent property owners and parties plaintiff therein owned no real estate abutting on the vacated street, and the closing thereof did not interfere with ingress to or egress from their premises. Such opinion is not controlling here.

Section 16-611, R. R. S. 1943, relied upon by defend-

ant, applies only to cities of the first class, and in any event it has no relation to streets which have been platted and dedicated, as in the case at bar. In that connection, section 15-701, R. R. S. 1943, was amended by Laws of Nebraska, 1959, Chapter 44, page 225, by adding thereto the following italicized portions and removing the portion in parenthesis, as follows: "The mayor and council shall have power by ordinance to open, widen or otherwise improve, vacate, care for, control, name, and rename any street, avenue, alley or lane, parks, and squares within the limits of the city, and also to create, open and improve any street, avenue, alley or lane; *Provided, all damages sustained by the owners of the property thereon shall be ascertained in the manner set forth in sections 76-704 to 76-724; and provided further,* whenever any street, avenue, alley or lane shall be vacated, the same shall revert to the owners of the adjacent real estate, one half on each side thereof, *unless the city reserves title thereto in the ordinance vacating such street, avenue, alley or lane. In the event title is retained by the city, such property may be leased for such periods and on such terms as the council may by ordinance authorize, or may be sold as provided by the city.* (The procedure to condemn property shall be exercised in the manner set forth in sections 76-704 to 76-724.)"

In such situation, we have held that: "A legislative act will not be permitted, even if an attempt so to do is disclosed, to operate retrospectively where it will have the effect to invalidate or impair the obligation of contracts or interfere with vested rights." Travelers Ins. Co. v. Ohler, 119 Neb. 121, 227 N. W. 449.

In School District of Omaha v. Adams, 151 Neb. 741, 39 N. W. 2d 550, we held that: "A legislative act will operate only prospectively and not retrospectively, unless the legislative intent and purpose that it should operate retrospectively is clearly disclosed." See, also, State

ex rel. City of Grand Island v. Union Pacific R. R. Co., 152 Neb. 772, 42 N. W. 2d 867.

Such 1959 amendment has no application here for two reasons. First, it does not clearly disclose that the act as amended was intended to operate retrospectively; and, second, if it did, the vacation of a street under the provisions of the act in cases such as that at bar would be a violation of Article I, section 21, and Article I, section 3, Constitution of Nebraska, for reasons heretofore stated.

In that connection, Hanson v. City of Omaha, 157 Neb. 403, 59 N. W. 2d 622, reaffirmed that: "A municipal corporation is a creature of the law established for special purposes, and its corporate acts must be authorized by its charter and other acts applicable thereto. It therefore possesses no power or faculties not conferred upon it, either expressly or by fair implication, by the laws which created it or by other laws, constitutional or statutory, applicable to it." See, also, Wagner v. City of Omaha, 156 Neb. 163, 55 N. W. 2d 490.

In connection with Article VIII, section 1, of the city charter as amended May 6, 1947, defendant contends that it deals with a matter of strictly local municipal concern, and still prevails even if in conflict with sections 17-117, 17-558, 15-106, and 15-701, R. R. S. 1943, the statutes in force at the time ordinance No. 6523 was passed which vacated Sixty-ninth Street. On the other hand, plaintiffs contend that where the Legislature has enacted a law or laws affecting municipal affairs which are also of state-wide concern, such laws take precedence over any action taken by such city, under the provisions of a city charter.

In Axberg v. City of Lincoln, 141 Neb. 55, 2 N. W. 2d 613, 141 A. L. R. 894, we held that: "Under the provisions of section 2, art. XI of the Constitution, a home rule charter must be consistent with and subject to the Constitution and laws of this state.

"Under a home rule charter, a city may provide for the

exercise of every power, not contravening constitutional inhibitions, connected with the proper and efficient government of the municipality.

"Where the legislature has enacted a law affecting municipal affairs, but which is of state-wide concern, such law takes precedence over any action taken by a home rule city under its charter.

"The preservation of order, the enforcement of law, the protection of life and property, and the suppression of crime are attributes of state sovereignty and matters of state-wide concern, and when the legislature enacts a general law upon any of these subjects with respect to cities of a particular class, such law applies to all cities of the class, including home rule cities.

"Cities which have adopted a home rule charter, as authorized by the Constitution, are subject to the general laws of the state, except as to municipal matters of strictly local concern.

"Whether or not an act of the legislature pertains to a matter of state-wide or strictly local concern becomes a question for the courts when a conflict of authority arises."

As we view it, statutes which are enacted for the transfer or protection of the property rights of every owner of real property in the state, or those in a proper municipal classification in this state, and the compensation which such owners are entitled to receive for the public use or disposal thereof as well, is of state-wide concern.

Therefore, when the land here involved was platted and dedicated in 1918, the village of Havelock took a fee simple determinable title to the street involved, and when the city of Lincoln annexed the village of Havelock in 1930, said city took a fee simple determinable title only to said street, exactly that and no more. Thus, when defendant vacated Sixty-ninth Street, the title thereto reverted "to the owners of the adjacent real estate, one half on each side thereof," despite any con-

trary provision of defendant's city charter or statutes thereafter amended or enacted.

Finally, defendant contends that the vacation ordinance, No. 6523, was legislative in character, and if the attempted reservation of title in the city was invalid, then the whole ordinance was void, and there was in fact no vacation of Sixty-ninth Street because the intent of the city was that vacation of the street should be subject to title remaining in the city, which provision was inseparable and without which the ordinance would not have been adopted. Assuming for purpose of argument only that the ordinance was legislative in character, it is controlled by the rule that: "If a city ordinance contains valid and void provisions, the valid portion will be upheld if it is a complete law, capable of enforcement, and is not dependent upon that which is invalid." Arrigo v. City of Lincoln, 154 Neb. 537, 48 N. W. 2d 643.

On the other hand, we held in State ex rel. Nelson v. Butler, 145 Neb. 638, 17 N. W. 2d 683, that: "The crucial test for determining that which is legislative and that which is executive or administrative is whether the resolution or ordinance of a city council is one making a law or one executing a law already in existence."

The vacation ordinance here involved was in effect simply executive or administrative in character, that is, it was one executing applicable and controlling laws already in existence, which could be done, but only in the form and manner authorized by such laws. In any event, that part of the ordinance which vacated the street was complete and capable of enforcement, and same was not dependent upon that invalid part which attempted to retain title to the street. Defendant's contention has no merit.

For reasons heretofore stated, we conclude that the judgment of the trial court should be and hereby is reversed, and the cause is remanded with directions to render a judgment in favor of plaintiffs and against defendant, and granting plaintiffs the relief sought by them

in their petition. All costs are taxed to defendant.

REVERSED AND REMANDED WITH DIRECTIONS.

EDWARD D. KENNEDY, ALSO KNOWN AS EDWARD KENNEDY, PLAINTIFF IN ERROR, V. STATE OF NEBRASKA, DEFENDANT IN ERROR.

101 N. W. 2d 853

Filed March 25, 1960. No. 34806.

1. **Criminal Law.** In a criminal case, after trial and conviction in the district court by a jury, error proceedings cannot be taken to this court by the defendant therein before a judgment has been rendered or a final order made by the court below, which judgment or final order must include a sentence.
2. **Criminal Law: New Trial.** However, in order to review alleged errors occurring during the trial, such errors must be pointed out to the trial court in a motion for new trial and a ruling obtained thereon.
3. **Criminal Law.** Insofar as Fisher v. State, 153 Neb. 226, 43 N. W. 2d 600, is in conflict herewith the same is overruled.
4. ———. It is a prerequisite to our right to review the trial court's ruling on a defendant's rights under subdivision (2) of section 24-342, R. S. Supp., 1957, that the affidavit therein referred to is filed in the district court.

ERROR to the district court for Douglas County: PATRICK W. LYNCH, JUDGE. On motion of defendant in error to dismiss. On motion of plaintiff in error for bill of exceptions. *Motion of defendant in error to dismiss overruled. Motion of plaintiff in error for bill of exceptions overruled.*

Jack L. Spence, for plaintiff in error.

Clarence S. Beck, Attorney General, and *Bernard L. Packett,* for defendant in error.

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

WENKE, J.

This is an error proceeding from the district court

for Douglas County. On February 15, 1960, the defendant in error, the State of Nebraska, filed a motion to dismiss the petition in error filed herein "for the reason that such Petition in Error has not been filed within the time prescribed by the laws of Nebraska, and this Court is, therefore, without jurisdiction in the premises."

Plaintiff in error, Edward D. Kennedy, filed a petition in error, transcript, and poverty affidavit in the office of the clerk of this court on February 10, 1960. Section 29-2306, R. S. Supp., 1957, which is applicable here, provides as follows: "In all criminal cases except when the punishment is capital, writs of error shall be issued by the Clerk of the Supreme Court upon the filing of a petition in error and transcript of the record of the proceedings of the district court and payment of a docket fee of twenty dollars to the Clerk of the Supreme Court; Provided, if any person desiring to obtain such writ of error shall file an affidavit with the clerk of the court that he is unable, on account of his poverty, to pay the costs, the clerk shall enter the suit upon the docket, and upon the entry of final judgment endorse the amount of costs upon the mandate, and the same shall be paid by the county in which the indictment was found." The plaintiff in error complied with the provisions of this statute and this court has jurisdiction of the cause if the above were filed in time. See Goodman v. State, 131 Neb. 662, 269 N. W. 383.

Section 25-1931, R. R. S. 1943, which we have held to be applicable and controlling in criminal cases, provides, insofar as here material, as follows: "No proceedings for reversing, vacating, or modifying judgments or final orders shall be commenced unless within one calendar month after the rendition of the judgment or making of the final order complained of; * * *." See, also, Lee v. State, 124 Neb. 165, 245 N. W. 445; Goodman v. State, *supra;* Fisher v. State, 153 Neb. 226, 43 N. W. 2d 600; Cunningham v. State, 153 Neb. 912, 46 N. W. 2d 636. It should be mentioned that

"judgments and sentences upon convictions for felonies and misdemeanors under the criminal code" are excepted from the procedures provided for by section 25-1912, R. R. S. 1943.

The transcript shows that on October 15, 1959, plaintiff in error, Edward D. Kennedy, defendant below, was found guilty by a jury in the district court for Douglas County on two counts: The first, that of having in his possession burglary tools with the intent of breaking and entering, and the second, that of having in his possession concealed weapons. Thereafter, on October 20, 1959, plaintiff in error filed a motion in the district court to have the verdicts of guilty set aside and for a new trial. This motion was filed within the time provided therefor by section 29-2103, R. R. S. 1943, and sets out therein some of the reasons contained in section 29-2101, R. R. S. 1943, for granting a new trial. This motion was overruled by the trial court on November 30, 1959. Thereafter, on December 11, 1959, the trial court set down for hearing on December 21, 1959, count three of the information wherein plaintiff in error was charged with being an "habitual criminal." See § 29-2221, R. R. S. 1943. Hearing thereon was had accordingly and on that date the trial court found and adjudged plaintiff in error to be an habitual criminal as charged. Thereafter, on January 11, 1960, plaintiff in error was sentenced to serve 15 years in the penitentiary on each of said convictions, such sentences to run concurrently. The error proceeding in this court was filed within 1 calendar month thereafter. The question arises, what constitutes the making of a final order under section 25-1931, R. R. S. 1943, in an error proceeding involving a conviction in a criminal case?

From a check of our holdings it would appear that we have never ruled directly on this question, although our holdings clearly indicate that in a criminal proceeding a conviction and sentence constitute a final order within the meaning of section 25-1931, R. R. S.

1943. See, Kountz v. State, 8 Neb. 294, 1 N. W. 142; Green v. State, 10 Neb. 102, 4 N. W. 422; Gartner v. State, 36 Neb. 280, 54 N. W. 516; Kock v. State, 73 Neb. 354, 102 N. W. 768; Farrington v. State, 116 Neb. 712, 218 N. W. 590; Hoover v. State, 126 Neb. 277, 253 N. W. 359; Goodman v. State, *supra;* Iron Bear v. State, 149 Neb. 634, 32 N. W. 2d 130. See, also, 2 Am. Jur., Appeal and Error, § 140, p. 934; 24 C. J. S., Criminal Law, § 1649, p. 245. As stated in 2 Am. Jur., Appeal and Error, § 140, p. 934: "With reference to what satisfies the requirement of finality, it may be stated generally that no judgment will be regarded as final unless sentence is pronounced."

We think the rule applicable is as follows: In a criminal case, after trial and conviction in the district court by a jury, error proceedings cannot be taken to this court by the defendant therein before a judgment has been rendered or a final order made by the court below, which judgment or final order must include a sentence. See Farrington v. State, *supra.* However, in order to review alleged errors occurring during the trial, such errors must be pointed out to the trial court in a motion for new trial and ruling obtained thereon. See Luster v. State, 142 Neb. 253, 5 N. W. 2d 705. Insofar as Fisher v. State, *supra,* is in conflict herewith the same is overruled.

In other words, error proceedings may be taken from the overruling of the motion for new trial or the imposition of sentence, whichever is the later. In view thereof we find the error proceeding was lodged in this court within the time provided therefor by section 25-1931, R. R. S. 1943, and, because thereof, the motion of the State to dismiss is overruled.

Plaintiff in error filed a request with the clerk of the district court for Douglas County on February 3, 1960, requesting a bill of exceptions containing all of the evidence offered at the trial, a copy of which was delivered to the official court reporter on February 4, 1960. There-

after, on February 10, 1960, he filed a motion in this court requesting an order of this court directing the trial court to order and have prepared a bill of exceptions for him and ordering the cost thereof to be taxed to Douglas County. He bases this request on the poverty affidavit originally filed by him in this court at the time he filed his petition in error and transcript here.

Section 24-342, R. S. Supp., 1957, which is controlling, provides, insofar as here material, as follows: "It shall be the duty of such reporter to furnish on the application of the county attorney, or any party to a suit in which a stenographic report of the proceedings has been made, or upon receipt of notice from the clerk of the district court as provided in section 29-2306.02, a transcribed copy of the proceedings so recorded, or any part thereof. The reporter shall be entitled to receive in addition to his salary, a fee of fifteen cents per hundred words, to be paid by the party requesting the same; except * * * (2) where the defendant in a criminal case, after conviction, shall make an affidavit that he is unable by reason of his poverty to pay for such copy, the court or judge thereof may, by order endorsed on such affidavit, direct the reporter to deliver such transcribed copy to such defendant, and his fees therefor shall be paid by the county in the same manner as other claims are allowed and paid, * * *." It is a prerequisite to our right to review the trial courts ruling thereon that such an affidavit be filed in the district court. In the absence thereof we are without right to do so for our jurisdiction in regard thereto is appellate and not original. If such an affidavit is filed in the district court, then our method of reviewing the trial court's ruling thereon is set out in Fisher v. State, *supra*. In view of the foregoing, the motion of the plaintiff in error is overruled.

But plaintiff in error's counsel has filed his affidavit in this court stating that he made an oral motion for that purpose to the trial judge, which was overruled. Such an affidavit does not supply the deficiency in the

record relating thereto. That can only be done by having the record of the trial court completed, so showing, and then filing a supplemental transcript thereof in this court. But that would serve no useful purpose here for the statute supplies the exclusive method by which an indigent defendant can proceed to obtain a bill of exceptions, if he is entitled thereto, and he must follow that method if he is to obtain the benefits thereunder.

MOTION OF STATE TO DISMISS OVERRULED.
MOTION OF PLAINTIFF IN ERROR FOR BILL OF EXCEPTIONS OVERRULED.

GRAYCE SAAB, APPELLANT, V. OMAHA & COUNCIL BLUFFS STREET RAILWAY COMPANY, NOW OMAHA TRANSIT COMPANY, A CORPORATION, APPELLEE.

102 N. W. 2d 59

Filed April 1, 1960. No. 34584.

1. **Negligence.** In an action for negligence the burden is on the plaintiff to show that there was a negligent act or omission by the defendant and that it was the proximate cause of plaintiff's injury or a cause which proximately contributed to it.
2. **Carriers: Negligence.** A prima facie case of negligence on the part of a common carrier is made in an action by a passenger against the carrier for personal injury where it appears that some defect in appliances or that some act of the carrier's employees in the conduct of its business contributed to the accident.
3. ———: ———. A prima facie case of negligence is not made in a case of injury to a passenger on leaving a vehicle of transportation where the passenger has been given a reasonable opportunity to select his time to alight and to direct his own progress, and who does alight on the street at his destination and becomes a pedestrian.

APPEAL from the district court for Douglas County: CARROLL O. STAUFFER, JUDGE. *Affirmed.*

Schrempp & Lathrop, Henry C. Rosenthal, Jr., and *Simon J. Albracht,* for appellant.

William P. Mueller and *Kennedy, Holland, DeLacy & Svoboda,* for appellee.

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

YEAGER, J.

This is an action by Grayce Saab, plaintiff and appellant, against Omaha & Council Bluffs Street Railway Company, now Omaha Transit Company, a corporation, defendant and appellee, for damages for personal injuries which the plaintiff alleges were sustained as a result of the negligence of the defendant. The case was tried to a jury. The jury returned a verdict in favor of the defendant and against the plaintiff. Judgment was rendered on the verdict. A motion for new trial was filed and in due course overruled. From the judgment and the order overruling the motion for new trial the plaintiff has appealed.

In the briefs there are three assignments of error which the plaintiff contends contain grounds for reversal of the judgment. The assignments refer separately to three instructions given by the court. An examination of the assignments and the instructions however discloses that a single question is involved. By these instructions the jury was effectually told that the plaintiff assumed the risk of passing into the condition and situation which caused the injury and the damages which she seeks to recover from the defendant.

There is no material dispute as to the facts upon which the determination herein must depend. A brief but sufficient review of the evidence discloses that on and prior to February 26, 1955, the plaintiff was employed by the First National Bank of Omaha, Nebraska, with time of daily employment starting at 1 p.m. and ending at 9 p.m. She lived at 3744 North Thirty-seventh Street in Omaha, Nebraska. The residence is on the west side of the street. The defendant operates bus lines for transportation of passengers for hire on the streets of

the city of Omaha. One of its lines extends from downtown Omaha to a point where it enters Thirty-seventh Street north of the residence of plaintiff and extends southward and passes this residence. A short distance to the north the bus traverses the intersection of Spaulding Street with Thirty-seventh Street. Spaulding Street extends east and west. In this area Thirty-seventh Street is paved and is generally level. The record from the weather bureau introduced in evidence shows that between February 3, 1955, and February 26, 1955, 7.2 inches of snow fell, and that during that period the daily average temperature ranged from 1° below zero to 34° above zero with only 2 days when the average exceeded 32° above zero. On February 4, 1955, snow was removed on Thirty-seventh Street by the defendant which was accomplished by the use of a blade or plow attached to some type of motorized equipment which caused the snow to be pushed to the west side. This blade was caused to move at an elevation above the pavement of about 1 inch. This would cause or produce a ridge of snow along the side of the street. Whether or not any snow was similarly removed later in the month is not made certain. It is certain that a cindering operation was carried out on February 26, 1955, which may have been accompanied by snow removal.

On February 26, 1955, after finishing her day's work, the plaintiff took passage in downtown Omaha as a regular passenger on a bus of the defendant and was transported to the vicinity of Thirty-seventh and Spaulding Streets where, in response to a signal properly made by her, the bus came to a stop. The bus stopped with the rear door from 27 to 30 feet north of the intersection of Thirty-seventh and Spaulding Streets and about 8 feet east of the west curb line of Thirty-seventh Street. The plaintiff alighted at the rear door and stepped down onto the street.

It is interpolated here that the appeal is in nowise

predicated on either the proposition that the exit was unsafe or that the location in the street where plaintiff was caused to alight was in an unsafe condition.

To the west of plaintiff when she alighted was a ridge of snow extending along the curb which was from 12 to 18 inches in height. There is no evidence as to its width except that its width was perhaps a little greater than its height. After alighting plaintiff took two or three steps, covering a distance of 3 or possibly 4 feet, west toward the ridge of snow and then she stepped over the ridge with her right foot after which she proceeded to bring her left foot over when she fell, as the result of which she received injuries. She was familiar with the surroundings, with the fact that the ridge of snow was there, and also with the fact that there was a passage through the ridge at the intersection with Spaulding Street.

There is no direct evidence and none from which a legally reasonable inference may be drawn as to what caused the plaintiff to fall. The total evidence in this regard is found in the testimony of the plaintiff. There are three instances in her testimony where she described what happened but in none of them does she say or indicate that she has any knowledge as to what caused her to fall. The cause of the fall was, on the record made at the trial, purely speculative and conjectural.

With the record of the evidence in this condition the defendant at the close of the evidence moved for a directed verdict on the ground that the pleaded cause of action had not been proved. This motion was overruled.

The defendant by its brief, in addition to a challenge to the propriety of the assignments of error in the light of the record of the evidence, asserts that there was no evidence upon which to justify the submission of any issue for determination by a jury. In other words the defendant insists that there was no proof of actionable negligence on its part and no proof at all of the

proximate cause of plaintiff's fall and her injuries. In consequence of this it insists that it was entitled to a directed verdict.

It is of course true that if the defendant was entitled to a directed verdict, as it insists, the question relating to instructions, which is the only one presented by the plaintiff on appeal, has no controlling significance, since the defendant obtained at the hands of the jury what it was entitled to under its motion for a directed verdict.

The burden was on the plaintiff, in order to recover, to prove that the defendant was negligent and also that the negligence was the proximate cause of the accident. The appropriate rule is stated as follows in Sipprell v. Merner Motors, 164 Neb. 447, 82 N. W. 2d 648: "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." The rule and its application are discussed at length in the opinion with citations of authority.

There are decisions of this court which announce what may be regarded as an exception to this rule under circumstances where a passenger is injured upon or while leaving a vehicle of public transportation. Under this exception, if it is made to appear in an action by a passenger against a common carrier for personal injury that some defect in appliances or that some act of the carrier's employees in the conduct of its business contributed to the accident, a prima facie case of negligence on the part of the carrier ordinarily is made. See, Jacobson v. Omaha & C. B. St. Ry. Co., 109 Neb. 356, 191 N. W. 327, 31 A. L. R. 563; Olson v. Omaha & C. B. St. Ry. Co., 137 Neb. 216, 289 N. W. 356.

A prima facie case of negligence however is not made in an instance where a passenger is given a reasonable opportunity to select his time to alight and to direct his own progress, and who does alight on the street at his

destination and becomes a pedestrian. Under such circumstances the carrier is under no duty to guard or protect him in his progress on the street from the place where he alights. See Jacobson v. Omaha & C. B. St. Ry. Co., *supra*.

In this case the record without peradventure discloses that the plaintiff was allowed to safely alight, in a safe place. She became a pedestrian and chose the path of departure from the place where she alighted. She could have chosen to walk 27 to 30 feet to the south where no ridge of snow obstructed passage to the west and to the sidewalk leading to her residence to the south. She chose instead to cross over the ridge of snow. In the light of her voluntary acts and the decisions of this court it may not be said that the defendant was guilty of any actionable negligence.

The plaintiff walked to the ridge of snow and stepped over with her right foot, then she started to bring her left foot over when she fell. What caused her to fall is not disclosed. There is a complete absence of proof of proximate cause and, as has been pointed out, no presumption is available to supply this failure of proof.

It becomes clear therefore that for failure of proof of a cause of action the motion of the defendant for a directed verdict should have been sustained. A discussion therefore of the particular assignments of error is rendered unnecessary since the verdict returned accomplished the proper result.

The judgment of the district court is affirmed.

AFFIRMED.

ELLIS WARREN, APPELLANT, V. OLLIE BOSTOCK, APPELLEE.
102 N. W. 2d 55

Filed April 1, 1960. No. 34742.

1. **Trial.** A motion for judgment notwithstanding the verdict must, for the purpose of decision thereon, be treated in the light most

favorable to the party against whom the motion is directed.

2. **Automobiles: Negligence.** A violation of statutes regulating the use and operation of motor vehicles upon the highways is not negligence per se, but evidence of negligence which may be considered with all the other facts and circumstances in determining whether or not a party was negligent.
3. **Negligence.** Actionable negligence exists when the injury is the proximate result thereof, and the proximate result must be the natural and probable consequence which ought to have been foreseen or reasonably anticipated in the light of the attendant circumstances.
4. ———. Proximate cause, as used in the law of negligence, is that cause which in the natural and continuous sequence, unbroken by an efficient intervening cause, produces the injury, and without which the injury would not have occurred.
5. **Negligence: Trial.** When the evidence is in conflict as to what negligence, if any, constituted the proximate cause of the injury, the determination of the proximate cause is for the jury.

APPEAL from the district court for Adams County: EDMUND NUSS, JUDGE. *Reversed and remanded.*

Conway & Irons and *John N. Marvel,* for appellant.

Stiner & Boslaugh, for appellee.

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

CARTER, J.

The plaintiff commenced this action to recover damages sustained to his person in an automobile accident. The defendant denied negligence on his part and asserted that the accident was the result of negligence on the part of plaintiff. Defendant counterclaimed for the damages sustained by his vehicle. The jury returned a verdict for the plaintiff in the amount of $1,375. Defendant moved for judgment notwithstanding the verdict and, in the alternative, for a new trial. The trial court sustained defendant's motion for judgment notwithstanding the verdict and dismissed plaintiff's petition and defendant's counterclaim. The plaintiff has appealed.

The accident occurred 2 miles south of Ayr on U. S. Highway No. 281, a short distance south of an intersection with a county road. U. S. Highway No. 281 is described as a paved black-top road, the pavement being 24 feet wide with a white stripe down the center. The pavement was dry and visibility was good. The area around the intersection was level. There was no other traffic in view on either road at the time of, or immediately before, the accident.

The plaintiff and defendant were both proceeding north towards the intersection on U. S. Highway No. 281 immediately before the collision. The plaintiff testified that he was driving north at a speed of 60 miles an hour. At a point about 400 feet south of the intersection he observed defendant's pick-up truck proceeding north at a point about 300 feet south of the intersection at the approximate speed of 30 miles an hour. Plaintiff stated that he reduced his speed to 55 miles an hour as he neared defendant's truck. Plaintiff stated that at a point 120 feet south of the intersection he turned into the left or west lane of the highway for the purpose of passing the defendant's truck. He gave no warning of his intention to pass. Plaintiff testified that when he was between 70 and 100 feet from defendant's truck the defendant turned his truck to the left across the center line into the path of plaintiff's station wagon. He applied his brakes, leaving skid marks on the pavement for 115 feet, but was unable to avoid a collision. The impact of the 2 vehicles occurred approximately 30 feet south of the intersection. The skid marks showed the right rear wheel of plaintiff's station wagon was 2 feet to the left of the center line. The front of plaintiff's station wagon struck the rear of defendant's truck. After the collision both vehicles were 148 feet north of the intersection, one on the west side of the road, the other on the east.

The defendant testified that his truck was on the right side of the center line of the road at all times

prior to the collision. He states that he did not look for, see, or hear the approach of plaintiff's station wagon from the rear. The defendant said that he gave no signal of any intent to turn left across the center line of the highway.

The plaintiff alleged that defendant was negligent in failing to keep a proper lookout, by driving on the left side of the highway, and by failure to signal his intention to leave the right lane of traffic. The defendant alleged plaintiff was negligent in attempting to pass without allowing a safe distance between his vehicle and that of defendant, in failing to drive on the right half of the highway while crossing an intersection, in failing to maintain proper control of his station wagon, in failing to keep a proper lookout, in driving at an excessive speed under the circumstances, and in failing to decrease his speed in approaching an intersection. The trial court instructed the jury on the applicable statutory rules of the road and it is not contended that the instructions were erroneous in any respect. The sole issue is whether or not the trial court erred in holding that plaintiff was guilty of negligence as a matter of law sufficient to bar a recovery by him.

This court has consistently held that a violation of a statutory rule of the road is not negligence per se, but evidence of negligence only, which may be considered with all the facts and circumstances in determining whether or not a party was negligent. Roby v. Auker, 149 Neb. 734, 32 N. W. 2d 491; Armer v. Omaha & C. B. St. Ry. Co., 151 Neb. 431, 37 N. W. 2d 607. It is the rule also that in considering a motion for judgment notwithstanding the verdict the evidence should be construed in the light most favorable to the party against whom the motion is made.

There is evidence in the present case which would sustain a finding of statutory violations of the rules of the road by both parties to the action. But such violations are evidence of negligence only which the jury

may consider in determining whose negligence, if any, was the proximate cause of the accident. The jury evidently found in the instant case that the proximate cause of the accident was not plaintiff's speed, his attempt to pass by turning to the left side of the highway, in failing to sound a warning, nor in failing to keep a proper lookout. It is just as evident that the jury did find that the proximate cause of the accident was the act of defendant in turning his vehicle into the left lane in front of plaintiff's oncoming station wagon without giving any warning of his intention to do so. The evidence was sufficient to sustain such a finding by the jury. Such being the case, the conclusion reached by the jury was within its province, and not a question of law for the court.

The defendant contends that plaintiff in attempting to pass the defendant's truck was negligent in that he was traveling at an excessive speed. We find no evidence in the record that would indicate that the speed of plaintiff's car was a proximate cause of the accident as a matter of law. See Herman v. Firestine, 146 Neb. 730, 21 N. W. 2d 444. Defendant contends also that plaintiff was negligent in not being able to stop his vehicle before striking an object within the range of his vision. This rule, recognized in certain situations, has no application to an operator of a vehicle who undertakes to pass another. The very nature of the movement contemplates the one engaged in passing another vehicle will travel at a greater speed than the vehicle being passed. The application of the rule to one engaged in passing another vehicle would effectively prevent passing other vehicles on a highway without being subject to a charge of negligence as a matter of law. Defendant contends further that plaintiff did not have reasonable control of his station wagon. There is no evidence on this point. The defendant testified that he did not see the plaintiff or his vehicle until after the collision. We have said that the control that is re-

quired of a motorist is such as will prevent the collision with another vehicle not being operated negligently. Bezdek v. Patrick, 167 Neb. 754, 94 N. W. 2d 482. Defendant further contends that plaintiff was negligent in attempting to pass defendant's truck at an intersection. Whether or not the statute prohibiting passing at intersections was violated, we do not here determine. There is no evidence to show that such violation, if there was one, proximately contributed to the accident as a matter of law. It is asserted by defendant that plaintiff was negligent in not warning of his intention to pass by sounding his horn. The duty to sound a warning is not an absolute one. Such duty depends largely on the circumstances of the particular case, and whether or not one is negligent in failing to sound a warning before attempting to pass is ordinarily a question for the jury. Adams v. Welliver, 155 Neb. 331, 51 N. W. 2d 739; Tews v. Bamrick, 148 Neb. 59, 26 N. W. 2d 499.

On the other hand, there is evidence that the defendant turned without warning from the right side of the highway across the center line onto the left side into the path of plaintiff's oncoming station wagon. The jury could properly find under this evidence, as it did, that the defendant was negligent in so doing and that such negligence was the proximate cause of the accident.

Actionable negligence exists when the injury or the loss is the proximate result thereof. The proximate result must be the natural and probable consequence which ought to have been foreseen or reasonably anticipated in the light of the attendant circumstances. An injury is not actionable if it would not have resulted from the alleged negligence but for the interposition of a new and independent cause. Proximate cause, as used in the law of negligence, is that cause which in the natural and continuous sequence, unbroken by an efficient intervening cause, produces the injury, and with-

out which the injury would not have occurred. Coyle v. Stopak, 165 Neb. 594, 86 N. W. 2d 758.

It is fundamental, of course, that where the evidence is in conflict as to what negligence, if any, constituted the proximate cause of the injury without which no injury would have occurred, the question is one for the jury to determine. The jury having returned a verdict for the plaintiff which is sustained by the evidence, the trial court was in error in sustaining a motion for judgment notwithstanding the verdict. The judgment of the district court is reversed and the cause remanded with directions to reinstate plaintiff's verdict and enter judgment thereon.

REVERSED AND REMANDED.

KEITH MUENCHAU, APPELLANT, V. WAYNE SWARTS ET AL., APPELLEES.

102 N. W. 2d 129

Filed April 1, 1960. No. 34749.

1. **Actions.** By the phrase "cause of action" is meant, not the formal statement of facts set forth in the petition, but the subject matter upon which the plaintiff grounds his right of recovery.
2. **Actions: Pleading.** So long as the court can see that the identity of the cause of action is preserved, the particular allegations of the petition may be changed and others added in order to cure imperfections and mistakes in the manner of stating the plaintiff's case.
3. ———: ———. An amended pleading which amplifies, expands, clarifies, or elaborates with greater fullness of detail than was alleged in the original pleading does not state a new and different cause of action.
4. **Pleading.** A petition in which the cause of action is insufficiently or defectively stated may be amended by adding other allegations to remedy or cure the defects.
5. **Limitations of Actions.** The statute of limitations does not run against an amended pleading wherein the amendment consists in setting forth a more complete statement of the original cause of action.

6. **Mechanics' Liens.** Mechanic's lien statutes are cumulative and remedial in nature requiring a liberal construction so as to effectuate their objects and purposes and protect all claimants within their scope.
7. ———. The lien is given not upon the ground that a contract was made by the owner with such subcontractor, but because the material so furnished was used in the erection of the building.
8. ———. A subcontractor must file a sworn statement of the amount due him from the contractor within 60 days from the date of the last material furnished to or labor performed for the contractor in order to perfect a mechanic's lien under the provisions of section 52-102, R. S. Supp., 1955.
9. **Appeal and Error.** A judgment will not be reversed for errors against a party not entitled to succeed in any event.

APPEAL from the district court for Saunders County: JOHN D. ZEILINGER, JUDGE. *Affirmed.*

Ginsburg, Rosenberg & Ginsburg and *Norman Krivosha,* for appellant.

Marti, O'Gara, Dalton & Sheldon, for appellees.

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

MESSMORE, J.

Keith Muenchau, plaintiff, brought this action in the district court for Saunders County against Wayne Swarts and Elenore Swarts, husband and wife, defendants, to foreclose a mechanic's lien. The lien was based upon work, labor, material, and services furnished by the plaintiff and his employees upon a house then being constructed by the defendants at Ashland, Saunders County, Nebraska. The trial court found that the plaintiff's original petition set out a cause of action wherein the plaintiff claimed to have a contract with the defendant Wayne Swarts; that the plaintiff's amended petition set out a new cause of action wherein the plaintiff alleged that he was a subcontractor and had an agreement with the contractor; that more than 2 years elapsed between the date of the filing of the mechanic's lien and the date of the filing of the plaintiff's amended petition;

that the new cause of action set out in the plaintiff's amended petition was barred by statute; that the plaintiff, by filing an amended petition, abandoned his claim for a contractor's lien; and that said petition and amended petition should be dismissed at plaintiff's cost. Judgment was rendered in conformity with the findings. The plaintiff filed a motion for new trial. From the overruling of the motion for new trial, the plaintiff perfected appeal to this court.

On February 1, 1957, the plaintiff filed his petition which alleged in substance that the plaintiff was engaged in the business of the sale and installation of plumbing and heating supplies and appliances, including construction and installation of plumbing lines and fixtures; that Wayne Swarts was the record title owner and in possession of certain real estate described in the petition; that on or about August 20, 1955, the defendant Wayne Swarts employed the plaintiff to furnish all work, labor, materials, plumbing supplies, pipes, appliances, fixtures, heating lines, ducts, including a water heater, and to provide plumbing and heating for the residence being constructed upon the real estate owned by defendant Wayne Swarts; that Wayne Swarts orally agreed to pay the plaintiff the fair and reasonable charges for the work, labor, and materials to be performed, installed, and constructed by the plaintiff in accordance with the said oral contract of employment; that Elenore Swarts was the wife of the defendant Wayne Swarts and ratified the oral contract; that thereupon the plaintiff provided all necessary plumbing and heating supplies and materials for the plumbing and heating of the house of defendants, and furnished all work and labor for the installation and construction of said plumbing and heating lines, supplies, and materials necessary for said residence property; that the date of the delivery of the first item of materials and labor to said premises was August 24, 1955, and the furnishing of the last item was on December 8, 1955; that the fair

and reasonable value of said work, labor, and materials so furnished was in the amount of $2,190.93; that on January 31, 1956, plaintiff filed an affidavit and account in the office of the register of deeds of Saunders County as a mechanic's lien on the described premises; and that there was due and owing plaintiff from defendant Wayne Swarts the sum of $2,321.53, for which amount the plaintiff prayed judgment, interest, and costs.

On November 9, 1957, the defendants filed their answer to the plaintiff's petition denying all allegations contained therein except those that were admitted. Defendants' answer admitted that the defendants were the owners of record of the real estate described in the plaintiff's petition, and alleged that William V. North at all times mentioned in the plaintiff's petition was a contractor and builder; that early in August 1955, the defendants and William V. North entered into a contract whereby William V. North agreed to construct a dwelling house and garage for the defendants on the real estate referred to in the plaintiff's petition and to furnish all of the labor and materials therefor, including plumbing and heating; and that defendants agreed to pay William V. North $10,000 for the construction of the dwelling house and garage. Defendants further alleged that they had paid William V. North all of the amounts due and owing to him for the construction of said dwelling house and garage; that they did not have any contract, agreement, or understanding with the plaintiff that the plaintiff was to furnish labor, materials, plumbing, or heating in the erection of the dwelling house; that the plaintiff was a subcontractor when he furnished labor and materials and plumbing and heating for the dwelling house; that said work and materials were furnished by the plaintiff to William V. North, the contractor, not to the defendants or either of them; and that any agreement for the furnishing of labor and materials was between the plaintiff as a subcontractor and William V. North, the contractor. De-

fendants denied that the last item of labor and materials was furnished by the plaintiff on December 8, 1955, and alleged that the last item of labor and materials furnished by the plaintiff in the erection of the dwelling house was furnished on or before November 23, 1955. Defendants alleged that plaintiff's affidavit and account for mechanic's lien was filed on January 31, 1956, and that more than 60 days had elapsed between the date the plaintiff furnished the last item of labor and materials and the date that said mechanic's lien was filed in the office of the register of deeds; and that said filing was therefore void and ineffective.

Thereafter the plaintiff requested the court for leave to file an amended petition. No objection was made to this request by the defendants, and leave was granted to file an amended petition. On October 21, 1958, the plaintiff filed an amended petition. The sole difference and distinction between the plaintiff's original petition and the amended petition was that in the original petition the plaintiff alleged an oral contract between the plaintiff and the defendant Wayne Swarts, while in the amended petition the plaintiff alleged a contract between the plaintiff and the contractor William V. North.

Leave was granted the defendants to file a demurrer to the amended petition. In their demurrer defendants alleged that the plaintiff's amended petition set forth an entirely new cause of action separate and distinct from the cause of action set forth in the plaintiff's original petition; that more than 2 years elapsed from January 31, 1956, the date the plaintiff filed his mechanic's lien, to the date of the filing of the plaintiff's amended petition; that plaintiff's alleged lien was barred by statute; and that the amended petition did not state a cause of action against the defendants or either of them. The trial court overruled the defendants' demurrer and apparently reserved his ruling as to whether or not the amended petition of the plaintiff stated a separate and distinct cause of action than that alleged in the plain-

tiff's original petition until the case was heard.

On October 21, 1958, the defendants filed an answer to the plaintiff's amended petition which was substantially the same as their answer to the plaintiff's original petition, except that the amended answer alleged that the plaintiff's amended petition set forth an entirely new cause of action separate and distinct from that set forth in the plaintiff's original petition; that more than 2 years had elapsed from January 31, 1956, the date the plaintiff filed his mechanic's lien in the office of the register of deeds of Saunders County, to the date of the filing of the plaintiff's amended petition; that the plaintiff's alleged lien was barred by statute; and that the plaintiff had no lien on the real estate described in the plaintiff's petition and amended petition. The prayer was that the cloud on the defendants' title caused by the filing of the mechanic's lien be removed and that the plaintiff's petition and amended petition be dismissed and the defendants recover their costs incurred.

The plaintiff assigns as error the following: The trial court erred in finding that plaintiff's amended petition set out a new cause of action from that set forth in the plaintiff's original petition; the trial court erred in finding that the plaintiff's amended petition was barred by the provisions of section 52-103, R. S. Supp., 1955, and section 52-104, R. R. S. 1943; and the trial court erred in dismissing the plaintiff's petition and plaintiff's amended petition.

The first question presented by this record necessitates the careful consideration of the original petition and the terms of the amended petition held by the trial court to state and introduce a new cause of action.

We have heretofore set out in substance the plaintiff's original petition, the answer of the defendants thereto, the amended petition of the plaintiff, and the defendants' answer thereto.

It appears that the plaintiff, in his amended petition, incorporated as a corrected statement of his claim the

matter contained in the defendants' answer to the effect that the furnishing of work, labor, and materials was not pursuant to a contract with the owner, but under an arrangement made with the general contractor. The question arises, was the identity of the plaintiff's cause of action preserved? On this phase of the case we deem the following to be applicable.

In Myers v. Moore, 78 Neb. 448, 110 N. W. 989, we held: "And by the phrase 'cause of action,' as here used, is meant, not the formal statement of the facts set forth in the petition as a cause of action, but the subject matter upon which the plaintiff grounds his right of recovery." We approved this definition in Burke v. Northup, 98 Neb. 849, 154 N. W. 715; in Zelen v. Domestic Industries, Inc., 131 Neb. 123, 267 N. W. 352; in Lincoln Joint Stock Land Bank v. Barnes, 143 Neb. 58, 8 N. W. 2d 545; in Gergen v. Western Union Life Ins. Co., 149 Neb. 203, 30 N. W. 2d 558; in Schwank v. County of Platte, 152 Neb. 273, 40 N. W. 2d 863; in Johnson v. American Smelting & Refining Co., on rehearing, 80 Neb. 255, 116 N. W. 517; and in City of Alliance v. Cover-Jones Motor Co., 154 Neb. 900, 50 N. W. 2d 349.

In Lincoln Joint Stock Land Bank v. Barnes, *supra,* this court said: "So long as the court can see that the identity of the cause of action is preserved, the particular allegations of the petition may be changed and others added in order to cure imperfections and mistakes in the manner of stating the plaintiff's case."

As stated in Tennyson v. Werthman, 167 Neb. 208, 92 N. W. 2d 559: "An amended pleading which amplifies, expands, clarifies, or elaborates with greater fullness of detail than was alleged in the original pleading does not state a new and different cause of action."

In Norfolk Beet-Sugar Co. v. Hight, 59 Neb. 100, 80 N. W. 276, the court held: "A petition in which the cause of action is insufficiently or defectively stated may be amended by adding other allegations to remedy or

cure the defects. * * * The statute of limitations does not run against an amended pleading wherein the amendment consists in setting forth a more complete statement of the original cause of action." See, also, Kennedy v. Potts, 128 Neb. 213, 258 N. W. 471; Chicago, R. I. & P. Ry. Co. v. Young, 67 Neb. 568, 93 N. W. 922; Witt v. Old Line Bankers Life Ins. Co., 92 Neb. 763, 139 N. W. 639; Duffy v. Scheerger, 91 Neb. 511, 136 N. W. 724.

The plaintiff, by filing his amended petition, recognized and adopted factual statements made by the defendants in their answer. By doing so, the plaintiff did not mislead or surprise the defendants with reference to the cause of action stated. The plaintiff's position and contention are that the essence of plaintiff's cause of action at all times was to assert a lien upon the defendants' premises for all necessary work and labor in the installation and construction of plumbing and heating lines, supplies, materials, and labor furnished to defendants' premises. The plaintiff's cause of action is without reference to contract or want of contract with the defendants, but arises by virtue of the furnishing to defendants' premises, for the defendants' benefit, work, labor, and materials as heretofore mentioned.

Considering the above authorities and authorities hereinafter cited relating to the mechanic's lien law it will become apparent that the plaintiff's amended petition did not introduce a new cause of action in this case and also that the statute of limitations, as hereinbefore pointed out, did not run against the plaintiff as contended for by the defendants.

This brings us to a consideration of certain sections of the statutes relating to mechanic's liens.

Section 52-101, R. S. Supp., 1955, provides for a contractor's lien. Section 52-102, R. S. Supp., 1955, provides for a subcontractor's lien. Section 52-103, R. S. Supp., 1955, intends to provide for mechanics' and materialmen's liens. However, this section provides that

any person entitled to a lien under sections 52-101 and 52-102, R. S. Supp., 1955, which would include a contractor and subcontractor, shall make an account in writing of the labor, fixtures, or materials furnished, and after making oath thereto shall, within 4 months from the date of performing such labor or furnishing such materials, file the same in the office of the register of deeds of the county in which such labor, fixtures, or materials have been furnished. This section also provides that when the lien is filed it shall, from the commencement of such labor or furnishing such materials for 2 years after the filing of such lien, operate as a lien on the several descriptions of such structures and buildings, and the lots on which they stand, as named in section 52-101, R. S. Supp., 1955. This, of course, is the statute of limitations referred to by the defendants which they contend bars the plaintiff's action.

This court in Garlichs v. Donnelly, 42 Neb. 57, 60 N. W. 323, had occasion to discuss what we have here referred to as sections 52-102 and 52-103, R. S. Supp., 1955. The court said: "The provision of the mechanics' lien law applicable to subcontractors is found in section 2, chapter 54, of the Compiled Statutes (1893), and seems to be an independent rule governing the manner in which the claim of a subcontractor shall be filed. * * * While the language with which section 3 (Comp. St., 1893) begins is broad enough to cover subcontractors as well as contractors, it is evident * * * that the section just named applies to one class entitled to liens, while section 2, complete in itself, applies to subcontractors alone."

The above language explains the difference in the two sections of the statutes above mentioned as they relate to a subcontractor's lien.

In the case of Rosebud Lumber & Coal Co. v. Holms, 155 Neb. 459, 52 N. W. 2d 313, this court said: "Mechanic's lien statutes are cumulative and remedial in nature requiring a liberal construction so as to effectu-

ate their objects and purposes and protect all claimants within their scope * * *." See, also, Gibson v. Koutsky-Brennan-Vana Co., 143 Neb. 326, 9 N. W. 2d 298; Way v. Cameron, 94 Neb. 708, 144 N. W. 172; White Lake Lumber Co. v. Russell, 22 Neb. 126, 34 N. W. 104, 3 Am. S. R. 262; Henry & Coatsworth Co. v. Fisherdick, 37 Neb. 207, 55 N. W. 643; Central Constr. Co. v. Highsmith, 155 Neb. 113, 50 N. W. 2d 817. This court further said: "The lien is given not upon the ground that a contract was made by the owner with such subcontractor, but because the material so furnished was used in the erection of the building."

In the case of Way v. Cameron, *supra,* foreclosure was brought to enforce a lien of a subcontractor. The lien which was filed stated that the work, labor, and materials had been performed and furnished under a contract with the owner. The court said, quoting from Garlichs v. Donnelly, *supra:* " 'It is not necessary to the sworn statement and claim of lien required to be filed by subcontractors that there should be attached thereto a copy of the written contract under the terms of which the rights of such subcontractor have accrued; neither is it necessary that the ownership of the property benefited should be set forth therein.' The recital in the notice of lien, that the materials furnished were 'for the said O. D. Helming under a contract,' was an unnecessary recital and should be treated as mere surplusage." Quoting from Marrener v. Paxton, 17 Neb. 634, 24 N. W. 209, the court said: " 'The lien is given, however, not upon the ground that a contract was made by the owner with such subcontractor, but because the material so furnished was used in the erection of the building. The furnishing of the material is notice to the owner of the rights of the party, and until the time for filing a lien has expired, he is directly liable to such party for the value of the same.' "

From the foregoing authorities it appears that the right of the plaintiff to a mechanic's lien arises from

the furnishing of work, labor, and materials. Neither the plaintiff's petition nor the amended petition was required to make any allegation with reference to any contract with the owner. The original petition sets forth the furnishing by the plaintiff of work, labor, and materials itemized in an exhibit. The plaintiff's amended petition alleged the furnishing of the same identical items of work, labor, and materials as set forth in the original petition, to the same property, in the same amounts, and in the same periods of time. The plaintiff's cause of action, as stated in the original petition, was to recover by way of a mechanic's lien for work, labor, and materials used in the construction of the defendants' residence. As we view the amended petition, the plaintiff preserved the identity of the cause of action wherein he sought foreclosure of the mechanic's lien upon the same property for the same items he claims he furnished to be used in the construction and erection of the defendants' residence.

We conclude that, in the light of the above-cited authorities relating to mechanics' liens, the trial court erred in rendering judgment that the plaintiff's amended petition stated a separate and distinct cause of action than that set forth in the plaintiff's original petition.

The trial court did not pass upon the merits of the case. This case is for trial de novo in this court.

The plaintiff claims one of the questions involved is whether or not the positive testimony of an employee who performed the work, and the original records of the employees showing performance of the work, is overcome by negative testimony of the owner of the premises and the owner's employee to the effect that they did not see the plaintiff's workman on the premises.

In support of this the plaintiff cites 32 C. J. S., Evidence, § 1037, p. 1084. The plaintiff cites the rule in part. We summarize the rule as it appears in the citation. "Other things, such as opportunity to observe

and credibility of witnesses, being equal, greater weight should be given to positive than to negative evidence, even though the number of negative witnesses is larger; but if it appears that the attention of a negative witness was specially directed to the matter, or that he would, in the ordinary course of events, have observed the fact had it occurred, his testimony may be entitled to as much weight as opposing positive evidence, or even more."

This court in In re Estate of Woodward, 147 Neb. 270, 23 N. W. 2d 75, discussed the rule above stated. It was argued that the testimony of witnesses to a positive fact is stronger and may outweigh even a greater amount of negative testimony given by other witnesses. This court said: "Evidence is positive in character where the witness states that a certain thing did or did not happen to exist, and negative in character where the witness states that he did not see or know of the happening or existence of a circumstance or fact. 31 C. J. S., Evidence, § 2, p. 506."

In any event, the weight of the evidence is for the trier of fact to determine to arrive at a decision. The plaintiff is charged with the burden of proving his case by a preponderance of the evidence.

For convenience we will refer to Keith Muenchau as plaintiff; to Wayne Swarts as defendant or by his name; to Wayne Swarts and his wife as defendants; to William V. North as North or contractor; and to Lawrence Smith as Larry Smith.

We summarize the relevant and material evidence as follows.

The plaintiff testified that he was engaged in the plumbing, heating, well drilling, and appliance business at Eagle, Nebraska, and that he did work for contractors. In 1955, he had a crew of men working for him. He was acquainted with North and the defendant. He and his employees furnished the plumbing and heating work, equipment, and supplies for the defendants'

residence being constructed in Ashland. North was the contractor for the construction of the defendants' dwelling house, and the plaintiff was doing the work for North, that is, he furnished the fixtures for the plumbing, such as the kitchen sink, bathtub, water heater, furnace, all pipes and duct work, in fact all material that went into the installation of the heating and plumbing in the house. This was the only job he had in Ashland.

The plaintiff identified exhibit 1, his book of permanent records, containing the amount of labor performed by him and by his employees during the fall of 1955. The plaintiff testified that the entries contained in this book were in his own handwriting and were made about the time of the dates shown therein. The entries were based on information the plaintiff received from his employees and from his own observation. This book indicated that on August 25, 1955, Larry Smith and Warren Lashley, plaintiff's employees, worked 7 hours in connection with the plumbing and heating required in the defendants' residence in Ashland. This exhibit shows the dates, the number of hours, and the names of the employees of the plaintiff who worked on the defendants' house in Ashland. We deem it unnecessary to set forth this evidence in full. It appears from the exhibit that the last item shown therein was on December 8, 1955, when Larry Smith worked 3 hours on the defendants' house in Ashland with reference to the plumbing and heating thereof.

There was also received in evidence an exhibit identified as pricing sheets made under the direction of the plaintiff, showing the list prices of the materials used on the defendants' residence. It appears that this pricing of materials was made as of the date of November 23, 1955.

Another exhibit was received in evidence which is the lien filed by the plaintiff with the register of deeds of Saunders County, and the exhibit constituting the

pricing sheets was attached to the lien. This mechanic's lien was filed January 31, 1956.

The plaintiff further testified that on Sunday following December 8, 1955, he and the defendant went to the defendants' house in Ashland to check the inventory list, which they both did, and visually counted the material on the premises. The plaintiff further testified that the prices charged for materials and labor were fair and reasonable.

On cross-examination the plaintiff testified that the contract he had with North was an oral contract; that he had no contract, either oral or written, with Wayne Swarts; that he guessed Larry Smith put the registers in the defendants' house on December 8, 1955; that he did not know when the registers were delivered; that some of them could have been delivered in November, however they were installed on December 8, 1955; and that he knew Larry Smith did this work because Larry Smith told him he did so. This witness further testified that generally the registers are the last thing to be installed in a house after the painting is finished; and that it would have been irregular if the registers had been installed in November 1955. With reference to some work that was done at the defendants' house on December 6, 1955, that work was probably with reference to the sump pump. The plaintiff further testified that he was aware that there was extra work that had to be done which was not finished on December 6, 1955; that such work would be the placing of hangers on duct work, work on the sump pump, and a valve that had to be installed; that this work would be in the basement; that he did not know why this work was not done prior to December 6, 1955; that it possibly could have been done before that date; and that this plumbing could have been done as early as November 23, 1955. This witness further testified that he had tried to contact North when he heard that North was about to take bankruptcy; and that he did not remember anyone

asking him to go to the defendants' house on December 8, 1955, or to furnish any material or labor on that date.

Larry Smith testified that he worked for the plaintiff in the fall of 1955; that he helped the plaintiff in the furnishing of materials, plumbing, and heating work that might be required on the defendants' job at Ashland; that he worked at the defendants' house as did other employees of the plaintiff; and that each employee kept his own individual book, and such employee would write down what work he had done that day or, in the alternative, the employees would probably see the plaintiff and tell him what they had done that day with reference to the work on defendants' house, or any other work. This witness further testified that he had seen the plaintiff's book of original entries which showed the record of the various dates and jobs upon which the employees were working and also the recorded information obtained by the plaintiff from this witness; that he worked on defendants' house in December 1955; that he could not remember the actual dates, but that he did put in the registers which was the final work to be done insofar as the work of the plaintiff and his employees were concerned; and that the registers were not installed earlier because there was painting that had to be done and it was not desirable to get things "messed up." This witness further testified that he imagined that he put hangers on the duct work, and also did some work on the sump pump, in fact, a foot valve was placed on it. He identified a check dated December 15, 1955, payable to him in the amount of $98.48, signed by Eleanore Muenchau, wife of the plaintiff, who customarily wrote the checks, for work that he did in December at the defendants' property.

On cross-examination this witness testified that it would not be necessary that a request be made to complete a job that had to be done, because the type of work to be performed by the plaintiff and his employees would by necessity have to be done at different times;

that the work he did at the defendants' house on December 8, 1955, took 3 hours; that he did not remember the time of day, but testified that it was probably in the morning, and no one else was around the house at that time; that on December 6, 1955, the hangers had to be hung and there was work to be done on the sump pump as it had to be hooked up with the sewer line; that the duct work would run almost the full length of the house, and when this was put up it was necessary to put hangers on it, but it might get out of line and require additional hangers; that he was unable to tell the number of hours he worked on December 6, 1955, at defendants' house; and that he got into the house on December 8, 1955, as he knew where the key was left for that purpose.

North testified that he was a contractor engaged on the building project of the defendants; that he employed the plaintiff to furnish all materials and supply the labor necessary for the plumbing and heating to be done at the defendants' house; and that the plaintiff and his employees did the work and furnished all the materials necessary to be installed, installed the same, and also did all the work relating to the heating requirements for the defendants' house. On cross-examination North testified that the plaintiff started to furnish the materials or to deliver the same on the job with the necessary labor in August 1955. This witness was unable to testify as to the final day any work was done on the defendants' house by the plaintiff or his employees. This witness further testified that he ceased to work on the job the day before Thanksgiving Day in 1955; that he was unable to testify whether the plumbing was completed or not at that time; that the heating was installed to the point that there was heat in the house; and that he terminated the job because he was contemplating taking bankruptcy.

An attorney who was appointed trustee in bankruptcy in the North bankruptcy proceedings on December 20, 1955, testified that he knew the plaintiff and had a con-

versation with him relative to some work done for the defendants at Ashland; that this conversation took place in the trustee's office with the plaintiff and the trustee being the only persons present; that this conversation occurred between Christmas and the end of the year 1955; that the plaintiff said he had done some work for North; and that the plaintiff attended the first meeting of the creditors in Omaha at the time the trustee was appointed. With reference to the conversation had with the plaintiff, this witness testified that the plaintiff mentioned two places that he had done some work for North, and this witness remembered especially the defendants' job at Ashland, and one at Waverly. The plaintiff told this witness the amounts due him and wondered what he should do. This witness told the plaintiff that he could file a proof of claim in the bankruptcy proceedings; and that if he did file a proof of claim he would not be paid in full because the assets in bankruptcy are almost never sufficient. This witness further testified that he questioned the plaintiff as to the time of the completion of the job and the plaintiff told him that while he did not remember the exact date, that he had completed the defendants' job in the latter part of November 1955.

North testified in behalf of the defendants that he had an oral agreement with the defendant with regard to constructing a dwelling house for him in Ashland; that the amount agreed on for this construction work was $10,000; and that construction started about the middle of August 1955, and ceased about November 20, 1955. After November 20, 1955, this witness left the state. This could have been on November 26, 1955. He went to Brookfield, Missouri, where he stayed approximately a week. While he was in Brookfield, Missouri, the plaintiff called this witness by telephone. During the conversation the plaintiff was quite curious and asked this witness what had happened, to which this witness

replied that he was "out of business"; and that he had terminated his business.

A witness called for the defendants testified that he was employed as a painter by North relative to the construction of defendants' house at Ashland in the latter part of 1955, and worked up until North quit business; that after that time he worked for Wayne Swarts to finish painting the house; that they finished the floors and finished painting and varnishing; that Bill McDonald assisted him; and that two other persons were at work sanding the floors during the time this witness worked there. This witness further testified that he started to work for Wayne Swarts on December 5, 1955. On that day he worked 8 hours; on December 6, he worked 8 hours; on December 7, 8 hours; on December 8, 7 hours; on December 9, 6 hours; on December 10, 6 hours; on December 12, 6 hours; and on December 17, 6 hours. He did not recall anyone from any plumbing company coming to the house and doing any plumbing work while he was there. He did not think that he saw Larry Smith there on December 6, 1955. He did not see Larry Smith there on December 8, 1955, nor did he see the plaintiff there at the house on December 6 or 8, 1955.

On cross-examination this witness testified that he was certain that Larry Smith was not at the defendants' house when he was there; and that the paint was kept in the kitchen and the painters went back and forth for the paint. On redirect examination this witness testified that the house consisted of five or six rooms.

Wayne Swarts testified that he had an agreement with North with reference to the construction of the house at Ashland, and had no business transactions with the plaintiff; that North started construction of the house about August 20, 1955, and worked at the house until a day or two before Thanksgiving Day in 1955; that when North quit working the construction was finished except for the painting, varnishing, sanding,

and polishing of the floors, the concrete work outside the house, and other matters relating to work that had to be done outside the house; that the plumbing and heating were all finished; and that they had used the heat and water all the time they were there when it was necessary. He was there while the workmen were painting, and was at the house at different times from the 5th to the 10th of December. He believed that he put in 6 or 8 hours a day working at the house. He did not see Larry Smith there on December 6 or December 8, 1955. He did not request the plaintiff to come to the house on December 8, 1955. The plaintiff came to his house either the latter part of November or the first part of December 1955, at night, and that was his first acquaintance with the plaintiff. They visited for a while in the car. In the conversation had with the plaintiff, the plaintiff told this witness that he did not intend to file a lien, but said he would like to see what the boys had put in the house and asked if this witness would go with him. They went to the house and into the basement where, this witness said, they remained for 3 or 5 minutes, then left. This witness further testified that he did not see the plaintiff again.

The plaintiff testified in rebuttal on his direct examination that in his conversation with the trustee in bankruptcy, which occurred sometime in December 1955, he did not talk to such trustee about the Swarts job. On cross-examination the plaintiff testified that he told the trustee in bankruptcy that the Swarts job was one job on which he would file a lien.

In Gatchell v. Henderson, 156 Neb. 1, 54 N. W. 2d 227, the court said: "A subcontractor must file a sworn statement of the amount due him from the contractor within sixty days from the date of the last material furnished to or labor performed for the contractor in order to perfect a mechanic's lien under the provisions of section 52-102, R. S. 1943." See, also, Parsons Constr. Co. v. Gifford, 129 Neb. 617, 262 N. W. 508.

We conclude from the evidence that the plaintiff failed to prove his case by a preponderance of the evidence, and failed to file his subcontractor's lien within 60 days from the date of furnishing the last item of material or labor. The evidence does not support the plaintiff's contention that he met the requirements of section 52-102, R. S. Supp., 1955.

"A judgment will not be reversed for errors against a party not entitled to succeed in any event." Eilts v. Bendt, 162 Neb. 538, 76 N. W. 2d 623. See, also, Borsen v. Moskowitz, 163 Neb. 223, 79 N. W. 2d 178.

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

AFFIRMED.

IN RE APPLICATION OF AINSWORTH IRRIGATION DISTRICT. AINSWORTH IRRIGATION DISTRICT, APPELLEE, V. HAROLD HARMS ET AL., APPELLANTS.

102 N. W. 2d 429

Filed April 8, 1960. No. 34616.

Waters. The Department of Water Resources has exclusive original jurisdiction to hear and adjudicate all matters pertaining to water rights, appropriations, and priorities for the use of public waters of this state for irrigation.

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

Quigley & Quigley and *Mason, Knudsen, Dickeson & Berkheimer,* for appellants.

William C. Smith, Jr., Bert L. Overcash, and *Woods, Aitken & Aitken,* for appellee.

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

CHAPPELL, J.

On September 25, 1958, plaintiff, Ainsworth Irrigation District, filed a petition in the district court for

Brown County, seeking approval and confirmation of its organization as an irrigation district, and approval and confirmation of its contract with the United States for construction of the Ainsworth unit of the Missouri River Basin project, together with operation and maintenance of certain distribution and drainage works for the irrigation of lands within the district and for the delivery of water from such works by employment of a part of the waters of the Snake River, a tributary of the Niobrara River. The first nine paragraphs of plaintiff's petition specifically set forth at length the procedure used in organizing the district, supported by exhibits attached to and made a part of plaintiff's petition, which appear in the bill of exceptions as exhibits A through I. Paragraph 10 of plaintiff's petition set forth at length the time, mode, and manner of executing its contract with the United States, together with its material terms and contents. Also, a copy of such contract, exhibit J, which appears in the bill of exceptions as exhibit 3, was attached to and made a part of plaintiff's petition.

Plaintiff prayed for the fixing of a time for hearing on its petition; the giving of notice, as required by law; and that upon such hearing, an order be rendered approving and confirming the organization of the district, approving and confirming the proceedings of plaintiff's board of directors leading up to and including the making of its contract with the United States, and approving and confirming the validity of its terms and the execution thereof.

Certain motions were filed by the parties and were overruled, but as we view it, the substance thereof is unimportant to ultimate decision herein.

Be that as it may, nine named defendants answered plaintiff's petition, admitting the allegations of fact contained in the first nine paragraphs of plaintiff's petition whereby they admitted that plaintiff had taken all of the procedural steps required by law to organize as

an irrigation district. Defendants' answer denied the allegations of fact set forth in paragraph 10 of plaintiff's petition, but admitted that plaintiff district, by its president and secretary, executed plaintiff's contract with the United States, a copy of which was identified as exhibit J by plaintiff's petition. Defendants then respectively set forth the description and location of lands owned by and in the possession of each of them and substantially alleged in paragraphs 6, 7, 8, 9, 10, 12, and 13 that the water intended to be appropriated for use by plaintiff would be diverted and appropriated from the Snake River and would not be returned thereto or to the Missouri River, contrary to and in derogation of the statutes, laws, and public policy of this state. Defendants also alleged that plaintiff's petition did not state a cause of action, and prayed for denial of the relief sought by plaintiff and a dismissal of plaintiff's petition. In that connection, this is a proper place to say that plaintiff's petition did state a cause of action under the provisions of sections 46-1,151 and 46-1,152, R. R. S. 1943, and other related sections hereinafter mentioned.

Plaintiff then filed a motion in the alternative to strike defendants' entire answer, or to strike paragraphs 6, 7, 8, 9, 10, 12, and 13 therefrom, upon the ground that the allegations therein were not a defense to plaintiff's action because the Department of Water Resources had exclusive original jurisdiction over all matters pertaining to water rights and the appropriation of water in such cases; that such defense was redundant and irrelevant to the object of plaintiff's action; and that paragraph 6 of plaintiff's contract with the United States specifically provided that: " 'The right to the beneficial use of the District water supply shall be governed by the Federal Reclamation Laws and the laws of the State of Nebraska, as the same may at any time apply to this contract; * * *.' " In that connection, the trial court overruled plaintiff's motion to strike defendants'

entire answer, but sustained plaintiff's motion to strike paragraphs 6, 7, 8, 9, 10, 12, and 13 from defendants' answer. Plaintiff's reply was a general denial.

Thereafter, a hearing was held upon the merits, and a judgment was rendered which approved and confirmed the organization of plaintiff as an irrigation district and approved and confirmed plaintiff's contract with the United States as prayed by plaintiff. Defendants' motion for new trial was overruled, and they appealed, assigning, as far as important here, that the trial court erred in striking the aforesaid paragraphs from their answer, and in excluding evidence by overruling defendants' offer to prove the facts alleged therein. We do not sustain defendants' assignment.

Defendants admit, and the record establishes as well, that plaintiff district was legally formed and organized by taking every procedural step required by law, and that plaintiff's contract with the United States was duly executed by the parties in every respect as required by law. In that connection, as stated in the record by defendants' counsel during the trial: "We are not making any objection to the interpretation of the language, or the various items in the contract, or the particular wording in this contract, Exhibit 3; our contention is that the entire Exhibit 3 is void and cannot be confirmed by the Court, because of its illegal nature," because it intends to appropriate and employ a "diversion of water from the Snake River into the canal for use in this district." Defendants' counsel further stated: "* * * we have admitted the proceedings that go to make up the district; but the district is illegally formed because it was formed for an unlawful and void purpose." Defendants agreed with the trial court that: "As far as these defendants are concerned" the whole issue was "the right of this district to divert this water over these various water sheds," as named and claimed by defendants.

Thus, the sole question presented in this case, as we

view it, is whether or not the trial court had original jurisdiction to hear and adjudicate the issue of plaintiff's water rights and its right to an appropriation and employment of water for irrigation purposes from the Snake River. We conclude that the trial court did not have such jurisdiction, but that the Department of Water Resources had exclusive original jurisdiction, acting as a quasi-judicial body, to hear, determine, and adjudicate plaintiff's water rights for irrigation and its appropriation rights and priorities, if any.

This action is a special proceeding in rem in the district court, as authorized by sections 46-1,151 and 46-1,152, R. R. S. 1943, and other related sections, 46-1,102 and 46-1,106, R. R. S. 1943. In that connection, section 46-1,151, R. R. S. 1943, authorizes the "board of directors of any irrigation district heretofore or hereafter organized" and "before or after the making of any contract with the United States or others," to "commence a special proceeding in the district court of the state, in and by which the proceedings of such board and of such district leading up to or including the making of any such contract, and the validity of any of the terms thereof * * * or the taking of any particular steps or action, shall be judicially examined, approved and confirmed, or disapproved and disaffirmed."

Section 46-1,152, R. R. S. 1943, provides the practice and procedure for such judicial determination, and recites that: "The court may approve and confirm such proceedings in part and disapprove and declare illegal or invalid other and subsequent parts of the proceedings, and insofar as possible the court shall remedy and cure all defects in such proceedings."

The trial court herein approved and confirmed plaintiff's contract with the United States, but ruled in effect during the course of the proceedings that plaintiff's right to an appropriation, and use of water by plaintiff for irrigation purposes, and the issue of defend-

ants' claimed unlawful diversion of water for irrigation from the Snake River, was within the exclusive original jurisdiction of the Department of Water Resources. In that connection, such department was created by section 81-101, R. R. S. 1943. Section 46-705, R. S. Supp., 1959, effective September 20, 1957, transferred to such department all powers and duties with regard to water rights for irrigation theretofore imposed by law upon the Department of Roads and Irrigation.

In such respect, section 46-209, R. S. Supp., 1959, effective September 20, 1957, provides in part: "The Department of Water Resources is given jurisdiction over all matters pertaining to water rights for irrigation, power or other useful purposes, and drainage, except as such jurisdiction is specifically limited by statute. Such department shall adopt rules governing matters coming before it. It may refuse to allow any water to be used by claimants until their rights have been determined and made of record. It may request information relative to irrigation * * * from any and all * * * irrigation * * * officers and from any other person or persons. It shall have public hearings on complaints, petitions, or applications in connection with any of the above matters. Such hearings may be had at the time and place designated by the department. The department shall have power to certify to official acts, compel attendance of witnesses, take testimony by deposition as in suits at law, to examine books, papers, documents, and records of any * * * party, or parties interested in any of the matters hereinbefore mentioned, or have such examinations made by its qualified representative, and shall make and preserve a true and complete transcript of its proceedings and hearings. Upon any hearing, the department shall receive any evidence relevant to the matter under investigation and the burden of proof shall be upon the person making the complaint, petition, and application. After such hearing and investigation, the department shall render a de-

cision in the premises in writing and shall issue such order or orders duly certified as it may deem necessary." In that connection, and contrary to defendants' contention, we are cited no statute or authority, and we have found none, which limited the exclusive original jurisdiction of the Department of Water Resources with relation to plaintiff's water rights and appropriation in the case at bar.

Section 46-210, R. R. S. 1943, provides for an appeal from final orders so rendered by the Department of Water Resources directly to this court. In Cozad Ditch Co. v. Central Nebraska Public Power & Irr. Dist., 132 Neb. 547, 272 N. W. 560, citing authorities, this court said: "The existence of a final order (made and rendered by the Department of Roads and Irrigation, now the Department of Water Resources) is essential and a prerequisite to review in this court."

Defendants relied upon Osterman v. Central Nebraska Public Power & Irr. Dist., 131 Neb. 356, 268 N. W. 334, to support their contention that the trial court had original jurisdiction to determine plaintiff's water rights and appropriation therefor, together with defendant's alleged issue of diversion. That opinion is entirely distinguishable, and, as a matter of fact, the very first paragraph thereof obliterates defendants' contention wherein it is pointed out: "This is an appeal to this court in a special statutory proceeding before the department of roads and irrigation" wherein "The final orders entered by that department" were "here sought to be reviewed * * *." Also, in a second appearance of Osterman v. Central Nebraska Public Power & Irr. Dist., 133 Neb. 606, 276 N. W. 398, this court said: "The litigation was instituted by proceedings before that public tribunal, the forum of original jurisdiction."

As early as Castle Rock Irrigation Canal & Water Power Co. v. Jurisch, 67 Neb. 377, 93 N. W. 690, this court said: "Thus the control of the waters of the state is provided for, and a state board established with ex-

clusive original jurisdiction to apportion the waters of the state to the citizens thereof for beneficial purposes." That opinion also held that an applicant for the appropriation of waters of the state for irrigation, cannot prosecute the work and condemn a right-of-way for that purpose until he has a permit from the State Board of Irrigation to divert the water of the state to specific lands described in his application.

In Kirk v. State Board of Irrigation, 90 Neb. 627, 134 N. W. 167, this court held: "In this state, the water of running streams is publici juris; its beneficial use belongs to the public and is controlled by the state in its sovereign capacity."

In Frenchman Valley Irr. Dist. v. Smith, 167 Neb. 78, 91 N. W. 2d 415, a special proceeding comparable with that at bar, this court held: "By statute, the board of directors of any irrigation district heretofore or hereafter organized may, in its discretion, before or after making any contract with the United States of America, or the taking of any particular steps or action, commence a special proceeding in the district court of the state, in and by which the proceedings of such board and of such district leading up to or including the making of any such contract, and the validity of the terms thereof, or the taking of any particular steps or action, shall be judicially examined, approved, and confirmed, or disapproved and disaffirmed.

"By statute, the United States of America and every person intending to appropriate any of the public waters of the state shall, before commencing the construction, enlargement, or extension of any works for such purpose, performing any work in connection with the same, or taking any water from any constructed works, make application to the Department of Roads and Irrigation for a permit to make such appropriation."

As said in In re Claim Affidavit of Parsons, 148 Neb. 239, 27 N. W. 2d 190, citing authorities: "It is well settled by the decisions of this court that the Department

of Roads and Irrigation has jurisdiction to hear, determine, and make adjudication upon irrigation appropriation rights and priorities, and in the absence of an appeal as provided by law, the orders made in a proper proceeding in reference thereto are final and binding upon the parties." This and other courts have so concluded in other cases too numerous to cite.

As recently as North Loup River Public Power & Irr. Dist. v. Loup River Public Power Dist., 162 Neb. 22, 74 N. W. 2d 863, we said: "It is clearly recognized that the department has authority, granted by statute, to adjudicate water rights in this state. It is invested with certain quasi judicial powers which have application only to the granting and cancellation of appropriation rights and priorities. State ex rel. Cary v. Cochran, 138 Neb. 163, 292 N. W. 239; Loup River Public Power Dist. v. North Loup River Public Power & Irr. Dist., 142 Neb. 141, 5 N. W. 2d 240. The approval of an application for an appropriation of public waters under section 46-235, R. R. S. 1943, is an exercise of the quasi judicial powers of the department. It will be noted that under the foregoing section of the statute the department, upon examination of the application, may endorse its approval 'for a less period of time for perfecting the proposed appropriation, or for a less amount of water, or for a less amount of land than applied for.' An aggrieved applicant is given an opportunity to be heard by the department, and the further right to appeal to this court from an adverse decision. In Loup River Public Power Dist. v. North Loup River Public Power & Irr. Dist., supra, we said: 'Under the provisions of section 81-6317, Comp. St. 1929, the department may approve the application for an appropriation of public waters in an amount less than that applied for. If the applicant be dissatisfied, the remedy is by appeal to the supreme court, and if he fails to appeal, the appropriation as made is final.' Otherwise stated, unless an appeal is taken from the adverse order of the depart-

ment; the decision of the department is final and the issues finally adjudicated."

In that connection, section 46-226, R. R. S. 1943, provides that: "The Department of Roads and Irrigation (now the Department of Water Resources) 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."

Also, section 46-233, R. S. Supp., 1959, effective September 20, 1957, provides that: "(1) The United States of America and every person hereafter intending to appropriate any of the public waters of the State of Nebraska shall before (a) commencing the construction, enlargement, or extension of any works for such purpose, (b) performing any work in connection with the same, or (c) taking any water from any constructed works, make an application to the Department of Water Resources for a permit to make such appropriation * * *. (3) Upon receipt of the application required by the provisions of subsection (1) of this section and containing the information set forth in subsection (2) of this section, the department shall (a) make a record of the receipt of such application, (b) cause the same to be recorded in its office, and (c) make a careful examination of the application to ascertain whether it sets forth all the facts necessary to enable the department to determine the nature and amount of the proposed appropriation."

Further, section 46-238, R. S. Supp., 1959, effective September 20, 1957, provides for the time within which the construction of irrigation works shall commence after approval of the application for water for irrigation purposes by the Department of Water Resources has been obtained. Such section also provides: "Any application for an appropriative right which is deficient by reason of past failure to comply with any of the

requirements of sections 46-233 and 46-238 for the perfection of an appropriative right, which application has not been dismissed or denied, is also hereby ratified and confirmed; unless, within one year from September 20, 1957, a petition to vacate such an order granting an extension of time, or a petition to forfeit, cancel or otherwise invalidate such an application for an appropriative right, shall have been filed with the department by a person affected adversely thereby."

Thus, although the organization of plaintiff district, and its contract with the United States have been approved and confirmed by the district court as authorized by statutes heretofore cited, plaintiff still has no water rights or authority to appropriate or use any water for irrigation, or to prosecute the work in connection therewith until the Department of Water Resources has adjudicated such rights. In other words, the approval and confirmation of plaintiff's organization as an irrigation district and its contract with the United States could neither give nor deprive plaintiff of any water rights or appropriation of water for irrigation purposes because the Department of Water Resources had exclusive original jurisdiction of such matters. In that connection, the defense pleaded in paragraphs 6, 7, 8, 9, 10, 12, and 13, which were stricken from defendants' answer, was entirely redundant and irrelevant to the object of the special proceedings at bar. Such paragraphs were properly stricken, and if any evidence was offered by defendants in support thereof, it was properly refused admission.

In this case, the Department of Water Resources had exclusive original jurisdiction "over all matters pertaining to water rights for irrigation," which included plaintiff's right to water for irrigation and an appropriation therefor, together with the issue of diversion claimed by defendants. As a matter of fact, such issues were ultimately presented and finally determined by special proceedings before the Department of Water Resources,

and defendants have appealed therefrom in case No. 34747, decided this day. Ainsworth Irr. Dist. v. Bejot, *post*, p. 257, 102 N. W. 2d 416.

For reasons heretofore stated, we conclude that the judgment rendered herein should be and hereby is affirmed. All costs are taxed to defendants.

AFFIRMED.

LLOYD W. SLEEZER, APPELLEE, V. ALICE M. LANG, SPECIAL ADMINISTRATRIX OF THE ESTATE OF CARL LANG, DECEASED, APPELLANT, IMPLEADED WITH BI-STATE DISTRIBUTING CORPORATION, A CORPORATION, APPELLEE.

102 N. W. 2d 435

Filed April 8, 1960. No. 34697.

1. **New Trial.** The purpose of a new trial is to enable the trial court to correct errors that have occurred in the conduct of the trial.
2. ———. A new trial may be granted only for legal cause or reason and where it appears that a legal right has been invaded or denied. If legal cause or reason exists and the complaining party makes his application in writing within the time fixed by statute, the trial court has no discretion, and motion for new trial must be sustained. Otherwise it must be overruled.
3. **Carriers.** A private carrier is one that is not bound to carry for any reason unless the obligation to do so is voluntarily assumed by virtue of a special contract, and such carrier is liable only for such loss or injury as results from a failure to exercise ordinary care.
4. **Appeal and Error.** A judgment will not be reversed for error in overruling a motion for a directed verdict at the close of plaintiff's case when certain essential testimony was not then in the record, when, at the time of renewing the motion at the close of all the evidence, such testimony is in the record and its admission is not assigned as error here.
5. **Pleading.** It is within the discretion of the court to permit a defendant, during the course of the trial, to amend his answer so as to present a new defense. In such case, the plaintiff, if not prepared to meet the new issue, may have a continuance of the cause, upon such terms as the court may deem just.
6. **Appeal and Error.** Except where jurisdiction is involved, this

court will consider on appeal only questions which have been presented to and passed upon by the trial court.

7. **Pleading.** If plaintiff's petition is prepared, signed, and verified by his attorney, and by mistake an erroneous statement is included therein, the court should before judgment, upon terms just and equitable to all parties, permit the litigant to withdraw that allegation.

8. ———. A party may at any time invoke the language of the pleading of his adversary on which the case is tried on a particular issue as rendering certain facts indisputable; and in so doing he is neither required nor permitted to offer the pleading in evidence. An admission made in a pleading on which the trial is had is more than an ordinary admission. It is a judicial admission and constitutes a waiver of all controversy so far as the adverse party desires to take advantage of it, and is therefore a limitation of the issues.

9. ———. A pleading which has been superseded by an amended pleading is only evidence of the facts therein alleged, and must be introduced as any other evidence in order to be considered. The rule that a party may at any and all times invoke the language of his opponent's pleading as rendering facts therein alleged indisputable applies only to statements in the pleadings upon which the case is tried.

10. **Pleading: Trial.** It is within the discretion of the trial court to permit or refuse an amendment of a pleading during the trial of a case, and error cannot be predicated on the action of the court in reference thereto unless an abuse of discretion is established to the prejudice of the party who is adversely affected thereby.

11. **Negligence.** A violation of the provision of a federal statute, or any rule or regulation promulgated thereunder, regulating the use and operation of airplaines in flight which are intended to safeguard travelers therein is not negligence per se, but evidence of negligence which may be taken into consideration with all the other facts and circumstances in determining whether or not negligence is established thereby.

12. **Evidence.** Impeaching evidence is that which is directed to the question of the credibility of the witness.

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

Gross, Welch, Vinardi & Kauffman, for appellant.

James J. Fitzgerald and *Robert E. O'Connor,* for appellees.

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

WENKE, J.

This is an appeal from the district court for Douglas County. It involves an action brought by Lloyd W. Sleezer against Carl Lang, doing business as Lang Flying Service, to recover damages for personal injuries suffered in an airplane accident which accident, plaintiff alleges, was caused by acts of negligence on the part of Lang and of the pilot thereof, who was an employee of Lang, while the latter was operating it in flight with plaintiff as a passenger therein.

Bi-State Distributing Corporation, plaintiff's employer, was also made a party defendant because of certain subrogation rights it would have in and to any recovery made by plaintiff by reason of payments it had and would make to and for plaintiff under and by reason of the Nebraska workmen's compensation statutes. Its rights are not material to any issue raised by this appeal and therefore they will not be discussed.

Trial was had to a jury and on December 3, 1954, a verdict was returned by it for defendant Carl Lang. Judgment was entered thereon. Thereafter, on December 10, 1954, plaintiff filed a motion for an order vacating the verdict and judgment entered thereon, and for new trial. This motion was not ruled on by the trial court until June 17, 1959, some 4 years, 6 months, and 7 days after it had been filed, when it was sustained. Thereafter, on July 10, 1959, it was suggested to the trial court that defendant Carl Lang had died on June 26, 1959. On July 13, 1959, the action was revived in the name of Alice M. Lang as special administratrix of the estate of Carl Lang, deceased, she being substituted as defendant in his place. On July 14, 1959, the special administratrix took this appeal from the order granting plaintiff a new trial. The appeal from such an order is authorized by section 25-1315.03, R. R. S. 1943.

"The purpose of a new trial is to enable the court to correct errors that have occurred in the conduct of the trial." Olson v. Shellington, 162 Neb. 325, 75 N. W. 2d 709. See, also, Pongruber v. Patrick, 157 Neb. 799, 61 N. W. 2d 578; Owen, Administrator v. Moore, 166 Neb. 226, 88 N. W. 2d 759.

The trial court gave no reason for its granting a new trial. In view thereof, the following applies: "If the trial court gave no reasons for its decision in sustaining the motion for new trial, then the appellant meets the duty placed upon him when he brings the record here with his assignments of error and submits the record to critical examination with the contention that there was no prejudicial error. The duty then rests upon the appellee to point out the prejudicial error that he contends exists in the record and which he contends justifies the decision of the trial court. The appellant then in reply has the right, if he desires, of meeting those contentions." Maska v. Stoll, 163 Neb. 857, 81 N. W. 2d 571. See, also, Hert v. City Beverage Co., Inc., 167 Neb. 557, 94 N. W. 2d 27; Gain v. Drennen, 160 Neb. 263, 69 N. W. 2d 916; Sautter v. Poss, 155 Neb. 62, 50 N. W. 2d 547. As stated in Sautter v. Poss, *supra*: "There is no burden in the sense of a burden of proof upon either party. The burden is upon both parties to assist the court to a correct determination of the question or questions presented." This the parties have endeavored to do.

In respect to the granting or denying of a motion for a new trial we said in In re Estate of Kinsey, 152 Neb. 95, 40 N. W. 2d 526: "The district court has the power and is required to consider and determine motions for new trial by the exercise of its judicial discretion, which means the application of statutes and legal principles to the whole record then before it. A new trial may be granted only for legal cause or reason and where it appears that a legal right has been invaded or denied. If legal cause or reason exists and the complaining party

makes his application in writing within the time fixed by statute, the trial court has no discretion, and motion for new trial must be sustained. Otherwise it must be overruled, because where a party has sustained the burden and expense of a trial and has succeeded in securing the verdict of a jury on the facts in issue, he has a right to keep the benefit of that verdict and judgment thereon unless there is prejudicial error in the proceedings by which it was secured." See, also, Owen, Administrator v. Moore, *supra;* Burhoop v. Brackhan, 164 Neb. 382, 82 N. W. 2d 557; Anderson v. Nielsen, 162 Neb. 110, 75 N. W. 2d 372; Dixon v. Coffey, 161 Neb. 487, 73 N. W. 2d 660.

Appellee Lloyd W. Sleezer, plaintiff below, was at all times herein material general manager of Bi-State Distributing Corporation of which Harry Sidles was then president. Bi-State Distributing Corporation, to which we shall hereinafter refer as Bi-State, was then engaged in distributing appliances, including Bendix. Bi-State had been invited to send representatives to a national sales meeting of Bendix to be held at South Bend, Indiana, on Thursday, September 18, 1952. Sidles called Carl Lang, to whom we shall hereinafter refer as either Lang or defendant, to charter a plane for the trip and did so a few days before September 17, 1952, arranging with Lang to leave on the afternoon of Wednesday, September 17, 1952, and return sometime during the day of Thursday, September 18, 1952. Lang was licensed to operate a private airplane taxi service and chartered planes for that purpose. He was not operating a regular scheduled plane service. His headquarters were at the Omaha Municipal Airport where he operated under the name of Lang Flying Service. Sidles, appellee, and R. J. Harrison, the latter being the general sales manager of Bi-State, planned to make the trip. They reported to Lang's headquarters at the Omaha Municipal Airport shortly before 3 p. m., on September 17, 1952, ready to take the chartered plane

to South Bend. Lang had furnished a single engine Beechcraft Bonanza for the trip and Ray Vequist as pilot. Ray Vequist, to whom we shall hereinafter refer as either Vequist or the pilot, was a licensed pilot who, at the time, was working for Lang. The Beechcraft Bonanza is built to carry four people, a pilot and three passengers. The plane, with all parties and their baggage aboard, left Omaha at 3 p.m., and arrived at South Bend at 6 p.m., or shortly thereafter. The trip was uneventful.

On the return trip on September 18, 1952, the plane left South Bend at 6:07 p.m., and the trip was again uneventful until after the plane had passed over Des Moines, Iowa, and headed for Omaha, Nebraska. For reasons, which will hereinafter be set out, the plane attempted an emergency landing at an airfield located at Atlantic, Iowa. In making such landing the plane missed the runway, landed in a field of soybeans, and nosed over on its top. It is because of personal injuries, which appellee claims he received as a result of the accident, that he here seeks to recover damages.

We said in Scarborough v. Aeroservice, Inc., 155 Neb. 749, 53 N. W. 2d 902, 30 A. L. R. 2d 1159: "A private carrier is one that is not bound to carry for any reason unless the obligation to do so is voluntarily assumed by virtue of a special contract, and such carrier is liable only for such loss or injury as results from a failure to exercise ordinary care." The evidence conclusively establishes that Lang was within the class to which the foregoing applies.

Appellant contends there was not sufficient evidence of negligence in this case to justify the court's submitting it to a jury, that is, that defendant was entitled to a directed verdict. The only charge of negligence submitted by the trial court "* * * is the claim that the pilot failed to refuel en route when he had ample opportunity and time to do so and thus permitted the plane to run out of gas."

On cross-examination Lang, while testifying in his own behalf, was asked the following question: "Specifically, there weren't any flares aboard this ship, were there?" Without objection being made he answered as follows: "No, no flares." In this situation the following has application: "A judgment will not be reversed for error in overruling a motion for a directed verdict at the close of plaintiff's case when certain essential testimony was not then in the record, when, at the time of renewing the motion at the close of all the evidence, such testimony is in the record and its admission is not assigned as error here." Lund v. Holbrook, 153 Neb. 706, 46 N. W. 2d 130.

The admission of this specific evidence, as such, is not assigned as error by appellant. However, appellant does contend that all evidence as to flares given on cross-examination by defendant, over objection, was erroneously admitted by the trial court and fully discusses that contention in her brief. However, such contention cannot be properly made to this specific evidence here for no objection was made thereto at the time it was received nor was any motion made to strike it at that time.

"Negligence is a failure to do what reasonable and prudent persons would ordinarily have done under the circumstances and situation, or doing what reasonable and prudent persons under the existing circumstances would not have done." Mundy v. Davis, 154 Neb. 423, 48 N. W. 2d 394. It is of course true that negligence cannot be inferred merely because an accident happened. Laurinat v. Giery, 157 Neb. 681, 61 N. W. 2d 251; In re Estate of Bingaman, 155 Neb. 24, 50 N. W. 2d 523.

"In determining the question of whether or not a motion of a defendant for a directed verdict * * * should be sustained the court is required to consider the evidence in the light most favorable to the plaintiff and to resolve every controverted fact in his favor, and he

should have the benefit of every inference that can reasonably be deduced therefrom." Anderson v. Evans, 164 Neb. 599, 83 N. W. 2d 59. We shall set forth the evidence in light of the foregoing principle.

Omaha is 500 air miles from South Bend. The daylight trip to South Bend on September 17, 1952, which was nonstop, was uneventful, weather conditions being good. It took only 3 hours to make the trip, the airplane being aided by a slight tail wind.

The airplane used had two tanks for gasoline, one in each wing. Each tank had a capacity of 20 gallons. The evidence is to the effect that the airplane would ordinarily use 10 gallons of gasoline an hour while in flight regardless of whether it had head winds or tail winds, as they would only affect its ground speed. However, it appears that on the trip from Omaha to South Bend it consumed more than 10 gallons an hour for when the airplane was serviced at South Bend, immediately after it arrived there, 32.5 gallons of gasoline were put in the 2 tanks.

The airplane left South Bend for a return nonstop flight to Omaha at 6:07 p.m., on September 18, 1952. The plane was to fly over the same route taken the previous day, which included Des Moines and Atlantic, Iowa. The same pilot and passengers, together with their luggage, were aboard as on the trip to South Bend. The pilot checked both gasoline tanks at South Bend and found them to be full. The pilot's flight plan indicated he estimated it would take 3 hours and 20 minutes to reach Omaha, which would make the latter part of the trip a night flight. In fact, darkness overtook the airplane as it passed over Chicago Heights, Illinois. The airplane carried no flares. Flares carried by airplanes are of an incendiary type, being made of magnesium. They burn intensely and are used for lighting purposes.

The trip back, as far as Des Moines, was uneventful, the weather being good. It is about 385 air miles from

South Bend to Des Moines and 115 air miles from there to Omaha. The airplane passed over Des Moines about 8:42 p.m., or 2 hours and 35 minutes out of South Bend. Although they had been bucking a slight head wind the gauges in the plane showed one of the gasoline tanks to be empty but the other to be three-fourths full as they passed over Des Moines. This indicated they had about 15 gallons of gasoline left at that point. The pilot testified it is good practice to have a 30-minute reserve of gasoline to continue flight to a certain point and that the regulations covering planes in flight so require. Omaha being only 115 air miles from Des Moines, and considering the speed it had made and the gasoline it had consumed from South Bend, it would appear that the airplane then had enough gasoline to provide this time reserve as it passed over Des Moines on its way to Omaha.

The record shows that Des Moines has a modern airport with modern facilities. It has multiple concrete runways 7,500 feet long that are fully equipped with modern lighting facilities. It also has modern radio, navigational, and radar facilities. It was lighted as the plane passed over Des Moines.

Atlantic, Iowa, is between Des Moines and Omaha. It was on the pilot's planned line of flight. Between Des Moines and Atlantic, at a point just beyond the half way point, the pilot of the plane noticed the gasoline gauge was dropping faster than he thought it should, it then indicating the tank that was three-fourths full over Des Moines was only about one-fourth full. Under these conditions the pilot decided to proceed on toward Atlantic.

Vequist was at all times during the flight from Omaha to South Bend and return operating the plane as an employee of Lang and any conduct on his part while doing so, which would give appellee any basis for a cause of action herein, would be imputed to Lang.

Atlantic has an airfield with a marked but unlighted

3,600-foot sod runway, which runs east and west. The airfield did have portable lights which consisted of smudge pots. These could, when lighted, be taken out and set along the runway to mark and light it. It had an airport manager who lived near the airfield but who was not in constant attendance thereat. The pilot was familiar with this airfield and its operations as he had, on previous occasions, landed there during the daytime.

When the airplane got over Atlantic the gasoline gauges on both gasoline tanks indicated they were empty. The pilot therefore decided to make an emergency landing at the airfield located there. He turned on his landing lights, there being one under each wing of the plane. He flew over the town with his landing lights on hoping the airport manager would see the plane and put out the portable lights along the runway. This did not happen. The pilot passed over the unlighted airfield twice with the landing lights on hoping to locate the runway. He was not able to do so. On the third pass he attempted to land. As he came down to land he observed markers and thought he would land on the runway. However, he landed some 50 to 100 feet north of the runway in a field of soybeans. As the nose wheel of his plane hit the furrows in the field, the field being planted in north-south rows, it crumpled and the airplane nosed over on its top.

Under this situation we think it was a question for a jury to decide whether the pilot failed to do what a reasonable and prudent person in his position would ordinarily have done under these circumstances and this situation or did what a reasonable and prudent person in his position would not have done under the existing circumstances; that is, whether to continue on toward Omaha, with the strong possibility of having to make an emergency landing at Atlantic on an unlighted airfield when he was not carrying flares, rather than to turn back to Des Moines and land there on a lighted

runway to check his gasoline supply and refuel his plane, if necessary.

"In an action to recover damages caused by alleged negligence, plaintiff must prove both negligence of defendant and that such negligence was the proximate cause of the injury complained of." Sippel v. Missouri P. Ry. Co., 102 Neb. 597, 168 N. W. 356. See, also, Tews v. Bamrick, 148 Neb. 59, 26 N. W. 2d 499.

"Proximate cause, as used in the law of negligence, is that cause which in a natural and continuous sequence, unbroken by an efficient intervening cause, produces the injury, and without which it would not have occurred." Barney v. Adcock, 162 Neb. 179, 75 N. W. 2d 683.

If, under the situation hereinbefore set forth, a jury should find the pilot was negligent in failing to turn back and land at the Des Moines airport to check his gasoline and refuel his plane, if necessary, then it can be said that the jury could also properly find that such negligence on the part of the pilot was the cause of his having to make an emergency landing with the airplane at an unlighted airfield at Atlantic, which landing resulted in the accident and the proximate cause thereof. There is evidence in the record to support a finding that appellee suffered serious injuries as a result of the accident. In view of what we have said the appellant's contention that the record does not present a jury question is without merit.

A jury was impaneled to try this case on Monday, November 22, 1954. Trial was then recessed until Wednesday, November 24, 1954, at which time the appellee began the introduction of his evidence. At that time Lang's answer, which he had filed on February 5, 1954, contained the following allegation: "* * * admits that the airplane in which plaintiff was riding as a passenger made an attempted emergency landing at the time and place alleged; that said plane nosed over in said attempted emergency landing, necessitated by a shortage of fuel caused by a severe and unexpected

head wind, and that the plaintiff received some injuries, the nature and extent of which are unknown to this defendant." In addition thereto the answer contained allegations setting forth the defense of assumpton of risk. At the close of the day on November 24, 1954, which was the day before Thanksgiving, the trial was recessed until Monday, November 29, 1954, when it was continued. Sometime during the day of November 29, 1954, Lang was "given leave to file amended answer instanter," which he did. The effect of the amended answer is a general denial and a withdrawal of the above admission and defense. Did the trial court err in permitting Lang to file this amended answer instanter and, if so, was it prejudicial and grounds for granting appellee a new trial?

Section 25-852, R. R. S. 1943, provides as follows: "The court may, either before or after judgment, in furtherance of justice, and on such terms as may be proper, amend any pleading, process or proceeding, by adding or striking out the name of any party or by correcting a mistake in the name of the party, or a mistake in any other respect, or by inserting other allegations material to the case, or, when the amendment does not change substantially the claim or defense, by conforming the pleading or proceeding to the facts proved. Whenever any proceeding taken by a party fails to conform, in any respect, to the provisions of this code, the court may permit the same to be made conformable thereto by amendment."

We have said this statute should be liberally construed in order to prevent a failure of justice. See, Louis Hoffman Co. v. Western Smelting & Refining Co., 150 Neb. 524, 34 N. W. 2d 889; Robinson Outdoor Advertising Co. v. Wendelin Baking Co., 145 Neb. 112, 15 N. W. 2d 388. As stated in Dunn v. Bozarth, 59 Neb. 244, 80 N. W. 811: "It is within the discretion of the court to permit a defendant, during the course of the trial, to amend his answer so as to present a new defense. * * * In such

case, the plaintiff, if not prepared to meet the new issue, may have a continuance of the cause, upon such terms as the court may deem just." See, also, Miller Rubber Products Co. v. Anderson, 123 Neb. 247, 242 N. W. 449; Robinson Outdoor Advertising Co. v. Wendelin Baking Co., *supra.*

It appears that Lang was permitted to file an amended answer without any objections being made to his doing so and that appellee filed a reply thereto on November 30, 1954. This court has often held that: "Except where jurisdiction is involved, this court will consider on appeal only questions which have been presented to and passed upon by the trial court." Dodge v. Galusha, 151 Neb. 753, 39 N. W. 2d 539. See, also, Wright v. Lincoln City Lines, Inc., 163 Neb. 679, 81 N. W. 2d 170; Olson v. Shellington, *supra;* Greenberg v. Fireman's Fund Ins. Co., 150 Neb. 695, 35 N. W. 2d 772; Busch v. Hagenrick, 10 Neb. 415, 6 N. W. 474.

We think the foregoing principle is here controlling of this issue. But let us assume the question of the court's ruling is properly before us. The record shows the original answer filed February 5, 1954, was drafted, signed, and verified by Lang's counsel. As we said in Snyder v. Collier, 85 Neb. 552, 123 N. W. 1023, 133 Am. S. R. 682: "If plaintiff's petition is prepared, signed and verified by his attorney, and by mistake an erroneous statement is included therein, the court should before judgment, upon terms just and equitable to all parties, permit the litigant to withdraw that allegation." This has particular application here because the evidence adduced at the time the court permitted the amended answer to be filed established that there were no severe and unexpected headwinds at the time and the record as a whole shows it was an erroneous statement inadvertently included therein by defendant's counsel.

But appellee contends the statements contained in Lang's original answer that the airplane had run out

of gas because of severe and unexpected headwinds were judicial admissions and required no proof on this issue. It is of course true, as we said in Wright v. Lincoln City Lines, Inc., 160 Neb. 714, 71 N. W. 2d 182, that: "A party may at any time invoke the language of the pleading of his adversary on which the case is tried on a particular issue as rendering certain facts indisputable; and in so doing he is neither required nor permitted to offer the pleading in evidence. * * * An admission made in a pleading on which the trial is had is more than an ordinary admission. It is a judicial admission and constitutes a waiver of all controversy so far as the adverse party desires to take advantage of it, and is therefore a limitation of the issues." See, also, Lash v. Erisman, 167 Neb. 606, 94 N. W. 2d 32; Johns v. Carr, 167 Neb. 545, 93 N. W. 2d 831. But here Lang was permitted to file an amended answer upon which the case was actually tried. Under this situation the following applies to admissions contained in Lang's original answer: "A pleading which has been superseded by an amended pleading is only evidence of the facts therein alleged, and must be introduced as any other evidence in order to be considered. * * * The rule that a party may at any and all times invoke the language of his opponent's pleading as rendering facts therein alleged indisputable applies only to statements in the pleadings upon which the case is tried." In re Estate of McCleneghan, 145 Neb. 707, 17 N. W. 2d 923. See, also, Arman v. Structiform Engineering Co., 147 Neb. 658, 24 N. W. 2d 723; Miller v. Nicodemus, 58 Neb. 352, 78 N. W. 618.

Appellee contends the trial court's granting him a new trial is correct because it had erred in two respects in refusing him permission to amend his petition to conform to the proof, first, by refusing to permit him to include a charge of negligence to the effect that the defendant was negligent in failing to have flares aboard on a night flight as required by law and, second, in

refusing him permission to include a charge of negligence to the effect that the safety belt appellee was using was defective.

We have already set out the fact that the evidence shows the airplane was not carrying flares as either the federal statutes or regulations governing at the time required. There is also evidence to the effect that the safety belt appellee was using broke. The pilot testified the safety belt evidently had a flaw in it or it wouldn't have broken, that is, if it broke it was defective.

As we have already said, section 25-852, R. R. S. 1943, which applies to all parties involved in any litigation and permits amendments to their pleadings at any time during the course of the trial, should be liberally construed and applied in order to prevent a failure of justice. See, Dixon v. Coffey, *supra;* Robinson Outdoor Advertising Co. v. Wendelin Baking Co., *supra.* However, as stated in Anderson v. Moser, 169 Neb. 134, 98 N. W. 2d 703: "It is within the discretion of the trial court to permit or refuse an amendment of a pleading during the trial of a case, and error cannot be predicated on the action of the court in reference thereto unless an abuse of discretion is established to the prejudice of the party who is adversely affected thereby."

It is the rule of this court that: "A violation of statutes regulating the use and operation of motor vehicles upon the highways is not negligence per se, but evidence of negligence which may be taken into consideration with all the other facts and circumstances in determining whether or not negligence is established thereby." Landrum v. Roddy, 143 Neb. 934, 12 N. W. 2d 82, 149 A. L. R. 1041. See, also, O'Neill v. Henke, 167 Neb. 631, 94 N. W. 2d 322; Gleason v. Baack, 137 Neb. 272, 289 N. W. 349.

As stated in Barney v. Adcock, *supra:* "The violation of a statute intended to assure the safety of travelers on the public highways is not negligence as a matter of

law but may be considered with other evidence in deciding an issue of negligence." Likewise, we think, the violation of any provision of a federal statute, or rules or regulations promulgated thereunder which are intended to assure the safety of travelers in airplanes, is not negligence as a matter of law but may be considered with other evidence in deciding an issue of negligence.

It is true, as appellant contends, that ordinarily if a plaintiff wishes to amend his petition by inserting a new issue he should do so, after he has rested, by asking leave to withdraw his rest for that purpose and, if granted, to introduce his evidence in support thereof. If such request is granted then the defendant, if he makes it clear to the court that he is not prepared to meet the new issue, should be granted a continuance for that purpose upon such terms as the court may deem just. However, such procedure is not necessary if the evidence relied on by plaintiff is already properly in the record. The proper procedure in such cases is to ask leave to conform thereto.

Appellee, in his opening statement to the jury, withdrew all charges of negligence against the defendant, of which there were six, except the claim that the pilot failed to refuel en route when he had ample opportunity and time to do so and thus permitted the plane to run out of gas. It is apparent this came about because of the allegations of the defendant's original answer, hereinbefore set forth, upon which the trial started. By its rulings and instructions Nos. 1, 7, and 11, the trial court held the appellee strictly thereto. In this we think the trial court abused its discretion when appellee requested leave to amend to conform to the proof as to the flares; especially in view of the fact that the defendant had been permitted to change his position by the nature of the allegations of his amended answer. As to the second request to include a charge of negligence to the effect that the safety belt appellee

was using was defective, quite a different situation presents itself. There is no evidence showing any part of the safety belt was defective except the pilot's statement that it evidently had a flaw in it or it wouldn't have broken. But a safety belt is not such a piece of equipment that the doctrine of res ipsa loquitur applies thereto in case it breaks. In the absence of the doctrine applying there is no evidence upon which a jury could base its finding that it broke because it was defective. The pilot did not testify it was defective. He only assumed it must have been or it wouldn't have broken. As we said in Wessel v. City of Lincoln, 145 Neb. 357, 16 N. W. 2d 476: "A verdict may not rest on mere conjecture or speculation." In view thereof, we do not think the trial court abused its discretion when it denied appellee's request to include a specification of negligence relating thereto to conform to the proof.

We have already set forth the nature of flares and the use for which they are intended and can be put. In view thereof a jury could properly find that the failure to have such flares on board the airplane, when the pilot attempted to make an emergency landing at Atlantic on an unlighted airfield, was the proximate cause of the airplane missing the runway and landing in a field of soybeans adjacent thereto, which resulted in the airplane crashing and nosing over on its top.

Appellee also contends the trial court was correct in granting him a new trial because certain exhibits were, on objection thereto by defendant, erroneously excluded. These exhibits consisted of letters from a division of the Civil Aeronautics Administration located at Des Moines, Iowa, and a regional office thereof located at Kansas City, Missouri, addressed to Lang and Vequist, respectively, and admittedly received by them. These exhibits were offered by appellee solely for the purpose of impeachment. In Drewes v. State, 156 Neb. 319, 56 N. W. 2d 113, we said: "Impeaching evidence is that

which is directed to the question of the credibility of the witness."

In regard to the C.A.A.'s investigation of the accident Lang testified he was present at the airfield at Atlantic on the day after the accident happened, when two inspectors for the Des Moines office of C.A.A. investigated it; that no charge of any kind or character was ever made by the government against him for violation of any rule or regulation as a result thereof; and that the C.A.A. gave him a clean bill of health. Defendant offered in evidence a certified copy of certain records on file in the Records Section, Bureau of Safety Investigation, Civil Aeronautics Board in Washington, D. C., covering the accident to support this contention. It is apparent that defendant's counsel made much use of the fact, as contended, that Lang and the pilot had been given a clean bill of health by those in authority. However, the letters above referred to clearly evidence that such was not the fact for they show that the Civil Aeronautics Administration found Lang and the pilot guilty of violating certain provisions of the Civil Air Regulations and provisions of the Civil Aeronautics Act of 1938, as amended. These violations, as evidenced by the letter addressed to Lang dated October 8, 1952, related to his failure to have flares on the airplane when its flight was planned to continue beyond sunset; in carrying inadequate fire extinguishing equipment thereon; and in not carrying adequate first aid equipment thereon. As to the pilot the findings were the same except that it did not contain any finding of violation as to fire extinguishing equipment carried thereon being inadequate. It may be, as appellant contends, that these exhibits were not admissible as substantive proof. See 49 U. S. C. A., § 1441(e). We do not pass on that issue for such is not the situation. Here these letters were offered solely for impeachment purposes. We think they should have been received for that purpose and, under the circumstances disclosed by the record, we think it was

very prejudicial for the trial court to exclude them. See 98 C. J. S., Witnesses, § 537, p. 473.

This litigation has already unnecessarily extended over a long period of time and unfortunately Lang has died in the meantime, but these facts are not here controlling. The record shows appellee has never had an opportunity to fairly present his case to a jury. In view of what we have herein said and held we affirm the trial court's judgment granting appellee a new trial.

AFFIRMED.

IN RE APPLICATION NO. 5218, WATER DIVISION NO. 2-C, AINSWORTH IRRIGATION DISTRICT.
AINSWORTH IRRIGATION DISTRICT, APPELLEE, V. JEROME BEJOT ET AL., APPELLANTS.
102 N. W. 2d 416

Filed April 8, 1960. No. 34747.

1. **Estoppel.** A litigant who knowingly and deliberately assumes a particular position in a judicial proceeding is generally estopped to take a position inconsistent therewith to the prejudice of an adverse party.
2. **Appeal and Error.** On appeal to this court from an order of the Department of Water Resources, the primary questions to be determined are generally whether such department acted within the scope of its authority and whether its findings and order complained of are supported by competent evidence or are unreasonable and arbitrary.
3. **Statutes.** Where the general intent of the Legislature may be readily ascertained, yet the language used in a statute gives room for doubt or uncertainty as to its application, courts and administrative tribunals such as the Department of Water Resources may resort to historical facts or general information to aid them in interpreting its provisions.
4. ———. The construction of a statute of doubtful meaning given it by those whose duty it is to enforce it, and which construction the Legislature has by its continued noninterference for a number of years acquiesced in, will be approved, unless as thus construed it contravenes some provision of the Constitution, or is clearly wrong.

5. ———. Long continued practical construction of a statute by the officers charged by law with its enforcement is entitled to considerable weight in interpreting that law.
6. ———. When a statute is ambiguous or susceptible of two constructions, one of which creates absurdities, unreasonableness, or unequal operation and the other of which avoids such a result, the latter should be adopted.
7. **Waters: Statutes.** Section 46-206, R. R. S. 1943, deals primarily with the limitation of the amount of water that may be appropriated and taken from rivers or streams more than 100 feet wide, and section 46-265, R. R. S. 1943, deals with the return of unused water transported in irrigation ditches or canals by the owner or owners thereof in order to prevent waste.
8. ———: ———. Such sections are not in conflict if the water of the river or stream from which appropriated and taken is transported by irrigation ditches or canals to lands in the same basin or watershed and the unused water is returned into a river or stream in the same basin or watershed where it naturally would have flowed in any event but for the appropriation and taking.

APPEAL from the Department of Water Resources. *Affirmed.*

Quigley & Quigley and *Mason, Knudsen, Dickeson & Berkheimer,* for appellants.

William C. Smith, Jr., Bert L. Overcash, Allen L. Overcash, and *Woods, Aitken & Aitken,* for appellee.

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

CHAPPELL, J.

This appeal involves an application of Ainsworth Irrigation District, hereinafter called plaintiff, seeking an appropriation of water from the Snake River for irrigation purposes. Such "Application No. 5218, Water Division No. 2-C" was filed with the Department of Roads and Irrigation, now the Department of Water Resources, on March 26, 1953, by one Vern P. Lindholm, as authorized agent for the benefit of plaintiff as named therein, in order to preserve a priority date for plaintiff pending entire and proper completion of its organization on

August 10, 1953, after which time Vern P. Lindholm admittedly assigned said application to plaintiff. In form and substance the application conformed with the requirements of section 46-233, R. R. S. 1943, now section 46-233, R. S. Supp., 1959, as amended and effective September 20, 1957. For approval and confirmation of plaintiff's organization as an irrigation district and its contract with the United States, see Ainsworth Irr. Dist. v. Harms, *ante* p. 228, 102 N. W. 2d 429.

On March 30, 1955, five named objectors, only one of whom appears as objector in this proceeding but who were all represented by the same counsel as appear herein, filed a motion with the department requesting it to withdraw "Application No. 5218, Water Division No. 2-C. Ainsworth Irrigation District * * * filed * * * on March 26, 1953," and return it to said district because it contained a request "for a trans-watershed diversion of the waters of the Snake River * * * beyond the authority and jurisdiction of the Department of Roads and Irrigation * * * to grant * * * and that in the event the request and motion is denied that the above-named parties be granted sufficient time to file objections to matters raised in the application for the purpose of making up issues to be determined by evidence adduced at a hearing on the merits of the application." After notice, an informal conference was held with relation thereto on April 18, 1955, in the office of the department by objectors' counsel, several other attorneys, interested parties, and the State Engineer. Thereafter, on May 3, 1955, the State Engineer wrote objectors' counsel, saying in part: "As you know, Application 5218 was filed by the Ainsworth Irrigation District on March 26, 1953, and it has been pending since that date. This application is for a permit to appropriate the waters of the State of Nebraska for the irrigation of the lands of the district by means of a canal and distribution system to be constructed by the U. S. Bureau of Reclamation when funds are appropriated for that purpose.

"We do not feel that it would be proper procedure for this department to withdraw Application 5218 from our files and return it to the Ainsworth Irrigation District at this time, and we are not complying with the request to do so in Paragraph A of the motion and request.

"The parties named in your motion and request will be given notice before any action is taken on Application 5218 and ample time for filing objections will be granted as requested in Paragraph C of the motion and request."

In that connection, section 46-238, R. S. Supp., 1959, effective September 20, 1957, provides in part: "Any application for an appropriative right which is deficient by reason of past failure to comply with any of the requirements of sections 46-233 and 46-238 for the perfection of an appropriative right, which application has not been dismissed or denied, is also hereby ratified and confirmed; unless, within one year from September 20, 1957, a petition * * * to forfeit, cancel or otherwise invalidate such an application for an appropriative right, shall have been filed with the department by a person affected adversely thereby." Admittedly, no such petition was ever so filed by defendants herein or any of them with the Department of Water Resources, and no question was raised regarding validity of plaintiff's application except upon the ground aforesaid until July 7, 1959.

On July 7, 1959, objections to plaintiff's application were filed by nine named objectors, hereinafter called defendants. One of such objections was that plaintiff's application was null and void because it was filed in the name of the Ainsworth Irrigation District before its organization was completed. We believe that this is the proper place to dispose of that objection. In that connection, plaintiff has at all times regarded and treated Application No. 5218 as its own, and has at all times accepted the benefits and obligations thereof, as it had a right to do. See, 1 Fletcher, Cyclopedia Corporations

(Perm. Ed.), § 207, p. 681; 13 Am. Jur., Corporations, § 102, p. 246, § 103, p. 247, citing numerous authorities from this and other jurisdictions. From the time of filing the application on March 26, 1953, until July 7, 1959, defendants treated the application as that of plaintiff, except to claim on the latter date that it was invalid only because of alleged "trans-watershed diversion." Plaintiff and the department as well were thus led by defendants to believe and assume, until July 7, 1959, that the application was that of plaintiff, and that defendants claimed invalidity only because of alleged "trans-watershed diversion." Also, defendants had ample notice and opportunity to file a petition, as provided by section 46-238, R. S. Supp., 1959, and thus attack validity of the application, but they admittedly failed to do so. We conclude that they are not now in any position to claim that the application was void because it was filed in the name of the Ainsworth Irrigation District before its organization had been completed.

As recently as Chicago, B. & Q. R. R. Co. v. State Board of Equalization & Assessment, *ante* p. 77, 101 N. W. 2d 856, citing numerous authorities, this court held: "A litigant who knowingly and deliberately assumes a particular position in a judicial proceeding is generally estopped to take a position inconsistent therewith to the prejudice of an adverse party."

In defendants' objections, one defendant, Harold Harms, simply alleged that he was the owner in possession of described lands in Cherry County. In that connection, the record discloses that such lands do not abut on the Snake River and are outside the irrigation district, but will be crossed in part by plaintiff's proposed irrigation canal. Another defendant, Garret O. Swanson, simply alleged that he was the owner in possession of described lands which abut upon the Snake River. In that respect, the record discloses that such lands are outside the irrigation district, but that 40 acres owned by him abut upon the Snake River some

distance above plaintiff's proposed dam and reservoir area, and that he has a one-fourth interest in other lands nearby. The remaining seven defendants alleged that they were owners in possession of described lands which total only 1,213 acres, representing 3.3 percent of the total area within the district. Of course, they would ordinarily be subject to the burden of water and the plaintiff's contract with the United States, appearing in this record and referred to in Ainsworth Irr. Dist. v. Harms, *ante* p. 228.

In that connection, plaintiff argued that none of defendants had any right to appear and object to plaintiff's application or appeal to this court, because they were not legally affected and had no legal interest in this proceeding for an appropriation. At least six defendants, who admittedly owned land within the district, we believe would be legally affected by the appropriation and had a legal interest in this in rem proceeding which plaintiff would be required to prosecute and establish before the Department of Water Resources to obtain an appropriation in any event, whether or not anyone objected. See, Ainsworth Irr. Dist. v. Harms, *ante* p. 228. We conclude that such six defendants had a right to object to plaintiff's application and to appeal to this court. However, whether or not defendants Harms and Swanson would be legally affected, or had a legal interest which would entitle them to object to plaintiff's application and appeal to this court, we need not decide in this proceeding in order to dispose of the case under the circumstances presented herein.

As far as important here, defendants' other objections were in substance as follows: (1) That the Department of Water Resources was without authority to approve plaintiff's application because the proposal involved the unlawful diversion of water from the Snake River and transportation thereof in a canal across the watersheds of Gordon Creek and several other named

creeks before it reaches the lands in the irrigation district from whence the unused waters would run into the Niobrara River, in violation of section 46-265, R. R. S. 1943; (2) that the proposed diversion of water was unlawful under the provisions of section 46-206, R. R. S. 1943, because the width of the Snake River at point of diversion of plaintiff's canal is less than 100 feet; and (3) that approval of plaintiff's application would be detrimental to the public welfare and deprive defendants of equal protection of the laws and of property without due process of law. Defendants prayed for a denial and dismissal of plaintiff's application.

On July 10, 1959, plaintiff filed an answer which traversed defendants' objections; and prayed for a denial of said objections and for granting of plaintiff's application. Defendants' reply, filed July 15, 1959, was in the nature of a general denial. A full and final hearing was held by the Director of Water Resources from July 21 to July 23, 1959, whereat the parties adduced evidence and thereafter filed briefs. Subsequently, on September 4, 1959, orders were rendered by the department overruling defendants' objections and approving plaintiff's application.

The order overruling defendants' objections found and adjudged substantially as follows: (1) That if Application No. 5218 was deficient when filed by reason of nonexistence of Ainsworth Irrigation District, it was validated by Vern P. Lindholm's assignment to plaintiff, and that the application became ratified and confirmed under the provisions of section 46-238, R. R. S. 1943 (now section 46-238, R. S. Supp., 1959); (2) that because waters of the Snake River discharged into the Niobrara River, and substantial portions thereof will continue to do so when diversions are made for the proposed Ainsworth project, and the Niobrara River is essentially the same stream as the Snake River, and also because both streams are a part of the same river basin, the diversion as proposed by plaintiff's application

will not be a violation of sections 46-206 and 46-265, R. R. S. 1943, as interpreted by the Supreme Court of this state, and as they have been administratively interpreted by the department and its predecessors; and (3) that the granting of a permit to use waters of the Snake River under plaintiff's application will not be detrimental to the public welfare.

The order approving plaintiff's application and certifying approval thereof by the department, as provided in section 46-235, R. R. S. 1943, was made subject to certain limitations and conditions. As far as important here, they were in substance as follows: That the source of the appropriation was the Snake River; that the water appropriated should be used for irrigation purposes only; that priority date of the appropriation was March 26, 1953; that on or before March 4, 1960, plaintiff should file a map in the office of the department as provided by section 46-237, R. R. S. 1943, and in accordance with rules and regulations of the department; provided that work of construction should begin on or before March 4, 1960, and be prosecuted to completion as provided in section 46-238, R. R. S. 1943 (now section 46-238, R. S. Supp., 1959), unless temporarily interrupted by some unavoidable and natural cause; fixed a time for completing work of construction as November 30, 1970; limited the amount of plaintiff's appropriation to one-seventieth of a cubic foot of water per second of time for each acre of land to which water is actually and usefully applied on or before October 31, 1975; provided that the department may require installation of a measuring device as provided by section 46-256, R. R. S. 1943; provided that the rights of owners of land bordering on streams in Water Division No. 2-C to use water for domestic purposes, including the watering of livestock, must be respected; provided that the prior rights of all persons who, by compliance with the laws of Nebraska, have acquired the right to use the waters of the natural streams of the state, must not be

interfered with by the use of water under this permit; recited that the record shows that there are periods during some years when the supply of water in the Niobrara River Basin is not sufficient to meet the requirements of all those having appropriations for its use, therefore applicant is given notice that it may be denied the use of water during times of scarcity; and that said "Section 6, Article XV, Constitution of Nebraska, 1920, and Sections 70-668 and 70-669, Reissue Revised Statutes of Nebraska, 1943, govern the use of water, and provide that no inferior right to the use of the waters of this State shall be acquired by a superior right without just compensation therefor to the inferior user with prior rights." Thereafter defendants' motion for rehearing was overruled and they appealed to this court, assigning in substance: (1) That the findings and determination of the department were contrary to the application, evidence, and law; and (2) that defendants were denied due process and equal protection of the law. We do not sustain defendants' assignments.

With regard to defendants' last assignment, they make no contention that the irrigation statutes and laws deny defendants due process or equal protection. However, citing and quoting from 12 Am. Jur., Constitutional Law, § 566, p. 257, defendants contend that the department in its administration of the law has made its own law by administrative fiat, and thereby discriminated against defendants and denied them equal protection of the law by refusing to give them protection on a parity with that afforded objectors in Osterman v. Central Nebraska Public Power & Irr. Dist., 131 Neb. 356, 268 N. W. 334, upon which defendants primarily rely.

In that opinion, this court concluded that under the established policy of this state, water for irrigation purposes taken from the Platte River or its tributaries could not be lawfully diverted over and beyond the southern watershed of that stream and applied to lands

situated beyond and without the basin of the Platte River. In other words, the primary issue decided in that case was that "waters of the Platte river" could not be lawfully transported "through and across the divide or watershed which separates the Platte river system from the basins of the Blue and Republican rivers (both tributaries of the Kansas river and constituting a part of its system), and therewith irrigate lands situated wholly outside the Platte river valley and beyond the watershed thereof." As hereinafter observed, we have no comparable situation in the case at bar.

Before proceeding further, we point out that defendants and their counsel as well had timely notice and knowledge that plaintiff's application had been filed with the department, together with timely notice and ample opportunity to file a petition attacking its validity within 1 year from September 20, 1957, but they admittedly failed to do so as required by section 46-238, R. S. Supp., 1959. Also, as shown by the opinion in Ainsworth Irr. Dist. v. Harms, *ante* p. 228, defendants and their counsel as well had timely notice and ample opportunity to defend and did defend in that special in rem proceeding and appeal therefrom to this court. Further, defendants and their counsel as well had timely notice and ample opportunity to defend in the case at bar, and they did so. No contention is made otherwise.

We point out also that in this proceeding defendants called but one witness who was a licensed professional consulting engineer in Lincoln. None of defendants testified at the hearing. There is no evidence that defendant Swanson, some of whose land admittedly abutted on the Snake River some distance above plaintiff's proposed dam and reservoir area, ever used any water from or had any appropriation of water from the Snake River, and if he did, every right which he had, if any, was protected by the department's final orders and the law. The same is true of defendant Harms, a part of whose land would be crossed by plaintiff's pro-

posed canal. As said in Crawford Co. v. Hathaway, 67 Neb. 325, 93 N. W. 781, 108 Am. S. R. 647, 60 L. R. A. 889, quoted with approval in Nebraska Mid-State Reclamation District v. Hall County, 152 Neb. 410, 41 N. W. 2d 397: "While there are some questions affecting property rights which grow out of the administration of the law by the state board of irrigation (now the Department of Water Resources), and in which are involved matters in dispute calling for action of a quasi-judicial character, yet as to all these ample provisions are made for recourse to the courts." We conclude that under the circumstances presented in this case, defendants could not and have not been deprived of any constitutional rights as argued by them.

In Nebraska Mid-State Reclamation District v. Hall County, *supra,* we said: "Article XV, section 4, Constitution of Nebraska, provides: 'The necessity of water for domestic use and for irrigation purposes in the State of Nebraska is hereby declared to be a natural want.' A natural want is one absolutely necessary to human existence. Therefore, its legislative conservation and control for such uses is a public purpose." In that connection, Article XV, section 5, Constitution of Nebraska, provides: "The use of the water of every natural stream within the State of Nebraska is hereby dedicated to the people of the state for beneficial purposes, subject to the provisions of the following section." Such "following section" is section 6, which provides: "The right to divert unappropriated waters of every natural stream for beneficial use shall never be denied except when such denial is demanded by the public interest. Priority of appropriation shall give the better right as between those using the water for the same purpose, but when the waters of any natural stream are not sufficient for the use of all those desiring to use the same, those using the water for domestic purposes shall have preference over those claiming it for any other purpose, and those using the

water for agricultural purposes shall have the preference over those using the same for manufacturing purposes. Provided, no inferior right to the use of the waters of this state shall be acquired by a superior right without just compensation therefor to the inferior user."

This court has concluded in cases comparable with that at bar that on an appeal to this court from an order of the Department of Water Resources, the primary questions to be determined are generally whether such department acted within the scope of its authority and whether its findings and order complained of are supported by competent evidence or are unreasonable and arbitrary. See State ex rel. Cary v. Cochran, 138 Neb. 163, 292 N. W. 239. We conclude that the department had authority to make the findings and orders herein about which defendants complained, and that as hereinafter observed, they were not unreasonable or arbitrary.

The record is voluminous. We can only summarize the relevant and material competent evidence with relation to the primary question of whether the Snake River and the Niobrara River are essentially one stream and a part of the same river basin and watershed, and whether the Snake River exceeds 100 feet in width so that diversion of water therefrom by plaintiff for irrigation purposes would not be a violation of sections 46-206 and 46-265, R. R. S. 1943, as found and adjudged by the Department of Water Resources. In that connection, section 46-206, R. R. S. 1943, provides: "The water appropriated from a river or stream shall not be turned or permitted to run into the waters or channel of any other river or stream than that from which it is taken or appropriated, unless such stream exceeds in width one hundred feet, in which event not more than seventy-five per cent of the regular flow shall be taken." Also, section 46-265, R. R. S. 1943, provides: "The owner or owners of any irrigation ditch or canal shall

carefully maintain the embankments thereof so as to prevent waste therefrom, and shall return the unused water from such ditch or canal with as little waste thereof as possible to the stream from which such water was taken, or to the Missouri river."

The record discloses that the Ainsworth Irrigation District unit is an integral component of the comprehensive "Missouri River Basin Project." The physical and economic feasibility of the Ainsworth unit was approved by the Department of the Interior, and its construction was approved and authorized by the Congress of the United States. The proposed physical facilities of the Ainsworth Irrigation District are demonstrated on a map, exhibit No. 30, prepared by a witness for plaintiff, who was a civil engineer with the Bureau of Reclamation at Ainsworth since 1948, and who has worked on the Ainsworth project making field surveys from the river down to the lands to be irrigated, and in the bureau office making purchasing and cost estimates for feasibility reports. The Snake River flows north and slightly east into the Niobrara River, which first meanders north and east, then gradually turns and meanders east and southeast, and eventually empties into the Missouri River. Plaintiff's proposed Merritt Dam was planned and designed by the head of the earth dam design section of the Bureau of Reclamation in Denver, Colorado. The dam and reservoir will be constructed on the Snake River several miles south of its confluence with the Niobrara River. The dam will be some 140 feet high, with a spillway capacity of 1,150 cubic feet of water per second, and will store some 68,600 acre feet of water for irrigation. Due to high elevation of the area surrounding the dam and reservoir, it is unlikely that any land in the vicinity will be damaged by seepage. Plaintiff's canal, having an initial capacity of 620 cubic feet per second for carriage of water to the unit lands from the dam, will be constructed about 56 miles. It first extends in a northeasterly di-

rection, then gradually east and south, thence northeast to and through the lands to be irrigated, with unused waters eventually emptying into the Niobrara River, where they would have been eventually carried in any event. Enroute, plaintiff's canal will intersect and cross several smaller streams or watercourses, as authorized by section 46-153, R. R. S. 1943, all of which streams are tributaries of and flow north or northeast, where they eventually empty into the Niobrara River. In that connection, the canal will be fenced throughout, and constructed with typical siphons, cross drains, culverts, drops, and checks. Where the canal is above ground water, it will be lined with concrete and in the ground water area it will be given a gravel stabilizing lining. The problem of seepage has been given careful study and losses are expected to be normal, that is, "three-tenths of a cubic foot per square foot of canal perimeter," which has been the bureau's experience in 17 western states.

The project will irrigate 33,960 acres of generally flat and smooth table lands, ideally situated and classified for irrigation, farming, and stock raising. Such lands, with minor exceptions, have a top soil of 18 inches. As shown by a comparison exhibit, the Ainsworth project has the highest benefit cost ratio of seven other units included in the general development plan for the Missouri River basin. The project meets all the feasibility requirements of the federal government, with costs beyond the ability of the farmers to repay being "met by surplus power revenues of the basin-wide project." In computing production with and without irrigation, conservative consideration was given to the "best data * * * available from the State." Thus, it is estimated that by increasing net farm and livestock income by irrigation, the farmers will absorb the reasonable water charges payable without interest over a period of 40 years and greatly improve their financial situation. The evidence shows that from 1928 to 1952,

effective precipitation in the area was never sufficient to meet the demands of full crop production except in 1951, and then precipitation was not equitably distributed. Ordinarily, rainfall is sufficient in April, May, and June to give crops in the area a start, but in July, August, and September, when crops are maturing and need for rainfall is greatest, it is generally uncertain and inadequate. Without dispute, dry farming in the area was generally unsatisfactory or impossible, and pump irrigation is generally prohibitive in cost and not an adequate solution for water needs in the district.

The annual flow of the Snake River for 25 years has averaged about 192,300 acre feet of water per year, which is of excellent quality for irrigation, and only 91,800 acre feet annually will be diverted by the project, which represents only about 47 percent of the annual flow of the Snake River at Merritt Dam site. There are only a few small appropriations located upstream having any priority date, and as far as this record shows, no defendant herein holds any appropriation, or makes any claim to use of the water. It appears to be undisputed that there is plenty of water for all needs. The only appropriations downstream are two small power plants owned by Consumers Public Power District, who admittedly will be compensated if they are damaged.

This record does not show any substantial dispute that the Snake and Niobrara Rivers were in fact and law a single stream, basin, or watershed. Defendants called but one witness who became a licensed engineer in 1953 and worked for the Department of Roads and Irrigation on matters other than irrigation until 1956. He had made no field survey of any kind, and testified entirely hypothetically from topographic maps. He never had been employed as a consultant by any irrigation district. He at first defined a watershed as "a divide line where water will run in opposite directions," inferring thereby, as argued by defendants, that the Snake River and every stream or watercourse in the

area, which are all tributaries of and empty into the Niobrara River, had a separate watershed across which plaintiff could not transport water for irrigation, as it proposed to do. However, defendants' witness conceded that another definition of a watershed would place all of the area involved in the Niobrara River watershed. In that regard, he was asked: "Q You have talked about watersheds. A Right. Q What do you understand a watershed to be? A There are two definitions of watershed. The definition I was using was a divide line where water will run in opposite directions. The other definition would be toward a drainage area that drains into a given creek or stream. Q Within the latter definition, would you say this is all in the Niobrara watershed? A Yes sir." He was also asked: "Q Both surface and underground flow is in that direction? (Northeast) A Generally, they follow the same lines, yes. Q This whole area could be said to be part of the Niobrara drainage area? A That is true, yes sir."

Defendants also offered in evidence from exhibit No. 29, Geological Survey Water Supply-Paper 1371, p. 9, the following: "The Ainsworth unit lies within the Niobrara River basin and is drained by both overland runoff and subsurface outflow to the Niobrara River and its tributaries." Defendants further offered in evidence from exhibit No. 13, the final report of the Department of Interior, p. 55, which assumed that there was no diversion of water from one watershed to another, since the "return flows will naturally find their way and thus be in the same location within the State as though they never had been diverted."

A consulting engineer with offices in Denver was called as a witness by plaintiff. He has continuously practiced engineering since 1919 "entirely within the field of water development" and related matters. He and his firm carry on extensive state, national, and international activities in that field, having other offices

in at least five named foreign countries. The record contains a lengthy review of the many projects with which the witness has been or is now associated, including his services as consultant in disputes involving the use of waters in various streams and rivers. Thereafter he defined the pertinent terms "from an engineering standpoint" as follows: "When a river is spoken of, it generally means a river and all its tributaries above a given point, which is the point on the river that is being dealt with. A river and all its tributaries constitutes a watershed, which may be defined as all the area lying within a divide, above a given point on a river or stream. The term watershed is synonomous (sic) with river basin, drainage basin, or catchment area, except in some instances, where by definition for specific purposes, in connection with specific agreements, the basin may have been extended upon the natural watershed." He also cited concrete applications of such definition in several projects. In speaking of the Snake and Niobrara Rivers, he testified: "I defy anyone to delineate a divide between those two streams. * * * I can't distinguish between the Snake and Niobrara. It is one watershed and no one can define it otherwise." Also, in the final analysis, defendants' only engineering witness did not disagree. In support of his definitions and conclusions aforesaid, and to illustrate previous administrative action by the state department in compliance therewith, plaintiff's witness prepared a large map reflecting all of the streams, systems, basins, and watersheds in Nebraska where irrigation development has occurred. Speaking with reference to defendants' contention, he testified that: "Under that concept there could not have been development of the major projects within the Platte river watershed, nor within the Republican river watershed, nor within the Loup river watershed. Development would be very much more minor than it is at the present time, and probably would be almost nil."

Contrary to defendants' contention, the foregoing evidence adduced by plaintiff was properly admitted for consideration of the department in making its findings and orders. In that connection, we have held that: "Where the general intent of the Legislature may be readily ascertained, yet the language used in a statute gives room for doubt or uncertainty as to its application, courts may resort to historical facts or general information to aid them in interpreting its provisions." Placek v. Edstrom, 148 Neb. 79, 26 N. W. 2d 489, 174 A. L. R. 856.

We have also held: " 'That construction of a statute of doubtful meaning given it by those whose duty it is to enforce it, and which construction the legislature has by its continued noninterference for a number of years acquiesced in, will be approved, unless as thus construed it contravenes some provision of the Constitution, or is clearly wrong.' State v. Bryan, 112 Neb. 692, 200 N. W. 870." Chicago & N. W. Ry. Co. v. Bauman, 132 Neb. 67, 271 N. W. 256.

Also, we have held that: "Long-continued practical construction of a statute by the officers charged by law with its enforcement is entitled to considerable weight in interpreting that law." Flint v. Mitchell, 148 Neb. 244, 26 N. W. 2d 816.

Further, we have held that: "When a statute * * * is ambiguous or susceptible of two constructions, one of which creates absurdities, unreasonableness, or unequal operation and the other of which avoids such a result, the latter should be adopted." Maska v. Stoll, 163 Neb. 857, 81 N. W. 2d 571.

Webster's New Twentieth Century Dictionary (2d Ed.), Unabridged, 1956, p. 2068, defines "watershed" as: "1. a ridge or stretch of high land dividing the area drained by different rivers or river systems. 2. the area drained by a river or river system." See, also, Webster's New International Dictionary (2d Ed.), Unabridged, 1943, p. 2886, which defines "watershed" as:

"The whole region or area contributing to the supply of a river or lake; drainage area; catchment area or basin."

In that connection, it is interesting to note that for administrative purposes by the Department of Water Resources, section 46-215, R. R. S. 1943, provides: "The State of Nebraska is hereby divided into two water divisions, denominated water division No. 1 and water division No. 2, respectively." Also, section 46-217, R. R. S. 1943, provides: "Water division No. 2 shall consist of all lands that may be watered from the Loup, White, *Niobrara* and Elkhorn rivers and their tributaries, and all other lands of the state not included in any other water division." (Italics supplied.) In such respect, plaintiff's application was entitled: "Application No. 5218. Water Division No. 2-C."

As we view it, the Snake River and the Niobrara River are for all intents and purposes but one and the same stream, comprising the same watershed or basin, and could as well have been called the north and south Niobrara. Under the circumstances in this case, a mere matter of having different names does not control the physical attributes or the character of the area through which they flow as one river basin or watershed without any dividing line between them. Cases comparable in all material respects are not cited or found, but statements found in some authorities are helpful in arriving at such conclusion.

In Dern v. Tanner, 60 F. 2d 626, it is said: "Tributary waters, branches, are inseparable parts of the main stream, and with it are subject to common appropriation and control in so far as reasonably necessary in irrigation as in navigation." The Snake River is admittedly a tributary of the Niobrara River.

Also, in E. C. Horst Co. v. New Blue Point Mining Co., 177 Cal. 631, 171 P. 417, citing authorities, it is said: "The mere fact that Wolf Creek has a separate name

and extends through another county does not make it less a part of Bear River."

In Osterman v. Central Nebraska Public Power & Irr. Dist., *supra,* this court took the position that the "Platte River or its tributaries" constitute one stream and basin or watershed. See, also, Frenchman Valley Irr. Dist. v. Smith, 167 Neb. 78, 91 N. W. 2d 415, which treated the Frenchman River and Stinking Water Creek as one stream.

We point out again that appellants in Osterman v. Central Nebraska Public Power & Irr. Dist., *supra,* admittedly attempted to transport water by canal from the Platte River basin or watershed across and into the Republican River basin or watershed to therewith irrigate lands situated wholly outside the Platte River valley basin and beyond the watershed or basin thereof. Objectors therein were either appropriators whose rights were based upon state irrigation laws, or riparians whose claims were incident to and arose out of ownership of and possession of lands bordering upon the Platte River or through which it ran, whose titles were initiated by settlement as early as 1857, and for which government patents issued earlier than 1870. The broad inference to be logically drawn from that opinion is that the state will not give its sanction to an appropriation of water which would in effect remove the waters of a river or stream from its natural basin or watershed and thereby cause it to be transported to another basin or watershed and lost to the communities which have grown up and developed in that basin or watershed. The opinion is entirely distinguishable as we view it from the case at bar on the facts and applicable law.

There is another factor which also becomes important in this case. Such factor is whether or not the Snake River exceeds 100 feet in width in order to come within the exception provided in section 46-206, R. R. S. 1943.

In that connection, section 46-206, R. R. S. 1943, deals primarily with a limitation of the amount of water that

may be appropriated and taken from rivers or streams more than 100 feet wide, and section 46-265, R. R. S. 1943, deals with the return of unused water transported in irrigation ditches or canals by the owner or owners thereof in order to prevent waste thereof. Although at first such sections seemingly are in conflict, in fact they are not if the water of the river or stream from which appropriated and taken is transported by irrigation ditches or canals to lands in the same basin or watershed and the unused water is returned into a river or stream in the same basin or watershed where it naturally would have flowed in any event but for the appropriation and taking.

This record overwhelmingly establishes that substantial relevant portions of the Snake River exceed 100 feet in width and that "there are times when the Snake river has a greater flow, and times when the Niobrara has a greater flow at the point of confluence." Admittedly, plaintiff would take for irrigation only about 47 percent of the Snake River flow. Admittedly, defendants' engineer never visited the area to make any inspection, survey, or measurements of the Snake River. His measurements of the width of the Snake River at some six points thereon were taken from an enlarged reproduction of an aerial photograph obtained from the files of the Department of Roads and Irrigation. Such photograph was admittedly taken September 30, 1939, some 20 years prior to this hearing. In that respect, his testimony that the widest such point on the Snake River was only 83 feet has little or no weight in this proceeding. We again call attention to the fact that such witness also admitted that the entire area here involved was in the Niobrara River basin or watershed.

On the other hand, plaintiff called as a witness a geologist for the Bureau of Reclamation on the Ainsworth project. He was born and raised in Ainsworth. He testified not only from experience since 1946 as a geologist for the bureau, but from experience in the

precise area for 12 years prior to 1943 while doing field work for the American Museum of Natural History. He identified a series of maps prepared by the bureau from field surveys which show that substantial portions of the Snake River exceed 100 feet in width. One such, exhibit No. 64, shows the upper end of the proposed reservoir area behind the proposed Merritt Dam. Such area, exceeding 100 feet in width, is colored blue, and comprises "about 12,000 feet, or somewhat over two miles." Another, exhibit No. 65, reflects an area downstream from exhibit No. 64, and so shows a "comparable" area exceeding 100 feet in width. Another, exhibit No. 66, being the "easternmost section of the three maps," so shows "those portions of the river where the waterway exceeds 100 feet." He testified that the three maps show "a reach of five river miles" where "the stream width exceeds 100 feet * * *. In fact, I know of places below the dam where this river width exceeds 100 feet."

Quadrangle maps appearing in this record also show that the Snake River exceeds 100 feet in width in the same or other areas. In such respect, exhibit No. 69, covering the proposed dam area, shows 10 such areas above the dam site and one below, varying in length from a few hundred feet up to a mile. Exhibit No. 70 reflects some 15 miles of the Snake River on upstream from exhibit No. 69, and shows 24 such areas of the same length. Exhibit No. 71 also joins exhibit No. 70 and reflects about 15 miles of the Snake River. It shows 25 such areas varying in length from a few hundred feet up to three-quarters of a mile.

In the case at bar, the proposed location and construction of irrigation canals and ditches, as well as the lands to be irrigated by the same, are located in and limited to the Niobrara River basin or watershed containing the source of the water to be used. All unused waters will be returned to the Niobrara River, thence to the Missouri River, where they would naturally have

flowed in any event through the Snake River and all other tributaries of the Niobrara River which lie in its basin or watershed. To hold otherwise would deprive 33,960 acres of irrigable land of needed water and permit it to be wasted in the Niobrara and Missouri Rivers, without authority of fact and law.

In this case, the orders of the Department of Water Resources properly appropriated and permitted water to be taken from the Snake River, which exceeds 100 feet in width, and is part and parcel of the Niobrara River basin or watershed. The findings and orders of said department are fully supported by the record and law. We conclude that the findings and orders of the Department of Water Resources should be and they are hereby affirmed. All costs are taxed to defendants.

AFFIRMED.

CARL LINDGREN ET AL., APPELLEES, V. SCHOOL DISTRICT OF BRIDGEPORT ET AL., APPELLANTS, IMPLEADED WITH EMMA B. HOPPEL ET AL., APPELLEES.

102 N. W. 2d 599

Filed April 15, 1960. No. 34740.

1. **Schools and School Districts: Estoppel.** The refusal of a school district board to admit a nonresident pupil to its high school under the discretionary provision of section 79-4,100, R. R. S. 1943, does not operate as an estoppel upon the members of the board to appeal from a decree holding that the proceedings transferring lands belonging to the pupil's parents into such district are void.
2. **Courts: Actions.** A litigant has no vested right in a mode of procedure, and an action commenced before an enactment changing the procedure in the court where the action is pending is properly triable under the changed procedure after the enactment becomes effective, unless the procedure is specifically retained by a saving clause.
3. **Statutes.** The general saving clause statute, section 49-301, R. R. S. 1943, relates to substantive and not to procedural law.
4. ———. The procurement of a bill of exceptions is a pro-

cedural matter and, when completed in accordance with a new statute after the effective date of such statute, it is properly obtained under controlling law.

5. **New Trial.** A motion for a new trial in an equity suit is required only if a review is sought of rulings of the trial court on alleged errors occurring at the trial, such as rulings on the rejection or reception of evidence.
6. **Schools and School Districts.** The granting of petitions by a county superintendent after notice and hearing, as provided by section 79-402, R. R. S. 1943, need not be entered with the formality of a judgment of a court of law. The rendition of an order granting the petitions and an entry thereof at an appropriate time and place is all that is required.
7. ———. A valid order of a county superintendent, made pursuant to section 79-402, R. R. S. 1943, is final as to all matters properly determined by it, unless a review thereof is sought, and as to such matters it is not subject to collateral attack.
8. **Injunctions.** An injunction suit to enjoin the enforcement of such an order is a collateral attack upon it and is not available unless the order is wholly void and not merely erroneous.
9. **Schools and School Districts.** The finding of a county superintendent, inherently contained in the grant of the petitions, that 55 percent of the voters of the district were signatory thereto, is a final determination of that fact unless a review thereof is sought, which may not be collaterally attacked unless it appears from the face of the petitions that they are void.
10. ———. The words "each district affected," contained in section 79-402, R. R. S. 1943, mean each school district in its entirety that is involved in the proceeding.
11. ———. The words "each district affected" do not refer to lands being transferred from one district to another, and no petition is required from the voters in the territory being detached from one district and annexed to another.
12. ———. When lands are transferred from one district to another under the provisions of section 79-402, R. R. S. 1943, the district from which the lands are detached retains its identity and the assets and unbonded obligations of such district by virtue of the specific provisions of such statute.
13. ———. Petitions initiated under section 79-402, R. R. S. 1943, for detaching lands from one district and annexing them to another, do not require a provision specifying the disposition of assets and unbonded indebtedness, since such disposition is made by statute.
14. **Constitutional Law: Schools and School Districts.** The transfer of lands from one district to another, initiated by petitions signed by the required number of voters, and granted by the

county superintendent after notice and hearing, and from which order a judicial review is available, meets all the requirements of due process.

15. **Schools and School Districts: Taxation.** A voter and taxpayer of a school district has no interest in the tax funds of a district, lawfully collected, other than to see that they are used for the public purpose for which levied.

16. ———: ———. The provision that tax funds previously levied and collected shall remain the property of the district remaining after the proper transfer of a part of its lands to another school district is within the province of the Legislature, and is not inhibited by constitutional provisions.

17. **Schools and School Districts.** Mere irregularities in proceedings to detach lands from one school district and annex them to another, under section 79-402, R. R. S. 1943, do not have the effect of vitiating the proceedings and subjecting them to collateral attack.

18. ———. Sections 25-520.01 to 25-520.04, R. S. Supp., 1957, do not require the service of personal notice upon the voters of the districts affected of the hearing by the county superintendent provided for in section 79-402, R. R. S. 1943.

APPEAL from the district court for Morrill County: RICHARD M. VAN STEENBERG, JUDGE. *Reversed and remanded with directions.*

James L. Macken, for appellants.

Wright, Simmons & Harris, for appellees.

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

CARTER, J.

This is a suit by a landowner and his wife to enjoin the defendants from giving effect to an order of the county superintendent of schools detaching certain lands of plaintiffs from School District No. 50 and annexing such lands to the School District of the city of Bridgeport. The trial court held the proceedings void and granted injunctive relief. The School District of the city of Bridgeport and the members of its board of education have appealed.

The School District of the city of Bridgeport is a

Class III district which we shall hereafter refer to as the Bridgeport district. School District No. 50 is a Class I district which we shall refer to as District 50. The remaining defendants are the members of the board of education of the Bridgeport district, the county superintendent, county clerk, county treasurer, and county assessor of Morrill County, the members of the school board of District 50, and the petitioning legal voters of that district.

The plaintiffs have filed a motion to dismiss the present appeal on the ground that appellants have accepted the judgment of the district court in the present suit by refusing to permit Robert Lindgren, the son of plaintiffs, to attend the high school in the Bridgeport district. The record shows the following: The final decree of the district court in the instant case was rendered on August 20, 1959, and an appeal taken therefrom as hereinbefore stated. On August 29, 1959, the board of the Bridgeport district refused to permit Robert Lindgren to attend the Bridgeport high school. Plaintiffs sought a writ of mandamus against the Bridgeport district to compel it to admit Robert Lindgren to its high school. The Bridgeport district successfully defended the action and a writ of mandamus was denied. No appeal was taken from this judgment. The motion to dismiss is without merit. We point out that a high school district is authorized by statute to refuse admission to any or all nonresident pupils. § 79-4,100, R. R. S. 1943. We point out further that the application of Robert Lindgren to attend Bridgeport high school was tendered on the basis of his being a nonresident pupil which the Bridgeport district board could accept or reject as a matter of discretion under section 79-4,100, R. R. S. 1943. The rejection of the application under this authority cannot be considered an acceptance of the decree in the instant case. It seems to us that if the Bridgeport district had accepted the application of Robert Lindgren as a nonresident pupil,

it would then have taken a position contrary to its position in the instant case that plaintiffs' lands were properly annexed and that plaintiffs thereby became residents of the Bridgeport district. In any event, the situation is such that it cannot be asserted as an estoppel against the Bridgeport district or its school board members to prosecute an appeal, or amount to an acceptance of the decree requiring a dismissal of the appeal.

The plaintiffs contend that there is no proper bill of exceptions in this court and that the only question to be determined is whether or not the pleadings sustain the judgment. As heretofore stated, the decree in this case was rendered on August 20, 1959. No motion for a new trial was filed. The appealing defendants ordered a bill of exceptions within time. Before the bill of exceptions was prepared, and on September 28, 1959, a new statute became effective which authorized this court to prescribe rules for obtaining a bill of exceptions. Such rules were prescribed and they became effective at the same time as the new statute. Admittedly, the procedure followed in procuring a bill of exceptions after September 28, 1959, was in accordance with the new statute and the rules of this court authorized thereby. The plaintiffs assert that the statute in force when the decree was rendered must be followed.

We point out that the new statute, section 25-1140, R. S. Supp., 1959, contains no saving clause. It is urged that the general saving statute, section 49-301, R. R. S. 1943, keeps the old procedure in effect. This contention is without merit. In Lovelace v. Boatsman, 113 Neb. 145, 202 N. W. 418, this court said: "A litigant has no vested right in the mode of procedure, and an action commenced before an enactment changing the procedure in the court where the action is pending, after the enactment becomes effective, is properly triable under the changed method." See, also, Norris v. Tower, 102 Neb. 434, 167 N. W. 728; Department of Banking

v. Hedges, 136 Neb. 382, 286 N. W. 277; Krepcik v. Interstate Transit Lines, 151 Neb. 663, 38 N. W. 2d 533. The general saving clause found in section 49-301, R. R. S. 1943, providing that the repeal of a statute shall in no manner affect pending actions founded thereon, nor causes of action not in suit that accrued prior to any such repeal, does not save to a party the procedures of the repealed law. The general saving statute relates to substantive and not procedural law. Lovelace v. Boatsman, *supra;* Ensley v. State, 4 Okl. Cr. 49, 109 P. 250; Wheelock v. Myers, 64 Kan. 47, 67 P. 632.

Plaintiffs rely primarily on Cozad v. McKeone, 149 Neb. 833, 32 N. W. 2d 760. That case is clearly not applicable. The final order appealed from in that case was rendered at a date subsequent to the effective date of the amendatory statute. We held that the procedures of the new statute applied to the appeal from such a final order and that a bill of exceptions should have been procured under the law in effect when the final order was rendered. The case has no application to a state of facts such as we have in the present case. The bill of exceptions was properly procured and is here for consideration by the court.

Plaintiffs further contend that no motion for a new trial having been filed the only question before the court is the sufficiency of the pleadings to sustain the judgment. Such is not the law. It has been the consistent holding of this court that in an equity action a motion for a new trial is required to secure a review of rulings of the trial court on alleged errors occurring at the trial, such as rulings on the rejection or reception of evidence. It is required for no other purpose. See, Timmerman v. Timmerman, 163 Neb. 704, 81 N. W. 2d 135; Rush v. Heinisch, 157 Neb. 545, 60 N. W. 2d 608; Nemetz v. Nemetz, 147 Neb. 187, 22 N. W. 2d 619.

Prior to February 6, 1958, plaintiffs were the owners of certain described lands in District 50. On or before that date a petition was circulated among the voters of

District 50 seeking to detach certain lands, including those of plaintiffs, from District 50 and to annex such lands to the Bridgeport district. A sworn list of all the voters in District 50 was attached to such petition. The petition contained signatures in excess of 55 percent of all the voters of District 50. On February 13, 1958, the board of the Bridgeport district accepted the lands described in the petition, and on March 31, 1958, it filed its petition with the county superintendent for a change in the boundary of its district by including the lands described in the petition circulated among the voters of District 50. The petition signed by the voters of District 50 was submitted to the county committee for school district reorganization on February 11, 1958, and was submitted by that committee to the state committee on the same date. The proposal was reviewed by both committees. The county committee, after a published notice of the meeting, held a public hearing. Ten days thereafter the petitions were filed with the county superintendent who, after publishing a notice of hearing, held a hearing to determine the validity and sufficiency of the petitions. Following such hearing the county superintendent on April 15, 1958, made an order by noting the following on the back of the petitions as follows: "Date Granted, April 15, 1958. Date Entered In The Record April 15, 1958. Emma B. Hoppel, County Superintendent of Schools." No proceeding was had to review the order made by the county superintendent.

The plaintiffs contend that the order of the county superintendent was insufficient and void in not meeting the requirements of section 79-402, R. R. S. 1943, which provides in part: "The county superintendent shall then advertise and hold a hearing to determine the validity and sufficiency of the petitions. Upon determination, as a result of the hearing, that valid signatures of at least fifty-five percent of the qualified legal voters of each district are contained in the respective peti-

tions, the county superintendent shall proceed to effect the changes in district boundary lines as set forth in the petitions. * * * Provided, changes affecting cities, villages, or Class III school districts may be made upon the petition of the school board or the board of education of the district or districts affected; * * *."

The defendants maintaining this appeal contend that the granting of the petition by the county superintendent in the manner that she did is valid and binding. We agree that it is. In State ex rel. Tanner v. Warrick, 106 Neb. 750, 184 N. W. 896, we said: "It was held in Biart v. Myers, 3 Neb. (Unof.) 196, that, while a superintendent of public instruction acts judicially in forming a new school district from territory embraced within the boundaries of other districts, it does not follow that his findings and orders in the premises must be entered with all the formality of a judgment of a court of law; if the record shows a substantial compliance with the statute it is sufficient. There is no time or place fixed by the statute for the declaration of approval by the county superintendent; it is enough that the approval be made, and it should, of course, be shown in writing within a reasonable time after the declaration is made; but the essential thing is the approval, which is a mental act, and the declaration, either oral or written, which is physical. The mental determination would be insufficient if unaccompanied by any act evidencing that it had been made; but, when made and declared, it becomes effective, notwithstanding the fact that the written evidence was not recorded until later. While the statute in terms does not require the recording of the act, the proper conduct of official affairs requires that such a record be made." See, also, Biart v. Myers, 3 Neb. (Unoff.) 196, 91 N. W. 573; School Dist. No. 49 v. School Dist. No. 65-R., 159 Neb. 262, 66 N. W. 2d 561.

The order of the county superintendent being valid and final, it may not be collaterally attacked as to any matter properly determined by it. Any dissatisfied

person who is aggrieved by the order made may have it reviewed by error proceedings to the district court. But such person may not stand by and permit the order to become final and thereafter attack the order collaterally on grounds that were available in an error proceeding. The bringing of an injunction suit to enjoin the enforcement of the order is a collateral attack upon it and is not available unless the order was wholly void and not merely erroneous. State ex rel. Larson v. Morrison, 155 Neb. 309, 51 N. W. 2d 626; Cacek v. Munson, 160 Neb. 187, 69 N. W. 2d 692; School Dist. No. 49 v. Kreidler, 165 Neb. 761, 87 N. W. 2d 429.

The finding of the county superintendent is equivalent to a finding that every fact essential to jurisdiction has been found to exist. It includes a determination that 55 percent of all the voters of District 50 had signed the petition. Such order is not therefore subject to collateral attack by injunction on this ground if the petitions are not void on their face.

The record shows that a petition was filed with the county superintendent to which was attached a sworn list of all the voters of District 50. The petition contained the names of persons totalling in excess of the 55 percent of all the voters of District 50. There was some discrepancy in names, but, after notice and hearing, the county superintendent found that 55 percent of the voters of District 50 had signed the petition and made the order granting the petition. This determination is final and not subject to collateral attack.

It is contended that the circulators of the petition misrepresented the facts and fraudulently induced voters to sign the petition. We point out, however, that no evidence was offered in this suit in support of the allegations of fraud contained in the last amended petition. There is therefore no issue of fraud presented by this appeal.

Plaintiffs contend the proceedings and order were void for several reasons. The first contention is that

the language of section 79-402, R. R. S. 1943, requires that the lands detached from one district and annexed to another must be treated as a district and, in the absence of a third petition signed by 55 percent of the voters of such third district, the order purporting to transfer the lands to another district is void. We do not sustain this contention. The pertinent language of section 79-402, R. R. S. 1943, is: "The county superintendent shall * * * change the boundaries of any district upon petitions signed by fifty-five per cent of the legal voters of each district affected." The districts affected are the school districts whose boundaries will be changed. This interpretation of the language "each district affected" appears to have been decided in Cowles v. School District No. 6, 23 Neb. 655, 37 N. W. 493, wherein it is said: "In other words, it is the district in its entirety, before the change of boundary from which the petition is to come, and one-third of the legal voters of which must sign it."

The laws of this state leave the control of the boundaries of school districts with the legal voters of each district. After the original organization of a school district no new district can be formed, old one altered, or the boundaries changed unless such action is initiated by the required percentage of voters in the school districts involved. School Dist. No. 49 v. Kreidler, *supra.* While it is true in the instant case that none of the voters in District 50, who lived on the lands being transferred to the Bridgeport district, signed the petition, the control of the boundaries of District 50 is left with the required majority of all the voters of that school district. No petition is required from the voters in the area or territory being transferred.

Plaintiffs allege that the petition is fatally defective in that it fails to specify the disposition to be made of the assets and unbonded indebtedness of District 50. In this respect, section 79-402, R. R. S. 1943, provides in part: "When a district is divided by petitions, said peti-

tions shall specify the disposition to be made of assets and unbonded indebtedness of the districts; Provided, the remaining portion of an original district divided through annexation shall retain the identity, assets, and unbonded obligations of the original district." It appears clear to us that the present case is within the proviso of the quoted portion of the statute. As a matter of law, District 50 retains its identity, and the assets and unbonded obligations of such district. It being fixed by law, it would be a vain thing to require a statement of the division of assets and unbonded obligations in the petition when no division thereof is permitted. For us to hold that such a statement is necessary to avoid a holding of invalidity would be to invalidate the petition for not stating a provision of law which everyone is presumed to know. We hold that a petition initiated under section 79-402, R. R. S. 1943, for detaching lands from one district and annexing them to another does not require a provision specifying the disposition of assets and unbonded indebtedness since such disposition is made by law.

It is asserted that the transfer of lands from District 50 to the Bridgeport district would result in funds raised by taxation on land in one district being distributed and used in another district, and is therefore unconstitutional. It is fundamental, of course, that tax funds raised in one district for school purposes may not be used in another district. Peterson v. Hancock, 155 Neb. 801, 54 N. W. 2d 85. But that is not the situation here.

The fixing of boundaries of school districts is a legislative function. The Legislature may, in the exercise of its control over school district boundaries, provide a method for changing such boundaries, and the method provided may properly authorize such change to be initiated by petition of the required percentage of the voters of the district. Such a method must, however, provide a means for determining whether the proposed change in boundaries is for a public purpose, and a means

by which an aggrieved property owner, whose property is injuriously affected, may have his rights judicially determined. Nickel v. School Board of Axtell, 157 Neb. 813, 61 N. W. 2d 566. In the instant case the Legislature has provided a method for transferring lands from one school district to another. It has provided for notice and hearing before the county superintendent, which hearing is judicial in character, and which may be reviewed by error proceedings to the district court. This constitutes due process of law. The fact that lands being transferred from one school district to another may thereby be subjected to a higher rate of taxation poses no question of unconstitutionality since the transfer has been made by a means consistent with due process. Nor does the fact that the school district from which the lands were detached retains tax funds, previously levied and collected, affect the validity of the transfer. A voter or taxpayer of a school district has no interest in the tax funds of a district other than to see that they are used for the public purpose for which they were levied. The provision that tax funds previously levied and collected shall remain the property of the district remaining after the proper transfer of a part of its lands to another school district is clearly within the province of the Legislature. State ex rel. School Dist. v. Ellis, 160 Neb. 400, 70 N. W. 2d 320; City of Fremont v. Dodge County, 130 Neb. 856, 266 N. W. 771.

It is contended that the proceedings are void in that the state committee on reorganization did not have its report before the county committee on reorganization at the time it held its hearing on the proposal to transfer the lands in question. Such report was filed with the county superintendent when the hearing was held to determine the sufficiency of the petitions. We point out that the consideration of the proposal to transfer lands by the state and county committees is advisory only. Such committees have no part in determining whether or not the transfer shall be made other than to make

recommendations thereon. The failure of the state committee to make its recommendations prior to the time the county committee met is an irregularity only where it is shown that such report was on file with the county superintendent at the hearing at which the transfer was approved. This is an irregularity that could have been raised by an error proceeding, and which affords no basis for a collateral attack.

Complaint is made also that the petition of the members of the Bridgeport district was not filed until March 31, 1958. This was a date prior to the hearing before the county superintendent. The record shows that the proposed transfer to the Bridgeport district was accepted by its school board on February 13, 1958, but that the formal petition was not filed until March 31, 1958. This is also an irregularity that may not be collaterally attacked.

It is next contended that the notice of hearing given by the county superintendent was insufficient and voids the proceedings in that personal service was not had upon the plaintiffs, pursuant to sections 25-520.01 to 25-520.04, R. S. Supp., 1957. The applicable portion of section 25-520.01, R. S. Supp., 1957, provides: "In any action or proceeding of any kind or nature * * * where a notice by publication is given as authorized by law, a party instituting or maintaining the action or proceeding with respect to notice or his attorney shall within five days after the first publication of notice send by United States mail a copy of such published notice to each and every party appearing to have a direct legal interest in such action or proceeding whose name and post-office address are known to him." Are the plaintiffs persons having a direct legal interest within the meaning of this statute? We think not. We point out that plaintiffs, as the owners of land being transferred to another school district, do not have a direct legal interest in the fixing of school district boundaries. As to that matter, 55 percent of the voters of District 50 have

the authority to change the boundaries of the district, irrespective of the views of the minority. Even though a minority voter may have the right to test the regularity of the proceedings by review in the district court and to attack such proceedings collaterally if they be entirely void, such voter cannot be said to have the direct legal interest contemplated by the cited sections of the statute. It is a right that is common to every voter and taxpayer in the district to see that the proceedings are in conformity with the statute. In section 25-520.02, R. S. Supp., 1957, the Legislature defined the action or proceeding to which section 25-520.01, R. S. Supp., 1957, applied. It is there said: "The term action or proceeding means all actions and proceedings in any court and any action or proceeding before the governing bodies of municipal corporations, public corporations, and political subdivisions for the equalization of special assessments or assessing the cost of any public improvement." The implications of this section are that matters of general concern to all taxpayers, such as the levy and assessment of property for general tax purposes, are not within the purview of this section. The statute means that it has application to matters of a direct interest to a taxpayer which is not common to all other taxpayers, and to the equalization of special assessments and the assessing of the cost of any public improvement. The statute does not contemplate that personal notice must be given to a class, such as voters or taxpayers in a political subdivision, on matters of general public concern, unless the member or members of the class are personally affected by the proceeding in a manner different from all the voters or taxpayers of the political subdivision, except as specifically provided by the statute. The changing of school district boundaries is a matter of policy which is purely legislative in character. It does not involve matters of direct legal interest to the individual voters or taxpayers of a school district. We conclude that the voters or taxpayers of

a school district do not have such a direct legal interest in the transfer of lands from one district to another as to require personal notice to each under the provisions of sections 25-520.01 to 25-520.04, R. S. Supp., 1957.

Other matters are raised which, in view of our holdings herein, we do not deem necessary to decide.

The record discloses that there was no genuine issue of fact to be determined and that the case was a proper one to be resolved by motion for a summary judgment. The plaintiffs and the appealing defendants each moved for summary judgment. On the basis of the holdings herein made, the trial court erred in sustaining the motion of the plaintiffs for summary judgment and in denying that of the appealing defendants. The judgment of the district court is reversed and the cause remanded to the district court with directions to overrule the motion of plaintiffs for summary judgment and to sustain the motion of the appealing defendants for such a judgment. The costs of this appeal are taxed to the plaintiffs.

REVERSED AND REMANDED WITH DIRECTIONS.

L. G. SCUDDER, APPELLEE, V. COUNTY OF BUFFALO, APPELLANT.

102 N. W. 2d 447

Filed April 15, 1960. No. 34743.

1. **Taxation: Appeal and Error.** One who concludes that his property has been excessively valued for taxation must apply to the county board of equalization to correct the error and, in case of an adverse determination, appeal therefrom.
2. ———: ———. Such remedy, provided by sections 77-1501 to 77-1513, R. R. S. 1943, is full, adequate, and exclusive.
3. ———: ———. Where property is excessively valued for taxation, or if prejudicial errors and irregularities intervened in the procedure of the county board of equalization, the statute affords a plain, adequate, speedy, and exclusive remedy which cannot be collaterally attacked unless the assessment or some part thereof is wholly void.

4. **Judgments.** The purpose of the Uniform Declaratory Judgments Act is to provide a procedure for the speedy determination of issues which would otherwise be delayed to the possible injury of the parties if the ordinary course of judicial proceedings is followed. It creates no new causes of action and provides no cumulative remedies, although the act is remedial in character.
5. ———. Ordinarily an action for a declaratory judgment will not be entertained where another equally serviceable remedy has been provided by law.

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

Robert A. Munro and *Charles H. Beatty,* for appellant.

Dier & Barton, for appellee.

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

CARTER, J.

This is an action for a declaratory judgment in which plaintiff prays for an adjudication of the rights of the parties growing out of an alleged mistake in the assessment of plaintiff's property for the years 1956 and 1957. The defendant denied generally and asserted that plaintiff was not entitled to relief under the Uniform Declaratory Judgments Act on the facts stated in the petition. The trial court found for the plaintiff and defendant has appealed.

There is no bill of exceptions filed in this case. The only question before the court is whether or not the judgment is supported by the pleadings. The facts alleged in the petition will be accepted as true in making this determination.

The facts are: On March 1, 1956, and March 1, 1957, plaintiff was the owner of certain real estate described in the petition upon which plaintiff had constructed an elevator for the storage of grain. The county assessor of the defendant county assessed the property for tax purposes for 1956 and 1957 in the amount of $630,585.

In making an assessment of the property in 1958, it was discovered that an error had been made by the county assessor in the years 1956 and 1957 as to the volume, size, character, context, and equipment on the premises and, but for such mistake, the assessed value should have been $438,060 and $429,120, respectively, for those years. It is upon these admitted facts that the trial court ordered a correction of the mistakes and a reduction of the assessed valuations on plaintiff's property for 1956 and 1957 as if no mistakes had been made.

It is a fundamental rule of tax law in this state that relief from the overassessment of property for tax purposes is by appeal to the district court from the order of the county board of equalization fixing the assessed value of the property. The remedy thus given is full, adequate, and exclusive. Hall v. Moore, 75 Neb. 693, 106 N. W. 785; Power v. Jones, 126 Neb. 529, 253 N. W. 867; Homan v. Board of Equalization, 141 Neb. 400, 3 N. W. 2d 650; Gamboni v. County of Otoe, 159 Neb. 417, 67 N. W. 2d 489. The claim that property is assessed too high for taxation purposes cannot be made, in the first instance, by direct application to any other body or by a collateral attack in law or equity, in the event of failure to bring the matter before the county board of equalization and to appeal therefrom in case of an adverse determination. Gamboni v. County of Otoe, *supra.*

A collateral attack may be made upon an assessment of property for tax purposes only if the assessment, or some part thereof, is wholly void. The rule is sometimes stated in our cases that the assessment must be void, or the result of willful discrimination or other fraudulent conduct of the assessing officers. No willful discrimination or fraud is here asserted, and we make no further reference to them. An overassessment is an erroneous assessment but not a void one. Boettcher v. County of Holt, 163 Neb. 231, 79 N. W. 2d 183. The statutes of this state, sections 77-1501 to 77-1513, R.

R. S. 1943, provide a complete and adequate remedy which, if not pursued, results in a final determination of the value of the property for taxation purposes unless the assessment is entirely void. S. S. Kresge Co. v. Jensen, 164 Neb. 833, 83 N. W. 2d 569. We necessarily conclude that an error in an assessment of property for taxation purposes, whether it be one of judgment or compilation, can be corrected only by the exclusive method provided by statute and, unless void, it cannot be collaterally attacked. See, Western Union Telegraph Co. v. Douglas County, 76 Neb. 666, 107 N. W. 985; Boettcher v. County of Holt, *supra*. The plaintiff not having availed himself of the statutory remedy provided cannot maintain the present action which is, in effect, a collateral attack upon the assessment made.

The plaintiff contends that the declaratory judgment act provides for a declaration of rights and status where the record shows a plain mistake in the appraisal and assessment of property. We do not agree with this contention. The act does not create a new cause of action where one did not previously exist. The purpose of the act is to provide a method for having issues speedily determined which would otherwise be delayed to the possible injury of those interested, if they were compelled to await the ordinary course of judicial proceedings. Stewart v. Herten, 125 Neb. 210, 249 N. W. 552. Where an exclusive remedy is provided, the declaratory judgment act does not provide an additional remedy. A declaratory judgment action can afford no relief to one who has failed to pursue a full, adequate, and exclusive statutory remedy. In fact, the general rule is that an action for a declaratory judgment will not be entertained when another equally serviceable remedy has been provided. Stewart v. Herten, *supra*. It certainly was never intended as a cumulative remedy to one who has failed to pursue a full, adequate, and exclusive remedy.

The plaintiff contends that section 77-1735, R. R. S.

1943, does not provide an adequate remedy and that this justifies relief under the declaratory judgment act. We think the foregoing section provides an exclusive remedy for recovering taxes paid where the tax was levied or assessed for an illegal or unauthorized purpose. Loup River Public Power Dist. v. County of Platte, 144 Neb. 600, 14 N. W. 2d 210. In the absence of such statutory provision, taxes voluntarily paid cannot be recovered back. Riggs-Orr Investment Co. v. City of Omaha, 130 Neb. 697, 266 N. W. 430. We have no such situation here. The tax before us was not levied for an illegal or unauthorized purpose. The plaintiff's claim is based on a mistake of the county assessor in compiling and determining the assessed value of the property. It is not a claim for a refund under section 77-1735, R. R. S. 1943, since the taxes have not been paid. We conclude that no rights have arisen under this section which are subject to declaration by declaratory judgment. The exclusive statutory remedy may not be circumvented by invoking the provisions of the declaratory judgment act. While the act does authorize a declaration of rights, status, and other legal relations whether or not further relief is or could be claimed, it may not declare rights to exist which are grounded on unfulfilled conditions precedent with which the plaintiff may or may not be able to comply. It is fundamental, we think, that until such conditions precedent have been complied with, the remedy does not exist. Under such a situation, the plaintiff has no accrued rights under this section of the statutes that can be determined by the declaratory judgment act. The fact that plaintiff asserts that the exclusive remedy provided by section 77-1735, R. R. S. 1943, is not adequate to meet the situation which confronts him, does not authorize the use of the declaratory judgment act, as we have heretofore defined the purpose of that act, as a cumulative remedy.

The petition in the instant case does not state facts

entitling plaintiff to any relief. The judgment of the trial court is not therefore supported by the pleadings. The judgment of the district court is reversed and the cause remanded with directions to dismiss plaintiff's petition.

REVERSED AND REMANDED WITH DIRECTIONS.

STATE OF NEBRASKA, PLAINTIFF IN ERROR, V. KELLEY COOMES, DEFENDANT IN ERROR.
102 N. W. 2d 454

Filed April 15, 1960. No. 34750.

1. **Constitutional Law: Criminal Law.** In all criminal prosecutions the accused shall have the right to demand the nature and cause of the accusation.
2. ———: ———. Due process of law requires only that the accused be given sufficient notice of the nature of the charge against him in order that he may prepare a defense and plead the judgment as a bar to any subsequent prosecution for the same offense.
3. **Criminal Law.** In this state all public offenses are statutory; no act is criminal unless the Legislature has in express terms declared it to be so; and no person can be punished for any act or omission which is not made penal by the plain import of the written law.
4. ———. There are no common law crimes in this state, and we only resort to common law definitions where general terms are used to designate crime.
5. **Breach of the Peace.** A breach of the peace is a violation of public order. It is the same as disturbing the peace. The definition of breach of the peace is broad enough to include the offense of disturbing the peace; it signifies the offense of disturbing the public peace or tranquility enjoyed by the citizens of a community.
6. ———. Breach of the peace is a common law offense. The term "breach of the peace" is generic and includes all violations of public peace, order, decorum, or acts tending to the disturbance thereof.
7. **Indictments and Informations.** An information must inform the accused, with reasonable certainty, of the charge being made against him in order that he may prepare his defense thereto

and also be able to plead the judgment rendered thereon as a bar to a later prosecution for the same offense.

ERROR to the district court for Sheridan County: ALBERT W. CRITES, JUDGE. *Exception overruled.*

Lawrence E. Mitchell, for plaintiff in error.

Charles A. Fisher, for defendant in error.

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

WENKE, J.

This is an error proceeding docketed in this court by the county attorney of Sheridan County, pursuant to leave granted, taking exception to the ruling of the district court for Sheridan County in the prosecution of a cause therein under section 28-818, R. R. S. 1943. See § 29-2315.01, R. S. Supp., 1959.

On September 14, 1959, the county attorney of Sheridan County filed in the district court for Sheridan County an information against Kelley Coomes. The part of said information that is here material is as follows: "* * * that Kelley Coomes * * * did, on the 26th day of August A. D. 1959, in the County of Sheridan and State of Nebraska aforesaid, wilfully and unlawfully disturb the peace and quiet of persons, families and the neighborhood, Contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State of Nebraska."

Section 28-818, R. R. S. 1943, under and pursuant to which said charge was filed, provides: "Every person who shall willfully disturb the peace and quiet of any person, family or neighborhood, shall upon conviction thereof be fined in any sum not exceeding one hundred dollars or be imprisoned in the county jail not exceeding three months."

Defendant Coomes filed a demurrer to the information which, insofar as here material, alleged: "* * * demurs to the information because it does not state

facts that constitute an offense punishable by the laws of this state, because the statute Section 28-818, R. R. S. under which the suppoed (sic) offense is charged is unconstitutional and void, because it is so vague and indefinite, so uncertain and ambiguous, that it does not meet the definition of disturbing the peace at common law, and that it does not any where charge a breach of the peace or provide that a breach of the peace is an essential element of the charge, and because the same shows on the face that intent to create a breach of the peace is not alleged, proof of the same being necessayr (sic) to make out offense of disturbing the peace and disorderly conduct or breach of the peace."

The trial court sustained this demurrer, giving the following reason for doing so: "The defendant then instanter filed his demurrer to the information, and the Court having heard argument thereon and being fully advised in the premises finds that the same is well taken and should be sustained because the said information fails to specify the acts constituting the offense charged therein, but finds that the statute under which prosection (sic) is brought is not unconstitutional and void as urged by the defendant. The Court finds that the information charges almost exactly in the words of the statute same being 28-818, R. S, 1943, but that regardles (sic) thereof it, the information, is not sufficient and that the demurrer is sustained and the cause dismissed.

"It is therefore Ordered and Adjudged that the demurrer of the defendant Kelly Coomes to the information filed herein charging him under Section 28-818 R. R. S. 1943 in almost exact statutory words, is sustained and the cause dismissed and the defendant Kelley Coomes is hereby discharged * * *."

The title to L. B. 461, which authorizes this procedure and under and pursuant to which it was taken, states it is: "An Act * * * to provide in criminal cases on application of the county attorney for review by the

Supreme Court on error proceedings of any ruling or decision of the district court adverse to the State of Nebraska; * * *." Laws 1959, c. 121, p. 453. Consequently the question of the constitutionality of section 28-818, R. R. S. 1943, is not properly before this court but only the question of whether or not the information is insufficient because it "fails to specify the acts constituting the offense charged therein."

Article I, section 11, of the Constitution of the State of Nebraska, provides, insofar as here material, that: "In all criminal prosecutions the accused shall have the right * * * to demand the nature and cause of accusation, * * *."

"Due process of law requires only that the accused be given sufficient notice of the nature of the charge against him in order that he may prepare a defense and plead the judgment as a bar to any subsequent prosecution for the same offense." Cowan v. State, 140 Neb. 837, 2 N. W. 2d 111. See, also, Dutiel v. State, 135 Neb. 811, 284 N. W. 321.

"In this state all public offenses are statutory; no act is criminal unless the legislature has in express terms declared it to be so; and no person can be punished for any act or omission which is not made penal by the plain import of the written law." Dutiel v. State, *supra.*

In Kinnan v. State, 86 Neb. 234, 125 N. W. 594, 27 L.R.A.N.S. 478, we said: "* * * there are no common law crimes in this state, and we only resort to common law definitions where general terms are used to designate crime." See, also, Fredericksen v. Dickson, 148 Neb. 739, 29 N. W. 2d 334.

A breach of the peace is a violation of public order. It is the same as disturbing the peace. The definition of breach of the peace is broad enough to include the offense of disturbing the peace; it signifies the offense of disturbing the public peace or tranquility enjoyed by the citizens of a community. See, State v. Clark,

64 W. Va. 625, 63 S. E. 402; State v. Long, 88 W. Va. 669, 108 S. E. 279; People v. Bartz, 53 Mich. 493, 19 N. W. 161; Fischbach v. Ohio State Racing Commission, 76 Ohio L. A. 540, 147 N. E. 2d 258; People v. Parker, 208 Misc. 978, 138 N. Y. S. 2d 2; Flores v. City and County of Denver, 122 Colo. 71, 220 P. 2d 373; Woods v. State, 152 Tex. Cr. 338, 213 S. W. 2d 685; City of St. Louis v. Slupsky, 254 Mo. 309, 162 S. W. 155, 49 L.R.A.N.S. 919.

Breach of the peace is a common law offense. The term "breach of the peace" is generic and includes all violations of public peace, order, decorum, or acts tending to the disturbance thereof. See, Faulkner v. State, 166 Ga. 645, 144 S. E. 193; Miles v. State, 30 Okl. Cr. 302, 236 P. 57, 44 A. L. R. 129; State v. Long, *supra;* City of Plattsburg v. Smarr (Mo. App.), 216 S. W. 538; State v. White, 18 R. I. 473, 28 A. 968; State v. McCoy, 99 Ohio App. 161, 131 N. E. 2d 679; State v. Wixon, 118 Vt. 495, 114 A. 2d 410; People v. Parker, *supra;* Woods v. State, *supra;* State ex rel. Thompson v. Reichman, 135 Tenn. 653, 188 S. W. 225, Ann. Cas. 1918B 889; City of St. Louis v. Slupsky, *supra.*

"The information must expressly and directly state each fact that is an essential element of the crime intended to be charged so that the accused will not be required to go beyond the information to learn the nature of the charge against him or the issue he must meet. * * *." Benedict v. State, 166 Neb. 295, 89 N. W. 2d 82. See, also, Sedlacek v. State, 147 Neb. 834, 25 N. W. 2d 533, 169 A. L. R. 868.

"In charging the commission of an offense in an information it is not necessary that the exact words of the statute be used, provided the words employed are the equivalent in meaning of those contained in the statute." Benedict v. State, *supra.* See, also, Fredericksen v. Dickson, *supra;* Spreitzer v. State, 155 Neb. 70, 50 N. W. 2d 516.

"Where a statute states the elements of a crime, it is generally sufficient, in an information or indictment, to

describe such crime in the language of the statute." Sedlacek v. State, *supra*. See, also, Fredericksen v. Dickson, *supra*.

"An indictment or information meets all constitutional requirements (1) if it shows that the acts which defendant is charged with committing amounted to a crime which the court had power to punish, and that it was committed within the territorial jurisdiction of the court, (2) if it informs the defendant of the nature of the charge against him, and (3) if it constitutes a record from which it can be determined whether a subsequent proceeding is barred by the former adjudication." Sedlacek v. State, *supra*. See, also, Fredericksen v. Dickson, *supra;* Cowan v. State, *supra*.

"An information must inform the accused, with reasonable certainty, of the charge being made against him in order that he may prepare his defense thereto and also be able to plead the judgment rendered thereon as a bar to a later prosecution for the same offense." Benedict v. State, *supra*. See, also, Spreitzer v. State, *supra;* Pauli v. State, 151 Neb. 385, 37 N. W. 2d 717; Anderson v. State, 150 Neb. 116, 33 N. W. 2d 362.

As stated in 42 C. J. S., Indictments and Informations, § 139(d), p. 1040: "Accused must be apprised of the crime charged with reasonable certainty, and if the language of the statute is insufficient for this purpose further averments of the facts and circumstances must be made." And, as stated in § 139(e) thereof, p. 1042: "Such averments as to time, place, person, and other circumstances as are necessary to identify the particular transaction are, of course, necessary."

In 11 C. J. S., Breach of the Peace, § 8, p. 821, the requirements, in this regard, are set out as follows: "In accordance with the general rules, a complaint, information, or indictment for a breach of the peace must set forth specific acts constituting the offense. If the offense is a statutory one, the complaint, information, or indictment must follow closely all the statutory essentials

of the offense. Where the words of the statute are fairly descriptive of the offense, it may be sufficient to charge the offense in the language of the statute, or to aver the fact of its commission generally without specifying the words or describing the acts. Where, however, the statute does not contain words sufficient to define any offense, it is not sufficient to charge the crime in the general language thereof, but in such cases the particular language or conduct on which the offense is predicated must be set forth in order that the court may judge whether or not a breach of the peace has been committed."

In the absence of allegations in the information as to specifically what defendant did that willfully disturbed the peace and quiet of some person, family, or neighborhood, where the act or acts took place, and what person, family, or neighborhood they disturbed the peace and quiet of, it is hard to see how the defendant could prepare his defense thereto and how a judgment rendered thereon could constitute a bar to a later prosecution for the same offense if sought to be used for that purpose.

In view of what we have said and held herein, we find the exception taken by the county attorney to the trial court's ruling to be without merit and the same is overruled.

EXCEPTION OVERRULED.

ROBERT L. HAINES, PLAINTIFF IN ERROR, V. STATE OF NEBRASKA, DEFENDANT IN ERROR.

102 N. W. 2d 609

Filed April 22, 1960. No. 34655.

1. **Indictments and Informations.** Where a statute states the elements of a crime, it is generally sufficient, in an information, to describe such crime in the language of the statute.
2. ———. If the information apprises the defendant with reason-

able certainty of the accusation against him so that he may prepare his defense and plead the judgment as a bar to a subsequent prosecution for the same offense, it meets the fundamental purposes of an information as well as constitutional requirements.

3. **Embezzlement.** The provisions of section 28-543, R. R. S. 1943, were enacted to prevent any public official from converting any public money received by him in his official capacity to his own use or from using it for any purpose other than the one for which the money was entrusted to him, and the offense provided in said section is committed by such violation of the statute, whether or not the public official fraudulently intended to do so.
4. **Justices of the Peace: Embezzlement.** A report and payment of fines collected by a justice of the peace, which is not made by him until after a shortage and conversion thereof to his own use has been discovered and exposed, is not a defense to a prosecution under the provisions of section 28-543, R. R. S. 1943.
5. **Criminal Law: Trial.** Ordinarily, when error is predicated upon the claim that counsel in addressing the jury prejudicially abused his privilege, the objectionable remarks, in order to be available on appeal, must have been properly objected to at the time they were made or at the conclusion of counsel's statement or argument, and an adverse ruling had thereon before submission to the jury.
6. ———: ———. It is generally the rule that a prosecutor, in argument to the jury, may state proper conclusions which are predicated upon competent evidence which will be or has been adduced, and unless an error in argument complained of was prejudicial to the rights of defendant, the judgment should not be reversed.
7. **Criminal Law: Evidence.** While a voluntary confession is insufficient, standing alone, to prove that a crime has been committed, it is, nevertheless, competent evidence of that fact, and may, together with sufficient corroborative circumstances, establish the corpus delicti as well as the defendant's guilty participation.
8. **Juries: Appeal and Error.** It is not the province of this court in law actions to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence. Those matters are for the jury.
9. **Criminal Law.** In a criminal case, this court will not interfere with a verdict of guilty based upon the evidence, unless it is so lacking in probative force that we can say, as a matter of law, that it is insufficient to support a finding of guilt beyond a reasonable doubt.

ERROR to the district court for Buffalo County: H. EMERSON KOKJER, JUDGE. *Affirmed.*

Kelly & Kelly, for plaintiff in error.

Clarence S. Beck, Attorney General, and *Cecil S. Brubaker,* for defendant in error.

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

CHAPPELL, J.

Robert L. Haines, hereinafter called defendant, was charged in an amended information filed January 29, 1959, in the district court for Buffalo County with converting to his own use and embezzlement of public money while serving from February 1, 1956, to August 25, 1958, as a justice of the peace of Buffalo County. The information contained six separate counts. The first five counts each separately charged in substance that defendant, while serving as such justice of the peace, "unlawfully and feloniously and fraudulently" converted to his own use and embezzled in Buffalo County specified sums of money paid to him as fines by named persons, at specified times, as follows: Count I, $57; Count II, $45; Count III, $90; Count IV, $20; and Count V, $20. Count VI likewise charged that defendant converted to his own use and embezzled not less than $4,618, paid to him as fines exclusive of Counts I through V, between February 1, 1956, and May 31, 1958.

Upon arraignment, defendant was present in court with his own counsel, whereat the information was read in full to defendant, and the trial court asked defendant separately as to each count and as to the information as a whole how he wished to plead thereto. Thereupon, defendant personally stated to the court that he stood mute as to each count separately and as to the information as a whole, whereupon as to each count separately and as to the information as a whole, the

court entered a plea of "Not Guilty" on defendant's behalf.

After consultation with attorneys for the State and defendant, the case was set for trial Tuesday, March 17, 1959, at 10 a. m., and trial to a jury, with defendant and his own counsel present, was commenced on that date. At conclusion of the State's case, and again at conclusion of all the evidence, defendant's counsel moved for dismissal or acquittal of defendant for alleged insufficiency of the evidence to support a conviction of the crimes charged. Such motions were overruled, and after the issues were submitted to a jury, it returned a verdict finding defendant guilty on each and all of the separate counts charged in the information and finding that the amount of money converted by defendant to his own use and embezzled by him in each count was as follows: Count I, $57; Count II, $45; Count III, $90; Count IV, $20; Count V, $20; and Count VI, $1,360. Thereafter, defendant's motion for new trial was overruled, and he was sentenced to serve a term of not less than 3 nor more than 6 years in the Nebraska Reformatory for Men upon each of the six counts of the information. However, the sentences were ordered to run concurrently and not consecutively. Defendant was also sentenced to pay a fine on each of the separate counts as follows: Count I, $114; Count II, $90; Count III, $180; Count IV, $40; Count V, $40; and Count VI, $2,720, together with costs of prosecution on each and all counts.

Thereafter, defendant prosecuted error to this court, assigning in substance: (1) That the information was defective and did not charge defendant with commission of the crimes alleged as provided by the statute; (2) that the trial court erred in admitting certain evidence relating to a possible violation of other laws not connected with the issues in the case at bar, and erred in permitting the county attorney, over objections of defendant, to make prejudicial opening statements to the

jury with relation thereto; and (3) that the verdict returned by the jury was not sustained by sufficient evidence. We do not sustain the assignments.

Defendant also assigned that: "The court erred in permitting the introduction of many pieces of evidence which were either incompetent or irrelevant, or for which there had not been proper or sufficient foundation laid." That assignment is disposed of without further discussion by Pulliam v. State, 167 Neb. 614, 94 N. W. 2d 51.

Defendant also assigned that: "The court erred in instructing the jury on vital issues to be resolved by said jury." However, such purported assignment is so indefinite and incomprehensible that this court will not search the record and attempt to discuss or answer it directly.

Section 28-543, R. R. S. 1943, upon which the information was predicated, provides, as far as important here, that: "If any officer * * * charged with the collection, receipt, safekeeping, transfer or disbursement of the public money, or any part thereof, belonging to the state or to any county or precinct * * * in this state, shall convert to his own use, or the use of any other person * * * in any way whatever, * * * any portion of the public money * * * received, controlled or held by him for safekeeping, transfer or disbursement, * * * every such act shall be deemed and held in law to be an embezzlement of so much of such moneys * * * as shall be thus converted, * * * which is hereby declared to be a high crime. Such officer * * * shall be imprisoned in the penitentiary not less than one year nor more than twenty-one years, according to the magnitude of the embezzlement, and also pay a fine equal to double the amount of money * * * so embezzled, which fine shall operate as a judgment at law * * * and shall be enforced to collection by execution or other process for the use only of the party or parties whose money or other funds * * * of any kind as aforesaid have been

so embezzled. In all cases, such fine so operating as a judgment shall only be released or entered as satisfied by the party in interest as aforesaid." The remaining portion of section 28-543, R. R. S. 1943, relates solely to recited conditions and situations of failure or refusal of a public official to pay over any public money or make settlement thereof within a reasonable time after notice or demand, which "shall be held and taken as prima facie evidence of such embezzlement." In that respect, such provisions are generally held to be evidentiary in character for protection of the public and are generally held not to be necessary elements of the offenses required to be alleged or proved by the state. See 29 C. J. S., Embezzlement, § 11, p. 686, citing authorities from this and other jurisdictions.

Defendant first argued that Count VI of the information was defective because it charged that defendant had converted to his own use and embezzled a specified sum of money between two dates, to wit, February 1, 1956, and May 31, 1958, during defendant's term of office. That contention has no merit because it is entirely answered and refuted by Bolln v. State, 51 Neb. 581, 71 N. W. 444, and Heilman v. State, 109 Neb. 15, 189 N. W. 303. See, also, Canada v. Jones, 170 F. 2d 606.

Thereafter, defendant argued that the information was defective because it did not charge defendant with intent to defraud the State of Nebraska or Buffalo County, which was an essential element of the crimes, and that instruction No. 13, given by the trial court, erroneously told the jury in part that: "An intent to convert the money involved to his own use is a necessary element of the crimes charged against the defendant. It is not necessary in a prosecution under the Statute quoted in Instruction No. 2 to prove an intent to defraud in committing the act charged, yet it is necessary to prove an actual knowledge on the part of the one charged thereunder that the act which he is

charged with having committed was committed without authority of law and was wrongful." In that connection, each count of the information alleged among other things that defendant, Robert L. Haines, "did then and there unlawfully and feloniously and fraudulently convert the same to his own use and embezzle of said public money, * * * arising from fines under the general laws of the State of Nebraska, which belong to said County of Buffalo, to be appropriated exclusively to the use and support of the common schools in Buffalo County * * *." It is thereby evident that if intent to defraud were an essential element of the crimes sought to be alleged under section 28-543, R. R. S. 1943, the allegations of the information were more than adequate.

In that connection, we have consistently held that: "Where a statute states the elements of a crime, it is generally sufficient, in an information or indictment, to describe such crime in the language of the statute.

"If the information or indictment apprises the defendant with reasonable certainty of the accusation against him so that he may prepare his defense and plead the judgment as a bar to a subsequent prosecution for the same offense, it meets the fundamental purposes of an information or indictment, as well as constitutional requirements." Liakas v. State, 161 Neb. 130, 72 N. W. 2d 677. See, also, Sedlacek v. State, 147 Neb. 834, 25 N. W. 2d 533, 169 A. L. R. 868.

In that connection, defendant relies upon Davis v. State, 121 Neb. 399, 237 N. W. 297, in arguing that intent to defraud was an essential element of the crimes charged against defendant. In that case, it was charged that defendant, as vice president of a bank, had embezzled private money of the bank under the provisions of section 28-547, R. R. S. 1943, which by its language specifically makes intent to defraud by bank officers an essential element of the crime of embezzlement. On the other hand, section 28-543, R. R. S. 1943, which re-

lates to embezzlement by public officers, does not do so.

As stated in 18 Am. Jur., Embezzlement, § 40, p. 597, citing authorities: "If a statute makes it a felony for a public officer knowingly and unlawfully to appropriate to his own use or to the use of any other person money received by him in his official capacity, it is not necessary, to constitute the offense of embezzlement, that there be an intent to appropriate the money so as forever to exclude the rightful owner from its use and possession. The purpose of the statute is to prevent any public official from using the money or property coming to him in his official capacity for any purpose other than the one for which the money or property was intrusted to him."

In People v. Warren, 122 Mich. 504, 81 N. W. 360, 80 Am. S. R. 582, which involved the interpretation and application of a comparable statute, the court said: "The intention of the statute was to prevent any public official from using money or property coming to him in his official capacity for any other purpose than the purpose for which it came to him. If he does knowingly use it, or permit others to do so, for other purposes than the one for which it was intrusted to him, then he comes within the provisions of the statute."

As stated in 29 C. J. S., Embezzlement, § 12, p. 687, citing authorities: "* * * under some statutes, especially those relating to the embezzlement of public funds, the offense consists in the violation of the statute and not the intent or motive by which the accused is actuated, * * *." See, also, § 35, p. 718.

We conclude that the crime of converting to his own use and embezzlement by a public officer under the provisions of section 28-543, R. R. S. 1943, was meant to prevent any public officer from converting to his own use or using any public money received by him in his official capacity for any purpose other than the one for which the money was entrusted to him, and that the offense consists in such violation of the statute, whether

or not the public official fraudulently intended to do so.

In the case at bar, the trial court properly instructed the jury, in connection with each of the six separate counts and indicated in instruction No. 13 as well, that in order to warrant conviction of defendant, the burden was on the State to prove, among other elements, beyond reasonable doubt that defendant "intentionally converted said money to his own use." Defendant's contentions have no merit.

We turn then to defendant's assignment that the trial court erred in admitting certain evidence relating to a possible violation of other laws not connected with the issues in the case, and in permitting the county attorney to make prejudicial statements with relation thereto. We conclude that such assignment is without merit.

At the beginning of the trial, defendant moved for a mistrial for the reason that: "* * * the county attorney in his opening statement covered material broader than is alleged in said complaint," which contains nothing about "the repayment of any funds at all." Of course, the fundamental issue was the alleged conversion to his own use and embezzlement by defendant of public funds, and as heretofore observed, failure to pay over such funds within a reasonable time after notice or demand was not an element necessary to be alleged in the information or to be proved by the State, if the evidence adduced was otherwise sufficient to establish that defendant had converted public money to his own use, as provided by section 28-543, R. R. S. 1943.

Also, defendant's motion aforesaid did not then call the trial court's attention to or object to any particular statement made by the county attorney, and being so indefinite and unintelligible, it was properly overruled. In that connection, counsel for defendant made no further objection to any purported statement of the county attorney until after the State had rested. At that time, defendant renewed his motion for "a mistrial for the

reason that certain evidence is before the jury that is highly prejudicial to the rights of the defendant * * *." He then offered in evidence the entire "opening statement of * * * County Attorney * * * as to certain matters that were to be proven in this case." Defendant's motion was overruled, whereupon defendant's counsel said, referring to the county attorney's opening statement: "It's not offered as an exhibit." Thus, the exhibit was not admitted. Thereupon, defendant's counsel offered to prove that the county attorney said in his opening statement that: " 'The evidence will show that there was insufficient money in his trust account; that the check bounced,' " which defendant now argues prejudicially related to a possible violation of other laws not connected with the issues in the case. The State objected, and the offer was refused upon the ground that it was incompetent, irrelevant, immaterial, out of time, and not then proper to be received.

In such respect, it is now elementary that ordinarily, when error is predicated upon the claim that counsel in addressing the jury prejudicially abused his privilege, the objectionable remarks, in order to be available on appeal, must have been properly objected to at the time they were made or at the conclusion of counsel's statement or argument, and an adverse ruling had thereon before submission to the jury. See Sandomierski v. Fixemer, 163 Neb. 716, 81 N. W. 2d 142, and authorities cited therein.

It cannot be said that defendant objected in any specific or proper manner at the time the alleged statement was made or thereafter so that the trial court could possibly know what defendant was complaining about. It is also elementary that a prosecutor, in argument to the jury, may state proper conclusions which are predicated upon competent evidence which will be or has been adduced, and unless an error in argument complained of was prejudicial to the rights of defendant, the judgment should not be reversed. See

Grandsinger v. State, 161 Neb. 419, 73 N. W. 2d 632, and authorities cited. In that connection, also, the trial court instructed the jury that it "should be governed solely by the evidence introduced" and not "by statements of counsel not supported by the evidence." Balis v. State, 137 Neb. 835, 291 N. W. 477, relied upon by defendant herein, is entirely distinguishable from the case at bar.

The evidence objected to by defendant was primarily that of a bank cashier who testified as a witness for the State that defendant's check for $3,200, dated February 10, 1958, by which he sought to pay $3,100 in fines to the county, was not paid when first presented to the bank by the county treasurer for payment because "there wasn't sufficient funds to pay it" so "later that morning" defendant deposited "Ten hundred and sixty dollars" in his "R. L. Haines, Trust Account" and the check was subsequently paid on February 11, 1958. There is evidence also that $780 of the money so deposited by defendant had been borrowed for that purpose. That was the evidence, together with that of the county treasurer and the person from whom the $780 was borrowed by defendant, upon which the county attorney had predicated his opening statement about which defendant complains.

Assuming, as the State has done, that the county attorney made the statement about which defendant complains, we are unable in the light of the foregoing evidence and authorities, to say that the county attorney's opening statement or that the evidence aforesaid relating thereto showed a violation of other laws not connected with the issues in the case which could in any manner have been prejudicial to defendant. The facts sought to be shown and which were properly shown by the aforesaid evidence as well, were that fines collected by defendant which should have been in his trust account in his bank, or otherwise securely available or in his possession so they could be paid

over to the county treasurer by defendant, as required by law, were not on deposit in defendant's trust account at the bank or securely available or in his possession. It was simply circumstantial evidence of the unlawful use of such funds by defendant, and a part of the alleged offense.

Finally, we turn to defendant's assignment that the verdict was not sustained by sufficient evidence. We do not sustain that assignment.

The evidence adduced is so voluminous that we can only summarize relevant and material portions thereof, bearing in mind the rule that: "It is not the province of this court to resolve conflicts in the evidence in law actions, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence. Those matters are for the jury.

"In a criminal case, this court will not interfere with a verdict of guilty based upon the evidence, unless it is so lacking in probative force that we can say, as a matter of law, that it is insufficient to support a finding of guilt beyond a reasonable doubt." Spreitzer v. State, 155 Neb. 70, 50 N. W. 2d 516.

As we view it, there is ample competent evidence in this record to establish and support the following: Defendant was admittedly a duly elected and qualified justice of the peace of Buffalo County from January 1955 until he resigned August 25, 1958. He was a lawyer who had previously served two full terms as county attorney of that county. During the time he was justice of the peace, defendant made some reports of and paid to the county treasurer some fines collected by him as such justice of the peace. On February 8, 1956, he reported receipts in the amount of $3,963, and paid that amount to the county treasurer for fines collected for the year 1955. Thereafter, on February 10, 1958, defendant made a report of fines collected during 1956 and 1957 in the amount of $3,100 which he paid to the county treasurer on February 11, 1958, by a check for

$3,200, which we have heretofore mentioned, and on that same date, the county treasurer remitted to defendant a purported extra $100. On February 22, 1958, defendant reported and paid to the county treasurer fines collected during January 1958, in the amount of $50. On March 19, 1958, defendant made his report to the county treasurer by mail, indicating that his docket reflected no criminal filings for February 1958. On July 7, 1958, because of discrepancies found by auditors, defendant reported and paid $200 as additional fines collected by him during 1956. Also, on December 6, 1958, defendant made an additional report and paid $40 as fines collected by him. In that connection, we should bear in mind that defendant's shortages were discovered when an audit was made during the summer of 1958 by the Auditor of Public Accounts, as requested by the Buffalo County board; that defendant was then notified that discrepancies had been discovered; that on August 25, 1958, one of the auditors asked defendant, "where is the money"; and that thereafter the original information was filed against defendant on September 26, 1958.

In support of Count I, the State's evidence discloses that on January 26, 1956, defendant fined a named person $100. Such person was then unable to pay the fine, so he was committed to the county jail. Thereafter, $57 of such fine was paid to the county sheriff, who paid that amount to defendant by check dated February 14, 1956. However, such sum so received by defendant was not reported or paid to the county treasurer by defendant, as required by law.

In support of Count II, the State's evidence discloses that on January 26, 1956, defendant fined a named person $100. Such person was then unable to pay the fine, so he was committed to the county jail. Thereafter, $45 of such fine was paid to the county sheriff, who paid that amount to defendant by check dated February 14, 1956. However, such sum so received by defendant was not re-

ported or paid to the county treasurer by defendant, as required by law.

In support of Count III, the State's evidence discloses that on March 2, 1956, defendant fined a named person $100. Such person was then unable to pay the fine, so he was committed to the county jail. Thereafter, $90 of such fine was paid to the county sheriff, who paid that amount to defendant by check dated March 26, 1956. However, such sum so received by defendant was not reported or paid to the county treasurer by defendant, as required by law.

In support of Count IV, the State's evidence discloses that on July 13, 1956, defendant fined a named person $15 and costs. Such person was then unable to pay the fine and costs, so he was committed to the county jail. Thereafter, on that day or the next such person paid $20 on his fine and costs to the sheriff, who paid that amount to defendant by check dated July 14, 1956. However, no part of such sum so received by defendant was reported or paid to the county treasurer by defendant, as required by law.

In support of Count V, the State's evidence discloses that on May 31, 1957, defendant fined a named person $20 and costs, who thereupon paid that amount to defendant. However, such fine so received by defendant was not reported or paid to the county treasurer, as required by law.

Count VI charged that defendant had converted to his own use and embezzled the sum of $4,618 paid to him as fines between February 1, 1956, and May 31, 1958, while serving as a justice of the peace of Buffalo County. In that connection, oral testimony of several police officers for the city of Kearney, and several Nebraska Safety Patrol officers, which testimony was supported by their daily records and reports, was properly offered and received. Such testimony and records disclosed arrests of named persons who had been fined by defendant and whose fines had been paid to defendant

either in cash at the time of hearing, or by waiver with cash fines enclosed in stamped addressed envelopes furnished by defendant and mailed to him through the United States mail, or by mail admittedly received by defendant during such period.

Also, the testimony of a state examiner and a state accountant from the office of the Auditor of Public Accounts discloses that they had traced and checked, then retraced and rechecked defendant's records, the records of the police and Nebraska Safety Patrol officers, and the county records as well with relation to the aforesaid arrests and fines imposed by defendant and received by him to determine whether such fines had been reported and paid to the county treasurer. Their testimony established that, with only one $10 exception, none of such fines thus paid to and received by defendant had ever been included in any reports or remittances made by defendant to the county treasurer, and that the amount of such fines unpaid by defendant was $305 plus $1,055, or a total of $1,360.

As requested by the county board of Buffalo County, the Auditor of Public Accounts made an audit of defendant's official accounts as justice of the peace, whereat he discovered discrepancies and reported same to the county board. Thus, on August 25, 1958, a state examiner and state accountant employed by the Auditor of Public Accounts went to defendant's office seeking to learn where the money was that defendant had not reported or paid. Thereupon, defendant reached in his desk and handed the county sheriff $460 cash for safekeeping, saying that it was his 1958 justice of the peace business. Thereafter, such sum was given to then counsel for defendant, and after November 10, 1958, all but $40 thereof, reported by defendant on December 6, 1958, as heretofore mentioned, was turned over to defendant.

Also, on August 25, 1958, defendant resigned as justice of the peace, and thereafter, on November 10, 1958, defendant paid to the county treasurer through his then

counsel the sum of $7,982, purportedly representing fines collected by defendant as justice of the peace and never theretofore reported or paid to the county treasurer. Also, on August 25, 1958, defendant orally admitted to the county attorney that he had used the fines collected by him for his own purposes. Defendant then told the county attorney that he would give a written statement that he had so used fines collected as justice of the peace, and on August 25, 1958, defendant voluntarily gave the county attorney a signed and witnessed statement which said in part that he had "used funds collected by me as Justice of the Peace of Buffalo County * * * for my own personal use, the amount of which moneys so used is not now known to me."

Likewise, on November 10, 1958, defendant filed a petition in this court, requesting and consenting to his disbarment as a lawyer in this state, alleging that he stood "charged in the District Court of Buffalo County with the misappropriation of funds which came into my hands while I was serving as Justice of the Peace in said county" and I "hereby acknowledge such charges to be true and admit that while serving as Justice of the Peace * * * I have been guilty of unprofessional conduct sufficient to warrant the revocation of my license to practice law." Further, this record discloses that acting thereon, this court disbarred defendant on November 14, 1958.

Defendant, as a witness in his own behalf, admitted that he had kept no complete records during the time he was justice of the peace; that they were in a deplorable condition; that he did not know how much money was due for fines collected by him; and that he had not and could not have personally accounted for the amount due. He admitted that he had made a report of fines due through his then counsel on November 10, 1958, which was accompanied by payment of $7,982 for such fines as he had not theretofore reported and paid to the county treasurer. However, defendant insisted

that he had never intended to steal the money.

In that connection, the report and payment of such fines to the county treasurer by defendant after the shortage and conversion thereof to his own use had been discovered and exposed would not be a defense under the provisions of section 28-543, R. R. S. 1943. See Heilman v. State, *supra.*

The State was not required to allege in the information that demand was made for payment of such fines by defendant, and that he had failed to account therefor or make settlement thereof within a reasonable time thereafter. Also, if conversion thereof was sufficiently established by other competent evidence, the State was not required to prove such demand and failure thereafter by defendant in order to support the verdict and judgment. See Bartley v. State, 53 Neb. 310, 73 N. W. 744.

Further, as recently as Olney v. State, 169 Neb. 717, 100 N. W. 2d 838, this court held: "While a voluntary confession is insufficient, standing alone, to prove that a crime has been committed, it is, nevertheless, competent evidence of that fact, and may, together with sufficient corroborative circumstances, establish the corpus delicti as well as the defendant's guilty participation."

We conclude that the verdict of the jury was amply sustained by the evidence; that defendant had an eminently fair and impartial trial; that there is no error in the record prejudicial to defendant's rights; and that the judgment of the trial court should be and hereby is affirmed.

AFFIRMED.

CORNIEL R. VERMAAS, APPELLANT, V. VERNON E. HECKEL, APPELLEE.

102 N. W. 2d 647

Filed April 22, 1960. No. 34682.

1. **Trial.** Where the evidence on the trial in the district court is not conflicting, and reasonable minds cannot differ as to the conclusion to be derived therefrom, it is the duty of the court, when requested, to direct a verdict in accordance with such conclusion.
2. **Negligence: Trial.** Where different minds may reasonably draw different conclusions from the evidence adduced or if there is a conflict in the evidence as to whether or not it establishes negligence or contributory negligence, and the degree thereof, when one is compared with the other, such issues must be submitted to the jury.
3. **Evidence.** Admissions in the law of evidence are concessions or voluntary acknowledgments made by a party of the existence of certain facts, and they are ordinarily classified as judicial and extrajudicial.
4. ———. A judicial admission is a formal act done in the course of judicial proceedings which is a substitute for evidence, thereby waiving or dispensing with the production of evidence by conceding for the purpose of litigation that the proposition of fact alleged by the opponent is true.
5. ———. A judicial admission is ordinarily final and conclusive upon the party by whom it was made, unless the trial court, in the exercise of a judicial discretion, timely relieves him from that consequence.
6. ———. An extrajudicial admission is simply an item of evidence in the mass of evidence adduced during a trial, admissible in contradiction and impeachment of the present claim and other evidence of the party making the admission.
7. ———. An extrajudicial admission is not ordinarily final and conclusive upon the party by whom it was made, in the absence of controlling elements of estoppel.
8. **Automobiles.** Although the negligence of the driver of an automobile will not ordinarily be imputed to a passenger therein when the passenger has no control over the automobile or driver, the passenger may not recover from a third person for injuries suffered in a collision when the negligence of the driver is the sole proximate cause of the accident.

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

Wagener, Marx & Galter, for appellant.

Chambers, Holland, Dudgeon & Hastings, for appellee.

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

WENKE, J.

This is an appeal from the district court for Lancaster County. It involves an action brought by Corniel R. Vermaas to recover damages from Vernon E. Heckel because of personal injuries which plaintiff claims he suffered in an automobile accident, which accident, plaintiff alleges, was caused by defendant's negligence. Trial was had and the jury returned a verdict for the defendant. Plaintiff thereupon filed an alternative motion asking the trial court to give him either a judgment notwithstanding the verdict or a new trial. This motion the trial court overruled and the plaintiff has perfected this appeal therefrom. We shall herein refer to the parties as they appeared in the court below.

The accident in which plaintiff claims he was injured happened about 3:45 p.m., on Saturday, October 4, 1958, in the intersection of Twenty-sixth and R Streets in Lincoln, Nebraska. The weather was good and the streets were dry. R Street runs east and west. It is hard surfaced between curbs, which are 40 feet apart. It is an arterial street protected by stop signs between Seventeenth and Twenty-seventh Streets, carrying a maximum speed limit of 35 miles an hour. Twenty-sixth Street runs north and south, having a hard surfaced area between its curbs which are 30 feet apart. There is a 13-foot set-off on Twenty-sixth Street at the intersection, Twenty-sixth Street north of R Street being located 13 feet farther to the west than it is south thereof. There are stop signs on Twenty-sixth Street as it enters R Street at both the northwest and southeast corners of the intersection. Plaintiff was, at the time, riding in a 1949 Plymouth automobile owned by

Elmer L. Keefover and being driven by him north on Twenty-sixth Street. Defendant was, at the time, driving his 1954 Hudson west on R Street. The accident happened at a point in the intersection approximately 6 feet north of the center of R Street when the left front of the Hudson ran into the right rear side of the Plymouth. After the impact the Hudson was standing in the intersection at about the point of the impact, facing west, whereas the Plymouth had skidded sideways, turned around, and ended up just out of the intersection to the north on Twenty-sixth Street. It was near the west curb thereof facing southeast, being some 35 feet from the point of the impact.

Plaintiff suggests the questions involved are as follows: "Did the defendant's judicial admissions establish, as a matter of law, that defendant was guilty of negligence which proximately caused the accident"; and "Did the trial court err in overruling plaintiff's motion for a directed verdict on the question of liability?" It should here be stated that plaintiff moved for a directed verdict against the defendant on the issue of defendant's liability after both parties had rested, which motion the trial court overruled. Plaintiff assigns as error the court's ruling doing so.

"Where the evidence on the trial in the district court is not conflicting, and reasonable minds cannot differ as to the conclusion to be derived therefrom, it is the duty of the court, when requested, to direct a verdict in accordance with such conclusion." Nebraska Transfer Co. v. Chicago, B. & Q. R. R. Co., 90 Neb. 488, 134 N. W. 163. See, also, Swanback v. Sovereign Camp, W. O. W., 103 Neb. 34, 170 N. W. 354.

"A motion for directed verdict or for judgment notwithstanding the verdict must, for the purpose of decision thereon, be treated as an admission of the truth of all material and relevant evidence submitted on behalf of the party against whom the motion is directed. Such party is entitled to have every controverted fact

resolved in his favor and to have the benefit of every inference that can reasonably be deduced from the evidence." Stark v. Turner, 154 Neb. 268, 47 N. W. 2d 569. See, also, Anderson v. Evans, 164 Neb. 599, 83 N. W. 2d 59.

However, as stated in Kipf v. Bitner, 150 Neb. 155, 33 N. W. 2d 518: "Where different minds may reasonably draw different conclusions from the evidence adduced or if there is a conflict in the evidence as to whether or not they establish negligence or contributory negligence, and the degree thereof, when one is compared with the other, such issues must be submitted to the jury." See, also, Burhoop v. Brackhan, 164 Neb. 382, 82 N. W. 2d 557.

Plaintiff contends the facts to which defendant testified in open court constitute judicial admissions which were binding upon him and which amounted to a waiver of all controversy as to those facts. Based on this contention plaintiff claims these admissions by defendant establish that he failed to maintain a proper lookout and that he did not have his vehicle under reasonable control.

"A person traveling a favored street protected by a stop sign, of which he has knowledge, may properly assume that oncoming traffic will obey it." Riekes v. Schantz, 144 Neb. 150, 12 N. W. 2d 766. See, also, Paddack v. Patrick, 163 Neb. 355, 79 N. W. 2d 701; Angstadt v. Coleman, 156 Neb. 850, 58 N. W. 2d 507.

However, we have said: "Even though the driver of a car has the right-of-way at an intersection he still has duties in regard to other cars which are approaching and entering it at about the same time." Burhoop v. Brackhan, *supra*. See, also, Bezdek v. Patrick, 167 Neb. 754, 94 N. W. 2d 482; Barajas v. Parker, 165 Neb. 444, 85 N. W. 2d 894; Maska v. Stoll, 163 Neb. 857, 81 N. W. 2d 571; Styskal v. Brickey, 158 Neb. 208, 62 N. W. 2d 854.

And, in that respect, we have held: "The failure of

the driver of an automobile, upon approaching an intersection, to look in the direction from which another automobile is approaching, where, by looking, he could see and avoid the collision that resulted, is more than slight negligence, as a matter of law, and defeats a recovery." Fairchild v. Sorenson, 165 Neb. 667, 87 N. W. 2d 235. See, also, Bezdek v. Patrick, *supra;* Barajas v. Parker, *supra.*

It is these latter decisions which plaintiff contends are here controlling. In order to determine that question it is necessary to discuss what are judicial admissions for defendant gave contradictory versions in regard to the facts which plaintiff contends are here controlling and there is other evidence in the record relating thereto.

We said in Kipf v. Bitner, *supra,* that: " 'Admissions' in the law of evidence are concessions or voluntary acknowledgments made by a party of the existence of certain facts, and they are ordinarily classified as judicial and extrajudicial."

Therein we went on to say that: "A judicial admission is a formal act done in the course of judicial proceedings which is a substitute for evidence, thereby waiving or dispensing with the production of evidence by conceding for the purpose of litigation that the proposition of fact alleged by the opponent is true." Kipf v. Bitner, *supra.*

"A judicial admission is ordinarily final and conclusive upon the party by whom it was made, unless the trial court, in the exercise of a judicial discretion, timely relieves him from that consequence." Kipf v. Bitner, *supra.* See, also, Johns v. Carr, 167 Neb. 545, 93 N. W. 2d 831; Kuhlmann v. Platte Valley Irr. Dist., 166 Neb. 493, 89 N. W. 2d 768. We have applied this principle to admissions contained in the pleadings of the parties upon which the case was actually tried. See, Johns v. Carr, *supra;* Wright v. Lincoln City Lines, Inc., 160 Neb. 714, 71 N. W. 2d 182; Barkalow Bros. Co.

v. English, 159 Neb. 407, 67 N. W. 2d 336. Also we have applied this principle where a party or his counsel has, either in the opening statement or during the course of trial, conceded or stipulated to a fact or facts. See, Kuhlmann v. Platte Valley Irr. Dist., *supra;* LeBarron v. City of Harvard, 129 Neb. 460, 262 N. W. 26, 100 A. L. R. 767. And, under certain conditions, we have applied it to the evidence of a party to the action. See Southwestern Truck Sales & Rental Co. v. Johnson, 165 Neb. 407, 85 N. W. 2d 705.

However, in Burhoop v. Brackhan, *supra,* we said: "We think the correct rule is stated in 169 A. L. R. under the annotation of 'Binding effect of party's own unfavorable testimony' under IV b, at page 805, as follows: '* * * where the more favorable evidence relied on by a party to overcome the effect of his own self-injurious statement is in his own testimony, no distinction is drawn as compared with the situation where the curative evidence is from other witnesses. It is still for the trier of fact to decide the issue upon all the evidence.'" And, in Rueger v. Hawks, 150 Neb. 834, 36 N. W. 2d 236, we said: "Under the older practice and prevailing rule, a party is entitled to the benefit of the testimony of other witnesses in contradiction of his own, wherever his own is not of the character of a judicial admission, and concerns only some evidential or constituent circumstance of his case. This is especially so as to the circumstances of an accident or similar event, because in such a case the party's testimony is especially subject to inexactness of observation and memory." In view of the entire record we think these two statements here controlling on this issue.

As we said in Kipf v. Bitner, *supra:* "An extrajudicial admission is simply an item of evidence in the mass of evidence adduced during a trial, admissible in contradiction and impeachment of the present claim and other evidence of the party making the admission. * * * An extrajudicial admission is not ordinarily final and

conclusive upon the party by whom it was made, in the absence of controlling elements of estoppel." See, also, Angstadt v. Coleman, *supra.*

Before discussing the facts in more detail we set forth the following principles here applicable to the driver of the car in which plaintiff was riding.

"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. * * * 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. * * * 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." Paddack v. Patrick, *supra.*

Under the principles announced by this court in Burhoop v. Brackhan, *supra,* and Styskal v. Brickey, *supra,* and the facts disclosed by the record, plaintiff could not be guilty of contributory negligence, and that issue was properly not submitted to the jury. However, as we said in Bergendahl v. Rabeler, 133 Neb. 699, 276 N. W. 673: "Although the negligence of the driver of an automobile will not ordinarily be imputed to a passenger therein when the passenger has no control over the car or driver, the passenger may not recover from a third person for injuries suffered in a collision when the negligence of the driver is the sole proximate cause of the accident." See, also, Burhoop v. Brackhan, *supra.*

This latter issue was raised by defendant's answer and properly submitted by the court's instruction No. 11.

We shall consider the record on the basis of the principle applicable when a motion is made for a directed verdict or when a verdict has been rendered for the party against whom the motion for judgment notwithstanding the verdict is made.

From the evidence adduced a jury could find that Keefover, with his wife and plaintiff in the front seat, was driving his Plymouth automobile north on Twenty-sixth Street; that when he came to where it intersects with R Street he stopped his car at the stop sign located on Twenty-sixth Street at the southeast corner of that intersection; that he then looked both west and east down R Street, his view being unobstructed, and saw no vehicles approaching from either direction; that he then started his automobile and proceeded to drive into the intersection; that after starting up his automobile Keefover did not again look to the east until after both plaintiff and his wife made an outcry, which happened after the Plymouth had fully entered the intersection, being north of the south curb line of R Street; that when this outcry was made Keefover immediately applied his brakes and almost came to a stop, skidding his tires a distance of approximately 13 feet 8 inches in doing so; that upon applying his brakes Keefover looked to the east and saw a Hudson automobile approaching the intersection from that direction, it then being some three-car lengths east thereof; that the front of Keefover's car was then just across the center of R Street; that Keefover thereupon released his brakes, let out his clutch, and stepped on the gas; and that he traveled about one-car length thereafter, his car being hit when its rear end was about 3 feet north of the center line of R Street.

The jury could also have found that as defendant turned west onto R Street from Twenty-seventh Street, where he had been stopped by a traffic signal, he picked

up speed; that his speed picked up to where he was going 25 to 30 miles an hour; that his view to the west was unobstructed, there being no other traffic on R Street at that time between Twenty-fifth and Twenty-seventh Streets; that he was between 50 and 100 feet from the Plymouth when he saw it out in the intersection; that the Plymouth seemed to stop and then start up again; that he immediately applied his brakes, leaving skid marks for a maximum distance of 24 feet, 6 inches; that he held to his side of the center of R Street, striking the Plymouth at a point about 6 feet north of the center thereof; and that after the impact his car came to almost an immediate stop.

It is true that defendant testified he first saw the Plymouth when its rear end was only about 3 feet south of the center of R Street; that he told the police officer investigating the accident that he was only 10 feet from the Plymouth when he first saw it; that he immediately applied his brakes; and that he was going 24 to 25 miles an hour at the time of the impact. The jury was not obligated to believe this testimony and could very well have come to the conclusion that defendant was mistaken when he made such admissions and so testified. That is particularly true when the following physical facts are considered: First, the reaction time it takes a driver to apply his brakes after seeing an object in his path; second, the length of the skid marks left by the tires up to the point of impact; and third, the fact that the Hudson came to almost an immediate stop after the impact.

"Negligence is the doing of something which an ordinarily prudent person would not have done under the same or similar circumstances, or the failure to do something which an ordinarily prudent person would have done under the same or similar circumstances. * * * Proximate cause, as used in the law of negligence, is that cause which in a natural and continuous sequence, unbroken by an efficient intervening cause, produces

the injury, and without which the injury would not have occurred." Shupe v. County of Antelope, 157 Neb. 374, 59 N. W. 2d 710.

Under the factual situation here disclosed a jury could properly find that Keefover was negligent in the manner in which he operated his automobile when he drove it into the intersection and that such negligence was the proximate cause of the accident and, in view of its verdict, apparently did so. In this respect we have not overlooked the fact that defendant testified that when he first saw the Plymouth automobile he probably could have turned to the left and have avoided hitting it but did not do so because of the danger involved to any oncoming traffic from the west. Plaintiff contends the record shows there was no traffic on R Street between Twenty-fifth and Twenty-seventh Streets at the time. It is true that defendant testified he observed no traffic ahead of him going west on R Street as far as Twenty-fifth Street and he didn't notice any coming east. However, whether or not any traffic had come from the west on R Street from beyond Twenty-fifth Street while defendant was driving west thereon between Twenty-seventh Street and the point of the accident is not established. Whether or not, under these circumstances, defendant was negligent in this regard we think was properly a jury question.

In view of what we have said we think the issue of negligence and proximate cause, insofar as the defendant was concerned, was a question for the jury. Since no question is raised as to the manner of its submission, we affirm the judgment of the trial court overruling plaintiff's motion.

AFFIRMED.

IN RE APPLICATION OF BURLINGTON TRUCK LINES, INC. BURLINGTON TRUCK LINES, INC., APPELLEE, V. BROWN TRANSFER ET AL., APPELLANTS.

102 N. W. 2d 450

Filed April 22, 1960. No. 34724.

1. **Public Service Commissions: Motor Carriers.** An application to the Nebraska State Railway Commission for the transfer of valid intrastate operating rights from one common carrier to another is properly instituted under section 75-240, R. R. S. 1943.
2. ———: ———. An order of the Nebraska State Railway Commission granting an application to a trucking company to operate over alternate routes for convenience only does not authorize the carriage of freight other than that which can be transported on the regular route authority.
3. **Public Service Commissions: Appeal and Error.** This court will not disturb an order of the Nebraska State Railway Commission based on evidence unless the evidence shows that such order is unreasonable or arbitrary.

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

Viren, Emmert, Hilmes & Gunderson, C. J. Burrill, and *Eleanor Knoll Swanson,* for appellants.

J. W. Weingarten and *James M. Adams,* for appellee.

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

CARTER, J.

This is an appeal from two orders of the Nebraska State Railway Commission approving the transfer of intrastate motor vehicle operating rights as a common carrier from Carl E. Speck to Burlington Truck Lines, Inc., and authorizing the Burlington Truck Lines, Inc., to operate over alternate routes for operating convenience only. The appellants, Brown Transfer, Peterson & Peterson, Inc., Red Ball Transfer Co., Inc., and Watson Bros. Transportation Co., Inc., protestants and interveners below, have appealed.

On February 26, 1959, the Burlington Truck Lines,

Inc., filed its application with the commission seeking a transfer to it of the intrastate operating rights held by Speck, whose certificate authorized the transportation of commodities generally, and specially, mainly small class freight and perishables requiring refrigeration, over regular routes from Kearney to and from Hastings via U. S. Highway No. 30 to Wood River, thence on a county highway to Hastings, serving the intermediate points of Gibbon, Shelton, and Wood River, and the off-route point of Kenesaw. On the same day Burlington Truck Lines, Inc., filed a second application requesting commission approval to operate over two alternate routes for operating convenience only: (1) To and from Kearney via Nebraska Highway No. 44 to its junction with U. S. Highways Nos. 6 and 34; (2) to and from Grand Island via U. S. Highway No. 30 to its junction with an unnumbered county road at Wood River. The two applications were set for hearing and notice was given thereof, such applications being consolidated for the purpose of hearing only. The hearing on the applications was held at Kearney on March 17, 1959, before an examiner for the commission. On April 28, 1959, the examiner filed his report recommending approval of the transfer application and a denial of the extension application. Exceptions were filed to the examiner's report. After hearing the commission entered an order on July 7, 1959, overruling the exceptions and granting both applications. Motion for a rehearing was filed by the appellants and after oral argument it was overruled on August 11, 1959. The appeal was taken from this order.

The record shows that on May 12, 1947, Speck filed an application with the commission for the transfer to him of the certificate held by George W. Mastalka. On May 14, 1947, the commission granted the application and issued a certificate of public convenience and necessity to Speck. Notice was not given nor a hearing held on this application. Under the holding of this court in

In re Application of Neylon, 151 Neb. 587, 38 N. W. 2d 552, the certificate granted to Speck was void. However, under the rule announced in Preisendorf Transp., Inc. v. Herman Bros., Inc., 169 Neb. 693, 100 N. W. 2d 865, and the evidence adduced, the commission was authorized to validate Speck's operating rights by the issuance of a new certificate. The evidence clearly shows that Speck had operated under color of right since 1947 and had in all respects complied with the law and regulations of the commission during the period of his operations.

It is the contention of the appellants that since the certificate issued to Speck in 1947 was void, the procedure for transferring Speck's rights to the Burlington Truck Lines, Inc., should have been brought under section 75-230, R. R. S. 1943, and not under section 75-240, R. R. S. 1943. In other words, the contention is that the application should have been for the issuance of a new certificate rather than for the transfer of his operating rights which he held under color of right under a void certificate.

The primary purpose of the proceeding was to transfer the operating rights of Speck to the Burlington Truck Lines, Inc., as evidenced by the certificate granted him on May 14, 1947. We have repeatedly held that the holder of a certificate has no vested property right therein. It grants him a privilege only which he cannot transfer without commission approval. A transfer must be approved by the commission, after which a new certificate is issued to the transferee. Even where the transfer of a valid certificate is involved the commission is required to find that the operating rights evidenced by the certificate have not been lost through dormancy or any other reason. Such lost rights can be granted to a transferee under section 75-240, R. R. S. 1943, only on satisfactory proof as required in the grant of a new certificate under section 75-230, R. R. S. 1943. It seems to us that an application for the transfer of operating

rights may in like manner involve a showing that the transferor is entitled to a certificate even though the one he holds is void in that it was not issued as required by statute. It is only the operating rights which the transferor actually has that may be transferred, irrespective of the validity or invalidity of the certificate, in whole or in part. Such being the case, an application for the transfer of operating rights obtained under color of right is properly brought under the transfer statute, section 75-240, R. R. S. 1943, irrespective of the validity or form of the certificate evidencing the existence of such rights. It would be a vain procedure to require the issuance of a valid certificate to Speck only to revoke it in order to issue a new certificate to the transferee in the transfer proceeding. We necessarily conclude that the operating rights of Speck, valid under our holding in the Preisendorf case, which were found to be in accordance with those stated in the void certificate, except for the off-route point of Kenesaw which the parties agree had become dormant, was properly transferable to the Burlington Truck Lines, Inc., under the proceedings provided by the transfer statute, section 75-240, R. R. S. 1943.

This conclusion is clearly in accord with our holding in Abler v. Wheeler Transp. Service, Inc., 169 Neb. 728, 101 N. W. 2d 476, wherein we upheld a transfer of operating rights under section 75-240, R. R. S. 1943, on an identical state of facts. The correctness of the holding in that case is supported by the language of section 75-240, R. R. S. 1943, wherein it says in part: "Whenever a consolidation, merger, purchase, lease, operating contract or acquisition of control of the properties, certificates or permits is proposed, the carrier or carriers or person seeking authority therefor shall present an application to the State Railway Commission, and thereupon the commission shall notify such carriers and other parties known to have an interest, of the time and place for a public hearing in accord-

ance with such rules and regulations as the commission may prescribe." The foregoing indicates that it is the transfer of property and operating rights that this section of the statute is designed to cover, not merely the transfer of the transferor's certificate of public convenience and necessity which is only prima facie evidence of the operating rights he actually has. We conclude that an application for the transfer of property, operating rights, certificates, or permits from one motor carrier to another is properly instituted under the provisions of section 75-240, R. R. S. 1943.

The second application was filed under the provisions of sections 75-228 to 75-232, R. R. S. 1943. The application states that applicant, in conjunction with its transfer proceeding, desires authority to operate over two routes for operating convenience only, serving no intermediate points. The evidence is that the regular route highway from Wood River to Hastings is a county road and not an all-weather highway. The applicant sought the alternate route from Wood River to Grand Island to Hastings, a paved route, solely as a matter of convenience for operating use in bad weather. The second alternative route was sought for a similar purpose. The protestants assert that the granting of the application would, in effect, provide a new service which would be competitive with the authority possessed by them. The applicant recognized that the grant of the alternative route was not a grant of additional service and offered at the trial to stipulate that a specific restriction to that effect be added to its certificate. The commission did not restrict the applicant's certificate in that manner. The grant of applicant's application was for the purpose of convenience only. This, we think, was a limitation upon the use to be made of the alternate routes and was not a grant of additional authority to handle any freight over the alternate route that could not be handled over the regular route authority transferred by Speck to the Burling-

ton Truck Lines, Inc. The grant of the alternate routes, therefore, does not authorize any freight service outside the scope of the authority granted over the regular routes. So construed, the objections of the protestants are without merit. The evidence of the applicant is sufficient to sustain the commission's order; that is, the order is sustained by evidence and is not unreasonable nor arbitrary.

We conclude therefore that both applications were properly granted under the evidence adduced, and consequently such orders were not arbitrary nor unreasonable, a finding necessary to obtain relief in this court on appeal.

AFFIRMED.

AMOS CLOWN HORSE, PLAINTIFF IN ERROR, V. STATE OF NEBRASKA, DEFENDANT IN ERROR.

102 N. W. 2d 625

Filed April 22, 1960. No. 34757.

1. **Homicide.** A purpose to kill and malice are essential elements of murder in the second degree and in a prosecution therefor each must be established beyond a reasonable doubt.
2. **Criminal Law.** This court may not in a case of the character of the present one resolve conflicts in or weigh the evidence or pass upon the credibility of the witnesses.
3. ———. It is implicit in a verdict of guilty in such a case that the jury decided all controverted questions of fact unfavorably to the accused and this court will not disturb the verdict if based on evidence unless, as a matter of law, it is insufficient to support a finding of guilt beyond a reasonable doubt.
4. **Homicide.** In a case of the character of the present one the unlawful killing is the principal fact but the condition of the mind of the accused or the attendant circumstances determine the class of the crime as second-degree murder or as manslaughter.
5. **Homicide: Trial.** If the evidence in reference thereto is such that various inferences may properly be deduced therefrom as to the degree of the crime, the trial court must submit the

different degrees to the jury to determine which inference shall prevail.

6. ———: ———. It is the duty of the district court to instruct the jury on such degree or degrees of homicide as are supported by evidence sufficient to sustain a verdict of guilty.

7. **Homicide.** If the fact of the homicide is established but the circumstances of it are not fully shown on the trial so that the jury can judge from the circumstances whether it was intentional, the law presumes legal malice; but if the circumstances of the homicide are all established by the evidence at the trial, then the law creates no presumption of malice but the issue as to it is one of fact to be determined by the jury from all of the circumstances surrounding the homicide.

ERROR to the district court for Scotts Bluff County: RICHARD M. VAN STEENBERG, JUDGE. *Affirmed.*

Willis A. Herman and *Donald L. Wood,* for plaintiff in error.

Clarence S. Beck, Attorney General, and *Bernard L. Packett,* for defendant in error.

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

BOSLAUGH, J.

The plaintiff in error, herein designated accused, was charged with the crime of murder in the second degree, was convicted of the crime of manslaughter, and was adjudged to be confined in the Nebraska State Penitentiary for a definite term. He prosecutes this error proceeding to review the record of his conviction.

The accused and Sarah Bad Heart, also named Sarah Bad Heart Bull and referred to herein as Sarah, were employed by and worked for a farmer northeast of Minatare and they with the five children of Sarah, the oldest of whom was 10 years and the youngest 6 months, lived in a labor house which was secured by the accused. He was not related to Sarah or any of her children. She and her husband were estranged and at the times important to this case he was confined in jail at Scottsbluff.

The accused and Sarah went to Scottsbluff on July 29, 1959. Accused stopped at a pool hall and Sarah did some shopping after which she went to Earl's Pool Hall, met the accused, and they drank beer. They then repaired to the Daily Double Bar and drank more beer. From there they traveled to Gering, arriving there about noon of that day. They visited the Union Bar in Gering and drank beer. They were joined there by Lila Orr Hamburger, hereafter spoken of as Mrs. Hamburger or the deceased, who brought the beer she was drinking with her and sat down and visited with the accused and Sarah. Mrs. Hamburger consented to take Sarah and the accused in her automobile to the home of the parents of accused on a farm west of Gering but before they started on that trip they secured two six-packs of beer and the three of them drank it while on that trip. They stayed at the farm where the parents of accused lived for quite a while and then returned to Gering and stopped at the Safeway Store where Sarah did some more shopping. Mrs. Hamburger wanted more beer and they went to Terry's in Terrytown between Gering and Scottsbluff and bought two six-packs of beer. It was then probably 3 or 4 o'clock in the afternoon. They then proceeded to the home of Mrs. Hamburger on the southeast corner of L and Twelfth Streets, known as 1115 L Street, in Gering to drink the beer they had recently purchased after which Mrs. Hamburger was going to take accused and Sarah to their home near Minatare. They sat in the home, conversed, and drank beer. Mrs. Hamburger produced a bottle of wine and she and accused drank it. They ate sandwiches prepared by her and thereafter accused wanted Sarah to go home with him because her five children had been left at home alone. She wanted to stay with Mrs. Hamburger who said she would bring Sarah home later in the evening. Accused insisted that Sarah go home with him and she refused. Accused became angry and he slapped Sarah. Mrs. Hamburger swore at

accused and told him not to slap Sarah again. Accused took Sarah by both arms in an attempt to have her go home with him to the children who had been alone in the home since before noon. Accused and Sarah were fighting and scuffling in the living room of the Hamburger home. Accused slapped Sarah a second time and thereupon Mrs. Hamburger stabbed accused in the back with a butcher knife. It was then about 8 o'clock in the evening.

The wound inflicted on accused by the stabbing was on the right upper posterior chest, that is, the back of the chest. It was deep enough that it communicated with the chest cavity. The knife struck a rib, traveled obliquely downward between two ribs, entered the chest cavity, and caused lung damage. The wound was probed with a rubber catheter and about 8 inches of it extended into the chest cavity. When a doctor saw accused a brief time later he was suffering severe pain, difficulty in breathing, and shock.

A specimen of blood was secured later that evening from accused and from the body of Mrs. Hamburger. The blood alcohol content from accused was determined to be 0.31 or 310 milligrams percent, and the blood alcohol content of the specimen from the body of Mrs. Hamburger was determined to be 0.15 or 150 milligrams percent. The result of each of these determinations was indicative of alcoholic intoxication. The record is convincing that accused, Mrs. Hamburger, and Sarah were each intoxicated when they went to the Hamburger home and thereafter until the two first named were placed in the hospital and Sarah was confined in jail.

Sarah did not see the knife with which accused was stabbed and she did not know that Mrs. Hamburger had it until after the accused was stabbed in the back by Mrs. Hamburger. She did not know who took the knife out of the body of accused. There is undisputed evidence of two doctors that accused could not have taken it from his body. Soon thereafter accused had

the knife in his hand and that is when Sarah first saw it. She grabbed for it, the knife was jerked away, and that is how her left hand was cut. Accused turned his body and she saw blood on his back from the wound caused by the stabbing of him. When accused turned around he slapped or hit Mrs. Hamburger and she fell or sat down in a big chair or on a couch. Sarah heard the accused say he was stabbed or something like that and to call the cops. She ran from the house and down the road until she met an automobile which stopped. The record is not clear what she told the operator of the automobile but it indicates she made it known to him that something serious had happened at the Hamburger home. Sarah came to the automobile of Mrs. Hamburger which was parked in the street in front of the Hamburger house and accused was then standing by it. He was all bloody. She attempted to take hold of him but he did not want to be touched. He told her to get away. He got into the front seat of the automobile and lay on his back. She got in the back seat and tried to talk to him but she could get no response. He gave evidence of suffering pain and appeared to be quite unconscious. She did not go back into the Hamburger house. The sheriff came to the automobile soon afterwards and put a bandage on her bleeding hand. He asked her what had happened and she told him that Mrs. Hamburger stabbed accused and then he stabbed Mrs. Hamburger. When accused was on the sidewalk near the automobile he told Sarah that he stabbed Mrs. Hamburger. There had been no ill feeling, disagreement, or difficulty between either the accused or Sarah and Mrs. Hamburger before the occurrences of the evening of that day which are involved in this case. All of their relations had been cordial and pleasant.

Two police officers came to the Hamburger home soon after Sarah got into the automobile parked in the street. She told the officers that a woman in the house had been stabbed. The officers entered the house and found

Mrs. Hamburger on the floor with a butcher knife inserted in her abdomen. The entire blade of the knife except about the last inch thereof next to the handle was buried in her body. The police officers called the sheriff and then they went for a doctor. The doctor was brought to the scene of the tragedy and he with the sheriff entered the house. They found Mrs. Hamburger on the floor with her left arm lying back of her and her legs drawn up. The doctor examined her. She was living but her respirations were very stertorous and she had no pulse or blood pressure. There was a knife in her left upper abdomen and she was covered with blood. The doctor administered an injection of adrenalin, removed the knife from her body, and told the sheriff and police officers to get her to the hospital at once. She was placed in an ambulance and taken to the hospital. She was dead when the ambulance arrived there. There were multiple bruises and minor lacerations about her head and face. They were especially on the right side of her face and involved the nose, the tissue about the right eye, right cheek bone, the right ear, and the area immediately behind the ear involving the bony prominence that is referred to as the mastoid area, and a stab wound in the body. The right side of her upper lip was bruised and had a laceration. Her mouth contained a broken dental plate and was partly filled with blood. Her left arm was broken at the junction of the upper third and the middle third of the humerus. The stab in her body was in the right hypochondrian, that is, it was just to the left of the midline and at the level of the sixth costal cartilage that joins the rib to the breastbone. The wound was straight into the body and extended into the attachment of the diaphragm to the rib cage, the left lobe of the liver, the ligament that suspends the stomach, into the peritoneal area, the tissues in the back part of the abdominal cavity, and through the aorta, both the front and back walls of it. The aorta

is that main branch from the heart which conducts blood to all parts of the body except the lungs.

The cause of the death of Mrs. Hamburger was hemorrhage of the stab wound of the aorta, most of which occurred into the abdominal cavity but there was a considerable amount of blood that leaked through the abdominal skin wall. The immediate cause of her death was a direct result of the stab wound made in her body.

The accused, Sarah, and deceased went to and entered the home of the latter on the afternoon of July 29, 1959, and they were the only persons there until Sarah left after the accused was stabbed by deceased. Thereafter she and accused were the only persons in the house until the police officers entered and found deceased with the knife thrust into her abdomen which caused the wound resulting in her death. Those three persons were the only ones at or near the house when the officers arrived there that evening. There was no mention in the record of any other person being at or near the house during that time or that anyone except these three persons had any part in the tragic events of that afternoon and evening. The deceased was a small person. Her height was 5½ feet and her weight was about 105 pounds. The accused was at least 6 feet tall, weighed about 205 pounds, was 27 years of age, able-bodied, athletic, and a trained fighter in the heavyweight class who had experienced fighting in the ring.

The accused in his version of the affray admitted that he was attempting to get Sarah to go with him from the Hamburger home because it was approaching night and the children of Sarah had been told that their mother and the accused would be home before dark that evening; that he slapped Sarah, how many times he did not remember; that he had her by one arm; and that they were resisting each other. It was at that time that accused was hit from behind with the knife and was stabbed by deceased. He quickly turned around. He struck deceased and he then saw for the first time

that she had a knife in her right hand. He grabbed her arm and they wrestled. He was attempting to take the knife from her. He said he thought she was going to use it again. He did not get the knife away from her and asserts he never did have it in his hand. He said at no time did he have the knife in either of his hands. He was experiencing trouble in breathing and was trying to get some air. He moved toward the door, opened it, fell down once or twice but finally got to the automobile parked in front of the house, and that was the last he remembered until the next morning in the hospital. He said when he saw the knife in the hand of deceased he for the first time realized that he had been stabbed. He said he had no reason, intention, or desire to do the deceased any injury and had no knowledge that he did so. He did remember that as he was struggling for breath and trying to get out of the house he saw her lying there in the room.

Sarah testified at the trial she did not remember that accused told her he stabbed deceased, and Sarah said she did not remember she told the sheriff accused had told her that he stabbed deceased. This record is adorned with inconsistent and contradictory statements but it was for the jury to say which were true and from the circumstances presented to it at the trial to determine the facts.

This court may not in a case of this kind decide conflicts in or weigh the evidence or pass on the credibility of witnesses. It is implicit in a verdict of guilty that the jury resolved all controverted questions of fact in favor of the State and this court will not disturb such a verdict based on evidence unless, as a matter of law, it is insufficient to support a finding of guilt beyond a reasonable doubt. Hertz v. State, 160 Neb. 640, 71 N. W. 2d 113; Wright v. State, 169 Neb. 497, 100 N. W. 2d 51.

This prosecution was based on section 28-402, R. R. S. 1943, which in part declares: "Whoever shall pur-

posely and maliciously, but without deliberation and premeditation, kill another, every such person shall be deemed guilty of murder in the second degree * * *." Malice and a purpose to kill are thereby made essential elements of the crime charged. Vanderheiden v. State, 156 Neb. 735, 57 N. W. 2d 761; Wright v. State, *supra.*

The relevant language of section 28-403, R. R. S. 1943, is: "Whoever shall unlawfully kill another without malice, either upon a sudden quarrel, or unintentionally, while the slayer is in the commission of some unlawful act, shall be deemed guilty of manslaughter * * *."

If an information charges the crime of murder in the second degree, the crime of manslaughter is included in the charge. In a case of the character of the present one the unlawful killing is the principal fact but the condition of the mind or the attendant circumstances determine the class or grade of the crime as second-degree murder or manslaughter. If the evidence in reference thereto is such that various inferences may properly be deduced therefrom as to the degree of the crime, the trial court must submit the different degrees to the jury to determine which inference shall prevail. Vanderheiden v. State, *supra;* Wright v. State, *supra;* Woodard v. State, 159 Neb. 603, 68 N. W. 2d 166. It is, of course, the duty of the district court to instruct the jury only on such degree or degrees of homicide as are supported by evidence sufficient to sustain a verdict of guilty. Woodard v. State, *supra.*

The accused complains that it was prejudicial error for the district court to instruct the jury as a part of its charge on the subject or element of intent, as follows: "Every sane person is presumed to intend the natural and probable consequences of his voluntary acts." It is said by the accused that this relieved the State of its burden of proving the element of malice beyond a rea-

sonable doubt and this is correct. It is also said by accused that the part of the instruction quoted above operated to prejudice defendant in his right to a fair and impartial trial. It cannot be conceded that this is a correct conclusion. It assumes, as the brief of accused asserts, that when the homicide is fully testified to by witnesses in a case in which second-degree murder is charged, the State to make a case must prove beyond a reasonable doubt that the homicidal act was done feloniously with the intent and purpose to kill.

In the present case the circumstances attending the homicide were not fully testified to by an eyewitness. The accused did not attempt to testify fully as to what took place in the Hamburger house after Sarah left upon his instructions to get the police shortly after he had been stabbed by deceased and before she was beaten, bruised, lacerated, her left arm bone fractured, and a fatal wound inflicted upon her by being stabbed with a sizable knife near enough to her heart to make an opening in a principal artery of her body. Sarah was not in the Hamburger house when any of the things referred to immediately above happened to deceased. Sarah was out of the house looking for the police when the wound was inflicted upon the body of deceased which was the cause of her death. There was no eyewitness to the killing of deceased who could or did testify to the circumstances thereof upon the trial of this case. The contention in this regard made by the accused is not new. It was announced in the decision of a similar contention in Vollmer v. State, 24 Neb. 838, 40 N. W. 420, that on a trial for murder in the second degree malice can be implied if the killing alone is shown; but if all the circumstances connected with the killing were shown by an eyewitness, then malice in such a case was a question of fact for the consideration and determination of the jury. This doctrine has since

been consistently adhered to in many subsequent decisions of this court.

Lucas v. State, 78 Neb. 454, 111 N. W. 145, states: "The law implies malice in cases of homicide if the killing alone is shown, but, if the circumstances attending the homicide are fully testified to by eye-witnesses, it is error to instruct the jury that there is a presumption of malice from the fact of the killing."

This court said in Flege v. State, 90 Neb. 390, 133 N. W. 431: "If the fact of the killing is established and the circumstances surrounding the killing are not fully shown, so that the jury can judge from the circumstances whether it was intentional, the law will imply legal malice; but, where the circumstances of the killing are all established by evidence or are manifest and not controverted, the law raises no implication as to malice, but leaves that as a fact to be determined by the jury from all of the circumstances surrounding the killing."

Chadek v. State, 138 Neb. 626, 294 N. W. 384, declares: "In a prosecution for murder in the second degree, when the fact of unlawful killing is proved and no evidence tends to show express malice on the one hand or any justification on the other, the law presumes malice. There is an inference that the killing was intentionally done. The crime of murder in the second degree is established, and the evidence requires the submission of the case to the jury." See, also, Kennison v. State, 80 Neb. 688, 115 N. W. 289; Whitehead v. State, 115 Neb. 143, 212 N. W. 35; Tvrz v. State, 154 Neb. 641, 48 N. W. 2d 761; Woodard v. State, *supra;* Wright v. State, *supra.* The instruction challenged by accused was, under the circumstances of this case, properly given to the jury.

It is argued by accused that his conviction is not sustained by the evidence and is contrary to law. It is not claimed that deceased was responsible for the injuries to her body which she suffered while only she

and the accused were in her home and Sarah was out on the street attempting to secure the presence of the police. The facts and circumstances permitted the jury to find that the accused was the only person who could have fatally injured deceased. The accused had quarreled and fought with and abused Sarah. He was intoxicated and when he was stabbed he released Sarah, suddenly turned around, and hit deceased. It was then that Sarah left the house. Shortly thereafter when accused came from the house to the automobile parked in front of it in the street and met Sarah she was told by the accused that: "I fixed her. I stabbed her back * * *," or words having that meaning. Sarah said that accused was then all covered with blood. Deceased in a matter of minutes thereafter was found in the house cut, bruised, the dentures in her mouth broken, one arm fractured, and a knife thrust into her body causing a wound which meant and resulted in certain death. The force to which she was subjected and the severity of the injuries inflicted upon her were indicative of a desire and purpose to destroy the victim and they were far beyond any protection required by accused from any hazard the victim could have been to him. She was a small person of scarcely 100 pounds. Accused was a tall, large, heavy, able-bodied young man trained in the art of boxing and experienced as a fighter of the slugger class. He had fought in and out of the ring. Any contest between them was heavily weighted in favor of the accused. He had no requirement for a butcher knife or the use of it to protect him from any threat to his safety of which she was capable. The choice of the location of the place of the insertion of the knife in the body and the accuracy of the direction of it to a distance that meant inevitable death of the victim were entitled to great consideration by the jury in deciding the purpose and intention of the accused. The jury could have found from the record in this case that the accused maliciously and

purposely killed deceased. In Woodard v. State, *supra,* it is said: "Where the evidence and circumstances of the crime are such that different conclusions may properly be drawn therefrom as to the degree, the trial court is without error in submitting the different degrees to the jury for its determination. See Jackson v. State, 133 Neb. 786, 277 N. W. 92. * * * We said in Fields v. State, 125 Neb. 290, 250 N. W. 63: 'If either Brown or the accused pointed the gun at the deceased, or some other person, and purposely fired the gun, then the intent to kill became specific * * *.' * * * While it is true that the jury did not find such purpose and intent existed, nevertheless, we think the evidence adduced was sufficient to support such a finding if it had been made. It was therefore not only proper but the duty of the trial court to submit the issue of second degree murder." A legal reason for interfering with the verdict of the jury has not been presented herein. Vanderheiden v. State, *supra,* states: "In a criminal case, this court will not interfere with a verdict of guilty based upon the evidence, unless it is so lacking in probative force that we can say, as a matter of law, that it is insufficient to support a finding of guilt beyond a reasonable doubt."

The judgment and sentence should be and they are affirmed.

AFFIRMED.

EDWARD D. KENNEDY, ALSO KNOWN AS EDWARD KENNEDY, PLAINTIFF IN ERROR, V. STATE OF NEBRASKA, DEFENDANT IN ERROR.

102 N. W. 2d 620

Filed April 22, 1960. No. 34806.

SUPPLEMENTAL OPINION

Criminal Law: Appeal and Error. The poverty affidavit of a defendant in a criminal case, filed under the provisions of section

24-342, R. S. Supp., 1959, in order to obtain a bill of exceptions at the cost of the county, must be filed within the same period of time as is provided by our rules for the ordering of the bill of exceptions, that is, within 1 calendar month after the rendition of the judgment or making of the final order complained of.

ERROR to the district court for Douglas County: PATRICK W. LYNCH, JUDGE. On motion of plaintiff in error for preparation of bill of exceptions. *Motion of plaintiff in error for bill of exceptions overruled.*

Jack L. Spence, for plaintiff in error.

Clarence S. Beck, Attorney General, and *Bernard L. Packett,* for defendant in error.

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

WENKE, J.

This cause was submitted on two motions. On March 25, 1960, our opinion was released disposing thereof. See Kennedy v. State, *ante* p. 193, 101 N. W. 2d 853. On the same day Edward D. Kennedy, plaintiff in error and defendant below, filed a supplemental transcript in this court. It discloses that on March 18, 1960, he filed a poverty affidavit in the district court for Douglas County wherein he asked that court "for an order directing the Clerk of the District Court of Douglas County to order a Bill of Exceptions and tax the costs of the preparation thereof to Douglas County * * *." This request the district court denied on March 21, 1960.

It appears from the supplemental transcript that no objections were made to plaintiff in error's affidavit, which was in the form of an application. It stands uncontradicted. Plaintiff in error contends, in view of our holding in Fisher v. State, 153 Neb. 226, 43 N. W. 2d 600, that the trial court therefore erred in denying his application for the order requested. He requests we overrule the trial court's order doing so and direct the clerk to have the official court reporter prepare a bill

of exceptions for him at the expense of Douglas County.

Section 24-342, R. S. Supp., 1959, under and pursuant to which plaintiff in error filed his poverty affidavit in the form of an application, does not provide when it shall be filed. However our rules, which have been in effect since September 28, 1959, provide, in criminal cases, "that it (bill of exceptions) shall be ordered within the period of time allowed for the filing of the petition in error in the Supreme Court." Rules of the Supreme Court, 1960, Rule 7h, p. 9. Section 25-1931, R. R. S. 1943, provides "one calendar month" for this purpose.

Here plaintiff in error's request for a bill of exceptions was filed with the clerk of the district court for Douglas County on February 3, 1960. This was within 1 calendar month of the final order complained of in this error proceeding, which was rendered on January 11, 1960. As already stated, the poverty affidavit of plaintiff in error was not filed in the district court until March 18, 1960. In order to expedite appellate procedure in criminal cases and to make such procedure certain and uniform as to when each step must be taken, we hold the poverty affidavit of a defendant in a criminal case, filed under the provisions of section 24-342, R. S. Supp., 1959, in order to obtain a bill of exceptions at the cost of the county must be filed within the same period of time as is provided by our rules for the ordering of the bill of exceptions. That is, within 1 calendar month "after the rendition of the judgment or making of the final order complained of." See § 25-1931, R. R. S. 1943.

In view of the foregoing we overrule the motion of plaintiff in error requesting us to "issue an order directing said trial court to order the costs of the preparation of a bill of exceptions to be taxed to Douglas County, Nebraska."

MOTION OF PLAINTIFF IN ERROR FOR BILL OF EXCEPTIONS OVERRULED.

JOHN JONES ET AL., APPELLANTS, V. HENRY SCHMIDT ET AL., APPELLEES.

102 N. W. 2d 640

Filed April 29, 1960. No. 34727.

1. **Quieting Title.** The plaintiff in an action to quiet title to real estate has the burden of proof and he must recover upon the strength of his own title and not because of weakness in the title of his adversary.
2. **Quieting Title: Waters.** A plaintiff who seeks to have title to real estate quieted in him on the ground that it is accretion to land to which he has title has the burden of proving the accretion by a preponderance of the evidence.
3. **Waters.** Accretion is the process of gradual and imperceptible addition of solid material, called alluvion, thus extending the shore line out by deposits made by contiguous water, or by reliction, the gradual withdrawal of the water from the land by the lowering of its surface level from any cause.
4. **Adverse Possession.** A party, in order to establish title to real property by the operation of the statute of limitations, or in other words by adverse possession, must prove by a preponderance of the evidence that he has been in actual, continuous, notorious, and adverse possession of the property under claim of ownership during the full period required by the statute.
5. ———. In order to establish title by adverse possession it is not necessary that a party shall prove complete enclosure nor that he remained continuously on the land for the statutory period, but only that the land was used continuously for the purposes to which it was by its nature adapted.
6. ———. The statutory period for the establishment of title to real estate by adverse possession is 10 years.

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

Mark J. Ryan, Philip H. Robinson, and *Clarence E. Haley,* for appellants.

Max W. Goetz, Frederick M. Deutsch, and *William I. Hagen,* for appellees.

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

YEAGER, J.

This is an action by John Jones, Lawine Casey, Leona

Adair, Lowell Jones, Margaret Day, Shirley Jones, and Ogar Jones, plaintiffs, against Henry Schmidt and Agnes Schmidt, defendants, to have quieted in them title to land in Cedar County, Nebraska, described as follows: "Commencing at the center of Section Thirteen (13) Township Thirty-three (33) Range One (1) East of the 6th P.M. in Cedar County, Nebraska, running thence East along the eastwest half section line of said Section 13-33-1E a distance of 2570 feet, thence due north a distance of 150 feet for the place of beginning. Running thence 1965 feet south 63 degrees east; thence 1375 feet south 19 degrees east, thence 1220 feet south 18 degrees east, thence 2135 feet south 38 degrees east, thence 645 feet south 18 degrees east, thence 810 feet south 4 degrees east, thence 159 feet south 54 degrees east; thence 695 feet south 67 degrees east, thence 955 feet south 61 degrees east, thence 775 feet south 59 degrees east, thence 156 feet north 26 degrees east, thence 1050 feet north 15 degrees west, thence 792 feet north 2 degrees east, thence 174 feet north 12 degrees east, thence 1420 feet north 22 degrees east, thence 920 feet north 10 degrees east, thence 955 feet north 27 degrees east, thence 996 feet north 12 degrees west, thence 1120 feet north 22 degrees west, thence 4400 feet north 25 degrees west, thence 2960 feet north 63 degrees west, thence 1570 feet north 75 degrees 30 minutes west, thence 470 feet south 18 degrees 30 minutes west, thence 4400 feet south 5 degrees west, thence 222 feet south 8 degrees west, thence 115 feet south 26 degrees west to the place of beginning, all in Cedar County, Nebraska." This description is based on a survey made in 1955. The basis of the action is claimed ownership of the land which they allege is accretion to Lot 1, Section 29, Township 33, Range 2 East in said Cedar County, Nebraska. This lot was in her lifetime the property of Margaret Jones. It descended to the heirs of Margaret Jones on her death, a part of which became the property of each of the plaintiffs by inheritance and a part

of which came to John Jones by purchase from other heirs.

After the action was filed the named defendants filed an answer and cross-petition. As to the answer nothing needs to be said except that there was a denial that the lands in question were accretion and also a denial that they belonged to the plaintiffs.

By the cross-petition the defendants made all persons having or claiming any interest in certain property parties to the action and had process duly issued and served. The description of the property in the cross-petition is as follows: "Commencing at the East Quarter Corner of Section Thirteen, Township Thirty-three North, Range One, East of the Sixth Principal Meridian in Cedar County, Nebraska, thence from the East-west center line of said Section Thirteen, an angle to the left of 86 degrees, 29 minutes, for 148.0 feet, to the point of beginning, a parcel of land bounded on the Southwest by a meander line described as follows: Commencing at the point of beginning, thence with an angle to the right, with a line between the East Quarter Corner and point of beginning, of 126 degrees, 23 minutes, for 693.6 feet, thence with an angle to the left of 34 degrees, 59 minutes, for 491.7 feet, thence with an angle to the right of 16 degrees, 35 minutes, for 473.0 feet, thence with an angle to the right of 27 degrees, 54 minutes, for 401.8 feet, thence with an angle to the right of 21 degrees, 05 minutes, for 322.4 feet, thence with an angle to the left of 4 degrees, 25 minutes, for 644.5 feet, thence with an angle to the right of 13 degrees, 59 minutes, for 1564.8 feet, thence with an angle to the left of 29 degrees 39 minutes, for 1004.3 feet, thence with an angle to the right of 5 degrees, 19 minutes, for 1241.2 feet, thence with an angle to the right of 21 degrees, 52 minutes, for 798.0 feet, thence with an angle to the right of 18 degrees, 43 minutes, for 536.7 feet, thence with an angle to the left of 63 degrees, 39 minutes, for 290.7 feet, thence with an angle to the left of 3 degrees,

41 minutes, for 691.2 feet, thence with an angle to the right of 1 degree, 25 minutes, for 959.3 feet, thence with an angle to the right of 11 degrees, 06 minutes for 806.4 feet, thence with an angle to the left of 107 degrees, 20 minutes, for 222.0 feet, to the high bank of the Missouri River, bounded on the west by a meander line described as follows: From the point of beginning, thence with an angle to the right, with a line between the point of beginning and the East Quarter Corner of Section Thirteen, of 23 degrees, 38 minutes, for 106.1 feet, thence with an angle to the left of 21 degrees, 38 minutes, for 342.9 feet, thence with an angle to the left of 1 degree, 15 minutes for 1522.0 feet, thence with an angle to the left of 0 degrees, 19 minutes, for 1182.0 feet, thence with an angle to the right of 0 degrees, 27 minutes for 1109.8 feet, thence with an angle to the left of 0 degrees, 19 minutes, for 490.15 feet, thence with an angle to the right of 13 degrees, 15 minutes, for 443.15 feet, to the high bank of the Missouri River, bounded on the north and East by the Missouri River." This description is purportedly and without dispute based on a survey made in 1958. There is a slight error. Where 401.8 feet appears should appear 410.8 feet. The error is of no real significance. The land area described in the petition is not identical with that described in the answer and cross-petition but the former is included within the latter, hence in the light of the disposition made of the issues by this opinion a description of the variance does not become important.

The purpose of the cross-action was to have title quieted in the defendant Henry Schmidt on the basis of adverse possession. The defendants Henry Schmidt and Agnes Schmidt pleaded that the defendant Henry Schmidt was the owner of the land and that he had been in open, notorious, exclusive, adverse, and continuous possession thereof under color of title and claim of ownership for more than 10 years before the commencement of the action.

The plaintiffs generally denied the allegations of the answer and cross-petition.

The action was tried to the court and a decree was rendered wherein title was quieted to the land in Henry Schmidt against Agnes Schmidt, each of the plaintiffs, and all of the parties who were made defendants pursuant to the filing of the cross-petition. From the decree the plaintiffs have appealed. None of the additional parties have appealed.

From this it becomes apparent that the questions before the court are those of whether or not the plaintiffs are entitled to prevail on the ground that they are owners of these lands as accretion to Lot 1, Section 29, Township 33, Range 2 East, Cedar County, Nebraska, or whether or not Henry Schmidt is the owner by reason of adverse possession. It is not disputed that the plaintiffs are the owners of the original Lot 1.

In Stratbucker v. Junge, 153 Neb. 885, 46 N. W. 2d 486, it was said: "Plaintiff in an action to quiet title has the burden of proof and he must recover upon the strength of his title and not because of any weakness in the title of his adversary." This pronouncement was made with reference to the question of whether or not there was a sufficiency of proof of accretion. From this it becomes clear one claiming that land is accretion has the burden of so proving by a preponderance of the evidence in an action to quiet title to the land. See, also, Stull v. Goold, 96 Neb. 263, 147 N. W. 468; Durfee v. Keiffer, 168 Neb. 272, 95 N. W. 2d 618.

It becomes necessary therefore to examine the evidence and therefrom ascertain whether or not the plaintiffs have sustained the burden of proving that this land is accretion to Lot 1.

It is pointed out here that the original Lot 1 is a narrow strip of land lying along the east line of Section 29, Township 33, Range 2. It does not extend either to the north or to the south line of the section. Its length is north and south and its width is east and west. Lot 1

was originally the western end of St. Helena Island, an island in the Missouri River. The Missouri River in this area comes down generally from the northwest and extends to the east and southeast. At one time in this area the river had two channels, one of which passed to the north of St. Helena Island and the other to the south. In an area which extended upward or westward and northwestward the river channels, in the course of nature, moved about in such manner as to interfere with and at times destroy surface structures of land and to bring into being others. Some of the new structures came into being with suddenness, and others imperceptibly by addition over long periods of time to other structures or by the lowering of the level of the water boundary. In the case here the concern, to the extent it is related to plaintiffs' cause of action, is with the latter, or what is termed accretion.

"Accretion is the process of gradual and imperceptible addition of solid material, called alluvion, thus extending the shore line out by deposits made by contiguous water, or by reliction, the gradual withdrawal of the water from the land by the lowering of its surface level from any cause." Burket v. Krimlofski, 167 Neb. 45, 91 N. W. 2d 57. See, also, Durfee v. Keiffer, *supra.*

Extending westward for about a mile from Lot 1 is an area or strip of land the width of which is not clearly disclosed. The direction of extension is somewhat northwest but since the general direction is westward, west will be employed for convenience. This extension is upstream of the Missouri River. At the upper end of this area the strip narrows for an uncertain distance. This narrower area is referred to in the evidence as the neck. The width of this neck is not certain but there is evidence that the distance across it in 1936 was ¼ mile or more, in 1955 about 156 feet, and in 1958 about 222 feet. Above the neck the land area becomes wider until a width of approximately one and one-half sections of land is reached.

Title to the land extending from Lot 1 to the indicated location about 1 mile west is not in issue in this case. The plaintiffs however contend that this strip of land together with the land to the west thereof and generally described by boundaries as follows is accretion to Lot 1 and that accordingly and on that ground they are entitled to have title thereto quieted in them: The northern boundary starts in section 20 about ¼ mile east of the southwest corner of section 20 and a short distance north of the south line of section 20. (This is about 1 mile northwest of the west end of Lot 1.) From there it follows the high bank of the river generally northward to the north line of section 20, thence north and a little bit east across about the south half of section 17, thence in a general northwesterly direction to a point slightly north of the east and west half-section line of section 7 and about 250 feet east of the township line which forms the west boundary of sections 7, 18, 19, and 30, thence south to a point about 150 feet north of the east and west half section line of section 18, thence in a meandering course but generally in a southeasterly direction to the point of beginning of this description.

It is pointed out again that this description is of land which falls within the description contained in the petition of the plaintiffs and also the description contained in the answer and cross-petition of the defendants.

It perhaps should also be pointed out that the reason for the use of approximations as to distances and locations is that the evidence is not in such condition as to permit, in these areas, a greater degree of certainty.

The right of the plaintiffs to prevail in their action depends upon whether or not they have sustained their burden of proving that the lands in dispute are accretion to Lot 1. This burden required proof that the first mile west was accretion and that the land on to the west was built up by a continuation of the accretion process.

The record discloses that title to Lot 1 was obtained

by William C. Jones in April 1895; that it was transferred by him by deed to Margaret Jones, his wife, in October 1908; that William C. Jones died in November 1913; that Margaret Jones died in February 1935; and that the deed from William C. Jones to Margaret Jones was recorded in August 1936. Without going into further detail it is made to appear, and no one disputes it, that the plaintiffs are the owners of Lot 1 and the accretion, if any, thereto by inheritance and by purchase under an unbroken chain of title extending back to the year 1895.

To prove the cause of action of plaintiffs, seven witnesses were called. Two of these were the plaintiff John Jones and his brother, Joseph Jones. Their ages were respectively 64 and 66 years at the time of the trial. Neither of these witnesses gave any factual testimony as to observations over the years which demonstrated or from which a reasonable inference could flow that the lands in question could be accretion to Lot 1. No other witness gave any such testimony. It is true that witnesses testified as to some topographical conditions and relative variations in the water elevation at different times, but none of this bears a probative relation to accretion.

It is pointed out that the plaintiffs did not call as a witness any surveyor or engineer, and on this account there was no opinion based upon engineering examination and analysis that the land involved here was accretion to Lot 1.

There was a total failure of proof on the part of plaintiffs that the land to which they seek to have title quieted in them was accretion to Lot 1. It follows that for this failure of proof the relief sought by the plaintiffs must be denied.

This failure of proof is sufficient to deny the plaintiffs any relief, but it appears proper to say that competent evidence of the defendants, which is not contradicted by anything else of probative value in the

record, appears to characterize the land in question, if it is in fact in whole or in part accretion, as accretion to land above and not to land below. There was no effort to delineate with certainty what had taken place over the years in the area above, but it was made clear that the westermost line of the area involved was a line between this and other land farther west to which it was attached of which it was an eastern continuation. Whether or not this land to the west at the time on which the testimony of the witness is based was in the nature of a portion of an island does not clearly appear. The same is true of the land involved here. Insofar as the plaintiffs' cause of action is concerned it is of no controlling importance, since as has been indicated if the plaintiffs are to recover they must do so on proof of accretion to Lot 1 and not on any weakness in the title of another. This supports the conclusion already arrived at that the plaintiffs may not be allowed to recover on their pleaded cause of action.

We come now to a consideration of the question of whether or not the defendants or either of them are entitled to have title quieted in them to the land area described in their answer and cross-petition on the ground of adverse possession.

A party, in order to establish title to real property by the operation of the statute of limitations, or in other words by adverse possession, must prove that he has been in actual, continuous, notorious, and adverse possession of the property under claim of ownership during the full period required by the statute. See, Lewon v. Heath, 53 Neb. 707, 74 N. W. 274; Worm v. Crowell, 165 Neb. 713, 87 N. W. 2d 384; Burket v. Krimlofski, *supra.*

In order to establish title by adverse possession it is not necessary that a party shall prove a complete enclosure nor that he remained continuously on the land for the statutory period, but only that the land was used continuously for the purposes to which it was by its

nature adapted. See, Lantry v. Parker, 37 Neb. 353, 55 N. W. 962; Lewon v. Heath, *supra;* Walker v. Bell, 154 Neb. 221, 47 N. W. 2d 504; James v. McNair, 164 Neb. 1, 81 N. W. 2d 813; Thomas v. Flynn, 169 Neb. 458, 100 N. W. 2d 37.

The statutory period for the establishment of title to real estate by adverse possession is 10 years. See, § 25-202, R. R. S. 1943; Ellsworth Corporation v. Stratbucker, 134 Neb. 246, 278 N. W. 381.

It is pointed out here that the defendant Agnes Schmidt makes no claim of any interest in this land in her own right. She is the wife of Henry Schmidt. For the further purposes of this opinion Henry Schmidt will be referred to as the defendant unless there is a departure with attention called to it.

The defendant testified that in 1927 he went on and used for pasture the described land at the upper or west end or immediately east of the township line to which reference has been made herein; that at that time the land area extended about ½ mile eastward and was bounded on the east by water which extended north and south and entirely surrounded the area occupied at that time; that thereafter the land built out and up from the northwest to the southeast and to the north until the entire area described in the answer and cross-petition had been built up; that, without going into great detail but in summary, as it built up he used, occupied, and claimed it as his own; that he used the area for pasture and on it he cleared different areas which he used for the production of crops; that the area thus used, occupied, and claimed was built up at least as early as 1942; and that at no time theretofore or since has he abandoned, surrendered, or released his possession, occupancy, or claim of title to this area.

The testimony of the defendant with regard to possession, use, and occupancy of this land is corroborated by the testimony of other witnesses.

This evidence of possession, use, and occupancy stands

without substantial refutation. There is however some testimony to the effect that the defendant was not occupying the land under claim of ownership but under an oral agreement made with him on behalf of the heirs of William C. Jones or of Margaret Jones for the years 1931 and 1932 by Joseph Jones, a son of William C. and Margaret Jones, and thereafter by John Jones, one of the plaintiffs. The evidence in this connection is that there was no arrangement for rental, but only that there was bare permission given to the defendant to use the land without any reasonably informative evidence as to when or where these incidents took place. This evidence relative to purported agreements was denied by the defendant.

On its face, in the light of the uncertainty and the manner in which this evidence appears, it must be concluded, as undoubtedly the trial court did conclude, that this may not be regarded as credible. In this connection it is pointed out that none of the plaintiffs or their predecessors in interest in Lot 1 ever did or attempted to put to use any of the land claimed by the defendant.

There is evidence that in 1953 the plaintiff John Jones requested a lease upon this land from the defendant or to have the defendant pay $10 or $15 as rental for the land.

The defendant refused to sign the proffered lease or to comply with the request for payment of rent.

There is no evidence of probative value that anyone ever attempted to oust the defendant from possession of the land until August 1953. In August 1953, the plaintiff John Jones requested him to deliver possession on March 1, 1954. There was no compliance with this request. Notice to quit was served in September 1955. Thereafter the plaintiff John Jones instituted forcible entry and detainer proceedings against the defendant to obtain possession of the land. A defense to the action was that the defendant was the owner. The fact that there was resistance in that instance is disclosed

by the opinion in Jones v. Schmidt, 163 Neb. 508, 80 N. W. 2d 289. The record discloses that in each and every instance where there was an effort to oust the defendant from possession of the land in whole or in part there was resistance which was successful.

From the entire record it becomes apparent that within the meaning of the law the defendant possessed and occupied this land under such conditions and for a sufficient period of time as to cause the title thereto to vest in him.

The judgment of the district court is therefore affirmed.

AFFIRMED.

IN RE ESTATE OF OLIVER C. MCVEY, DECEASED. COUNTY OF KEITH, APPELLEE, V. JOHN M. CREAMER, EXECUTOR OF THE ESTATE OF OLIVER C. MCVEY, DECEASED, APPELLANT.

102 N. W. 2d 632

Filed April 29, 1960. No. 34766.

1. **Statutes.** Where a right has been created by statute, which did not exist at common law, the Legislature may impose restrictions thereon, and the conditions so imposed qualify and limit the right and must be fully complied with in the manner prescribed.
2. **Insane Persons.** There is no common-law liability of a parent for support of an insane relative, and the statutory procedure for determining and fixing such a liability must be strictly followed.
3. ———. Under section 83-352, R. R. S. 1943, providing a procedure for imposing liability on a parent for the care and maintenance of an insane child in a state hospital, investigation and determination by the county board to determine ability of a parent to pay without depriving dependents of necessary support is a condition precedent to the attaching of liability.
4. ———. Where conditions precedent contained in section 83-352, R. R. S. 1943, have not been complied with during the lifetime of a relative sought to be charged, no absolute liability attaches to the relative nor to his estate.

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

George B. Hastings and *Fred E. Wanek,* for appellant.

Firmin Q. Feltz, for appellee.

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

CARTER, J.

This is an appeal from the allowance of a claim by the county of Keith against the estate of Oliver C. McVey, deceased, in the amount of $6,067.66 and interest, for the maintenance of Edward Hamilton McVey, a son of Oliver C. McVey, who was committed to the Hastings State Hospital as an insane person.

The case is presented on stipulations of fact. The essential facts are: Edward Hamilton McVey, whom we shall hereafter refer to as Edward, was an adult son of Oliver C. McVey when he was adjudicated insane and committed to the Hastings State Hospital on June 10, 1939. Edward had no estate or income with which to pay the cost of his care and maintenance. Edward remained continuously in the hospital to and after the death of Oliver C. McVey on October 20, 1958. During the times herein mentioned Oliver C. McVey was possessed of an estate and income sufficient to pay the cost of Edward's care and maintenance in the hospital without depriving those dependent upon him of their necessary support. The county of Keith paid the cost of the care and maintenance of Edward in the hospital. There is no dispute as to the correctness of the amount. No attempt was made by the county to collect from Oliver C. McVey during his lifetime. After the latter's death and on November 18, 1958, the county of Keith filed its claim in the estate of Oliver C. McVey, deceased, for the care and maintenance of Edward for the 4 years immediately preceding the death of Oliver C. McVey. The claim was

allowed by the county court. On appeal to the district court the claim was also allowed. The present appeal to this court resulted.

It is the contention of the executor of the estate of Oliver C. McVey, deceased, that the estate of a deceased parent is not liable for the care and maintenance of an insane son in a state hospital where the amount is neither fixed nor determined during the lifetime of the parent. This appears to be the only issue before the court on this appeal.

There was no right at common law to recover the cost of care and maintenance of insane persons from the insane person or his estate, or from the relatives of such person. The claim here arises by statute, section 83-352, R. R. S. 1943, and, it being in derogation of the common law, it must be strictly construed against the county. Where a right has been created by statute which did not exist at the common law, the Legislature may impose restrictions upon the right, and the restrictions imposed are a limitation upon such right. Unless such restrictions are fully complied with in manner prescribed, the right does not exist. Clay County v. Bottorf, 166 Neb. 262, 88 N. W. 2d 898.

Plaintiff relies upon section 83-352, R. R. S. 1943, as authority for sustaining this proceeding. It contains these relevant provisions: "If any patient in a state hospital for the mentally ill, or the * * * parent of such patient, is possessed of an estate and income sufficient to meet the expense of the patient's care and maintenance in the hospital without depriving those dependent upon such patient or relative of their necessary support, the guardian, * * * or parent of such patient shall pay to the superintendent of the hospital * * * a sum to be fixed by the Board of Control * * *. If any patient is being maintained * * * and the patient * * * or parent of such patient, is possessed of an estate or income sufficient to meet the expense of the patient's care and maintenance without depriving those dependent upon such patient

or relative of their necessary support, the guardian * * * or parent of such patient shall pay to the county a sum equal to the cost of maintaining the patient * * *. The amounts to be paid under this section shall constitute a claim against the estate of the patient and be collectible therefrom. * * * It shall be the duty of the county board of each county to investigate all unpaid claims and cause action to be brought in the name of the county by the county attorney to recover thereon, where it is probable that some recovery can be made." It will be observed that this statute grants no cause of action in terms against the estate of a deceased parent, although such an action against the estate of the patient is authorized. We point out also that the liability of a parent is a conditional one. An investigation and determination by the county board that the parent is possessed of an estate or income sufficient to meet the expense of the patient's care and maintenance without depriving those dependent upon the parent of their necessary support, is a condition precedent to liability.

It is the contention of the county that a cause of action arose against Oliver C. McVey as each quarterly payment accrued and, such statutory cause of action being remedial, it survives the death of the parent. We do not concur in this view.

Section 83-352, R. R. S. 1943, has a long legislative history. There was a time when the cause of action against a spouse or designated relative did survive by virtue of the language of the then existing statute. Richardson County v. Frederick, 24 Neb. 596, 39 N. W. 621; Richardson County v. Smith, 25 Neb. 767, 41 N. W. 774. But the statute applicable during the period of the present claim contained no language to such effect. We recently construed this statute as follows: "The statute above quoted is indispensable to the cause of action asserted by appellee. It creates a right that did not exist at common law. It requires as a condition

precedent to the existence and enjoyment of the right that the incompetent be possessed of an estate and income sufficient to meet the expense of the incompetent's care and maintenance in the hospital without depriving those dependent upon him of their necessary support. This is not a matter of defense to be pleaded and established by the incompetent or his guardian. It is by the statute made a condition of the right and of the remedy." Clay County v. Bottorf, *supra*. Under such interpretation no obligation accrued against Oliver C. McVey until the conditions precedent had been met, to wit, an investigation by the county board and a determination that Oliver C. McVey was possessed of an estate and income sufficient to meet the expense of the care and maintenance of Edward in the hospital without depriving those dependent upon the parent of their necessary support. This not having been done, the statutory conditions precedent to liability were not complied with and no liability attached during the lifetime of Oliver C. McVey. The liability of Oliver C. McVey, not having been fixed and determined in his lifetime, there is no liability that can afford a basis of claim against his estate.

In the case of Estate of Hahto, 236 Wis. 65, 294 N. W. 500, the Supreme Court of Wisconsin had the same issue under a similar statute before it. The court said: "In support of the claim that the liability of the wife is a fixed liability and attached to her estate, appellant urges that (the statute) creates an obligation upon the wife to support her insane husband regardless of an intermediate determination of the appellant to pay made by the collection and deportation counsel. This contention overlooks the requirements that the determination is to follow giving due consideration to those who may be lawfully dependent for their support upon the property discovered by the counsel in his investigation. * * * In referring to the liability of an inmate for his own support, the words 'or his estate' are used, but these words are missing in the reference to liability of

relatives. It is considered that the legislature did not intend to rest the liability regardless of any and all considerations upon the relatives, but intended to make them liable only after consideration of the circumstances pointed out in the statute had been given which resulted in a determination of the collection counsel that the ability of the relative is such that the obligation or a portion of it ought to be visited upon that relative. An inmate himself during his life and his estate after his death are to account for his care at public expense, but no such absolute arrangement in connection with the relatives' obligation exists. * * * The trial court held that an investigation and a determination with reference to the making of a claim must occur during the lifetime of the relative sought to be charged, and with that we agree." We accept the reasoning in the foregoing case as a correct statement of the law.

Where a right has been created by statute which did not exist at the common law, the Legislature may impose restrictions thereon, and the conditions so imposed qualify and limit the right and must be fully complied with in the manner prescribed. Duhrkopf v. Bennett, 108 Neb. 142, 187 N. W. 813. The statute, section 83-352, R. R. S. 1943, makes the conditions thereof a prerequisite of the right and the remedy. Clay County v. Bottorf, *supra*. The investigation and determination by the county board of a parent's ability to pay without depriving his dependents of necessary support is a condition precedent to a recovery. Since this condition was not complied with during the lifetime of the parent sought to be charged, no absolute liability attached to the parent nor to his estate. State ex rel. Cromwell v. Panzeri, 76 Ida. 211, 280 P. 2d 1064.

The judgment of the district court is reversed and the cause remanded with directions to dismiss plaintiff's petition at plaintiff's costs.

REVERSED AND REMANDED WITH DIRECTIONS TO DISMISS.

FRANK H. KUCERA, PLAINTIFF IN ERROR, V. STATE OF NEBRASKA, DEFENDANT IN ERROR.

102 N. W. 2d 635

Filed April 29, 1960. No. 34772.

Criminal Law: Trial. It is the duty of the court to instruct the jury on the law of the case, whether requested so to do or not; and an instruction or instructions which, by the omission of certain elements, have the effect of withdrawing from the consideration of the jury an essential issue or element of the case, is erroneous; but where the jury is instructed generally upon the law, and when the instructions given do not have the effect above stated, error cannot be predicated upon the failure of the court to charge upon some particular phase of the case unless a proper instruction was requested by the party complaining.

ERROR to the district court for Platte County: ROBERT D. FLORY, JUDGE. *Affirmed.*

Wagner & Wagner, for plaintiff in error.

Clarence S. Beck, Attorney General, and *John E. Wenstrand*, for defendant in error.

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

MESSMORE, J.

Plaintiff in error, Frank H. Kucera, hereinafter called the defendant, was charged by a complaint filed in the justice court for Platte County, Nebraska, with operating a motor vehicle on or about June 21, 1959, on a highway outside of a city or village at a rate of speed exceeding 55 miles an hour between the hours of sunset and sunrise, to wit, at 72 miles an hour, contrary to law. The case was tried to a jury. The jury returned a verdict finding the defendant guilty as charged. The court assessed a fine in the amount of $31 and costs against the defendant. The defendant appealed to the district court. The case was tried in the district court to a jury. The jury returned a verdict finding the defendant guilty. The defendant filed a motion to vacate the verdict and

grant the defendant a rehearing, which motion was overruled by the trial court. The trial court assessed a fine of $35 and costs against the defendant. The defendant brings his case to this court by petition in error.

The record discloses that Claude Whitney, a sergeant connected with the Nebraska Safety Patrol, was on duty on the shift from approximately 4 p.m., June 20, to 2 a.m., June 21, 1959; that he was working traffic on U. S. Highway No. 30 in Platte and Colfax Counties; that he and trooper Earl Dughman had a radar speedmeter unit set up approximately 4 miles east of Columbus, just to the west of the Loup River Public Power Company canal, on the north shoulder of the highway facing southwest, between 25 and 40 feet west of a driveway immediately adjacent to the bridge, and used by the power company to service its canal; that the radar unit must be operated by at least two officers, one in charge of the radar meter and the other to operate a pursuit car; that the two officers in charge keep contact by two-way radio which allows the officers to talk to each other; and that Dughman operated the radar meter and Whitney was in charge of the pursuit car. The pursuit car was situated slightly to the east and generally to the north in the driveway to the Loup River Public Power Company canal, and back in the driveway a distance of approximately 50 yards. The officers in charge of the radar speed meter tested the meter by driving at a constant speed of 55 miles an hour east and west through the radar zone to ascertain if it was working properly, and it was.

Sergeant Whitney testified that he received a radio message from Dughman that a 1950 Chevrolet car traveling east had checked through the radar zone at 72 miles an hour; that at the time the defendant's car passed through the radar beam, this witness was parked facing the highway, looking to the south, and the area in front of him was under his observation; that he saw the car operated by the defendant pass through the immediate

area of the radar zone, and kept defendant's car within his vision during the time that Dughman radioed the message to him; and that the defendant's car did not leave his vision after he saw it passing the radar beam. He further testified that there were no other vehicles in the immediate area which passed through the radar beam at the same time the defendant's car passed through it; that no car followed the defendant's car through the radar beam; and that he followed and stopped the defendant's car, wrote a summons ticket for the defendant to appear in justice court in Platte County, and returned to his station.

On cross-examination this witness testified that he traveled a little over a mile to catch the defendant's car; and that the defendant did mention that a car had passed him between Columbus and the canal and the officer could probably overtake such car which was traveling east. This witness testified on redirect examination that he had no description of the car and would not have known what car to look for if he had pursued it.

Earl Dughman, a member of the Nebraska Safety Patrol and on duty at the same time as sergeant Whitney, that is, from 4 p.m., on June 20, until 2 a.m., on June 21, 1959, testified that he was in charge of the radar speed meter; that he was sitting in his patrol unit approximately 60 feet to the north of the radar unit which was facing in a southwesterly direction; and that his vision was not obscured to the west and was good for approximately three-quarters of a mile to the east. He further testified that about 1 a.m., on June 21, 1959, just before the defendant's car passed through the radar zone he was watching it travel down the highway; that the traffic was light; that the lights of the defendant's car were on; that he watched the car for some distance before it passed through the radar beam; and that he obtained a reading of 72 miles an hour from the radar meter at the time the defendant's car passed

through the radar beam. He further testified that he notified Whitney by radio, and Whitney acknowledged his communication; and that there was no other car passing from the east at the time the defendant's car passed through the radar beam.

On cross-examination this witness testified that when a car passed through the radar zone the speed of that vehicle would be registered at that time, and when that car passed out of the scope of the radar meter, if a second car was still within the scope of the radar meter the machine would register the speed of the second car passing through the radar zone; and that if the second car was going faster than the first car, and entered the radar zone while the first car was partly, or any distance, within the radar zone, the radar meter would read the first car until it got out of the scope of the radar zone, then the second car's speed would be registered by the radar machine.

On redirect examination this witness testified that when a car passes through the 170-foot radar beam, it is a fair statement to say that the radar meter will register the first car passing through until that car gets out of the radar beam, and then the radar meter picks up the second car if it is within the beam or just entering the radar beam. On recross examination this witness testified that if the second car would tie the first car, and then pass it at the point of the radar beam, the radar speed meter would stop reading the first car and register the speed of the second car passing through the radar beam.

The defendant, John F. Holub, and John G. Kucera are musicians. On the evening of June 20, 1959, they were entertaining in a tavern in Columbus. They were required to be out of the tavern by 1 a.m. When they left Columbus they were all sitting in the front seat of the defendant's car. Holub was to the defendant's right, John G. Kucera was to Holub's right, and the defendant was driving the car.

The defendant testified that he owned a 1950 Chevrolet car and had owned it for over 4 years; that the speedometer of this car registered 85,000 miles; that when he drove his car from Columbus, he drove on the Lincoln Highway; that while doing so, two cars passed him; that the first car passed him about 1 mile west of the canal, and the second car passed him right close to the canal; that the cars were close together; and that the second car passed on the left side of him just west of the canal. When the second car had passed them, Holub said: "Look at that boy going. * * * Here we go only 47 miles, and look at him where he is already." He further testified that the speed of his car was 46 or 47 miles an hour; that he always kept the speed of his car under 50 miles an hour; that the patrol officer stopped him not quite a mile from the canal; that after the officer stopped him he rolled the window of his car down and told those riding with him he wondered what had happened, it must be a taillight; and that he asked the officer what the trouble was and the officer told him that the radar meter registered the speed of his car at 72 miles an hour, and that he was speeding. The defendant told the officer that two cars had passed him at a high rate of speed, but the officer would not listen to him and requested his driver's license which he gave to the officer. The defendant further testified that after his arrest he tested his car for speed and got it up to 65 miles an hour and it sputtered and missed; that he could not get it to a speed of 70 miles an hour; and that he never drove over 50 miles an hour.

John F. Holub testified that after he, the defendant, and John G. Kucera left Columbus in the defendant's car and proceeded down the highway, a car passed them at a speed of about 80 miles an hour while defendant's car was going at 47 miles an hour; and that as they arrived near the canal another car passed them. After proceeding almost a mile beyond the canal, a patrol officer drove along beside them and stopped them. This

witness asked the patrol officer what the trouble was, and he said "speeding." This witness told the patrol officer that he was mistaken. He further testified that the defendant's car was traveling at a rate of speed of 47 or 48 miles an hour. He also testified that at no time when he looked at the speedometer was it ever showing over 50 miles an hour.

John G. Kucera testified that when the patrol officer stopped the defendant's car, the defendant told the officer about the two cars which had passed his car; that the cars were going very fast between Columbus and the canal, and were ahead of him; that the officer had the wrong car; and that the officer should catch the cars which had passed the defendant. He further testified that the two cars which passed the defendant's car were going very fast. This witness could not tell the make of the cars that passed the defendant's car, but the license plates showed they were from county 43. One of the cars passed the defendant's car about a mile west of the canal and the second car passed the defendant's car right at, or just west of, the canal. Holub said: "Look how this man is traveling." Holub then looked at the speedometer and said: "We are going only 47 miles an hour, * * *." This witness also looked at the speedometer and it indicated 47 miles an hour. He further testified that the defendant usually kept the speed of his car between 45 and 50 miles an hour; and that the defendant's speed just before his car was stopped by the patrolman was 47 miles an hour.

The defendant predicates error on the giving of instructions Nos. 1 and 6. The defendant also predicates error on the failure of the court to instruct on the issue as to whether the speed registered on the radar meter was reflected by the defendant's car or by another car. Other assignments of error are interrelated to the above and need not be set forth.

The defendant contends that the real issue in the case is, did the defendant's car go through the radar

zone at the same time as another car, and did the other car make the record as shown on the radar meter? The defendant also contends that the trial court failed to present that issue to the jury, and consequently withdrew the real issue from the jury.

Instruction No. 1, in part, charged the jury in the language used by the complaint, stated that the defendant pleaded not guilty, and that the trial was for the purpose of determining his guilt or innocence. The statement in instruction No. 1 was purely informative and true. There was no error in this instruction. See Smith v. State, 169 Neb. 199, 99 N. W. 2d 8.

Instruction No. 6 given by the trial court reads as follows: "The laws of Nebraska provide that the speed of any motor vehicle being driven upon any public street or highway may be determined by the use of radio-micro waves or other electronic device, and that the results of such determination shall be accepted as prima facie evidence of the speed of such motor vehicle in any court of (sic) legal proceedings where the speed of the motor vehicle is at issue. Such electronic devices are what is commonly called radar.

"Prima facie evidence is such evidence as, in judgment of law, is sufficient to establish the fact; and, if not rebutted, remains sufficient for the purpose.

"This does not mean that testimony, based upon the use of radar, is necessarily conclusive proof of the speed of the defendant's vehicle, but it is your duty to weigh such evidence together with all other evidence in relation to the guilt or innocence of the defendant, giving it such weight as it is entitled to receive under all the facts and circumstances. Neither does such evidence have the effect of shifting the burden of proof, which is always upon the State to prove the guilt of the defendant beyond a reasonable doubt."

Section 39-7,108.02, R. S. Supp., 1957, provides in part: "The speed of any motor vehicle being driven upon any public street or highway may be determined

by the use of radiomicro waves or other electronic device. The results of such determinations shall be accepted as prima facie evidence of the speed of such motor vehicle in any court or legal proceedings where the speed of the motor vehicle is at issue."

It will be noted that instruction No. 6 corresponds in part to the section of the statute as above set out.

The defendant's position is that the court was under a mandatory duty to give an instruction on the defense that a car other than the one belonging to the defendant went through the radar zone and registered the speed of 72 miles an hour, and the court's failure to do so constituted prejudicial error.

The defendant did not tender any instructions to the district court.

This court in Planck v. State, 151 Neb. 599, 38 N. W. 2d 790, quoted with approval from Jones v. State, 147 Neb. 219, 22 N. W. 2d 710, as follows: " 'The rule is well established that it is the duty of the court to instruct the jury on the law of the case, whether requested so to do or not; and an instruction or instructions which, by the omission of certain elements, have the effect of withdrawing from the consideration of the jury an essential issue or element of the case, is erroneous; but where the jury is instructed generally upon the law, and when the instructions given do not have the effect above stated, then error cannot be predicated upon the failure of the court to charge upon some particular phase of the case unless a proper instruction was requested by the party complaining.' " See, also, Sedlacek v. State, 147 Neb. 834, 25 N. W. 2d 533, 169 A. L. R. 868; Smith v. State, *supra.*

In Smith v. State, *supra,* this court said: " 'Where the trial court has instructed generally as to the issues in a criminal prosecution, error can not be predicated on its failure to instruct as to a particular phase of the case, where no proper instruction has been requested by the party complaining.' Martin v. State, 67 Neb. 36, 93

N. W. 161. See, also, Frades v. State, 131 Neb. 811, 270 N. W. 314."

From an analysis of the entire charge to the jury in the instant case, we conclude that the instructions complained of do not constitute prejudicial error.

The jury heard all of the evidence and determined that the defendant was guilty as charged. We find no prejudicial error in the record. The judgment of the trial court should be, and is, affirmed.

AFFIRMED.

STATE OF NEBRASKA EX REL. CLARENCE S. BECK, ATTORNEY GENERAL, PLAINTIFF, V. PHILIP B. LUSH ET AL., DEFENDANTS.
103 N. W. 2d 136

Filed May 6, 1960. No. 34257.

1. **Judgments.** A judgment or decree rendered by consent of the parties is valid if requirements establishing its validity have been met.
2. ———. A consent decree is as much a final decree and as conclusive upon the parties as is one which has been rendered after a hearing on the merits.
3. **Injunctions: Contempt.** An injunction granted by a judge may be enforced as the act of the court, and disobedience thereof may be punished as a contempt by the court.
4. **Injunctions.** A party who has knowledge of an injunction and is in privity with a party enjoined is bound thereby.

Original action. On stipulation for consent decree. *Consent decree approved.*

Clarence S. Beck, Attorney General, *Robert A. Nelson,* and *John S. Samson,* for plaintiff.

Crosby, Pansing & Guenzel and *Chauncey E. Barney,* for defendants.

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

YEAGER, J.

This is an original action which was instituted by the State of Nebraska on relation of Clarence S. Beck, Attorney General, plaintiff, against Philip B. Lush; Gail A. Clinkenbeard; Grand Lodge Brotherhood of Railroad Trainmen; Subordinate Lodge No. 853, Falls City, Nebraska; Subordinate Lodge No. 400, Fairbury, Nebraska; Subordinate Lodge No. 190, Chadron, Nebraska; Subordinate Lodge No. 170, Lincoln, Nebraska; Subordinate Lodge No. 134, Grand Island, Nebraska; R. J. Groves; F. A. Arnold; W. G. Griffin; D. G. Klein; and W. Stull, defendants. The defendant Lush is a lawyer who was, until January 1, 1956, the legal regional representative of the defendant Grand Lodge Brotherhood of Railroad Trainmen in Minneapolis, Minnesota, which organization is located in Cleveland, Ohio, with subordinate organizations or lodges in the State of Nebraska and elsewhere; the defendant Clinkenbeard is a regional investigator of the Grand Lodge; the named defendant subordinate lodges are representatives of the Grand Lodge; and the remaining named defendants are the representatives of the designated subordinate lodges. Other defendants were named in the proceedings as originally instituted but they have not been brought before the court by legal process and there has been no general appearance by them in the action.

The action was instituted on May 10, 1957, by the filing of an information, an affidavit, and a motion for a citation of the defendants for contempt of court. These were filed on behalf of the plaintiff by Clarence S. Beck, Attorney General, as relator. Hereinafter the State of Nebraska will be referred to as plaintiff.

The basis of the action will not be set out in great detail. Only sufficient of it will be related herein to adequately present an understanding of what is presented at this time. The action at its inception was twofold. First, it was charged in the presentation that the defendant Lush as an attorney at law and regional

representative of the Grand Lodge Brotherhood of Railroad Trainmen, Clinkenbeard as representative of the Grand Lodge, the five defendant subordinate lodges through their representatives who were the other named defendants, and these five defendants had engaged in the practice of soliciting in the State of Nebraska of persons having claims against railroads to allow themselves to be represented in actions to recover on the claims against the railroads by attorneys and agents of the choice of the defendants, contrary to law and to the established ethics of the legal profession. On this account it was charged that the defendants were in contempt of court.

In the second phase it was substantially charged that the defendants were and would continue to be engaged in the unlawful and unethical practices which were the basis for the charge of contempt. On this account the plaintiff sought injunctive process to prevent and prohibit these practices.

In the action issues were joined and other proceedings had which do not require description herein. After these proceedings were had and in April 1960, the plaintiff by its attorney and the defendants by their attorneys entered into a stipulation for the rendition and entry of what is termed a consent decree which if rendered and entered will fully dispose of the issues presented which have been briefly described herein. The proposed decree was presented with the stipulation, and consent thereto is recited therein.

Under the law of this jurisdiction a judgment or decree rendered by consent is valid if requirements establishing its validity have been met. This subject was discussed at length in McArthur v. Thompson, 140 Neb. 408, 299 N. W. 519, 139 A. L. R. 413. In the opinion the following was quoted with approval from 19 Am. Jur., Equity, § 407, p. 280: " 'Decrees are frequently entered on consent of the parties; and where this practice has been followed, the fact should be recited in

the decree. Having been entered, such a decree is binding on the consenting parties; it cannot be reviewed except on a showing that consent was obtained by fraud or that the decree was based on mutual error. A consent decree is as much a final decree and as conclusive upon the parties as is a decree which has been rendered after a hearing on the merits.' " See, also, Clark v. Charles, 55 Neb. 202, 75 N. W. 563; 49 C. J. S., Judgments, § 178, p. 314.

Examination of the issues presented by the pleadings and an application thereto of the law and of the Canons of Professional Ethics discloses that the proposed decree contains the essential requirements to the validity of a consent decree. Among other requirements, not necessary to set out here, the acts which are the subject of the proposed decree are, under law and the Canons of Professional Ethics, subject to the injunctive processes no matter by whom committed.

The following from the proposed consent decree contains the disposition of the issues which were before the court for consideration before the presentation of the stipulation and the proposed decree:

"IT IS THEREFORE ORDERED, ADJUDGED AND DECREED:

"(1) That motion for citation for contempt be and the same is hereby dismissed as to each defendant.

"(2) That in the procurement of a case within the State of Nebraska the defendants, Grand Lodge Brotherhood of Railroad Trainmen, Subordinate Lodge No. 134, Grand Island, Nebraska; Subordinate Lodge No. 170, Lincoln, Nebraska; Subordinate Lodge No. 190, Chadron, Nebraska; Subordinate Lodge No. 400, Fairbury, Nebraska; Subordinate Lodge No. 853, Falls City, Nebraska, Gail A. Clinkenbeard, R. J. Groves, F. A. Arnold, W. G. Griffin, D. G. Klein and W. Stull and all persons acting by, through and under them or either of them are hereby jointly and severally permanently enjoined and restrained from:

"a. Telling any person or his representatives that said person has a cause of action, the amount he is entitled to recover, where suit should be filed, or doing any other act or thing which constitutes the practice of law within the State of Nebraska;

"b. Negotiating or attempting to negotiate contracts of employment for legal services on behalf of any lawyer or lawyers;

"c. Accepting pay or any gratuity or benefit whatsoever, directly or indirectly, from any lawyer, person or organization for services in obtaining contracts of employment for legal services;

"d. Loaning or advancing or promising to loan or advance money to any person or his representative pending trial or settlement of his claim or suit either personally or for or on behalf of any other person;

"e. Displaying, exhibiting, or showing copies or photographs of checks, releases, newspaper accounts or other data concerning settlement made on behalf of other claimants for the purpose of inducing any person, or his representatives, or which may tend to induce said person, to enter into contracts for the legal services of any lawyer;

"f. In any way or any manner in concert with any resident or nonresident lawyer conspire to violate the laws of Nebraska or the Canons of Legal Ethics imposed by the Courts on lawyers licensed to practice law in the State of Nebraska.

"g. In any way or in any manner violate or aid or abet the violation of the provisions of Paragraph (2) of this decree.

"(3) That in the procurement of a case within the State of Nebraska the defendant, Philip B. Lush as an individual and as a lawyer admitted to the practice of law within the State of Minnesota, and all persons acting by, through or under him, in any way or in any manner, either personally or by or through an agent, servant, employee, partner, or associate is hereby jointly

and severally enjoined and restrained from:

"a. Improperly and illegally soliciting employment as a lawyer in the State of Nebraska;

"b. Paying any person, either directly or indirectly, for services rendered in obtaining or soliciting such contracts of employment within the State of Nebraska, or accepting any such employment or any benefit derived from any such solicitation;

"c. Promising to loan or advance, or loaning or advancing, money to any person or persons at any time for the purpose of inducing said person or persons to employ said defendant, either jointly or severally;

"d. Making unsolicited calls on any person for the purpose of soliciting contracts of employment;

"e. Violating the laws of Nebraska concerning the practice of law within the State of Nebraska or Canons of Legal Ethics imposed by the Supreme Court of Nebraska, required of and observed by resident lawyers licensed in the State of Nebraska;

"f. In any way or in any manner violate or aid and abet the violation of the provisions of Paragraph (2) of this decree."

It becomes apparent from an examination of the pleadings, the stipulation, and the proposed decree that if the decree is entered that all of the purposes of the action will have been accomplished except that portion relating to the matter of contempt on or before May 10, 1957.

This abandonment by the plaintiff of the effort to hold the defendants for alleged acts committed before May 10, 1957, in view of the injunctive provisions of the decree, if rendered, and the effect thereof, it is thought, should not militate against the rendition of the decree on the basis of the stipulation.

Section 25-1072, R. R. S. 1943, provides in part: "An injunction granted by a judge may be enforced as the act of the court. Disobedience of an injunction may be punished as a contempt by the court, or by any judge

who might have granted it in vacation."

In interpretation and application of this statutory provision this court has said: "The first point raised is that, as she was not made a party to the injunction proceedings, she is not bound by the orders therein. We cannot sustain her in this, as it has too frequently been held that one who has knowledge of an injunction and is in privity with the party enjoined is bound thereby." Wilcox v. Ashford, 131 Neb. 338, 268 N. W. 81.

It is therefore the opinion of this court that the proposed decree presented with the stipulation of the parties should be and it is hereby approved and it shall be considered as rendered and entered by this court on being signed by one of the members of the court.

CONSENT DECREE APPROVED.

GERTRUDE NICHOLS, ADMINISTRATRIX OF THE ESTATE OF DUANE NICHOLS, DECEASED, APPELLEE, V. J. EMMETT MCARDLE, APPELLANT, IMPLEADED WITH STATE OF NEBRASKA, DEPARTMENT OF ROADS, APPELLEE.

102 N. W. 2d 848

Filed May 6, 1960. No. 34692.

1. **Automobiles: Highways.** There is, in the absence of evidence to the contrary, a presumption that a motorist in approaching and entering a favored highway intersection acted with due care.
2. ———: ———. A motorist traveling on a favored highway protected by a stop sign of which he has knowledge may properly assume that oncoming traffic will obey it.
3. **Highways.** A user of highways may assume that other users thereof will use them in a lawful manner and govern his acts in accordance with such assumption unless or until he has warning, notice, or knowledge to the contrary.
4. **Automobiles: Highways.** A motorist approaching a highway protected by stop signs must stop before going upon the highway, must look to his left and to his right, and must permit a motor vehicle which is proceeding along the highway protected by stop signs to pass if it is at a distance and is traveling at a speed making it imprudent for the motorist to proceed into the intersection.

5. ———: ———. The duty of a motorist to look for vehicles approaching on a highway protected by stop signs implies the obligation to see what is in plain view.
6. ———: ———. A motorist entering an intersection of highways is obligated to look for approaching automobiles and to see any vehicle within that radius which denotes the limit of danger.
7. ———: ———. If a motorist 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 negligence as a matter of law.
8. ———: ———. A motorist approaching or entering an intersection is required to see another automobile approaching or entering the intersection which has been favored with the right-of-way under the statutory rules of the road and the failure to see such favored automobile is negligence as a matter of law.
9. **Evidence: Trial.** If a litigant without reasonable explanation testifies to facts substantially different concerning a material issue than had previously been testified to by him in another action, the change being to meet the exigencies of the pending action, the evidence is discredited as a matter of law and should be disregarded.
10. **Negligence.** Negligence, which is the moving or effective cause of a happening, is the proximate cause thereof.
11. **Trial: Appeal and Error.** The trial court is required to submit to the jury for its determination only the issues of fact presented by the pleadings and supported by evidence, and it is generally prejudicial error for the trial court to present to the jury for its determination any issue of fact for which there is no proof.

APPEAL from the district court for Douglas County: CARROLL O. STAUFFER, JUDGE. *Affirmed.*

Fraser, Wenstrand, Stryker, Marshall & Veach, Joseph Polack, and *O'Sullivan & O'Sullivan,* for appellant.

Wear, Boland, Mullin & Walsh and *A. Lee Bloomingdale,* for appellee.

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

BOSLAUGH, J.

Gertrude Nichols as administratrix of the estate of Duane Nichols, deceased, seeks to recover by this litiga-

tion damages for the wrongful death of her husband, Duane Nichols, in the collision of an automobile operated by him with an automobile driven by appellant at or near the first intersection of highways south of the Waterloo overpass over the tracks of the Union Pacific Railroad Company on U. S. Highway No. 275, which collision and death were, as it is alleged, caused by the negligence of appellant.

The State of Nebraska, Department of Roads, was the employer of Duane Nichols at the time of his death and was made a party to the litigation because of subrogation rights it might have by virtue of the Workmen's Compensation Act of the state. It is named as appellee but it asserts no rights or interest in this appeal and will not be again mentioned herein. Gertrude Nichols as administratrix of the estate of Duane Nichols, deceased, will be designated as appellee and her decedent will be mentioned as deceased. The Ford automobile operated by the deceased at the time of the collision is described in the record as the patrol car and will be referred to as the Ford. The automobile driven by appellant at that time will be identified as the Chevrolet.

The collision of the Ford and the Chevrolet occurred at about 4:30 p. m., July 24, 1958, on U. S. Highway No. 275, hereafter spoken of as highway No. 275, at or near the first intersection of highways south of the Waterloo overpass and it was the cause of the death of the deceased. The heirs at law and next of kin of deceased are his widow and three minor children the ages of whom at the time of the collision were, respectively, 32 years, 9 years, 7 years, and 3 years, each of whom was dependent on deceased for their support and maintenance. The deceased was then 31 years of age; had a life expectancy of 40 years; was able-bodied, well trained, earning an income of about $4,800 per year; and was rendering valuable service, help, assistance, and support to his wife and children of which they were deprived by his wrongful death.

The specifications of negligence charged against appellant by appellee included in substance the following: Failure to stop his automobile before going upon highway No. 275; failure to make a proper turn upon said highway; his act in turning into and traveling upon the east lane of the highway south of the intersection while deceased was properly occupying and using the east lane, moving therein toward the north; failure to have and maintain a proper lookout for traffic and especially the vehicle driven by deceased on highway No. 275; failure to have his automobile under proper control and to respect the right-of-way of deceased; and the operation of his automobile on the east lane of highway No. 275 in disregard of his duty to traffic moving from south to north thereon. Appellee asserted that the acts and omissions of appellant mentioned in the specifications of negligence were a violation of the laws of the state.

The first cause of action of appellee seeks damages because of the alleged wrongful death of the deceased and the second cause of action is for the recovery of burial expense occasioned by his death.

The substance of the defense of appellant was a denial of the claims of appellee and a plea of contributory negligence of the deceased of a nature and in a degree sufficient to defeat and bar any recovery in the case by appellee. Appellee traversed the plea of contributory negligence made by appellant.

When the evidence was completed the trial court charged the jury that the evidence produced on the trial established that deceased was exercising due care and was free from contributory negligence at the time of the collision; that the death of deceased was proximately caused by negligence of appellant; that appellee was entitled to a verdict of the jury for the amount of damages, if any, caused the widow and children of the deceased which a preponderance of the evidence established they suffered by reason of the wrongful death

of the deceased; and that the only question for the jury to determine in the case was the amount it would award appellee on her two causes of action. The verdict was a recovery by the appellee on each of the causes of action. Appellant made a motion for a judgment notwithstanding the verdict or, in the alternative, for a new trial, he having made a motion for a directed verdict at the conclusion of the evidence, which was denied. Judgment was rendered on the verdict and this appeal presents the record for review.

The motion of appellant for a new trial specified nearly a score of errors claimed to have occurred to the prejudice of appellant at the trial. His brief in this court assigns numerous errors. Appellant in his brief and during his argument at the submission of the case discussed only the alleged error of the trial court in resolving all issues in the case in favor of appellee as a matter of law except the amount, if any, appellee was entitled to recover a verdict for against appellant. In this posture of the case the issue on this appeal is whether the evidence establishes as a matter of law that the negligence of appellant was the sole, proximate cause of the collision resulting in the death of the deceased. If it does, the judgment must be affirmed.

Highway No. 275 extends north and south for a considerable distance on either side of the intersection near which the collision of the automobiles occurred and the town of Waterloo is a short distance north from it. Highway No. 275 has two concrete paved lanes each 10 feet wide, divided by a black line in the center of it. It is a level road from a considerable distance south of the place of the collision to a distance north thereof and the grade of the highway to the north then gradually rises until it attains an elevation of about 32 feet at the high point on the overpass which is about 875 feet north of the place of the accident and is known as the Waterloo overpass.

There is a graveled road which extends from north-

east to southwest on a slight angle near highway No. 275 but to the southeast of it. The graveled highway extends to and joins highway No. 275 at the east edge of the paved portion of it about 875 feet south of the south end of the Waterloo overpass. The graveled road about 100 feet from where it joins highway No. 275 curves or turns quite sharply to the right and joins highway No. 275 at a slight angle to the southwest but at substantially right angles. The graveled road terminates there. It was at or near the south line of the intersection of the two highways that the collision of the automobiles occurred which caused the death of the deceased. He approached the intersection from the south and appellant came to and on it at an angle to the southwest. The graveled road was substantially level with the paved portion of highway No. 275. There was a highway stop sign regulating traffic traveling on the graveled road toward highway No. 275. The angle on which it and the intersecting road approached each other was such that either of the motorists as they came to the intersection had a clear, unobstructed view of each other, the intersection, and its surroundings for an extensive distance.

A motorist traveling south on highway No. 275 soon after 4 p.m. the day of the tragedy said at the trial that as he came over the overpass at a speed of about 30 miles per hour there was a truck to the rear of him moving toward the south a distance of from 75 to 100 yards; that there was no traffic in front of him going south; that there were three or four vehicles to the south of witness traveling to the north; that the nearest approaching vehicle of that group was an automobile which afterwards was identified as the Ford operated by the deceased traveling at a speed of about 50 miles per hour a distance south of the place of the collision estimated by the witness to have been about 200 or 300 yards; and that witness first saw the Chevrolet going southwest on the traveled road when it was 20 or 30 feet from

highway No. 275 and he watched it continuously until the collision of it and the Ford. The Chevrolet was continuously in motion during the time it was observed by the witness. The Ford was, the witness thought, about 100 yards south of the place of the collision when he first saw the Chevrolet. However, the witness identified the location of the Ford at the time he first saw it by a post on the east side of highway No. 275 which continued there until the time of the trial and an actual measurement showed the distance was 176⅓ feet instead of about 200 or 300 yards as the witness estimated in his testimony. The Chevrolet was traveling quite fast when the witness first saw it but its speed was decreased and then suddenly increased "and the car spurted out." The witness said that he then knew there was going to be an accident and he shouted a warning. He was then 50 or 60 feet from the place of the collision and he immediately applied the brakes on his car as he saw the Chevrolet start accelerating its speed after it had slowed down. It reached the pavement on highway No. 275 and the accident immediately occurred. The Ford was traveling in the east lane continuously from the time witness first saw it to the time of the collision. It was only seconds from when the witness first saw the Chevrolet until the automobiles collided. The front of the Chevrolet was only a few feet from the east side of highway No. 275 when its speed was decreased and then suddenly accelerated. The Ford was something like 50 feet south of the place of the collision of the automobiles when the Chevrolet was on the extreme south or left side of the graveled road as it came on an angle to the southwest and entered highway No. 275 on its east side. The collision occurred immediately thereafter. The Ford was moving due north and the Chevrolet was traveling at a slight angle to the southwest, more south than west, as they met almost head-on in the east lane of highway No. 275. The Ford

was traveling about 50 miles per hour during the entire time it was observed by the witness.

A traveler who saw the collision of the Ford and the Chevrolet testified in substance: He was going north on highway No. 275 about 4:30 p. m. on July 24, 1958. Preceding him was a truck. A highway patrol car passed the witness and the truck about 300 yards south of the place of the accident. Witness then passed the truck and thereafter he maintained a speed of about 50 miles per hour. The patrol car was the Ford above mentioned and it was from 150 to 175 feet ahead of the witness after he passed the truck. The distance between them continued about the same until the time of the accident. The Ford was in the east lane of highway No. 275 and continued therein at a speed of about 50 miles per hour until the time of the accident. The witness first saw the Chevrolet on his right coming from the east when the Ford was probably 150 feet south of the place of the contact of the automobiles. The Chevrolet was then near highway No. 275, in motion at a moderate speed, and it did not stop after the witness first saw it. When the front of the Chevrolet was at the east edge of highway No. 275 the Ford was probably from 20 to 25 feet from the place of the accident and instantly the automobiles collided. The witness saw the brake lights on the Ford flash red and at practically the same time the collision happened.

A driver of a truck, traveling south on highway No. 275 near the south end of the Waterloo overpass at about 4:30 p. m. on the day of the accident, saw the collision. He first saw the Ford when it was an estimated distance of 300 yards south of the place of the collision, traveling north at a speed of about 50 miles per hour. When the Ford was probably 150 feet south of the place of the accident, witness saw the Chevrolet traveling from his left going southwest toward and near highway No. 275. When the front of the Chevrolet was about at the east edge of the highway the Ford

was an estimated 75 feet south of the place of the collision. Witness said the time between when he first saw the Chevrolet until the accident happened was like the time required to snap one's fingers. The Chevrolet did not stop from the time the witness first saw it until the accident. The collision of the automobiles was almost head-on notwithstanding the Ford was going due north and the Chevrolet was moving to the southwest on a slight angle.

The evidence locates the place of the collision of the automobiles in the east lane of highway No. 275 and somewhat south of the south line of the traveled portion of the road on which appellant traveled as it comes to and joins the east side of highway No. 275. There was a considerable quantity of debris in the east lane of the highway at the place of the accident, and north of it a few feet was a fresh mark or gouged out place in the pavement. One of the bumper guards of the Ford was knocked down. There were tire skid marks about 20 feet in length extending from the south to the north except at or near the end where they terminated and at that place they veered to the west and ended near where the Ford came to rest. The Ford after the collision was facing southwest in the west lane of highway No. 275 and about 7 feet north of it the Chevrolet was in the west lane facing northwest.

Appellant testified he was operating his 1954 Chevrolet on the day of the accident from Waterloo on the graveled road which extends from northeast to southwest and is easterly from but not parallel with highway No. 275. He said as he came to the part of that road where it turned westerly onto highway No. 275 he stopped at the stop sign to his right. He then drove onto highway No. 275. He said he did not know whether he looked to the right or to the left. He was asked if he saw the patrol car and his answer was: "From then on I don't know anything." He did not know whether he hit the Ford and did not remember any impact,

crash, or collision. There was no additional effort of appellant to explain or account for the collision of his Chevrolet and the Ford.

Appellant testified by deposition before the trial of this case in other litigation against him resulting from the collision herein involved that he had no remembrance or knowledge of anything that happened prior to, at the time of, or after the accident, the subject of this litigation, except "I recall laying there and seeing people going by and looking. I knew there was something up." This obviously refers to an event after the collision. When appellant was asked if he had any recollection about the collision or what happened he answered he could not remember anything of it. Later in his testimony he said he did not know anything about the accident or what happened prior to it. He in substance repeated that near the end of his testimony in the present case after he had said previously that he remembered he stopped at the stop sign near the intersection of the road on which he traveled with highway No. 275.

In the Chevrolet riding with appellant was James Edward Rodgers, herein called Rodgers. He joined appellant at Waterloo and said the trip was uneventful until they approached the intersection of the road they were traveling on with highway No. 275. Rodgers would not say that appellant stopped at or because of the stop sign on the right side of the road on which they were traveling. He estimated the speed of the Chevrolet on the trip was from 20 to 25 miles per hour. He said as appellant approached highway No. 275 but before he got to the intersection he decreased the speed of his automobile and slowed down. Then suddenly the automobile lunged to pull onto the highway. He testified the Chevrolet was slowed down before it reached highway No. 275 and then the speed of it was suddenly increased as it went onto the highway and continued at the accelerated speed until the collision. He said there was no reason apparent for what appellant did at that

time. Witness saw the Ford and instantly the collision happened.

The automobiles collided some feet south of the south line of the intersection wholly in the east lane of highway No. 275. It was almost a head-on contact of the automobiles. Deceased was operating the Ford traveling north in the east lane of the highway at a speed estimated by all of the testimony on the subject at not more than 50 miles per hour. He was and had been for several years fully informed concerning the highway, its intersections, the stop sign for the control of traffic from the graveled road mentioned herein to and upon the intersection near which the tragedy concerned herein occurred, and all of the surroundings of the intersection. It was an open one and any traveler within the vicinity of it had an opportunity for clear and unobstructed vision for an extensive distance desired by a traveler towards or upon the intersection. The accident happened in the daytime while favorable and pleasant conditions existed. There was no evidence that deceased was not exercising due care in the operation of the Ford on highway No. 275, a favored road, on the day of and at the time of the collision. In this situation a presumption prevails that the deceased was exercising due care. There is, in the absence of evidence to the contrary, a presumption that a motorist in approaching a favored highway intersection acted with due care. Bell v. Crook, 168 Neb. 685, 97 N. W. 2d 352. The deceased as a traveler on a favored highway approaching an intersection protected by a stop sign of which he had knowledge was legally privileged to assume that oncoming traffic would obey the stop sign and perform all other obligations imposed by law upon any traveler about to enter upon such an intersection before he did so. A traveler on highways may assume, unless and until he has warning, notice, or knowledge to the contrary, that any other user of the highways will use them in a lawful manner; and until he has such warn-

ing, notice, or knowledge, he may govern his acts in accordance with such assumption. Paddack v. Patrick, 163 Neb. 355, 79 N. W. 2d 701; Egenberger v. National Alfalfa Dehydrating & Milling Co., 164 Neb. 704, 83 N. W. 2d 523; Bell v. Crook, *supra*.

Appellant as he approached the intersection was to the right of the deceased. When the Chevrolet was near to the intersection appellant decreased the speed he had been traveling as if he were going to stop but instead he suddenly accelerated the speed of his automobile, drove onto the intersection and south into the east lane of highway No. 275, and collided almost head-on with the Ford. There is undisputed evidence that the Ford was only about three car lengths or 50 feet from the place of the collision when appellant accelerated the speed of the Chevrolet and drove it into the path of the Ford as it was traveling north at about 50 miles per hour. This was graphically expressed by an eyewitness who said that appellant "no sooner hit the pavement than he hit the Patrolman." The conduct of appellant instead of tending to warn or indicate to deceased that appellant was intending to enter the intersection in front of deceased, on the contrary, because of the slowing down of the Chevrolet, was an indication that appellant was going to stop and give the deceased safe passage across the intersection. The view of appellant to the south down highway No. 275 as he approached the intersection was unobstructed for an extensive distance. Appellant by his admission was very familiar with the intersection, knew that highway No. 275 was the principal highway in that area, and that it carried heavy and frequent traffic. The hazard of entering that highway from the secondary road at the time appellant did was obvious. There were the Ford; another automobile; and a large truck, a tractor and trailer unit, traveling toward the intersection. Each of them apparently was traveling at about the same speed, 50 miles per hour. The companion of appellant, James

Edward Rodgers, said that as the automobile of appellant was coming to the intersection he, Rodgers, saw an automobile going north on highway No. 275 cross the intersection: "—it just flashed across."

Appellant does not claim that he looked either to the right or the left when he came to and drove upon highway No. 275 with total disregard of the traffic then thereon. Appellant was obligated when he approached highway No. 275 which was protected by a stop sign to stop as directed thereby before going upon it, to look both to his right and left, and to permit any traffic to pass which was at a distance and traveling at a speed that was dangerous for appellant to have moved forward onto the highway. Bell v. Crook, *supra,* declares: "The driver of a motor vehicle approaching a highway protected by stop signs must stop before going upon it, look to his left and to his right, and permit vehicles to pass which are at a distance and traveling at a speed that it would be imprudent for the motorist to proceed into the intersection." See, also, Bezdek v. Patrick, 164 Neb. 398, 82 N. W. 2d 583; Paddack v. Patrick, *supra.*

Appellant was not only legally compelled to stop and to look in each direction for oncoming traffic on the highway before he went upon it but the duty imposed upon him as a motorist using the public highways was mandatory that he see what was then in sight and could and should have been seen by any normal person reasonably and effectively complying with this obligation.

Simcho v. Omaha & C. B. St. Ry. Co., 150 Neb. 634, 35 N. W. 2d 501, states: "The duty of the driver of a vehicle to look for vehicles approaching on the highway implies the duty to see what is in plain sight."

In Cappel v. Riener, 167 Neb. 375, 93 N. W. 2d 36, this court said: "The driver of an automobile entering an intersection of two streets (or highways) is obligated to look for approaching automobiles and to see any vehicle within that radius which denotes the limit of danger. * * * 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 negligence as a matter of law. * * * The operator of an automobile approaching or entering an intersection is required to see another automobile approaching or entering the intersection which has been favored with the right-of-way under the statutory rules of the road and a failure to see such favored automobile is negligence as a matter of law."

The observation of this court in Dale v. Omaha & C. B. St. Ry. Co., 154 Neb. 434, 48 N. W. 2d 380, is appropriate to this case: "From his testimony and its inescapable inferences the plaintiff came into this intersection in the path of a vehicle which was favored over him. He knew it was coming but a short distance away. If he looked he saw it in time to avoid the collision. It was his duty to look and if he failed to do so the consequences of his failure are his own." See, also, Armer v. Omaha & C. B. St. Ry. Co., 151 Neb. 431, 37 N. W. 2d 607; Eden v. Klaas, 165 Neb. 323, 85 N. W. 2d 643.

Appellant said while he was a witness that as he came to the part of the road on which he was traveling which turns westerly and joins highway No. 275 he stopped his Chevrolet automobile at the stop sign to his right as it required of any traveler in a like situation. He did not say that he looked to the right or to the left or that he made any effort to advise himself as to the situation of traffic on highway No. 275 at or near that location at that time before he drove his automobile onto the highway and to the collision which resulted in and caused the death of the deceased. Appellant had previously testified in litigation against him pending in another court involving the identical collision that he had no remembrance or knowledge of anything that happened concerning the accident prior to, at the time of, or after it until he came to lying alongside of the road after the collision. He offered no explanation of the

contradictory and inconsistent testimony given by him in the two cases. The assertion made on the trial of this case by appellant that he stopped his automobile at the stop sign before he entered upon the highway is not, under the circumstances, available to him in this litigation. A litigant may not recite upon oath one statement of fact in one judicial proceeding and thereafter, to meet the exigencies of the case in the trial of a different cause, recite an entirely different and inconsistent story. In such a situation the evidence is discredited as a matter of law and will be disregarded. Kirchner v. Gast, 169 Neb. 404, 100 N. W. 2d 65.

However, in the circumstances of this case, if appellant stopped at the stop sign, that fact would not change the result because there is no evidence he looked to advise himself of the traffic situation at or near the intersection. If he did look he did not see what was plainly in view which was not only the Ford but a second automobile and a truck approaching the intersection from the south in close proximity at a speed that made it not only imprudent but disastrous for a traveler to proceed into the intersection. Nothing could excuse his failure to see what was then plainly in view. If he did not see, then it must be concluded that he was not even mildly alert to the situation and hazard; and if he saw and did not avoid a collision, it must be decided he did not have required control. In either event, in the circumstances of this case, the conclusion must be that the default of appellant was the proximate cause of the collision and the results thereof. Armer v. Omaha & C. B. St. Ry. Co., *supra*. Negligence, which is the moving and effective cause of a happening, is the proximate cause thereof. Kennedy v. Chicago, R. I. & P. R. R. Co., 156 Neb. 345, 56 N. W. 2d 446; Shields v. County of Buffalo, 161 Neb. 34, 71 N. W. 2d 701.

Appellant argues that if one is in a place of safety and sees or could have seen the approach of a moving vehicle in close proximity to him and suddenly moves

from the place of safety into the path of such an oncoming vehicle, he is guilty of contributory negligence as a matter of law. It was appellant, not deceased, who was in a place of safety as appellant came toward highway No. 275 which was protected by a stop sign from traffic on the secondary or side road. It was appellant, and not the deceased, who was in a place of safety and saw or was charged with looking and seeing the approach of the Ford on the favored highway when appellant suddenly and quickly propelled his automobile from a place of safety into the path of and in collision with the Ford. The rule to which appellant appeals in this respect affords him no consolation or assistance. So far as he is concerned in this case, the rule is more of a sword than a shield.

Deceased violated no provision of the law of the road. He was in and maintained a correct position on highway No. 275 as he came toward the intersection at a speed of less than the prima facie lawful speed. He was traveling in open country. There was no condition present that required deceased to diminish his speed as he came toward the intersection. Appellant asserts that deceased was coming to a curve and a crest of a hill. The factual assumption in this argument is faulty. The overpass at its high point north of the intersection curves but the south end of the overpass is about 875 feet north of the place of the collision. The overpass was not in any way concerned in the collision.

In Moses v. Mitchell, 139 Neb. 606, 298 N. W. 338, the facts were the defendant was driving on highway No. 275 in the daytime at a speed of 55 miles per hour approaching an intersection with highway No. 130. Plaintiff was traveling in an opposite direction and had stopped incident to making a left-hand turn onto highway No. 130. A third party struck the rear of the vehicle of plaintiff and propelled it into the path of the vehicle of defendant. The court said concerning the speed of the defendant: "The day was clear and visi-

bility was good. Certainly, a speed of 55 miles an hour on a state highway in open country on a clear day is not of itself negligence." The court further observed in the opinion in that case: "As Mitchell approached the Moses car, he observed that it had come to a complete stop to permit him to pass. It was only when he was within 50 feet of the Moses car that he saw the Racine car strike it and shove it into his path. He applied his brakes immediately, the undisputed evidence showing that tire marks were burned on the pavement by the application of his brakes for a distance of 42 feet. That he was faced with a sudden emergency cannot be questioned. All the evidence is to the effect that only two to five seconds elapsed from the time the Moses car was struck until the Mitchell car crashed into it. We do not think that this evidence is sufficient to sustain a finding that Mitchell had a reasonable opportunity to avoid hitting the Moses car."

In Fairchild v. Sorenson, 165 Neb. 667, 87 N. W. 2d 235, the facts were the defendant was proceeding from the south on highway No. 103 at a speed not in excess of 55 miles per hour and was approaching an intersection with another highway. The highway on which defendant was traveling was protected by stop signs. The view to the south at the intersection was unobstructed for 500 feet. Plaintiff's driver came to highway No. 103 from the west and stopped at the stop sign. When defendant was 75 feet from the intersection plaintiff's driver proceeded into the intersection and a collision occurred. The court said: "There is no evidence * * * that the automobile in which the defendants were riding was being operated at any time in excess of 55 miles an hour or that it was being operated in an unlawful position on the highway. There was no evidence from which a reasonable inference could flow that the defendants had notice of danger in entering the intersection at the rate of speed and the manner in which their automobile was being operated as it approached the

intersection until Herman E. Fairchild drove his automobile into it."

In the present case deceased had no notice of danger which required him to reduce his speed below 50 miles per hour until appellant suddenly propelled his automobile into the intersection only an estimated 50 feet in front of deceased. He could hardly be charged with contributory negligence in not avoiding the collision which was clearly caused by the act of appellant.

The defense of contributory negligence on the part of deceased was not sustained by any evidence. The evidence is clear that the negligence of appellant as a matter of law was the proximate cause of the collision. The trial court decided all issues in the case as a matter of law except the issue concerning damages. It is the duty of the trial court to present to the jury only issues presented by pleadings and supported by evidence, and it is generally prejudicial error to submit to the jury issues which are not sustained by evidence. Simcho v. Omaha & C. B. St. Ry. Co., *supra;* Shields v. County of Buffalo, *supra.*

The judgment should be and it is affirmed.

AFFIRMED.

MARIE T. SHANAHAN, APPELLEE, V. STANLEY C. JOHNSON, COUNTY TREASURER, APPELLANT.

102 N. W. 2d 858

Filed May 6, 1960. No. 34732.

1. **Injunctions: Taxation.** A landowner may invoke the aid of a court of equity to enjoin collection of a void assessment against his property to pay the cost of location and construction of a drainage improvement. Knowledge of the proceedings for and completion of the improvement will not estop the owner from avoiding liability for a void assessment, and such an assessment cannot be enforced solely on the ground of benefits of the improvement to the owners of abutting lands.
2. **Counties: Drains.** The power and authority of a county board

to make drainage improvements does not of itself confer power and authority to levy and collect assessments to pay the cost of such improvements.

3. **Counties.** Counties and county boards can exercise only such powers as are expressly conferred upon them by statute, and such grant of powers must be strictly construed and any reasonable doubt of the existence of the powers is resolved against them.

4. **Counties: Drains.** County boards possess limited jurisdiction and they have no power or authority to locate and construct a drainage improvement under Chapter 31, article 1, R. R. S. 1943, and levy assessments to pay the cost thereof unless all of the jurisdictional steps have theretofore been timely taken.

5. ———: ———. The power delegated to a county board to locate and construct drainage improvements and levy assessments for the cost thereof is to be strictly construed against such board, and every reasonable doubt as to the extent or limitation of such power is resolved against the board and in favor of the taxpayer.

6. ———: ———. When the statute prescribes a particular mode in which the county board shall act in the location and construction of drainage improvements and the levy of assessments to pay the cost thereof, such board can only act in the mode prescribed and the enjoyment of the grant of such authority requires a compliance with any condition or restriction of the grant.

7. ———: ———. Under the provisions of Chapter 31, article 1, R. R. S. 1943, a county board cannot physically locate and complete construction of a drainage improvement; pay the contractor in full therefor; thereafter take the statutory steps required by sections 31-105 to 31-111, and section 31-118, R. R. S. 1943; and thereby validly assess the cost of the improvement to abutting landowners.

8. ———: ———. A county board has no statutory power or authority to make a reassessment after the previous assessment to pay the cost of a drainage improvement has been declared void by the final judgment of a court of competent jurisdiction.

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

A. C. Sidner, for appellant.

Kerrigan, Flory & Miller, for appellee.

John L. Cutright, amicus curiae.

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

CHAPPELL, J.

Plaintiff, Marie T. Shanahan, brought this action for herself and on behalf of other landowners similarly situated, against defendant, Stanley C. Johnson, county treasurer of Dodge County, seeking to enjoin the collection of allegedly void assessments for drainage improvements made by the county board of Dodge County in straightening and altering Rawhide Creek under the provisions of Chapter 31, article 1, R. R. S. 1943. Plaintiff alleged in substance that after a petition for the improvement had been filed by landowners with the county clerk, and a copy of same had been delivered on April 13, 1955, to the county board, hereinafter called the board, it took certain preliminary steps; approved and levied assessments; let the contract for construction of the improvement; completed its construction; and paid the contractor in full therefor prior to August 25, 1956. However, allegedly, a cause entitled Frederiksen v. Dahl, brought on behalf of plaintiff therein and other landowners similarly situated, was tried in the district court for Dodge County on August 27, 1956, and thereafter a judgment was rendered which found that construction of the project had been completed prior to the trial, but found and adjudged that by reason of a jurisdictional defect, all proceedings had and done by the board on and after April 13, 1955, were void and a nullity, including any levy of assessments against any real estate based upon such proceedings. Defendants therein, who were the county clerk and the defendant herein, were then perpetually enjoined from performing or attempting to perform any action toward collecting or receiving any such assessments; the assessments then on file with defendant county treasurer in connection with such project were declared void; and the liens and clouds upon the titles to real estate therein referred to were

declared void and of no effect as to all property which had been purportedly assessed to pay for such improvement.

Plaintiff alleged that such judgment was not appealed from but has at all times remained in full force and effect since September 7, 1956, and that, as ordered by the board, all such void assessments as had been paid were refunded to the landowners.

Plaintiff then alleged in substance that on September 6, 1956, and thereafter, the board, having accepted as final the court's decision heretofore set forth, again attempted to comply with Chapter 31, article 1, R. R. S. 1943, by following the statutes and taking the procedural steps required by it from and after the filing of the original petition for the project on April 13, 1955, without making any changes in the construction work which had been theretofore completed; that thereafter the county surveyor filed with the board a cost estimate and specifications for the project, together with an assessment of benefits, after which the county clerk set a date for hearing on assessments and served notices thereof on landowners whose lands were so purportedly assessed for such improvement project. Allegedly thereafter the board purportedly approved such new assessments and directed the county clerk to advertise for sealed bids for construction of the ditch, and pursuant thereto a purported letting was held April 10, 1957, whereat the board let a contract to the original contractor, who was sole bidder, on a bid of $39,474.84, exactly $1 more than the amount previously received by such contractor for actual completed construction of the ditch project. Plaintiff alleged that the board ordered the county clerk to place the assessments, including that against plaintiff's land, on the tax rolls by furnishing defendant a duplicate of assessments prepared by the county surveyor and approved by the board, which provided by resolution in connection therewith that such assessments should be due and payable September 1, 1957.

Plaintiff alleged that all such proceedings on and after September 6, 1956, were wholly void for reasons theretofore alleged, and for the reasons that neither Chapter 31, article 1, R. R. S. 1943, nor any other statute contains any provision authorizing the board to either assess benefits a second time or make a reassessment after assessments have been declared void or to make an assessment or impose a lien therefor on plaintiff's real estate or upon that of anyone else after the improvement had been completed; that said statutes provide a certain order of work and procedure by the board and other county officials which was not followed in the proceedings commenced September 6, 1956, in that all of said proceedings came after the actual construction work had been done, and the contractor performed no work whatsoever on the purported contract let April 10, 1957; and that if for some reason the proceedings after September 6, 1956, were not a reassessment, then the statute gives the board no power to make an assessment after a purported assessment had been judicially declared void, and no power to determine a route, make a survey, hold a hearing on assessments on benefits and damages, advertise for bids, or let a contract on an improvement project, the work on which has been completed prior to the taking of such procedural steps.

Plaintiff alleged that unless defendant is enjoined from doing so, he will collect the assessments against her property and that of others similarly situated, and that unless said assessments are enjoined as void, they will remain a perpetual lien against said real estate and a cloud on the titles thereof, all of which would be wholly unlawful and result in irreparable injury to plaintiff, for which plaintiff has no adequate remedy at law. Accordingly, plaintiff prayed for a judgment that the second assessments were void; for a perpetual injunction; and for equitable relief.

Defendant's general demurrer to plaintiff's petition was overruled, and he answered. Therein he denied

generally and specifically denied that the assessments of which plaintiff complains were reassessments for work previously done. He then admitted as follows: That defendant was county treasurer of Dodge County, and that certain assessments for altering and straightening Rawhide Creek, including the one against plaintiff's real estate, had been certified to him, and unless prohibited by the court, he would proceed to collect the same; that theretofore, and after September 11, 1956, at request of landowners, the board commenced the Rawhide Creek project a second time and took all the required procedural steps under the provisions of Chapter 31, article 1, R. R. S. 1943, to complete the project; and that the board necessarily and in the exercise of good judgment and for the best interests of the landowners, including plaintiff, adopted and utilized work completed under a former project. Defendant alleged in that connection that even if the board were wrong in its judgment, notice having been given as required by law, and neither plaintiff nor other landowners having appealed from any determination of the board or from the assessments for substantial benefits received, they were estopped from objecting to any determination so made. Defendant alleged that plaintiff had an adequate remedy at law provided by statute but she had failed and refused to follow the provisions thereof. Defendant prayed for a denial of plaintiff's petition and recovery of costs.

The cause was tried as if plaintiff's reply were a general denial, and a judgment was thereafter rendered which found and adjudged that the proceedings of the board, purporting to act on a petition praying for certain work to be done upon Rawhide Creek, are and were void at all times on and after April 13, 1955; that all proceedings had and done in the premises on and after September 6, 1956, including the assessments and levy of special assessments for the project, were and are void and a nullity; and perpetually enjoined defendant from performing or attempting to perform any action toward

the collection or receiving of any assessments based upon any such proceedings. The judgment also declared void and of no effect the liens and clouds upon the titles to real estate involved, not only as respects plaintiff's property but also as to all property purportedly assessed for taxes or special assessments to pay for the improvement, the owners of which property elect to avail themselves of the judgment. The judgment further stated that it was: "* * * without prejudice to any further procedures there may be in connection with the levy or collection of assessments in connection with said improvement project, the court holding herein that proceedings heretofore taken and assessments heretofore levied are void." In connection with such quoted provision, we conclude that it is of no consequence here and that we are not required to discuss or determine whether or not there are further procedures by which the county board can levy or collect assessments or taxes in connection with said project. It is sufficient to say that such provision in the judgment was not in any manner prejudicial to defendant or the county board.

Thereafter, defendant's motion for new trial was overruled, and he appealed, assigning and arguing in substance: (1) That the trial court erred in enjoining the collection of assessments against plaintiff and other landowners who had not complied with section 31-124, R. R. S. 1943, and were estopped to claim that the second proceedings and resulting assessments were void; and (2) that the judgment was contrary to law. We do not sustain the assignments.

The facts are either stipulated or without dispute, and they amply sustain the allegations of plaintiff's petition. They are substantially as follows: Plaintiff was the owner of described real estate in Dodge County upon which assessments for the Rawhide Creek project were made and approved a second time. Defendant was at all times the duly qualified and acting county treasurer of Dodge County. Purporting to act under Chapter 31,

article 1, R. R. S. 1943, a petition requesting the county board to clean and straighten Rawhide Creek and its overflow channel, sometimes known as Dry Creek, was filed by several landowners with the county clerk, and on April 13, 1955, a copy thereof was delivered to the board. Thereupon, the board, purportedly acting under the provisions of Chapter 31, article 1, R. R. S. 1943, took certain preliminary steps; approved and levied assessments; let the contract for construction of the improvement; completed its construction; and paid the contractor $39,473.84, in full payment for the completed work, with money borrowed from the general fund of the county.

However, as alleged by plaintiff and heretofore mentioned, such proceedings were admittedly adjudged to be void on and after April 13, 1955, because the board: "* * * never made the determination required by Section 31-105 of the statutes that the line of the proposed improvements described in the petition * * * was or is the best route * * * which is jurisdictional." State ex rel. Union Pacific Ry. Co. v. Colfax County, 51 Neb. 28, 70 N. W. 500, and Dodge County v. Acom, 61 Neb. 376, 85 N. W. 292, affirmed on rehearing, 72 Neb. 71, 100 N. W. 136, sustained that conclusion. In that connection, the foregoing judgment also said: "That it is not necessary to determine and this court makes no determination as to whether other defects in the proceedings alleged in the petition (of plaintiff's therein) are actually defects or have been proved." Admittedly, such judgment also perpetually enjoined collection of the assessments as void, and admittedly such judgment was not appealed from but became final and remained in full force and effect at all times on and after September 7, 1956. Admittedly, thereafter the board ordered refunds of all such void assessments as had been paid, and they were all refunded except $61.71 which remained unclaimed.

In that situation, on September 6, 1956, and there-

after, the board, accepting the aforesaid judgment as final and binding on it, admittedly began second proceedings wherein it purportedly backed up, followed the provisions of Chapter 31, article 1, R. R. S. 1943, and took the procedural paperwork steps required thereby from and after the filing and delivery of the original landowners' petition on April 13, 1955. The board again viewed the premises, and after considering letters from the county's engineer and its special counsel, the board on September 11, 1956, adopted a resolution which purported to remedy the jurisdictional defects which had made its first proceedings and assessments void. In that connection, no change was made during the second proceedings in the report, plat, profile, survey, specifications, and cost estimates made by the county surveyor for the construction work which had been theretofore entirely completed. In that situation also, an assessment for benefits was filed by the county surveyor after which the county clerk set a date for hearing thereon and served notice thereof on landowners whose lands were so purportedly assessed. Thereafter, the county board purportedly approved such new assessments and directed the county clerk to advertise for sealed bids for construction of the ditch, which in fact had already been constructed. Pursuant to such advertisement, a purported letting was held April 10, 1957, whereat the board let the contract a second time to the original contractor, who was sole bidder on a bid of $39,474.84, exactly $1 more than the amount previously received by him for his former completed actual construction of the project. In that connection, the advertisement for bids provided in part: "The contract is to be awarded to the lowest responsibile bidder * * *" but "The successful bidder shall give suitable credit for any work heretofore done on said project." In other words, by bidding just $1 more for being required to do exactly nothing under the second contract, the original contractor and bidder purportedly complied with the

advertisement for bids, and on September 7, 1957, he was paid $1 upon a claim theretofore filed by him.

In connection with the entire second proceedings, the chairman of the board testified that after the court had declared the first proceedings and assessments void, the board concluded that it had to do something. Thereupon, its then counsel advised the board that it could proceed to back up, refile a petition, and take all the procedural steps again such as were required by the paperwork, so it then backed up and did all the paperwork over again. Thus, the board went out and looked at the project and inspected the route of the creek even though it had already been changed by previous construction of the ditch, and the board made no change in the route of the ditch that had already been completed. He testified that the guiding principle of the board in all its proceedings after September 6, 1956, was that the paperwork record of the second proceedings should be as exactly in accordance with the statutes as the board could make it. He admitted that on and after September 6, 1956, the board did not make any new determinations or decisions, but that it simply ratified what it had already decided and done.

On the other hand, the county clerk testified that the plans and specifications for both the first and second proceedings were identical, and that by August 25, 1956, " 'everything was done and the Board accepted the project and has paid the contractor in full' * * * all of his money under that contract for the first project * * *." He also verified that as directed by the board in the second proceedings, he advertised for sealed bids for construction of the ditch already completely constructed, and that on April 10, 1957, a contract therefor was let as heretofore set forth.

The county surveyor testified that he drew the plans and specifications for the ditch in both proceedings, and supervised complete construction of the ditch prior to September 6, 1956; that he thereafter inspected the

ditch about September 10, 1956; that he submitted separate cost estimates to the county board for both the first and second proceedings; and that the estimated cost for listed items of work and excavation of the ditch in each estimate was the same except for the cost of hauling some dirt included in the second estimate. However, such dirt hauling was not required to be done by the contractor under the second contract.

The county treasurer testified that $49,000 was transferred from the county general fund to the Rawhide Ditch fund prior to paying the contractor for construction of the ditch in August 1956; that after September 11, 1956, by refunding the first void assessments, there were no other funds to the credit of the project with which to pay for right-of-way and damages; that the total of the second assessments was about $65,000, which was sufficient to complete the project in its entirety, including prior construction of the ditch and payment for right-of-way and damages; that $33,762.79 has been paid on the second assessment; and that $21,722.29 remained in the project fund.

Defendant first argued that his demurrer should have been sustained and that the trial court erred in enjoining collection of the second assessments as sought by plaintiff because she had not complied with section 31-124, R. R. S. 1943, by first paying the amount of her assessments, and that she was estopped to claim that the second proceedings were void. We do not agree.

In that respect, as early as Morris v. Merrell, 44 Neb. 423, 62 N. W. 865, this court, in dealing with that section, held that: "A party who is not guilty of laches may invoke the aid of a court of equity to restrain the collection of a void tax or assessment."

Thereafter, in Cullingham v. City of Omaha, 143 Neb. 744, 10 N. W. 2d 615, this court quoted the foregoing rule, but, relying upon City of McCook v. Red Willow County, 133 Neb. 380, 275 N. W. 396, we modified such rule by concluding that when special assessments against

property to pay costs are void, knowledge of the proceedings and of construction of the improvement will not estop the owner from avoiding liability therefor, and that such a void tax or assessment cannot be enforced solely on the ground of benefits of the improvement to the owners of abutting lands. In that connection, this court said: "It will be noted that by the earlier rule laches might be a defense to an action in equity to restrain the collection of a void tax or assessment whereas by the later rule it may not.

"We think the later statement of the rule is the correct one. Delay of effort to protect against a void tax or assessment cannot have the effect of making vital and valid that which had no vitality or validity from the beginning."

Therein, also, this court went on to say: "Clearly the statute contemplated that contracts for public improvements should be entire in character, that is that full responsibility for the performance of the contract for the contract price should rest upon the contractor. It does not contemplate a discretion to modify or depart therefrom by the municipality and consequent payment on the basis of modification or departure in violation of the terms of the contract and statute.

"The power of a municipality to contract for public improvements and to levy special assessments to defray the expense is statutory and such powers must be strictly construed.

"In Hutchinson v. City of Omaha, 52 Neb. 345, 72 N. W. 218, this court said: 'It is familiar law that in order to sustain an assessment of this character the record must show affirmatively a compliance with all the conditions essential to the valid exercise of the taxing power.'

"In Futscher v. City of Rulo, 107 Neb. 521, 186 N. W. 536, it was stated: 'The power delegated to a city to construct local improvements and levy special assessments for the payment thereof is to be strictly construed

against the city, and every reasonable doubt as to the extent or limitation of such power is resolved against the city.' The same holding was made in slightly different wording in Baker v. Dahlman, 119 Neb. 425, 229 N. W. 280. Of like effect are Garver v. City of Humboldt, 120 Neb. 132, 231 N. W. 699, and Musser v. Village of Rushville, 122 Neb. 128, 239 N. W. 642.

"A compelling reason for this rule is well stated in Wright v. Hoctor, 95 Neb. 342, 145 N. W. 704, by quotation from Malette v. City of Spokane, 68 Wash. 578, 123 Pac. 1005, as follows: 'Under such a system there would be no limit to the "discretion" of the city officers, who to serve personal or political ends might burden the taxpayer beyond the point of endurance.'" Such opinion was cited with approval in Besack v. City of Beatrice, 154 Neb. 142, 47 N. W. 2d 356. See, also, Annotation, 108 A. L. R. 204, citing numerous authorities from this jurisdiction. By analogy, of course, the same rules apply in cases such as that at bar.

We are required then to determine whether the assessments here involved were void within the meaning of the law. We conclude that they were void.

In Thompson v. Colfax County, 106 Neb. 351, 183 N. W. 571, this court concluded that in such proceedings the board of county commissioners acts as agent or trustee of the persons whose property is chargeable with the cost of the work, and not for the county. In that connection, also, as early as Morton v. Carlin, 51 Neb. 202, 70 N. W. 966, this court held: "Counties and county boards can exercise only such powers as are expressly conferred upon them by statute, and such grant of powers must be strictly construed. (State v. Lincoln County, 18 Neb. 283.)"

In State ex rel. Johnson v. County of Gage, 154 Neb. 822, 49 N. W. 2d 672, we held that: "A county in this state has only such powers as are expressly conferred upon it by statutes and such as are incidentally indispensable to carry into effect those expressly granted it.

"A grant of power to a county is strictly construed and any reasonable doubt of the existence of the power is resolved against the county." Such opinion was cited with approval as recently as Board of Commissioners v. McNally, 168 Neb. 23, 95 N. W. 2d 153.

As early as Hurford v. City of Omaha, 4 Neb. 336, citing authorities, this court said: "That when the particular provision of the statute relates to some immaterial matter, where compliance is a matter of convenience rather than substance, or where the directions of the statute are given with a view to the proper, orderly, and prompt conduct of business merely, the provision may generally be regarded as directory.

"When a fair interpretation of the statute, which directs acts or proceedings to be done in a certain way, shows that the legislature intended a compliance with such provision to be essential to the validity of the act or proceeding, or when some antecedent and pre-requisite conditions must exist prior to the exercise of power, or must be performed before certain other powers can be exercised, then the statute must be regarded as mandatory. And under such statutory provisions, the corporation has no election in the matter as to how or when the duties shall be performed, and municipal officers have no option or authority to act differently from the mode particularly prescribed. And if there be manifest irregularity in the proceedings, presumptions are not indulged to sustain such proceedings, or to give new character to that which is seen to be defective, or to supply the place of that which is not apparent.

"When the statutory provision relates to acts or proceedings immaterial in themselves, but contains negative terms, either expressed or implied, then such negative terms clearly show a legislative intent to impose a limitation, and therefore the statute becomes imperative, and requires strict performance in the mode or manner prescribed."

That opinion was cited and quoted from with approval by this court in Chicago, St. P., M. & O. Ry. Co. v. City of Randolph, 163 Neb. 687, 81 N. W. 2d 159, wherein we said: "'* * * when the statute prescribes a particular mode in which the corporation is to act, it can only act in the mode prescribed. To sanction a contrary doctrine * * * would place the corporation above the law, and would, to say the least, be fraught with dangerous consequences.'"

In Clay County v. Bottorf, 166 Neb. 262, 88 N. W. 2d 898, we held that: "A grant of authority to a county is strictly construed and enjoyment of the grant requires a compliance with any condition or restriction of the grant."

In Besack v. City of Beatrice, *supra,* we held that: "The power and authority to make public improvements does not of itself confer power and authority to levy and collect special taxes or assessments to defray the cost of such improvements.

"The legislative power and authority delegated to a city to construct local improvements and levy assessments for payment thereof is to be strictly construed and every reasonable doubt as to the extent or limitation of such power and authority is resolved against the city and in favor of the taxpayer." See, also, Chicago & N. W. Ry. Co. v. City of Seward, 166 Neb. 123, 88 N. W. 2d 175; Danielson v. City of Bellevue, 167 Neb. 809, 95 N. W. 2d 57; Chicago & N. W. Ry. Co. v. City of Omaha, 156 Neb. 705, 57 N. W. 2d 753.

Also, as held in Haecke v. Eastern Sarpy County Drainage Dist., 141 Neb. 628, 4 N. W. 2d 744: "'Statutory provisions authorizing assessments of special taxes against property benefited by public improvements are to be strictly construed, and it must affirmatively appear that the taxing authorities have taken all steps which the law makes jurisdictional; the failure of the record to show such proceedings will not be aided by

presumptions.' Morse v. City of Omaha, 67 Neb. 426, 93 N. W. 734."

Without quoting therefrom or particularly setting forth its provisions at length, it is sufficient for us to point out that the respective sections appearing in Chapter 31, article 1, R. R. S. 1943, provide the procedural steps and the order of time in which they must be taken to authorize and approve a project such as that here involved; ascertain and determine the cost of location and construction; make and approve the apportionments and assessments; advertise for bids and let the contract for construction to the lowest responsible bidder; supervise and complete the construction; and pay the contractor therefor, as well as pay for right-of-way and damages.

In the case at bar, a petition for the improvement was filed with the county clerk, who delivered a copy of same to the board April 13, 1955. Thereafter, the first contract was let, the ditch was entirely and completely constructed, and the contractor was paid in full therefor prior to August 27, 1956, whereupon the entire proceedings, including the assessments theretofore made and approved by the board, were held to be void and a nullity. It was thereafter, on September 6, 1956, that the county board attempted to back up, complete the course of paperwork procedure provided by Chapter 31, article 1, R. R. S. 1943, and thereby ratify its former procedure by revising and amending same to supply its jurisdictional defects and give validity to what the board had already done, which had no vitality or validity from its beginning. In other words, every step required by statute except the filing of the landowner's petition and bond, was taken by the board after the project had been entirely completed and without any new determination or decision except that the line of the project was the best route, which the chairman of the board testified had actually been determined in the first proceedings but had not been made in writing

or placed of record in its journal. Now, after the project had been completed during the first proceedings, which were admittedly void, the defendant argues that it was sufficient for the board to simply proceed with the required paperwork and thereby implement its power to make new valid assessments. We do not agree.

A comparable contention was made in Chicago, St. P., M. & O. Ry. Co. v. City of Randolph, *supra,* wherein this court said: "This argument is tantamount to saying that the city could proceed to make improvements without compliance with the jurisdictional requirements of the statute as to the creation of a valid district, and after the improvements were completed it will be sufficient then to enact an ordinance to implement its power. In short, that it can do at the end of the proceedings that which the statute makes the first jurisdictional requirement to create the power to improve and assess.

"Paraphrasing language used in Gutta Percha & Rubber Mfg. Co. v. Village of Ogallala, 40 Neb. 775, 59 N. W. 513, 42 Am. S. R. 696, approved in City of Plattsmouth v. Murphy, 74 Neb. 749, 105 N. W. 293, if ratification is sanctioned upon a proceeding of this kind, legislative restriction upon municipal corporation powers is in vain."

Further, in State ex rel. Union Pacific Ry. Co. v. Colfax County, *supra,* this court said: "County boards possess limited jurisdiction, and the grant of power conferred upon them is to be strictly construed. * * * They have no authority to construct a ditch under the drainage law, unless all the jurisdictional steps have been taken."

We conclude that the applicable statutes prescribe the jurisdictional procedure and the mode whereby the board exercises its power to make drainage improvements, and that such procedure and mode must be strictly followed or the assessments will be void. Under Chapter 31, article 1, R. R. S. 1943, a county board can-

not physically locate and complete construction of a drainage improvement, pay the contractor in full therefor, then take the statutory steps required by sections 31-105 to 31-111, and section 31-118, R. R. S. 1943, and thereby validly assess the cost of the improvement to abutting landowners. To hold otherwise would clearly be a violation of the statute, which cannot be justified by a need for the improvement.

There is another reason why the assessments were void. They were in effect a reassessment, and we do not have presented herein a case where the Legislature has attempted to authorize a reassessment, or a second procedure, or otherwise to permit the making of another assessment after one has been declared void. Defendant in his brief concedes "that a governing body having constructed and completed an improvement and the assessment for the same been held invalid, could not breathe new life into the old assessment by some paper work in the way of new certification."

As stated in 48 Am. Jur., Special or Local Assessments, § 147, p. 688, citing authorities: "A reassessment implies not merely the fact of the improvement, but also that one attempt has been made to collect the cost and failed, and it is in a sense a continuation of the original proceedings."

Since the board in its second paperwork based its proceedings on the original petition of landowners filed and delivered to the board on April 13, 1955, we believe that it was simply a continuation of the original void proceedings. In that connection, Chapter 31, article 1, R. R. S. 1943, does not authorize a county board to make a reassessment after an assessment has been declared void by a court of competent jurisdiction whose decision was not appealed and was admittedly in full force and effect. There are numerous other provisions in the statutes whereby governing bodies such as first-class cities, primary cities, metropolitan cities, and drainage districts, of which this is not one, are given authority in

one form or another, to reassess where the first assessments have been declared void. See, §§ 14-538, 15-719, 15-725, 15-822, 16-708, and Chapter 31, articles 3, 4, and 5, R. R. S. 1943. On the other hand, second-class cities and villages, drainage projects initiated by individual landowners, counties, and county boards are given no such general powers in any statute cited or found. In that connection, defendant argued that the board simply utilized the previous work in developing a new plan. However, the undisputed facts heretofore set forth entirely refute that contention.

We have been cited no authority and we have found none which could give defendant any relief in this proceeding. For reasons heretofore stated, we conclude that the judgment of the trial court should be and it is hereby affirmed. All costs are taxed to defendant.

AFFIRMED.

STATE OF NEBRASKA EX REL. ARTHUR BOTTOLFSON, APPELLANT, V. SCHOOL BOARD OF SCHOOL DISTRICT NO. R 1 OF CEDAR AND DIXON COUNTIES, NEBRASKA, ET AL., APPELLEES.

103 N. W. 2d 146

Filed May 6, 1960. No. 34761.

1. **Statutes.** By Article III, section 14, Constitution of Nebraska, it is provided that no bill shall contain more than one subject which subject shall be clearly expressed in the title.
2. ———. The title to an act of the Legislature must be such as to give reasonable notice to the members of the Legislature, and others interested, of the general subject upon which it is proposed to legislate.
3. ———. The test of the validity of amendments is whether or not their provisions are germane to the provisions of the statute sought to be amended.
4. ———. The purpose of the constitutional 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.

5. ———. The title of an act amending a former act of the Legislature may be looked to, as well as that of the original act, to ascertain if the amending act has any matter different from what is expressed in the title.
6. ———. Where the title of an amendatory or supplemental act sufficiently indicates the nature of the legislation in it contained, or the nature of the changes or additions by it made, it is immaterial whether or not the provisions of the act are covered by the title of the act amended or supplemented.

APPEAL from the district court for Cedar County: JOHN E. NEWTON, JUDGE. *Affirmed.*

Addison & Addison, for appellant.

Gordon C. Gobel, for appellees.

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

YEAGER, J.

This is an appeal in an action in the district court for Cedar County, Nebraska, wherein in the name of the State of Nebraska on relation of Arthur Bottolfson, relator, an affidavit and petition were filed, the purpose of which was to secure a peremptory writ of mandamus against the School Board of School District No. R 1, a Class II school district of Cedar and Dixon Counties, Nebraska, and the individual members of the board, respondents, requiring the board to sign a petition to transfer the southwest quarter of Section 16, Township 31 North, Range 3 East of the 6th P. M., in Cedar County, Nebraska, which land is owned by the relator and is in School District No. R 1, to School District No. 32, which is a Class I school district. The request was made pursuant to the following which is a part of section 79-402, R. S. Supp., 1957: "* * * and provided further, that school boards or boards of education shall sign such petitions when requested to do so by persons desiring to transfer their land from a Class II or III district to a Class I district or another Class II or III district when such persons have personally paid tuition

for their children to attend school in the other district over a period of two or more years or reside nearer the schoolhouse in the other district than the schoolhouse in their own district." This was an amendment to section 79-402, R. S. Supp., 1955, which originally was a section of a bill enacted into law by the 1949 session of the Legislature. This was Legislative Bill 1, Laws 1949, c. 256, p. 689.

To the affidavit and petition the respondents filed an answer and an amendment thereto. By the answer the material allegations of fact are not denied. In fact by stipulation in the bill of exceptions their truth is admitted.

By the answer and the amendment thereto the respondents challenge the constitutionality of the statutory provision which is the basis of the claimed right of the relator to the peremptory writ of mandamus. It is charged specifically that the statutory provision is violative of Article XIV, section 1, Constitution of the United States, and of Article I, section 3, Constitution of Nebraska, and generally that it is "contrary to the fundamental law of the Constitution and void."

The case was tried to the court and the writ was denied. It was denied on the ground that the statutory provision is unconstitutional and void.

The relator has appealed from this judgment. He will be hereinafter referred to as the appellant. The respondents will be referred to as appellees.

By the assignments of error which require consideration here the appellant asserts generally (1) that the court erred in holding that the provision of section 79-402, R. S. Supp., 1957, is unconstitutional; (2) that the court erred in holding that the provision which is purportedly an amendment to section 79-402, R. S. Supp., 1955, is in fact an amendment to section 79-403, R. S. Supp., 1955, and accordingly unconstitutional; (3) that the court erred in holding that the provision is arbitrary and creates an unlawful classification and distinc-

tion between persons and property, and therefore unconstitutional; and (4) that the court erred in holding that the provision is unconstitutional for the reason that no provision is made for notice and hearing as a prerequisite to a transfer of land at the request of a resident.

In order to determine the questions presented it becomes necessary to trace the history of section 79-402, R. S. Supp., 1957, from the date of its original enactment in 1949 to at least the date of the commencement of this action in the district court. As pointed out the original section was enacted into law as a section of Legislative Bill 1, Laws 1949, c. 256, p. 689. By its title it was designated an act to revise, adopt, and establish a code of laws for the State of Nebraska relating to schools and to repeal Chapter 79, R. S. 1943, all amendments contained in R. S. Supp., 1947, and a group of bills and a part of another of the Sixty-first session of the Legislature. This bill consisted of 515 sections and covered 177 pages in the session laws of that session of the Legislature. This section in its entirety as originally enacted is as follows: "The county superintendent shall create a new district from other districts, or change the boundaries of any district upon petitions signed by fifty-five per cent of the legal voters of each district affected. Such officer shall have the discretionary power to annex any territory, not organized into districts, to any existing district; Provided, changes affecting cities or villages shall be made upon the petition of the board of education of the district or districts affected."

It is observable that the subjects or powers declared by the section are creation of new districts from other districts or change of the boundaries of any district on petition of 55 percent of the legal voters of each district affected, except that where the changes affect cities or villages the petition shall be by the board of education, and discretionary power of the county superintend-

ent to annex any territory not organized into districts to any existing district.

This section was amended by section 2 of Legislative Bill 92 by the Legislature at its session in 1951. Laws 1951, c. 276, § 2, p. 928. There was no substantial departure from the powers and duties prescribed by the original section. The following powers and duties however were added: The county superintendent was required to give notice of and to conduct hearings, and it was provided that a newly enlarged district should assume any indebtedness previously incurred by any one or more districts annexed, unless otherwise specified in the petitions.

It is pointed out that neither the title to this amendatory act nor the section as amended in 1951 contained any direct or inferential reference to the subject contained in the provision under attack in this action.

By Legislative Bill 279, Laws 1953, c. 295, § 1, p. 999, the Legislature amended section 79-402, R. S. Supp., 1951. The only material change made was a requirement that any plan for reorganization of a school district must be submitted to the state committee for school district reorganization and be approved before hearing by the county superintendent.

This bill contained two new sections, or sections which were not amendatory of section 79-402, R. S. Supp., 1951. These sections have no reference to the substance of section 79-402, R. S. Supp., 1951, but only to petitions and proceedings in case of an attempt to reorganize by a group of districts.

As was true with relation to the 1951 amendment there is no reference in the title nor the act itself to the subject contained in the provision under attack.

By Legislative Bill 305, Laws 1955, c. 315, § 3, p. 973, the Legislature amended section 79-402, R. S. Supp., 1953. The only material change, if it may be regarded as material, was the addition of Class III school districts in the first sentence of the proviso, so that the proviso

pertained to Class III school districts as well as to cities and villages. As disclosed by the bill, the amendment is separately referable to section 79-402, R. S. Supp., 1953, although the bill contains 10 sections. An examination of the title and the body of the section as amended discloses that the subject and purpose of the provision under examination here was not introduced.

As has already become evident section 79-402, R. S. Supp., 1955, was amended in 1957. This was done by Legislative Bill 582, Laws 1957, c. 342, § 1, p. 1181. The title to that bill is the following: "AN ACT to amend sections 79-402, 79-426.09, and 79-426.15, Revised Statutes Supplement, 1955, relating to schools; to change the procedure for reorganization of school districts and making other changes as prescribed; to provide for meetings of special committee as prescribed; and to repeal the original sections and also sections 79-426.20 and 79-426.21, Revised Statutes Supplement, 1955."

Examination of this title discloses no reference to any right or procedure of a person or persons to have land transferred from one school district to another for any reason, and particularly on the basis of school attendance and distance from school attended. Likewise there is no reference to a mandatory right of an owner of land to have a school board or board of education sign a petition for a transfer of land from one district to another on request of individual landowners.

This history discloses that nothing is to be found in the original text of section 79-402, R. S. Supp., 1949, in the amendments thereto, or the titles to the amendatory acts which will permit it to be said that attention was directed to this amendatory provision. It was a subject matter foreign thereto, and in nowise germane.

Article III, section 14, Constitution of Nebraska, contains the following: "* * * No bill shall contain more than one subject, and the same shall be clearly expressed in the title. * * *"

This provision requires, as is stated in Appel Mercan-

tile Co. v. Barker, 92 Neb. 669, 138 N. W. 1133, that: "The title of an act of the legislature must be such as to give reasonable notice to the members of the legislature, and others interested, of the general subject upon which it is proposed to legislate." See, also, West Point Water Power & Land Improvement Co. v. State ex rel. Moodie, on rehearing, 49 Neb. 223, 68 N. W. 507; State v. Burlington & M. R. R. R. Co., 60 Neb. 741, 84 N. W. 254.

In Wayne County v. Steele, 121 Neb. 438, 237 N. W. 288, it was said: "The test of the validity of amendments is whether their provisions are 'germane' to the provisions of the statute sought to be amended."

The basic purpose of the constitutional provision quoted herein is set forth in Omaha Parking Authority v. City of Omaha, 163 Neb. 97, 77 N. W. 2d 862, as follows: "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."

As a guide to a determination of whether or not Article III, section 14, Constitution of Nebraska, is violated in an instance where the sufficiency of the title to an amendatory act is brought into question, this court in Miller v. Iowa-Nebraska Light & Power Co., 129 Neb. 757, 262 N. W. 855, quoted with approval the following from Jones v. Mayor and Council of Columbus, 25 Ga. 610: " 'The title of an act amending a former act of the legislature may be looked to, as well as that of the original act, to ascertain if the amending act has any matter different from what is expressed in the title.' "

As a further guide the following was quoted in the same opinion from 59 C. J., Statutes, § 400, p. 819: " 'Where the title of an amendatory or supplemental act sufficiently indicates the nature of the legislation in it contained, or the nature of the changes or additions by it made, it is immaterial whether or not the provi-

sions of the act are covered by the title of the act amended or supplemented.' "

On application of these statements of legal principle under Article III, section 14, Constitution of Nebraska, to the provision of section 79-402, R. S. Supp., 1957, which is under attack, and the history of the section as outlined herein it becomes apparent that this subject matter never appeared and it was not expressed in the original section or in the title to the original section or in the title to any amendatory act. Accordingly the provision is unconstitutional to the extent that the district court found by its judgment.

This conclusion disposes of the primary question of constitutionality presented to the district court and to this court on appeal favorably to the appellees. It appears however that some explanatory observations with reference to remaining assignments of error are proper and in order. Attention is therefore directed to an assignment that the court erred in holding that the provision in question was an amendment to section 79-403, R. S. Supp., 1955, and not to section 79-402, R. S. Supp., 1955.

This may be disposed of by the statement that the court's finding that this provision was an amendment to section 79-403, R. S. Supp., 1955, was erroneous, but it cannot be said to impair the ultimate judgment of the court. It is rejected as having no significance in the determination of the case. The amendment was to section 79-402, R. S. Supp., 1955, and there can be no doubt about that. No opinion is expressed as to constitutionality if it had been enacted as an amendment to section 79-403, R. S. Supp., 1955.

This provision read separately, or together with the entire section, either before or after the amendment, did not deal with a right of the appellant to have his property transferred but only with a right on his part to have the school board of his district sign a petition for transfer. Obviously if the amendment was constitu-

tional there could be no transfer without going through the processes designated in section 79-402, R. S. Supp., 1957. Under these 40 days is allowed within which to submit proposals to the state committee. The state committee is allowed 40 days to review the proposals. The county committee is allowed 15 days thereafter to give notice and hold a public hearing. The county committee is then required to hold the petitions for 10 days and then file them with the county superintendent. The county superintendent is then required to advertise and hold a hearing for determination of the validity of the petitions.

The transcript herein discloses that on August 4, 1959, the appellant requested the president of school district No. R 1 to sign a petition for transfer of land. It appears that the affidavit and petition herein were filed August 6, 1959. On November 10, 1959, the judgment which is the basis of this appeal was rendered.

The Legislature of 1959 again amended the section which amendment became effective September 28, 1959. Legislative Bill 244, Laws 1959, c. 385, p. 1333. The right of a property owner to have a petition signed for transfer of his property to a Class I district was taken away by this amendment.

The question of whether or not the issue presented to the district court became and is moot because of this we do not decide, since it is not presented by the briefs. It may not however be well contended, in the light of procedures analyzed, that even if the provision which furnishes the basis for this action were held constitutional that the reversal of the judgment of the district court would or could effect the transfer which the appellant seeks. The lapse of time statutorily provided for necessary procedures would prevent it.

The judgment of the district court is affirmed.

AFFIRMED.

EARL S. TEXTER, PLAINTIFF IN ERROR, V. STATE OF NEBRASKA, DEFENDANT IN ERROR.

102 N. W. 2d 655

Filed May 6, 1960. No. 34775.

1. **Witnesses: Evidence.** A witness may be impeached by showing that he made statements out of court contrary to those made in court in regard to some matters relevant to the issue. Such declarations are not substantive evidence of the fact declared, unless made against interest by one who is a party to the record. Such declarations are received to aid the court or the jury in estimating the character and credibility of the witness.
2. **Criminal Law.** Where a defendant in a criminal case offers himself as a witness on his own behalf, he is subject to the same rules of cross-examination as other witnesses, and it is the duty of the court to keep the cross-examination within the law.
3. ———. It is the duty of the prosecution to produce all evidence tending to establish the guilt or innocence of an accused. However, it is not necessary for the State to call every witness whom it knows may have some knowledge relating to the crime charged if such knowledge is not material to the question of the accused's guilt or innocence.
4. **Rape.** In cases of rape, where the accused testifies as a witness on his own behalf and denies the charge, the testimony of the prosecutrix alone is not sufficient to support a conviction. It must be corroborated by other evidence on material points.
5. ———. It is not essential that the prosecutrix be corroborated by the testimony of other witnesses as to the particular act constituting the offense. It is sufficient if she be corroborated as to material facts and circumstances which tend to support her testimony and from which, together with her testimony as to the principal fact, the inference of guilt may be drawn.
6. ———. In a prosecution for rape the prosecutrix may testify in chief, if within a reasonable time under all the circumstances after the act was committed she made complaint to another, to that fact and the nature of the complaint, but not as to its details; and that other may likewise testify in chief to such fact and the nature of the complaint, but not as to its details. Such testimony, together with all other facts and circumstances in evidence, may be considered by the jury in corroboration of the testimony of the prosecutrix as to the main fact in issue.
7. **Criminal Law.** This court, in a criminal action, will not interfere with a verdict of guilty based upon conflicting evidence

unless it is so lacking in probative force that we can say, as a matter of law, that it is insufficient to support a finding of guilt beyond a reasonable doubt.

ERROR to the district court for Lancaster County: PAUL W. WHITE, JUDGE. *Affirmed.*

John McArthur, for plaintiff in error.

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

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

WENKE, J.

Earl S. Texter was convicted by a jury in the district court for Lancaster County of the crime of statutory rape. He thereupon filed a motion in that court asking it to vacate and set aside the jury's verdict, for reasons therein set forth, and to grant him a new trial. This motion the trial court overruled, after which it sentenced defendant to serve 10 years in the Nebraska State Penitentiary. This error proceeding was taken by the defendant to this court for the purpose of having us review the record of his conviction in relation to certain errors which he claims occurred in the court below and which errors he claims prevented him from having a fair and impartial trial. For convenience we shall herein refer to the plaintiff in error as either defendant or Tex.

The first contention made by the defendant is that the trial court erred by receiving in evidence, over his objections, hearsay evidence that he committed the crime with which he had been charged. The evidence referred to was given by detective Lowell Sellmeyer of the Lincoln police force and relates to what he was told by Olga H. Verry, mother of the prosecutrix, shortly after the crime occurred of which defendant was convicted. If this evidence had been offered by the State and received as substantive proof of the crime charged

it would fall within the cases cited by the plaintiff in error and be controlled thereby. See, Langdon v. Loup River Public Power Dist., 142 Neb. 859, 8 N. W. 2d 201; Triplett v. Western Public Service Co., 129 Neb. 799, 263 N. W. 229; Village of Ponca v. Crawford, 18 Neb. 551, 26 N. W. 365; Clopper v. Poland, 12 Neb. 69, 10 N. W. 538. But such is not the case. Olga H. Verry was called by the State and testified in detail as to just what happened on the night of July 22, 1959, when the crime with which the defendant was charged occurred. On cross-examination she changed her testimony in at least two material aspects. Thereafter, on redirect examination by the State, she maintained the testimony she had given on cross-examination was correct. The State then asked the proper questions for impeaching her on these material changes. Subsequently police officer Sellmeyer was put on the stand by the State and he testified to what this witness had told him the night of July 22-23, 1959, in regard to these matters and the trial court properly limited the jury's consideration of his testimony in regard thereto by its instruction No. 11. We held in Penhansky v. Drake Realty Construction Co., 109 Neb. 120, 190 N. W. 265: "Where one has been misled or entrapped into calling a witness by reason of such witness, previous to the trial, having made statements to the party, or his counsel, favorable to the party's contention, and at variance with the testimony given at the trial, and the party believed and relied upon such statements in calling the witness, and is surprised by the testimony on a material point, he may, in the discretion of the court, be permitted to show the contradictory statements made before the trial." And, as stated in Mason v. Reynolds, 135 Neb. 773, 284 N. W. 257: "To this holding we may add the reasons therefor: Counsel should be allowed to show such previous inconsistent statements of his own witness, for the reason of refreshing his memory, probing his conscience, and, if for no other reason, that

he may show the court and jury the circumstance which induced him to call and vouch for such a witness." See, also, Cornell v. State, 139 Neb. 878, 299 N. W. 231; Svehla v. State, 168 Neb. 553, 96 N. W. 2d 649. As stated in Schluter v. State, 153 Neb. 317, 44 N. W. 2d 588: "Evidence tending to show that a person made, before becoming a witness in a case, statements inconsistent with and contrary to his testimony as a witness on the trial thereof, does not dispose of his testimony as to the matters involved. It constitutes a part of the evidence in the case to be weighed and considered in the determination thereof. Proof of contradictory statements of a witness is received not as evidence of the facts declared, unless made against interest by one who is a party to the record, but for the purpose only of aiding the jury in estimating the credibility of the witness. This is clearly stated in Zimmerman v. Kearney County Bank, 59 Neb. 23, 80 N. W. 54: 'A witness may be impeached by showing that he made statements out of court contrary to those made in court in regard to some matters relevant to the issue. * * * Such declarations are not substantive evidence of the fact declared, unless made against interest by one who is a party to the record. * * * Such declarations are received to aid the court or the jury in estimating the character and credibility of the witness.'" And the foregoing would have equal application when a witness called changes her testimony as to material matters on cross-examination.

By its instruction No. 11 the trial court instructed the jury as follows in this regard: "The State was permitted to lay the foundation for the impeachment of Mrs. Olga Verry to show that this witness answered various questions to a police officer inconsistent with and contrary to her testimony as a witness on the trial hereof. Proof of contradictory statements of a witness, if such you find, is received not as evidence of the facts declared in such alleged contradictory statement

or statements, but for the purpose only of aiding the jury in estimating the credibility of the witness." This instruction properly limited the purpose of this evidence. See, Cornell v. State, *supra;* Schluter v. State, *supra.* We find no merit in this contention.

Defendant complains of the fact that he was, on cross-examination, required to answer the following question although he made objection to doing so: "Q-Did you know that Delores (Gaub) told the police that you did have intercourse there in the bedroom at that time?" The "time" related to the night of July 22-23, 1959. We have always adhered to the principle that: "Where a defendant in a criminal case offers himself as a witness on his own behalf, he is subject to the same rules of cross-examination as other witnesses, and it is the duty of the court to keep the cross-examination within the law." Elliott v. State, 34 Neb. 48, 51 N. W. 315. See, also, Leo v. State, 63 Neb. 723, 89 N. W. 303; Dunlap v. State, 116 Neb. 313, 217 N. W. 89; Wehenkel v. State, 116 Neb. 493, 218 N. W. 137; Crawford v. State, 116 Neb. 629, 218 N. W. 421.

As stated in Kleinschmidt v. State, 116 Neb. 577, 218 N. W. 384: "Unless it can be said, with reasonable certainty, that irrelevant and incompetent evidence received upon the trial of a criminal case is not so prejudicial as to deprive the defendant of a fair trial, a conviction secured by such evidence will be set aside."

Delores Gaub did not so testify nor did the State produce any police officer who testified to that effect. In view thereof we will assume, for the purpose of discussion only, that it was error to require the defendant to answer the question, which he did in the negative.

However, as stated in Jurgensen v. State, 135 Neb. 537, 283 N. W. 228: "Error may creep into the proceedings in criminal prosecutions in spite of impartiality, care, learning and vigilance of the trial judge. It is only error prejudicial to a right of accused or the denial of a substantial legal right that requires the re-

versal of his conviction. Harmless error does not require a second trial. The law recognizes the possibility of harmless imperfections in the proceedings of judicial tribunals and does not defeat itself by exacting absolute perfection in bringing malefactors to justice." See, also, § 29-2308, R. R. S. 1943. Evidence, which was received without objection, shows that defendant, who at all times herein material was a married man, spent many nights in the apartment occupied by Delores Gaub, whom he was dating, and her mother Olga H. Verry; that the apartment consisted of a bedroom, living room, dining room, kitchen, and bath; that he had spent one night in a bedroom with Delores Gaub in the apartment of the latter's brother Gordon Gaub, although not with the brother's knowledge or consent; that on many occasions defendant and Delores came out of her bedroom together; that on the night in question they were in her bedroom together; and that on August 22, 1959, the police caught defendant and Delores together in bed in a hotel in Lincoln, for which charges were filed against them which are still pending. Under this situation we do not think that having to answer this question could have been prejudicial to the defendant.

Defendant contends it was prejudicial error for the State to permanently remove Dennis Gaub from the state and to fail to produce Dennis and policewoman Hulda Roper of the Lincoln police force as witnesses. Dennis Gaub was a 10-year-old brother of the prosecutrix. Their parents had been divorced in 1956. Thereafter, in October 1957, the father Christoph J. Gaub, who then lived in Sidney, Montana, was given the custody of the parents' three youngest children, which included Dennis and the prosecutrix, the latter being 7 years of age on July 22, 1959. On July 11, 1959, the daughter Delores and her mother went to Sidney, Montana, in Delores' car to get the three youngest children. They returned with the children on July 13, 1959, with the intention of having the children visit with them and

the children's brother Gordon until school started in September. However, after the incident of July 22, 1959, Gordon Gaub, under the auspices of the Red Cross, returned the children to the custody of their father at Sidney, Montana. This he did on July 26, 1959. Thus it becomes evident the State did not remove any of these children, which would include Dennis.

It is the duty of the prosecution to produce all evidence tending to establish the guilt or innocence of the accused. Fugate v. State, 169 Neb. 434, 99 N. W. 2d 874. And there may be situations where a failure to do so can result in error requiring reversal. See, Klawitter v. State, 76 Neb. 49, 107 N. W. 121; Peery v. State, 163 Neb. 628, 80 N. W. 2d 699. However, it is not necessary for the State to call every witness whom it knows may have some knowledge relating to the crime charged if such knowledge is not material to the question of the accused's guilt or innocence.

On the night of July 22, 1959, Dennis and his sister, the prosecutrix, stayed at the apartment of their mother and sister located at 219 South Fifteenth Street in the city of Lincoln. The mother put the children to bed in the living room, Dennis sleeping on a rollaway bed and prosecutrix on a couch, which is also referred to in the record as a sofa or daveno. The rollaway bed and couch were about 2 or 3 feet apart. The record shows that at all times herein material Dennis was asleep. Under these circumstances we do not see why the State should have been required to call him nor do we think it was obligated to do so. As to policewoman Hulda Roper, the evidence shows she talked to the mother, Delores, Dennis, and the prosecutrix the morning of July 23, 1959. What these people told her would not be admissible except possibly the complaints of the prosecutrix as to her being molested, if she made any such complaint to her. But the latter would only be corroborative of what other witnesses have testified to. Therefore, we do not think it was necessary for the State

to call her. We find defendant's contention in this regard to be without merit.

Finally, the defendant contends the evidence adduced is not sufficient to sustain the verdict because the corroboration is inadequate. As a witness defendant unequivocally denied the commission of the crime with which he was charged. We said in Klawitter v. State, *supra,* that: "The rule is settled in this state that in cases of rape unless the testimony of the prosecutrix is corroborated on material points, where the accused testifies as a witness on his own behalf and denies the charge, her testimony alone is not sufficient to warrant a conviction." However, we therein went on to say: "But this rule is qualified by the other principle that it is not essential that she be corroborated by the testimony of other witnesses as to the particular act constituting the offense. It is sufficient if she be corroborated as to material facts and circumstances which tend to support her testimony and from which, together with her testimony as to the principal fact, the inference of guilt may be drawn." See, also, Haynes v. State, 137 Neb. 69, 288 N. W. 382; Cascio v. State, 147 Neb. 1075, 25 N. W. 2d 897; Prokop v. State, 148 Neb. 582, 28 N. W. 2d 200, 172 A. L. R. 916; Sherrick v. State, 157 Neb. 623, 61 N. W. 2d 358; Peery v. State, *supra.* In Krug v. State, 116 Neb. 185, 216 N. W. 664, it was said: "In prosecution for rape, the prosecutrix may testify in chief, if within a reasonable time under all the circumstances after the act was committed she made complaint to another, to the fact and nature of the complaint, but not as to its details; and that other may likewise testify in chief to such fact and nature of the complaint, but not as to its details. Such testimony, together with all other facts and circumstances in evidence, may be considered by the jury in corroboration of the testimony of the prosecutrix as to the main fact in issue."

There are discrepancies, inconsistencies, and conflicts in the evidence adduced but these are matters which it

was the duty of the jurors to consider and weigh in arriving at their verdict for the credibility of witnesses and the weight of the evidence are for the jury to determine in a criminal case. Sedlacek v. State, 166 Neb. 736, 90 N. W. 2d 340; Small v. State, 165 Neb. 381, 85 N. W. 2d 712. As stated in Small v. State, *supra*: "This court in a criminal action will not interfere with the verdict of guilty based upon conflicting evidence, unless it is so lacking in probative force that we can say, as a matter of law, that it is insufficient to support a finding of guilt beyond a reasonable doubt." See, also, Sherrick v. State, *supra*.

The crime of which defendant was found guilty occurred on Wednesday, July 22, 1959. In order to get a better picture of the situation out of which the charges made against defendant arose a background of his relation to the Gaub family is necessary. The Gaub family was originally from Sidney, Montana. It consisted of the mother, now Olga H. Verry; the father, Christoph J. Gaub; a daughter, Delores; a son, Gordon; a daughter, Dianne; a son, Dennis; and a daughter, Donna Lou, the prosecutrix. On July 22, 1959, these children were respectively 20, 19, 13, 10, and 7 years of age. The Gaubs were divorced in 1956 in what is referred to as a bitterly contested action. Thereafter, in October 1957, the father was awarded the custody of Dianne, Dennis, and Donna Lou. Delores came to Lincoln in May 1958. She was then and still is single. She became acquainted with defendant and, in either February or March 1959, they started going together. The close intimacy of that relationship has already been referred to. Gordon, who was married, also came to Lincoln to live, being assigned to duty at the Lincoln Air Force Base. In March 1959, the mother came to Lincoln. At first she and Delores lived with Gordon and his family in the latter's apartment. Apparently after the incident that occurred there in which defendant and Delores were involved, hereinbefore referred to, the mother and Delores moved out of Gordon's

apartment and into the one they occupied at 219 South Fifteenth Street on July 22, 1959. On July 11, 1959, Delores and her mother, in the former's car, drove to Sidney, Montana, to get Dianne, Dennis, and Donna Lou, arrangements having been made for them to visit in Lincoln until school opened in September. They arrived in Lincoln on July 13, and thereafter the three children stayed with either Gordon and his family in their apartment or with the mother and Delores in their apartment, or with both.

Defendant originally came from Philadelphia, Pennsylvania. He had been in the Air Force since March 30, 1954, and, at all times herein material, was assigned to duty at the Lincoln Air Force Base, being a staff sergeant. He was married in 1956. However, he and his wife separated and she obtained a decree of divorce on April 15, 1959, which did not become final until October 15, 1959. He was 22 years of age on July 22, 1959.

The evidence adduced would fully support a jury's finding that on July 22, 1959, Dennis and Donna Lou had supper with their mother in her and Delores' apartment; that between 8:30 and 9 p.m., the mother put them to bed in the living room of her apartment in the manner hereinbefore described; that about 10 p.m., after the children had gone to sleep, the defendant came up to the apartment and he and the mother went into the kitchen and visited, they being very good friends; that shortly before 11 p.m., the mother left the apartment to get some beer, closing and locking the door as she left; that when she left the defendant, Dennis, and Donna Lou were the only persons in the apartment; that no one else came into the apartment or left it while the mother was gone; that while the mother was gone Donna Lou awakened and found defendant lying on top of her, she being on her back, and sexually molesting her; that defendant had his hands over her mouth and that when she tried to cry out he put a hand on her neck and asked her if she wanted to live; that when she

said she did he told her not to yell; that he had put her panties down around her ankles and had unbuckled his pants and put them down; that he continued to sexually molest her; that when the mother came back she knocked on the door; that defendant then got up off of her, pulled up his pants and buckled them, and then opened the door; that Donna Lou, although she was crying and continued to do so, did not complain to her mother about what had happened to her as long as defendant was in the apartment because of her fear of him in view of what he had said to her; that about 11:30 p.m., Delores returned from work, she having left the apartment for that purpose prior to 5 p.m.; that later, between 12 and 12:30 a.m., defendant left the apartment, which was on the third floor, to go back to the base; that Delores went down stairs with him; that after defendant left the apartment Donna Lou told her mother that "Tex," whom she had previously seen in the apartment and knew, had sexually molested her; that the mother then called to Delores and asked her to come back to the apartment; that Delores did so, and as she did defendant followed her; that when he got back to the apartment the mother confronted him with what Donna Lou had said, which charges he denied; that the mother then said they would have to take Donna Lou to the hospital to have her examined; and that defendant then called the Lincoln air base and left the apartment shortly thereafter. Defendant was later found by the Lincoln police in the Provost Marshall's office at the base.

After defendant left the apartment Delores called St. Elizabeth Hospital and made arrangements to have Donna Lou examined. The mother and Delores, in the latter's car, then took Donna Lou to the hospital where she was taken to the emergency room. Dr. Bernard Rudis, an intern at the hospital, examined Donna Lou about 1 o'clock a.m., on July 23, 1959. He testified, because of her age, he did a modified pelvic examination;

that he found her hymen had been lacerated; that a tear extended about one or two millimeters into the vaginal wall; that there was bleeding and a moderate amount of mucoid material which was bloody; and that the child was quite disturbed. It was his opinion the child had been molested. It should be stated that the panties Donna Lou wore that night and the bed sheet she slept on were both offered in evidence and both were badly stained from blood, particularly the crotch of the panties.

Two officers of the Lincoln police force were at the hospital when the mother, Delores, Dennis, and Donna Lou arrived there. The officers were there on other business but when they became aware of the reason the Gaubs were there they asked them to come to the police station. As a result they all reported to police headquarters after Dr. Rudis had completed his examination. There each of them talked to Bobby W. Myers, a night lieutenant of the Lincoln police force. Lt. Myers testified Donna Lou made a complaint to him about what had happened to her, that is, that defendant had had intercourse with her. Donna Lou also testified to the fact that she told the man she talked to at the police station about what defendant had done to her.

While there is evidence to the contrary, especially that produced by defendant, we believe the evidence adduced by the State to be amply sufficient to furnish the necessary corroboration. In fact, it would be difficult to get a stronger case in the absence of eyewitnesses. For somewhat comparable situations when this court has held the evidence as to corroboration to be sufficient, see, Beer v. State, 129 Neb. 366, 261 N. W. 824; Robbins v. State, 106 Neb. 423, 184 N. W. 53; Kotouc v. State, 104 Neb. 580, 178 N. W. 174.

In view of what we have herein said and held, it is our opinion that the evidence is sufficient to sustain the jury's finding of guilt and that defendant had a fair trial. We therefore affirm the judgment of the trial court overruling defendant's motion for a new trial

and its judgment sentencing defendant to the Nebraska State Penitentiary.

AFFIRMED.

NETTIE CARTER, GUARDIAN OF TROY V. CARTER, INCOMPETENT, APPELLANT, V. CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, A CORPORATION, ET AL., APPELLEES.
103 N. W. 2d 152

Filed May 13, 1960. No. 34581.

1. **Railroads: Negligence.** A violation of a city ordinance regulating the speed of railroad trains is not negligence per se, but evidence of negligence which may be taken into consideration with all the other facts and circumstances in determining whether or not negligence is established thereby.
2. ———: ———. An instruction which informs the jury that it is not at liberty to find a railroad company negligent on account of the speed alone of a train approaching a crossing, but that the jury is at liberty to consider the speed at which the train was proceeding at the time of the accident with all the other evidence in the case in determining whether or not the railroad company was negligent, does not constitute prejudicial error.
3. **Automobiles.** A guest by the terms of section 39-740, R. R. S. 1943, is a person who accepts a ride in a motor vehicle without compensation therefor.
4. ———. A person riding in a motor vehicle is a guest if his carriage confers only a benefit upon himself and no benefit upon the owner or operator except such as is incidental to hospitality, social relations, companionship, or the like, as a mere gratuity. However, if his carriage contributes such tangible and substantial benefits as to promote the mutual benefits of both the passenger and owner or operator, or is primarily for the attainment of some tangible and substantial objective or business purpose of the owner or operator, he is not a guest.
5. ———. A benefit to the owner or operator of a motor vehicle sufficient to remove an occupant riding in it from the provisions of the guest statute must be a tangible and substantial one and a motivating influence for his furnishing the transportation.
6. ———. The question of whether a person riding in a motor vehicle is a guest, or engaged in a joint enterprise, or other

relationship, is generally one for determination in the individual case. It must be ascertained from facts establishing the identity of the persons advantaged by the carriage, the relationship between the parties, and the purposes to which the transportation is incident.

7. **Negligence: Trial.** Where contributory negligence is pleaded as a defense, but there is no competent evidence to support such defense, it is prejudicial error to submit that issue to the jury.
8. **Railroads: Negligence.** Where contributory negligence of a plaintiff is taken from the jury by an instruction, it is prejudicial error to give other instructions imposing a duty upon such plaintiff to exercise due precautions and to look where he could see and listen where he could hear an approaching train.
9. **Trial: Appeal and Error.** Conflicting instructions are erroneous and they are prejudicial unless it is apparent from the record that the jury was not misled thereby.

APPEAL from the district court for Lancaster County: HARRY R. ANKENY, JUDGE. *Reversed and remanded for new trial.*

John J. Wilson, Healey, Wilson & Barlow, and *Kenneth Cobb,* for appellant.

Mason, Knudsen, Dickeson & Berkheimer, Richard M. Duxbury, J. W. Weingarten, Jack Devoe, and *Elmer M. Scheele,* for appellees.

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

MESSMORE, J.

This is an action brought in the district court for Lancaster County by Nettie Carter as guardian of Troy V. Carter, an incompetent person, plaintiff, against the Chicago, Burlington & Quincy Railroad Company, a corporation, Roy Vermaas and Earl Vermaas, individually and doing business as Vermaas Service Station, Vermaas Service Station, Inc., a corporation, and United States Rubber Company, a corporation, defendants, to recover damages alleged by plaintiff to have been suffered by Troy V. Carter, resulting from a collision be-

tween an automobile, owned and operated by the defendant Roy Vermaas, and a train owned and operated by the defendant railroad company, occurring at the intersection of North Twenty-seventh Street, Lincoln, Nebraska, and the defendant railroad company tracks, on the evening of December 14, 1955.

The case was tried to a jury, resulting in a verdict in favor of the defendants Chicago, Burlington & Quincy Railroad Company, a corporation, Roy Vermaas and Earl Vermaas, individually and doing business as Vermaas Service Station, and Vermaas Service Station, Inc., a corporation.

The United States Rubber Company, a corporation, is in the case on the ground that it was and is obligated, pursuant to the workmen's compensation law of Nebraska, to make certain payments on behalf of Troy V. Carter who, at the time of the accident, was an employee of the defendant United States Rubber Company. This defendant filed an answer because of its claimed subrogation rights under the workmen's compensation law.

The plaintiff, Nettie Carter, guardian of Troy V. Carter, incompetent, filed a motion for new trial against the Chicago, Burlington & Quincy Railroad Company, a corporation, and a motion for new trial against the defendants Vermaas, as above designated. The trial court overruled both motions for new trial involving all defendants, of course except the United States Rubber Company. From the order overruling her motions for new trial, the plaintiff perfected appeal to this court.

All parties to this action agreed that at all times material to the case the defendants Roy Vermaas and Earl Vermaas were doing business as Vermaas Service Station; that Roy Vermaas was the owner and operator of the automobile involved in the accident; that Vermaas Service Station, Inc., was a corporation organized and existing under the laws of the State of Nebraska and a successor to Roy Vermaas and Earl Vermaas doing

business as Vermaas Service Station; that the defendant, Chicago, Burlington & Quincy Railroad Company was a corporation organized and authorized to do business in the State of Nebraska, and said defendant was the owner of the train and engine involved in the accident which was being operated by Mr. Merle White, an employee who at all times was acting in behalf of said company and within the scope of his employment; that Nettie Carter was the duly appointed, qualified, and acting guardian of Troy V. Carter, an incompetent person; and that the accident occurred within the limits of the city of Lincoln, Nebraska.

For convenience Troy V. Carter will be referred to as Carter, or plaintiff's ward; the defendant Chicago, Burlington & Quincy Railroad Company, a corporation, as Burlington; the owner and operator of the automobile here involved as Roy Vermaas; the defendants Roy Vermaas and Earl Vermaas, individually and doing business as Vermaas Service Station, and the Vermaas Service Station, Inc., a corporation, as defendants Vermaas, or as Vermaas; Marvin L. McGee as McGee; and Joe E. Tomsik as Tomsik.

The plaintiff's petition alleged that on the evening of December 14, 1955, while Troy V. Carter was riding at the request of Roy Vermaas in his 1955 Packard sedan and was being driven by Roy Vermaas to the "Steak House" owned by Earl Vermaas so that he could join them for certain contemplated business negotiations, and while proceeding north on North Twenty-seventh Street in the vicinity of the tracks of the defendant Burlington, Roy Vermaas did run into the path of a train that was proceeding in an easterly direction, resulting in a collision; and that said collision was the proximate result of the negligent and careless acts of omission and commission of the defendants and each of them, other than the United States Rubber Company, proximately resulting in injuries and damages which are fully set forth in the petition. The negligent

acts of omission and commission of the defendant Burlington and defendant Roy Vermaas are set out in the petition. The petition further alleged that as a proximate result of the negligent acts of the defendants alleged, severe and permanent injuries resulted to the plaintiff's ward. The prayer of the petition was for damages in a substantial amount.

The answer of the Burlington admitted the acts of negligence of the defendant Roy Vermaas alleged by the plaintiff's petition; denied negligence on its part; alleged that the accident was caused by the negligence of the driver of the automobile, and set out the negligent acts of omission and commission of Roy Vermaas as the driver of the automobile involved, and of plaintiff's ward; alleged that the driver of the automobile and the plaintiff's ward were engaged in a joint enterprise; alleged contributory negligence on the part of the plaintiff's ward, setting forth several allegations wherein this defendant claimed that such ward was guilty of contributory negligence; and denied the allegation of the petition as to the injuries sustained by the plaintiff's ward. The prayer was that plaintiff's petition be dismissed.

The answer of the defendants Vermaas admitted that the defendant Burlington was negligent as alleged in the plaintiff's petition; denied negligence on their part; alleged that the accident was proximately and directly caused by the negligence of the defendant Burlington, and set forth the specific acts of negligence of the Burlington; and alleged that at all times the plaintiff's ward rode within the automobile of Roy Vermaas as a guest. The answer prayed for dismissal of the plaintiff's petition.

By amendment to the plaintiff's petition, the plaintiff pleaded that at all times mentioned there was in full force and effect a city ordinance of the city of Lincoln, limiting the speed of trains within the corporate limits to 18 miles an hour.

The plaintiff assigns as error the following: (1) The trial court erred in giving instruction No. 27 which stated that the jury was not at liberty to find the Burlington negligent on account of the speed alone at which the train in question approached the crossing in question; (2) the trial court erred in giving instruction No. 27 which allowed the jury to consider the speed of the train in question only in connection with the negligence otherwise charged in plaintiff's petition; (3) the trial court erred in giving instructions No. 19, No. 28, No. 34, and each of them, which pertain to the duties of a driver and the occupant, or occupants, thus submitting to the jury the issue of contributory negligence of plaintiff's ward, after the court had determined as a matter of law that the plaintiff's ward was not contributorily negligent; (4) the trial court erred in giving instruction No. 25 which directed the jury to consider whether the parties or any of them were guilty of negligence, thus submitting to the jury the issue of the contributory negligence of the plaintiff's ward, after the court had determined as a matter of law that the plaintiff's ward was not contributorily negligent; and (5) the trial court erred in giving instruction No. 9 which allowed the jury to determine whether plaintiff's ward was a guest or passenger of Roy Vermaas at the time of the accident, when the evidence established that the conveyance was in furtherance of an overall plan for an evening's activities which were in the mutual business interests of the parties.

The record shows that Twenty-seventh Street in Lincoln runs north and south. The railroad crossings on North Twenty-seventh Street consist of tracks of the Chicago, Rock Island & Pacific Railroad, hereafter referred to as the Rock Island, which are located 180 feet south of the double tracks of the Burlington main line which run in a northeast and southwest direction, making an angle at the intersection at the southwest corner of the crossing of Twenty-seventh Street of approxi-

mately 55 degrees. The general area is within the city limits of Lincoln. The Chicago and North Western Railroad Company has a single track which crosses the Burlington tracks just to the west of Twenty-seventh Street, and crosses Twenty-seventh Street just north of the Burlington railroad crossing in a southwest and northeast direction. The Burlington crossing has protection devices at Twenty-seventh Street which consist of a signal installed on the east side of Twenty-seventh Street south of the crossing, containing a pair of red flashing lights facing south and mounted approximately 6 feet 3 inches above the level of the pavement, and an identical signal on the west side of Twenty-seventh Street, north of the crossing, facing north. The standard on the south side holding the flashing lights also contains a bell, a reflectorized cross-buck sign located above the flashing lights containing the words "Railroad Crossing," a reflectorized sign stating "3 Tracks," and a reflectorized sign placed below the flashing lights stating "Stop on Red Signal."

Approximately 16 feet south of the Burlington tracks and 13 feet west of the pavement on Twenty-seventh Street there is located a small signal instrument house, and there are no other obstructions on the east or west side of Twenty-seventh Street between the Burlington and Rock Island railroad tracks.

There is a line of trees running in an east-west direction 432.5 feet south of the Burlington crossing on the west side of Twenty-seventh Street, and a line of houses facing Twenty-seventh Street, south of the trees.

The above sufficiently describes the area relating to the place where the accident occurred.

The record discloses the following.

Marvin L. McGee, a salesman in the petroleum division of the United States Rubber Company, which we will hereafter refer to as the U. S. Rubber Company, testified that he knew Carter and helped him in his work with Champlin outlets in Carter's territory; and that

Roy Vermaas and Earl Vermaas were engaged in operating a Champlin service station in Lincoln at the time of the accident. This was a partnership business. Earl Vermaas is a brother of Roy Vermaas, and at the time of the accident, December 14, 1955, was the owner of the Steak House. McGee and Carter drove Carter's Buick automobile to the Vermaas Service Station where they met Roy Vermaas. The purpose of the meeting with Roy Vermaas was to endeavor to have the products of the U. S. Rubber Company distributed by Vermaas on a wholesale basis to new and existing service stations in the Lincoln trade area. McGee further testified that it had been planned that after dinner that evening they were going to work out a program concerning the stocking of merchandise and solicitation of other Champlin outlets; that the program was to be worked out at the Steak House; and that there were no plans to go to any home, office, or any place other than the Steak House following dinner. Vermaas desired to go home first and freshen up. He invited McGee and Carter to his home for refreshments before going to dinner. McGee, Carter, and Tomsik went to the Roy Vermaas house, had refreshments, and left for the Steak House after 20 or 30 minutes. McGee further testified that the purpose of going to the Steak House was to talk over the matter with Earl Vermaas, the brother of Roy Vermaas and partner in the service station business. Earl Vermaas testified that on December 14, 1955, he was in Scottsbluff, Nebraska; and that he left Lincoln the Sunday before the accident and did not return to Lincoln until the morning after the accident. McGee further testified that he never had any conversation with either Roy or Earl Vermaas relative to a planned meeting. Roy Vermaas invited McGee, Carter, and Tomsik to ride in his 1955 Packard sedan, which invitation was accepted. When they got into the car, McGee sat in the back seat immediately behind the driver, Roy Vermaas. To the right of McGee sat Tomsik, and Carter

sat to the right of Roy Vermaas in the front seat. McGee further testified that it was dark, the weather was cold, there was no snow, the windows in the car were not steamed over or frosted, the heater was on, and the car was comfortable. The conversation of Tomsik, Vermaas, Carter, and McGee, while riding in the car, was not related to business, but with reference to the interior of the car, and was a rather light conversation. McGee further testified that Roy Vermaas did nothing with reference to driving that attracted his attention. McGee testified that before the accident he was facing the front of the car; that there was no obstruction in front of him; that he was paying close attention to what was in front of him; that he was familiar with automatic lights at railroad crossings; that at no time before the accident did he see flashing lights or hear the whistle or bell of a train approaching; that there was nothing to prevent him from hearing a bell or whistle; that he did not see a headlight of a train in front of him; and that he remembered nothing about the actual accident.

On cross-examination McGee testified that he was not aware that they were approaching a railroad crossing just before the accident; that he did not listen for a train whistle or bell nor look for a headlight; that he never saw the train that hit the Vermaas car; and that he did not know if the signal lights at the crossing were within the range of his vision shortly before the accident.

Tomsik testified that he was a district sales manager for the Champlin Oil and Refining Company; that he knew Roy Vermaas through business associations; and that on December 14, 1955, the U. S. Rubber Company was marketing its products in Champlin service stations. He further testified that Roy Vermaas told him they were going out to dinner, then going to his house to write up the order and watch the fight. This witness called his wife in Norfolk and told her that after dinner

he would be at the Roy Vermaas residence, and gave her the telephone number there. He further testified that it was the intention to go in Carter's car, but Carter said he had supplies in the back seat of his car and not all of them could ride in his car. Thereafter Roy Vermaas offered the use of his car and Carter said that was a good idea as he had been wanting to ride in Roy's new car and now was the time to do so. He further testified that he accompanied McGee and Carter in the Roy Vermaas car in an advisory capacity to Roy Vermaas because of his knowledge of certain elements of service station business, however, he had nothing to do with any agreement or contract that might be entered into by Vermaas and the representatives of the U. S. Rubber Company. They started north on Twenty-seventh Street to go to the Steak House for dinner, and the speed of the Vermaas car was from 25 to 30 miles an hour. He remembered approaching the point where the accident happened. He was familiar with the fact that there were railroad crossings on North Twenty-seventh Street and flashing lights located at the railroad crossings. Before they arrived at the crossings, he saw some red lights flashing. This was when they were 100 to 200 yards south of the Rock Island tracks. The only other lights he could see were neon lights about a quarter of a mile north of the Burlington crossing. He further testified that the red lights he saw as they approached the point where the accident happened went out a short time after he sighted them. After these lights went out, he watched straight ahead. The flashing lights on the right side of the street never did come on. He further testified that he did not hear a whistle, nor did he see a beam of light from a headlight of an engine; and that there was nothing to obstruct his view.

On cross-examination Tomsik testified that he could not tell whether he was looking at the Burlington or Rock Island flashing lights; that he thought he saw a

train about the time he saw the flashing red light; and that when the light went out it was about the same time that a train going east passed by the crossing. He did not see the train that hit the Vermaas automobile. He also testified that when Roy Vermaas invited him to dinner, Vermaas told him that they were going out to dinner then to the Vermaas house for a meeting and to write up an order with the U. S. Rubber Company; that while he was present at the Vermaas house and on the way to dinner, he heard nothing said with reference to a tire order or other business; and that the purpose was to go to the Steak House for dinner and return to the Vermaas house where an order would be written up between Vermaas and the representative of the U. S. Rubber Company.

Roy Vermaas testified that he was the active manager of the Vermaas Service Station and handled Champlin products; that Earl Vermaas owned the Steak House; and that he, Roy Vermaas, had no financial interest in the Steak House. He further testified that he knew Carter and purchased tires from him; and that Carter on occasions suggested a change in the relationship between the U. S. Rubber Company and the Vermaas Service Station business, the idea being to set up a U. S. Rubber Company distributor to furnish new service stations with tires, batteries, and accessories. This witness further testified that he saw Carter and McGee on December 14, 1955, when they drove to the service station between 4:30 and 5 p.m., in Carter's Buick automobile. At that time Carter wanted to know if they could get started on an order. Roy Vermaas told Carter it was late, and he would rather have McGee and Carter come to his house after dinner. McGee and Carter then invited Vermaas to dinner. He accepted the invitation. Carter asked Vermaas if he would call his wife and find out if she would like to go to dinner, and then Carter would call his wife and invite her. Vermaas was unable to contact his wife by telephone, and invited Carter and

McGee to his home for refreshments, and they agreed to this. Afterward, when McGee, Carter, and Tomsik were at the Vermaas house, Roy Vermaas mentioned that it was about 10 minutes until 7 o'clock and the reservation had been made at the Steak House for 7 o'clock. Roy Vermaas further testified that when the parties left his house Carter endeavored to remove certain materials used by salesmen from his car, and Vermaas told Carter that was not necessary, that they would take the Vermaas car. He further testified that he drove north on Twenty-seventh Street, and maintained a rate of speed of 30 miles an hour; and that as he approached the railroad crossing the headlights on his car were operating satisfactorily, all of the windows and the windshield were clear, and all other mechanical parts of the car were in good operating condition. When he was about a block from the Burlington railroad crossing, he looked to see if any signals were flashing, and there were none. When he was about half a block from the railroad tracks, he looked to the right and left and did not see a train approaching from either direction. At that time the flashing lights of the railroad crossing signals were within his range of vision, and none of them were flashing. As he proceeded closer to the railroad tracks, he looked to see if the signals were flashing. They were not, so he crossed the Rock Island railroad tracks and approached the first Burlington railroad track. He looked again to see if the signals were flashing on the right side of Twenty-seventh Street as he proceeded north, and they were not. He again looked to his left and did not see any lights of a train, or a train approaching on any of the railroad tracks. He observed the Burlington flashing light signal on the east side of Twenty-seventh Street, and this signal was not flashing, so he continued across the Burlington railroad tracks. He heard no warnings of the approach of a train, and there was no warning from anyone in the automobile. As he started across the Burlington rail-

road tracks his automobile came in contact with a train, and he remembered nothing until the next afternoon. He further testified that he had no plans or intention of discussing business matters with McGee or Carter at the Steak House, and no arrangements had been made to that end by anyone.

The engineer on Burlington train No. 305, involved in the accident, testified that the engine was a small diesel engine used for freight or passenger service. He further testified that he sat on the right side of the engine about 8 feet from the front of it; that from the top of the engine to the ground would be about 15 or 16 feet; and that the controls of the engine were to his left and at his fingertips. He explained the different instruments, the automatic brakes and the brake system as it operates the train, and testified that the train was equipped with a sanding device in connection with the braking system. He further testified that he applied his emergency brake at the time of the accident; that the fireman rode on the left side of the engine and occupied that position at the time of the accident; and that the train consisted of one coach coupled to the engine, and was en route to Omaha as an extra train. He further testified that the train left the passenger station between P and Q Streets on Sixth Street at approximately 6 p.m. Before leaving the depot, he turned on the electrically operated engine bell. This bell would ring continuously until it was shut off, and it was not shut off that night between the time the train left the depot and the time it stopped after the accident. The bell weighed in excess of 30 pounds. The engine was equipped with a Mars headlight which oscillated in a figure-8 pattern, and with a steady beam light below the Mars light. This witness further testified that both lights were turned on before starting the train, and remained on continuously thereafter. When the train arrived at the dwarf signal at the Missouri Pacific crossing it was going at a rate of approximately 15 miles an hour. Thereafter its speed

was increased to 31 to 32 miles an hour between the Seventeenth and Twenty-seventh Street crossings. This witness further testified that he gave the regular crossing signal of two long blasts of the whistle, one short blast, and another long blast, until the train reached the crossing at Twenty-seventh Street. The engineer further testified that as he approached the Twenty-seventh Street crossing he watched the overhead signal on the signal bridge west of Twenty-seventh Street which controls the south track; that he had seen this signal turn green at the Missouri Pacific crossing at Eleventh Street; that he first saw the flashing lights on the south side of the Twenty-seventh Street crossing when he was approximately 2,000 feet from Twenty-seventh Street, and observed they were operating; and that he first saw the Roy Vermaas automobile on Twenty-seventh Street south of the railroad crossing when it appeared past the line of evergreen trees north of the last house located on the west side of Twenty-seventh Street 432.5 feet south of the crossing. The headlights on the Vermaas automobile were on. The train was then approximately 600 feet from the crossing, and the engineer's vision was not obstructed when he looked toward the Vermaas automobile. He further testified that he checked the overhead bridge signal, the motor gauges, and looked down the track to see if it was clear. He did not apply his brakes when he saw the Vermaas automobile the first time, for the reason that he estimated the speed of that automobile to be 20 or 25 miles an hour, which was not fast, and he was unable to tell whether or not the driver of the car was going to stop. He further testified that he next saw the Vermaas automobile an instant before the impact when it was 2 or 3 feet from the engine. At that time he applied his emergency brakes. The train stopped approximately 600 feet east of the crossing. The train was backed up a minute or so later, until the rear part of it was 75 to 100 feet east of the signal bridge located east of

Twenty-seventh Street. This witness further testified that train No. 305 passed train No. 273 going east on the north track about halfway between Seventeenth and Twenty-seventh Streets.

The fireman on train No. 305 testified that the headlight and the Mars light were operating from the time the train left the depot. When train No. 305 was approaching the crossing on Twenty-seventh Street, he could see the red lights flashing on the south side of the crossing from the time the train was 1,000 feet west of Twenty-seventh Street. The last time he looked at the south signal was 100 feet west of the crossing. He further testified that he heard the whistle of the engine sounding when the train was 600 or 700 feet west of Twenty-seventh Street. The last whistle blast lasted until the train reached the railroad crossing. He estimated the speed of train No. 305 at about 30 miles an hour as it approached Twenty-seventh Street. He further testified that he observed the overhead signal on the bridge west of Twenty-seventh Street until it went out of sight, and the signal was clear.

The rear brakeman and flagman on train No. 305 testified that he rode in the coach; and that he got off of the rear of the train after it stopped, and walked back to warn other trains. He gave as his opinion that train No. 305 was traveling from 30 to 35 miles an hour when it crossed Twenty-seventh Street. He testified that the lights in the coach were on; that he heard the engine whistle as the train approached Twenty-seventh Street; and that he saw the flashing lights on Twenty-seventh Street after the accident as he walked back to the Vermaas automobile.

The conductor on train No. 305 testified that he was seated in the rear seat of the coach on the south side filling out forms. He estimated the speed of the train as it approached the Twenty-seventh Street crossing to be 30 to 35 miles an hour. As the train crossed Twenty-seventh Street, he observed the flashing lights operating

on the south side of the crossing. He further testified that he made a record of the train stops as he was required to do, and which he did that night; and that when train No. 305 stopped it was 7:10 p.m. by his watch. This was verified by a delay report made out by the conductor. He further testified that he called the dispatcher from a telephone located near the signal bridge east of Twenty-seventh Street, and informed the dispatcher of the accident.

The other brakeman on train No. 305 was on the north side of the coach. He testified that he observed that the engine's lights were on when the train left the depot. He estimated the speed of the train at approximately 35 miles an hour. He further testified that he observed the light in the side of the flashing signals at the Twenty-seventh Street crossing.

The engineer on train No. 273 which was composed of 27 freight cars and proceeding east from Lincoln on the north track of the Burlington, testified that train No. 273 stopped 200 feet west of the signal bridge west of Twenty-seventh Street due to motor trouble; that the signal on this bridge was green when the train stopped, and turned red shortly afterward; that the steady beam light and the Mars light were operating on train No. 273; that train No. 305 passed train No. 273 just east of Seventeenth Street; that in his opinion train No. 305 was going at a rate of speed of 30 miles an hour when it passed train No. 273; that he estimated the speed of train No. 273 was from 5 to 14 miles an hour; that he observed the headlight and Mars light on train No. 305, and the coach lights, all of which were operating; and that he heard the whistle of train No. 305 as it approached the Twenty-seventh Street crossing.

The conductor on train No. 273 testified that he was sitting in the caboose when this train stopped at the signal bridge west of Twenty-seventh Street at 7:10 p.m. Thereafter he walked to Twenty-seventh Street and observed the crossing signals operating. He ob-

served the headlights on train No. 305 as it came up behind train No. 273 before passing it, and they were operating. Train No. 273 was delayed somewhat due to motor trouble, and was eastbound to Pacific Junction, Iowa.

Thelma Olson testified that she resided one block north and one block west of the railroad tracks here involved; that on the day of the accident she saw the mail train on the Burlington tracks cross Twenty-seventh Street at 2 p.m.; and that the flashing light signals were working. She further testified that she arrived at the place of the accident about 3 minutes after it happened; that she heard the whistle of the train, and noticed a train sitting on the east side of the crossing; and that the flashing signals were still working at that time.

Leora Johns testified that she saw the accident when she was driving her automobile north on Twenty-seventh Street; and that as she was crossing the Rock Island tracks she saw the swinging Mars headlight on the train when it was a block west of Twenty-seventh Street. She did not remember whether she heard a train whistle or saw the flashing signals operating, nor did she remember if she looked to see if the flashing lights were operating.

Dr. Alfred Hausrath, a mechanical engineer, after setting forth his qualifications and the manner, form, and technique used to discern the speed of automobiles, trains, and vehicles in general, determined that train No. 305 was traveling at a rate of speed of 52 miles an hour at the time of the collision.

Another expert, a consulting engineer and college professor who had conducted and participated in a great many tests of brake shoes and the stopping ability of trains, made an analysis from certain facts using his knowledge with reference to the subject matter, and determined that train No. 305 was traveling at a rate of speed of 55.2 miles an hour at the time of the collision.

A consulting engineer with many years experience

doing research in engineering for large companies testified that by taking into consideration certain facts, and by his expert knowledge and analysis, he concluded that train No. 305 was operating at a speed of 52.2 miles an hour at the time of impact.

A Lincoln city police officer, connected with the traffic division and whose duty it was to investigate automobile accidents, testified that he was called to the scene of the accident at the Burlington crossing on North Twenty-seventh Street, on December 14, 1955, arriving there at approximately 7:20 or 7:25 p.m. He observed the Vermaas car 12 or 15 feet south of the south track of the Burlington. From measurements taken from the south Burlington track this automobile was 193 feet east of Twenty-seventh Street. On cross-examination this witness testified that he observed the cross-buck signals, and they were flashing off and on.

The plaintiff contends that excessive speed of a train within the city limits of a city, when in violation of an ordinance, is in itself sufficient evidence of negligence to hold the railroad company liable for injury, if the jury finds that such excessive speed was a contributing cause of the injury.

In this connection, the plaintiff attacks instruction No. 27 given by the trial court to the jury as constituting prejudicial error. Instruction No. 27 reads as follows: "You are instructed that you are not at liberty to find the defendant railroad company negligent on account of the speed alone at which the train in question approached the crossing in question, but you are at liberty to consider the speed at which the train was proceeding at the time of the accident with all the other evidence in the case, in coming to a conclusion as to whether said defendant railroad company is chargeable with the negligence otherwise charged in plaintiff's petition."

The plaintiff's petition charged the Burlington with negligence in the following respects: (a) Failure to maintain proper observation; (b) failure to maintain

proper signal devices; (c) failure to sound any audible warning of the approach of the train to the crossing; (d) failure to have a headlight in operation; (e) operating the engine without proper warning lights; (f) operating the engine at an excessive rate of speed, to wit, in excess of 18 miles an hour in violation of an ordinance limiting speed within the city limits to 18 miles an hour; (g) maintaining defective signal devices at crossing; and (h) although the engineer saw, or should have seen, the approach of said vehicle, he acted in disregard of such knowledge.

At the time of the accident there was in full force and effect an ordinance of the city of Lincoln which provided that no train should be run over any railroad within the corporate limits of the city of Lincoln at a greater speed than 18 miles an hour.

As heretofore mentioned, there is evidence that the speed of the Burlington train in approaching the crossing was in violation of the city ordinance. The trial court, in instruction No. 25, informed the jury that the violation of the city ordinance was not in and of itself negligence, as a matter of law, but the violation thereof was evidence of negligence which the jury should consider together with all the other evidence in the case to determine whether or not the parties, or any of them, were guilty of negligence. While instruction No. 25 will be considered in connection with another assignment of error, insofar as it relates to the violation of the city ordinance, it is a proper instruction.

It is the rule of this court that: "A violation of statutes regulating the use and operation of motor vehicles upon the highways is not negligence per se, but evidence of negligence which may be taken into consideration with all the other facts and circumstances in determining whether or not negligence is established thereby." Landrum v. Roddy, 143 Neb. 934, 12 N. W. 2d 82, 149 A. L. R. 1041. See, also, O'Neill v. Henke, 167 Neb. 631, 94 N. W. 2d 322; Gleason v. Baack, 137 Neb. 272, 289 N. W.

349. The same rule would apply to the operation of trains within the city limits in violation of a city ordinance.

From our research, we find no case in this state holding that the excessive speed of a train, in and of itself, constitutes negligence per se.

Instruction No. 27 given in the instant case is substantially the same as an instruction appearing in the case of Kepler v. Chicago, St. P., M. & O. Ry. Co., 111 Neb. 273, 196 N. W. 161. This court said that the court did not err in giving instruction No. 14, in substance that the jurors were not at liberty to find the defendant negligent in running its train at the rate at which it was running, but were at liberty to consider the speed of the train in connection with other negligence in the manner charged. The court said: "There can be no error in this instruction. If the train was being run at a high rate of speed and the engineer was engaged in getting everything out of his engine that it could accomplish, it is possible that his intentness upon the matter of speed might make him forgetful of his duty to ring the bell or blow the whistle. * * * And it sufficiently appears that the court otherwise in such instruction indicated that the matter of speed was not in itself a ground of negligence."

Instruction No. 27 does not prohibit the jury from considering speed as evidence of negligence if the jury found there was a violation of the city ordinance. There are other instructions relating to this subject matter which we deem unnecessary to set forth. We conclude that instruction No. 27 given by the trial court did not constitute prejudicial error.

The plaintiff contends that the evidence discloses that the purpose of using the automobile of Roy Vermaas was to further the mutual business interests of the parties, and that the trial court erred in failing to instruct the jury that, as a matter of law, Carter was a

passenger and not a guest in the Roy Vermaas automobile at the time of the accident.

Section 39-740, R. R. S. 1943, provides in part: "The owner or operator of a motor vehicle shall not be liable for any damages to any passenger or person riding in such motor vehicle as a guest or by invitation and not for hire, unless such damage is caused by the driver of such motor vehicle being under the influence of intoxicating liquor or because of the gross negligence of the owner or operator in the operation of such motor vehicle. For the purpose of this section, the term 'guest' is hereby defined as being a person who accepts a ride in any motor vehicle without giving compensation therefor, * * *."

It is necessary in this case, in order to arrive at a decision herein, to determine the status of Carter while he was riding in the Roy Vermaas automobile, that is, was Carter a guest or a passenger? The burden of establishing Carter's status as a passenger was on the plaintiff. Lincoln v. Knudsen, 163 Neb. 390, 79 N. W. 2d 716.

In Born v. Estate of Matzner, 159 Neb. 169, 65 N. W. 2d 593, we said: "A guest by the terms of section 39-740, R. R. S. 1943, is a person who accepts a ride in a motor vehicle without compensation therefor." See, also, Eilts v. Bendt, 162 Neb. 538, 76 N. W. 2d 623.

The next question is whether or not there was an issue of fact on this question. We said in Van Auker v. Steckley's Hybrid Seed Corn Co., 143 Neb. 24, 8 N. W. 2d 451, that: "If the evidence is undisputed, or such that minds of men could not reasonably arrive at any other conclusion, the question is one for decision by the court as a matter of law; otherwise, it is a question for the jury to decide as other issuable facts in the case."

"The question of whether a person riding in a motor vehicle is a guest, or engaged in a joint enterprise, or other relationship, is generally one for determination in the individual case. It must be ascertained from facts establishing the identity of the persons advantaged

by the carriage, the relationship between the parties, and the purposes to which the transportation is incident." Van Auker v. Steckley's Hybrid Seed Corn Co., *supra*. See, also, Paxton v. Nichols, 157 Neb. 152, 59 N. W. 2d 184.

"The phrase 'without giving compensation therefor' (Comp. St. Supp. 1939, section 39-1129, now section 39-740, R. R. S. 1943) indicates an intention not to limit compensation to persons specifically paying for transportation in cash or equivalent, or to require that it pass exclusively from the passenger to the driver." Van Auker v. Steckley's Hybrid Seed Corn Co., *supra*. See, also, Born v. Estate of Matzner, *supra*.

"A person riding in a motor vehicle is a guest if his carriage confers only a benefit upon himself and no benefit upon the owner or operator except such as is incidental to hospitality, social relations, companionship, or the like, as a mere gratuity. However, if his carriage contributes such tangible and substantial benefits as to promote the mutual interests of both the passenger and the owner or operator, or is primarily for the attainment of some tangible and substantial objective or business purpose of the owner or operator, he is not a guest." Van Auker v. Steckley's Hybrid Seed Corn Co., *supra*. See, also, Gunn v. Coca-Cola Bottling Co., 154 Neb. 150, 47 N. W. 2d 397; Born v. Estate of Matzner, *supra*.

"A benefit to the owner or operator of a motor vehicle sufficient to remove an occupant riding in it from the provisions of the guest statute must be a tangible and substantial one and a motivating influence for his furnishing the transportation." Born v. Estate of Matzner, *supra*.

There would be no useful purpose in citing and discussing cases from foreign jurisdictions for the reason that we have said that each case must stand on its own facts, and those facts must be gauged by the standards

which we have heretofore determined should be applied thereto.

We have heretofore set out the evidence relating to this issue and shall not repeat it. Under the controlling standards heretofore set out, we think the evidence establishes as a matter of law that Carter was riding in the Roy Vermaas automobile as a guest at the time of the accident. It is true, the trial court submitted the issue as to whether Carter was a guest or passenger in the Roy Vermaas automobile to the jury in instruction No. 9. In the light of our conclusion, discussion of instruction No. 9 becomes unnecessary, and the plaintiff's assignment of error cannot be sustained.

The plaintiff contends that the trial court committed prejudicial error in submitting to the jury issues as to duties of care imposed upon an occupant of an automobile which has been struck by a railroad train, when there was no evidence in the record as to the negligence on the part of such occupant.

The trial court, in instruction No. 10, instructed the jury that there was no sufficient evidence to sustain a finding of negligence on the part of plaintiff's ward, and therefore all allegations and claims of negligence against Carter were withdrawn from the consideration of the jury.

The trial court, in instruction No. 34, instructed the jury: "You are advised that the existence of automatic signals at a crossing does not excuse the driver and an occupant of a motor vehicle from exercising due precaution and looking where he could see, and listening where he could hear, for an approaching train." Instruction No. 34 was requested by the Burlington.

The words "an occupant," insofar as the jury was concerned, would mean Carter as an occupant of the Roy Vermaas automobile at the time of the accident. Instruction No. 34 directed the attention of the jury to the question of a duty imposed upon Carter in looking and listening for an approaching train. The language

in instruction No. 34 stating that the presence of signals does not "excuse" an occupant of the Roy Vermaas automobile from exercising due care and caution and looking where he could see and listening where he could hear an approaching train, submits the issue of possible failure to exercise precaution, or failure to look, or failure to listen, to the jury.

In Anderson v. Nielsen, 162 Neb. 110, 75 N. W. 2d 372, this court said: "It is of course true that if there was no contributory negligence shown on the part of plaintiff it was prejudicial error to submit that issue to the jury. The controlling rule appears in Allen v. Clark, 148 Neb. 627, 28 N. W. 2d 439, as follows: 'Where contributory negligence is pleaded as a defense, but there is no evidence to support such defense, it is prejudicial error to submit such issue to the jury.' See, also, Driekosen v. Black, Sivalls & Bryson, 158 Neb. 531, 64 N. W. 2d 88; Scott v. Service Pipe Line Co., 159 Neb. 36, 65 N. W. 2d 219; Fick v. Herman, 159 Neb. 758, 68 N. W. 2d 622."

Since the evidence does not substantiate any such claim of contributory negligence on the part of Carter, the submission of the issues contained in instruction No. 34 constituted prejudicial error.

In instruction No. 25, which has heretofore been referred to, the trial court instructed the jury: "If you find that any of the parties to this action violated any of the laws of the State of Nebraska which are set forth in these instructions, or any of the ordinances which were received in evidence during the trial and which are referred to in these instructions, you are instructed that the violation thereof is not in and of itself negligence, as a matter of law, * * *." This instruction submitted the contributory negligence of Carter to the jury after the trial court had determined, as a matter of law, that Carter was not contributorily negligent.

It might be well to point out that the mere fact that

the action was brought by the guardian of Carter, declared to be an incompetent, does not mean that he is not a party to this litigation. He is, in fact, the real party in interest as far as the plaintiff's case is concerned, and he was so treated in the court's instructions to the jury.

In instruction No. 28, the trial court instructed the jury: "The failure of the crossing protection flasher signals to operate at a railroad crossing does not relieve the driver or occupant of an automobile about to cross the tracks from the duty to use due care to look and listen for an approaching train."

Instruction No. 25 and instruction No. 28 are subject to the same objections, that is, that by instruction No. 10, the trial court eliminated any question of the alleged negligence on the part of Carter. By the instructions as above set out the trial court placed before the jury the question of whether Carter, as an occupant of the Roy Vermaas automobile, fulfilled certain duties as are set forth in such instructions. We believe the following to be applicable.

In Barney v. Adcock, 162 Neb. 179, 75 N. W. 2d 683, this court said: "Conflicting instructions are erroneous and they are prejudicial unless it is apparent from the record that the jury was not misled thereby because it is impossible to know which of the directions the jury followed. Peterson v. Chicago, M. & St. P. Ry. Co., 101 Neb. 3, 161 N. W. 1043; Bryant v. Modern Woodmen of America, 86 Neb. 372, 125 N. W. 621, 27 L. R. A. N. S. 326, 21 Ann. Cas. 365; Sanderson v. Huffman, 132 Neb. 321, 271 N. W. 870; Hief v. Roberts Dairy Co., 138 Neb. 885, 296 N. W. 331; Harsche v. Czyz, 157 Neb. 699, 61 N. W. 2d 265."

While the plaintiff predicated error on the giving of instruction No. 19 and the Burlington argued that the giving of this instruction was proper, we believe it is unnecessary to discuss the giving of instruction No. 19 for the reason that the instructions heretofore mentioned and discussed constitute prejudicial error.

We conclude that the plaintiff's assignment of error relating to the instructions above discussed should be sustained for the reason that they constitute prejudicial error.

Under the evidence shown in the record, we conclude that it is sufficient to submit to the jury, under proper instructions, the issue of negligence on the part of the Burlington, and the issue of gross negligence on the part of the defendant Roy Vermaas.

While there are other assignments of error presented on this appeal, inasmuch as a new trial must be had, we deem it unnecessary to discuss such other assignments of error.

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

REVERSED AND REMANDED FOR NEW TRIAL.

LOUISA KUNZ, APPELLANT, IMPLEADED WITH GOLDA HAITH ET AL., APPELLEES, V. H. L. BORNEMEIER ET AL., APPELLEES.

102 N. W. 2d 842

Filed May 13, 1960. No. 34733.

1. **Highways: Adverse Possession.** A public highway may be established by prescription by continuous adverse use thereof by the public for a period of 10 years.
2. **Highways.** In determining the question of whether or not a public highway has been established by dedication the court is required to examine the proceedings had to ascertain if the jurisdictional requirements necessary for that purpose have been met.
3. ———. If the jurisdictional requirements for the establishment of a public highway by dedication have not been met the lapse of time will not supply the defect.
4. **Bridges: Counties.** In determining the character of repairs to be made to bridges, and what bridges shall be repaired, when there are not sufficient funds for all, the court will not control the discretion of county commissioners, unless there is a clear abuse of discretion.

5. **Bridges: Mandamus.** It is a general principle that the building of bridges, or the making of local improvements, is a discretionary power entrusted to public and municipal corporations, and, when the proper authorities have in good faith decided, mandamus will not issue to compel them to a different course.

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

Johnston & Grossman and *Norman F. Langemach*, for appellant.

James F. Begley, for appellees.

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

YEAGER, J.

This is an action wherein Louisa Kunz, Golda Haith, and Kenneth Haith, plaintiffs, instituted an action in the district court for Cass County, Nebraska, against H. L. Bornemeier, W. F. Nolte, and Melvin R. Todd, county commissioners of Cass County, Nebraska, defendants, the purpose of which was to obtain a writ of mandamus requiring the defendants to rebuild, restore, or replace a bridge and maintain a section-line public highway on the line between Section 4, Township 10 North, Range 10 East, and Section 9, Township 10 North, Range 10 East, in Cass County, Nebraska, which line was alleged to be 1 mile of a road designated as No. 169. Highway No. 169 is a road 8 miles in length.

A trial was had to the court and the writ of mandamus was denied. A motion for new trial was filed and in due course overruled. From the judgment denying the writ and the order overruling the motion for new trial, the plaintiff Louisa Kunz has appealed.

By the petition the plaintiffs substantially alleged that the area involved was and still is a public highway which has never been vacated, and that it was at one time used as a United States mail route; that they are the owners of 80 acres of land which is of the value of

$20,000 in Section 4 which abuts, adjoins, and is contiguous to this line; that there is no other adequate and proper means of ingress or egress to this land; and that the plaintiffs, the traveling public, and the taxpayers of Cass County are entitled by law to have the highway and a bridge across it maintained in a reasonable and passable condition.

It is further alleged, again substantially, that although it was the duty of the defendants to rebuild, restore, or replace the bridge and maintain the highway they have failed so to do.

The defendants Bornemeier and Todd filed separate answers which in all material respects are the same. They admitted that the land in question was owned by the plaintiffs Louisa Kunz and Golda Haith. There was a general denial of the other allegations of the petition. This was followed by affirmative allegations, in substance, that another public highway had been established which gives adequate ingress and egress to the land directly involved; and that the cost and expense of constructing and maintaining the bridge and road would entail an unwarranted expense of public funds and a breach of the discretion with which they are clothed as county commissioners.

The defendant Nolte filed a separate answer concerning which it is necessary to state here only that by it he declared that the road and bridge in question were not passable and usable; and that he at no time voted to deny the relief prayed by plaintiffs in this action. The answer concluded with a prayer for instruction by the court as to his duty.

The judgment was based on a finding that the defendants Todd and Bornemeier exercised their best judgment and discretion in the performance of their official duties in denying the request of plaintiffs to open the section-line road and restore the bridge involved in this dispute, and that they did not act arbitrarily, capriciously, or unreasonably.

The appellant has set forth in her brief five assignments of error. There are however but two questions presented for consideration. The first is that of whether or not the judgment is contrary to the evidence and the other is that of whether or not it is contrary to law.

Before entering upon a consideration of the assignments of error it appears necessary to consider the theory on which the case was presented by the petition and a defense thereto which is presented by the answers of the defendants Bornemeier and Todd, but not responded to by the judgment.

The theory is, as has been pointed out, that the appellant is entitled to have this mile maintained and the bridge kept in repair for the reason that this is an established public highway. The position of the defendants Bornemeier and Todd is that this was never established as a public highway.

It is true that if this has never been established as a public highway no right on the record made in this case flows in favor of the appellant to have it opened and maintained. Highways may be established in two ways. One is by dedication and the other is by prescription.

"A public highway by prescription may be established by continuous adverse use thereof by the public for a period of ten years." Lancaster County ex rel. Rosewell v. Graham, 120 Neb. 785, 235 N. W. 338.

The question of whether or not this was established as a highway by prescription must be decided adversely to the appellant. There is no evidence to support a finding that the mile was ever, over any continuous period of 10 years, used by the public as a highway.

In determining the question of whether or not a highway has been established by dedication the court is required to examine the proceedings had to ascertain if the jurisdictional requirements necessary for that purpose have been met. If they have not been met the right does not exist and lapse of time will not

supply the defect. See, Peterson v. Fisher, 71 Neb. 238, 98 N. W. 660; Rosenbery v. Tibke, 88 Neb. 51, 128 N. W. 647; State ex rel. Draper v. Freese, 147 Neb. 147, 22 N. W. 2d 556.

There was no effort made on the trial to prove the establishment of this as a road by dedication except by evidence of some proceeding in about 1870. The proper statutory procedure at that time required the posting of notice on the courthouse door and in three other public places for at least 20 days and then the filing of a petition with the board of county commissioners. See R. S. 1866, c. 47, § 19.

The statute required that the petition be signed by at least 10 landowners who were residents of the county. It then became the duty of the board of county commissioners to conduct a hearing of the interested parties, and if in their judgment it appeared probable that the location or change proposed would advance the interests of the county, or was essential to the best interests of the applicant, it became their duty to appoint a commissioner to proceed to view the road proposed. If in the opinion of the commissioner the public good required this, it became his duty to lay out, mark, and plat the road. See R. S. 1866, c. 47, § 20.

Within 20 days after making the survey and location it was the duty of the commissioner to make and file his report, together with the plat and field notes, with the county clerk. After this was done a road was deemed established. See R. S. 1866, c. 47, § 21.

The record fails to disclose that all of the essential requirements of these three sections of the statute were complied with. Whether or not there was a notice acceptable under the terms of the statute; a sufficient petition; a proper hearing; or even that a commissioner was properly appointed is not disclosed. This lack of adequate information in these areas is quite likely accounted for by a failure of public officials at that time to keep proper and sufficient records of proceedings.

It is certain however that a purported commissioner made a report to the board of county commissioners. If the antecedent proceedings were proper the effect of the report made by him pursuant to the terms of section 21 was to establish this mile as a part of public highway No. 169.

While of course it is a matter of no controlling significance it is true, as is disclosed by their testimony, that the defendants Bornemeier and Todd regarded this as a part of a public highway in the county.

In the light of the record made it will be assumed, but not for all purposes decided, that this was a 1-mile portion of a previously established public highway.

Coming then to the basis on which the case was decided by the trial court, that is, on the question of whether or not the county commissioners properly refused to build the bridge or maintain the road, resort must be had to the particular facts surrounding the situation and the law applicable thereto.

The principles by which the county commissioners are to be controlled and their acts adjudged in a situation such as this are set forth in State ex rel. Heil v. Jakubowski, 151 Neb. 471, 38 N. W. 2d 26, as follows:

"In determining the character of repairs to be made to bridges, and what bridges shall be repaired, when there are not sufficient funds for all, the court will not control the discretion of county commissioners, unless there is a clear abuse of such discretion.

"It is a general principle that the building of bridges, or the making of local improvements, is a discretionary power entrusted to public and municipal corporations, and, when the proper authorities have in good faith decided, mandamus will not issue to compel them to a different course." See, also, State ex rel. Draper v. Freese, *supra;* State ex rel. Weinberger v. Gormley, 155 Neb. 242, 51 N. W. 2d 343.

The evidence indicates that this mile of highway is on the section line between Section 4 on the north and

Section 9 on the south. It is a part of a highway which apparently starts 2 miles west of these two sections and extends eastward a distance of 8 miles. This is known as highway No. 169. At the west end of this mile of highway is a usable and used north and south public highway extending in both directions well beyond any land to which this litigation pertains. It has not been made clear whether or not No. 169 west of the north and south road was in use at the time of the trial. It is reasonably inferable that the highway east of this mile was being maintained and used. There is no convincing evidence that any part of the mile was ever maintained for use or used as a public highway, except a small part of the west end. A short distance east of the west end of this mile is a creek which crosses the highway. The exact distance of the creek from the north and south highway is not shown but it appears to be less than ⅛ mile. At one time there was a bridge across this creek, but in about 1950 it was washed out and has never been replaced. Whether or not the bridge was built by the county is not disclosed. Whether or not the portion of the highway to the west was maintained by the county does not clearly appear. There was no maintenance after the bridge was washed out. There is no evidence that the bridge and the road to the west was ever used by anyone except the owner and occupant of 80 acres of land bounded by this mile of highway on the south and the west line of Section 4 on the west. In order to open this mile of highway for use it would be necessary to construct a bridge across the creek, construct three culverts, and grade the road for travel. An engineer estimated the total cost of this at $24,530. Another estimate was at least $11,000 to $12,000. A witness for appellant testified that the cost of constructing a bridge by utilizing one which had been used elsewhere would be about $2,500, and that the cost of putting the road in usable condition would be an additional $1,000. It is clear that this witness

had no real information as to costs and requirements in an instance such as this and no reliable information as to the availability of a used bridge.

There are no buildings on either side of the highway to which anyone was seeking to have access over this mile. Also there was no evidence that anyone had any purpose to do any construction work thereon which would require access. In fact no one expressed a desire or intention to use this highway if opened and maintained, except a tenant on a year-to-year basis on 80 acres of land owned by plaintiffs. This land abuts this highway to the north for a width of ¼ mile. Its west boundary is ¼ mile east of the west line of Section 4 and its north boundary is the east-west half-section line of Section 4.

The present practical reasons given for opening and maintaining the highway were that it would furnish this tenant with a shorter route over which to deliver the products of his farming operation to market; that it would furnish a shorter route for transportation of fertilizer; and that it was wanted for convenience of planting and harvesting crops. This tenant does not live on the land and his home is not in the direction of the market to which he refers but is 3½ miles to the south and 1 mile to the west of the 80 acres of land.

This tenant became such in 1959. At that time there was no access road to the 80 acres of land. The county commissioners, in order to provide access, purchased, established, and made usable an access road thereto at a cost to the county of about $1,250. This road is 2 rods in width and it extends eastward to the northwest corner of the 80 acres on the half-section line of Section 4 from the north and south road along the west side of the section. It is nowhere contended that as a road this is not satisfactory. The only complaint made about it was that since this gave an entrance way of only 16½ feet it was not of sufficient width. The record however

shows that this was corrected by the county commissioners by providing for a wider entrance way.

The only other suggested reason is that in prospect is the improvement of State Highway No. 1 and that it would be worthwhile to have this mile opened for the purpose of providing better access to that road. This of course is entitled to no present consideration.

The only present benefit which could flow from the construction of this bridge, these culverts, and the maintenance of the highway would be the purposes advanced by the tenant which have already been pointed out. The maximum advantage to the tenant would be a saving of 2 miles on a one-way trip to market and 1 mile on a trip to his residence.

In the exercise of their discretion in determining whether or not this bridge should be constructed and the other things done necessary to make this mile of highway fit for use, it was the right of the county commissioners to investigate the question of need or general demand; the work required; the cost; and the question of whether or not there are sufficient funds, in the light of the entire picture of the county road situation, to permit the demanded construction and maintenance.

As pointed out herein where, as here, county commissioners deny an application, mandamus will not lie to compel action unless there has been a clear abuse of discretion. See, State ex rel. Heil v. Jakubowski, *supra;* State ex rel. Weinberger v. Gormley, *supra.*

The question of need and utility as well as estimates of cost have been pointed out herein. In addition to this, among other things not deemed necessary to be mentioned, a single statement as to physical conditions relative to county highways and highway bridges and the financial status of the county with relation thereto demonstrates clearly that in the present instance there was no abuse of discretion. In the county, at the time of trial, there were 16 bridges washed out, condemned, and unusable. An engineer estimated the cost of re-

placement at $433,810. There was a balance of only $9,126.11 in the bridge fund. There was a total balance in the funds for road districts of $17,704.67. There was a federal matching fund of $66,496.48 of which $45,350 was already committed. It is not contended that any portion of the federal matching fund could be used for the purpose of carrying into effect the construction of this bridge or the improvement of this road.

It is further pointed out in the record that the electorate of the county in 1950 and 1952 defeated a proposal to increase the bridge levy which would have produced additional funds for the construction and reconstruction of bridges.

From this it becomes clear that there was not sufficient money available to take care of the needs of the county in this area.

In the light of all of these considerations it may not be said that the county commissioners abused their discretion by their refusal to build the bridge and to maintain this mile of highway. The writ of mandamus was properly denied.

The judgment of the district court is affirmed.

AFFIRMED.

THOMAS MARKEY, A MINOR, BY NOLA K. HENRY, HIS MOTHER AND NEXT FRIEND, APPELLANT, V. BOB HUNTER ET AL., APPELLEES.

103 N. W. 2d 221

Filed May 20, 1960. No. 34679.

1. **Evidence.** A photograph is properly admissible as evidence if it be shown that it is a true and correct representation of the place or subject it purports to represent at a time pertinent to the inquiry.
2. **Evidence: Appeal and Error.** The admission of a photograph in evidence, which merely demonstrates the correctness of undisputed oral testimony already before the court, does not ordinarily constitute prejudicial error.

3. **Appeal and Error.** Errors in instructions not prejudicial to the complaining party do not require a reversal of a judgment otherwise correct.
4. **New Trial: Appeal and Error.** A motion for a new trial upon the ground of newly discovered evidence is addressed to the sound judicial discretion of the trial court, and its ruling thereon will not be disturbed unless an abuse of discretion is shown.
5. **New Trial.** To support a motion for new trial the newly discovered evidence must be of such a nature that if offered and admitted at the former trial it probably would have produced a substantial difference in result.

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

Rice & Adams, Schrempp & Lathrop, Henry C. Rosenthal, Jr., and *Simon J. Albracht,* for appellant.

Morris J. Bruckner and *Cassem, Tierney, Adams & Henatsch,* for appellees.

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

CARTER, J.

This is an action for damages for injuries sustained in a motor vehicle accident. The action was brought by Thomas Markey, a minor, by his next friend, against Bob Hunter, the owner of a truck involved in the collision, and Glen W. Miller, the driver of the truck. The jury returned a verdict for the defendants and plaintiff has appealed.

The accident occurred on Highway Nos. 73-75 a short distance north of the Platte River bridge in Sarpy County on June 8, 1956, at about 4 p. m. The pavement was dry and visibility was good. Plaintiff and Wendall Schoening were riding in a coupé automobile as guests of Joel White, the operator of the car. Plaintiff was sitting between the driver and Schoening. As the car proceeded north on the highway they were preceded by the Hunter truck operated by Miller and an automobile operated by one Stevens. Immediately behind the

White car was one driven by one Jacobson. The collision occurred at a point where a private road branches off the highway to the west into the works of the Lyman-Richey Sand & Gravel Company. The driver of the truck approached the intersecting private road with the intention of turning left across the highway into the private road.

The driver of the truck testified that as he approached the private road he slowed down and gave a left-turn signal, and at a time when he had practically cleared the highway the rear end of his truck was struck by the car in which plaintiff was riding. The evidence further shows that before the truck made the left turn it was passed by the Stevens car and the Jacobson car. The White car followed the Jacobson car and when its driver saw the truck some 40 or 50 feet from him, he applied his brakes and swerved back to the right in an attempt to avoid the collision. White testified that he saw no left-turn signal by the driver of the truck and asserted that no such signal was given. It is not contended that the issue of negligence was not one for the jury.

Plaintiff contends that the trial court erred prejudicially in admitting certain photographs in evidence. The photographs were those of the truck taken long subsequent to the accident in which the driver of the truck at the time of the accident sat behind the wheel with his left arm horizontally extended. Its purpose was to demonstrate the visibility of the arm signal beyond the body of the truck from the front and from the rear as testified to by defendants' witnesses.

It is contended by the plaintiff that photographs which constitute a reenactment or illustration of one party's theory of the case are not admissible in evidence over proper objection and that their reception in evidence constitutes prejudicial error. In support of his contention plaintiff cites Massey v. Ivester, 168 Okl. 464, 33 P. 2d 765, and Wyldes v. Patterson, 31 N. D.

282, 153 N. W. 630, which hold in substance that photographs must be shown by extrinsic evidence to be faithful representations of the place or subject as it existed at the time involved in the controversy; and that photographs taken to show more than this with men in various assumed positions and things in various assumed situations, intended only to illustrate hypothetical conclusions and to explain certain theories of the parties, are incompetent. Conceding the validity of plaintiff's authorities for the purposes of this case, they have no application to the situation before us. The purpose of the photographs in question was to demonstrate that the extended left arm of the driver, if so extended, was visible from the front and rear of the truck involved in the accident. They did not purport to demonstrate anything that occurred at the time of the accident, nor did they purport to show the movement of animate objects at the time of the accident. The photographs were nothing more than an attempt to meet the issue raised by the plaintiff that defendant was negligent in operating upon the highway a truck which was defective in that the box of said truck protruded beyond the cab to such an extent as to impair the visibility of a hand-and-arm signal given by the driver.

We point out that the photographs demonstrated only that the horizontal extension of the left arm of the driver of the truck was visible from the front and rear of the truck, as testified to by defendants' witnesses. The question of whether or not an adequate arm signal was given remained a question for the jury. The admissibility of the photographs falls within the rule announced in Zancanella v. Omaha & C. B. St. Ry. Co., 93 Neb. 774, 142 N. W. 190, which holds that the admission of such evidence is largely within the discretion of the trial court, depending upon the circumstances and the condition of the evidence. See, also, Patras v. Waldbaum, *ante* p. 20, 101 N. W. 2d 465; Bedford v. Herman, 158 Neb. 400, 63 N. W. 2d 772. Some

contention is made that the foundation was insufficient in that the location of the camera with relation to the truck was not adequately shown. We find no abuse of discretion by the trial court in this respect. We find nothing in the record to indicate an abuse of discretion on the part of the trial court in admitting the questioned photographs in evidence.

Plaintiff contends that instructions Nos. 6 and 7 were in conflict and were prejudicial for that reason. Instruction No. 6 informed the jury of the necessity under the applicable statute of giving an appropriate signal of the intention to make a right or left turn by hand and arm or signal device, but when a hand-and-arm signal would not be visible both to the front and rear, the signal must be given by lamp or signal device from the left side of the vehicle. By instruction No. 7 the court informed the jury that a vehicle assembled prior to January 1, 1954, is not required to be equipped with automatic turn signals, and that defendants' truck having been assembled prior to such date was not required to be equipped with automatic turn signals. While it would have been better, in view of the evidence, not to have included that part of instruction No. 6 dealing with hand-and-arm signals when the construction of the vehicle prevents them from being seen, we fail to see how the jury was prejudiced thereby. The faulty part of instruction No. 6 had no application to the issues in the case under the evidence, a conclusion that was readily apparent to the jury. The evidence that a hand-and-arm signal could be seen if the arm was horizontally extended was not disputed. It is fundamental that errors in instructions which are not prejudicial to the complaining party do not require a reversal of a judgment otherwise correct. Becker v. Hasebroock, 157 Neb. 353, 59 N. W. 2d 560; Van Wye v. Wagner, 163 Neb. 205, 79 N. W. 2d 281.

The plaintiff asserts that the trial court erred in overruling plaintiff's motion for a new trial on the ground

of newly discovered evidence, the newly discovered evidence being that the truck appearing in the photographs offered in evidence at the trial was not the truck involved in the accident. A hearing was had on the motion for a new trial at which the evidence of a number of witnesses was taken. Plaintiff relied on the registration certificates of the truck and the affidavit of the mechanic who repaired the truck to establish his assertion.

The evidence does show that proper registration certificates and plates were not placed on the truck involved in the accident. Several witnesses positively identified the truck as the one that participated in the accident. The mechanic who repaired the truck after the accident testified that he became confused at the time he gave his affidavit because of the mix-up in license plates. He positively identified the truck in the photographs as the one in the collision of June 8, 1956, which he had repaired. While it was established at the hearing on the motion for a new trial that improper registration certificates and license plates had been placed on the truck, the evidence clearly established that the truck in the photographs was the truck that participated in the accident.

The alleged new evidence was not of such a nature that if offered and admitted at the trial it would probably have produced a substantial difference in the result. In fact, the evidence on the motion for a new trial was almost conclusive that the truck shown in the photographs offered at the trial was the truck with which the car in which plaintiff was riding collided.

It is a fundamental rule that an application for a new trial upon the ground of newly discovered evidence is addressed to the sound judicial discretion of the trial court, and its ruling thereon will not be disturbed unless an abuse of discretion is shown. Reinsch v. Pacific Mut. Life Ins. Co., 140 Neb. 225, 299 N. W. 632; Finnern v. Bruner, *ante* p. 170, 101 N. W. 2d 905. The trial court

was correct in overruling the motion for a new trial on the ground of newly discovered evidence.

The judgment of the district court being free from prejudicial error is affirmed.

AFFIRMED.

STATE OF NEBRASKA, DEPARTMENT OF ROADS, APPELLEE, V. EARL F. ALBERT ET AL., APPELLANTS.

103 N. W. 2d 277

Filed May 20, 1960. No. 34685.

1. **Trial: Appeal and Error.** Instructions are to be considered together, to the end that they may be properly understood, and, if as a whole they fairly state the law applicable to the evidence when so construed, error cannot be predicated on the giving thereof.
2. **Appeal and Error.** Before an error requires a reversal, it must be determined that it was prejudicial to the rights of the party against whom it was made.

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

Francis M. Casey, for appellants.

Clarence S. Beck, Attorney General, and *Harold S. Salter,* for appellee.

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

MESSMORE, J.

This is an action in condemnation. The State of Nebraska, Department of Roads, plaintiff, appealed from an appraiser's award to the district court for Cass County. The case was tried to a jury resulting in a verdict for the defendants. The defendants filed a motion for new trial which was overruled. Defendants perfected appeal to this court.

The defendants assign as error that: (1) The trial

court erred in giving on its own motion an admonition to the jury; and (2) the trial court erred in failing to properly instruct the jury as to the law applicable in the case.

The record shows: "BY THE COURT: Then, for the record here, it is further agreed that at the conclusion of opening statements the jury be permitted to view the premises in a body in charge of the bailiff, and that counsel may go in a car separate from any of the jurors for the purpose of making sure that they get to the right location and view the proper premises involved." Counsel for the parties agreed to what the trial court stated above.

"BY THE COURT: * * * The next order of procedure, Ladies and Gentlemen, will be the opening statements of counsel, by which they are privileged to outline to you a little more in detail the nature of the case and the evidence by which they expect to maintain their respective positions. * * * Opening statements of counsel having been concluded, it has now been agreed by them that before introducing evidence the jury be privileged to view the premises involved, where this controversy arises; and in order to do that it will be necessary for you to go to the site. Everyone doesn't need to take their individual car; you will be in the charge of the bailiff, Mr. Beckman, he has his car, and three or four of you can ride with him; two other cars would be sufficient among the jurors. Are there two of you who have cars available that can take them? Mr. Norris, you have one, and Mr. Resso. The three of you, then, Mr. Norris, Mr. Resso and Mr. Beckman, the bailiff, can take cars, and the jury will be escorted under the direction of the bailiff in a body, and Mr. Crosby and Mr. Salter will go in a separate car; and you can follow them out there, Mr. Beckman, so you know you are getting to the right location. They are not going out for the purpose of answering questions or arguing their case out at the site at all, they are just going to make sure you

look at the right place, that's all, and any inquiries that you have concerning the matter, direct them to the bailiff and he in turn will endeavor to pass them on to counsel, and if they can give you an answer by agreement, all well and good; you are out there for the purpose of viewing and getting your feet on the ground as to the place that the evidence is going to be about here this afternoon, and it will be a little bit better for you if you can visualize what is being discussed and talked about, rather than having witnesses just describe it."

The defendants argue that the jury was permitted to view the premises prior to the introduction of testimony in court; that the trial court failed, in its admonition, to advise the jury that what it was to view could be considered as evidence; that the jury was limited in the view as to the exact location on the land; that the law is clear that the view of the premises is not for the purpose of knowing the location so as to better follow the evidence, but is evidence in and of itself to be considered along with other evidence in the case in arriving at a verdict; and that the court started the admonition to the jury, "Before introducing evidence" the jury would be permitted to view the premises.

In this connection the defendants cite Chicago, R. I. & P. Ry. Co. v. Farwell, 60 Neb. 322, 83 N. W. 71, wherein the following was quoted from Peoria Gas Light & Coke Co. v. Peoria Terminal Ry. Co., 146 Ill. 372, 34 N. E. 550, 21 L. R. A. 373: "It has been frequently held by this court that the results of the personal view of the premises by the jury in condemnation cases are in the nature of evidence, and may be taken into consideration by them in passing upon the testimony of the witnesses; and that where the evidence is conflicting, they may be resorted to by the jury as bearing upon the weight to be given to the variant and conflicting estimates given by the various witnesses, so that, if the verdict of the jury is supported by the evidence,

it will not be disturbed simply because it is contrary to what appears to be the preponderance of the testimony."

The defendants also cite Stull v. Department of Roads & Irrigation, 129 Neb. 822, 263 N. W. 148, as follows: "This court is committed to the rule that the viewing of the premises involved in litigation by the jury is evidence, and not merely a means of enabling the jury better to construe and apply the evidence adduced in court."

In applying the above rule as stated in Stull v. Department of Roads & Irrigation, *supra,* the defendants assert that in the admonition by the court before viewing the premises, the jurors were not advised that what they were to view was evidence, but were told, or led to believe, that it was a means of enabling them to better construe or understand the evidence.

The defendants quote a part of instruction No. 10, as follows: "In determining any of the questions of fact presented in this case, the jury should be governed solely by the evidence introduced before them. * * * if a juror be personally acquainted with any particular fact or facts not supported by the evidence, such juror is not permitted to take his or her personal knowledge of such fact or facts into consideration or to mention the same to the other jurors."

The defendants contend that instruction No. 10 failed to state or to define (1) the evidence the jury viewed on the scene; (2) the application of the jurors' general knowledge of that evidence; and (3) that what they viewed at the scene was evidence the same as the testimony adduced before them.

Instruction No. 6 reads as follows: "Pursuant to stipulation of the parties you have been permitted to view the premises in controversy. Such view may be considered by you along with all the other evidence in the case, and it is proper for you to take into account the results of your observations and to consider the

same, in connection with all the other evidence, in arriving at your verdict."

The defendants' contention is that the trial court, in instruction No. 6, did not advise the jurors that their view of the premises was evidence.

Instruction No. 9 dealt with what constitutes preponderance of the evidence. The defendants complain of this instruction on the ground that it did not advise the jury that the evidence adduced by viewing the premises could be taken into consideration in determining the credibility of the witnesses.

As we view the assignments of error raised on this appeal, the substitution of the word "evidence" for "testimony" was of little consequence. The following is applicable.

In Carlson v. Hanson, 166 Neb. 96, 88 N. W. 2d 140, this court held: "Instructions are to be considered together, to the end that they may be properly understood, and, if as a whole they fairly state the law applicable to the evidence when so construed, error cannot be predicated on the giving thereof." This rule of law has been pronounced several times by this court in cases too numerous to cite.

Assuming that there was error as contended for by the defendants, it was harmless error. As was said in Wolfe v. Mendel, 165 Neb. 16, 84 N. W. 2d 109: "The rule is that before an error requires a reversal, it must be determined that it was prejudicial to the rights of the party against whom it was made. Bartek v. Glasers Provisions Co., Inc., 160 Neb. 794, 71 N. W. 2d 466."

We fail to find prejudicial error in the record, as contended for by the defendants.

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

AFFIRMED.

STATE OF NEBRASKA EX REL. NEBRASKA STATE BAR ASSOCIATION, RELATOR, V. CHARLES A. FISHER, RESPONDENT.

103 N. W. 2d 325

Filed May 27, 1960. No. 34625.

1. **Attorney and Client.** The duty rests on this Court to maintain the integrity of the legal profession by disciplining lawyers who indulge in practices designed to bring the courts or the profession into disrepute, or to perpetrate fraud on the courts, or to corrupt and defeat the administration of justice. We therefore review the evidence adduced in such proceedings de novo to determine if discipline should be imposed and, if it should, the extent thereof. In our discretion we may adopt the findings and recommendations of the referee if the evidence adduced, based on the principles applicable thereto, so justifies.
2. ———. Disbarment proceedings are essentially civil and not criminal in character and the recognized rules governing civil practice are applicable thereto. However, in such proceedings the presumption of innocence applies and the charge made against an attorney must be established by a clear preponderance of the evidence. That is, the Court should be satisfied to a reasonable certainty that the charges are true.
3. ———. A complaint against an attorney should set forth the grounds upon which discipline is sought with reasonable definiteness, that is, with sufficient definiteness so the Court may be advised of the matters complained of and the attorney fully informed of the matters with which he is charged so as to enable him to prepare and present his defense thereto.
4. ———. If the charges made against an attorney constitute a crime the fact that he has neither been charged therewith nor convicted thereof is immaterial in a disciplinary proceeding.
5. ———. In a disciplinary proceeding only those matters which are specifically charged in the complaint can be considered.
6. ———. In granting a license to practice law it is on the implied understanding that the party receiving it shall in all things demean himself in a proper manner, and abstain from such practices as cannot fail to bring discredit upon himself, the profession, and the courts.
7. ———. An attorney, as an officer of this Court, must so conduct himself as to assist in maintaining confidence in the integrity and impartiality of the Court.
8. ———. The ethical standards relating to the practice of the law in this state are the Canons of Professional Ethics of the Ameri-

can Bar Association which have been or may be, from time to time, approved by the Supreme Court.

9. ———. Violation of a code of ethics or any conduct on the part of an attorney in his professional capacity which tends to bring reproach on the legal profession constitutes ground for suspension or disbarment.

10. ———. Whether or not the reputation of an attorney is of material importance in any discipline case must necessarily depend largely upon the facts and circumstances thereof.

Original action. *Judgment of suspension.*

Clarence S. Beck, Attorney General, and *Gerald S. Vitamvas,* for relator.

William A. Stewart, Sr., Bevin B. Bump, and *Charles A. Fisher,* for respondent.

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

WENKE, J.

This is an original disciplinary proceeding brought in the name of the State of Nebraska on the relation of the Nebraska State Bar Association against the respondent, Charles A. Fisher. See Part III, Rule 2, Disciplinary Proceedings of the Revised Rules of the Supreme Court.

The complaint charges that: "On June 15, 1954, the respondent, while serving as counsel for the defendant Loyd Carroll Grandsinger, who was then and there being prosecuted for murder in the first degree, in the case of State of Nebraska vs. Loyd Carroll Grandsinger, then pending in the District Court of Cherry County, Nebraska, and while engaged in the trial of said cause in said court, did knowingly and contemptuously pick up a leather belt, which had been introduced in evidence and identified as Exhibit 10 in said proceeding, which leather belt contained a hole, and which exhibit was vital material evidence in the cause then being tried, and did, then and there, knowingly and contemptuously force the end of a wooden tapered dowel through

the hole in said belt in such manner as to increase the size of the hole and thereby to damage the probative value of said exhibit." The complaint then goes on to state: "That the acts herein set forth constitute unprofessional conduct by the respondent as a member of the Nebraska State Bar; constitute a violation of his oath of office as an attorney; constitute a violation of Section 7-105 R. R. S. of Nebraska, 1943, which makes it the duty of an attorney to employ, for the purpose of maintaining the cause confided to him, such means only as are consistent with the truth; constitute a violation of Section 7-106, R. R. S. of Nebraska, 1943, relating to an attorney who is guilty of deceit with intent to deceive a court; constitute a violation of Section 28-737 R. R. S. of Nebraska, 1943, relating to the offense of corruptly endeavoring to obstruct or impede the due administration of justice; constitute a violation of Section 28-711, R. R. S. of Nebraska, 1943, relating to the altering of any record pertaining to any court; constitute a violation of Canon 15, Canon 22, and Canon 32 of the Canons of Professional Ethics of the American Bar Association as approved by the Nebraska Supreme Court."

Respondent filed an answer to the complaint. We thereupon appointed a referee to take testimony and make a report to this Court. The referee had a hearing, took testimony, and made a report. Therein he set forth his findings of fact and recommendations as to the discipline he thought should be imposed. This was proper procedure for the referee to follow for Rule 7 of our Rules of Disciplinary Proceedings provides, in part, that: "The referee shall make a written report stating his findings of fact and recommendations."

Exceptions were taken by respondent to both the referee's findings of fact and recommendations as to discipline while the relator took exception only to the latter. Since the duty rests on this Court to maintain the integrity of the legal profession by disciplining

lawyers who indulge in practices designed to bring the courts or the profession into disrepute, or to perpetrate fraud on the courts, or to corrupt and defeat the administration of justice, we necessarily review the evidence adduced in such proceedings de novo to determine if discipline should be imposed and, if it should, the extent thereof. In our discretion we may adopt the findings and recommendations of the referee if the evidence adduced, based on the principles applicable thereto, so justifies. See, State ex rel. Nebraska State Bar Assn. v. Gudmundsen, 145 Neb. 324, 16 N. W. 2d 474; State ex rel. Nebraska State Bar Assn. v. Richards, 165 Neb. 80, 84 N. W. 2d 136; In re Veach, 365 Mo. 776, 287 S. W. 2d 753.

In view of respondent's contentions we think it necessary to set forth certain principles which are applicable in disciplinary proceedings.

Disbarment proceedings are essentially civil and not criminal in character and the recognized rules governing civil practice are applicable thereto. However, in such proceedings the presumption of innocence applies and the charge made against an attorney must be established by a clear preponderance of the evidence. That is, the court should be satisfied to a reasonable certainty that the charges are true. See, Part III, Rule 1, Disciplinary Proceedings of the Revised Rules of the Supreme Court; State ex rel. Nebraska State Bar Assn. v. Price, 144 Neb. 542, 13 N. W. 2d 714; State ex rel. Nebraska State Bar Assn. v. Gudmundsen, *supra;* State ex rel. Nebraska State Bar Assn. v. Richards, *supra.*

A complaint against an attorney should set forth the grounds upon which discipline is sought with reasonable definiteness, that is, with sufficient definiteness so the Court may be advised of the matters complained of and the attorney fully informed of the matters with which he is charged so as to enable him to prepare and present his defense thereto. See, Part III, Rule 3, Disciplinary Proceedings of the Revised Rules of the Su-

preme Court; Braverman v. Bar Assn. of Baltimore City, 209 Md. 328, 121 A. 2d 473, certiorari denied, 352 U. S. 830, 77 S. Ct. 44, 1 L. Ed. 2d 51; 5 Am. Jur., Attorneys at Law, § 291, p. 437; 7 C. J. S., Attorney and Client, § 31a, p. 776. If the charges made against an attorney constitute a crime the fact that he has neither been charged therewith nor convicted thereof is immaterial in a disciplinary proceeding. See State ex rel. Nebraska State Bar Assn. v. Butterfield, 169 Neb. 119, 98 N. W. 2d 714.

In a disciplinary proceeding only those matters which are specifically charged in the complaint can be considered. See, Article XI, section 7, of the Rules Creating, Controlling and Regulating Nebraska State Bar Association; State ex rel. Nebraska State Bar Assn. v. Price, *supra.*

Respondent was admitted to practice law in this state on June 4, 1927. Immediately following his admission he began the practice of his chosen profession at Chadron, Dawes County, Nebraska, and has been practicing there ever since. He is presently a member of the Nebraska State Bar Association and licensed to practice law anywhere in the state.

We have often said: "In granting a license to practice law it is on the implied understanding that the party receiving it shall in all things demean himself in a proper manner, and abstain from such practices as cannot fail to bring discredit upon himself, the profession, and the courts." State ex rel. Attorney General v. Burr, 19 Neb. 593, 28 N. W. 261. See, also, State v. Fisher, 103 Neb. 736, 174 N. W. 320; State ex rel. Nebraska State Bar Assn. v. Wiebusch, 153 Neb. 583, 45 N. W. 2d 583; State ex rel. Nebraska State Bar Assn. v. Richards, *supra.*

"An attorney, as an officer of this court, must so conduct himself as to assist in maintaining confidence in the integrity and impartiality of the court." State ex rel. Sorensen v. Goldman, 127 Neb. 340, 255 N. W.

32. See, also, State ex rel. Nebraska State Bar Assn. v. Wiebusch, *supra;* State ex rel. Nebraska State Bar Assn. v. Richards, *supra.*

"Section 7-104, R. R. S. 1943, provides the oath every person must take and subscribe upon being admitted to practice by this court. In State ex rel. Nebraska State Bar Assn. v. Wiebusch, *supra,* we said: 'Such an oath requires lawyers to faithfully discharge their duties, uphold and obey the Constitution and laws of this state, observe established standards and codes of professional ethics and honor, maintain the respect due to courts of justice, and abstain from all offensive practices which cast reproach on the courts and the bar.' " State ex rel. Nebraska State Bar Assn. v. Richards, *supra.*

The act with which respondent is here charged occurred while he, in association with William C. Heelan, now deceased, was acting as counsel for Loyd Carroll Grandsinger in the district court for Cherry County. Grandsinger had been charged therein with the murder of Marvin Hansen, a member of the Nebraska Safety Patrol. Respondent, in association with Heelan, was helping conduct his defense. The charge was being prosecuted by William B. Quigley, County Attorney of Cherry County, assisted by Rush C. Clarke, who had been appointed for that purpose by the court. See Grandsinger v. State, 161 Neb. 419, 73 N. W. 2d 632. During the course of the trial, which lasted from June 4 through 16, 1954, a Sam Browne belt and a pants belt worn by Marvin Hansen at the time he was killed were introduced in evidence. Both belts contained holes in them. There was evidence to the effect that these holes had been caused by a .22 caliber bullet passing through them. That fact, if true, was very material to the State's case. In fact, as to the pants belt, the judge admonished the jury to "Just examine the hole and do not probe it with anything." In connection with the Sam Browne belt, Lieutenant Wayne Byler of the Nebraska Safety Patrol was asked to take a dowel and make a

test thereon. Respondent objected to his doing so on the basis that it would alter the exhibit. Before the court ruled on this objection Byler was asked: "Can that (the test) be done without altering the exhibit?" He replied thereto: "No, I am afraid not." He was then asked: "In what way would it alter it?" He replied: "I think it would make the hole larger." The court thereupon sustained respondent's objection. It thus becomes evident that respondent was aware of the importance and materiality of the holes in these exhibits and the effect that probing them with a dowel would have.

Both the State and defense rested their case in the murder trial on Monday, June 14, 1954. Thereupon, a recess was taken until 9 a.m., Tuesday, June 15, 1954. The incident complained of happened shortly before 9 a.m., on Tuesday in the district courtroom, but before court had reconvened. There were present in the courtroom at that time, insofar as here material, the official court reporter, the county attorney, and respondent. The jury had not been called and was not present although there were others in the courtroom. The trial judge, Clarke, and Heelan were in the judge's chambers, which is adjacent to and just to the west of the south part of the west wall of the courtroom. The official court reporter had removed the exhibits from the judge's chambers onto his desk. While the reporter and the county attorney were moving them from that desk to a table in front of the jury box respondent was standing at the northeast corner of the reporter's desk. The evidence shows that respondent, while standing there, picked up the pants belt and a wooden dowel, exhibits in the case, from the reporter's desk and intentionally inserted the dowel in the bullet hole in the belt, twisting it while doing so. The county attorney caught respondent in the act.

The county attorney testified he turned very suddenly to catch respondent in the act of forcibly inserting

the dowel into the bullet hole in the pants belt; that he observed the respondent's face at the time and it was set with a determined expression; and that he grabbed respondent by the left arm and immediately took him into the judge's chambers where he admitted to the trial judge what he had done.

Clarke, who was in the judge's chambers at the time with the trial judge and Heelan, testified that the county attorney entered the judge's chambers with respondent, whom he was holding by the left arm; that respondent was holding a belt, one of the exhibits in the murder case, in his left hand and wooden dowel in his right; and that the dowel was still inserted in the bullet hole in the belt.

Sometime later that morning court reconvened and the record shows the following took place in the presence of the jury:

"BY MR. CLARKE:

Before we proceed with the arguments, Your Honor, there is a matter that has been taken up with, Your Honor, which we wish to get into the record.

THE COURT: Very well.

MR. CLARKE: We wish the record to show that counsel for the defendant, is willing that it shall show, that this mrongin (morning) in this court room, after the court reporter had brought all the exhibits in the case out and laid them on the reporter's desk, Mr. Fisher, one of counsel for the defendant, while he was examining Exhibit No. 10, being the leather pants belt heretofore identified as the belt of Marvin Hansen, and that at that time he took a dowel, being one of the wooden dowels on the reporter's desk, and being either the same or one exactly like the one I am holding in my hand, which I will have to have marked as an exhibit, and pushed it violently—

MR. FISHER: (Interrupting) I didn't violently push it—

MR. CLARKE: (Interrupting) pushed it through the hole in the belt hard enough so that it materially en-

larged the size of the hole to an extent which cannot now be determined and that the belt, Exhibit No. 10, is not now in the same condition as it was when it was offered in evidence and received in evidence, and that the hole is now materially larger than it was before Mr. Fisher did that.

* * *

THE COURT: Mr. Fisher, as I understand it you have told counsel that you did that?

MR. FISHER: Yes.

THE COURT: You recognize that the hole is larger?

MR. FISHER: Yes."

Section 7-105, R. R. S. 1943, provides in part as follows: "It is the duty of an attorney and counselor: (1) To maintain the respect due to the courts of justice and to judicial officers; * * * (3) to employ, for the purpose of maintaining the cause confided to him, such means only as are consistent with the truth; * * * (5) to abstain from all offensive practices * * *."

Section 7-106, R. R. S. 1943, provides in part as follows: "An attorney and counselor who is guilty of deceit or collusion, * * * with intent to deceive a court, or judge, * * * is liable to be disbarred, * * *."

"The ethical standards relating to the practice of the law in this state are the canons of Professional Ethics of the American Bar Association and those which may, from time to time, be approved by the Supreme Court." State ex rel. Nebraska State Bar Assn. v. Richards, *supra.* See, also, Article X of the Rules Creating, Controlling and Regulating Nebraska State Bar Association; State ex rel. Nebraska State Bar Assn. v. Fitzgerald, 165 Neb. 212, 85 N. W. 2d 323.

Canon 15 provides in part: "The office of attorney does not permit, much less does it demand of him for any client, violation of law or any manner of fraud or chicane."

Canon 22 provides in part: "The conduct of the

lawyer before the Court and with other lawyers should be characterized by candor and fairness."

Canon 32 provides in part: "He must also observe * * * the statute law, * * *."

"Violation of a code of ethics or any conduct on the part of an attorney in his professional capacity which tends to bring reproach on the legal profession constitutes ground for suspension or disbarment." State ex rel. Nebraska State Bar Assn. v. Richards, *supra.*

Respondent seeks to explain and justify what he did by testifying as follows: "A. I was trying to probe it to see if there was any possible thing in the hole. I may explain that the slug had never been found—this .22 slug." When asked: "And you at that time thought the slug might have still been in the belt?" He replied: "I thought if it was their theory was blown clear out of the building."

Considering the thickness of the pants belt involved and the size of the bullet of a .22 caliber short, let alone that of a .22 caliber long rifle cartridge which was the type of ammunition used, this explanation is neither realistic nor plausible.

Respondent calls our attention to the condition of the hole in the belt now, over 5 years later, to show what he did did not materially alter or change the condition of the hole in the pants belt and offered evidence to the effect. Assuming that is true it is no excuse for what respondent did or attempted to do. The mere fact that he was caught before he completed what he set out to do is no excuse.

Respondent has offered a large number of affidavits by persons who have known him for many years. These are generally to the effect that he has always had a good reputation in Chadron and the surrounding territory both as a lawyer and as a citizen. We said in State ex rel. Nebraska State Bar Assn. v. Butterfield, *supra:* "Whether or not the reputation of an attorney is of material importance in any discipline case must neces-

sarily depend largely upon the facts and circumstances thereof." As we said in State ex rel. Nebraska State Bar Assn. v. Richards, *supra:* "* * * we think this evidence of his reputation and integrity as a lawyer in a community where he has practiced law for many years should be given consideration in determining the extent of discipline that should be imposed." See, also, State ex rel. Nebraska State Bar Assn. v. Gudmundsen, *supra.*

Respondent had been actively engaged in the practice of law for 27 years when the incident occurred of which we here find him guilty. He had a large practice and should have been and was fully aware of the Canons of Professional Ethics which controlled his conduct while so engaged. In view of the facts herein set forth, and all the circumstances disclosed by the record relating thereto, we find the ends of justice will be properly served by suspending respondent from the further practice of law, the same to go into effect 30 days after our judgment rendered herein becomes effective. If, at the end of 1 year from the effective date of his suspension, respondent makes an affirmative showing sufficient to satisfy this Court that he has fully complied with our order of suspension and that he will not, in the future, engage in any practices offensive to the legal profession then he will be reinstated and allowed to engage in the practice of law. However, if he fails to do so within a reasonable time thereafter then the suspension herein provided for shall become permanent.

Judgment of suspension accordingly. All costs of this proceeding are taxed to the respondent.

JUDGMENT OF SUSPENSION.