REPORTS OF CASES

DECIDED BETWEEN

MARCH 18, 1966 and NOVEMBER 18, 1966

IN THE

Supreme Court of Nebraska

JANUARY TERM 1966 and SEPTEMBER TERM 1966

VOLUME CLXXX

WALTER D. JAMES
OFFICIAL REPORTER

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1967

SUPREME COURT

DURING THE PERIOD OF THESE REPORTS

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LESLIE BOSLAUGH, Associate Justice
ROBERT C. BROWER, Associate Justice
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JUDICIAL DISTRICTS AND DISTRICT JUDGES

Number of District	Counties in District	Judges in District	Residence of Judge
First	Johnson, Pawnee, Nemaha, and Richardson.	William F. Colwell	Pawnee City
Second	Sarpy, Cass, and Otoe.	Victor H. Schmidt Walter H. Smith	Papillion Plattsmouth
Third	Lancaster.	Herbert A. Ronin Elmer M. Scheele Bartlett E. Boyles William C. Hastings	Lincoln Lincoln Lincoln Lincoln
Fourth	Douglas.	Patrick W. Lynch Lawrence C. Krell James P. O'Brien Donald Brodkey John C. Burke Paul J. Garotto John E. Murphy Rudolph Tesar Donald Hamilton	Omaha Omaha Omaha Omaha Omaha Omaha Omaha Omaha Omaha
Fifth	Hamilton, Polk, York, Butler, Seward, and Saunders.	H. Emerson Kokjer John D. Zeilinger	Wahoo York
Sixth	Boone, Platte, Colfax, Dodge, Washington, Nance, and Merrick.	Robert L. Flory C. Thomas White	Fremont Columbus
Seventh	Fillmore, Saline, Thayer, and Nuckolls.	Joseph Ach	Friend
Eighth	Thurston, Dakota, Dixon, and Cedar.	John E. Newton	Ponca
Ninth	Knox, Antelope, Cuming, Pierce, Madison, Stanton, Wayne, and Burt.	Fay H. Pollock George W. Dittrick	Stanton Norfolk
Tenth	Adams, Clay, Phelps, Kearney, Harlan, Franklin, and Webster.	Edmund Nuss Norris Chadderdon	Hastings Holdrege
Eleventh	Hall.	Donald H. Weaver	Grand Island
Twelfth	Sherman and Buffalo.	S. S. Sidner	Kearney
Thirteenth	McPherson, Logan, Lincoln, and Dawson.	Hugh Stuart	North Platte
Fourteenth	Chase, Hayes, Frontier, Furnas, Red Willow, Hitchcock, Perkins, Gosper, and Dundy.	Victor Westermark	McCook
Fifteenth	Brown, Keya Paha, Boyd, Rock, Holt, and Wheeler.	William C. Smith, Jr.	Ainsworth
Sixteenth	Cherry, Sheridan, Dawes, Box Butte, and Sioux.	Robert R. Moran	Alliance
Seventeenth	Scotts Bluff.	Ted R. Feidler	Scottsbluff
Eighteenth	Jefferson and Gage.	Ernest A. Hubka	Beatrice
Nineteenth	Banner, Kimball, Morrill, Cheyenne, Garden, Deuel, Arthur, and Keith.	John H. Kuns	Kimball
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TABLE OF CASES REPORTED

HAMILTON COUNTY TELEPHONE COMPANY, A CORPORATION, APPELLANT, V. NORTHWESTERN BELL TELEPHONE COMPANY, A CORPORATION, ET AL., APPELLEES, NEBRASKA EDUCATIONAL TELEVISION COMMISSION, INTERVENER-APPELLEE.

140 N. W. 2d 834

Filed March 18, 1966. No. 36098.

Public Service Commissions: Telecommunications. Interconnecting facilities which carry television signals between studios and transmitters are used in interstate communication and are not subject to the jurisdiction of the Nebraska State Railway Commission.

Appeal from the Nebraska State Railway Commission. Affirmed.

Hal B. Hasselbalch and Wallace M. Rudolph, for appellant.

William I. Aitken, Bert L. Overcash, John A. Anderson, H. A. Poley, and Edward Sklenicka, for appellees.

Clarence A. H. Meyer, Attorney General, and Harold Mosher, for intervener-appellee.

Heard before CARTER, SPENCER, BOSLAUGH, BROWER, SMITH, and MCCOWN, JJ., and KOKJER, District Judge.

BOSLAUGH, J.

This is an appeal from an order of the Nebraska State Railway Commission dismissing a formal complaint filed

by the Hamilton County Telephone Company against the Northwestern Bell Telephone Company and The Lincoln Telephone and Telegraph Company as defendants.

The complaint alleged that the defendants had entered into a contract to furnish interconnecting channels and associated equipment to the Nebraska Educational Television Commission; that the defendants had not applied for or obtained a certificate of convenience and necessity from the railway commission; that the contract called for a consolidation of telephone properties; and that the contract would combine the capital and facilities of the defendants and that some services would be furnished at below cost, all in violation of sections 59-801 and 59-805, R. R. S. 1943.

The defendants' answer alleged in detail the history of the Nebraska Educational Television Commission, its invitation to bidders to furnish interconnecting channels for its system, and the contract which had been entered into by the defendants and the Nebraska Educational Television Commission. The answer denied the allegations of the complaint and specifically alleged that the railway commission had no jurisdiction over the matters alleged in the complaint. The defendants also filed a motion for summary judgment.

The Nebraska Educational Television Commission intervened in the proceeding and alleged that the complaint should be dismissed for lack of jurisdiction.

The defendants' motion for summary judgment was overruled. Motions for rehearing and motions to dismiss were then filed. These motions were sustained, the previous order set aside, and the complaint dismissed. The complainant filed a motion for rehearing which was overruled, and it has appealed.

The railway commission found that the interconnecting channels to be furnished by the defendants to the Nebraska Educational Television Commission were to be used exclusively in interstate commerce and were under

the exclusive jurisdiction of the Federal Communications Commission; that the railway commission had no jurisdiction over their construction, location, and maintenance; and that the defendants were not required to obtain a certificate of convenience and necessity from the railway commission. This is the primary and controlling issue in the case.

The record shows that the programs of the educational television system will originate in studios located in Lincoln and Omaha, Nebraska. The programs will be broadcast from transmitters constructed at seven locations throughout the state. The connecting facilities between the studios and the transmitters are to be furnished to the educational television commission by common carriers upon a leased basis. The contract which the defendants have entered into with the educational television commission is a contract to furnish connecting facilities between the studios and the transmitters.

The complainant contends that the service which the defendants have contracted to furnish is essentially a telephone service; that it is intrastate because all of the facilities will be located within this state; and that the railway commission has the same jurisdiction over the facilities that it has over any other telephone service.

The defendants and the intervener contend that broadcasting is interstate commerce and under the exclusive jurisdiction of the Federal Communications Commission; that the interconnecting facilities which the defendants have contracted to furnish are an integral part of broadcasting; and that the railway commission has no jurisdiction over the facilities.

The cases which have considered this question sustain the contention of the defendants and the intervener. In re Capital City Telephone Co., 3 F. C. C. 189, involved the jurisdiction of the Federal Communications Commission over a telephone company furnishing wire service to a radio station for broadcasting purposes. The commission said: "The principle is now well established

that radio communication, including broadcasting, is essentially interstate communication. As the Supreme Court said in Federal Radio Commission v. Nelson Bros. Bond & Mortgage Co., 289 U. S. 266, 77 L. ed. 1166: 'No state lines divide the radio waves, and national regulation is not only appropriate but essential to the efficient use of radio facilities.' * * * Congress was cognizant of the fact that wires were used in connection with broadcasting. The intention of Congress to clothe the Federal Communications Commission with jurisdiction over charges and services for wires used in radio communication is evidenced by Section 202 (b), which reads: Charges or services, whenever referred to in this Act, include charges for or services in connection with the use of wires in chain broadcasting or incidental to radio communication of any kind.

"The fact that the wires used to carry the program from the microphone to the transmitter may be confined to a single state does not mean that the wires are not used in interstate communication. The contract or leasing agreement may be for a wire service which begins and ends within a single state. The complete transmission, however, is an interstate communication and therefore subject to legislation by Congress under the Commerce Clause. * * * The interstate communication of a broadcasting company begins at the microphone, passes over the wires to the transmitter, and then through the ether, constituting a continuous interstate communication which, because of its very nature, must be subject to federal regulations.

"Viewing the Communications Act as a whole, it is logical to conclude that Congress intended that a connecting carrier could furnish wires and wire service to broadcast companies without changing its status as a connecting carrier, since the specific section with reference to the furnishing and use of wires in connection with radio communication is contained in the sections made applicable to such connecting carriers.

"This Commission has exclusive regulatory jurisdiction over wires and wire service furnished by a telephone carrier to a radio broadcasting station, even though such wires do not cross state or national boundaries."

Ward v. Northern Ohio Telephone Co., 300 F. 2d 816, was a suit for damages by the operator of a radio station against a telephone company which refused to furnish wire service to carry radio broadcasts from the source of the program to the transmitter for broadcast. In holding that the action was within the jurisdiction of the United States District Court, the Court of Appeals said: "Where lines, therefore, are furnished for broadcast purposes to a radio station by a telephone company, the telephone company is engaged in interstate communication, and is in interstate commerce, subject to federal law, even where all the property of the company is located within a single state. 'No state lines divide the radio waves, and national regulation is not only appropriate but essential to the efficient use of radio facilities.' Federal Radio Commission v. Nelson Brothers Bond and Mortgage Company, 289 U. S. 266, 53 S. Ct. 627, 77 L. Ed. 1166. Radio communication is interstate communication; and although all its facilities are located in one state, and although it is a connecting carrier, a telephone company, required to furnish lines to a radio station, on reasonable request, is considered a common carrier engaged in interstate communication. Such a common carrier, engaged in such interstate communication, is subject to the Federal Communications Act, including the sections providing for remedial action to be brought in the district court because of a violation of the Act. The conclusion therefore follows that, under these statutes, appellee telephone company, insofar as the furnishing, or obligation to furnish, wires for broadcast purposes, is engaged in interstate commerce; and that it is under a duty to furnish such communication service by the use

of wires to appellant either in chain broadcasting, or incidental to radio communication of any kind."

The principles announced in these cases were reaffirmed in a recent decision of the Federal Communications Commission. In re Application of Pacific Telatronics, Inc., 37 F. C. C. 1163. That case involved an application to construct and operate common carrier microwave facilities in California which were to be used to carry commercial and educational television signals. The application was opposed by the Pacific Telephone & Telegraph Company which alleged that the service was intrastate in nature, and that the applicant had not obtained a certificate of convenience and necessity from the California Public Utilities Commission. In regard to this contention the commission said: "PT&T's contention that Pacific requires prior approval from the State of California might be significant if the service Pacific proposes is intrastate in nature. On the other hand, if the proposed service is intrastate (interstate) in nature, then no prior State authorization is required, since the FCC has exclusive jurisdiction over interstate common carrier communication services unless specifically exempted by the Communications Act of 1934, as amended. * * * Pacific's facilities are used to carry television signals which are interstate in nature. It is our conclusion that the type of common carrier service which Pacific proposes to provide is an extention of, and incidental to, the broadcasting of television signals, and, therefore, is incidental to radio communication as defined in the Communications Act. Accordingly, its services are interstate communication services subject to our jurisdiction under title II of the act. * * * Neither the act nor the rules require certification by a State public utilities commission as a prerequisite to operation as an interstate microwave communications common carrier. Accordingly, we conclude that additional legal authority from the California State Public Utilities Commission is unnecessary and that PT&T's position is without merit."

See, also, California Interstate Telephone Co. v. Federal Communications Commission, 328 F. 2d 556.

The interconnecting facilities which the defendants have contracted to furnish to the Nebraska Educational Television Commission will be used in interstate communication and are not subject to the jurisdiction of the Nebraska State Railway Commission. The order of the railway commission dismissing the complaint is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. MELVIN WILLIAM HOMAN, APPELLANT.
141 N. W. 2d 30

Filed March 18, 1966. No. 36157.

1. **Constitutional Law.** Under the facts shown, the defendant's constitutional rights were not violated within the rules announced in Escobedo v. Illinois, 378 U. S. 478, 84 S. Ct. 1758, 12 L. Ed. 2d 977.
2. **Criminal Law: Evidence.** In order to predicate error on the reception of inadmissible evidence, there must have been objection made contemporaneously with the offer thereof.

Appeal from the district court for Douglas County: JOHN E. MURPHY, Judge. Affirmed.

James E. Abboud, Jr., and Henry G. Brown for appellant.

Clarence A. H. Meyer, Attorney General, and Chauncey C. Sheldon, for appellee.

Heard before CARTER, SPENCER, BOSLAUGH, BROWER, SMITH, and MCCOWN, JJ., and KOKJER, District Judge.

MCCOWN, J.

The defendant was convicted of the crime of shooting with intent to kill, wound, or maim. His wife was the alleged target.

The evidence shows that the defendant returned home

intoxicated at approximately 6 p.m., April 5, 1965. He had some conversation with his wife. Some of his children were present in the house. The defendant and his wife went from the kitchen into the dining room. His wife was "scared." She saw him take a gun from a buffet drawer and took the children and ran from the dining room, through the living room, and out the front door. She heard the gun go off behind her. The bullet entered the wall above the archway between the dining room and the living room. The defendant later, on the front porch, fired a shot in the direction of an approaching policeman, although his arm was deflected. Two spent cartridges were found on the front porch and one in the dining room. The police took the gun from the defendant on the front porch. The defendant's wife testified that she did not believe her husband was shooting at her because the bullet entered the wall near the ceiling. The defendant testified that the gun went off accidentally in the dining room and again accidentally on the porch.

The defendant's arguments on appeal all center on a claim of violation of his constitutional rights within the rule of Escobedo v. Illinois, 378 U. S. 478, 84 S. Ct. 1758, 12 L. Ed. 2d 977.

The evidence shows that the intoxicated defendant was taken to the police station, booked, and placed in jail. The next morning at approximately 8 a.m., he was interviewed in the interrogation room. The interviewing officer testified to certain statements made by the defendant in the interview. The officer's testimony included: "He states that the shooting incident occurred because of an argument with his wife concerning his heavy drinking lately. When asked why he wanted to kill his wife, he stated no reason, she's just been on my back."

No objection was made to the introduction of the officer's testimony. There is no evidence that the defendant ever requested counsel, although he does testi-

fy that he asked to use a telephone, and was refused. The defendant himself did not testify that he was not told that he had a right to counsel nor that he was not told that he did not need to say anything; and he did not testify that he was not told that anything he said might be used against him. There is no claim that any threats were used or any promises made. There is no evidence of abuse or misconduct of any kind on the part of the police. There is no evidence whatever as to whether the defendant knew he had a right not to say anything, nor whether he knew that statements made might be used against him. There is no evidence of the defendant's educational level or mental ability being anything but normal. His physical condition was affected only by the fact that he had a hangover.

The defendant's own testimony as to the interrogation was:

"Q. Now, did they ask you to answer any questions? A. Yes, they did. Q. What was your response to that? A. Well, I answered most of them. Q. Did you ask to use the phone? A. I did. Q. What did they say? A. I was refused."

The only testimony as to the fact of whether the defendant was advised that he did not need to speak or that he had a right to counsel was that of the interrogating officer who testified that he did not remember whether he had advised the defendant that he did not need to talk to him, or that he had a right to counsel.

In this case, it is quite clear that the defendant never requested counsel, and there is no affirmative testimony of anyone that he was not warned of his right to remain silent, or that he was not warned that anything he said might be used against him. There is simply the absence of specific affirmative testimony that he was warned or advised. Under such circumstances, the case clearly does not come within the ambit of the Escobedo rule. It is even questionable whether it comes within the undetermined area of possible extension of the Escobedo rule.

In any event, and under these circumstances, and at a time almost a year after the Escobedo decision, there was no objection made to the introduction of the evidence involving the defendant's statements. The issues of the voluntariness of the statements and the constitutional rights of the defendant under the Escobedo rule were not raised in the motions to dismiss made at the conclusion of the State's evidence and again at the conclusion of the trial. The issue of the constitutional rights of the defendant within the ambit of the Escobedo rule was raised for the first time in the motion for a new trial.

Under the circumstances here, there is no reason whatever to depart from the fundamental principal of criminal procedure that in order to predicate error on the reception of inadmissible evidence, there must have been objection made contemporaneously with the offer thereof. Fugate v. State, 169 Neb. 420, 99 N. W. 2d 868; State v. Longmore, 178 Neb. 509, 134 N. W. 2d 66.

Under the circumstances here, no error was committed by the district court and the judgment is affirmed.

AFFIRMED.

PAUL RHODES, APPELLANT, V. THE CONTINENTAL INSURANCE COMPANY, A CORPORATION, APPELLEE.

PAUL RHODES, APPELLANT, V. AETNA INSURANCE COMPANY, A CORPORATION, APPELLEE.

PAUL RHODES, APPELLANT, V. NATIONAL FIRE INSURANCE COMPANY OF HARTFORD, A CORPORATION, APPELLEE.

141 N. W. 2d 415

Filed March 25, 1966. Nos. 36068, 36069, 36070.

1. **Insurance.** Section 44-501, R. R. S. 1943, prescribing the 1943 New York standard form of fire insurance policy, is definite notwithstanding adoption of the form by reference.
2. **Statutes.** In the construction of statutes on the same subject a special statute ordinarily controls a general one.

3. **Constitutional Law: Statutes.** An attack upon the constitutionality of a statute cannot ordinarily originate in an appeal from the district court.

Appeals from the district court for Morrill County: JOHN H. KUNS, Judge. Affirmed.

Paul Rhodes, pro se.

Haney, Walsh & Wall, for appellees.

Heard before WHITE, C. J., CARTER, SPENCER, BOSLAUGH, BROWER, SMITH, and MCCOWN, JJ.

SMITH, J.

Plaintiff brought these actions to recover on three fire insurance policies which provided that "No suit * * * shall be sustainable * * * unless commenced within twelve months next after inception of the loss." In each case the insurer demurred to plaintiff's petition on the ground of noncompliance with the clause of the contract. The district court sustained the demurrers and dismissed the petitions. Plaintiff has appealed, his assignments of error being common to the three cases.

Plaintiff commenced these actions February 7, 1963. A fire loss within policy coverage had occurred February 8, 1959. The quoted clause in defendants' contracts is a part of the 1943 New York standard fire insurance form, the limitation period being regulated by the following statutory language:

"No policy * * * of fire * * * insurance * * * shall be * * * issued * * * other than such as shall conform in all particulars as to * * * context, provisions, agreements and conditions with the 1943 Standard Fire Insurance Policy of the State of New York * * *." § 44-501, R. R. S. 1943.

Defendants' contracts were authorized notwithstanding incorporation of the standard policy in the statute by reference. The form has been enjoying wide currency. See, Olson Enterprises, Inc. v. Citizens Insurance Co., 255 Iowa 141, 121 N. W. 2d 510; 3 Richards on Insurance

(5th ed.), § 497, p. 1587. In connection with an antecedent standard this court said:

"The form * * * which the legislature adopted, known as the New York standard, is a definite and well-known form of contract. Its characteristics, terms and conditions * * * are familiar to all carrying on the business of fire insurance." State ex rel. Martin v. Howard, 96 Neb. 278, 147 N. W. 689. See, also, Scottish Union & National Ins. Co. v. Phoenix Title & Trust Co., 28 Ariz. 22, 235 P. 137.

The general statute specifying a 5-year limitation of actions on written contracts, section 25-205, R. R. S. 1943, yields to the reference statute. The chapter of the statutes in which adoption of the New York form is found also provides:

"No insurance company shall issue * * * any policy * * * containing * * * any provision limiting the time within which an action may be brought to less than the regular period of time prescribed by the statutes of limitations * * *, unless otherwise prescribed by this chapter." § 44-357, R. R. S. 1943.

In the construction of statutes on the same subject a special statute ordinarily controls a general one. Dawson County v. Whaley, 134 Neb. 509, 279 N. W. 164; Olson Enterprises, Inc. v. Citizens Insurance Co., *supra*.

Plaintiff insists that the reference statute violates Article III, section 14, Constitution of Nebraska, but a procedural irregularity shuts out consideration by us. He launched his objections in this appellate proceeding, or so we assume from the silent records. An attack upon the constitutionality of a statute cannot ordinarily originate in an appeal from the district court. Mergenthaler Linotype Co. v. McNamee, 125 Neb. 71, 249 N. W. 92.

The judgments were correct, and they are affirmed.

AFFIRMED.

LUCILE R. CORRIGAN, APPELLANT, V. FIREMAN'S FUND INSURANCE COMPANY, A CORPORATION, APPELLEE.

141 N. W. 2d 170

Filed March 25, 1966. No. 36094.

1. **Reformation of Instruments.** In an action for reformation of a written instrument, the burden rests upon the moving party of overcoming the strong presumption arising from the terms of the written instrument. If the proofs are doubtful and unsatisfactory and if there is a failure to overcome this presumption by testimony entirely plain and convincing beyond reasonable controversy, the writing will be held to express correctly the intention of the parties.
2. **Insurance.** The falsity of any statement in the application for any sickness and accident insurance policy may not bar the right to recovery thereunder unless such false statement materially affected either the acceptance of the risk or the hazard assumed by the insurer. § 44-710.14, R. R. S. 1943.
3. ———. If an incorrect answer is inserted in an insurance application by an agent of the insurer when correct information was given to him by the insured, the insurer cannot rely upon such answer in an action in equity to rescind or reform the policy issued on the application.
4. ———. Every agent or broker who shall solicit an application for insurance of any kind shall, in any controversy between the insured or his beneficiary and the company issuing any policy upon such application, be regarded as representing the company and not the insured. § 44-329, R. R. S. 1943.
5. ———. Where an insured can prove that he truthfully provided correct information to complete an insurance application, he may have the policy reformed in equity, and the mere fact that he retained the policy and did not examine it until after a loss occurs will not prevent reformation.

Appeal from the district court for Douglas County: JAMES P. O'BRIEN, Judge. Reversed and remanded with directions.

Young, Denenberg & Mullery, for appellant.

Gaines, Spittler, Neely, Otis & Moore and Michael T. Levy, for appellee.

Heard before WHITE, C. J., CARTER, SPENCER, BOSLAUGH, BROWER, SMITH, and MCCOWN, JJ.

SPENCER, J.

This is an action to reform a major medical insurance policy and for judgment for the amount claimed to be due under the terms of said policy. Judgment was entered for the defendant, Fireman's Fund Insurance Company, a corporation, hereinafter referred to as defendant, and plaintiff, Lucile R. Corrigan, hereinafter designated as plaintiff, perfected an appeal to this court.

Plaintiff alleges that one Richard J. O'Brien, Jr., hereinafter referred to as O'Brien, sold her the policy. Plaintiff discussed with O'Brien the insurance under which she was covered at that time, including Blue Cross and Blue Shield and two small policies issued by Mutual of Omaha. O'Brien advised plaintiff that she should purchase the policy in question and let the Mutual policies expire. Plaintiff signed an application supplied by O'Brien to secure the instant policy.

One of the questions contained in said form is as follows: "What other hospital or surgical insurance are you or any of your family members named above applying for or carrying?" This was left blank by the plaintiff and was subsequently completed by O'Brien by marking an "X" in the box adjoining the word "None." Plaintiff alleges that she was informed that O'Brien construed this to be the proper answer to the question concerning other insurance, inasmuch as none of the insurance covering the plaintiff at that time was of the major medical type. Plaintiff did offer a copy of a letter written to defendant by O'Brien subject to the claim, in which he states as follows: "I know that Mrs. Corrigan did not tell me an untruth, and she maintains that I filled out that answer. If I did check that block—which I could have—I probably thought that the question pertained to any other major medical type of insurance."

Plaintiff further alleges that at the request of O'Brien she signed a form authorizing her family physician, hereinafter referred to as Doctor Hartigan, to furnish information relative to her medical history. The answer

to the question on medical history was left blank on the application when it was delivered to O'Brien so he could have it properly completed. O'Brien submitted the application form to Doctor Hartigan for completion, and it was then returned to O'Brien. The answer supplied by Doctor Hartigan was as follows: "Been in hospital for treatment of gastric ulcer in 1954. Have had periodic physical exams since then, & in the hospital in March, 1962, for active viral pneumonitis. Dr. J. D. Hartigan."

Defendant, for answer, alleges that the policy was obtained by the plaintiff through false statements and the concealment of material facts which materially affected both the acceptance of the risk and the hazard assumed by the defendant, and that said policy would not have been issued had truthful disclosure been made. Defendant also cross-petitioned, praying that said policy be adjudged to be void and of no force and effect, for the reason that plaintiff concealed other medical coverage and that the information supplied by Doctor Hartigan in the medical history was false or a concealment in that it did not include all of plaintiff's ailments, diseases, and body impairments.

It is the defendant's contention that the coverage by Blue Cross and Blue Shield, which was supplied by the employer of plaintiff's husband, and two Mutual of Omaha policies should have been reported in plaintiff's application, and a more complete medical history should have been supplied. The claim involved in this action covers a hospitalization starting October 9, 1962, for an inflamatory condition of the back. The complaint was a pain across the lumbar spine. A laminectomy was performed in late November 1962. It is defendant's position the policy would not have been issued if full information had been furnished.

The evidence discloses that on an occasion in 1956 plaintiff consulted Doctor Hartigan for a sudden pain in the lower back, which occurred when she bent to pick up a child. The doctor diagnosed it as back strain

and gave her a muscle relaxant. She had discomfort for about a week and it went away. Thereafter she carried on all of her regular activities without any trouble. In 1957 she was hospitalized for a sinus infection. In May 1960 she had a low back strain which occurred when she reached across the bed to pick up the telephone. She made one visit to Doctor Hartigan and he gave her a prescription and prescribed a corset-type garment which she wore for about 2 weeks. She had no further back trouble and was able to do heavy housework, regular office work, and to engage in swimming, golf, and other sports. While hospitalized for viral pneumonitis in March 1962, a dilatation and curettement procedure, which is a diagnostic test, was performed, and a negative report for carcinoma was obtained. Inasmuch as the test was negative, Doctor Hartigan thought it was not of significance and did not list it.

Doctor Hartigan testified that in completing the form he referred only to those episodes which he thought were of major significance. There was no connection between the dilatation and curettement and the disability for which the present claim was made. It was also his opinion that there was no connection between the difficulty in October 1962 and the backache in 1956 or the back strain in 1960. His opinion was that the difficulty in October 1962 had its onset when the clinical symptoms began to appear, which was 2 weeks before the hospitalization.

The court specifically found that the plaintiff informed O'Brien of the policies with Mutual of Omaha and of a policy carried by her husband's employer which covered the plaintiff, and that the medical history was furnished by Doctor Hartigan after the application was signed by the plaintiff. The court further determined that the application contained false statements materially affecting the acceptance of the risk; found the policy to be void; and denied plaintiff all benefits thereunder.

Plaintiff testified that O'Brien visited her while she

was hospitalized in March 1962, and that they discussed the policies she had, including the coverage by Blue Cross and Blue Shield provided by her husband's employer. O'Brien told her the Mutual policies were outdated and suggested major medical coverage with the defendant. Subsequently, O'Brien visited her at her office, examined the Mutual of Omaha policies, and recommended the policy involved herein.

It is the testimony of plaintiff's husband, who also purchased a policy from defendant, that a full disclosure was made to O'Brien; that O'Brien told him the Mutual of Omaha policies were obselescent and should be permitted to expire; and that the policy herein, with their Blue Cross and Blue Shield, should give them sufficient coverage.

Plaintiff testified that O'Brien gave her the application form, asked her to fill out the personal information, and to sign a release so that the company could secure her medical history from her physician. They talked about her previous medical history, and O'Brien told her he knew Doctor Hartigan was her medical doctor and he would take the form to Doctor Hartigan and see that it was filled in by the doctor because he had all of her records.

O'Brien, defendant's agent, was called as a witness for the plaintiff. Although his testimony is evasive to the extreme, it does corroborate the plaintiff's story in essential respects. O'Brien admits that he discussed hospitalization insurance with the plaintiff while she was hospitalized in March 1962, and that he subsequently called on the plaintiff at her place of work. The application was signed on April 17, 1962. O'Brien testified that he does remember that they discussed present insurance coverage because she was just out of the hospital and she was collecting on some policies then in existence. He does remember that plaintiff's husband had a group policy and he thinks something was mentioned about the Mutual policies. He does not remember

whether the group policy was referred to specifically as Blue Cross and Blue Shield. He also testified that he knew they were going to have to get the information on her medical history from her doctor, so he had her sign an authorization to permit the company to obtain that information. He testified that it was his recollection that the question of other insurance was left blank, "* * * that there was no mark in that block." He does not know who put the "X" in the box, but he does know that it was blank when it was received in his office.

Relative to the question on medical history, O'Brien's testimony is as follows: "Q. In what connection? Tell the Judge the gist of the conversation as best you can recall. A. Well, as I mentioned, we were discussing hospitalization insurance because she just come out of the hospital. I had a brochure in my possession from Fireman's Fund which said it was catastrophe hospitalization insurance. I said, 'Lucile, here is something that might be helpful to you and you might have some benefit or use for it.' We started to look it over and we came to the question 'Medical History.' She said, 'I give up, I know nothing about this.' We discussed at that time maybe she should find some medical man to help her fill that out. I know at that time Dr. Hartigan's name was mentioned, being the family doctor for the Corrigans since they had been in Omaha."

On this point, plaintiff testified as follows: "Q. What did he say about filling in Items 3 and 4? A. He said, leave it blank and he would have Dr. Hartigan fill it in. * * * Q. Now were you asked to sign anything else in connection with the securing of this information from Dr. Hartigan? A. He asked me to sign the Release to the Doctor which would release all my medical records to the Fireman's Fund people. Q. I will ask you to examine this Exhibit No. 11 and tell me if it contains the release of medical information that you signed? A. The Doctor's authorization here on the bottom, I signed this." It is plaintiff's testimony that she then gave the

application to O'Brien. O'Brien thought the application was mailed to his office but could not remember by whom. We are convinced that the logical inference from the evidence is that O'Brien left with or sent the form to Doctor Hartigan to be completed, and that the form was then returned directly to O'Brien.

Defendant cites Beideck v. National Fire Ins. Co., 139 Neb. 171, 296 N. W. 873, to sustain its contention that the burden of proof for reformation rests on the plaintiff. In that case, we said: "In an action for reformation of a written instrument, the burden rests upon the moving party of overcoming the strong presumption arising from the terms of the written instrument. If the proofs are doubtful and unsatisfactory and if there is a failure to overcome this presumption by testimony entirely plain and convincing beyond reasonable controversy, the writing will be held to express correctly the intention of the parties." There is no question this is the rule in Nebraska.

The difficulty with defendant's position, however, is its premise that somehow plaintiff failed to meet this burden. As we read the record, there is no important point on which the plaintiff's evidence is actually disputed. The proof herein is not doubtful but is conclusive that defendant's agent O'Brien was fully informed and the plaintiff did not know that the information given to him had not been communicated to his principal. On this record there is not one scintilla of evidence that the plaintiff in any way misrepresented the insurance she held, or her medical condition.

Defendant takes comfort from section 44-710.14, R. R. S. 1943, which provides: "The falsity of any statement in the application for any policy covered by this act may not bar the right to recovery thereunder unless such false statement materially affected either the acceptance of the risk or the hazard assumed by the insurer."

Defendant urges that in this instance its only burden

is to show the falsity of statements in the application, and that except for such false statements, the policy would not have been issued. Defendant's hurdle is the fact that the plaintiff made no false statements. The plaintiff acted in complete honesty and in good faith. We have no quarrel with the many cases cited by the defendant on false statements and misrepresentation. The difficulty is that they are not applicable to the fact situation herein.

Defendant, to sustain its contentions, quotes at length from our opinion in Gillan v. Equitable Life Assurance Society, 143 Neb. 647, 10 N. W. 2d 693, 148 A. L. R. 496. In addition to not being applicable on the facts in this case, the following from Mutual Benefit Health & Accident Assn. v. Milder, 152 Neb. 519, 41 N. W. 2d 780, is a complete answer to defendant's reliance on it: "The discussion of that subject (contradicting by oral evidence parts of an application for insurance) and the rule adopted in that case are limited to actions at law for a recovery on the policy and are not pertinent to this or any case in equity to reform, cancel, or rescind an insurance contract."

Plaintiff gave full information to defendant's agent about other insurance she carried, and for the purpose of this action this constitutes a full disclosure to the defendant. Defendant's agent concedes that the application was delivered to him with the question pertaining to the other insurance left blank, and that it was completed incorrectly after it was received in his office. His explanation as to the failure to list plaintiff's other policies is that he thought the question pertained only to other major medical insurance. If an incorrect answer is inserted in an insurance application by an agent of the insurer when correct information was given to him by the insured, the insurer cannot rely upon such answer in an action in equity to rescind or reform the policy issued on the application. Mutual Benefit Health & Accident Assn. v. Milder, 152 Neb. 519, 41 N. W. 2d

780. See, also, 4 Couch on Insurance (2d ed.), § 26:276, p. 180.

It is true Doctor Hartigan did not list plaintiff's complete medical history. He listed those episodes he deemed to be of major significance. It is defendant's contention that the plaintiff appointed Doctor Hartigan as her agent for the purpose of giving response to the medical questions, and that she is bound by his statements. But here again, as we construe the evidence, it was defendant's agent who undertook the responsibility of securing the medical history from Doctor Hartigan. By so doing he assumed the responsibility for the adequacy of that report, and this can in no way constitute a misrepresentation or concealment on the part of the plaintiff.

It should be noted that the information was obtained by O'Brien after the application had been signed by the plaintiff and had been delivered to him. What plaintiff did was to authorize O'Brien, defendant's agent, to obtain complete information from Doctor Hartigan. In this respect, we call attention to section 44-329, R. R. S. 1943, which provides: "Every agent or broker who shall solicit an application for insurance of any kind shall, in any controversy between the insured or his beneficiary and the company issuing any policy upon such application, be regarded as representing the company and not the insured."

Defendant urges that the plaintiff had ample opportunity to correct the falsity of the statements, particularly the medical history furnished by Doctor Hartigan upon receiving the policy which contained a copy of the application upon which the policy was issued. Plaintiff's evidence is that she did not read the policy but upon its receipt placed it with her other papers.

The following from Mutual Benefit Health & Accident Assn. v. Milder, 152 Neb. 519, 41 N. W. 2d 780, is a sufficient answer to defendant's contention: "The appellant argues that the retention of the policy with a copy of

the application attached thereto by appellee was a ratification and adoption of all statements appearing in the application; that appellee is estopped from asking or having reformation of the application; and that the insured was bound as a matter of law to know the contents of the application. When the insured states the facts correctly to the agent of the company, he is not bound to exercise vigilance thereafter to determine whether or not the agent exercised care, good faith, or truthfulness in his transactions on behalf of the company. The company is estopped from seeking to avoid its contract because of a mistake or fraud committed by its agent, if the insured acted in good faith, although he may have been negligent. The case of Robinson v. Union Automobile Ins. Co., 112 Neb. 32, 198 N. W. 166, is pertinent to this contention. Therein it is said: 'It is next contended that, where a party accepts a contract of insurance and makes no effort to examine or read the policy until a loss occurs, he is bound by the terms of the policy as written. Several authorities are cited as sustaining this principle, * * *. The cases cited, however, in the main are actions on contracts as written and where one or the other of the parties seek to avoid the legal effect of some clause in the contract of which he had no personal knowledge. They are not actions for reformation of the contract. In such an action, where one party seeks the aid of a court of equity to require the contract to conform to the actual intent and agreement of the parties, a different rule is applicable. It is a general principle, sustained by abundant authority, that if, by inadvertence, accident, or mutual mistake, the terms of the contract are not fully set forth in the policy, it may be reformed so as to express the real agreement.' See, also, Mogil v. Maryland Casualty Co., 147 Neb. 1087, 26 N. W. 2d 126."

We hold that where an insured can prove that he truthfully provided correct information to complete an insurance application, he may have the policy reformed

in equity, and the mere fact that he retained the policy and did not examine it until after a loss occurs will not prevent reformation. Plaintiff herein was entitled to reformation and to judgment in accordance with the terms of her contract.

The judgment herein is reversed and set aside, and the cause is remanded to the district court with directions to enter judgment for the plaintiff in accordance with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

BETTY L. LORENZEN, REGULAR ADMINISTRATRIX OF THE ESTATE OF JOHN C. LORENZEN, DECEASED, APPELLEE, V. CONTINENTAL BAKING COMPANY, A CORPORATION, APPELLANT, IMPLEADED WITH PETER PAN BAKERS, INC., A CORPORATION, APPELLEE.

141 N. W. 2d 163

Filed March 25, 1966. No. 36129.

1. **Negligence: Trial.** Where different minds may reasonably draw different conclusions or inferences from the evidence on issues of negligence, the determination of such issues is for the jury.
2. ———: ———. Negligence is a question of fact and may be proved by circumstantial evidence. Where the facts and circumstances proved, together with the inferences that may be legitimately drawn therefrom, indicate with reasonable certainty the commission of the negligent act charged, the issue is for the jury.
3. **Torts: Death.** The law of the place of wrong governs the amount of recovery for wrongful death, as well as the right to recover. Any limitation upon the amount imposed by the law of the place of wrong will be applicable to determine the maximum amount recoverable elsewhere.
4. **Death.** The wrongful death statute of Iowa is a survival statute and not an ordinary Lord Campbell's Act statute by which damages may be awarded to beneficiaries for the loss they sustained.
5. ———. Under the Iowa survival statute the recovery is for such damages as deceased himself might have recovered had

he survived the injury and brought the action, enlarged to include the wrongful death.

6. **Death: Damages.** The measure of damages under the Iowa survival statute is the present worth or value of that which the deceased would reasonably be expected to save and accumulate as a result of his efforts if he had lived out the usual time of his life expectancy.
7. ———: ———. Under the Iowa survival statute in a wrongful death case the loss of the ability of the deceased to earn and accumulate money or property is an important element in the measure of damages.
8. ———: ———. The measure of damage under the Iowa survival statute for wrongful death is the amount of money and property which the deceased would reasonably save and accumulate in his lifetime but for his wrongful death, reduced to its present worth.
9. ———: ———. The damages in such a case are ordinarily for the jury to determine, even though they are speculative in nature, but the amount of damages found by the jury must be within the maximum amount shown by the evidence.
10. **Trial: Appeal and Error.** Under the law of Iowa, where it appears that a verdict was prompted by passion and prejudice or other ulterior influence, or the jury disregarded the evidence or the court's instructions, or the verdict appears unconscionable or clearly not warranted by the record, it is the duty of the appellate court to set aside the verdict.

Appeal from the district court for Douglas County: PATRICK W. LYNCH, Judge. Affirmed in part, and in part reversed and remanded.

Stoehr, Rickerson & Caporale, for appellant.

Eisenstatt, Lay, Higgins & Miller and Moyer & Moyer, for appellee Lorenzen.

Cassem, Tierney, Adams & Henatsch, for appellee Peter Pan Bakers, Inc.

Heard before CARTER, SPENCER, BOSLAUGH, BROWER, and MCCOWN, JJ., and KOKJER, District Judge.

CARTER, J.

This is an action to recover for the wrongful death of John C. Lorenzen, plaintiff's decedent, alleged to have

been caused by the negligence of the Continental Baking Company. The jury returned a verdict for the plaintiff in the amount of $85,368, and Continental has appealed.

On June 21, 1963, plaintiff's deceased was employed by Peter Pan Bakers, Inc., as a truck route driver on a regular bread route. He left Omaha early in the morning of that day and had traveled about 5 miles east of Council Bluffs, Iowa, when his truck was in a collision with a tractor-trailer belonging to Continental and operated by William Vincent. Both drivers were killed instantly. Each driver was alone in his vehicle. There were no eyewitnesses to the accident. The evidence as to the cause of the accident comes from those who appeared on the scene immediately after the accident, expert witnesses, and the surrounding circumstances. Continental contends that the evidence is insufficient to support a judgment, and even if sufficient, the judgment is excessive.

The accident occurred on U. S. Highway No. 6 about 5 miles east of Council Bluffs, within the State of Iowa. Immediately prior to the accident the Peter Pan truck was traveling in a northeasterly direction. It was approaching an elbow bend in the road, the road turning to the right on an elbow turn as it proceeded on its way from Council Bluffs to Oakland, Iowa. The Continental tractor-trailer, immediately prior to the accident, was approaching the bend or curve from the opposite direction. The accident occurred after the Continental tractor-trailer had turned the curve.

The road was paved for a width of 18 feet. The center of the road was marked with a broken white line. It was raining at the time of the accident, the pavement was wet, and the shoulders were soft. Visibility was limited to one-half to three-quarters of a mile. The road was level in the area of the accident, although the road was hilly and winding in the general area through which it passed. The Peter Pan truck was completely wrecked

and was 7 feet or more off its right-hand side of the road after the collision. The Continental tractor-trailer was 168 feet beyond the Peter Pan truck when it came to a stop after the accident. The 40-foot trailer was crosswise on the road completely blocking it. The tractor and trailer were in a jackknifed position, the tractor being at the side of the trailer farthest from the point of collision. The weight of the Continental tractor-trailer and load at the time of the accident was 28,212 pounds. The Peter Pan truck and load weighed approximately 7,350 pounds.

There is no evidence of the speed of the Peter Pan truck, nor any direct evidence that it was not traveling on the right-hand side of the road. The presumption necessarily is that it was being operated in accordance with the rules of the road and free from negligence on the part of its driver. The same presumption exists as to the driving of the Continental tractor-trailer and its driver. The burden of proof is upon the plaintiff to prove negligence by a preponderance of the evidence.

It is not disputed that the speed limit for the two vehicles at the place of the accident was 50 miles per hour, day or night. The Continental tractor was equipped with a tachometer which showed its speed at the time of the accident to have been 56 to 57 miles per hour.

The driver of the Continental tractor-trailer was William Vincent. He was 21 years of age. This met with the age requirements of the Interstate Commerce Commission for driving this type of vehicle. The Continental Baking Company, however, had a company rule that its over-the-road drivers of this type of vehicle should be at least 25 years of age. The plaintiff makes a point of the fact that the garage supervisor for Continental, who was the hiring agent for Continental, was Vincent's father-in-law and that the waiver of the company rule as to age is evidence of negligence by the company. We think not. The waiver of a company rule is not in the same category as a violation of statutes or regulations of a

governmental agency. While the age of a driver is a circumstance that may be considered, it is not, under such circumstances, in itself evidence of negligence.

Each of the parties called an expert witness who qualified as an expert in the general area of collision analysis. Prof. W. F. Weiland testified that he went to the scene of the accident between 12 and 1 o'clock p.m. on the day of the accident and examined the premises. Pictures of the vehicles were taken by the patrolman at the scene of the accident, and Prof. Weiland also took many pictures of the Continental tractor-trailer after it had been removed from the scene of the accident. From an examination of the scene of the accident, and all of the pictures offered in evidence, he concluded that the accident was a head-on collision between the left front ends of the two vehicles and, from an analysis of the damage thereto, that the Peter Pan truck was necessarily encroaching on its left-hand lane at the time of the collision.

Dr. William H. Tonn, Jr., was called by the plaintiff. He examined all the photographs that were offered in evidence. His testimony is that there was no head-on collision as indicated by the front ends of the two vehicles. He pointed out that the horns on the frame of the Peter Pan truck were in such condition as to indicate no head-on collision. The radiator core, he says, would have been smashed in if such collision occurred, and that, in fact, it was not damaged. He concluded that all the evidence indicates that the force applied to the Peter Pan truck which pushed it off the highway, was from the side. His final conclusion was that the Continental tractor-trailer was jackknifing immediately before the collision; that the Continental vehicle struck the left side of the Peter Pan truck, stopping its forward motion, and that the momentum of the heavier Continental rig pushed the Peter Pan truck off the road and against the embankment; and that the Continental rig continued in a jackknifed position and came to rest as previously described. It is evident that the jury ac-

cepted the opinion evidence of Dr. Tonn and rejected that of Prof. Weiland.

There is much evidence in the record on the issue as to whether or not the air hose controlling the brakes on the trailer of the Continental rig were connected and operating prior to the accident. Admittedly they were disconnected after the accident. There is evidence that they were hanging down immediately after the accident and at a later time were found wrapped around an air intake pipe or an exhaust pipe on the tractor. We do not think the evidence on this issue supports the contention of the plaintiff. There is also evidence in the record that the wheels of the trailer were free and not braked as they would be in case of an emergency break in the hose line. There is conflicting evidence to the effect that the wrecker could not move the trailer and that the emergency air tank had to be bled before the trailer could be moved. In fact, in one of the pictures taken by the highway patrolman, one of the wrecker operators was shown on the ground under the trailer in front of the rear dual tires, where the petcock, used in bleeding the air to release the brakes, was located. The evidence is in conflict as to whether or not the trailer wheels were free after the accident.

Summarizing the evidence in this case the jury could find as follows: The Continental tractor-trailer was being driven by Vincent immediately before the accident at a speed of 56 to 57 miles per hour on a highway where the speed limit for the vehicle was 50 miles per hour. The weather conditions were adverse and the pavement was wet and slippery. Vincent was driving in the outside lane on a rather pronounced curve. After completing the curve he either changed the direction of his tractor or failed to brake his trailer in time to prevent a jackknifing of his rig. The jury could also find that the brakes of the trailer were not operating properly. The jury could well believe the expert evidence of Dr. Tonn that the jackknifing occurred before the collision and

was the cause of it. Such evidence, if believed, affirmatively shows that it, and not any contributory negligence of plaintiff's decedent, was the proximate cause of the accident. We conclude that the whole of the evidence is sufficient to sustain the inference drawn by the jury that the negligence of Vincent was the proximate cause of the death of John C. Lorenzen. We find no error in the action of the trial court in submitting the case to the jury.

Continental assigns as error the giving of instruction No. 2 in that it submitted issues not sustained by evidence. The instruction submitted the issues, among others, as to whether or not the driver of the Continental tractor-trailer had reasonable control of the rig immediately previous to the collision and whether or not he was keeping a proper lookout. Under all the facts and circumstances of this case, even though there is no direct evidence on the issues, the question of proper control and lookout was for the jury. If the Peter Pan truck was being operated on its right-hand side of the road, the accident was necessarily caused by a failure to control the Continental tractor-trailer, or by the failure of its driver to see and avoid striking the Peter Pan truck. Although the evidence was largely circumstantial, it was sufficient to submit the issues about which complaint is made. The trial court did not err in submitting instruction No. 2.

Continental assigns as error the excessiveness of the verdict and judgment. As to damages, the evidence is substantially as follows: The deceased, John C. Lorenzen, was 28 years of age with a life expectancy of 43 years. He was married to Betty L. Lorenzen on June 6, 1954, and at the time of his death they were the parents of two sons, Larry Lee and Gary Gene, aged 9 and 4 years at time of trial. The deceased was a high school graduate and had attended college for two summers. He taught country school two years. He subsequently worked as an apprentice telegrapher at a salary of $40

per week. Later he worked for a chain store at a salary of $50 per week. He then worked for a construction company for which he was also paid $50 per week. In 1958 he was employed as a relief route driver for Peter Pan Bakers, Inc., and in 1960 moved to Omaha where he continued in its employ as a route bread-truck driver until his death. That he was an energetic and faithful employee is shown by the evidence. He was reliable in his work and was highly regarded by his employer. He had no bad habits, had the confidence of his route customers, and had the ability to get along well with his employer and its customers. He was in line for promotion with an increase in pay at the time of his fatal accident, a matter which will be hereafter discussed.

At the time of his decease he was renting a home in Omaha. He owned a 1960 model Falcon automobile, bought in June 1962, which was mortgaged for $400. He had purchased and paid for furniture in the amount of $1,200. At the time of his death he had a bank account of approximately $1,300. He had a $5,000 policy of life insurance, the premiums on which were paid for by withholdings from his pay. He had no stocks, bonds, or other investments. He did not own his own home. He was frugal and kept his bills paid up. He had been able to accumulate small savings only since his employment with Peter Pan Bakers, Inc.

He was employed on a salary plus a percentage on sales over a fixed amount. The evidence shows that the deceased earned a gross salary of $7,085.19 in 1961, $7,109.03 in 1962, and $3,660.86 from January to June 1963. There is evidence that deceased was to take a new city route a few days after his death. This route earned a gross salary of $7,790.30 in 1963 and $8,665.46 in 1964. The federal income tax of deceased indicated earnings of $6,247.31 in 1960, $6,155.83 in 1961, $6,169.22 in 1962, and $3,171.46 from January 1, 1963, to the date of his death on June 21, 1963. There is no evidence of the amounts remaining after living costs were deducted.

This constitutes the sole evidence of the earning capacity of the deceased.

The accident occurred in Iowa and the rule of damages is therefore determined from the law of Iowa. Restatement, Conflict of Laws, § 391, Comment d, p. 480. See, also, Restatement, Conflict of Laws, § 412, p. 493.

Liability for a negligent death did not exist at common law. Liability for such a death was legislatively created in England by the enactment of Lord Campbell's Act in 1846. Similar legislation for wrongful death in this country soon followed in most of the states. In Iowa, however, the wrongful death statute contained many differences from the usual Lord Campbell's Act wrongful death statutes enacted by most of the states. While the Iowa statute had the same remedial purpose, it differs in its provisions, its theory, and its application. It is necessary that we note the differences in the Iowa wrongful death statute since it is so different from our own.

Under the law of Iowa the measure of damage for wrongful death is the loss resulting to the estate of the deceased. It is a survival statute, not an ordinary Lord Campbell's Act wrongful death statute by which damages may be awarded to beneficiaries for the loss sustained. Under the Iowa survival statute the recovery is for such damages as deceased himself might have recovered had he survived the injury and brought the action, enlarged to include the wrongful death. Fitzgerald v. Hale, 247 Iowa 1194, 78 N. W. 2d 509. In other words, the measure of damages in a wrongful death case in Iowa is the present worth or value of that which the decedent would reasonably be expected to save and accumulate as a result of his efforts if he had lived out the usual time of his life, to which may be added interest on reasonable funeral expense for such time as it was prematurely incurred. Brophy v. Iowa-Illinois Gas & Electric Co., 254 Iowa 895, 119 N. W. 2d 865 (1963); Cardamon v. Iowa Lutheran Hospital, 256 Iowa 506, 128

N. W. 2d 226 (1964). It is evident that under the Iowa law, in a wrongful death case, the loss of the ability of the deceased to earn and accumulate money or property is the important element in the measure of damage. Cardamon v. Iowa Lutheran Hospital, *supra*. Reduced to the ultimate in simplicity of statement, the measure of damage is the amount of money and property which the deceased would reasonably have accumulated in his lifetime but for his wrongful death, reduced to its present worth.

The evidence in this case shows that the largest amount of compensation the deceased Lorenzen earned or would have earned is $8,665.46 in 1964. The amount of this compensation that would have been saved and accumulated by him is not shown, but it does appear that from June 6, 1954, to the date of his death on June 21, 1963, it was about $1,300. It is true that he had purchased furniture and a second-hand automobile which would depreciate out of existence and require replacement. We point out also that the maintenance and schooling of the two small boys would increase until they became self-sustaining. After this period his savings would in all likelihood be increased. Without any evidence of his cost of living expenses, uncertainty exists as to the amount the deceased would have saved or accumulated over the years.

The judgment in this case was for $85,368, which represents the present worth of the amount the jury found that the deceased would have saved and accumulated during his expectancy but for his premature death. Assuming that the present worth was determined on a 4½ percent earning rate of interest, the jury would have to find that deceased would have saved and accumulated $250,138.24 to produce a present worth of $85,368. If the present worth was determined by a 4 percent earning rate, the jury would have to find that deceased would have saved $232,190.96. If the deceased saved $2,000 per year, he would have saved and accumulated $86,000 in

43 years, $129,000 if he saved and accumulated $3,000 per year, and $172,000 in 43 years at $4,000 saving per year. The amount shown to have been saved and accumulated during the 5 years previous to his death does not even approach these figures.

It is true that the measure of damages under Iowa law is speculative in nature. It is true also that the damages in a death case is left to the jury to determine. But the amount fixed must bear some reasonable relation to the maximum amount shown by the evidence. We submit that the amounts of $250,138.24 or $232,190.96 as the savings and accumulations of deceased during his 43-year expectancy are not supported by the evidence. Nor does the evidence sustain any amount, which reduced to present worth, would produce $85,368, the amount of the judgment in this case. Nor would the interest on the premature burial expenses, reduced to present worth, make any substantial difference.

Plaintiff argues in her brief that the purchasing power of money should be considered in determining if a judgment is excessive. This is ordinarily true, but in the instant case the purchasing power of money is likewise reflected in the earnings of the deceased. Hackman v. Beckwith, 245 Iowa 791, 64 N. W. 2d 275. Although there may be some lag between the purchasing power of money as it relates to living costs and that represented in wages and salaries, it does not play too great a part under such a rule as exists in Iowa. Plaintiff also points out that much larger judgments are sustained in other states which is, of course, true. But we point out that in those states the recoverable damages in a wrongful death action are compensatory, and often punitive as well, while in Iowa they are neither compensatory nor punitive.

The Iowa court has said that it is not permitted for the court to substitute its judgment for that of the jury except with extreme caution. Mazur v. Grantham, 255 Iowa 1292, 125 N. W. 2d 807. A verdict cannot be char-

acterized as being excessive unless the record on appeal affirmatively shows it to be a fact or shows an apparent disregard of the law as given by the court's instructions. Grafton v. Delano, 175 Iowa 483, 154 N. W. 1009; DeToskey v. Ruan Transport Corp., 241 Iowa 45, 40 N. W. 2d 4, 17 A. L. R. 2d 826.

We point out that it is a very difficult matter to determine the compensatory loss of a young husband and father to his family. In one sense of the word there is no way of making adequate compensation. The question necessarily becomes a matter of policy in the state where the tort occurs. The State of Iowa has adopted a policy in which compensatory damages play no part. The damages there allowed are for the loss to the estate of the deceased; what he would have had in his estate if he had lived out his expectancy. Giving the evidence its most favorable interpretation, it will not support a verdict that the deceased would have saved such an amount, reduced to its present worth, that would sustain the verdict of $85,368. While it is the province of the jury to fix the amount of a verdict in a wrongful death case, the verdict fixed must be within the scope of the evidence offered. Soreide v. Vilas & Co., 247 Iowa 1139, 78 N. W. 2d 41; Sisson v. Weathermon, 252 Iowa 786, 108 N. W. 2d 585; Brophy v. Iowa-Illinois Gas & Electric Co., *supra*.

We conclude that plaintiff is entitled to keep the verdict of the jury finding in effect that Continental was liable to the plaintiff for negligence. The verdict for $85,368 is set aside as excessive, and the judgment is reversed and the cause remanded to the district court for retrial as to damages only.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED.

EDWARD A. COSTELLO, APPELLANT, V. GENEVIEVE SIMON, APPELLEE.

141 N. W. 2d 412

Filed March 25, 1966. No. 36130.

1. **Trial.** A motion for dismissal or, in the alternative, for a directed verdict must, for the purpose of decision thereon, be treated as an admission of the truth of all material and relevant evidence submitted on behalf of the party against whom the motion is directed, and that party is entitled to have every controverted fact resolved in his favor and to have the benefit of every inference that can reasonably be deduced from the facts in evidence.
2. **Negligence.** Negligence is never presumed and it cannot be inferred from the mere fact that an accident happened.
3. **Trial.** Where the facts adduced to sustain an issue are such that but one conclusion can be drawn when related to the applicable law, it is the duty of the court to decide the question as a matter of law, and not submit it to a jury.
4. **Negligence.** While the owner of premises owes the duty to an invitee to exercise ordinary care to have the premises in a reasonably safe condition for use in a manner consonant with the purposes of the invitation, generally, there is no duty on the part of an inviter owner to protect an invitee against hazards which are known to the invitee or are so apparent that he may reasonably be expected to discover them and protect himself.
5. ———. The presence of natural moisture in level, open ground in a residential yard, even though under a natural covering of grass and leaves, does not constitute a trap under the facts in this case nor establish negligence on the part of the defendant.

Appeal from the district court for Douglas County: JAMES P. O'BRIEN, Judge. Affirmed.

Eisenstatt, Lay, Higgins & Miller, for appellant.

Pilcher, Howard & Dustin, for appellee.

Heard before CARTER, SPENCER, BOSLAUGH, BROWER, SMITH, and MCCOWN, JJ., and KOKJER, District Judge.

MCCOWN, J.

This is an action for personal injuries sustained by the plaintiff when he jumped or fell from a ladder

placed in position by the defendant against the side of her residence. The district court sustained defendant's motion for dismissal at the conclusion of the testimony and this appeal followed.

Plaintiff, Edward A. Costello, and defendant, Mrs. Genevieve Simon, are next door neighbors in Omaha. The defendant's house is basically one-story frame construction, faces south, and had metal guttering extending along the length of the east and west eaves of the house, approximately 11 feet above the ground. The guttering on the east side of the house was fastened to the eaves by braided wire hangers at intervals of several feet. Along the east side of the defendant's house was a wooden picket fence about 3 feet in height, and 4 feet from the side of the house, running parallel to it. There was a concrete sidewalk along that side of the house, and a strip of ground 8 to 10 inches in width between the east edge of the sidewalk and the picket fence. This ground between the sidewalk and the picket fence was covered with leaves and grass. There had been no rain from the 10th through the 20th of September 1963, but there had been .04 inch on the 21st, .21 inch on the 22nd, .81 inch on the 23rd, and .03 inch on the 24th. There had been no rain since the 24th, but the area was shaded and did not receive much sunlight. There is evidence that the ground was moist and slippery.

On September 27, 1963, while Mrs. Simon was working on the west side of her house, and Mr. Costello was working in his adjoining yard, Mrs. Simon asked him to help her remove the guttering on the east side of her house. Mr. Costello agreed, obtained a pair of wire snips to cut the braided wire hangers which held the guttering in place, and they proceeded to the rear of Mrs. Simon's house on the east side. Mrs. Simon furnished a wooden ladder which was somewhere between 8 and 12 feet long. Mrs. Simon placed the base of the ladder in the area between the sidewalk and the picket fence near the rear or north end of the east

side of her house. Mr. Costello mounted the ladder, reached up and cut the braided wire hanger holding the guttering, and they proceeded to the south down the east side of the house, with Mrs. Simon moving the ladder each time to the location of the next braided wire hanger. It was moved four or five times. At the point where the ladder was placed in position below the last hanger to the south, Mr. Costello again went up the ladder. He cut the braided wire hanger with the wire snips in his right hand, and his left hand was on a rung of the ladder; the gutter came down on his left arm; the ladder slipped just after he cut the hanger; the base of the ladder going to the north and the top to the south. In view of the close proximity of the picket fence, in Mr. Costello's words: "I throwed my weight over and hit the sidewalk with my heel." He fractured his left heel. After the occurrence, the base of the ladder was sticking into the picket fence, and the ladder was up against the house sideways.

The testimony was that Mr. Costello had used ladders a good many times before; that he tested the ladder each time to see that it was solid, and that on the last occasion, out of which his injury arose, he had looked at the base to see that it was resting securely before he started; that the ladder looked like it was in good position; and that he tested it with his weight, it did not slip, and had not slipped at any other time. There is some confusion in the testimony as to how closely Mr. Costello looked at the ground where the ladder was placed, but it is undisputed that he did not see the ground under the grass and leaves, nor notice any moisture. Mrs. Simon had not warned Mr. Costello that the ground was damp and slippery.

A motion for dismissal or, in the alternative, for a directed verdict must, for the purpose of decision thereon, be treated as an admission of the truth of all material and relevant evidence submitted on behalf of the party against whom the motion is directed, and

that party is entitled to have every controverted fact resolved in his favor and to have the benefit of every inference that can reasonably be deduced from the facts in evidence. Middleton v. Nichols, 178 Neb. 282, 132 N. W. 2d 882.

Negligence is never presumed and it cannot be inferred from the mere fact that an accident happened. Flory v. Holtz, 176 Neb. 531, 126 N. W. 2d 686.

Where the facts adduced to sustain an issue are such that but one conclusion can be drawn when related to the applicable law, it is the duty of the court to decide the question as a matter of law, and not submit it to a jury. Crawford v. Soennichsen, 175 Neb. 87, 120 N. W. 2d 578.

While the owner of premises owes the duty to an invitee to exercise ordinary care to have the premises in a reasonably safe condition for use in a manner consonant with the purposes of the invitation, generally, there is no duty on the part of an inviter owner to protect an invitee against hazards which are known to the invitee or are so apparent that he may reasonably be expected to discover them and protect himself. Crawford v. Soennichsen, *supra*.

In this case there is no evidence of any defect in the ladder being used, nor that there was anything different about the condition of the ground at the place where the fall occurred from that of any other portion of the strip of ground. The conditions were as apparent to the plaintiff as they were to the defendant. Our previous cases have also drawn a distinction between conditions existing inside and outside of buildings or places of business. Gorman v. World Publishing Co., 178 Neb. 838, 135 N. W. 2d 868.

It was a nice day in September at 10:30 in the morning, and the plaintiff was familiar with and had used ladders many times. The defendant is not an insurer of the safety of invitees, even helpful, neighborly ones. The liability of the defendant is for her own negligence.

The presence of natural moisture in level, open ground in a residential yard, even though under a natural covering of grass and leaves, does not constitute a trap under the facts in this case nor establish negligence on the part of the defendant.

For the reasons stated, the action of the trial court was correct, and is affirmed.

AFFIRMED.

DORIS EVELYN COOK, APPELLEE, V. LYALL LOWE, APPELLANT.
141 N. W. 2d 430

Filed April 1, 1966. No. 36008.

1. **Appeal and Error.** The function of assignments of error is that they set out the issues presented on appeal. They serve to advise the appellee of the questions submitted for determination in order that appellee may know what contentions must be met. They also advise this court of the issues which are submitted for decision.
2. **Negligence.** The possessor of land is subject to liability for bodily harm caused to a business invitee by a natural or artificial condition thereon if he knows, or by the exercise of reasonable care could discover, the condition which, if known to him, he should realize as involving an unreasonable risk.
3. **Appeal and Error.** The brief of appellant shall set out particularly each error asserted and intended to be urged for reversal, vacation, or modification of the judgment alleged to be erroneous.

Appeal from the district court for Dakota County: JOHN E. NEWTON, Judge. Affirmed.

Richard E. Twohig, for appellant.

James E. Abboud, Jr., and Rodney R. Smith, for appellee.

Heard before WHITE, C. J., CARTER, SPENCER, BOSLAUGH, BROWER, SMITH, and MCCOWN, JJ.

SPENCER, J.

This is an action for personal injuries brought by Doris

Evelyn Cook, a married woman, hereinafter referred to as plaintiff, against Lyall Lowe, hereinafter referred to as defendant. Plaintiff alleges she sustained injuries as a result of a fall down a flight of stairs on defendant's premises in the early morning of April 3, 1963. The case was tried to a jury which returned a verdict for $3,000 for the plaintiff. Defendant has perfected an appeal to this court from the judgment entered thereon.

The defendant was the operator of the Town House Motel in South Sioux City, Nebraska. On the evening of April 2, 1963, plaintiff's husband was a guest at said motel, staying in a room for which arrangements had been made by previous agreement between his employer, Wilson Concrete Company, and the defendant. Plaintiff's husband, along with other drivers for Wilson Concrete Company, worked irregular hours and when off duty in the area would occupy a room in defendant's motel.

Defendant's assignments of error are informal in the extreme, and there is a very serious question as to whether they are sufficient to constitute assignments of error. The function of assignments of error is that they set out the issues presented on appeal. They serve to advise the appellee of the question submitted for determination in order that the appellee may know what contentions must be met. They also advise this court of the issues which are submitted for decision. Wieck v. Blessin, 165 Neb. 282, 85 N. W. 2d 628. For the purposes of this opinion, we interpret plaintiff's assignments of error to raise the question of the sufficiency of the evidence to sustain the verdict.

There is no question that the evidence on both negligence and contributory negligence was sufficient to present a jury question, and it will serve no useful purpose to detail the various contentions of the parties. The jury could have found that the plaintiff's husband, who was staying at the motel, called his wife in Omaha, Nebraska, in the late evening of April 2, 1963, and re-

quested her to come to South Sioux City. She arrived between 1:30 and 2 a.m., April 3. Her husband had told her to come to unit No. 3. The office was dark when she arrived, and because she had the unit number, she parked her car and walked along the sidewalk area. When she came to unit No. 5, she realized that unit No. 3 would be around the corner on the other side. She walked around the corner and as she turned she fell down a stairway which was immediately around the corner and in the sidewalk area.

There is a dispute as to whether or not the stairway was protected by a gate, but it is evident that if there was a gate at that time, it was open. The testimony of plaintiff's witnesses is that the area was dark and unprotected. Plaintiff was hospitalized in Sioux City, Iowa, for hip and back injuries and did sustain some degree of permanent disability. There was evidence from which the jury could find that the plaintiff was an invitee on said premises, and that the defendant was negligent in failing to properly light the stairway and in failing to protect the area. The possessor of land is subject to liability for bodily harm caused to a business invitee by a natural or artificial condition thereon if he knows, or by the exercise of reasonable care could discover, the condition which, if known to him, he should realize as involving an unreasonable risk. Niemeyer v. Forburger, 172 Neb. 876, 112 N. W. 2d 276.

The argument in defendant's brief, which covers less than two pages, attempts to question certain pretrial rulings of the court, certain of the court's instructions, the fact that the jury deliberated just over an hour to reach its verdict, and the contributory negligence of the plaintiff. Except as the latter is included in the assignment on the sufficiency of the evidence, none of these points are covered by any assignment of error and will not be discussed. Section 25-1919, R. R. S. 1943, provides in part: "The brief of appellant shall set out particularly each error asserted and intended to be

urged for the reversal, vacation or modification of the judgment * * * alleged to be erroneous * * *." See, also, Rule 8a2(3), Revised Rules of the Supreme Court, 1963. The trial court submitted the question of negligence and contributory negligence to the jury under proper instructions.

Plaintiff was permitted to testify as to her medical expense without objections of any nature. When the bills were offered in evidence, however, an objection to their admission was sustained. Defendant attempts to predicate error on the fact that the court failed to instruct the jury that these items had been disallowed. There is no merit to defendant's assignment for several obvious reasons. Suffice it to say that the damage instruction given by the court specifically limited plaintiff's recovery to pain and suffering.

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

AFFIRMED.

LOUISE FOLTYN, APPELLEE AND CROSS-APPELLANT, V. ALOIS FOLTYN, APPELLANT AND CROSS-APPELLEE.

141 N. W. 2d 433

Filed April 1, 1966. No. 36022.

1. **Divorce.** In a divorce suit the court has the authority to adjust all the respective property interests and rights of the parties.
2. ———. The division of property and allowance of alimony in divorce actions are always to be determined by the facts in each case.
3. ———. In making a division of property in a divorce case, the court will consider the ages of the parties, their earning abilities, the duration of the marriage and the conduct of each during the marriage, their station in life, the circumstances and necessities of each, the physical condition of each, the property owned by them and whether or not it was acquired by their joint efforts, and any other pertinent facts leading to an award that is equitable and just.

Appeal from the district court for Douglas County. JOHN E. MURPHY, Judge. Reversed and remanded with directions.

McCulloch, Leigh & Koukol and Joseph V. Benesch, for appellant.

Warren D. Sweiback and Monsky, Grodinsky, Good & Cohen, for appellee.

Heard before WHITE, C. J., CARTER, SPENCER, BOSLAUGH, BROWER, SMITH, and MCCOWN, JJ.

CARTER, J.

This is an appeal from a division of property made in a divorce decree. The defendant, Alois Foltyn, contends that the award of property to him is insufficient and he has appealed to this court. The plaintiff, Louise Foltyn, asserts that the award of property to her is insufficient and she has cross-appealed.

The controlling rule of law has been so often announced by this court that we cite only some cases which support it. Francil v. Francil, 153 Neb. 243, 44 N. W. 2d 315; Matson v. Matson, 175 Neb. 60, 120 N. W. 2d 364; Loukota v. Loukota, 177 Neb. 355, 128 N. W. 2d 809.

The parties were married on November 27, 1955. They were in their early fifties at the time of their marriage. It was the third marriage for each. The petition for divorce on which the decree was granted was filed on April 14, 1964, and trial had thereon in the district court on August 24, 26, and 27, 1964. Several divorce petitions had been filed previous to the one here involved, the first being filed in March 1957, none of which was tried. Their married life after the first year or so had indeed been a rocky one. The only question raised by the appeal and the cross-appeal is whether or not the division of property made by the trial court is equitable under all the circumstances.

Each of the parties owned an automobile. Louise was the owner of household furniture which went into the

home, and Alois was the owner of carpenter tools which he used in his vocation of cabinet maker. The value of this property is not shown. The award of the foregoing property by the district court to the parties will not therefore be disturbed nor considered by this court.

A short time prior to the marriage Louise had $3,007.96. After a discussion with Alois before their marriage she purchased Lots 25 and 26, Block 12, Albright's Annex, an Addition to South Omaha, now Omaha, Douglas County, Nebraska, for $1,500, on which the parties intended to build a home after their marriage. The remaining $1,507.96 subsequently went into the home. Louise worked during most of the time during the marriage in a drapery shop belonging to her two sons by her first marriage, George and Donald Patach, for which she received approximately $50 per week. This income went for the payment of household expenses, or into the cost of the new home, or both. Louise testified that she sold her former home in June 1955 to her son George and his wife. The deed shows the consideration to have been "One Dollar, Love and Affection." Louise, George, and his wife testified, however, that the actual consideration was an oral agreement to pay $5,000 for the home. Exhibit 19, a loose-leaf record headed "House payments," allegedly kept by George Patach's wife, was offered in evidence. This record shows that on the first day of every month from and after November 1, 1955, to August 1, 1964, excepting one hiatus of 7 months, a payment was made. The amount of each payment was $40, except 11 for $50, 1 for $30, and 4 for $20. The record does not indicate that the entries were made simultaneously with the payments on the first day of each month. The purported payments total $3,980 and show the amount remaining due as $1,020. The evidence is that each payment was made on the first day of each month, they were all paid in cash, no receipts were given, and no record kept by Louise. Alois testified that he knew nothing of any such cash payments during

the 8 years they were allegedly made. Louise admits that she never told Alois that such payments were being made, or that they were being used to pay for the new house. The assertion that these cash payments had been made to Louise totalling $3,980 and applied on the cost of the house is an incredible statement that the record does not support.

At the time of the marriage Alois was employed by Disbrow & Company. He had been so employed for 13 years at the time the divorce was granted. He testified that his pay checks were turned over to Louise and that she had deposited them in his, her, or their accounts with the Commercial Savings & Loan Association. The record shows that Alois did purchase a new automobile in 1959, and a new stove, washing machine, and television set. It appears that all of the earnings of the parties, except for the foregoing purchases, went into living expenses and the cost of the new home. The evidence shows that from December 1959 to August 28, 1963, his pay checks endorsed by Louise amounted to $6,998.64. Alois stated that all of his earnings, amounting to more than $3,600 a year for 9 years, went into living expenses and the new home, and that he has nothing left other than current pay checks.

As before stated, Louise purchased the two lots for $1,500 and paid for them prior to the marriage. On May 12, 1956, they commenced the construction of the house. The house was laid out on the ground by Donald Patach and the labor in constructing the house was largely performed by Alois, with the assistance of George and Donald Patach. The record shows that Alois built cabinets for George and Donald Patach for their homes and office. The evidence sustains a finding that the building of the home was a family enterprise in which George and Donald Patach exchanged work with Alois. The parties found it necessary to borrow sums of $5,000 and $800 to complete the house. The $800 has been paid and the $5,000 obligation has been reduced to $2,658.12.

The house was built on the north 66 feet of Lots 25 and 26. An expert appraiser valued the land at $3,500 and the house at $11,750, a total valuation of $15,250. He fixed the value of the south 62 feet at $1,750. Another real estate expert valued the north 66 feet of Lots 25 and 26 at $1,400 and the south 62 feet at $1,200. He valued both lots and the house at $13,500. After a consideration of all the evidence, we fix the value of the north 66 feet and the house at $14,000, and the value of the south 62 feet at $1,500. The north 66 feet and house thereon are subject to a mortgage of $2,658.12, leaving a net value of $11,341.88. Louise at the time of the trial had a bank account of $500, and $1,020 due from her son George. Alois had pay checks and cash in the amount of $381.21. We think the net assets of the parties consist of the south 62 feet of Lots 25 and 26 valued at $1,500; the north 66 feet of Lots 25 and 26, including the home thereon, valued at $11,341.88; cash in possession of Louise $500; and cash in possession of Alois $381.21. We do not consider the item of $1,020 allegedly due Louise from her son George Patach.

The evidence shows further that the parties in settling a previous divorce action entered into an agreement with reference to the ownership of the residence property in May of 1959. By the terms of that agreement Louise conveyed Lots 25 and 26 to Alois and herself as tenants in common. The agreement also provided for a settlement of a dispute over the bank accounts of the parties, and the funds in said accounts were distributed in accordance with the agreement.

We conclude that the trial court correctly awarded the household furniture and her automobile to Louise. The award of his automobile and his carpenter tools to Alois is correct. The division of net assets should be on a 60-40 basis. Louise should have the equivalent of $7,720 and the cash in her possession on the day of the trial, and the defendant should have the equivalent of $5,100 and the cash in his possession on the day of trial.

If the values of the real estate are over or undervalued, in case a sale is required, the awards shall be proportionately decreased or increased, as the case may be. We find no equity in the cross-appeal of the plaintiff. The judgment of the district court is reversed and the cause remanded to the trial court with instructions to enter a judgment in accordance with this opinion as practically as it can be done.

The wife, Louise, requests an allowance for the services of her attorney in this court. The record shows that the parties have paid counsel $250 each for services rendered. The trial court allowed plaintiff $500 for services in that court. We make no further allowance of attorney's fees in this court. Each party will pay his own costs of this appeal.

REVERSED AND REMANDED WITH DIRECTIONS.

MARTHA ESSAY, APPELLEE, V. EDWARD J. ESSAY, APPELLANT, BUSINESS CAPITAL, INC., OF IOWA, INTERVENER-APPELLANT.
141 N. W. 2d 436

Filed April 1, 1966. No. 36030.

1. **Partnership: Good Will.** Where the defendant, who as managing partner has had the exclusive control of the production, sales, and distribution of the products of the partnership, seeks to establish the value of the good will and franchise thereof, the burden of doing so will rest upon him.
2. **Partnership.** A managing partner who acquiesces in the matter of the depreciation relating to the partnership business as set up by an accountant is in no position to complain about such depreciation.
3. ———. A managing partner having exclusive control of a partnership business not only controls production, sales, and distribution of products but is responsible for keeping all records and books of account.
4. **Judgments.** When a question of fact is once determined on its merits, that question is settled so far as the litigants are concerned and it may not be relitigated between the same parties.
5. **Actions: Intervention.** Ordinarily, an intervener must take the

suit as he finds it, is bound by the previous proceedings in the case, and cannot complain of the form of the action or of informalities or defects in the proceedings between the original parties.

6. Partnership. A managing partner, who has been held by the court to be responsible for keeping its records and accounts, has the burden of showing any errors in a balance sheet prepared from such accounts by an auditor appointed by the court pursuant to a stipulation of the partners in which such managing partner joined.

Appeal from the district court for Box Butte County: ALBERT W. CRITES, Judge. Affirmed.

No appearance for appellant.

Reddish, Fiebig & Curtiss, Robert L. Jeffrey, and Richard L. Goos, for intervener-appellant.

Wright, Simmons & Hancock, for appellee.

Heard before WHITE, C. J., CARTER, SPENCER, BOSLAUGH, BROWER, SMITH, and MCCOWN, JJ.

BROWER, J.

This is the second appearance of this case in this court. Our prior decision is set forth in Essay v. Essay, 175 Neb. 689, 123 N. W. 2d 20. In that case a supplemental opinion was entered on rehearing at 175 Neb. 730, 123 N. W. 2d 648.

The action was originally brought by the plaintiff Martha Essay for the dissolution of the partnership existing between the plaintiff and the defendant Edward Essay, doing business as Pepsi-Cola Bottling Company and Standard Bottling Company, and for an accounting of its operations and the appointment of a receiver to wind up its affairs. The intervener Business Capital, Inc., of Iowa filed a petition in intervention subsequent to our first decision. Its interest arises by virtue of an assignment of the interest of the defendant in all of the partnership assets as collateral security for the loan of $60,000 made by it to the defendant Edward Essay.

The previous appeal to this court was from a judgment of the trial court entered September 7, 1962, which found the partnership was dissolved on April 13, 1960, by reason of the defendant on that day excluding the plaintiff from the partnership business. The trial court's judgment had approved an audit of the partnership accounts as of July 24, 1961, the day a receiver was appointed. It found the plaintiff's investment account in the partnership was $181,231.27 and that of the defendant was a minus $138,657.43. In addition to his overdraft, the defendant had converted to his own use $40,378.81 of the partnership funds which he had not shown on the books of the partnership. The trial court had entered judgment against defendant in favor of the plaintiff for one-half of the said overdraft in defendant's drawing account, one-half of the money so converted being $89,517.62, together with half of certain rentals due plaintiff amounting to $3,000. The receiver was directed to sell the partnership as a going concern and to make a distribution in a manner to be subsequently determined by the court. This court in its opinion in Essay v. Essay, 175 Neb. 689, 123 N. W. 2d 20, accepted the audit and the trial court's judgment with respect to the matters set forth above.

The trial court in its judgment had found that since the defendant's investment account was overdrawn and the plaintiff owned all of the capital assets, the plaintiff was entitled to all of the profits from the partnership from its dissolution to the receiver's appointment. In our first opinion, Essay v. Essay, 175 Neb. 689, 123 N. W. 2d 20, this portion of the trial court's judgment was reversed and it was there held that the profits from the dissolution, April 13, 1960, to the appointment of the receiver were to be shared equally by the parties. It was this portion of our decision that the supplemental opinion, Essay v. Essay, 175 Neb. 730, 123 N. W. 2d 648, changed. That opinion states: "We direct the trial court to reserve its ruling with reference thereto until

there has been a final accounting of the capital and assets of the partnership, and that the profits earned after the dissolution be then apportioned in the proportion that each had in the partnership assets at the time of dissolution, subject to a consideration of the service and personal skill of Edward Essay in earning such profits, either by adequate compensation therefor or by increasing his share of the profits as equity requires."

Two appeals are presently before this court. The first is from the judgment of the trial court determining the assets of the partnership and the interest of the partners therein on the date of dissolution, and the corresponding interest of the partners in the subsequent profits after dissolution. The second is from an order confirming the sale of the business to the plaintiff. Although both appeals were taken by both the defendant and intervener, the intervener alone has filed briefs herein. We will consider the two appeals in the order stated in this paragraph.

After the case was remanded to the trial court, the plaintiff and defendant on May 7, 1964, stipulated that the receiver retain the accounting firm of Crum, Miller & Melick and instruct it to prepare a balance sheet of the Pepsi-Cola Bottling Company and Standard Bottling Company at the close of business on April 13, 1960. Thereafter such a balance sheet was submitted by the accounting firm mentioned in the stipulation, showing the assets and liabilities of the Pepsi-Cola Bottling Company and the Standard Bottling Company as of that date, with a statement of operations from January 1, 1960, through April 13, 1960, and the capital accounts of the partners from January 1, 1956, through April 13, 1960.

On July 13 and 14, 1964, a hearing was had on this account and the objections of the defendant thereto, simultaneously with objections to the confirmation of a previous sale containing a request for a determination of both partner's capital accounts. At this hearing the

intervener was allowed to participate although previous filings by it were later stricken. It also asked that the capital accounts of the partners be set and determined before the court ruled upon the application for confirmation. Evidence was offered on behalf of the plaintiff, the defendant, and the intervener, and the matter was taken under advisement by the court. On July 29, 1964, the court entered its order finding the balance sheet was the best obtainable under the circumstances and the capital accounts of the parties were correctly shown thereby as of April 13, 1960. It further found that on that date the partnership had a capital deficit of $28,-991.78 and was overdrawn at the bank in excess of $53,-000; that the partnership was insolvent; and that the franchise, good will, and going concern then had no value. It held defendant on that day had a capital deficit of $100,060.97 and was not entitled to share in the profits subsequently earned.

On August 11, 1964, the intervener filed its petition in intervention pursuant to permission granted it on July 29, 1964, at which time its early pleading had been stricken.

On September 4, 1964, the defendant and intervener were granted a new trial for the submission of evidence as to the value of the business and the determination of the capital accounts as of April 13, 1960. A new trial was had on October 5 and 7, 1964, and further evidence was taken. On November 30, 1964, the trial court entered an order reinstating its order of July 29, 1964, and the defendant and intervener have appealed from an order overruling their motion for a new trial on the order reinstating the order of July 29, 1964.

The intervener contends the judgment of the trial court is contrary to the law and the evidence because of certain of its findings and conclusions which are needlessly repeated and successively related to each of the court's rulings. Those necessary to be determined will be stated as discussed.

The intervener maintains the trial court erred in finding the good will of the partnership had no value on April 13, 1960. It insists that it had great value which, if properly determined, would have greatly increased the capital accounts and would have resulted in the defendant having an interest in the subsequent profits earned.

Defendant testified that there was a rule of thumb to determine the value of the intangible assets such as good will, franchise, and going concern in a pepsi-cola business. He stated this rule was to multiply the number of cases sold the previous year by $1.50, and in this instance where 140,194 cases were sold, it would have been $210,291. He stated this was in addition to the value of all physical assets. He testified he was familiar with the method of valuing similar intangibles for the beer business which, he said, would vary from 25 cents to $1 a case of beer sold, depending on the profits for the preceding year. The value of good will of the beer business in suit, using his formula, is not shown. The receiver, Paul Jones, testified the rule of thumb in the sale of a pepsi-cola business was $1 per case for all bottled goods for the previous year but that this included not only the franchise and good will but also the machinery and equipment used in connection with such a business. He said it included everything but the cash on hand, accounts receivable, and inventory. In 1959, 208,324 cases of soft drinks of all kinds were sold and using his rule, the franchise, good will, machinery and equipment, put together, would have had a value of $208,324.

In addition, the report of the auditor disclosed the balance sheet on April 13, 1960. It showed assets of $95,066.80 and liabilities of $131,896.45, making a net deficit of $36,829.65 in assets on that day. The report contained also an operating statement of the business from December 31, 1959, to the close of business on April 13, 1960. It showed a net loss in that period of

$2,095.63 which was reflected in the balance sheet. The capital accounts of the partners were shown. The defendant's capital account was shown to be a minus $107,898.84, and the plaintiff's $71,069.19. The trial court further adjusted the defendant's capital account in his favor because of error in arithmetic, concerning which there is no appeal by the plaintiff, making it a minus $100,060.97 on April 13, 1960. It would appear that if the good will and franchise of pepsi-cola were valued at defendant's figure of $210,291, and half of it added to the defendant's capital account of a minus $100,060.97, the defendant's capital account would be increased to $5,084.53, but the evidence is in conflict and the condition of the partnership's affairs enter into the determination of value. Defendant would still be, however, indebted to the partnership by reason of the $40,378.81 because of his conversion of the miscellaneous receipts.

The contents of various pleadings filed by the defendant before the intervention show that the receiver had been operating on a temporary authorization to continue bottling pepsi-cola from the Pepsi-Cola Company of New York, dated August 1, 1961, to expire October 31, 1961. The New York company claimed the franchise granted the partnership in 1948 was terminable at any time by either party and was not transferable without its consent. Pepsi-Cola Company of New York granted a further temporary extension to bottle its products but purportedly terminated all such temporary authority by letter dated November 30, 1962. Defendant recognized the danger to the business in his pleading, wherein he stated: "* * * that a profitable bottling business cannot be carried on in Alliance without a Pepsi-Cola bottling appointment; that irrespective of the correctness of the action of the Pepsi-Cola Company said Receiver will not be furnished the necessary ingredients for the bottling of Pepsi-Cola and that if said sale is postponed such business will be operated at a loss for an indefinite period of time, and that if such

sale is postponed until the plaintiff's and the Receiver's rights against the Pepsi-Cola Company are adjudicated the assets in the possession of the Receiver will be diminished and wasted and that all of the assets in the possession of the Receiver will be wagered on the outcome of such suit against the Pepsi-Cola Company; * * *." Defendant maintained the franchise with the Pepsi-Cola Company of New York was not saleable or transferable and the receiver could not transfer any rights to it. Meanwhile, a new franchise had been issued to the Mid-West Bottler's, Inc., of which the defendant was an employee and stockholder. To obtain the necessary ingredients, the trial court authorized the receiver to bring suit for the determination that the franchise was perpetual and assignable, which was done, and such determination was made, and the Pepsi-Cola Company of New York was enjoined from furnishing its secret formula to others in the area. This is of record herein as well as having been set out in the opinion in Jones v. Pepsi-Cola Company, 223 F. Supp. 650. From December 31, 1959, to April 13, 1960, while the company, according to the balance sheet, had a net loss of $2,095.63 and its assets were depleted as stated, the defendant drew $8,978.07 from the firm. The trial court found that, considering the financial condition of the partnership and the precarious condition it faced from the excessive withdrawals of the defendant and the uncertainty of its franchise on April 13, 1960, its good will, franchise, and going concern had no value at that time.

This court in Iman v. Inkster, 90 Neb. 704, 134 N. W. 265, held: "The good will of a dissolved partnership is a part of the assets of the firm." In 40 Am. Jur., Partnership, § 351, p. 376, it is stated: "The partner claiming an allowance for his share of the good will must show its value by evidence, and if none is shown to exist he will not be entitled to receive anything." It is not necessary to determine whether this rule should be applied in all cases. We do conclude, however, that in the case before

us where the defendant, who as managing partner has had the exclusive control of the production, sales, and distribution of the products of the partnership, seeks to establish the value of the good will and franchise thereof, the burden of doing so will rest upon him. The record before us does not indicate he has met that burden and we are in accord with the determination of the trial court that the good will and franchise of the partnership had no value on the date of dissolution.

The next objection to the judgment concerns the finding that the partnership's bank accounts were overdrawn more than $53,000. The intervener claims the accounts were overdrawn in a much lesser amount and if the correct amount was shown the balance sheet would not have shown insolvency. The principal place of business of the partnership was at Alliance, Nebraska, where the actual bottling of pepsi-cola and other ingredients was performed. It, however, had maintained warehouses and ancillary facilities at Valentine, Scottsbluff, and Sidney, Nebraska. It maintained bank accounts in all of these cities. On April 13, 1960, the books of the banks in the towns hereafter listed showed credits to the partnership accounts therein in the amounts set out hereafter to which, in some instances, items of credit in transit are added: Nebraska State Bank, Valentine, $1,590.49; an unnamed bank at Scottsbluff, $2,096.17, transit items $185.95, total $2,282.12; American National Bank, Sidney, $2,963.26, transit items $110.51, total $3,073.77; and an unnamed bank at Alliance to the credit of Pepsi-Cola Bottling, including transit items, $3,926.95, and to the credit of Standard Bottling Company, $4,868.72, transit $1,214.32, total $6,083.04. The controversy concerns the outstanding checks on April 13, 1960, all of which were later paid by the receiver at the banks on which they were drawn in the following amounts on the several banks, to wit: Valentine, $6,891.02; Scottsbluff, $11,498.46; Sidney, $16,307.14; Alliance Pepsi-Cola account, $28,043.98; and Standard Bottling Company,

$7,028.34. The balance sheet treated the bank accounts as though all the outstanding checks had been paid on April 13, 1960, which left an overdraft in the combined bank accounts of $52,812.57 which is approximately, but not in excess of, $53,000.

Some of these outstanding checks are what a member of the auditing firm who testified termed "internal checks." We will hereafter refer to this witness as the auditor. He designated these internal checks as those drawn on the banks at Valentine, Scottsbluff, or Sidney in favor of the partnership which were to be later deposited to the partnership account at the bank at Alliance. It is, of course, obvious that any checks issued to the partnership by the partnership and later deposited by it to its credit in another bank would not alter or deplete the aggregate partnership's bank account. In this case the auditor's testimony shows that not all of the checks drawn on the banks at Valentine, Scottsbluff, or Sidney were "internal checks" but most of them were, to wit: At Valentine, $6,670.22; at Scottsbluff, $11,195.01; and at Sidney, $15,849.68. The auditor testified none of the checks, either of Pepsi-Cola or Standard Bottling Company, on Alliance were internal checks. The intervener contends these internal checks, totaling $33,714.91, should not have been counted as outstanding checks and would not affect the partnership bank accounts.

We do not think the "internal checks" can be disposed of so lightly. It is necessary to consider the evidence with respect to the partnership books and the circumstances and purpose for which the checks were drawn. We think this may be reasonably and fairly inferred from the evidence in the record. When, for instance, the warehouse at Valentine ordered pepsi-cola, the trucks at Alliance took it from the warehouse there to that at Valentine. The check on Valentine was then drawn. It appears to have been physically written at Alliance. On the Valentine books it was credited to the bank and

debited to the warehouse purchases in accounts payable. Until the check was cashed at Alliance the value of the shipment in the amount of the check was credited to sales on the warehouse books and charged to warehouse accounts receivable. When the bank account at Valentine permitted the checks to be paid they were cashed at Alliance and charged to the bank there and credited to the warehouse accounts receivable on the books there. It seems clear this was a method to keep score on the bottled merchandise going out of the warehouse at Alliance to the other branches of the business until settled for. It is clearly inferable from the evidence that those in charge of the branch offices were to deposit the receipts from deliveries made from their warehouse in their respective bank at the branch. If, in the end, the checks were not paid the merchandise represented by the accounts receivable at Alliance and purchases payable at Valentine would remain unpaid and their value lost. The undisposed portion of the merchandise in the warehouse would be, of course, reflected in the inventory. The same method of issuing checks and carrying the accounts was followed at Scottsbluff and Sidney.

The intervener claims the internal checks either should have been disregarded or else they should have been treated as cash. The auditor states: "No adjustment was made in the bank account, because the checks were issued, outstanding, and they had been charged to purchases on the warehouse records. And they were subsequently deposited to the Alliance bank account. The warehouse accounts receiveable (sic), due in Alliance, were only set up at the end of each year. The amount of this payable, which was set up as being owed by the warehouses to Alliance, was shown on the Alliance record as accounts receiveable (sic) due from warehouse. Since the checks previously issued by the warehouse, and charged to purchases at the time issued, were being held because of insufficient funds in the warehouse

bank account. This resulted in an overstatement in purchases to the extent of the amount of the oustanding (sic) checks.

"We adjusted the payables and purchases by the amount of the checks that had been issued and were outstanding at December 31st, and had previously been charged to purchases.

"Now, if we had ignored these outstanding checks, and adjusted the bank account for them, an adjustment in like manner would have to be made to accounts payable, and the net effect on the capital accounts would have been none." Also, he testified if he had treated the checks as cash, he would have had to reduce the accounts receivable and the assets would have remained the same.

It appears, therefore, that however these checks are considered the liabilities of the partnership remains the same, showing a shortage either in the bank or in the warehouse. The auditor treated them as checks afloat against the bank account on which they were issued and from which the receiver later paid them. This was done in accordance with the entries on the books maintained by the defendant. We think there was no error in so doing.

Other complaints are made as to the auditor's balance sheet. They involve amounts proportionately so small that alone they could not possibly result in reducing the deficit in defendant's capital account enough to show he had an interest in the partnership on April 13, 1960. Some of them only will be mentioned.

The intervener claims that the trucks and other important items of machinery had been depreciated too rapidly and that the equipment which was valued at $85,294.21, being the depreciated value on the books, should have been revalued. The auditor took this from the books of the partnership which this court charged the defendant with the responsibility of keeping. Essay v. Essay, 175 Neb. 689, 123 N. W. 2d 20. In Frey v. Hauke, 171 Neb. 852, 108 N. W. 2d 228, it is stated: "A

managing partner who acquiesces in the matter of the depreciation relating to the partnership business as set up by an accountant is in no position to complain about such depreciation."

The intervener claims that certain items of expense such as advertising, insurance, and rent, covered in part items which would accrue after April 13, 1960. It contends the prepaid portion of the items should have been excluded from the items of expense for the period in question on the operating statement. The auditor, while admitting this might have properly been done, explained that they were computed as paid. He said if items paid during the period prepaid in part obligations to accrue thereafter were excluded, payments of expense made thereafter which included expense for the period in question should be added.

A certified public accountant, who testified for the defendant and intervener, maintained the balance sheet as prepared by the auditor appointed by the court was incomplete and inaccurate. He said the balance sheet was prepared on an accrual basis and any prepaid items should have been set out. The auditor testified that he prepared the balance sheet from the books of the partnership which, in some respects, were incomplete and that some statements were missing. The inventories on the books were in dollar totals and not in physical assets. He stated it was the best the accountants could do because there were so many unknowns. It is to be noted that the balance sheet was prepared more than 4 years subsequent to the date in question.

In Essay v. Essay, 175 Neb. 689, 123 N. W. 2d 20, this court determined in the same proceeding: "A managing partner having exclusive control of a partnership business not only controls production, sales, and distribution of products but is responsible for keeping all records and books of account, * * *." This court in its prior opinion also held that Edward as managing partner had a continuing duty to keep the books and records

accurately and the entries therein are conclusive as against him. "When a question of fact is once determined on its merits, that question is settled so far as the litigants are concerned and it may not be relitigated between the same parties." Frey v. Hauke, 171 Neb. 852, 108 N. W. 2d 228.

These determinations were made before the petition in intervention was filed. "Ordinarily, an intervener must take the suit as he finds it, is bound by the previous proceedings in the case, and cannot complain of the form of the action or of the informalities or defects in the proceedings between the original parties." State ex rel. Nelson v. Butler, 145 Neb. 638, 17 N. W. 2d 683.

In this case, we further hold that a managing partner, who has been held by the court to be responsible for keeping its records and accounts, has the burden of showing any errors in a balance sheet prepared from such accounts by an auditor appointed by the court pursuant to a stipulation of the partners in which such managing partner joined. Having examined the record presented to the trial court, we adopt the balance sheet prepared by the accountants appointed by the court and find under the evidence received that on the date of the dissolution of the partnership on April 13, 1960, the defendant Edward Essay had no interest in the partnership assets and therefore no interest in the profits earned after dissolution.

The second appeal herein is from the trial court's order confirming the sale of the business, including the good will and franchise of the partnership, to Martha Essay for the sum of $366,000. There were three sales herein. The first, which was held at public auction on April 27, 1964, after extensive advertisement, resulted in Martha Essay being the highest bidder in the sum of $294,000. This was set aside at the instance of the defendant. At the second one held September 8, 1964, the defendant made the high bid of $333,000 but he did not perform his bid. The trial court found there

had been no sale and offered the same for sale in open court but no bids were received. Declaring the bidding was open, it deferred further action concerning the sale on defendant and intervener's motion until after the determination of the capital accounts of the partners. By the order of the court on November 30, 1964, the sale was continued until January 5, 1965, at 10 o'clock a.m. On that day an auction was held in open court at which the plaintiff and Western Bottlers Company, an Iowa corporation, were bidders, resulting in a sale by the court to Martha Essay for $366,000 which the court on the same day confirmed.

The intervener in its brief does not contend that the partnership property did not sell for a fair and reasonable value, nor that a subsequent sale would bring a greater amount. The only argument made in the brief of the intervener is to contend that the trial court erred in sustaining a motion made by the plaintiff shortly after confirming the sale for permission to give her credit for all of her bid in excess of $60,000 upon her capital account, the profits, and any amounts due her from the defendant. This, it is urged, amounts to changing the terms of the sale after confirmation.

Lockwood v. Cook, 58 Neb. 302, 78 N. W. 624, was an action of foreclosure of a real estate mortgage. There was a decree and sale. At the sale the plaintiff in the action, whose lien was the first one, purchased the property at a sum less than the amount to which he was entitled under the decree. It was held not a forceful objection to confirmation of the sale that the amount bid had not been paid to the officer in money; and that it was unnecessary that the formality of handing the money to the officer by the plaintiff and purchaser and its return to him by the officer should be observed. In In re Renne, 55 F. Supp. 868, the federal court for the district of Nebraska cited and discussed Lockwood v. Cook, *supra,* and other cases and authorities, and concluded that under Nebraska law a lienholder may re-

ceive credit on his bid at a judicial sale to the extent that, under the decree, the purchase price is applicable on his lien. In the present case the court had already found the plaintiff had an investment account which exceeded $190,000 and that she was entitled to the profits from the business after the dissolution. These profits have been quite substantial during the receivership. Plaintiff did assume certain obligations to pay the partnership creditors. She made application to the court to be allowed credit for that part of her bid which exceeded $60,000. The court had cognizance of the reports of the receiver and the auditors before it granted this credit. We think under the circumstances there was no error in its so doing.

After considering the contentions urged by the intervener we find no error in either of the judgments of the trial court appealed from and the same are therefore affirmed.

AFFIRMED.

CENTRAL CONSTRUCTION COMPANY, A NEBRASKA CORPORATION, APPELLEE AND CROSS-APPELLANT, V. MABEL H. BLANCHARD, APPELLANT AND CROSS-APPELLEE.
141 N. W. 2d 416

Filed April 1, 1966. No. 36033.

1. **Mechanics' Liens.** Where there is a contract for a specified sum to furnish labor and materials for the repair of a building, a detailed account is not necessary for filing a mechanic's lien.
2. **Alteration of Instruments.** Under the circumstances in this case, the filling of a blank in the written instrument was not a material alteration, and the plaintiff, in the absence of specific instructions otherwise, had implied authority to fill in the date.
3. **Usury: Costs.** In an action to recover the valid principal amount due on a usurious contract, the defendant shall recover costs under the provisions of section 45-105, R. R. S. 1943.
4. **Usury: Interest.** Where the defense of usury is established, the plaintiff is not entitled to interest on the judgment awarded him.

Appeal from the district court for Madison County: GEORGE W. DITTRICK, Judge. Affirmed as modified.

James F. Brogan, for appellant.

Abrahams, Kaslow, Story & Cassman and Deutsch & Hagen, for appellee.

Heard before WHITE, C. J., CARTER, SPENCER, BOSLAUGH, BROWER, SMITH, and MCCOWN, JJ.

BROWER, J.

This is an action to foreclose a mechanic's lien based on a written contract involving a time price differential. The trial court entered a judgment for the plaintiff for the amount of the cash contract price. The defendant has appealed, and the plaintiff has cross-appealed.

On April 10, 1963, the plaintiff and defendant entered into a written contract providing that the plaintiff would remodel and repair the defendant's residence. The contract had a total cash price of $1,350, and contained a time price differential of $505.80, with a total time price balance of $1,855.80, payable in 60 installments of $30.93 each on the same day of each successive month. It was on a printed form which was completely filled out at the time it was signed by the defendant except for the commencement date of the payments. There was specific testimony that it was understood and agreed that the payments would commence 45 days after the job was completed. Sometime later the date of June 28, 1963, was inserted as the commencement date for monthly payments.

The plaintiff employed a carpenter who performed most of the labor. The plaintiff furnished the materials and the work was completed on or about May 10, 1963. On that date, the defendant signed a completion certificate. The mechanic's lien was filed May 25, 1963, for the sum of $1,855.80. The itemization on the lien was: "See attached copy of contract."

The judgment of the district court found that the

plaintiff was entitled to recover the sum of $1,350 only and that the charge for the time price differential was invalid. It held the sum of $1,350, together with $4.75 of recording expense, was a first lien, and entered judgment of foreclosure for the sum of $1,354.75, with interest from the date of the judgment at 6 percent and plaintiff's costs in this action.

The defendant contends first that the plaintiff was a mere broker who advanced money only; that the labor was actually performed by someone other than the plaintiff; and that, therefore, the plaintiff has not established that it furnished labor and materials within the meaning of the mechanic's lien statute. It is apparently the defendant's position that a contractor must perform the labor and deliver the materials itself, and cannot perform through agents or subcontractors. The argument is that when a principal contractor contracts with someone else to furnish labor or materials required, the contractor is merely furnishing money, and not the labor or materials within the meaning of the mechanic's lien statute. This is simply unsupported by the record here, and there is no question but that the work and materials were furnished by the plaintiff under the contract, although the labor was performed by a carpenter who was paid on a basis other than an hourly basis.

It is contended that the plaintiff did not file a written itemized account as required by section 52-103, R. R. S. 1943, although it did attach to and file with the lien a copy of the written contract. This court has held that where there is a contract for a specified sum to furnish labor and materials for the repair of a building, a detailed account is not necessary. Green v. Fiester, 125 Neb. 874, 252 N. W. 397. The lien and its filing here complied with sections 52-101 and 52-103, R. R. S. 1943.

The defendant also contends that the plaintiff had no authority to fill in the blank as to the date for commencement of monthly payments. The evidence shows that it was agreed that the commencement date would be

45 days after the job was completed. The defendant did not deny that agreement, but simply testified that she did not give any authority to fill in any blanks. Under such circumstances, the filling of the blank in the written instrument was not a material alteration, and the plaintiff, in the absence of specific instructions otherwise, had implied authority to fill in the date. See, Montgomery v. Dresher, 90 Neb. 632, 134 N. W. 251, 38 L. R. A. N. S. 423; Mazanec v. Lincoln Bonding & Ins. Co., 169 Neb. 629, 100 N. W. 2d 881.

The district court's action in entering a judgment for the plaintiff for the amount of the cash contract price was correct.

The remaining matters in dispute involve that portion of the contract requiring payments in excess of the cash price, and with the right to interest and costs as affected by those requirements. The defendant contends that the plaintiff is not entitled to any costs, nor even interest on the judgment because the contract is usurious. The plaintiff contends, in its cross-appeal, that the contract was for a time price differential; that it was not usurious; and that the plaintiff is entitled to the full amount of the contract, including the full time price differential, interest, and costs.

The district court found that the time price differential was invalid, and the defense of usury was specifically pleaded. It has been established since Elder v. Doerr, 175 Neb. 483, 122 N. W. 2d 528, that a contract in compliance with the 1959 Nebraska Installment Sales Act was not a bona fide time sale, under circumstances similar to those in the case here, and that such agreements were usurious when they provided for time price charges in excess of the legal interest rate. Since that decision, legislative action has changed the effect of such contracts so that they are no longer entirely void, but there is now no right to collect or receive any interest or charges on such a contract. The practical effect has been to place such contracts under the provisions of the gen-

eral usury statute, section 45-105, R. R. S. 1943. That section provides: "If a greater rate of interest than is allowed in section 45-101 shall be contracted for or received or reserved, the contract shall not on that account be void, but if in any action on such contract, proof be made that illegal interest has been directly or indirectly contracted for, or taken, or reserved, *the plaintiff shall recover only the principal, without interest,* and the defendant shall recover costs; and if interest shall have been paid thereon, *judgment shall be for the principal,* deducting interest paid; * * *." (Italics supplied.)

The statute is specific that the defendant shall recover costs. In Montgomery v. Albion National Bank, 50 Neb. 652, 70 N. W. 239, it was held that the defendant's recovery of costs even applied to costs incurred in the suing out of an attachment before judgment.

In the case of Interstate Savings & Loan Assn. v. Strine, 58 Neb. 133, 78 N. W. 377, this court held that where the defense of usury was established, the plaintiff was not entitled to interest on the judgment awarded him. This is the proper construction placed on section 45-105, R. R. S. 1943, hitherto set out. The first portion in italics plainly provides that on a usurious contract the plaintiff shall recover only "the principal, without interest." The second portion emphasized refers to the judgment which shall be for the principal. We think the legislative intent is clear that no interest can be recovered on the judgment. Section 45-105, R. R. S. 1943, is a special statute governing usurious contracts and judgments to be entered thereon, and takes precedence over the general statute providing for interest on judgments, section 45-103, R. R. S. 1943, in cases where usury is established.

The judgment in this case should be for the plaintiff for the sum of $1,350 without interest, with all costs to be taxed to the plaintiff.

For the reasons herein stated, the judgment is affirmed as modified, the same to be without interest, and with

costs taxed to the plaintiff.

AFFIRMED AS MODIFIED.

McCOWN, J., dissenting.

I respectfully dissent from that portion of the majority opinion which affirms the case of Interstate Savings & Loan Assn. v. Strine, 58 Neb. 133, 78 N. W. 377, and holds that, under the provisions of section 45-105, R. R. S. 1943, the plaintiff is not entitled to interest on the judgment awarded it.

Not only does the majority opinion reaffirm the Strine case, it actually extends it. The Strine case reached its holding with no reference whatever to section 45-103, R. R. S. 1943, dealing with interest on all decrees and judgments. The majority opinion here states: "Section 45-105, R. R. S. 1943, is a special statute governing usurious contracts *and judgments to be entered thereon,* and takes precedence over the general statute providing for interest on judgments, section 45-103, R. R. S. 1943." (Emphasis ours.)

The Strine case in 1899 apparently overlooked, and certainly did not consider, the doctrine of merger. The majority opinion here still does not mention the doctrine of merger, under which a judgment becomes a new cause of action and wipes out the old cause of action. This is done on the strength of the language that the plaintiff shall "recover only the principal without interest." This court now concludes that "the legislative intent is clear that no interest can be recovered on the judgment." The opinion determines that the Legislature specifically intended to discard the doctrine of merger as applied to judgments entered upon portions of usurious contracts specifically declared to be valid by the same statutory enactment.

Restatement, Judgments, § 47, p. 181, states the rule of merger: "Where a valid and final personal judgment in an action for the recovery of money is rendered in favor of the plaintiff, (a) the plaintiff cannot thereafter maintain an action against the defendant on the

cause of action; but (b) the plaintiff can maintain an action upon the judgment." The comment is particularly applicable here: "a. The doctrine of merger. Where the plaintiff brings an action against the defendant and a valid and final judgment for the payment of money is rendered in favor of the plaintiff, the original claim of the plaintiff is extinguished and a new cause of action on the judgment is substituted for it. In such a case, the plaintiff's original claim is merged in the judgment. It is immaterial whether or not the plaintiff's original claim was valid. It is immaterial whether or not the defendant had a defense to the action if he did not rely upon it, or if he did rely upon it and judgment was nevertheless given against him. It is immaterial whether the judgment was rendered upon a verdict or upon a demurrer or other objection to the pleadings or upon confession or default."

The majority opinion determines that section 45-105, R. R. S. 1943, is a special statute as to interest on judgments. It appears in Chapter 45 dealing only with interest. Section 45-103, R. R. S. 1943, deals with interest on judgments and decrees; section 45-104, R. R. S. 1943, deals with interest on other contract obligations; and section 45-106, R. R. S. 1943, deals with interest on warrants or orders of municipal subdivisions. The conclusion that it is a special statute, applying to judgments, is reached in spite of the fact that section 45-105, R. R. S. 1943, itself, in the first sentence states "the *contract* shall not on that account be void, but if in any action on such *contract* * * *." (Emphasis ours.) The only portion of section 45-105, R. R. S. 1943, which ever mentions the word "judgment" says "judgment shall be for the principal, deducting interest paid."

Our belief that the Strine case overlooked the doctrine of merger, and the relevancy of section 45-103, R. R. S. 1943, is confirmed by the case of Male v. Wink, 61 Neb. 748, 86 N. W. 472, which clearly involved the same issue of interest on the judgment itself. This court said:

"Plaintiffs are entitled to a decree of foreclosure for the sum of $115.12 (the principal amount, deducting interest paid), and for the amount of taxes by them paid on the mortgaged premises, with ten per cent interest thereon from the date of such payment. The decree is accordingly reversed, and the cause remanded with directions to enter a decree in favor of the plaintiffs in accordance with this opinion, without costs to them." (Parenthetical insert ours.) The implication as to interest on the judgment seems clear, although the Strine case was not referred to.

Various legislative and constitutional provisions dealing with time sales contracts have been adopted recently in specific response to this court's prior holdings that usurious time sales contracts were void. All of the legislative enactments and declarations refer to *contracts* or to *interest or charges contracted for.* These enactments specifically state that the contracts shall not be void. So far as we can determine, not one of the legislative enactments refer to judgments nor interest on judgments.

The majority opinion treats section 45-105, R. R. S. 1943, as though the words "the plaintiff shall recover only the principal, without interest," not only designated the amount for which the judgment should be entered, but also specifically said that the judgment itself should be without interest. In the portion of section 45-105, R. R. S. 1943, dealing with situations where interest shall have been paid, the only place where the word "judgment" is used, the specific direction of the statute is that "judgment shall be for the principal, deducting interest paid," and there is no reference whatever to interest on the judgment.

As this court held in Patterson v. Spelts Lumber Co., 166 Neb. 692, 90 N. W. 2d 283, the provisions of section 45-103, R. R. S. 1943, for the payment of interest on all decrees and judgments for the payment of money: "* * * refer to judgments or decrees for money which

is immediately due and collectible where its nonpayment is a breach of duty on the part of the judgment debtor." The judgment here is clearly that.

It seems to us a strained construction to treat section 45-105, R. R. S. 1943, as a special statute intended to apply not only to interest on usurious contracts before judgment, but also as intended to apply to judgments for the portion of such contracts which the same statute specifically declares to be valid, and which by judgment and merger become immediately due and collectible. We believe that the majority opinion here not only raises serious questions as to the doctrine of merger and of special and general legislation, but affirms a decision which we believe to be erroneous. Subsequent action of this court, the electorate, and the Legislature has also altered the problems of interpretation.

We believe that the case of Interstate Savings & Loan Assn. v. Strine, 58 Neb. 133, 78 N. W. 377, should be overruled, and that the plaintiff should have judgment for the sum of $1,350, with interest from November 20, 1964, with all costs to be taxed to the plaintiff.

I am authorized to state that Boslaugh and Smith, JJ., join in this dissent.

STATE OF NEBRASKA, APPELLEE, V. ROY E. QUINN, APPELLANT.
141 N. W. 2d 422

Filed April 1, 1966. No. 36107.

1. **Criminal Law.** The Supreme 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 it can be said, as a matter of law, that it is insufficient to support a finding of guilt beyond a reasonable doubt.
2. ———. Malice is an element of the offense of maliciously shooting a person with intent to kill, wound, or maim, as the crime is defined by section 28-410, R. R. S. 1943.
3. ———. Where the trial court defines "malice" or "maliciously"

by a general definition, it is not prejudicial error in the absence of a request that the jury be given the more recognized legal definition.

Appeal from the district court for Lancaster County: ELMER M. SCHEELE, Judge. Affirmed.

John McArthur, for appellant.

Clarence A. H. Meyer, Attorney General, and Bernard L. Packett, for appellee.

Heard before WHITE, C. J., CARTER, SPENCER, BOSLAUGH, BROWER, SMITH, and MCCOWN, JJ.

CARTER, J.

Defendant was convicted of the crime of shooting with intent to kill, wound, or maim and sentenced to penal servitude for a term of 3 years. The defendant has appealed.

The evidence shows that about 4:30 p.m. on October 23, 1964, defendant went to the Highway Tavern and met Claude D. Lovelace. Twila Quincy came into the tavern shortly thereafter. The three of them engaged in drinking until about 10:30. They then went to the Arrow Inn where they continued their drinking. It appears that defendant had been keeping company with Twila for some time. They got into an argument and Twila left accompanied by Lovelace. They went to Twila's home.

Lovelace testified that Twila invited him into the house. He says they drank some coffee and smoked a cigarette. Twila then stated she was going to bed. She went into the bedroom and lay on the bed without undressing. Lovelace says that he went into the bedroom, sat on the edge of the bed and tried to talk to Twila, but she fell asleep. He says that he either fell asleep or passed out and fell to the floor. He says that he continued to sleep until he was awakened by defendant prodding him with the butt end of a rifle. He says that Twila was lying on the floor with a mangled foot

He quotes the defendant as saying, "I have already shot her and I'm going to shoot you." Lovelace says he ran out the door followed by the defendant who fired two shots as he ran down the street. He ran about 10 blocks at which time he hailed a police cruiser car and came back with the policemen to Twila's home.

An ambulance was sitting in front of her home when Lovelace and the police arrived. Other members of the police force arrived shortly thereafter. The police found Twila lying on the floor with her clothes on and one foot practically shot off. A .348 caliber rifle was laying on the bed. There were large blood spots on the bed and on the floor. Two bullet holes were found in the bed. One bullet was found in the floor, another in a wall. Defendant was present. He told the police the shooting was an accident. Twila was removed to a hospital by ambulance and her foot was subsequently amputated.

Defendant testified to the same facts as Lovelace and Twila up to the time the latter two left the Arrow Inn. From that point on his testimony was substantially as follows: He did not see Twila and Lovelace leave the Arrow Inn. About midnight he went home and to bed. Thereafter he began to worry as to whether or not Twila got home safely. He called her home and no one answered. He called a second time and a man answered who in response to his question said Twila was not there. He thought the voice was that of Twila's former husband. He had previously been told by Twila that her former husband was very abusive and that he had beaten her up several times. He dressed, loaded his .348 caliber rifle, and drove to Twila's home. He admits that he shot a hole in the floor of his apartment while loading the gun.

On arriving at Twila's home, he tried to enter through the north door. Finding it locked, he shot the lock off and entered the kitchen. He says Twila came running into the kitchen and that he asked, "Where's Elmer?"

Twila told him he was not there and demanded the gun. He handed it to her. He looked around for Twila's former husband and discovered Lovelace lying on the floor. He thought he better get the cocked gun because it was dangerous and might go off. Twila pushed him aside and ran into the bedroom with the gun. He heard a shot. He ran into the dark bedroom and picked up the gun which was laying on the bed. Lovelace jumped up and ran out of the house. He says that he did not prod Lovelace with the gun and that Lovelace said nothing before running out of the house. He followed Lovelace out of the house and shot up in the air to "just help him along a little bit." He went back in the house and Twila said, "I'm shot." He asked where the light switch was and he says she got up and turned on the lights. He says he then attempted to let the hammer down on the gun, the hammer slipped, and the gun went off shooting the second hole in the bed. He then threw the gun over on the bed where it was found by the police. Defendant says that he thought the man who was in the room was Twila's ex-husband and that he knew no differently until the police told him at the police station.

Prior to the trial, Twila and defendant were married. She was called as a witness for the defendant. She testified that she did not know that Lovelace was in the house until he got up from the floor and ran out of the house. She says she was asleep and awoke when she heard the gun blast that blew the lock off the kitchen door. She ran into the kitchen, told defendant "Elmer" was not there, and demanded the gun. He gave her the gun. Defendant saw Lovelace on the floor and demanded the gun. Twila pushed defendant aside and ran into the bedroom with the gun and, to keep defendant from getting it, she "flipped" across the bed to lay it at the side of the bed and the gun went off. The shot awakened Lovelace and he ran out of the bedroom with the defendant behind him. There was no conversation between defendant and Lovelace. Defendant came back

into the bedroom and she got up off the bed and walked to the south wall and turned on the lights. She then heard a second shot. She says she was then leaning against defendant and when he moved she fell to the floor. Defendant called an ambulance and she was removed to the hospital after the arrival of the police.

A policewoman was called and testified that she interviewed Twila in the hospital the next day. She testified that Twila said she came home with Lovelace; and that she slept on the bed fully clothed. She first saw defendant in the doorway of her bedroom, she heard two shots, and she fell or was blasted out of bed by the first shot. Twila said she heard defendant tell the police it was an accident but that she knew it was not. She further said that after having her leg shot off she was in a state of shock and could not remember details. She further stated that she did not think defendant intended to kill her; that they had been drinking; that she knew Lovelace had stayed all night; and that defendant had shot the gun while in a fit of rage. She said that defendant stood in the doorway screaming and cursing; and that he shot her. Twila came back on the witness stand and denied that she had made the incriminating statements to the policewoman.

The evidence is sufficient to sustain the conviction. The evidence was in conflict on many of the essential facts, but the question of guilt under such circumstances is for the jury. It is a fundamental rule of law that the credibility of the witnesses and the weight to be given their testimony on conflicting evidence present a question of fact for the jury. In Texter v. State, 170 Neb. 426, 102 N. W. 2d 655, this court said: "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, 157 Neb. 623, 61 N. W. 2d

358; Salerno v. State, 162 Neb. 99, 75 N. W. 2d 362. The verdict is sustained by the evidence.

The defendant asserts that the trial court erred in not defining malice in the instructions. This issue was not raised in the motion for a new trial. No request for instructions was made. It is the contention of the defendant that since malice is an element of the crime, the trial court is required not only to set malice out as an element of the crime but to define it as well.

The applicable statute provides: "Whoever shall maliciously shoot, stab, cut or shoot at, any other person with intent to kill, wound or maim such person, shall be imprisoned in the Nebraska Penal and Correctional Complex not more than twenty years nor less than one year." § 28-410, R. R. S. 1943.

The trial court instructed the jury as to the elements of the crime as follows: "(1) That on or about the 24th day of October, 1964, in the County of Lancaster, State of Nebraska, the defendant, Roy E. Quinn, did then and there maliciously shoot Twila R. Quincy (2) With the intent to kill, wound, or maim said Twila R. Quincy." In a previous instruction the jury was told the following: "Under these pleas of 'Not Guilty,' the burden is upon the State to prove beyond a reasonable doubt each and every one of the elements necessary for a conviction on both Counts I and II and each of them." It is clear that the trial court submitted the issue of malice as an element of the crime charged to the jury.

The trial court gave the following definition of terms: "You are instructed that to do an act unlawfully, willfully, maliciously, and feloniously means to do it with the intent to violate the law and commit the act charged."

The defendant relies upon a definition in a homicide case which defines "malice" in its legal sense as follows: " 'Malice,' in its legal sense, denotes that condition of mind which is manifested by the intentionally doing of a wrongful act without just cause or excuse. It means any willful or corrupt intention of the mind." Housh

v. State, 43 Neb. 163, 61 N. W. 571. A correct and suitable definition of "malice," though many times attempted, has never been attained except by giving the term many different definitions. Carr v. State, 23 Neb. 749, 37 N. W. 630. In that case we said: "Approximately, it is that condition of the mind which shows a heart regardless of social duty, and fatally bent on mischief, the existence of which condition is inferred from acts done or words spoken." While the legal definition of malice could have been better stated in the instant case, the definition given is sufficient in the absence of a request for a more definite definition. The definition given in the instant case could not have misled the jury to the prejudice of the defendant.

We find the record to be free from prejudicial error and the judgment of the district court is affirmed.

AFFIRMED.

KATIE COUNTRYMAN, APPELLEE, V. R. B. RONSPIES, APPELLANT.
141 N. W. 2d 425

Filed April 1, 1966. No. 36119.

1. **Negligence: Trial.** Where reasonable minds may draw different conclusions as to whether or not acts of negligence charged have been proved, the case must be submitted to the jury for decision.
2. **Trial.** In considering a motion for a directed verdict, or for a judgment notwithstanding the verdict, the party against whom the motion is made is entitled to have every disputed question of fact in the evidence resolved in his favor, and to have the benefit of every inference that can be reasonably derived from the facts in evidence.
3. **Animals: Highways.** It is the duty of the owner of cattle to exercise ordinary care to confine his cattle to prevent them from being unattended upon the public highway. The principal test is whether or not he should reasonably have foreseen that any of his cattle would be upon the highway and the occurrence of such an accident; and if the owner knows or, in the exer-

cise of ordinary diligence, should have known that any of his cattle are unattended upon the highway, it is his duty to exercise ordinary care to round them up and confine them.

4. **Appeal and Error.** Error may not be predicted upon a refusal to give tendered instructions where the court has covered the substance thereof in other instructions.
5. **Trial: Appeal and Error.** A party may not proceed with trial without objection and speculate on the outcome of the jury's verdict and, if unfavorable, obtain a reversal on a ground upon which he might have but did not move for a mistrial at the time.
6. **Appeal and Error.** A verdict of a jury in a law action based upon conflicting evidence will not be disturbed on appeal unless clearly wrong.

Appeal from the district court for Pierce County: FAY H. POLLOCK, Judge. Affirmed.

Deutsch & Hagen and William E. Webster, for appellant.

Brogan & Monen, for appellee.

Heard before CARTER, SPENCER, BOSLAUGH, BROWER, SMITH, and MCCOWN, JJ., and KOKJER, District Judge.

KOKJER, District Judge.

This is an action instituted by the plaintiff against the defendant to recover damages claimed to have been sustained by her on October 21, 1962, at about 6:35 p.m., when defendant's Hereford cow came suddenly into her lane of traffic as she was driving north on U.S. Highway No. 81, causing a collision with other cars. Defendant's motion for directed verdict was overruled and the case was submitted to the jury which returned a verdict for plaintiff. Defendant's subsequent motion for a judgment in his favor notwithstanding the verdict or, in the alternative, for a new trial was overruled and defendant appealed. We find that the case was properly submitted to the jury and that its verdict, based upon conflicting evidence, and the judgment entered thereon should be sustained.

Defendant assigns error to the district court on the grounds, among others, that his motion for directed ver-

dict should have been sustained; that the verdict and judgment are contrary to the law and the evidence; and that a judgment in his favor notwithstanding the verdict should have been rendered.

If reasonable minds could have drawn different conclusions as to whether or not acts of negligence charged were proved, the law required that the case be submitted to the jury; and the law also required that every controverted question of fact be resolved in favor of the plaintiff against whom the motion was made, and that she was to have the benefit of every inference which could be reasonably derived from the evidence. These rules require a review of the evidence.

There was evidence that defendant lived on the southeast quarter of a section where his home and buildings were located. A short distance north of his home was a pasture in which were four cows. The defendant's Hereford cow involved in the accident was, according to defendant's testimony, in this pasture in the afternoon and he had seen her there at about 6:15 p.m., when he returned home from a trip to the home of his son, Eugene. On cross-examination he admitted he had been asked, when a deposition was taken on March 6, 1965, this question: "When was the last time you saw the cattle on October 21, 1962?" And that he had replied: "It must have been about 3:00, 4:00 o'clock." The calf of the Hereford cow involved had been taken from her and was locked in the barn near the house. He said it was 9 months old and that the cow had not been bawling to get to it.

Defendant also owned the west half of the section immediately east from his home, across U. S. Highway No. 81. He rented this to his son, Eugene. There was a pasture on this half section which was east of an unfenced area referred to as "idle acres." Both defendant and Eugene had cattle in this pasture. They were Shorthorns and red white-face cattle. Defendant testified it was his duty to maintain the fences on these two farms

but that Eugene helped. Defendant said that none of his cattle had been out and the only time any had been on the highway was in 1957 or 1958 when a bull he had loaned to Eugene broke out at Eugene's place in the next section north of defendants. He said that if any cattle were out they were probably Behnkes. He stated on cross-examination that Behnke's cattle were Black Angus. He stated the nearest person that owned cattle other than Behnke would be 1½ or 2 miles from his place, except for those owned by his son, Eugene.

Mr. Joseph C. Maly, a rural letter carrier from Crofton, Nebraska, testified that he left home between 8 and 9 o'clock on the morning of October 21, 1962, and drove to Norfolk. Over the first hill north of the Ronspies place he saw some six or eight cows, roan and red, close to and on the east side of the highway. He also said they might have been Herefords as they were red. He drove into the Ronspies place and told a young man about the cattle being out close to the highway. The young man said they were theirs and the witness drove on. In the evening, somewhere around 5 or 5:30 o'clock, he again passed the Ronspies place and, about the same distance north, two or three cows were out between the pasture fence and the highway—one or two roans and a red one or one or two red ones and a roan. He just drove on because he figured if they had put them in in the morning, they would more than likely go and look again in the evening to see if they stayed in. Mrs. Theresa Maly was with her husband on this trip. Her testimony was similar to his. She was not so sure of the color of the cows, thought they were mixed, some white faces and a couple of roans. The young man said they would take care of them. Both of these witnesses testified that defendant was not the man they talked to. It was a younger man.

Mr. Bert McKibbon, a farmer living near Bloomfield, Nebraska, with his wife, drove on U. S. Highway No. 81 past the Ronspies place on October 21, 1962, around

10:30 or 10:45 in the morning. He testified that he saw, "two—some cattle," in the ditch on the east side of the highway north of the driveway into the Ronspies place. They were Herefords and were on the south side of the knoll or hill, between the knoll and the Ronspies driveway. They were still there when he returned sometime after 4 p.m., on his way home; and one started up on the grade, so he slowed up.

None of these witnesses knew who owned the cattle. It was admitted by defendant that the cow which was killed in the accident was his. The other cattle were on defendant's land. The young man at the Ronspies place informed the witnesses Maly that the cattle which were out were theirs. Except for Behnke's Black Angus cattle, it was some distance to other owners of cattle.

The only people living on the Ronspies farm were defendant, his wife, and his two sons Dennis and Wilfred. These two sons were not engaged in farming but sold machinery which they kept in an area close to the highway near the house. Some one of these was always at home, and the one who was there was in charge. On the day in question, which was a Sunday, they went to church at different hours so at least one of them was at home. No other person was there during the day. The defendant and his sons flatly denied that any cattle were known by them to be out and that no one came into the yard and informed any of them that any cattle were out.

An inference may be drawn, largely from testimony of disinterested witnesses, that defendant's cattle were out; that he knew, or should have known about it; and that he made no effort to round them up and confine them. There was evidence from which reasonable minds might draw different conclusions as to whether or not defendant was negligent, and it would have been error to direct a verdict for the defendant.

Defendant claimed that no cattle of his had ever been hit by a car except the bull earlier referred to. Mr.

Wilbur Ekdahl testified on rebuttal that he lives in Wausa, Nebraska, where he runs the Gamble Store. In July 1957, he was driving on U. S. Highway No. 81 past the Ronspies place at about 9 o'clock p.m., when a cow ran out of the ditch in front of his car and he hit it. This was a very short distance, 30 to 40 feet, north of the Ronspies drive, and the critter ran up the driveway to the barn. He stated that he had not run into a bull about a mile north at any time; and that the animal he hit was not killed. He testified that his car was disabled in the accident; and that, as soon as the car stopped, there was a young man right beside it, pretty soon more people came, and someone called a patrolman who came and did some checking. He testified that one of the boys—he thought it was Dennis—was the one beside his car; and that Dennis had said they saw from the window, by passing car lights, a critter on the road, he had gone down the driveway to get it, was standing at the edge of the driveway as witness' car was coming from the south, and decided to wait until it went by and chase the critter back but the critter met Dennis first. The witness also said he definitely saw Wilfred because after the car had been pulled up on the place, Wilfred took the witness and his wife home to Wausa.

Wilfred then testified that he could remember taking Mr. Ekdahl and his wife home but did not remember about the cow or whether it was a bull or a cow, or anything else about the accident. Dennis was asked if he knew anything about the episode and said, "I don't remember anything like that." He was asked if it ever occurred, and replied, "I don't know it it did or not. I don't remember it if it did." Defendant testified that no cow owned by him was ever struck as testified to by witness Ekdahl.

There was evidence to support plaintiff's claim that the accident was caused by the cow coming suddenly into her lane of traffic just ahead of her. The issue of contributory negligence was properly submitted to the

jury upon the evidence adduced. It determined these issues in favor of plaintiff. A verdict of a jury in a law action, based upon conflicting evidence, will not be disturbed on appeal unless it is clearly wrong.

Error is claimed in the giving of instruction No. 8 and the refusal to give instructions Nos. 2 and 3 requested by defendant. The instructions given by the court have been examined and found to correctly and fully reflect the law involved. Defendant's requested instruction No. 2 includes reference to a cow being intentionally turned loose on the highway. No such question was involved here. The applicable substance of requested instruction No. 3 is included in the instructions given by the court. Error may not be predicated upon refusal to give tendered instructions which involve issues not included in the evidence or where the substance of the requested instruction has been covered by instructions given.

An insurance adjuster was subpoenaed by plaintiff. Defendant claims this was misconduct. Before the trial started defendant's counsel made a record before the court and stated that he expected to move for a mistrial if any effort was made to inject the question of insurance into the lawsuit. Plaintiff's counsel stated on the record that defendant, on discovery proceedings, had denied that any of his cattle had been struck on the highway in 20 years. The subpoena duces tecum required the witness to bring with him certain records bearing upon that question. The witness was advised to stay in the clerk's office. He was seen by two or three jurors who knew him. He was not called as a witness, the evidence referred to having been given by other witnesses. Under the circumstances it does not appear that the question of insurance was placed before the jury. In any event, defendant did not move for a mistrial.

Defendant claimed misconduct on the part of the court. A review of the record shows that the court did no more

than to require the attorneys to try the lawsuit with professional fairness and without complaining of the court's rulings to this end. The court's handling of the situation was wholly proper. Again, no motion was made for a mistrial.

A party may not proceed with trial without objection, speculate on the outcome of the jury's verdict and, if unfavorable, obtain a reversal on a ground upon which he might have, but did not, move for a mistrial at the time.

No error having been committed by the trial court, the judgment and verdict are affirmed.

AFFIRMED.

KATHRYN G. GOODMAN, APPELLEE, V. DAVID E. GOODMAN, APPELLANT.

141 N. W. 2d 445

Filed April 1, 1966. No. 36134.

1. **Divorce: Judgments.** Ordinarily an application for a change with respect to care and custody of minor children, which has been provided for in a decree of divorce, made at any time after the decree has been entered, must be founded upon new facts and circumstances which have arisen subsequent to the entry of the decree. In the absence of such facts and circumstances, it will be deemed res judicata.
2. **Divorce.** The proper rule in a divorce case, where the custody of a minor child is involved, is that the custody of the child is to be determined by the best interests of the child, with due regard for the superior rights of fit, proper, and suitable parents.
3. **Divorce: Parent and Child.** Ordinarily courts may not properly deprive a parent of the custody of a minor child unless it is shown that such parent is unfit to perform the duties imposed by the relation or has forfeited that right.
4. ———: ———. While the wishes of a child who has reached sufficient age, and has the ability to express an intelligent preference, are entitled to consideration, the wishes of the child are not controlling.
5. **Divorce.** The courts preserve an attitude of impartiality between religions and will not disqualify a parent because of his

or her religious beliefs. Particularly is this true where there is no showing that the religious beliefs, or a conflict between them, seriously threaten the health or well-being of the child.

6. **Trial: Parent and Child.** Findings of fact must rest on a preponderance of evidence, the verity of which has been carefully and legally tested. The relationship of parent and child should not be severed or disturbed unless the facts justify it.
7. **Parent and Child.** The custodial parent normally has the right to control the religious training of the child.
8. **Divorce.** A parent found unfit for custody should not, by the mere passage of time without further misconduct, be able to change child custody provisions in a divorce decree in the absence of clear and convincing evidence that the custodial parent is failing to provide proper and reasonable care for the children; that the best interests and welfare of the children are adversely affected; and that the formerly unfit parent can and will better perform the duties of a custodial parent in the best interests of the child.
9. ———. Where there is no evidence that the party having custody has failed in the responsibility of caring for and maintaining the children, evidence of reformation or rehabilitation of the parent formerly found unfit is, in itself, not sufficient evidence of changed circumstances to warrant a change in custody.

Appeal from the district court for Douglas County: LAWRENCE C. KRELL, Judge. Reversed and remanded with directions.

Kistle & Telpner, Stern, Harris, Feldman & Becker, and Robert Bray, for appellant.

Hotz, Hotz, Taylor & Moylan, for appellee.

Heard before CARTER, SPENCER, BOSLAUGH, BROWER, and MCCOWN, JJ., and BRODKEY, District Judge.

MCCOWN, J.

This was an application to modify a divorce decree with respect to the custody of minor children. The district court found that circumstances have changed materially; that both parents were fit to have custody; that the children had expressed a desire to be with the mother; that it was not in the best interests of the children that they be raised in two religious faiths; that the children had expressed their preference for the

Catholic religion; that for the daughter, a "mother figure" is preferable to that of a "father figure"; that the children should not be separated; that the children are both resourceful and intelligent; and that the best interests of the children would be served by awarding primary custody to the mother with a right of reasonable visitation by the father. The court ordered a change of custody from the father to the mother, with the mother's custody subject to the supervision of the welfare department of Douglas County; granted reasonable visitation by the father; enjoined him from rearing the children in his religious faith; and fixed amounts of child support.

The defendant's motion for fixing of a supersedeas bond was denied by the district court, granted by this court, and this appeal followed.

This is the second appearance of this case in this court on modification of custody provisions. The former case was Goodman v. Goodman, 173 Neb. 330, 113 N. W. 2d 202.

A brief review of the facts in the former case is deemed appropriate. On January 11, 1956, Kathryn G. Goodman, plaintiff and appellee here, was granted an absolute divorce from David E. Goodman, defendant and appellant here. They will hereafter be referred to as plaintiff and defendant. Custody of the two minor children, then approximately ½ year and 4 years of age, was granted to the plaintiff. On March 31, 1959, defendant filed an application to modify the decree by transferring the custody of the children from the plaintiff to the defendant. Because of delay occasioned by the plaintiff's conduct, the details of which are set out in our former opinion, modification of the decree changing the custody to the defendant was not made until May 18, 1961, in the district court for Douglas County. That action was affirmed by this court. A portion of that opinion states: "The evidence shows that the plaintiff is not a fit and proper person to have the cus-

tody of the minor children. The plaintiff has demonstrated that she is an irresponsibile person who is primarily interested in her own pleasure. What interest she has in her children is secondary to her concern for herself. * * * The evidence further shows that the defendant is a fit and proper person to have the custody of the children."

The defendant has had the custody of the children since May 18, 1961, subject to visitation rights in the plaintiff which included virtually all Sundays, 2 full weekends per month, 2 weeks summer vacation, and 3 days over Christmas.

On June 23, 1964, the plaintiff filed the application for modification of decree with which we are here concerned. Hearings were had on October 21, 1964, and March 16, 1965, and the order modifying the decree and changing custody to the plaintiff was entered April 13, 1965.

The power of the district court to revise a decree of divorce as to custody of children is covered by statute. "If the circumstances of the parties shall change, or it shall be to the best interests of the children, the court may afterwards from time to time on its own motion or on the petition of either parent revise or alter, to any extent, the decree so far as it concerns the care, custody and maintenance of the children or any of them." § 42-312, R. R. S. 1943.

In the case presently before us, the court found that both parties were now fit persons to have the care and custody of the children. In 1961, the defendant was found to be a fit person and the plaintiff specifically found unfit. The evidence is without dispute that the defendant has conscientiously performed his parental duties to these children, including their instruction in the Jewish religion. There is no question but that the children are well cared for. They are bright, intelligent children, both doing well in public school, and well ad-

justed for their ages. The daughter is now 14 years old and the son is 10 years old.

The evidence of the plaintiff as to changed conditions affecting her was presented by herself, her mother, her step-father, her aunt, and a fellow employee with whom she had lived for approximately 17 months. She has been regularly employed, and, in the opinion of her witnesses, is fit to have the custody of the children. The evidence also discloses that the plaintiff's invalid marriage to Frank Davis, referred to in our former opinion, was annulled in 1961, after the entry of modification decree in this cause. The plaintiff also relinquished for adoption the child born of the relationship with Frank Davis.

Ordinarily an application for a change with respect to care and custody of minor children, which has been provided for in a decree of divorce, made at any time after the decree has been entered, must be founded upon new facts and circumstances which have arisen subsequent to the entry of the decree. In the absence of such facts and circumstances, it will be deemed res judicata. See Young v. Young, 166 Neb. 532, 89 N. W. 2d 763. The same rule quite obviously applies to a modification as well as to the original decree.

The proper rule in a divorce case, where the custody of a minor child is involved, is that the custody of the child is to be determined by the best interests of the child, with due regard for the superior rights of fit, proper, and suitable parents. Ordinarily courts may not properly deprive a parent of the custody of a minor child unless it is shown that such parent is unfit to perform the duties imposed by the relation or has forfeited that right. Caporale v. Hale, 169 Neb. 751, 100 N. W. 2d 847; Goodman v. Goodman, *supra*.

It is quite apparent that there is here a basic conflict between the parents with respect to the religious education and training of the children, and the plaintiff relies heavily on the slight preference expressed by the chil-

dren for the mother's custody and religion. It is undisputed that the children have affection for both of their parents. While, of course, the wishes of a child who has reached sufficient age, and has the ability to express an intelligent preference, are entitled to consideration, the wishes of the child are not controlling. Hall v. Hall, 178 Neb. 91, 132 N. W. 2d 217.

The courts preserve an attitude of impartiality between religions and will not disqualify a parent because of his or her religious beliefs. Particularly is this true where there is no showing that the religious beliefs, or a conflict between them, seriously threaten the health or well-being of the child. Here it is quite obvious that a social worker, largely on information submitted by the children and the plaintiff in one interview, expressed fear of emotional damage to the children. The testimony of public school teachers of both of the children, the Rabbi, and virtually every other witness was to the contrary, and the social worker herself found the children to be "relatively well adjusted for their age." The social worker's opinion was that the absence of a "mother figure" in the home of the defendant made it unstable. No reference is made to the absence of a "father figure" if custody be changed. She termed the defendant's housekeeper a "servant figure," but did not even meet the plaintiff's mother, who was going to care for the children while the plaintiff worked, nor did she visit her home where the plaintiff intended to leave them for such care.

Hearsay, opinion, gossip, bias, prejudice, and the hopes and fears of social workers should not be the basis for a change of custody. Findings of fact must rest on a preponderance of evidence, the verity of which has been carefully and legally tested. The relationship of parent and child should not be severed or disturbed unless the facts justify it. See Young v. Young, *supra*.

The custodial parent normally has the right to control the religious training of the child. See 24 Am. Jur.

2d, Divorce and Separation, § 787, p. 893. We question whether even a noncustodial parent might legally be, or should be, enjoined from imparting religious instruction to his child in the absence of a showing of serious threat to the health or well-being of the child.

Children are not chattels. A parent found unfit for custody should not, by the mere passage of time without further misconduct, be able to change child custody provisions in a divorce decree in the absence of clear and convincing evidence that the custodial parent is failing to provide proper and reasonable care for the children; that the best interests and welfare of the children are adversely affected; and that the formerly unfit parent can and will better perform the duties of a custodial parent, in the best interests of the child. The custody of children should not be the subject of a continuous contest between divorced parents at the expense of the children's well-being, even when ostensibly motivated by religious principles.

Where there is no evidence that the party having custody has failed in the responsibility of caring for and maintaining the children, evidence of reformation or rehabilitation of the parent formerly found unfit is, in itself, not sufficient evidence of changed circumtances to warrant a change in custody. See Stanley v. Stanley, 155 Neb. 125, 50 N. W. 2d 558. In the case of Pollard v. Galley, 178 Neb. 587, 134 N. W. 2d 261, it was held that the proof of changed conditions must show the suitability and responsibility of the applicant, and that the best interests of the children are not unduly impaired before a change in legal custody will be directed. The rule of that case, which involved custodial grandparents, becomes even stronger in this case which involves a natural parent.

For the reasons stated, the order of the district court of April 13, 1965, is hereby reversed and the cause remanded with directions to vacate the said order.

REVERSED AND REMANDED WITH DIRECTIONS.

ROBERT O. REHKOPF ET AL., APPELLEES AND CROSS-APPELLANTS, V. BOARD OF EQUALIZATION OF DOUGLAS COUNTY, NEBRASKA, APPELLANT AND CROSS-APPELLEE.

HARRY E. JUDD, APPELLEE AND CROSS-APPELLANT, V. BOARD OF EQUALIZATION OF DOUGLAS COUNTY, NEBRASKA, APPELLANT AND CROSS-APPELLEE.

141 N. W. 2d 462

Filed April 8, 1966. No. 36102.

1. **Corporations: Taxation.** Sections 77-706, R. S. Supp., 1963, and 77-722, R. R. S. 1943, both contemplate the valuation of shares of stock upon the basis of book value, less the deductions set out in the respective sections.
2. **Statutes.** Where the words of a statute are plain, direct, and unambiguous, no interpretation is needed to ascertain the meaning.
3. **Corporations: Taxation.** The tax imposed upon the shares of stock is a property tax upon the owner of the shares and not a tax upon the corporation.
4. ———: ———. The Legislature may make a reasonable classification of persons, corporations, and property for purposes of legislation concerning them, but the classification must rest upon real differences in situations and circumstances surrounding the members of the class, relative to the subject of the legislation, which render appropriate its enactment; and to be valid the law must operate uniformly and alike upon every member of the class so designated.
5. ———: ———. The classifying of stock in foreign corporations differently from that in domestic corporations, for assessment, does not contravene the constitutional provision for uniformity.
6. ———: ———. A shareholder in a domestic corporation whose property is taxed in the hands of the corporation by the state is not in the same class with the shareholder in a foreign corporation whose property is not taxed and cannot be taxed by the taxing authority of the state.
7. ———: ———. Taxing shares of foreign corporations when owned by the inhabitants of the state does not deny the owners the equal protection of the laws, because, in the case of domestic corporations, it is the property, and not the shares, which is taxed.
8. **Constitutional Law: Taxation.** The power to classify for tax purposes is primarily in the Legislature and not in the courts, and its laws should not be declared invalid unless it clearly appears that they transgress the Constitution.

Appeal from the district court for Douglas County: JOHN C. BURKE, Judge. Affirmed.

Clarence A. H. Meyer, Attorney General, Homer G. Hamilton, Donald L. Knowles, and William F. Ryan, for appellant.

Edson Smith and Swarr, May, Royce, Smith, Andersen & Ross, for appellees.

Heard before WHITE, C. J., CARTER, SPENCER, BOSLAUGH, BROWER, SMITH, and MCCOWN, JJ.

BROWER, J.

These cases involve the valuation of shares of common stock for intangible tax purposes in Frito-Lay, Inc., a foreign corporation organized under the laws of the State of Texas and not domesticated in Nebraska.

The appellees Robert O. Rehkopf and Merle S. Rehkopf are husband and wife, and each owned in their own right stock in the corporation mentioned in the years 1962 and 1963. The appellee Harry E. Judd owned stock therein in the year 1963. All three are residents of Douglas County, Nebraska. The Rehkopfs filed protests with the appellant Board of Equalization of Douglas County, Nebraska, for each of these years and Judd for the year 1963 alone. In each case the taxpayer's complaint was dismissed and they appealed to the district court where the three cases were consolidated for trial. In this court they were docketed together as one appeal.

The facts are all established by the pleadings and the stipulations of the parties.

Prior to 1920, the Constitution of Nebraska made no distinction between tangible and intangible property for the purpose of taxation. See International Harvester Co. v. County of Douglas, 146 Neb. 555, 20 N. W. 2d 620. In 1920, Article VIII, section 1, of the Constitution of Nebraska, was amended to read as follows: "The necessary revenue of the state and its governmental subdivi-

sions shall be raised by taxation in such manner as the Legislature may direct; but taxes shall be levied by valuation uniformly and proportionately upon all tangible property and franchises, and taxes uniform as to class may be levied by valuation upon all other property. Taxes, other than property taxes, may be authorized by law. Existing revenue laws shall continue in effect until changed by the Legislature." This section of the Constitution was again amended in 1952, 1954, 1960, and 1964. None of these amendments affect the determination of these cases.

Following the 1920 amendment to the Constitution, legislation was enacted which divided intangible property into two general classes with respect to the rate of tax applicable thereto. This legislation, which now appears as sections 77-701, 77-702, and 77-703, R. R. S. 1943, provides generally for a tax at the rate of 2½ mills on the dollar of the actual value of money, book accounts, savings accounts, bank deposits, bills of exchange, checks, and drafts, and 4 mills on the dollar of the actual value of all other kinds of intangible property.

Shares of stock have also been classified with respect to the method of computing their value for assessment purposes. Section 77-706, R. S. Supp., 1963, which relates to the valuation of shares of stock in domestic corporations and certain domesticated corporations, provides as follows: "The value of the shares of stock of corporations, organized or domesticated under the laws of this state, shall be determined for the purpose of taxation by deducting from the actual value of the paid-up capital stock, surplus, and undivided profits of such corporation available for stock dividends, the actual value of the property of the corporation, both intangible and tangible, listed and taxed in this state, the actual value of the property of the corporation outside of this state, the actual value of bonds or other obligations issued by the United States of America or any of its agencies or instrumentalities, or by the State of Nebraska or any

of its municipal or political subdivisions, and the actual value of the shares of stock of other Nebraska corporations, domestic or domesticated, owned by the corporation; Provided, this section shall not apply to domesticated corporations subject to assessment and taxation under the provisions of Chapter 77, article 6, * * *. The corporation shall furnish the county assessor or Tax Commissioner or his authorized representative such proof of the value of its property outside of the state as they may require. The corporation shall pay the tax assessed upon its stock or shares, and shall have a lien thereon for the tax so paid."

Section 77-722, R. R. S. 1943, which relates to the valuation of shares of stock in foreign corporations, provides as follows: "If any foreign corporation is taxed in this state upon any tangible or intangible property, then the value of its gross shares of stock shall be ascertained by deducting from the actual value of the foreign corporation's paid-up capital stock, surplus, and undivided profits, the actual value of its property taxed in this state; and thereafter the taxing officials of counties, in which shares of stock of any such foreign corporation may be owned, shall determine, in relation to such net value of the gross shares of stock, the value for assessment and taxation purposes of any such individual shares of stock in the hands of the resident owners."

Sections 77-706, R. S. Supp., 1963, and 77-722, R. R. S. 1943, both contemplate the valuation of shares of stock upon the basis of book value, less the deductions set out in the respective sections.

The appellant board of equalization contends that shares of common stock in Frito-Lay, Inc., should be valued at $42.62 per share for 1962 and $29.75 per share in 1963, less the value of certain property of the corporation which was taxed in Nebraska during those years. The appellant admits that section 77-722, R. R. S. 1943, is applicable, but contends that the market value of the stock rather than its book value should be used as the

basis for its valuation. This contention ignores the plain language of section 77-722, R. R. S. 1943, which refers to the value of the corporation's "paid-up capital stock, surplus, and undivided profits."

Where the words of a statute are plain, direct, and unambiguous, no interpretation is needed to ascertain the meaning. Bachus v. Swanson, 179 Neb. 1, 136 N. W. 2d 189.

The district court held that the shares of common stock in Frito-Lay, Inc., should be valued at book value which the record shows was $6.77 per share in 1962 and $8.24 per share in 1963. This is the proper construction of section 77-722, R. R. S. 1943, although it results in the property being valued at a fraction of its actual value or fair market value. This disposes of the issues raised by the appellant's appeal.

The appellee taxpayers cross-appealed from the judgment of the district court. They contend that shares of stock in corporations constitute a single class of property; that the Legislature is without power to classify the stock of foreign corporations separately for valuation for taxation; and that such classification is arbitrary, unreasonable, and an unconstitutional discrimination.

An examination of section 77-706, R. S. Supp., 1963, at once discloses that the deductions there authorized to be made from the actual value of the paid-up capital stock, surplus, and undivided profits available for stock dividends greatly exceed those permitted to foreign corporations under section 77-722, R. R. S. 1943. It is shown in the record that the evaluation of shares in domestic and domesticated corporations under section 77-706, R. S. Supp., 1963, results in a zero value in most instances. Of the 1,932 domestic and domesticated corporations which filed an information return or schedule with the county assessor of Douglas County, Nebraska, upon a form authorized by the Tax Commissioner known as "Form 4," 1,786 had a zero value for tax purposes and

the remainder of them had a minimal value for intangible tax purposes. It is also shown that if the common stock of Frito-Lay, Inc., were valued by the method set out in section 77-706, R. S. Supp., 1963, its common shares would have a zero value also. On the other hand, it is shown that by applying the method prescribed in section 77-722, R. R. S. 1943, a substantial value will result in nearly all instances.

The question presented by the cross-appeal is whether it is within the power of the Legislature to classify the stock of a foreign corporation in the hands of a stockholder separately and apart from other capital stock.

The tax imposed upon the shares of stock is a property tax upon the owner of the shares and not a tax upon the corporation. Nemaha County Bank v. County Board, 103 Neb. 53, 170 N. W. 500; Peters Trust Co. v. Douglas County, 106 Neb. 877, 184 N. W. 812; Moeller, McPherrin & Judd v. Smith, 127 Neb. 424, 255 N. W. 551. The property of the corporation which is in Nebraska, both tangible and intangible, is taxed to the corporation. The shares of stock in the corporation, which are the property of the shareholders, are taxed to them. A domestic or domesticated corporation is the agent for its stockholders for the purpose of payment of any tax which may be due upon its shares of stock. Peter Kiewit Sons' Co. v. County of Douglas, 161 Neb. 93, 72 N. W. 2d 415.

Article VIII, section 1, of the Constitution of Nebraska, already quoted, after providing for taxes to be levied by valuation uniformly and proportionately on all tangible property and franchises, provides: "* * * and taxes uniform as to class may be levied by valuation upon all other property." This court has said many times the Legislature may make a reasonable classification of persons, corporations, and property for purposes of legislation concerning them, but the classification must rest upon real differences in situations and circumstances surrounding the members of the class, relative to the

subject of the legislation, which render appropriate its enactment; and to be valid the law must operate uniformly and alike upon every member of the class so designated. Creigh v. Larsen, 171 Neb. 317, 106 N. W. 2d 187.

The trial court found the provisions of section 77-722, R. R. S. 1943, did not violate the Constitution of this state or of the United States. Its opinion indicates it based its judgment in this respect on the decision of this court in Bute v. Hamilton County, 113 Neb. 230, 202 N. W. 616. The Bute case was decided in 1925 prior to the enactment of what is now section 77-722, R. R. S. 1943. At that time the statute did not prescribe a method for the valuation of shares of stock in a foreign corporation. What is now section 77-201, R. S. Supp., 1963, then appeared as section 5820, Comp. St. 1922, and provided: "All property in this state, not expressly exempt therefrom, shall be subject to taxation, and shall be valued and assessed at its actual value. 'Actual value,' as used in this act, shall mean its value in the market in the ordinary course of trade." The Bute case held that shares of stock in a foreign corporation should be valued in accordance with section 5820, Comp. St. 1922; and that section 5884, Comp. St. 1922, which as amended now appears as section 77-706, R. S. Supp., 1963, was not applicable to shares of stock in a foreign corporation. The opinion states: "The Constitution, as it stood before the amendment of 1920, of itself supplied the classification of property for taxation purposes; the amendment vests this power in the legislature. The classifying of stock in foreign corporations different from that in domestic corporations, for assessment, does not contravene the constitutional provision for uniformity. In this conclusion we are supported by Gaar, Scott & Co. v. Shannon, 52 Tex. Civ. App. 634; Ducat v. City of Chicago, 48 Ill. 172; Hughes v. City of Cairo, 92 Ill. 339; Bacon v. Board of State Tax Commissioners,

126 Mich. 22; Hunter v. Wells Fargo Express Co., 134 Ia. (La.) 358.

"Appellee urges that appellant abandoned his contention of double taxation on this appeal, relied upon in the lower court, because the stock in question has been assessed in West Virginia. Whether he did nor not, the contention is without merit. Dwight v. Mayor and Aldermen of City of Boston, 94 Mass. 316; Bradley v. Bauder, 36 Ohio St. 28; Judy v. Beckwith, 137 Ia. 24."

The Bute case has neither been overruled nor modified and has been the rule of law stated by this court for 40 years. Within less than a month after the decision of this court in the cited case the Legislature enacted Laws 1925, chapter 173, page 454, with the emergency clause, providing for filing of statements by foreign corporations and prescribing the method of ascertaining the value of the stock of such corporations. The statute so enacted has been subsequently amended and, as amended, presently appears as sections 77-721, R. S. Supp., 1963, and 77-722, R. R. S. 1943. It is apparent the Legislature of this state has relied, during the entire period, on the decision of this court as to the constitutionality of such legislation.

It is now suggested that the Bute case was wrongly decided and appellees contend that there was and is no reasonable basis for the classification of the shares of stock of foreign corporations differently than those of a domestic or domesticated one. It is claimed that no real difference in the situation and circumstances of the property or the owners thereof exist which render the separate classification appropriate.

There are, however, cases from many jurisdictions which have adopted the same rule as to classification enunciated in the Bute case. Some of them have spelled out the reasons therefor at considerable length. In the case of Georgia Railroad & Banking Co. v. Wright, 125 Ga. 589, 54 S. E. 52, the Supreme Court of Georgia had under consideration very similar statutes involving

practically the same constitutional provisions. It gives a clear and complete statement of the underlying difference which permits such a classification. "A single tax upon any species of property will satisfy the demands of the constitution. A tax law will not be construed to tax the same property twice, unless such a conclusion is constrained either by the express provisions of the law or by necessary implication. Gray on Lim. Tax. Power, § 1366. Many, if not all, laws imposing taxes upon property contain provisions which in effect tax some species of property more than once. There are in the tax laws of this State instances where the thing which gives value is twice taxed. Wherever there is the imposition of a tax upon one who holds the tangible article of inherent value, as well as upon another who holds merely the symbol which derives its value solely from the tangible article, the same property is twice taxed. The property of a corporation is that which gives value to its shares. If a tax is levied upon the property in the hands of the corporation, and a tax is levied upon the value of the shares in the hands of the shareholders, that which gives value to the holdings of the corporation and to the shares of the shareholder is unquestionably subjected to a double burden. While shares of stock are property in the hands of the shareholder, they have no inherent value, and derive their sole value from the tangible or other property which is owned by the corporation. The taxation of both the property of a corporation in the hands of the corporation, and the value of the shares in the hands of the shareholders, is manifestly an instance where the same property is twice taxed. It is double taxation in a sense, but not that species of double taxation which would be void. It is permissible, but not compulsory. Gray on Lim. Tax. Power, § 1372 et seq.; Commonwealth v. Fall Brook Co., 156 Pa. St. 488 (26 Atl. 107); Commonwealth v. Lehigh Co., 162 Pa. St. 603 (29 Atl. 664). * * *

"It may be that double taxation results so far as those

interested in the property are concerned, the property of the corporation being taxed in one jurisdiction and shares of stock in another jurisdiction. * * * It would be more than idle to contend in this day that one who owns shares of stock in a corporation is not an owner of property. It is true that the value of the property depends largely, if not entirely, upon a fiction of the law. But every holder of a share of stock in any corporation is a property owner. Shares of stock are bought and sold. They are bequeathed to legatees and descend to heirs. They have all the qualities of every other character of property, except that they have no inherent value. The value of the shares depends upon the value of the property of the corporation which issues them. Their situs for taxation is within limits subject to legislative declaration. The legislature may have even the right under our constitution to declare that the situs for taxation of shares of foreign stock held by a resident of Georgia is not in Georgia, but they clearly have the power to declare that shares of such stock have a situs for taxation in this State. * * *

"A shareholder in a domestic corporation whose property is taxed in the hands of the corporation by the State is not in the same class with the shareholder in a foreign corporation whose property is not taxed and can not be taxed by the taxing authority of the State. Therefore a tax law levying a tax upon the market value of shares in foreign corporations held by citizens of this State, and not levying such a tax upon shares of stock in a corporation in this State where the corporation has paid the full amount of tax upon its property, does not violate the rule of uniformity in our own constitution; nor does it violate that provision in the State constitution which says that protection to property shall be impartial and complete; nor does it violate that provision in the fourteenth amendment to the constitution of the United States which declares that no State shall deny to any person within its jurisdiction the equal protection

of the laws. Kidd v. Alabama, 188 U. S. 730; Wright v. Railroad Co., 195 U. S. 219; Missouri v. Dockery, 191 U. S. 165." See, also, Coca-Cola Company v. Atlanta, 152 Ga. 558, 110 S. E. 730, 23 A. L. R. 1339, as to which certiorari to the Supreme Court of the United States was denied, 259 U. S. 581, 42 S. Ct. 585, 66 L. Ed. 1074.

The same reasoning is set forth and the same conclusions reached in State v. Nelson, 107 Minn. 319, 119 N. W. 1058; Judy v. Beckwith, 137 Iowa 24, 114 N. W. 565, 15 L. R. A. N. S. 142, 15 Ann. Cas. 890; and Bacon v. Board of State Tax Commissioners, 126 Mich. 22, 85 N. W. 307, 60 L. R. A. 321, 86 Am. S. R. 524. In the latter case the court said: "The State has said, in effect, to its citizens, 'If you invest your property in corporations, you shall be taxed upon the shares, except where the property of the corporation is taxed to the corporation by this State.' We may doubt the abstract justice of this; but we believe the State has the power to tax the shares of residents in foreign corporations, and that this power is not affected by the action of another State in imposing taxes upon the corporations. Michigan owes much to the investment of foreign money in her corporations which she taxes, and it is probably to her interest that moneys so invested be not taxed again elsewhere: but she is powerless to prevent it, though it goes without saying that the property, in effect, is taxed twice. There are the questions of policy and abstract justice involved, both protesting against double taxation; but the legislatures of the States are judges of both policy and propriety, so long as the constitutions have not forbidden it, and the weight of authority supports the claim that, in the absence of clear and express prohibition, they have not."

In Kidd v. Alabama, 188 U. S. 730, 23 S. Ct. 401, 47 L. Ed. 669, it was held that a statute of Alabama taxing stocks of railroads incorporated in other states held by citizens of Alabama is not unconstitutional under the Fourteenth Amendment to the Constitution of the United

States because no similar tax is imposed on the stock of domestic railroads or of foreign railroads doing business in Alabama; the property of the former class of railroads being untaxed, and that of the latter two classes being taxed by the state. In that case, Justice Holmes said: "We say that the State in taxing stock may take into account the fact that the property and franchises of the corporation are untaxed, whereas in other cases they are taxed; and we say untaxed, because they are not taxed by the State in question. The real grievance in a case like the present is that, more than probably, they are taxed elsewhere. But with that the State of Alabama is not concerned. No doubt it would be a great advantage to the country and to the individual States if principles of taxation could be agreed upon which did not conflict with each other, and a common scheme could be adopted by which taxation of substantially the same property in two jurisdictions could be avoided. But the Constitution of the United States does not go so far. Coe v. Errol, 116 U. S. 517, 524; Knowlton v. Moore, 178 U. S. 41; Dyer v. Osborne, 11 R. I. 321, 327; Cooley, Taxation, 2d ed. 221, n. One aspect of the problem was touched in the case of Blackstone v. Miller, at the present term. 188 U. S. 187. The State of Alabama is not bound to make its laws harmonize in principle with those of other States. If property is untaxed by its laws, then for the purpose of its laws the property is not taxed at all. * * * Practically the law before us, in the broad aspect in which alone we are asked to consider it, seems to us to work out substantial justice and equality, if we leave on one side the probable taxation by other States, which does not affect the State of Alabama's rights." See, also, with respect to the United States Constitution, Wright v. Louisville & Nashville R.R. Co., 195 U. S. 219, 25 S. Ct. 16, 49 L. Ed. 167; Hawley v. Malden, 232 U. S. 1, 34 S. Ct. 201, 58 L. Ed. 477, Ann. Cas. 1916C 842; Wright v. Central of Georgia Ry. Co., 236 U. S. 674, 35 S. Ct. 471, 59 L. Ed. 781.

The rules referred to in the cases hitherto discussed are set forth in the text at 51 Am. Jur., Taxation, § 489, p. 498, and § 583, p. 570, and many cases are there cited. The text refers to the annotation beginning at 43 A. L. R. 686, covering "Shares owned by a resident in a foreign corporation as subject of property tax." In the annotation the cases are grouped with respect to various constitutional provisions. At page 691 are cases holding: "Taxing shares of foreign corporations when owned by inhabitants of the state does not deny the owners the equal protection of the laws, because, in the case of domestic corporations, it is the property, and not the shares, which is taxed." On page 693 appear those holding: "The imposition of a property tax upon the shares of a foreign corporation, which are also taxed in the foreign state, owned by a domestic corporation (or resident of the state), does not conflict with the provision of the Federal Constitution providing for the giving of full faith and credit to the public acts of other states." On page 707 appear others stating: "The taxation of shares of stock held by residents of the state in foreign corporations, while exempting from direct taxation shares in domestic manufacturing corporations whose property is taxed by the state, does not violate the provisions of the state Constitution to the effect that all laws must have a uniform operation, and that no citizen shall be granted privileges or immunities not open to all citizens on the same terms, and that the property of all corporations for pecuniary profit shall be subject to taxation the same as that of individuals." A subsequent annotation on the same subject is contained in 48 A. L. R. 997. A review of the many cases cited in the two annotations makes clear that the majority of all the cases are in accord with the rules in the decision of this court in Bute v. Hamilton County, *supra*. Indeed, there appears very little authority to the contrary.

In 84 C. J. S., Taxation, § 36, p. 120, it is stated: "The power to classify for tax purposes is primarily in

the legislature, and not in the courts, and its laws should not be declared invalid unless it clearly appears that they transgress the constitution. So a classification not based on an unreasonable distinction will not be interfered with by the courts, nor will a classification be declared void as unreasonable unless plainly and grossly oppressive and unequal or contrary to common right; and it has been stated that no classification or method of computing taxes is to be held invalid by the courts unless it precludes the assumption that it was made in the exercise of legislative judgment and discretion. It is not necessary that the court perceive the precise legislative reason for the classification; and the legislature is not required to preamble or label its classification for tax purposes, or disclose the principles on which they are made, but it is sufficient if the court, on review, may find them supported by justifiable reasoning."

Here the court is not concerned with the justice, wisdom, or appropriateness of the statute before us. That is the prerogative of the Legislature and not the office of the court. We are asked to overrule Bute v. Hamilton County, *supra,* decided by this court more than 40 years ago, on the basis of which decision the Legislature of this state has acted and relied upon during that period. Moreover, we are urged to do so although that case is in agreement with the decisions of the courts of last resort in most of the other states, which have had the question before them, and of those of the United States.

The appellees in their brief on cross-appeal call our attention to certain cases of this court where other and different statutes classifying property for taxation were declared to have violated the constitutional requirement of uniformity as to class. These statutes and the classifications contained therein are not before us. They do not relate to the separate classification of the stock of foreign corporations and the stock of domestic or domesticated corporations. The case of Bute v. Hamilton County, *supra,* does and in so doing agrees with the

majority of the decisions in other states. This opinion would be unnecessarily extended if those cases having no bearing upon the classification before us were discussed.

We conclude that the errors assigned by the cross-appellants cannot be sustained. It follows that the judgment of the trial court should be and is affirmed.

AFFIRMED.

SPENCER, BOSLAUGH, and SMITH, JJ., dissenting.

We agree that the Nebraska intangible tax upon shares of stock is a property tax upon the owners of the shares and not a tax upon the corporation; that sections 77-706, R. S. Supp., 1963, and 77-722, R. R. S. 1943, provide for the valuation of shares of stock upon the basis of book value, less certain deductions; and that the 1952, 1954, 1960, and 1964 amendments to Article VIII, section 1, of the Constitution of Nebraska, do not affect the determination of these cases. We are unable to agree that section 77-722, R. R. S. 1943, is a valid legislative enactment.

The 1920 amendment to Article VIII, section 1, of the Constitution, authorized taxes uniform as to class to be "levied by valuation" upon intangible property. Valuation should mean actual value or some part thereof. The tax which has been imposed is upon the "actual value" of the shares. § 77-703, R. R. S. 1943. However, both sections 77-706, R. S. Supp., 1963, and 77-722, R. R. S. 1943, provide for a method of valuation by book value. Book value usually has little relation to actual value as is well demonstrated by the record in this case. Where the authority to tax is restricted to a levy by valuation, we believe that it is beyond the power of the Legislature to prescribe artificial methods of valuation.

Sections 77-706, R. S. Supp., 1963, and 77-722, R. R. S. 1943, classify shares of stock for the purpose of valuation according to whether the corporation issuing the stock was a domestic, domesticated, or foreign corporation. Both sections permit the deduction of the actual

value of the property of the corporation in this state. Section 77-706, R. S. Supp., 1963, permits shareholders of domestic and domesticated corporations to deduct the value of all property outside the state; bonds or other obligations issued by the United States of America, its agencies or instrumentalities, or by the state or any municipal or political subdivision; and the value of shares of stock in other domestic or domesticated corporations. As pointed out in the majority opinion, this results in a zero value for the shares of stock in most domestic or domesticated corporations. The stockholders of foreign corporations are not permitted to make these deductions in computing the value of their shares.

So far as the individual shareholder is concerned, we are unable to perceive the real or substantial difference in situation or circumstances between an investment in the shares of a domestic corporation, or particularly the shares of a domesticated corporation, and the shares of a foreign corporation, which will justify a substantial value for taxation upon the shares of stock in the foreign corporation and a zero value for the other shares.

The justification urged for the discrimination against stockholders of a foreign corporation seems to be based upon a theory that the property of domestic and domesticated corporations is located within the state and taxed to the corporations. The assumption that most of the property of domesticated corporations is located within the state and taxed directly to them is not borne out by the record in this case and is unwarranted.

The classification of the stock of domestic and domesticated corporations separate from that of foreign corporations is supposed to alleviate double taxation. Double taxation of corporation property in this state is eliminated by the deduction of the value of all corporation property within the state. The deduction of the value of corporation property outside of the state, which is allowed to the stockholders of domestic and domesticated corporations, is totally unrelated to the double

taxation of corporation property by this state.

In a series of cases, commencing at about the time of the decision in Bute v. Hamilton County, 113 Neb. 230, 202 N. W. 616, and continuing up to this time, this court has insisted that the shares of stock in banking corporations be valued upon the same basis as shares of stock in domestic corporations. It seems to us that the principles involved in those cases are applicable here.

KEVIN LANG, A MINOR, BY JEROME LANG, HIS FATHER AND NEXT FRIEND, APPELLANT, V. GLENN KERR, APPELLEE.
141 N. W. 2d 759

Filed April 8, 1966. No. 36123.

1. **Trial.** A motion for a directed verdict must, for purpose of decision thereon, be treated as an admission of the truth of all material and relevant evidence supporting the position of the party against whom the motion is directed; and such party is entitled to have every controverted fact resolved in his favor and to have the benefit of every inference that can reasonably be deduced from the evidence.
2. **Trial: Appeal and Error.** A verdict of a jury in a law action based upon conflicting evidence will not be disturbed on appeal unless clearly wrong.
3. ———: ———. In determining whether or not there was error in the use of the phrase "the proximate cause" in one instruction, and "a proximate cause" in other instructions, the true meaning will be determined from a consideration of all that is said on the subject.

Appeal from the district court for Lancaster County: BARTLETT E. BOYLES, Judge. Affirmed.

Asa A. Christensen and Kier, Cobb & Luedtke, for appellant.

Healey & Healey, for appellee.

Heard before CARTER, SPENCER, BOSLAUGH, BROWER, SMITH, and MCCOWN, JJ., and KOKJER, District Judge.

KOKJER, District Judge.

This action was brought by Jerome Lang as father and next friend for Kevin Lang, a minor. Defendant was Glenn Kerr, driver of the car in which Kevin was riding on August 19, 1963. An accident occurred when defendant was attempting to pass a truck which turned left in front of him to enter a county road, No. 20. The incident took place on U. S. Highway No. 75 in Minnesota about 2 miles south of the town of Kent.

Plaintiff's motion for a directed verdict on the issue of liability was denied. The case was submitted to the jury. A verdict was rendered for the defendant. Plaintiff's motion for a new trial having been denied, he appealed.

Plaintiff has assigned that the court erred: (1) In overruling his motion for a new trial; (2) in failing to direct a verdict for plaintiff on the issue of damages; (3) in admitting in evidence, over objection, testimony of the mother of plaintiff, who was a passenger in the car, that she did not feel the car was going too fast; (4) in allowing the defendant on cross-examination to give a long and elaborate explanation of his answer pertaining to knowledge of a danger; (5) in refusing to allow the plaintiff to read into evidence from the deposition of defendant his testimony that he recognized that a slow-moving vehicle on an open highway, that is approaching an intersecting road, is usually going to turn; and (6) in giving instruction No. 1 wherein, in summarizing the pleadings, he set out that plaintiff alleged the defendant's acts were "the" proximate cause instead of "a" proximate cause of said collision.

In addition to the defendant driver, there were in the front seat of the car Charlotte Faye Lang, an aunt of the plaintiff, who had been dating defendant, and Joette Lang, her niece. In the back seat were Ramona Lang and her 8-year-old son, Kevin, the plaintiff.

Defendant was taking the others from Cleveland, North Dakota, to Wahpeton, North Dakota, where

they were to meet another friend with whom they were going to ride back to Lincoln, Nebraska. It was a clear day. The highway was dry and level. The accident happened at about 12:40 o'clock p. m. U. S. Highway No. 75 at the accident scene angles slightly from the northwest to the southeast. County road No. 20 joins the highway from the east but does not cross it. The angle between U. S. Highway No. 75 and the county road to the east, formed by the south side of the county road and the east side of U. S. Highway No. 75, is slightly more than a right angle. As defendant, who was driving from the north toward the south, approached the truck which was proceeding south ahead of him, he was driving about 60 miles an hour. The truck was going 15 or 20 miles an hour just before the accident. Defendant pulled into the left lane, looked to the south for approaching traffic, and, seeing that no car was coming from the south, proceeded to pass the truck at about the same speed he had been driving. The truck turned left to go onto the county road. Defendant put on his brakes, laying down a faint skid mark 60 feet, 6 inches long and heavy skid marks 89 feet, 9 inches long. His car was slowed down by the brakes but he estimated it was going 40 to 50 miles per hour—probably closer to 50—when he hit the rear end of the truck. Defendant testified he was looking at the back of the truck and saw no signal nor lights of any kind and no arm signal. On cross-examination, Charlotte Lang, one of plaintiff's witnesses, testified as follows: "Q- Miss Lang, did you see this truck at all? A- Yes. Q- Did you see it—You must have seen it then as Mr. Kerr was approaching the truck in his automobile. Is that correct? A- Well, I think I saw it. I'm not sure. I couldn't really say, for sure. I just remember somebody making some comment to make me look up and realized that we were—that we were going to hit. Q- You saw the truck then? A- I saw the truck then. Q- Was that truck signaling for a turn?

A- I don't remember seeing it signal at all. Q- Isn't it true, Charlotte, that the first thing you said after this accident was, 'He didn't even signal'? A- That's right."

Ramona Lang, a witness for plaintiff, testified in part as follows: "Q- What was your first notice that something was happening? A- I still had my head down. * * * And some startling statement from the front seat made me realize that something unusual was taking place. So, I immediately looked up * * *. Q- What did you see then? A- I saw a truck just beginning to cross over into the left lane. Q- When you say 'cross over,' * * * you noticed it cross the white line down the middle of the highway? A- Yes. A portion of the truck had already entered the front, or, the left lane of the highway. Q- What was taking place with regard to your vehicle at this time? A- We were completely over in the left lane, the passing lane." On cross-examination she again testified that she was looking down until something was said in the front seat that startled her—something to do with the truck turning. She was then asked: "Q- Where was the truck when you saw it? A- The truck was beginning a turn, at an angle; just starting over into the left lane."

The substance of this witness' testimony as to signals was to the effect that, upon hearing the startling statement, she sat up, with her arms resting on the back of the front seat, and could see the truck well; and that she did not see any lights, blinking lights, or any lights at all, or signals of any kind from the truck.

The truck driver testified that when he was ½ mile north of the intersection he was traveling 40 to 45 miles per hour. When he reached a point 400 feet north of the intersection he looked in his rear-view mirror and saw a car over ½ mile behind him, he turned his left blinker light on and started slowing down for a left-hand turn, he heard squealing brakes, and his truck was hit when three-fourths of it was on the county road, headed a little southeast. The patrol officer who inves-

tigated the accident testified the turn signals were in working order except for one on the left rear which was broken in the accident, and that gouge marks and skid marks from defendant's car were all in the east lane of the highway.

For the purpose of decision on plaintiff's motion for a directed verdict on the issue of liability, the district court had to treat as true all material and relevant evidence supporting the position of the defendant and to resolve every controverted fact in his favor, together with every inference that could be reasonably deduced from the evidence. Kipf v. Bitner, 150 Neb. 155, 33 N. W. 2d 518; Stark v. Turner, 154 Neb. 268, 47 N. W. 2d 569.

The court made no error in overruling the motion for a directed verdict.

The jury evidently came to the conclusion that the accident was caused by the truck driver who made no signal, but turned to the left in front of defendant as he was in the act of passing. A verdict of a jury in a law action based upon conflicting evidence will not be disturbed on appeal unless clearly wrong. Burry v. Interstate Transit Lines, 136 Neb. 695, 287 N. W. 66.

Error is assigned to the district court in giving instruction No. 1 wherein, in summarizing the pleadings, it was set out that plaintiff alleged defendant's acts were "the" proximate cause instead of "a" proximate cause of the accident. The last paragraph of this instruction reads as follows: "The foregoing is an abstract or synopsis of the claims and allegations made by the parties to this action, and this summary is made for your convenience and it is, of course, not to be taken as a statement of facts, matters or acts proved by any of the parties except as to admissions specifically made and to which the Court has called your attention." In instruction No. 2 the jury was told that the burden is upon the plaintiff to prove that the alleged negligence of the defendant was "a" proximate cause of the collision. Instruction No. 7 outlined the rule as to liability when the negligence

of two persons combines to produce a single injury, to the effect that if both the defendant and the driver of the second vehicle were negligent, and their combined negligence was "a" proximate cause of plaintiff's injuries, recovery could be had from defendant. The last part of the instruction reads as follows: "* * * but if you find that the defendant, Glenn Kerr, was not negligent or that the sole proximate cause of plaintiff's injuries was the negligence of a driver of a second vehicle, then your verdict would be for the defendant."

Instruction No. 9, which had to do with the measure of damages, begins with this statement: "If you find from a preponderance of the evidence in this case that the negligence of defendant was 'a' proximate cause of such injuries and damages as you find were sustained by plaintiff, you will award plaintiff as damages such an amount as will fairly and reasonably compensate him for any damages which you find from the evidence under these Instructions that he has sustained as a proximate result of the accident."

The true meaning of a set of instructions will be determined from a consideration of all that is said in them and not from picking out and emphasizing one errant word. Myers v. Willmeroth, 151 Neb. 712, 39 N. W. 2d 423; Fridley v. Brush, 161 Neb. 318, 73 N. W. 2d 376.

After Ramona Lang had testified that she had been riding in defendant's automobile for a considerable time, that she drives an automobile, and that she is able usually to feel if the automobile she is in is going too fast, she was asked on cross-examination: "Q- And had you felt the automobile you were in was going too fast on the particular day of this accident?" Over objection that it called for a conclusion, she answered: "I had not felt that we were going at a very fast rate of speed, no." Such testimony on cross-examination was considered in Buie v. Beamsley, 171 Neb. 181, 105 N. W. 2d 738. In the present case there was other evidence fixing

speed. This witness' testimony was to the effect that she did not consider, during the drive on that day, the speed was too fast. This did not add to the evidence on speed but it could not have confused the jury in any way. She was plaintiff's witness and if it was considered important to him to have the witness express herself in miles per hour he could have questioned her further.

Error is also assigned because of the refusal of the district court to permit plaintiff to read the testimony of the defendant from a deposition, to the effect that he recognized that a slow-moving vehicle, in an open highway, that is approaching an intersection, is usually going to turn. Plaintiff was permitted to bring out this testimony from the witness on cross-examination and if there was any error in the earlier ruling it was cured thereby. The explanation made by the witness of this answer was no more than he would have been permitted to do had his testimony been read from the deposition. This assignment of error is not sustained.

The only other complaint made by plaintiff had to do with the court's failure to include, in summarizing plaintiff's petition, one specification of alleged negligence concerning an occurrence some 15 miles or more north of the accident scene. Defendant had started to pass another vehicle but, seeing a car approaching from the opposite direction, braked quickly and was able to get back in his right lane, back of the preceding vehicle, without mishap. Plaintiff was permitted, over objection, to bring this out before the jury, together with the fact that defendant had slept only about 4 hours the night before and that witness Charlotte Lang, who had slept no longer the night before, asked him if he wanted her to drive. The incident was remote. There was no evidence to connect it in any way as a cause of the accident. The court was liberal in permitting the testimony. The court was entirely correct in leaving it out of instruction No. 1.

The case was properly submitted to the jury and its verdict, based upon conflicting evidence, will not be disturbed. The judgment is affirmed.

AFFIRMED.

ELMER STOLTENBERG, DOING BUSINESS AS STOLTENBERG CABINET SHOP, ET AL., APPELLEES, V. STEPHEN F. CAFFREY ET AL., APPELLANTS, IMPLEADED WITH THE EQUITABLE BUILDING & LOAN ASSOCIATION, A CORPORATION, ET AL., APPELLEES.

141 N. W. 2d 458

Filed April 8, 1966. No. 36156.

1. **Mechanics' Liens.** A subcontractor who performs labor or furnishes materials for any of the purposes mentioned in section 52-101, R. R. S. 1943, may file a mechanic's lien therefor within 3 months from the performance of labor or the furnishing of the materials, as provided by section 52-102, R. R. S. 1943.
2. ———. The burden of proof is upon one claiming a mechanic's lien to show that the labor performed, or the materials furnished, were performed or furnished within 3 months prior to the filing of a claim of lien; otherwise the purported lien is not enforcible.
3. ———. Materials or labor furnished a contractor for the purpose of replacing defective material previously furnished, or correcting construction defects, are the subject of a new and separate agreement between the general contractor and the subcontractor, and do not operate to extend the time for filing a mechanic's lien.

Appeal from the district court for Hall County: DONALD H. WEAVER, Judge. Reversed and remanded with directions.

Wagoner & Grimminger, for appellants.

Richard L. DeBacker, for appellee Johnson Cashway Lumber Co.

Kelly & Kelly, for appellee Herman.

Heard before CARTER, SPENCER, BOSLAUGH, BROWER, SMITH, and MCCOWN, JJ., and KUNS, District Judge.

CARTER, J.

This action was commenced by three mechanic's lienholders to foreclose their liens on Lot 22, Block 1, Knickrehm's Fourth Addition to the City of Grand Island, Hall County, Nebraska, belonging to the defendants Stephen F. Caffrey and Maxine D. Caffrey as joint tenants. In addition to the owners, eight lienholders were also made parties defendant. The Johnson Cashway Lumber Company, a corporation, and Albert A. Herman, doing business as Herman Plumbing Company, filed answers and cross-petitions. By their cross-petitions the two answering defendants prayed for the foreclosure of mechanic's liens claimed by them. After trial the district court rendered judgment for Johnson Cashway Lumber Company for $2,654.94 and interest, and for Herman Plumbing Company for $1,382.26 and interest. From these two judgments the defendants Caffrey appeal.

On June 14, 1960, the defendants Caffrey entered into a contract with Leo G. Wissing, a general construction contractor, for the construction of a home, the general contractor to furnish all labor and materials in accordance with written specifications. Wissing purchased materials from Johnson Cashway Lumber Company in the amount of $2,654.94 for which he did not pay. On May 16, 1961, Johnson Cashway Lumber Company filed a mechanic's lien on the property. By its cross-petition in this action it seeks a foreclosure of the mechanic's lien.

It is the contention of the Caffreys that the mechanic's lien was not filed within 3 months after the completion of the work, as required by section 52-102, R. R. S. 1943, and that the purported lien is therefore not enforcible. As the mechanic's lien was filed for record on May 16, 1961, the work should have been completed by February 16, 1961, to bring the lien within the statute.

Materials were first purchased for the new residence on August 1, 1960. The last item is shown as February 27, 1961. It is contended by the Caffreys that they moved into the new home on February 2, 1961, and that it was wholly completed at that time. This raises the issue as to whether or not charges made after February 16, 1961, were for materials used in the construction of the home and sufficient to bring the date of May 16, 1961, within the 3-month period from the completion of the work, as the statute requires.

The following invoices are in question: No. 3658 for $0.62, dated February 17, 1961, signed by Clyde Buhrman; No. 3991 for $3 dated February 22, 1961, signed by Clyde Buhrman; No. 3934 for $12.90, dated February 22, 1961, signed by Leo Wissing; No. 4001 for $2.40, dated February 22, 1961, signed by Leo Wissing; No. 4097 for $17.14, dated February 23, 1961, signed by Clyde Buhrman; No. 4073 for $12.15, dated February 23, 1961, signed by Leo Wissing; No. 4111 for $3.28, dated February 23, 1961, signed by Clyde Buhrman; and No. 4333 for $1.78, dated February 27, 1961, signed by Conrad Buhrman.

The materials listed in the foregoing invoices were sold to Leo G. Wissing, the general contractor, and were picked up and signed for at the Johnson Cashway Lumber Company place of business by Wissing or his two employees Clyde Buhrman and Conrad Buhrman. The only information the Johnson Cashway Lumber Company had that the materials were for the Caffrey house were furnished by the persons ordering and taking the material from the lumber yard. There is no evidence by anyone, including that of Wissing, that these materials were delivered to the premises or used in the construction of the Caffrey residence.

Stephen F. Caffrey testified that he entered into the contract for the construction of the house with Wissing on June 14, 1960; that he watched the construction of the house closely; and that he moved into the completed

house on February 2, 1961. He said that everything was completed except for some plumbing and painting in which Johnson Cashway Lumber Company was not involved. Invoice No. 3991 shows the purchase of 50 metal siding corners. These were in place and painted when the first coat of paint was applied in December 1960. Invoice No. 3934 shows a charge for 3 roof louvers. The evidence shows that these were in place on the roof when the Caffreys moved into the house on February 2, 1961. Invoice No. 4097 shows the purchase of board lumber and coving. The evidence shows that no board lumber was used in the home after February 2, 1961, and that the coving was in the basement and ready for installation on that date. Invoice No. 4073 shows a charge for 3 door jambs. The evidence shows that all doors were hung and in place on February 2, 1961, complete with door jambs. Other questioned invoices were for nails and small items that could be used generally and could not be identified as used in the Caffrey house.

The evidence shows that Wissing was engaged in constructing more than one house during the period here in question. No witness was able to say that the materials purchased by Wissing after February 16, 1961, were delivered to the premises or used in the construction of the home. The testimony of the Caffreys and their witnesses refutes any implications that it was so used. The trial court was in error in sustaining the mechanic's lien. It was filed out of time and is not enforcible.

Albert H. Herman, doing business as Herman Plumbing Company, claims a mechanic's lien for materials furnished and labor performed. The evidence shows that Herman entered into a contract with Wissing, the general contractor, to furnish the plumbing materials and perform the labor of installing the plumbing fixtures in the Caffrey home. He alleges he performed his contract and, not being paid therefor, filed a mechanic's lien on May 23, 1961.

The general contract was entered into on June 14,

1960. The contract provided that Wissing would install one 40-gallon water heater guaranteed for 10 years and rough-in for a basement stool without fixtures. In the subcontract between Herman and Wissing it was provided that Herman would install a 30-gallon water heater and the rough-in for the basement stool without fixtures was not mentioned.

Herman began furnishing materials and labor on October 24, 1960. The last item was furnished on April 4, 1961. The lien was filed on May 23, 1961. Consequently, the work should have been completed on or after February 23, 1961, if the mechanic's lien was filed within the time provided by section 52-102, R. R. S. 1943. The last work performed prior to April 4, 1961, was on February 4, 1961. Herman testified that the plumbing work was completed in accordance with his contract with Wissing on February 4, 1961.

The Caffreys moved into their new home on February 2, 1961. A few days thereafter Maxine Caffrey called Herman's attention to the fact that the water heater was a 30-gallon instead of a 40-gallon one and that the roughing-in for a basement stool had not been done. Herman told her he would talk to Wissing about it, since it was not required by his contract, which he did. Wissing directed him to put in a 40-gallon water heater and to rough-in the basement stool. On April 4, 1961, Herman roughed-in the basement stool and made a charge of $43.69 therefor, and installed a 40-gallon water heater in place of the 30-gallon one and made a charge of $15 for the larger heater. It is contended that the doing of this work and the furnishing of the materials has the effect of extending the time for filing the mechanic's lien under the subcontract with Wissing.

It is clear from the evidence that Herman had completed the work and furnished the materials under his subcontract on February 4, 1961. The materials furnished and work performed on April 4, 1961, were pursuant to a new agreement between Herman and Wissing

on matters not within the original contract.

The applicable rule is: "The mechanics' lien law does not enable a materialman or laborer to tack one contract to another by filing one statement which secures a lien for material and labor furnished under one contract, and at the same time secure a lien for material and labor under another contract as to which he has not complied with the statute." Patterson v. Spelts Lumber Co., 166 Neb. 692, 90 N. W. 2d 283. See, also, Rivett Lumber & Coal Co. v. Linder, 113 Neb. 567, 204 N. W. 77.

"Materials furnished a contractor for the purpose of replacing defective material previously furnished, or correcting construction defects, are the subject of a new and separate contract between the contractor and subcontractor, and do not operate to extend the time for filing a mechanic's lien." Lofholm v. Stoltenberg, 178 Neb. 318, 133 N. W. 2d 387. See, also, Davidson v. Shields, 129 Neb. 877, 263 N. W. 490.

Herman completed the work and furnished the materials on his subcontract with Wissing on February 4, 1961. He had until May 4, 1961, to file his claim of lien. This he did not do and his claim of lien therefor cannot be sustained. His claim of lien for materials furnished and labor performed on April 4, 1961, in the amount of $58.69 is valid, and a decree of foreclosure should be entered for that amount.

The judgment of Johnson Cashway Lumber Company is reversed and the cause remanded with directions to dismiss its cross-petition. The judgment of Herman Plumbing Company is reversed and the cause remanded with directions to foreclose its claim of lien in the amount to $58.69 only.

REVERSED AND REMANDED WITH DIRECTIONS.

CARL EBBERSON ET AL., APPELLEES, V. SCHOOL DISTRICT NO. 64 OF CEDAR COUNTY, NEBRASKA, APPELLANT.
141 N. W. 2d 452

Filed April 8, 1966. No. 36161.

1. **Schools and School Districts.** A school district having no territorial integrity may not maintain an action involving a change of the boundaries of the school district.
2. **Pleading: Appeal and Error.** If the want of legal capacity to sue is not raised by demurrer or answer in the trial court, it is waived and cannot be considered on appeal.
3. **Constitutional Law: Schools and School Districts.** De Jonge v. School Dist. of Bloomington, 179 Neb. 539, 139 N. W. 2d 296, is controlling on the issues raised herein as to the constitutionality of section 79-403 (2), R. S. Supp., 1963.
4. **Appeal and Error.** An issue not presented in the trial court may not be raised for the first time in the Supreme Court.

Appeal from the district court for Cedar County: JOHN E. NEWTON, Judge. Affirmed.

Ginsburg, Rosenberg, Ginsburg & Krivosha and David W. Curtiss, for appellant.

Duane K. Peterson, for appellees.

Heard before CARTER, SPENCER, BOSLAUGH, BROWER, SMITH, and MCCOWN, JJ., and BURKE, District Judge.

SPENCER, J.

This is an appeal from the granting of an application to transfer land from School District No. 64 of Cedar County, Nebraska, a nonaccredited high school district, to School District No. 41-R of Cedar County, a fully accredited high school district, in a proceeding filed under subsection (2) of section 79-403, R. S. Supp., 1963.

The appeal is perfected by School District No. 64, hereinafter designated as appellant. Carl Ebberson and Frances Ebberson, hereinafter referred to as appellees, raise the question of the legal capacity of the appellant to appeal. We have held that a school district having no territorial integrity may not maintain an action involving a change of boundaries of the school district.

Board of Education v. Winne, 177 Neb. 431, 129 N. W. 2d 255. However, appellees' objection was not raised in the trial court but is asserted in this court for the first time. In Hinze v. School Dist. No. 34, 179 Neb. 69, 136 N. W. 2d 434, we held that when the question of want of legal capacity to sue is not raised by demurrer or answer in the trial court, it is waived and cannot be considered on appeal.

This case was tried on a stipulation of facts. There is no question the appellees meet all of the criteria set out in section 79-403 (2), R. S. Supp., 1963, to entitle them to the transfer of their property from a nonaccredited high school district to an accredited high school district.

Appellant's amended answer raised two issues. The first is a plea of res judicata, which is not raised in this appeal and has been abandoned. The second issue concerns the constitutionality of section 79-403 (2), R. S. Supp., 1963.

While this appeal was pending herein, we filed the opinion in De Jonge v. School Dist. of Bloomington, 179 Neb. 539, 139 N. W. 2d 296. We there determined the identical issues raised by appellant in the district court adverse to its contention, and held section 79-403 (2), R. S. Supp., 1963, to be a constitutional enactment. De Jonge v. School Dist. of Bloomington, *supra,* is controlling on the issue of the constitutionality of section 79-403 (2), R. S. Supp., 1963.

Appellant's assignments of error in this court only inferentially question the constitutionality of section 79-403 (2), R. S. Supp., 1963, but in several specific assignments appellant attempts to raise the constitutionality of section 79-1247.02 (2), R. R. S. 1943, on the theory that it is the statute providing the procedure for accreditation.

Appellant argues that since section 79-403 (2), R. S. Supp., 1963, makes detachment of school lands dependent upon the fact of accreditation, that accreditation becomes determinative of the ability to detach one's real

estate from a school district, and that it is therefore proper for appellant to inquire whether the accreditation procedure is in conformance with constitutional requirements. The difficulty with appellant's position is that the constitutionality of section 79-1247.02 (2), R. R. S. 1943, was not pleaded, considered, or raised in any manner in the district court, nor is it raised in any manner in the appellant's motion for new trial. The constitutionality of section 79-1247.02 (2), R. R. S. 1943, is raised for the first time in this court on appeal. It therefore is not before us for determination. The rule is well established that an issue not presented in the trial court may not be raised for the first time in the Supreme Court. Jones v. Village of Farnam, 174 Neb. 704, 119 N. W. 2d 157.

For the reasons given, we determine there is no merit to appellant's assignments, and the judgment herein is affirmed.

AFFIRMED.

IN RE PROCEEDINGS FOR THE MERGER OF VARIOUS SCHOOL DISTRICTS IN THE COUNTY OF SALINE AND IN THE COUNTY OF GAGE, STATE OF NEBRASKA.

SCHOOL DISTRICT OF WILBUR, COUNTY OF SALINE, STATE OF NEBRASKA, ET AL., APPELLEES, V. ARNOLD PRACHEIL ET AL., APPELLANTS.

141 N. W. 2d 768

Filed April 8, 1966. No. 36190.

1. **Schools and School Districts: Appeal and Error.** Any person adversely affected by the changes made by the county superintendent under section 79-402, R. S. Supp., 1963, may appeal to the district court of any county in which the real estate or any part thereof involved in the dispute is located. If the real estate is located in more than one county, the court in which the appeal is first perfected shall obtain jurisdiction to the exclusion of any subsequent appeal.
2. **Appeal and Error.** When the Legislature enacts a law pro-

viding for an appeal without providing the procedure therefor, the procedure for appeal to the district court shall be the same as for appeals from the county court to the district court in civil actions. Trial in the district court shall be de novo upon the issues made up by the pleadings in the district court. § 25-1937, R. R. S. 1943.

3. ———. The term "appeal" as used in section 25-1937, R. R. S. 1943, is a process of civil law origin, and removes the cause entirely, subjecting the fact as well as the law to a review and retrial. It is, in fact, granting a new trial upon the same issue in the district court.

4. **Schools and School Districts: Appeal and Error.** The undertaking required in an appeal from the order of the county superintendent under section 79-402, R. S. Supp., 1963, is a cost bond and not a supersedeas.

Appeal from the district court for Saline County: BARTLETT E. BOYLES, Judge. Reversed and remanded with directions.

Jerry L. Snyder, for appellants.

Clarence C. Kunc and Perry & Perry, for appellees.

Heard before CARTER, SPENCER, BOSLAUGH, BROWER, SMITH, and MCCOWN, JJ., and BURKE, District Judge.

SPENCER, J.

This is an appeal from the sustaining of a motion to dismiss appellants' appeal from the order of the county superintendents of schools of Saline and Gage Counties. The appellants are Arnold Pracheil, Adolph H. Svancara, Harvey Ebbers, Emma Vales, Leonard Karl, and Russell H. Dunn. They will hereinafter be referred to as appellants.

Proceedings for the merger of school districts Nos. 3, 4, 5, 9, 34, 51, 73, 75, 78, 79, 87, 88, 93, 97, 106, and 120 in Saline County, and school district No. 155 in Gage County, with school district No. 82 in Saline County, under section 79-402, R. S. Supp., 1963, were instituted before the county superintendents of schools by the filing of petitions signed by 520 legal voters residing in the 18 school districts. A hearing was held thereon in

Saline County on March 22, 1965, and the matter was taken under submission. On March 24, 1965, an order was entered granting the petitions and effecting the changes in the district boundaries of all of the districts except school districts Nos. 75, 87, and 88 of Saline County. The petitions as to those three districts were dismissed.

Appellants filed a notice of appeal with the county superintendent of Saline County, and also an undertaking, which was approved by both county superintendents, and requested a transcript of the proceedings, which was filed in the district court for Saline County. The certificate is dated April 21, 1965. No filing stamp appears on the transcript, but we assume it was filed April 21, 1965, which is within the time required for perfecting an appeal. On April 27, 1965, school district No. 82 and Kenneth Reid, a taxpayer, legal voter, and chairman of the board of education of school district No. 82, who will hereinafter be designated as appellees, filed a motion to dismiss said appeal for 11 specific reasons, which we summarize as follows: (1) Said proceedings were not perfected as required by law; (2) no petition in error has been filed; (3) no transcript of the evidence has been provided or prepared; (4) all necessary parties are not brought before the court by the purported proceedings; (5) parties who are not necessary parties and have no interest in the proceedings on appeal are purportedly made parties, and there is a misjoinder of parties; (6) no transcript was filed within 1 month from the entry of the order of the county superintendents; (7) no petition in error was filed within 1 month; (8) all of the parties who filed the respective petitions are not made parties to the proceedings; (9) the designation purportedly made by the appellants of parties is erroneous; (10) the proceedings held before the county superintendents of schools were not a civil action but were a determination of the property rights and an appeal was not permitted; and (11) the proceedings had before the

county superintendents were not by their nature adversary proceedings, and the statutory provisions relative to appeal as to civil actions or adversary proceedings have no application herein.

The trial judge found generally for the appellees and sustained the motion to dismiss, but did not particularize in any way which of the questions raised by appellees he considered controlling. From appellees' brief, we consider their position to be that the appeal must be dismissed for the following reasons: (1) Appeal is not a proper remedy; (2) review may only be had by petition in error; (3) the parties plaintiff, who are the signers of the various petitions, must be listed and be served with process; (4) defect of parties; (5) a transcript of the evidence must be filed with a transcript of the proceedings; and (6) the gross inadequacy of the bond.

Previous to 1963, review of proceedings under section 79-402, R. S. Supp., 1961, was limited to proceedings in error. However, this section was amended by Legislative Bill 284. Laws 1963, c. 473, p. 1518. L. B. 284 added the following provisions, among others, to the statute: *"Provided,* that any person adversely affected by the changes made by the county superintendent may appeal to the district court of any county in which the real estate, or any part thereof, involved in the dispute is located. * * * If the real estate is located in more than one county, the court in which an appeal is first perfected shall obtain jurisdiction to the exclusion of any subsequent appeal." § 79-402, R. S. Supp., 1963.

There can be little doubt but that the statute was amended to remedy the difficulty suggested by the very questions appellees now attempt to raise. The obvious legislative intent was to simplify the review procedure. This conclusion is irrefutable when we consider that this provision was a Judicial Council proposal, offered to specifically provide for an appeal.

The Judicial Council also suggested Legislative Bill 277 (Laws 1963, c. 138, p. 515) to the 1963 Legislature to

provide the procedure for appeal where the statute confers a right to appeal but fails to prescribe the procedure. L. B. 277, which is now section 25-1937, R. R. S. 1943, prescribes not only the manner of taking an appeal to the district court but also provides how the appeal shall be considered. Section 25-1937, R. R. S. 1943, is as follows: "When the Legislature enacts a law providing for an appeal without providing the procedure therefor, the procedure for appeal to the district court shall be the same as for appeals from the county court to the district court in civil actions. Trial in the district court shall be de novo upon the issues made up by the pleadings in the district court. Appeals from the district court to the Supreme Court shall be taken in the same manner provided by law for appeals to the Supreme Court in civil cases and shall be heard de novo on the record."

Section 25-1937, R. R. S. 1943, is a complete answer to most of the questions raised by appellees. Appellees contend that while appellants have a right to be heard in the court of last resort, their remedy must be by proceedings in error. They argue as follows: "It appears clear that for this type of special proceeding the provisions of justice court appeal or actions between adversary parties are ineffectual to comply with the mandate of the statute and to advise parties to school petitions for merger that they are involved in litigation as litigants." The obvious answer to appellees' argument is that the statute now provides otherwise. While it may be restating the obvious, we suggest there is a clear distinction made in our Code of Civil Procedure between proceedings by petition in error and by appeal.

As to appellees' contention that all petitioners must be advised that they are involved in litigation as litigants, the filing of their petitions initiating the procedure which resulted in the hearing before the county superintendents accomplished that result. When the provisions of section 79-402, R. S. Supp., 1963, which require a notice

of hearing by the county committees and again by the county superintendents of schools, were complied with, jurisdiction was acquired on everyone to be affected by the proceeding. The appeal to the district court is essentially a new trial of the proceeding the 520 signers of the petitions initiated. Those concerned are bound to know that any dissatisfied legal voter had the privilege to appeal any order entered by the county superintendents to the district court. The filing of the notice of appeal was notice to all concerned that the question was to be presented to the district court by appeal.

Appeals from the county court to the district court in civil actions are provided for in section 24-544, R. R. S. 1943. It will be noted that it is to be "* * * in the manner as provided by law in cases tried and determined by justices of the peace." This procedure is found in Chapter 27, article 13, R. R. S. 1943.

Section 27-1302, R. R. S. 1943, provides the party appealing shall enter into an undertaking to the adverse party in double the amount of the judgment and costs within 10 days from the rendition of the judgment. Appellants entered into an undertaking in the amount of $100, conditioned as required by the statute. This undertaking was approved by both county superintendents on April 1, 1965, and was filed within the 10 days. Appellants filed a praecipe with the county superintendents of Saline and Gage Counties, as follows: "TO: BERNARD J. KLASEK, COUNTY SUPERINTENDENT OF SCHOOLS OF SALINE COUNTY, NEBRASKA; and LYLE B. HUNKINS, COUNTY SUPERINTENDENT OF SCHOOLS OF GAGE COUNTY, NEBRASKA.

"You are hereby requested to prepare a transcript of the proceedings had before the Board consisting of Bernard J. Klasek, County Superintendent of Schools of Saline County, Nebraska, and Lyle B. Hunkins, County Superintendent of Schools of Gage County, Nebraska, upon which an Order was entered by said Board on the 24th day of March, 1965, entitled, 'ORDER GRANTING

THE PETITION AND EFFECTING THE CHANGES IN THE DISTRICT BOUNDARIES, EXCEPTING AS TO SCHOOL DISTRICT NUMBER 75, OF SALINE COUNTY, NEBRASKA, SCHOOL DISTRICT NUMBER 87, OF SALINE COUNTY, NEBRASKA, AND SCHOOL DISTRICT NUMBER 88, OF SALINE COUNTY, NEBRASKA, AND DISMISSING THE PETITIONS AS TO SAID THREE LAST NAMED SCHOOL DISTRICTS'; said transcript should contain all entries made upon the docket the court filed therein, and the original of all papers filed in said proceedings."

A transcript of the proceedings was prepared and filed in the district court within 30 days, as required by section 27-1303, R. R. S. 1943. To appellees' contention that indispensable parties are not before the court, we suggest that the filing of the transcript transferred the proceedings to the district court for a trial de novo on the record made by the pleadings in the district court.

Section 27-1305, R. R. S. 1943, provides the parties shall retain the same status in the district court as they had in the tribunal below, so that the appellants here are defendants in the district court. Section 27-1306, R. R. S. 1943, provides that the plaintiff in the tribunal below shall within 50 days from the date of the judgment below file a petition, as required in civil cases in the district court, and that answer shall thereafter be filed and issue joined as in cases commenced in the district court.

It would appear to us that the appellants took every necessary step to perfect an appeal from the order of the county superintendents to the district court. It then became the burden of those interested in sustaining the order entered by the county superintendents to file a petition in the district court to effect that result.

Appellees insist that appellant should have filed a transcript of the testimony before the county superintendents. We do not understand that to be a requirement herein. The statute is clear that in an appeal from an

inferior tribunal to the district court, trial in the district court shall be de novo upon the issues made up by the pleadings in the district court. § 25-1937, R. R. S. 1943. The term "appeal" has on occasions been used as a generic term for all forms of rehearing, but as used in section 25-1937, R. R. S. 1943, we determine it to be used as the term is defined in Western Cornice & Mfg. Works v. Leavenworth, 52 Neb. 418, 72 N. W. 592. "Appeal" is a process of civil law origin and removes the cause entirely, subjecting the fact as well as the law to a review and retrial. It is, in fact, granting a new trial upon the same issue in a higher court. It is, therefore, incumbent upon those interested in sustaining the order entered by the county superintendents to file a petition within 50 days from the entry of the order by the county superintendents.

Appellees argue that no jurisdiction should attach herein because of the gross inadequacy of the bond. It is their contention that a proper bond should be in the amount of at least $150,000 rather than for a nominal amount. What has been said heretofore should be a sufficient answer to this contention. The bond required in this proceeding is merely a cost bond and is not a supersedeas. The bond filed and approved herein is in excess of the minimum bond required by section 27-1302, R. R. S. 1943, and the appeal is not subject to a motion to dismiss for its alleged inadequacy. If the bond is in fact inadequate as a cost bond, appellees are not without remedy.

For the reasons given above, the sustaining of appellees' motion to dismiss and the dismissal of appellants' appeal was erroneous. The judgment of the district court is reversed and the cause is remanded with directions to reinstate appellants' appeal and for further proceedings in harmony with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

AGNES WAAK, THROUGH AND BY HER DAUGHTER AND NEXT FRIEND, RACHEL MULLER, APPELLANT, V. NATIONAL BANKERS LIFE INSURANCE COMPANY, APPELLEE.
141 N. W. 2d 454

Filed April 8, 1966. No. 36206.

1. Insurance. Whether or not a certain institution is a hospital within the coverage of an insurance policy, or a convalescent home within the exclusionary clause, is solely a question of law.
2. ———. A hospitalization insurance policy providing indemnity while confined as a bed patient in a specified type hospital, and excluding a convalescent home from coverage, relates to the place of treatment and care and not to the type or degree of care required.
3. ———. The care of a patient, even though convalescent in nature, rendered by a qualified and licensed hospital, is within the terms of an insurance policy providing coverage to an insured required to be confined as a bed patient within a regularly licensed hospital.
4. ———. A policy of insurance will be given effect according to the ordinary sense of the terms used, and if they are clear they will be applied according to their plain and ordinary meaning.
5. ———. The language of a policy of insurance should be considered, not in accordance with what the insurer intended the words to mean, but what a reasonable person in the position of the insured would have understood them to mean.
6. ———. When an insurance contract prepared by the insurer contains provisions reasonably subject to different constructions, one favorable to it and one favorable to insured, the construction favorable to insured will be adopted.

Appeal from the district court for Dodge County: ROBERT L. FLORY, Judge. Reversed and remanded.

Homer E. Hurt, Jr., and Eugene R. Retz, for appellant.

Richards, Yost & Schafersman, for appellee.

Heard before CARTER, SPENCER, BOSLAUGH, BROWER, SMITH, and MCCOWN, JJ., and BURKE, District Judge.

CARTER, J.

This is an action to recover benefits under an insurance policy indemnifying the insured for losses as speci-

fied therein, caused by accidental bodily injuries or sickness. The defendant answered and denied generally the allegations of plaintiff's petition. Defendant subsequently filed a motion for summary judgment which the trial court sustained. Plaintiff has appealed from the sustaining of the motion for summary judgment and the dismissal of her petition.

On December 3, 1955, the defendant issued its policy of insurance to the plaintiff, insuring her against specified losses caused by accident or sickness. All premiums were paid until November 18, 1963, at which time defendant terminated the policy. On June 26, 1963, plaintiff was confined by illness within the Dodge County Memorial Hospital. The defendant made the following payments under the insurance policy: September 9, 1963, $300.25; October 28, 1963, $185; December 10, 1963, $370; a total of $855.25. Plaintiff alleges that $1,525 remains due and unpaid for which defendant admits that claims have been timely filed.

The insurance policy contains the following provisions: "If such injury or such sickness requires the Insured or any member of the Family Group to be confined as a bed patient within a regularly incorporated or licensed hospital recognized as such by the American Hospital Association, the American Medical Association or the American Osteopathic Association (except sanitoriums, convalescent homes, health resorts, charitable institutions or hospitals which are agencies of the Federal Government), while this policy is in force, the Company will pay, as a result of any one disability, the Insured (or the Hospital, if authorized by the Insured to do so) for the following items of hospital expense actually incurred, but not to exceed the amounts stated below: (a) Hospital Room, including meals and general nursing care not to exceed $10.00 per day and not to exceed 365 days as the result of any one disability." Other scheduled expenses for which the company agrees to pay are then listed, which are not material to the present appeal.

Plaintiff entered the hospital on June 26, 1963, suffering from Parkinson's Disease. She remained in the acute section of the hospital until July 26, 1963, when she was removed into another part of the hospital building designated in the record as the Annex, where she still remained at the time of trial. It is the contention of the insurance company that the Annex is a convalescent home within the exclusionary provision heretofore quoted from the policy and for this reason refused payment on plaintiff's claims covering the period she was occupying the Annex. It was stipulated that plaintiff has been paid the amounts due under the policy for the time she was a patient in the acute section of the hospital. The only issue raised by the appeal is whether or not the Annex is a hospital or a convalescent home within the provisions of the insurance policy.

The Dodge County Memorial Hospital is owned and operated by Dodge County. It is under a single roof, although it has different departments or sections used for specific purposes. It has one board of directors of three members and one administrator who superintends the whole operation. All accounts are paid at a central office and admissions and discharges are handled in the same office. The hospital is licensed by the state as a hospital under a single license. Although convalescent homes are required to be licensed in this state, the Dodge County Memorial Hospital does not have, nor is it required to have, such a license.

The method of operating the facility is shown in the evidence of Lloyd N. Hermanson, the hospital administrator charged with the management of the institution. He testified that the hospital provides two general degrees of care, the acute care in one portion and convalescent care in the other. There is evidence that the part referred to as the Annex resembles a convalescent home, according to the care it provides. But we think the policy refers to places where care is provided rather than to the service given to the patient. In other words,

the policy contract provides for care provided by a qualified hospital and excludes that provided by sanitoriums, convalescent homes, health resorts, charitable institutions, or hospitals operated by the federal government. While it may be, and is apparently true, that the type of service rendered in the Annex is similar to that rendered by some of the excluded facilities, this is not a controlling factor. If the care is given by a hospital qualified under the terms of the policy, and it is not questioned that Dodge County Memorial Hospital is so qualified, the basis of liability under the terms of the insurance policy exists.

In interpreting a policy of insurance it will be given its ordinary meaning. It should be construed to give effect to the intent of the parties at the time it was made. Garrelts v. Department of Motor Vehicles, 176 Neb. 220, 125 N. W. 2d 678; Koehn v. Union Fire Ins. Co., 152 Neb. 254, 40 N. W. 2d 874. In the last-cited case this court said: "An insurance policy should be construed as any other contract to give effect to the intent of the parties at the time it was made. The language should be considered not in accordance with what the insurer intended the words to mean, but what a reasonable person in the position of insured would have understood them to mean. If the contract was prepared by the insurer and contains provisions reasonably subject to different interpretations, one favorable to the insurer and one advantageous to the insured, the one favorable to the latter will be adopted."

The insurance company wrote the policy in the instant case. Admittedly, an argument can be made in support of each of the claimed interpretations here made. Under the circumstances shown, the court should construe the policy against the insurance company.

The same question arose in Rew v. Beneficial Standard Life Ins. Co., 41 Wash. 2d 577, 250 P. 2d 956, 35 A. L. R. 2d 891. It was therein held that the question, of whether or not Valley View Convalescent Home involved in that

case was a hospital within the coverage of the policy, was one of law. It was there held that the convalescent home, although performing some services usually performed in hospitals, was not a hospital but was a convalescent home within the exclusionary clause of the policy. The effect of this holding is that it is not the service performed that determines the question, but rather the place where it is performed that determines the issue of liability. In the instant case, the service was performed in the Dodge County Memorial Hospital and not in a sanitorium, convalescent home, health resort, charitable institution, or hospital operated by the federal government as those terms are used in the exclusionary terms of the policy. If the insurance company had intended to exclude any room, section, or department of a recognized and licensed hospital from the coverage of the policy, it could have so provided in clearly expressed terms. We think it is a reasonable construction of the policy to say that the coverage includes all services rendered by a licensed hospital, and does not include services rendered by other institutions, private or public, that were specifically named in the exclusionary provision of the policy.

We conclude that the trial court was in error in holding that the plaintiff was being cared for after July 26, 1963, in a convalescent home within the meaning of the contract of insurance. The judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

E. E. ERDMAN, APPELLANT, V. NATIONAL INDEMNITY COMPANY, A CORPORATION, APPELLEE.
141 N. W. 2d 753

Filed April 8, 1966. No. 36212.

1. **Affidavits: Pleading.** An affidavit may be used to verify a

pleading, to prove the service of a summons, notice, or other process in an action, to obtain a provisional remedy, an examination of a witness, a stay of proceedings, or upon a motion, and in any other case permitted by law. § 25-1244, R. R. S. 1943.

2. **Affidavits: Process.** An affidavit may be used to impeach an officer's return on the service of a summons.
3. **Trial.** It is within the discretion of the district court to take testimony orally for the determination of issues of fact arising upon motions, and not a right of either party to compel the adduction of such testimony.
4. **Process.** It is essential to the integrity and permanency of judicial records that the return of an officer, which is a part of the judicial record in a case, be impeached only by clear and convincing evidence.
5. **Corporations: Process.** A summons against a corporation may be served upon the president, mayor, chairman of the board of directors or trustees, or other chief officer; or, if its chief officer is not found in the county, upon its cashier, treasurer, secretary, clerk, or managing agent; or, if none of the aforesaid officers can be found, by a copy left at the office or last usual place of business of such corporation. When the defendant is a foreign corporation, having a managing agent in this state, the service may be upon such agent. § 25-511, R. R. S. 1943.
6. **Process.** Statutes prescribing the manner of service of summons are mandatory and must be strictly pursued.

Appeal from the district court for Douglas County: FRANK G. NIMTZ, Judge. Affirmed.

Haney, Walsh & Wall, for appellant.

Gross, Welch, Vinardi, Kauffman & Schatz, for appellee.

Heard before CARTER, SPENCER, BOSLAUGH, BROWER, SMITH, and MCCOWN, JJ., and KUNS, District Judge.

SPENCER, J.

This is an appeal from the dismissal of the action after the overruling of a motion to reconsider an order sustaining a special appearance. This motion was filed after we dismissed a previous attempt to appeal from the sustaining of a special appearance for lack of an appealable order. See Erdman v. National Indemnity Co., 178 Neb. 312, 133 N. W. 2d 472.

E. E. Erdman, hereinafter referred to as plaintiff, filed this action against National Indemnity Company, hereinafter designated as defendant, on April 1, 1963, and on the same day a summons was issued and delivered to the sheriff of Douglas County for service. Purported service was made by J. D. Marino, deputy sheriff, who will hereinafter be referred to as Marino. Marino's return, so far as material herein, is as follows: "Received this writ on the 1st day of April 1963 and served the same on the 2nd day of April 1963 on the within named NATIONAL INDEMNITY COMPANY, A CORPORATION: by delivering to Dale Burns, Managing Agent, personally in Douglas County, Nebraska, a true and duly certified copy of this writ with all the endorsements thereon.

"He being in charge at the usual place of doing business of such named company in said county, and, No President, Mayor, Chairman of the Board of Directors or Trustees or other Chief Officer of said Corporation being found in Douglas County, State of Nebraska."

Defendant thereafter appeared specially for the sole purpose of objecting to the jurisdiction of the court for the reason that no proper and sufficient service of process had been made upon it. This special appearance was supported by the affidavits of Marguerite White, defendant's receptionist and switchboard operator; Dale Burns, upon whom the purported service was made; and Jack D. Ringwalt, defendant's president. We will hereinafter refer to them by their family names.

We summarize these affidavits as follows: White deposed that her desk and switchboard are immediately inside the main entrance of the defendant's place of business. On the morning of April 2, 1963, Marino came to her desk and stated, "I have a summons.' " White called Burns on the telephone and told him, " 'There is a gentleman here who has a summons.' " White then directed Marino up the steps. When Marino came to her desk, he did not ask for the president, mayor, chair-

man of the board of directors or trustees, or any person in particular. She further stated that the president, vice president, treasurer, and secretary of the company were in Douglas County at the time the deputy came in.

Burns deposed that he had been employed by defendant for 16 years; that on April 2, 1963, he was director of personnel; that his duties consisted of interviewing, screening, and hiring employees; that he supervised the bookkeeping; and that he was not now and never has been an officer of the company. He stated that he was called by White who stated that there was a gentleman at the desk who had a summons. He told White to send him up and he would meet him, and he met Marino on the stairs. Marino told him that he had a summons, and handed the summons to affiant. Marino did not ask affiant if he was an officer or managing agent of the defendant, nor did he ask affiant what his capacity was.

Ringwalt deposed that on April 2, 1963, he was the president of the defendant, which is a Nebraska corporation with its principal place of business at 3024 Harney Street, Omaha, Douglas County, Nebraska. Affiant stated that he spent all of that day, with the exception of time out for lunch, at the offices of defendant, and no one served or attempted to serve him any summons in the above action. Affiant further stated that in addition to himself, the other officers of the corporation were a vice president, treasurer, and secretary, and that these three officers were at the place of business of the defendant all of April 2, 1963, except that the vice president and the treasurer were absent during the lunch hour.

At a hearing on the special appearance, the plaintiff objected to the reception into evidence of the defendant's affidavits for the reason that they constituted hearsay; were not the best evidence and were incompetent; and for the further reason that they deprived the plaintiff of the right of cross-examination. These objections were overruled, and the affidavits were received in evi-

dence. Plaintiff then had Marino sworn as a witness for the plaintiff. After he had stated his name and employment, an objection was made to the reception of oral evidence, which objection was sustained. After an offer of proof, plaintiff was given leave to file Marino's affidavit, which we summarize as follows: Marino deposed that as a deputy sheriff he received the summons in question and went to the office of the corporation at 3024 Harney Street, Omaha, Nebraska. He presented himself to a female secretary; told her that he was from the sheriff's office and had a summons for service upon the defendant; and requested the secretary to direct him to the highest officer of the company present. After completing a telephone call, the secretary advised affiant that a Mr. Burns would see him, and that Mr. Burns would come down a flight of stairs, which said secretary pointed out to affiant. He met a gentleman midway up the stairs, advised him that he was from the sheriff's office, and advised him that he had a summons pertaining to a suit instituted by E. E. Erdman. He deposed that at this time he told this gentleman he was serving him as the highest officer present of the corporation, handed him the summons, and asked him his full name and position with the defendant company. This gentleman advised him that his name was Dale Burns and he was the manager of the defendant. Marino further deposed: "That at no time did the man who identified himself as Dale Burns advise your affiant that there was any higher officer of the corporation present at the premises or that he, the said Dale Burns, was not the highest officer present at that time."

Plaintiff's assignments of error are as follows: "I. That the trial Court erred in sustaining the defendant's Special Appearance and dismissing the plaintiff's petition. II. That the trial Court erred in receiving the defendant's Exhibits A, B & C. III. That the trial Court erred in precluding plaintiff from producing direct evidence to

impeach the evidence adduced by the defendant in the form of affidavits."

Assignment of error No. II is premised on plaintiff's argument that an affidavit is an improper method of procedure because affidavits contain conclusions rather than statements of fact and deprive a party of the right of cross-examination of the deponent. The difficulty with plaintiff's premise is that our statute, section 25-1244, R. R. S. 1943, provides: "An affidavit may be used to verify a pleading, to prove the service of a summons, notice or other process, in an action, to obtain a provisional remedy, an examination of a witness, a stay of proceedings, or upon a motion, and in any other case permitted by law."

This court has on several occasions interpreted this statute to mean that an affidavit may be used to impeach an officer's return on the service of a summons. See Johnson v. Carpenter, 77 Neb. 49, 108 N. W. 161.

Assignment of error No. III is directed to the fact that the trial court refused to permit the plaintiff to produce oral evidence at the hearing on the special appearance. There was no error in this respect. The taking of oral testimony is discretionary with the trial court. In Hamer v. McKinley-Lanning Loan & Trust Co., 52 Neb. 705, 72 N. W. 1041, this court said: "It is within the discretion of the district court to take testimony orally for the determination of issues of fact arising upon motions, and not a right of either party to compel the adduction of such testimony." This has been the rule in this jurisdiction since at least 1897.

It is essential to the integrity and permanency of judicial records that the return of an officer, which is a part of the judicial record in a case, be impeached only by clear and convincing evidence. Westman v. Carlson, 86 Neb. 847, 126 N. W. 515.

Marino's return on its face appears to be regular. Defendant's affidavits clearly impeach the return. Marino's affidavit, while in conflict with the affidavits of White

and Burns, does lend some credence to them. Marino states that he asked for the highest officer present. This is directly denied by both White and Burns. Marino states that Burns told him he was the manager of the defendant. This is directly denied by Burns. It is evident from Marino's affidavit that he did not attempt to serve its chief executive officer in the first instance. His own affidavit states that he asked for the highest officer present. It is noteworthy that he states Burns did not tell him that he was not the highest officer present. Who has the burden of attempting to make proper service?

The statute does prescribe the manner of service of process on corporations by explicit provisions. Section 25-511, R. R. S. 1943, is as follows: "A summons against a corporation may be served upon the president, mayor, chairman of the board of directors or trustees, or other chief officer; or, if its chief officer is not found in the county, upon its cashier, treasurer, secretary, clerk, or managing agent; or, if none of the aforesaid officers can be found, by a copy left at the office or last usual place of business of such corporation. When the defendant is a foreign corporation, having a managing agent in this state, the service may be upon such agent."

These provisions are mandatory, and must be strictly pursued. See Nelson v. Robinson, 154 Neb. 64, 46 N. W. 2d 892, in which we held: "Statutes prescribing the manner of service of summons are mandatory and must be strictly pursued." Marino's return would indicate that the statute was complied with. His affidavit, read in conjunction with the defendant's affidavits, would indicate otherwise.

The statute sets out in sequence those upon whom service is to be made. If none of them is available, there is then a provision for the leaving of a copy. The first two classifications provide for personal service, the third one for the equivalent of residential service on an individual. From a mere reading of the statute, the con-

clusion is inescapable that in the first instance service is to be made upon the chief officer of the corporation. This is the only meaning that can be read into the words *or if its chief officer is not found.* We construe the statute to mean that it is incumbent upon the officer making service to exercise diligence in seeking to make that service in accordance with the priority listed. To hold otherwise would give no meaning to the plain wording of the statute. We do not interpret the statute to mean that a search must be conducted to serve the chief officer, but we do interpret it to mean that service should be had on the chief officer of a corporation if he is available. If the chief officer is not available for service, then service may be had upon one of those in the next classification. If none of those in the second classification are available so that personal service can be made, then and only then a copy of the summons may be left at the place of business of the corporation.

The intent of the statute is clear that wherever possible service be first attempted on the most responsible officer of the corporation. Plaintiff concedes the purpose of the statute is to insure that the summons be placed in responsible hands. He argues, however, that here there is no claim that Burns was not at least a responsible clerk, and that the defendant had due notice of the action. This is true, and in this instance possibly no harm would be done by aborting the plain language of the statute. To do so, however, would require us to overrule those cases which hold that strict compliance with the statute is mandatory.

We determine the showing herein to be sufficient to sustain the trial court's finding that the deputy sheriff did not follow the provisions of section 25-511, R. R. S. 1943, in making service on the defendant. The special appearance was properly sustained, and the judgment dismissing plaintiff's petition is affirmed.

AFFIRMED.

McCOWN, J., dissenting.

I respectfully dissent. Restatement, Conflict of Laws, § 75, p. 111, reads: "A state cannot exercise through its courts judicial jurisdiction over a person, although he is subject to the jurisdiction of the state, unless a method of notification is employed which is reasonably calculated to give him knowledge of the attempted exercise of jurisdiction and an opportunity to be heard."

A court, by proper service of process, acquires jurisdiction over a domestic corporation. It is equally clear that in the field of conflict of laws and judgments, the validity of service of process depends upon whether the method of service prescribed is reasonably calculated to give notice of the action to the corporation and an opportunity to be heard. See, Restatement, Judgments, comment b, § 27, p. 119; Restatement, Conflict of Laws, comment b, § 87, pp. 135, 136.

At common law, jurisdiction of a court of a state over a domestic corporation is acquired by service of process upon its principal officer. The effect of local statutes extending the method of service are, of course, determined under the above rules, as to whether they are reasonably calculated to give the corporation knowledge of the action and an opportunity to be heard.

The particular statute of Nebraska, section 25-511, R. R. S. 1943, provides: "A summons against a corporation may be served upon the president, mayor, chairman of the board of directors or trustees, or other chief officer; or, if its chief officer *is not found* in the county, upon its cashier, treasurer, secretary, clerk, or managing agent; or, if none of the aforesaid officers *can be found,* by a copy left at the office or last usual place of business of such corporation. When the defendant is a foreign corporation, having a managing agent in this state, the service may be upon such agent." (Emphasis supplied.)

The issue specifically involved here has not been passed upon in this state. It is important to note, first, that the section obviously was intended to cover serv-

ice on a municipal corporation as well as a business corporation. The word "mayor," for example, occurs in the list of titles described under the first portion of the statute which refers to the "chief officer." We think it also apparent that the word "clerk," appearing in the list of officers or agents who may be served if the chief officer is not found, was intended to refer to the clerk of a municipal corporation, and not simply any clerk of a business corporation. The word "cashier" in the same section obviously was intended to refer to banking corporations. This particular portion of the statute obviously was not intended to be limited to officers or agents with the specific titles designated because it concludes with the words "or managing agent." If this section were limited to the titles mentioned insofar as officers were concerned, it would omit all vice presidents, or executive vice presidents, or comptrollers, and we see no compelling reason to give it such limiting construction. For those reasons, however, the term "managing agent" may require some additional construction.

As early as 1915, this court held that a local poultry, egg, and cream buyer, whose conduct of the local business required judgment and discretion, was a managing agent of a domestic corporation. Brophy v. Fairmont Creamery Co., 98 Neb. 307, 152 N. W. 557, L. R. A. 1918A 367. See, also, Kron v. Robinson Seed Co., 111 Neb. 147, 195 N. W. 939. We believe the proper construction of section 25-511, R. R. S. 1943, should be that a managing agent upon whom service of summons may be made is an agent who has charge of the business activities of the corporation, or of some branch, department, or division thereof, and who, in respect to matters entrusted to him, is vested with powers requiring the exercise of independent judgment and discretion, and, under the circumstances here, is of sufficient rank to make it reasonably certain the defendant will be apprised of the service of summons. See, Dillon v. Gunderson, 235

Minn. 208, 50 N. W. 2d 275; Roehl v. Texas Company, 107 Cal. App. 691, 291 P. 255.

Mr. Dale Burns was director of personnel, and also supervisor of all bookkeeping activities of the accounting department. For purposes of service of summons, under the language of our statute, we believe he had sufficient rank to make it reasonably certain that the defendant would be apprised of the service. The language of the statute does not confine the term "managing agent" to *the* general manager, nor to *the* managing agent rather than *a* managing agent. The persons designated for service if the "chief officer is not found" are all coequal, and the statute does not require service to be attempted consecutively on each applicable title designated. Service may be made upon any person coming within the class of officers or agents designated if the chief officer is not found.

There is no question here but that the deputy sheriff attempted to serve a summons upon the corporation by going to its home office and advising the switchboard operator that he had a summons to serve. There is dispute in the affidavits as to whether he asked for the highest officer present. The return of the summons made by the deputy sheriff specifically showed the summons was delivered to "Dale Burns, Managing Agent" personally in Douglas County, Nebraska. It was also stated: "No President, Mayor, Chairman of the Board of Directors or Trustees or other Chief Officer of said Corporation being found in Douglas County, State of Nebraska." The defendant does not deny that the chief officer was not found, but contends that he could have been found if the deputy had inquired for him. The statute itself provides that if the president or chief officer "*is* not found," the service may be made on the next category of officers or agents, but if none of them "*can* be found," the service shall be made by leaving a copy at the office or usual place of business. If we permit the impeachment of a return of personal service of summons

merely because of affidavits indicating a lack of diligent inquiry for the chief officer before serving another officer or agent specifically authorized by statute to receive it, then a case by case determination of what is a reasonable or diligent inquiry or search must be undertaken. This case does not involve a situation in which personal service is omitted and a copy left at the office or last usual place of business.

We think it also important to note that the fault in service was the fault of the deputy sheriff. Even if an attorney had examined the return immediately upon filing, it appeared on its face to be sufficient. In modern practice in a metropolitan center, it would be almost a practical impossibility for an attorney to assume responsibility for the individual specific instruction of deputies as to service of process in each case involvng a corporation. In other connotations dealing with jurisdictional requirements previously held mandatory, we have held that where the fault lies with the court officer, substantial compliance with an otherwise mandatory statute will be sufficient. See Liljehorn v. Fyfe, 178 Neb. 532, 134 N. W. 2d 230. It seems only reasonable to apply the same principle in this case. The better rule would seem to be that where personal service was actually made upon an officer or agent of a domestic corporation within the class of those authorized by statute to receive service of summons, it will be deemed sufficient compliance with the statutes prescribing the manner of service of summons where it appears that the chief officer of the corporation was not found, even though a more diligent attempt to comply with the statute would probably have resulted in serving the chief officer.

Statutory enactments governing service of process against corporations were intended to be liberalizations and extensions of the common law rule which restricted service of process to the principal officer. Under these circumstances, technical form should not take precedence

over the basic and fundamental requirement that personal service of process on a domestic corporation should be one reasonably calculated to give the corporation knowledge of the action and an opportunity to be heard.

WAYNE BALL, APPELLEE, V. GLADYS BALL, APPELLANT, IVAN JEFFRIES ET AL., INTERVENERS-APPELLEES.
141 N. W. 2d 449

Filed April 8, 1966. No. 36213.

1. **Divorce.** The proper rule in a divorce case where the custody of a minor child is involved, is that the custody of the child is to be determined by the best interests of the child, with due regard for the superior rights of fit, proper, and suitable parents.
2. **Parent and Child.** Courts may not properly deprive a parent of custody of a minor child unless it is affirmatively shown that such parent is unfit to perform the duties imposed by the relationship or has forfeited that right.
3. **Divorce.** An application for a change of custody of a minor child, provided for in a decree of divorce, must be founded upon new facts and circumstances which have arisen subsequent to the entry of the decree and in the absence of such facts and circumstances, the decree will be deemed res judicata.

Appeal from the district court for Red Willow County: VICTOR WESTERMARK, Judge. Affirmed.

Sarah Jane Cunningham, for appellant.

Fred T. Hanson, for appellee.

Heard before CARTER, SPENCER, BOSLAUGH, BROWER, SMITH, and MCCOWN, JJ., and BURKE, District Judge.

MCCOWN, J.

This case involves a proceeding in a divorce case to change the custody of one of three children from the father to the maternal grandparents on the ground of a change of circumstances. The district court dismissed the amended ancillary petition of the grandparents and confirmed the custody of the minor daughter in the father. This appeal followed.

Wayne Ball and Gladys Ball were married in 1950. They have three children, John, Thomas, and Susan. At the time of the hearing on August 23, 1965, the children were respectively 13, 12, and 10 years old. The plaintiff, Wayne Ball, filed a divorce petition against the defendant, Gladys Ball, on March 25, 1964, and obtained temporary custody of all the children. On January 14, 1965, a decree of divorce was entered, finding that the plaintiff was entitled to a divorce, and that the defendant, by her conduct, had forfeited her right to custody of the minor children of the parties. The plaintiff was given custody of the minor children, subject to the right of the defendant to visit them at reasonable times within the State of Nebraska. The maternal grandparents were granted the right to have the children in their home during the last 2 weeks of June of each year, and during Christmas vacation every other year.

By stipulation and order, the 2-week visit to the grandparents in 1965 was changed to June 27 to July 10. During this first visit, and on July 2, 1965, the grandparents filed an ancillary petition praying that the court on its own motion revise the original decree to give the petitioning grandparents exclusive custody of the minor daughter, Susan Ball. The amended ancillary petition alleged that there had been a change of circumstances, whereby the best interests of the minor daughter were not being served in the custody of the plaintiff.

On August 23, 1965, the district court entered its decree specifically finding: "* * * against the petitioners and in favor of the plaintiff; that the plaintiff is the natural parent of the minor and there is no evidence that the plaintiff is unfit to have custody; that there is no sufficient evidence of a change of circumstances to justify any change of custody; that the evidence shows that the plaintiff has made every reasonable effort to maintain a proper home for the three minor children of the parties after the defendant left them without cause; that it is to the best interests of the minor involved and

other children that the children be kept together and reared together; that the evidence shows that there was no complaint as to the care the father was giving to the minors until the children were visiting the petitioners; that the evidence shows that the plaintiff is making plans to provide a suitable home by marrying a person who is willing, able and suitable to assume the role of parent to the minor children; that the expression of the minor daughter that she wants to live with the petitioners is not sufficient under the circumstances shown by the evidence, to deprive the plaintiff of custody of said minor daughter."

The amended ancillary petition was dismissed, and the custody of the minor child, Susan Ball, was awarded to the plaintiff in accordance with the former decree.

The proper rule in a divorce case where the custody of a minor child is involved, is that the custody of the child is to be determined by the best interests of the child, with due regard for the superior rights of fit, proper, and suitable parents. Caporale v. Hale, 169 Neb. 751, 100 N. W. 2d 847.

Courts may not properly deprive a parent of custody of a minor child unless it is affirmatively shown that such parent is unfit to perform the duties imposed by the relationship or has forfeited that right. Goodman v. Goodman, 173 Neb. 330, 113 N. W. 2d 202.

It will be noted also that this is not a case involving a contest for custody between parents, nor even a situation in which the grandparents have previously exercised custodial rights. It is also established that an application for a change of custody of a minor child, provided for in a decree of divorce, must be founded upon new facts and circumstances which have arisen subsequent to the entry of the decree and in the absence of such facts and circumstances, the decree will be deemed res judicata. Young v. Young, 166 Neb. 532, 89 N. W. 2d 763.

It is quite apparent from an examination of the record

that the basis for this proceeding to change custody is grounded on certain incidents related by Susan, and not fixed as to time. On one occasion, she said she found "a whole bunch of bad pictures" under the mattress in her father's room. She goes on to testify that she told her brothers about them, and that after they had seen them, they tried to get her to do bad things, and to take off her clothes. According to her story, the incident occurred while her father was gone, and that he was usually gone every night of the week except 2. She also asserted that the "babysitter" told her all about sexual matters.

The brothers' story about finding the "pictures" and books is at complete variance with Susan's version. They flatly deny any misconduct with her. Virtually every witness except Susan testified that the children were never left alone at any time for more than a few minutes. The "babysitter" was a neighbor with grown daughters, who testified that she only answered, to the best of her ability, the questions which Susan asked.

The father introduced in evidence two 1959 nudist council magazines which he had found while cleaning out the closet about a year after his wife had left him. He had put them in his dresser drawer under some papers. One pamphlet called "Personal Hygiene for every Woman and Girl" belonged to his former wife, and it had been in an upper cabinet in the kitchen. A regularly bound book, "When you Marry," published by the secretary of the National Conference on Family Relations, was in a bookcase. These are the locations where the boys testified they found them, and they did not even know that Susan had ever seen them.

Except for the incidents above, related by Susan, the evidence is without contradiction that the plaintiff had made every reasonable effort to maintain a proper home for the children, and at least one witness felt that he was doing a much better job of it than the mother had done previously. The evidence also showed that the

father was engaged to be married in a short time to a woman, with a 6-year-old daughter of her own, who was willing, able, and suitable to assume the role of parent to his children.

The district court was correct in finding that there was no evidence that the plaintiff was unfit to have custody, nor was there sufficient evidence of a change of circumstances to justify any change of custody. See Goodman v. Goodman, *ante* p. 83, 141 N. W. 2d 445. The rule of that case is of even stronger application here where the parties applying for a modification of a custody decree are not parents, but grandparents who have not previously had custody.

For the reasons stated, the action of the district court was correct and is affirmed.

AFFIRMED.

GEORGE WASSERBURGER ET AL., APPELLEES AND CROSS-APPELLANTS, V. BILL B. COFFEE ET AL., APPELLANTS AND CROSS-APPELLEES, GERTRUDE QUINTARD ET AL., INTERVENERS-APPELLEES AND CROSS-APPELLANTS.
141 N. W. 2d 738

Filed April 15, 1966. No. 36049.

1. **Waters.** The common law fixes the reciprocal rights and duties of riparian proprietors, except as it has been modified by Constitution or statute.
2. **———.** A right to the use of waters under the doctrine of prior appropriation is superior to a competitive riparian right in land which was part of the public domain prior to April 4, 1895, the effective date of the irrigation act of 1895.
3. **Constitutional Law: Waters.** Riparian water rights were not abolished by Article XV, sections 4 to 6, Constitution of Nebraska.
4. **Waters.** At common law riparian land consists of a continuous parcel on a watercourse or lake and in one possession.
5. **———.** In respect to competing water claims by an appropriator and by a riparian proprietor, land is considered riparian if by common law standards it was such immediately prior to

April 4, 1895, and if it has not since lost its riparian status by severance.

6. ———. An appropriator of water in a watercourse who, in using water pursuant to a statutory permit, intentionally causes substantial harm to a riparian proprietor, through invasion of the proprietor's riparian interest in the use of the waters, is liable to the proprietor in an action for damages if, but only if, the harmful use is unreasonable in respect to the riparian proprietor.
7. ———. An appropriator's use of water is unreasonable with respect to a competing riparian right unless the utility of the use outweighs the gravity of the harm.
8. ———. In evaluation of the utility of the appropriation causing intentional harm to the riparian proprietor, the following factors are to be considered: (1) The social value which the law attaches to the use for which the appropriation is made; (2) the priority date of the appropriation; and (3) the impracticability of preventing or avoiding the harm.
9. ———. In evaluation of the gravity of intentional harm to the riparian proprietor through the appropriator's use of the water, the following factors are important: (1) The extent of the harm involved; (2) the social value which the law attaches to the riparian use; (3) the time of initiation of the riparian use; (4) the suitability of the riparian use to the watercourse; and (5) the burden on the riparian proprietor of avoiding the harm.
10. **Injunction.** The appropriateness of injunction against tort depends upon a comparative appraisal of all factors in the case, some of the primary factors being the following: (1) The character of the interest to be protected; (2) the public interest; (3) the relative adequacy to the plaintiff of injunction and of other remedies; and (4) the relative hardship likely to result to defendant if injunction is granted and to plaintiff if it is denied.

Appeal from the district court for Sioux County: ALBERT W. CRITES, Judge. Affirmed in part, and in part reversed and remanded.

Neighbors & Danielson, for appellants.

Atkins, Ferguson & Nichols, for appellees and interveners-appellees.

R. O. Canaday and Wilber S. Aten, for amicus curiae.

Heard before WHITE, C. J., CARTER, SPENCER, BOSLAUGH, BROWER, SMITH, and MCCOWN, JJ.

SMITH, J.

Riparian owners complained that they no longer could water cattle in creeks running through their lands, because upper irrigators were exhausting the streams by diversions pursuant to appropriation permits from the State of Nebraska. The district court found that the owners were entitled to the use of the streams for watering the number of cattle normally pastured on those parcels which were riparian but not on larger contiguous parcels in the same ownership, and the court accordingly enjoined the appropriators.

The hydra of perplexity in this case emerged from the dual administration of water resources under the doctrines of riparian rights and of prior appropriation. Although each method of administration contains internal controls, the law governing a dispute between riparian proprietor and appropriator is vague at best. The two methods are incompatible, and the disorder multiplies problems.

The issues are broad. Defendant appropriators deny that plaintiff landowners, including plaintiffs in intervention, possess a riparian water right. Going further and hypothesizing not only the right but also a wrongful interference with it, defendants take the position that plaintiffs should be left to an action for damages. Injunction is said to be an inappropriate remedy for the wrong to a riparian proprietor, and especially so where equities weigh against him.

On cross-appeal plaintiffs contend that the injunction stopped short of complete relief. According to them, all parcels contiguous to riparian land in the same ownership are also riparian; and livestock water is a use which defendants must respect under the terms of their permits.

The lands are located in Hat Creek watershed in Sioux County, Nebraska. Hat Creek flows generally north some degrees east across the county and into the State of South Dakota. A tributary, Sowbelly Creek, crosses a continuous tract of 3,320 acres owned by plaintiffs

Gertrude and Merrill Quintard. North of the confluence of the two creeks and within 8 miles of the Nebraska-South Dakota boundary, Hat Creek flows through the following four tracts, each of which is shown on exhibit 1-A to be continuous:

Plaintiff Owners	Number of Acres
George and Beatrice Wasserburger	3,440
Ray and Patricia Semroska	2,920
John and Lois Geiser	1,680
John and Helen Engebretsen	1,760

Defendants own more than 41,000 acres of land within the watershed, and they possess statutory permits to appropriate water from Hat Creek and its tributaries for purposes of irrigation and irrigation storage. The points of diversion are located upstream from plaintiffs' lands.

The major subjects of discussion are:

A. Statutory abrogation of the riparian water right.

B. The riparian water right in view of constitutional amendments.

C. Restrictions on quantity of riparian land.

D. Comparative reasonableness of uses by riparian proprietor and by appropriator.

E. Appropriateness of injunction.

A. Statutory Abrogation of the Riparian Water Right.

The common law fixes the rights and duties of riparian proprietors, except as it has been modified by Constitution or statute. See, § 49-101, R. R. S. 1943; Meng v. Coffee, 67 Neb. 500, 93 N. W. 713, 108 Am. S. R. 697, 60 L. R. A. 910. All agree that the common law has been modified by legislative adoption of the prior appropriation doctrine, but the parties differ on the time of the change. Defendants cite the irrigation act of 1889, which was effective March 27, 1889. Plaintiffs rely on the irrigation act of 1895, which was effective April 4, 1895. See, Laws 1889, c. 68, p. 503; Laws 1895, c. 69, p. 244.

The time of modification delimits the land which can validate the common law use by plaintiffs against the

statutory use by defendants. If a severance of land from the public domain occurred earlier than enactment of the statute, a riparian water right in the private land may be superior to an appropriative right; but if legislation preceded severance, the appropriative right outranks the riparian right under the facts of the present case.

Some parcels in the five tracts of plaintiffs were patented between 1890 and March 27, 1895, and receiver's receipts show that a few of these patents had been initiated by entries filed prior to March 27, 1889. All other patents were initiated after April 4, 1895. The district court selected the 1889 cutoff.

Nothing in the act of 1889 specifically dedicated to the people the use of waters in watercourses, but the law authorized appropriation for application to beneficial use. It announced that: "As between the appropriators the one first in time is first in right." It established no permit system, but public notice was made a prerequisite to future appropriative rights. See Laws 1889, c. 68, p. 503. Two sections provided as follows:

"The right of the use of * * * water, flowing in a * * * stream * * * may be acquired by appropriation by any person * * *; Provided, That in all streams not more than fifty feet in width, the rights of the riparian proprietors are not affected by * * * this act." Art. 1, § 1, p. 503. (This proviso was amended in 1893 to apply to streams not more than 20 feet wide. Laws 1893, c. 40, § 1, p. 377.)

"All persons * * * owning or claiming any lands situated on the banks or in the vicinity of any stream are entitled to the use of the waters of such stream for the purpose of irrigating the land so held or claimed." Art. 2, § 1, p. 506.

The irrigation act of 1895 inaugurated the present system of appropriation. The Legislature then dedicated the use of unappropriated waters of every stream to the people subject to appropriation for beneficial use,

and it declared water for purposes of irrigation to be a natural want. It specified that priority in time gave the better right as between those using the water for the same purpose, and it preferred domestic use over other uses in cases of insufficient water. See Laws 1895, c. 69, §§ 42, 43, 65, pp. 260, 268.

Our decisions have fostered both sides of the argument. There is authority that the 1889 act substituted the doctrine of prior appropriation for the common law. See, Crawford Co. v. Hathaway, on rehearing, 67 Neb. 325, 93 N. W. 781, 108 Am. S. R. 647, 60 L. R. A. 889; Osterman v. Central Nebraska Public Power & Irr. Dist., 131 Neb. 356, 268 N. W. 334 (by implication). Other cases have approved the 1895 cutoff on the theory that the Legislature then for the first time dedicated the use of natural streams to the people. See, Nine Mile Irr. Dist. v. State, 118 Neb. 522, 225 N. W. 679; Southern Nebraska Power Co. v. Taylor, 109 Neb. 683, 192 N. W. 317.

The history of irrigation legislation in the western states is checkered, but it suggests that prior to 1895 our Legislature intended only to chip away at the common law right. The 1889 law was taken substantially from a California act which provided that "the rights of riparian proprietors are not affected by the provisions of this title." However, our Legislature left out this section. Clark v. Cambridge & Arapahoe Irr. & Imp. Co., 45 Neb. 798, 64 N. W. 239. In California, riparian rights which had been acquired subsequent to the passage of the act were preserved against appropriations made after the acquisition. See Lux v. Haggin, 69 Cal. 255, 10 P. 674. The following explanation appears in 1 Wiel, Water Rights in Western States (3d ed.):

"In so far as Nebraska upholds the abrogation of the common law by State statute for future patents, it is contrary to Lux v. Haggin. The California court placed its decision to a great extent on the ground that abrogating the rule of riparian rights would interfere with the primary disposal of the Federal lands, an interfer-

ence not depending upon the date of a statute, and equally an interference if only abrogating for future patented land. * * * As the decision in Lux v. Haggin was rested largely on constitutional grounds, a strict adherence to the California doctrine does not recognize any power in the legislature to abrogate riparian rights present or future." § 126, pp. 155-156.

"* * * the very earliest statutes of several of these states contained a provision that all landowners on the banks of a stream have a right to the use of the water. This was probably intended as declaratory of riparian rights, to the same end as the California provision, 'The rights of riparian proprietors are not affected by the provisions of this title.' Such a statute existed in other States, where it is construed as only declaratory of riparian rights, and is held to force the court to follow the California doctrine." § 185, pp. 224-225.

The 1889 act, with its provisions at cross-purposes, is so unclear that any interpretation may be unsatisfactory, but we reach two conclusions. The references to riparian rights were declaratory of the common law, and the other provisions failed to substitute the prior appropriation doctrine. In respect to parcels which were severed from the public domain prior to April 4, 1895, plaintiffs may possess a superior right. Decisions in conflict are overruled on this point.

B. The Riparian Water Right in View of Constitutional Amendments.

In 1920 the doctrine of prior appropriation received constitutional protection with the adoption of Article XV, sections 4 to 6, Constitution of Nebraska. These sections, which incorporate part of the irrigation act of 1895, provide as follows:

"The necessity of water for domestic use and for irrigation purposes * * * is hereby declared to be a natural want.

"The use of the water of every natural stream * * * is hereby dedicated to the people * * * for beneficial

purposes, subject to the provisions of the following section.

"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 waters for domestic purposes shall have preference over those claiming it for any other purpose * * *. 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."

No amendment abolished riparian water rights. The prohibition against acquisition of a superior right without just compensation indicates that existing riparian rights were to be preserved. Another sign dispels any doubt. In the Constitutional Convention a member of the committee which proposed the amendment explained, "* * * the question of riparian rights * * * is not particularly affected * * *, except as custom is fast doing away with that right, * * *." Proceedings of the Constitutional Convention (1919-1920), p. 1916.

C. Restrictions on Quantity of Riparian Land.

To say that the 1889 act permitted future acquisition of riparian rights is not to say that all lands patented prior to the 1895 act are riparian for present purposes. Guidelines are needed.

Area restrictions vary from jurisdiction to jurisdiction, but it is generally understood that riparian land has at least two characteristics—a stream or lake bed and a present unitary possession. The parcel must include a part of the bed of a watercourse or lake, and the possession must be unitary in the sense that no part of the parcel is separated from the rest by intervening land in another possession. See, Krimlofski v. Matters, 174 Neb.

774, 119 N. W. 2d 501; Restatement, Torts, § 843, p. 326.

Plaintiffs argue that since the common law knows no limitation on the distance which a tract may extend away from a stream without loss of riparian status, all parts of their five tracts are riparian. Defendants take a different view. The size cannot exceed the area acquired by a single entry or purchase from the federal government; and it may be further reduced to a government subdivision of 40 acres or, in case of irregular tracts, a numbered lot designated in the government survey, even though additional land is included in the certificate of purchase or instrument of conveyance. The district court apparently restricted quantity to a government subdivision of 160 acres.

Some recognized tests appear in 1 Kinney, Irrigation and Water Rights (2d ed.), § 464, p. 788, as follows:

"First, the smallest separate piece or parcel of land bordering upon the stream in the history of the title of all of the land of the riparian owner at the time that the claim is made or at the time of use; second, the riparian land stops at the outermost edge of the land away from the stream as described by a single original entry of the land in the acquisition of title from the Government; and, third, * * * the riparian lands held in common ownership include the entire tract, no matter how acquired or from what sources of title, at the time the claim is made."

Crawford Co. v. Hathaway, on rehearing, 67 Neb. 325, 93 N. W. 781, 108 Am. S. R. 647, 60 L. R. A. 889, approved the restriction to a single original entry or purchase of land in the acquisition of title from the United States, but the court reached no conclusion concerning further restriction to a government subdivision. The two tests have not been accepted in a majority of jurisdictions applying exclusively the common law of riparian rights. "The area or size of the parcel is immaterial insofar as its character as riparian land is concerned." Restatement, Torts, § 843, Comment c, p. 327. Between riparian

proprietors restrictions to original entries or to government subdivisions are clearly arbitrary, and we disapprove them.

These tests, arbitrary in contests between riparian proprietors, are likewise unsuitable here, because they ignore the historical development of the two doctrines in Nebraska. By the same token, if the common law is not modified in order to resolve the competing claims in suit, legislative abrogation of future riparian rights to water use will lose vitality.

In such cases land has a riparian status only if two requirements are met. First, by common law standards the land was riparian immediately prior to the effective date of the irrigation act of 1895. Second, the land subsequently has not lost its riparian status by severance; consequently it ordinarily is a part of the smallest tract held in one chain of title leading from the owner on April 4, 1895, to the present owner. If a tract was riparian on April 3, 1895, its status was unaffected by the statutes. However, if the tract, or part of it, later lost its riparian status as a result of severance, the nonriparian land cannot regain the riparian status.

All parcels patented prior to April 4, 1895, and located in the five tracts, satisfy the test of present unitary possession, but the history of the titles is incomplete. Little has been established beyond patent and present ownership. In view of the unsettled law the cause should be remanded in order that the parties may adduce additional evidence.

D. Comparative Reasonableness of Uses by Riparian Proprietor and by Appropriator.

An incompatibility of riparian rights and appropriative rights is undoubtable. The common law test of reasonable use places little emphasis upon the time when the use was initiated. See, Restatement, Torts, c. 41, topic 3, scope note, pp. 344-346; 1 Wiel, Water Rights in Western States (3d ed.), § 801, p. 857. Under the appropriation doctrine, priority in time gives the better right be-

tween users for the same purpose. The flexibility of the one test opposes the rigidity of the other.

We cannot synthesize the two doctrines in one decision. Facts are so important that in the absence of legislation a viable system ought to be evolved by the process of inclusion and exclusion, case by case. Here the conflicting claims are claims of private right to uses for purposes of livestock water and of irrigation. We limit our broad outline of a system to the specific facts before us.

An appropriator who, in using water pursuant to a statutory permit, intentionally causes substantial harm to a riparian proprietor, through invasion of the proprietor's interest in the use of the waters, is liable to the proprietor in an action for damages if, but only if, the harmful appropriation is unreasonable in respect to the proprietor. The appropriation is unreasonable unless its utility outweighs the gravity of the harm. Compare Restatement, Torts, §§ 851, 852, pp. 353, 358.

In evaluation of the utility of the appropriation causing intentional harm to a riparian proprietor, the following factors are to be considered: (1) The social value which the law attaches to the use for which the appropriation is made; (2) the priority date of the appropriation; and (3) the impracticability of preventing or avoiding the harm. Compare Restatement, Torts, § 853, p. 361.

In evaluation of the gravity of intentional harm to a riparian proprietor through the appropriator's use of the waters, the following factors are important: (1) The extent of harm involved; (2) the social value which the law attaches to the riparian use; (3) the time of initiation of the riparian use; (4) the suitability of the riparian use to the watercourse; and (5) the burden on the riparian proprietor of avoiding the harm. Compare Restatement, Torts, § 854, p. 369.

Since settlement the five tracts have been used for grazing, and for a long time plaintiffs have been using them mostly for winter pasture from October 15 to May

15. There is evidence that for an animal unit—cow and calf—plaintiffs require 15 acres of winter pasture and 35 acres of pasture all year. The cattle consume only a small portion of the stream flow.

With few exceptions Hat Creek and Sowbelly Creek supplied sufficient livestock water during the winter grazing seasons prior to 1959. Some shortages were met by one or more appropriators turning down water upon request. For many years the creeks have been dry in the summertime, but the principal complaint is the winter deficiency, although two plaintiffs have been holding cattle on summer pasture.

Since 1958 defendants have been interfering with plaintiffs' use. During the 1959-1960 winter the creeks flowed intermittently. The diminution was caused in substantial part by defendants. The permits, bearing adjudicated priority dates as early as 1880 and as late as 1961, indicated that after 1951 defendants increased their appropriations out of Hat Creek and its tributaries approximately 11 cubic feet per second for irrigation of more than 800 additional acres. In the winters following 1959-1960 the flow of Hat Creek through the southernmost tract of plaintiffs started at the end of the calendar year.

No other source has been reasonably available to plaintiffs. They tried to use well water, but it was alkaline. It is impracticable for them to impound water. There is no site suitable for a storage dam, and the cost of a dam strong enough to withstand floodwaters would be excessive.

Defendants point to needs of their own. They and their predecessors developed extensive facilities consisting of diversion and storage dams, pipelines, and irrigation canals and laterals. Their capital expenditures in the last 20 years exceeded $250,000. They possess not less than 3,500 acres of irrigated hay land producing annual cuttings of 4,350 to 6,200 tons. They graze more than 5,000 head of cattle in the wintertime on their lands

within the watershed. If they are unable to irrigate their hay meadows, they will be compelled to reduce the size of their herds at least one-half. The quantity of water available to defendants for appropriation under the judgment of the district court was not estimated.

Causes of action for damages have been established. With few exceptions the amount of water was adequate until 1959, and deterioration resulted substantially from increased abstractions of water by defendants. In contrast water for the number of cattle on riparian pasture in accordance with good husbandry represents neither a new use nor an enlarged use.

Defendants contend that a riparian right is subject to an appropriative right prior in time. Some of their permits bear adjudicated dates prior to severance of any parcel in the five tracts from the public domain. Under the 1895 statute the board of irrigation fixed the priority dates of appropriators who had acquired rights earlier than the effective date of the statute. The board determined appropriative priorities but not riparian rights. Compare Plunkett v. Parsons, 143 Neb. 535, 10 N. W. 2d 469. The adjudication established the time when the appropriations had been initiated, but time is only one of the elements to be considered in the adjustment of the competing rights.

On the facts of this case the riparian right is superior. Plaintiffs' need for livestock water is greater than defendants' need for irrigation, and the difference is not neutralized by time priorities. For the most part the land within the watershed is pasture. Irrigation has increased the grazing capacity of defendants' pastures; loss of irrigation would not destroy them. Between plaintiffs and defendants approximate equality of grazing capacity is more desirable than glaring inequality.

E. Appropriateness of Injunction.

The argument that equity refuses to enjoin the appropriator from wrongful interference with the riparian use comes from prior decisions in injunction suits in-

volving competing uses by the riparian proprietor and by the appropriator. The appropriator prevailed, whichever party sought judicial protection. See, Cline v. Stock, on rehearing, 71 Neb. 79, 102 N. W. 265; McCook Irr. & W. P. Co. v. Crews, on rehearing, 70 Neb. 115, 102 N. W. 249; Clark v. Cambridge & Arapahoe Irr. & Imp. Co., 45 Neb. 798, 64 N. W. 239.

We think the cases have been misread. The appropriative rights seem to have been asserted by irrigation companies offering a public service. The court attached significance to the public benefit, to the appropriation project completed in good faith and at great cost, and to the tardy initiation of the riparian use. If the court went too far, the limitations themselves have remained. We reject the startling proposition that equity sends every riparian proprietor packing. Defendants are private appropriators—not champions of the public interest. Compare, Vetter v. Broadhurst. 100 Neb. 356, 160 N. W. 109, 9 A. L. R. 578; Onstott v. Airdale Ranch & Cattle Co., 129 Neb. 54, 260 N. W. 556. The remedy rests on other considerations.

The appropriateness of injunction against tort depends upon a comparative appraisal of all factors in a case, some of the primary factors being the following: (1) The character of the interest to be protected; (2) the public interest; (3) the relative adequacy to the plaintiff of injunction and of other remedies; and (4) the relative hardship likely to result to defendant if injunction is granted and to plaintiff if it is denied. See, McCubbin v. Village of Gretna, 174 Neb. 139, 116 N. W. 2d 287; Restatement, Torts, § 936, p. 693.

The public interest in the maximum conservation and utilization of water resources exerts a powerful influence upon the propriety of the remedy. The injunction before us speaks of a constant flow for watering cattle. From conflicting evidence we conclude that loss of water in transit is not substantial; but another loss, the flow of unused water, may not be so justified.

If we had a judgment which went no further than to protect waste at the expense of beneficial use, the result would be clear. But the supposition is not the present case. If defendants may exhaust the flow, the riparian tracts will be of little use for pasture. The parties stand at two extremes, and there is no middle ground.

We regret our inability to find a middle ground, a "physical solution," under the broad powers of equity to ration water and to condition an order of injunction. See Rancho Santa Margarita v. Vail, 11 Cal. 2d 501, 81 P. 2d 533. The evidence negates a satisfactory alternative method of supply. The cattle found well water barely drinkable, and stream water cannot be impounded at reasonable cost. Under all the circumstances plaintiffs are entitled to injunctive relief in connection with those lands which the evidence on remand establishes to be riparian.

The district court measured relief in terms of a constant flow in sufficient quantity for the watering of livestock in the numbers normally pastured on the riparian land. The court safeguarded normal operations consistent with good husbandry, but it impliedly disapproved any surcharge on riparian pasture. Plaintiffs say that this yardstick is inaccurate, that water for all of their cattle is a domestic use protected by certain limitations on defendants' permits.

Some of the permits require the permittee to respect riparian rights to so much of the natural flow as is necessary for domestic use, including livestock water. Similar language has limited all other approvals of applications for natural flow since the first appropriation was adjudicated in 1895, but the limitations are unexplained in the records of the Department of Water Resources.

The district court correlated these administrative restrictions with the injunction. We agree that defendants should be enjoined from interfering with the use of livestock water for the number of cattle held on riparian pasture in accordance with good husbandry, but

we do so without approving any interpretation of the permits or defining domestic use under the Constitution and the common law.

As to the rest of the cattle plaintiffs' contention has two dimensions. First, the permits protect the water use on nonriparian pasture. Second, a surcharge on riparian pasture is immaterial. The argument lacks strength under the test of reasonableness in the dual administration of water resources. It gains none from the limitations on the permits.

We have not referred to a separate 160-acre tract owned by plaintiffs Geiser or to any lands owned by plaintiff S. C. Turnbull, all being shown on exhibit 1-A. The district court correctly denied injunctive relief in respect to these parcels.

The judgment is affirmed in part and reversed in part, and the cause is remanded for proceedings consistent with this opinion. Costs on appeal are taxed to appellants.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED.

LEWIS BERLOWITZ, APPELLANT, V. STATE OF NEBRASKA, DEPARTMENT OF ROADS, APPELLEE.
141 N. W. 2d 764

Filed April 15, 1966. No. 36081.

1. **Eminent Domain.** The measure of compensation for land taken for public use is the fair and reasonable market value of the land actually appropriated and the difference in the fair and reasonable market value of the remainder of the land before and after the taking.
2. **Eminent Domain: Highways.** If an owner of property abutting on a highway possesses a property right of access to the highway, the measure of his right is reasonable ingress and egress under the circumstances.
3. ———: ———. Destruction or substantial impairment of the property right of access to a highway is ordinarily a question of fact.

Appeal from the district court for Lancaster County: BARTLETT E. BOYLES, Judge. Affirmed.

Ginsburg, Rosenberg, Ginsburg & Krivosha, for appellant.

Clarence A. H. Meyer, Attorney General, Harold S. Salter, Warren D. Lichty, Jr., James J. Duggan, and Thomas H. Dorwart, for appellee.

Heard before WHITE, C. J., CARTER, SPENCER, BOSLAUGH, BROWER, SMITH, and MCCOWN, JJ.

SMITH, J.

In this eminent domain proceeding a jury assessed plaintiff's recovery at $3,530. Inadequacy of the verdict is the assignment of error to be discussed.

Plaintiff owned an irregular tract of land, Lots 37 and 57, in Lancaster County, Nebraska. Lot 37 is located at the northeast corner of the intersection of Cornhusker Highway and Milton Street. Prior to commencement of this eminent domain proceeding Lot 37 fronted on Cornhusker Highway a distance of 225 feet. Its area was 85,835 square feet. Lot 57, comprising approximately 12.15 acres, adjoins the north side of Lot 37.

On July 18, 1962, the State, in order to widen Cornhusker Highway, acquired the west 15.1 feet and all the south 22 feet except the west 15.1 feet of Lot 37, the total area being 9,555.5 square feet. It also appropriated 302 square feet from Lot 57. In the interest of clarity the parties have obviated further mention of Lot 57, the small award for that appropriation being attributed to Lot 37 for practical purposes. Ingress and egress were limited to Milton Street and a service road.

The $3,530 verdict reflects the testimonial conclusion of the only real estate appraiser called by the State. It may be assumed that testimony of three other appraisers would have sustained a verdict between $26,000 and $35,000. Plaintiff contends that the witness for the State erred in computing the amount of loss from units of

valuation which he employed in his market data approach. An argument of secondary prominence concerns the denial of damages allegedly resulting from impairment of access to Cornhusker Highway.

The witness for the State testified to opinions in harmony with the principle of just compensation—market value of the part appropriated plus the difference in market value of the remainder before and after the taking. See Chaloupka v. State, 176 Neb. 746, 127 N. W. 2d 291. Prior to the appropriation the front foot value of Lot 37 had been $90, and the total value, $20,250. However, the unit of valuation relevant to the part taken was the square foot, that is, $0.23 per square foot, or $2,267. The remainder damage of $1,263 represented the difference between $17,983 and $16,720. The appraisal of the overall loss to plaintiff was $3,530.

It faintly appeared that the witness was incorrectly overlapping separate units of valuation. The possibility neared probability as he continued his testimony. The land remaining after the appropriation was worth $80 per front foot for the rounded 209 feet or a total of $16,720. On cross-examination he explained that in employing front foot valuations of $90 and $80 he had been including the land taken.

Plaintiff contends that the minimum verdict supported by evidence would have been $4,366. He adds to the $2,267 for the land taken the sum of $2,099 representing remainder damage of $10 per front foot for 209.9 feet.

We disagree. To accept plaintiff's argument is to discard the explanation on cross-examination. The witness adopted the unit front foot to appraise the land before the taking and the remainder after the taking. No special benefits reduced his valuation of the part appropriated; under the circumstances his method was consistent with standards of just compensation. Deficiencies in his testimony, too obvious for specification, went merely to credibility.

Prior to July 18, 1962, Cornhusker Highway furnished

access to a realtor's office and a portable gasoline service station located on Lot 37. Three driveways 40 to 66 feet wide led from the highway to the lot. As a result of eminent domain access from the highway is furnished only by the service road, which runs parallel between the highway and the south side of the lot. The two entrances to the service road from the highway are located 900 feet east of the lot and at the Milton Street intersection.

The verdict responded to the testimony of the real estate broker called by the State. In his opinion plaintiff's access had not been impaired. Reasonableness measures this property right, and impairment is ordinarily a question of fact. See Balog v. State, 177 Neb. 826, 131 N. W. 2d 402. It was here.

There was no error prejudicial to plaintiff, and the judgment is affirmed.

AFFIRMED.

WHITE, C. J., not participating.

LEO J. LADENBURGER, APPELLANT, V. PLATTE VALLEY BANK OF NORTH BEND, A CORPORATION, APPELLEE.
141 N. W. 2d 766

Filed April 15, 1966. No. 36115.

1. **Pleading.** A general demurrer tests the substantive rights of parties upon admitted facts, including reasonable inferences from facts well pleaded.
2. **Restitution.** The law of restitution deals with situations in which one person is accountable to another on the ground that otherwise he would unjustly benefit or the other would unjustly suffer loss.

Appeal from the district court for Dodge County: ROBERT L. FLORY, Judge. Affirmed.

Sidner, Gunderson, Svoboda & Schilke, for appellant.

Kerrigan, Line & Martin, for appellee.

Heard before WHITE, C. J., CARTER, SPENCER, BOSLAUGH, BROWER, SMITH, and MCCOWN, JJ.

SMITH, J.

Defendant bank applied a general deposit in a checking account against the depositor's indebtedness to it. Subsequently a check drawn against the deposit and payable to plaintiff was dishonored by nonpayment. The district court sustained a general demurrer of the bank to plaintiff's petition for restitution. From the resultant order of dismissal plaintiff has appealed.

Plaintiff theorizes that the bank owes him a duty to make restitution, and he builds his theory on a series of events which commenced with a sale governed by the Uniform Sales Act. See Ch. 69, art. 4, R. R. S. 1943, repealed by Laws 1963, c. 544, § 10-102, p. 1943, effective September 1, 1965. The nature of the sale is the critical issue.

Plaintiff sold fat cattle to Garret W. Waters on January 11, 1963, pursuant to an agreement that payment of the price was to await computation of the amount. Waters delivered range cattle in part payment. On February 4, 1963, plaintiff received a check drawn by Waters in the sum of $3,129, which represented the balance of the price. In the petition those transactions are glossed with the following allegations:

"At the time of the sale plaintiff was not paid for the reason that time was needed to compute the amount due * * *. There was no intent by plaintiff to extend credit to * * * Waters and no intent or desire by * * * Waters that he be given credit. The transaction was a cash sale."

Prior to February 4, 1963, Waters sold the fat cattle and deposited the proceeds with the bank. The bank applied $3,129 of that deposit against an indebtedness of Waters to it. The setoff caused dishonor by nonpayment on February 7, 1963, of the check payable to plaintiff.

The allegations of specific fact resist a reasonable inference concerning possession or delivery of the fat cattle. The 24-day period between the sale and the receipt of Waters' check shuts out a reasonable conclu-

sion that plaintiff delivered the cattle for examination or for determination of weight during all that time.

The gloss of a cash sale does not supply the omission. In such a case the seller retains title and right of possession until he is paid; however, a conditional delivery may be inferred from the seller's acceptance of a worthless check. See, Allen Dudley & Co. v. First Nat. Bank, 122 Neb. 443, 240 N. W. 522; 2 Williston, Sales (Rev. Ed.), § 341, p. 325. Of course acceptance does not conclusively imply a simultaneous transfer of possession to the buyer. Aside from the check cases, several situations indicate substantial defects in plaintiff's petition.

"* * * the real question is, Does the seller assent to the transfer of the property?—and in order to answer this question the original bargain and what is subsequently done must both be considered. If the original bargain was for a cash sale, in the technical sense of those words, that must mean that the buyer was to have neither the title nor the use and enjoyment of the goods until the price was paid. If the buyer was to have not only possession but the use and enjoyment of the goods, though not the title, before payment of the price, the transaction would be a conditional sale, not a cash sale. Accordingly, if after bargaining for a cash sale the seller subsequently, voluntarily, delivers to the buyer the goods with the intent that the buyer may immediately use them as his own, and without insisting upon contemporaneous payment, this action is inconsistent with the original bargain." 2 Williston, Sales (Rev. Ed.), § 346, pp. 340-341.

"If the goods are delivered without any permission, express or implied, to the buyer to deal with them as his own until the price is paid, the condition that payment shall be simultaneous with the transfer of title is not waived; but if the seller on delivering the goods does so without restriction, so that the buyer is violating the terms of no bargain if he uses the goods as his own, it is a conclusion of law that if the transaction was

originally a cash sale, the condition has been waived. At most, the bargain becomes what has been commonly called a conditional sale; but the natural inference is that the transaction is not even a conditional sale. A delivery to the buyer with authority to use the goods immediately should be conclusive evidence of transfer of the property in the absence of clear evidence showing an intention to reserve the title. * * * Even though a delivery to the buyer is not a waiver of a cash sale, because the delivery was for some purpose other than to transfer the property, the seller may lose his right to insist on the condition by a failure to reclaim the goods for an unusual time. Such failure shows an assent to the permanent retention by the buyer of goods originally delivered to him for a temporary purpose only." 2 Williston, Sales (Rev. Ed.), § 346b, pp. 345-346.

The law of restitution "deals with situations in which one person is accountable to another on the ground that otherwise he would unjustly benefit or the other would unjustly suffer loss." Restatement, Restitution, p. 1. See, also, Carey v. Humphries, 171 Neb. 578, 107 N. W. 2d 20. If plaintiff suffered no unjust loss, the bank reaped no unjust benefit. A legal conclusion that Waters wrongfully sold the fat cattle is impermissible. Plaintiff's petition does not state facts sufficient to constitute a cause of action.

The judgment is affirmed.

AFFIRMED.

WHITE, C. J., not participating.

LOUIS H. BAUERLE ET AL., APPELLANTS AND CROSS-APPELLEES, V. ROBERTA FROSH, APPELLEE AND CROSS-APPELLANT.

141 N. W. 2d 748

Filed April 15, 1966. No. 36144.

1. **Trial: Appeal and Error.** A verdict of a jury based upon con-

flicting evidence will not be set aside unless it is clearly wrong.

2. ———: ———. A party is not permitted to proceed with the trial without objection and speculate on the outcome of the jury's verdict, and, if unfavorable, contend that a mistrial should have been declared, when he did not ask for the same at the time.

3. **Public Lands.** Where a new lessee files a notice of appeal to the district court from an appraisement of the improvements upon school land, the costs in that court are taxable to the new lessee. §§ 72-240.06 and 76-720, R. S. Supp., 1963.

Appeal from the district court for Chase County: VICTOR WESTERMARK, Judge. Affirmed.

Bosley & Bosley, for appellants.

Daniel E. Owens and Russell, Colfer & Frazier, for appellee.

Clarence A. H. Meyer, Attorney General, Bernard L. Packett, Maupin, Dent, Kay & Satterfield, McGinley, Lane, Mueller & Shanahan, Bern R. Coulter, and Davis, Thone, Bailey, Polsky & Hansen, for amici curiae.

Heard before CARTER, SPENCER, BOSLAUGH, BROWER, SMITH, and MCCOWN, JJ., and KUNS, District Judge.

BOSLAUGH, J.

This is a proceeding under section 72-240.06, R. S. Supp., 1963, to determine the value of the improvements upon a tract of school land. Louis H. Bauerle and Lola V. Bauerle, the plaintiffs, are former lessees. Roberta Frosh, the defendant, is the new lessee.

Two of the appraisers fixed the value of the improvements at $11,622. The third appraiser valued the improvements at $6,952.10. The plaintiffs and the defendant then appealed to the district court where the jury returned a verdict in the amount of $4,000. The plaintiffs' motion for new trial was overruled and they have appealed to this court.

The assignments of error relate to the sufficiency of the evidence to sustain the judgment, and alleged misconduct of the defendant.

The improvements involved in this proceeding are 78.6 acres of winter wheat; a pasture fence and a lot fence; a catch pen and loading chute; a garage; a steel grain bin; a water supply consisting of a windmill, well, pump, pipes, and steel tank; a basement house; an outdoor toilet; a granary and cattle shed barn; dams and terraces; and disking and cultivation for future crops. The defendant's lease commenced January 1, 1964, and the improvements are to be valued as of that date.

The evidence is in conflict as to the value and condition of the improvements. Plaintiff Louis Bauerle testified that the improvements had a value of $12,488.40. Elmo Frosh, the defendant's husband, testified that the value of the improvements was $3,125.47. Other witnesses testified as to values between those amounts or as to the value of particular items.

On direct examination, Elmo Frosh testified that the total value of all the improvements was $4,012.39. He did not separately value the growing wheat, but by deducting the values placed on other individual items, his testimony indicates that he valued the wheat at $1,893.12. On cross-examination, his testimony as to the value of the wheat was stricken upon the motion of the plaintiffs. Later, this witness testified that the wheat had a value of $12.90 per acre, which extended amounts to $1,006.20 for 78 acres. Thus, the testimony of this witness which the jury was permitted to consider valued the improvements at $3,125.47.

There was evidence that some of the improvements were of little or no value. For example, the basement house had no value except for salvage purposes. There was testimony that the labor required to dismantle the house would exceed the value of the material which could be salvaged.

The plaintiffs argue that the verdict in this case is clearly against the weight and reasonableness of the evidence, that it must be set aside, and a new trial granted. From our examination of the record we con-

clude that this contention cannot be sustained. Although the evidence would sustain a verdict for a higher amount, and the verdict in this case is in the lower range of the testimony, the evidence does sustain the judgment. The value of the improvements involved in this case is a question of local nature, and the verdict of the jury should not be set aside unless it is clearly wrong.

The defendant attempted to cross-examine the plaintiff Louis Bauerle as to personal property tax schedules or returns filed by him. The plaintiffs' objections to the questions asked were sustained. Later, the defendant called the county assessor and had him identify a 1964 personal property tax schedule filed by Bauerle. The defendant then recalled Bauerle for additional cross-examination and again attempted to cross-examine him concerning the schedule. The plaintiffs' objections to these questions were sustained. The plaintiffs did not move for a mistrial.

The plaintiffs contend that the defendant's attempts to inject the personal tax schedule of Louis Bauerle into the case tended to confuse and mislead the jury and prevented the plaintiffs from having a fair trial. The plaintiffs assume that the defendant was not entitled to cross-examine Bauerle as to values which he listed in the tax schedule. However, it is unnecessary for us to decide that question. Under the circumstances in this case, the plaintiffs' failure to move for a mistrial precludes a consideration of the alleged error. Segebart v. Gregory, 160 Neb. 64, 69 N. W. 2d 315.

The trial court taxed the costs of the action to the defendant. By cross-appeal the defendant contends that this was erroneous and that the costs should have been taxed to the plaintiffs.

Section 72-240.06, R. S. Supp., 1963, provides that all proceedings on appeal to the district court shall be had and conducted in the manner prescribed in sections 76-716 to 76-720, R. S. Supp., 1963. Section 76-720, R. S. Supp., 1963, provides as follows: "If an appeal is taken

from the award of the appraisers by the condemnee and the amount of the final judgment is greater by fifteen per cent than the amount of the award, or if appeal is taken by the condemner and the amount of the final judgment is not less than eighty-five per cent of the award, or if appeal is taken by both parties and the final judgment is greater in any amount than the award, the court may in its discretion award to the condemnee a reasonable sum for the fees of his attorney and for fees necessarily incurred for not more than two expert witnesses. On any appeal by the condemner, the condemner shall pay all court costs on appeal. If appeal is taken by the condemnee only, he shall be charged with such costs if the final judgment is not greater than the award of the appraisers."

In this case the defendant filed a notice of appeal to the district court from the appraisement. The costs in the district court were properly taxed to the defendant.

The judgment of the district court is affirmed.

AFFIRMED.

HOLIDAY MOBIL HOMES RESORTS, INC., A CORPORATION, APPELLANT AND CROSS-APPELLEE, V. JOHN FROSH ET AL., APPELLEES AND CROSS-APPELLANTS.
141 N. W. 2d 751

Filed April 15, 1966. No. 36145.

1. **Trial: Appeal and Error.** A verdict of a jury based upon conflicting evidence will not be set aside unless it is clearly wrong.
2. **Public Lands.** Where a new lessee files a notice of appeal to the district court from an appraisement of the improvements upon school land, the costs in that court are taxable to the new lessee. §§ 72-240.06 and 76-720, R. S. Supp., 1963.

Appeal from the district court for Chase County: VICTOR WESTERMARK, Judge. Affirmed.

Bosley & Bosley, for appellant.

Daniel E. Owens and Russell, Colfer & Frazier, for appellees.

Clarence A. H. Meyer, Attorney General, Bernard L. Packett, Maupin, Dent, Kay & Satterfield, McGinley, Lane, Mueller & Shanahan, Bern R. Coulter, and Davis, Thone, Bailey, Polsky & Hansen, for amici curiae.

Heard before CARTER, SPENCER, BOSLAUGH, BROWER, SMITH, and MCCOWN, JJ., and KUNS, District Judge.

MCCOWN, J.

This is a proceeding under section 72-240.06, R. S. Supp., 1963, to determine the value of the improvements upon a tract held under a school land lease. The plaintiff, Holiday Mobil Homes Resorts, Inc., a corporation, is the former lessee. John Frosh and Elmo J. Frosh, the defendants, are the new lessees.

Two of the appraisers fixed the value of the improvements at $17,350. The third appraiser valued the improvements at $10,090.57. These appraisals, however, did include certain personal property not involved here. The defendants appealed to the district court where the jury returned a verdict for $5,710. The plaintiff's motion for new trial was overruled and it has appealed.

The assignments of error relate to the sufficiency of the evidence to sustain the judgment.

The particular improvements involved are 249 acres of growing wheat; plowing for future crops; an irrigation well; land leveling; well, windmill, and pens; and fences. The defendants' lease commenced January 1, 1964, and the improvements are to be valued as of that date.

The sole issue involved is the valuation of the improvements. Briefs amici curiae were filed in this court by parties who are not parties to this action. Those briefs raise issues having to do with approval of improvements by the Board of Educational Lands and Funds, under the terms of school land leases and applicable statutes. Those issues are not properly before the

court, and are not in any way determined here.

The evidence is in conflict as to the value and the condition of the improvements. Mr. Dewey Traves, the sole operator and manager of the plaintiff, testified that the improvements had a value of $11,119.40. Mr. John Frosh, one of the defendants, testified that the value of the improvements was $4,400. Other witnesses testified to the value of particular items, the conditions of the growing crops or other improvements, or as to operations performed on the land, and the character of the soil. The valuation of the growing wheat and of the farm fences involves the major differences in the testimony. Mr. Traves valued the growing wheat at $7,470, and the farm fences at $1,300. Mr. Frosh valued the growing wheat at $2,962.50, and the farm fences at $400. The other improvements involved account for the remaining differences in valuation.

The plaintiff contends that the verdict of the jury is clearly against the weight and reasonableness of the evidence, and is so grossly inadequate that it was founded on prejudice, passion, mistake, or other means not apparent in the record. From a thorough examination of the record, we conclude that this contention cannot be sustained. The verdict is within the range of the testimony. The verdict of the jury should not be set aside unless it is clearly wrong. Sall v. Schnackenberg, 178 Neb. 699, 134 N. W. 2d 808.

The trial court taxed the costs of the action in the district court to the defendants. By cross-appeal, the defendants contend that this was erroneous, and that the costs should have been taxed to the plaintiff. This issue has been determined in the case of Bauerle v. Frosh, *ante* p. 170, 141 N. W. 2d 748. While the Legislature may not have considered the differences between a condemner and a new lessee of school lands, its language is specific and controlling. In this case, the defendants filed a notice of appeal to the district court from the

appraisement and the costs in the district court were properly taxed to the defendants.

The judgment of the district court is affirmed with costs in this court taxed to the plaintiff.

AFFIRMED.

ALVIN BAUER ET AL., APPELLEES, V. ARTHUR BAUER, APPELLANT, IMPLEADED WITH IRENE BAUER ET AL., APPELLEES.

141 N. W. 2d 837

Filed April 15, 1966. No. 36217.

1. **Deeds.** A reservation in a deed must be to the grantor, or to one of them, where there are two or more, but an estate cannot be created in a stranger to a deed by reservation or recital therein.
2. ———. An exception in a deed is a qualification by which some part of the estate is not conveyed which could have passed to the grantee but for the exception.
3. ———. Exceptions and reservations can only be created by and for the benefit of the grantor and his heirs and not for a stranger.
4. **Courts: Deeds.** It shall be the duty of courts of justice to carry into effect the true intent of the parties so far as such intent can be collected from the whole instrument, and so far as such intent is consistent with rules of law.
5. **Statutes.** While the intent statute does not have the effect of changing substantive law, it is declaratory of a rule of construction long adopted by this court.
6. **Deeds.** In construing a reservation which is obscure, uncertain, or ambiguous, the intention of the parties is to be pursued, if possible, and emphasis is given to a determination of what the grantor meant by the language of the reservation.
7. ———. A reasonable construction should be given, and the entire instrument and the surrounding circumstances, including the purpose for which the property or right reserved is intended to be used, should be considered.

Appeal from the district court for Lancaster County: BARTLETT E. BOYLES, Judge. Affirmed.

Jack L. Craven, for appellant.

John E. Mekota and Gerald J. Hallstead, for appellees Alvin Bauer et al.

Crosby, Pansing, Guenzel & Binning, for appellee Loos.

Heard before CARTER, SPENCER, BOSLAUGH, BROWER, SMITH, and MCCOWN, JJ., and BURKE, District Judge.

SPENCER, J.

This is an appeal from a judgment quieting title in Alvin Bauer and Mary Bauer, husband and wife, hereinafter referred to as plaintiffs, to the east half of the northeast quarter of Section 30, Township 8 North, Range 5, in Lancaster County, Nebraska. The defendants in the district court were Arthur Bauer and Irene Bauer, husband and wife, and Clara Loos. An appeal has been perfected by Arthur Bauer, who is the sole appellant herein. He will hereinafter be referred to as defendant.

On the 29th day of November 1946, Mary Bauer, a widow and the mother of Alvin Bauer and the defendant, for a recited consideration of $2,500 and other valuable consideration, conveyed the land in question to the plaintiffs by warranty deed. Following the words "subject to" in the printed form of the deed, the following was typed: "Life interest and $2500.00 to be paid to her son Arthur Bauer." The deed was executed in the office of Frank Novak, a real estate man at Crete, Nebraska. At the same time and place a separate instrument, which we will hereinafter refer to as an agreement, was signed and acknowledged by the plaintiffs. It is as follows: "As a part of the consideration for the conveyance of the East Half (E½) of the North East Quarter (NE¼) of Section Thirty (30), in Township Eight (8), North Range Five (5) in Lancaster County, Nebraska by the within named Mary Bauer, Widow, to Alvin Bauer, her son, by deed of this date, the undersigned Alvin Bauer and Mary Bauer, his Wife, hereby agree to deliver to the said Mary Bauer, Widow, two-

fifths of all crops to be raised on said premises as long as the said Mary Bauer shall live; no crops shall be delivered to the estate of the said Mary Bauer after her death.

"The undersigned further agree to pay to Arthur Bauer, son of the said Mary Bauer, Widow, the sum of Twenty Five Hundred Dollars ($2,500.00) within three months from the date of her death; the undersigned hereby grant and convey to the said Arthur Bauer a lien upon said real estate for the payment of said sum of $2,500.00. Said sum shall draw interest at the rate of 4% per annum from the date of the death of said Mary Bauer, Widow, until paid, if not paid within the said 90 day period."

Both the deed and the agreement were prepared in the office of Novak, and both of them were acknowledged by him as a notary public. The deed and the agreement were recorded in the office of the register of deeds in Lancaster County on December 9, 1946.

The plaintiffs took immediate possession of the land, farmed the same openly, and continued in open, exclusive possession, claiming ownership under said deed and paying the two-fifths of the crop share to Mary Bauer until her death February 21, 1955. On September 17, 1955, plaintiffs paid defendant $2,555, representing the $2,500 and interest from the date of Mary's death. The defendant signed and acknowledged a release which is in words and figures as follows, to wit: "In consideration of payment, the undersigned Arthur Bauer hereby releases the lien on the East Half (E½) of the Northeast Quarter (NE¼) of Section Thirty (30), Township Eight (8), North Range Five (5) in Lancaster County, Nebraska, created by the Agreement of Alvin Bauer and Mary Bauer, recorded December 9, 1946, at Page 435 of Book 30 of the Miscellaneous Real Estate Records of said Lancaster County."

In 1962 the plaintiffs entered into a written contract for the sale of said property to Clara Loos. A question

was raised as to the merchantability of the title because of differing interpretations of the words "subject to Life interest and $2500.00 to be paid to her son Arthur Bauer." Defendant refused to execute a quit claim deed and this action was filed.

The question raised is whether the life interest involved is the life interest of the grantor or her son Arthur Bauer. Even though there is no doubt in our minds as to the construction to be put on the language from the instrument itself, we cannot say that the deed is plain and unambiguous as the defendant argues.

If we adopt defendant's contention that the clause as it appears in the instrument was intended to reserve a life estate to him, then it is a reservation to the grant in favor of a stranger to the transaction. If so, it would be ineffectual to create title in him. In Burchard v. Walther, 58 Neb. 539, 78 N. W. 1061, we said: "A reservation in a deed must be to the grantor, or to one of them, where there are two or more, but an estate cannot be created in a stranger to a deed by a reservation or recital therein."

Defendant argues, however, that it was the intention of the parties that the quoted language operate as an exception to the grant. An exception in a deed is nothing more than a qualification by which some part of the estate is not conveyed which could have passed to the grantee but for the exception. We held in Burchard v. Walther, *supra,* that exceptions and reservations can only be created by and for the benefit of a grantor and his heirs and not for a stranger.

Defendant cites several cases from other jurisdictions holding that an exception or reservation in favor of a stranger to the deed will vest in him good title to the interest excepted where the deed plainly discloses an intention that he shall have the interest, and words deemed sufficient to vest it in him are used. We do not deem it necessary to discuss or analyze these cases because we

do not believe the deed in question plainly discloses any intention that defendant shall have the interest. As we interpret the deed, it was the grantor's intention to reserve a life estate to herself.

Section 76-205, R. R. S. 1943, so far as material here, provides: "* * * it shall be the duty of the courts of justice to carry into effect the true intent of the parties, so far as such intent can be collected from the whole instrument, and so far as such intent is consistent with the rules of law."

Defendant contends that the intent of the grantor must be ascertained from within the four corners of the deed and that so construed it is evident that it was the grantor's intent to except a life estate for his benefit. While the intent statute does not have the effect of changing substantive law, it is declaratory of a rule of construction long adopted by this court. This statute, first enacted in 1866, relates only to rules of construction and does not enlarge on in any way or modify any rule of substantive law which existed in 1866 or has since been created. See Andrews v. Hall, 156 Neb. 817, 58 N. W. 2d 201, 42 A. L. R. 2d 1239.

The agreement and the deed were executed at the same time and are a part of the same transaction. Although the agreement does not bear the signature of the grantor of the deed, the benefits of the agreement run to the grantor. The agreement was signed by the plaintiffs, who were the parties to be bound. There can be no question the agreement was executed with the intention to bind the grantees and to explain the extent of their obligation. As we interpret the transaction, it is no different from the usual transaction resulting in a deed and the delivery of a mortgage for the balance of the purchase price. The mortgage is executed only by the grantees of the deed. In those situations, we have held that where they are executed at the same time, they are presumed to constitute one transaction. See Taylor v. Harvey, 90 Neb. 770, 134 N. W. 647.

We construe the deed in the light of the rule enunciated in Gettel v. Hester, 165 Neb. 573, 86 N. W. 2d 613: "In construing a reservation which is obscure, uncertain, or ambiguous, the intention of the parties is to be pursued, if possible, and emphasis is given to a determination of what the grantor meant by the language of the reservation. A reasonable construction should be given, and the entire instrument and the surrounding circumstances, including the purpose for which the property or right reserved is intended to be used, should be considered."

It is also pertinent to observe that the parties themselves construed the deed as reserving a life estate in the grantor. Plaintiffs, who farmed the land themselves, paid the grantor the usual landlord's crop share during the remainder of her life, and paid the $2,500 with interest to the defendant after the grantor died. They performed in the exact manner specified in the agreement.

Defendant in his brief attempts to suggest that there were facts which were withheld from him relative to his rights so that the release signed by him should be void as to any interest other than the $2,500, regardless of the time that has elapsed. Defendant's testimony on the signing of the release was very evasive. If there were any question herein, his very evasiveness would raise a serious doubt as to whether or not he was fully informed about the transaction.

For the reasons given, we find that there is no merit to any assignment of error herein, and that the judgment entered in the district court is correct and is affirmed.

AFFIRMED.

JAMES F. MYERS, APPELLANT, V. JOSEPH P. DROZDA, M.D., ET AL., APPELLEES.

DEBORAH L. MYERS, A MINOR, BY JAMES F. MYERS, HER NEXT FRIEND, APPELLANT, V. JOSEPH P. DROZDA, M.D., ET AL., APPELLEES.

141 N. W. 2d 852

Filed April 22, 1966. No. 36014.

1. **Charities.** A nonprofit charitable hospital possesses no exemption from tort liability in respect to causes of action arising after April 22, 1966.
2. **Charities: Insurance.** The liability of a nonprofit charitable hospital to its patients for negligence in respect to causes of action arising prior to April 23, 1966, is limited to the applicable amount of its liability insurance, if any.
3. **Appeal and Error: Judgments.** The effect of an overruling decision may be retrospective, partially retrospective, or prospective. The choice is influenced by considerations of judicial policy, which may include the following: The reasons for overruling the prior decision; the public interest in institutional stability; justifiable reliance upon the old rule; and uniformity of application to parties similarly situated.

Appeal from the district court for Douglas County: JOHN E. MURPHY, Judge. Reversed and remanded.

John Allan Appleman and Richard G. Stehno, for appellants.

Kennedy, Holland, DeLacy & Svoboda, Joseph P. Cashen, and Clarence E. Heaney, Jr., for appellee Lutheran Medical Center.

Heard before WHITE, C. J., CARTER, SPENCER, BOSLAUGH, BROWER, SMITH, and MCCOWN, JJ.

SMITH, J.

An infant girl and her father urge us to repudiate the court-made rule which has exempted nonprofit charitable hospitals from liabiilty for negligent injuries to patients. In the district court the rule of exemption produced a summary judgment for the hospital on the personal in-

jury claim of the girl and the derivative claim of her father. These appeals followed.

For purposes of review we assume the truth of the following statements. Defendant Lutheran Medical Center is a charitable corporation operating a nonprofit hospital. While the baby girl was a patient in the surgical quarters of the hospital, an employee of defendant hospital negligently anesthetized her. As a result she suffered a cardiac arrest. Defendant hospital carried hospital professional liability insurance with limits of $10,000 per claim and $30,000 aggregate.

In 1912 we adopted a policy of partial immunity which protected parties like defendant hospital. See Duncan v. Nebraska Sanitarium & Benevolent Assn., 92 Neb. 162, 137 N. W. 1120, 41 L. R. A. N. S. 973, Ann. Cas. 1913E 1127. In 1955 we affirmed that policy. See, Muller v. Nebraska Methodist Hospital, 160 Neb. 279, 70 N. W. 2d 86; Cheatham v. Bishop Clarkson Memorial Hospital, 160 Neb. 297, 70 N. W. 2d 96. Today we reexamine it.

The rationale of exemption has these four labels: "Trust fund," "respondeat superior," "implied waiver," and "public policy." Under the trust fund theory the diversion of assets to satisfy tort judgments would breach the trust. Respondeat superior is said to govern a business for profit but not a charity. An implied waiver by a patient of his tort claim is defended as a fair conclusion from the patient-hospital relationship. The public policy contains the assumption that liability would dissipate the assets of charities. See Muller v. Nebraska Methodist Hospital, *supra*.

Although the law of trusts and agency has exempted the hospital from tort liability to its patients, the law has not been applied to the claim of the invitee; a physician may recover, a patient may not. See Marble v. Nicholas Senn Hospital Assn., 102 Neb. 343, 167 N. W. 208. Why? The riddle goes unsolved.

Implied waiver is a fiction. Of many illustrations we

choose one—plaintiff's allegations. At the time of the "waiver" the age of the girl was 1 year. "* * * waiver * * * amounts merely to imposing immunity as a rule of law in the guise of assumed contract or renunciation of right, when all other reasons are found insufficient to support the distinction." President & Directors of Georgetown College v. Hughes, 130 F. 2d 810, at page 826.

The foreboding that tort liability would dissipate assets was dispelled years ago by the following language in President & Directors of Georgetown College v. Hughes, *supra,* at pp. 823-825:

"No statistical evidence has been presented to show that the mortality or crippling of charities has been greater in states which impose full or partial liability than where complete or substantially full immunity is given. Nor is there evidence that deterrence of donation has been greater in the former. Charities seem to survive and increase in both, with little apparent heed to whether they are liable for torts or difference in survival capacity. * * *

"What is at stake, so far as the charity is concerned, is the cost of reasonable protection, the amount of the insurance premium as an added burden on its finances, not the awarding over in damages of its entire assets. * * *

"Whether immunity be found on the 'trust fund' theory, the rule of respondeat superior, so-called 'public policy,' or the more indefensible doctrine of 'implied waiver,' is not for us a controlling consideration. * * * They are merely different names for the same idea, cast according to the predilection of the user * * *. The differences in foundation do not affect even the extent of the departure."

If this exemption formerly met a need, it has had its day. In 1942 four states apparently imposed unqualified liability. President & Dir. of Georgetown College v. Hughes, *supra,* at p. 819. In 1955 we named 22 states, exclusive of Nebraska, which had granted some degree

of immunity, and we said that 10 of them had recently reaffirmed their position. See Muller v. Nebraska Methodist Hospital, *supra*. Afterward courts in 8 of the 22 states abrogated the immunity, and 5 of the 10 "recent" decisions were overruled. See, Mullikin v. Jewish Hospital Assn. of Louisville (Ky.), 348 S. W. 2d 930; Parker v. Port Huron Hospital, 361 Mich. 1, 105 N. W. 2d 1; Collopy v. Newark Eye & Ear Infirmary, 27 N. J. 29, 141 A. 2d 276; Avellone v. St. John's Hospital, 165 Ohio St. 467, 135 N. E. 2d 410; Hungerford v. Portland Sanitarium & Benev. Assn., 235 Or. 412, 384 P. 2d 1009; Flagiello v. Pennsylvania Hospital, 417 Pa. 486, 208 A. 2d 193; Adkins v. St. Francis Hospital of Charleston (W. Va.), 143 S. E. 2d 154; Kojis v. Doctors Hospital, 12 Wis. 2d 367, 107 N. W. 2d 131. Two legislatures intervened on one side or the other. See, Nev. R. S., § 41.480; N. J. S. A., §§ 2A: 53A-7, 53A-8. It is doubtful that any court has overruled a decision declaring a charity to be nonexempt. See Adkins v. St. Francis Hospital of Charleston, *supra*. Liability probably represents the majority view. See Parker v. Port Huron Hospital, *supra*. The judicial trend is unmistakable.

Defendant hospital relies upon our prior announcement that any change ought to be made by the Legislature. See Muller v. Nebraska Methodist Hospital, *supra*. If we endorsed legislation by silence, we erred. See, Art. I, § 13, Constitution of Nebraska; Hungerford v. Portland Sanitarium & Benev. Assn., *supra;* Adkins v. St. Francis Hospital of Charleston, *supra*. Stare decisis "was intended, not to effect a 'petrifying rigidity,' but to assure the justice that flows from certainty and stability. * * * we would be abdicating 'our own function, in a field perculiarly nonstatutory,' were we to insist on legislation and 'refuse to reconsider an old and unsatisfactory court-made rule.' " Bing v. Thunig, 2 N. Y. 2d 656, 143 N. E. 2d 3.

"* * * judges of an earlier generation declared the immunity simply because they believed it to be a

sound instrument of judicial policy which would further the moral, social and economic welfare of the people of the State. When judges of a later generation firmly reach a contrary conclusion they must be ready to discharge their own judicial responsibilities in conformance with modern concepts and needs." Collopy v. Newark Eye & Ear Infirmary, *supra*.

The old rule being clearly wrong, we hold that nonprofit charitable hospitals are not exempt from tort liability to their patients. Contrary decisions are overruled to the extent of their inconsistency.

The point of departure from precedent remains to be determined. Loss of exemption may be retrospective, partially retrospective, or prospective. The choice is influenced by these broad considerations: The reasons for overruling the prior decisions; the public interest in institutional stability; justifiable reliance upon the exemption; and uniformity of application to parties similarly situated.

Other courts have considered some of those policy factors. Several decisions removed the exemption prospectively except for the cases being decided. Three reasons were given. First, the charitable corporation may have relied on the old rule whether or not insurance coverage existed. Second, announcement of prospective operation would be dictum. Third, if the effort and expense of challenge were to go unrewarded, appellant would have no incentive to contest the old rule. See, Darling v. Charleston Community Memorial Hospital, 33 Ill. 2d 326, 211 N. E. 2d 253; Molitor v. Kaneland Community Unit Dist. No. 302, 18 Ill. 2d 11, 163 N. E. 2d 89, 86 A. L. R. 2d 469; Parker v. Port Huron Hospital, *supra;* Kojis v. Doctors Hospital, *supra*.

We too think that the new rule should be partially retrospective; however, insurance is significant. A differentiating factor between a charity and its insurer is reliance. An insured charity does not rely justifiably on the exemption within the limits of the insurer's lia-

bility. The impact of liability upon an insurer should be relatively light because of its ability to spread the loss. "* * * ordinarily it is impossible to trace the impact of particular legal doctrines upon liability insurance rates." Keeton, Creative Continuity in the Law of Torts, 75 Harv. L. Rev. 463, at page 493. Factors concerning dictum and reward carry some weight but not much.

In conclusion the new rule applies to all causes of action arising after April 22, 1966, the filing date of this opinion. In respect to other causes of action the new rule applies if, but only if, the nonprofit charitable hospital was insured against liability on the claim of the patient, and then only to the extent of the maximum applicable amount of its insurance coverage.

The judgment is reversed, and the causes are remanded for proceedings consistent with this opinion.

REVERSED AND REMANDED.

WHITE, C. J., not participating.

BROWER, J., dissenting.

I respectfully dissent from the opinion of the court herein. In my opinion, the office of this court is to interpret the substantive law as it is and of the Legislature as the direct representative of the people to make such changes therein as it deems best for the future. The present decision is nothing but judicial legislation made clear in the opinion which applies the change prospectively as if it were a legislative enactment, which may be necessary if the court is to engage in legislation.

This is particularly ill-advised in the present case when as late as 1955, in considering this same question, this court in Muller v. Nebraska Methodist Hospital, 160 Neb. 279, 70 N. W. 2d 86, expressly stated that if changes were to be made in the law under consideration, it should be done by the Legislature which has heretofore declined to do so.

It is stated in the majority opinion that the previous rule was court made and that is advanced as a sufficient license for the court to change the law when it sees fit

to do so. When the rule was adopted in Duncan v. Nebraska Sanitarium & Benevolent Assn., 92 Neb. 162, 137 N. W. 1120, 41 L. R. A. N. S. 973, Ann. Cas 1913E 1127, it is quite evident from the decisions cited therein that our previous holding was part of the common law which was adopted by statute, section 49-101, R. R. S. 1943.

This decision indicates whenever existing law in the opinion of this court needs changing, it is the duty of this court to reconsider it.

The scope of the court's work will accordingly be greatly extended into a field hitherto reserved for the Legislature whose duty it is to resolve conflicting social problems, a field in which this court is not fitted. It is the function of courts to declare the law and not to create it.

In the past, attorneys and clients have governed their actions in reliance on what our decisions have said the law was. If judicial legislation is to take place, they will be required to consider whether those decisions were right in the first place or need revision. Their tasks will also be made more difficult.

CARTER, J., joins in this dissent.

A. L. HAARHUES, APPELLEE, V. OLIVER B. GORDON ET AL., APPELLANTS.
141 N. W. 2d 856

Filed April 22, 1966. No. 36053.

1. **Evidence: Witnesses.** Written statements of witnesses in the possession of an adversary are not obtainable as a matter of right under section 25-1267.39, R. R. S. 1943.
2. **Evidence.** The burden is upon the party seeking discovery under section 25-1267.39, R. R. S. 1943, to demonstrate from facts appearing in the record that good cause exists for production of statements taken by adversary or his agents.
3. **Evidence: Witnesses.** A court is not justified in ordering production of statements by witnesses simply on the theory that facts sought are relevant and not privileged, or merely to help

counsel to prepare himself to examine witnesses and to make certain that nothing is overlooked.

4. ———: ———. Special circumstances are necessary to the establishment of good cause to sustain the entry of an order requiring a party to produce statements taken from witnesses.

5. ———: ———. A court is not justified in ordering a litigant to produce the statements of witnesses which he has procured in preparing for trial upon his adversary's mere surmise or suspicion that he might find impeaching material in the statements.

6. ———: ———. Good cause for production of statements of witnesses for the benefit of an adversary ordinarily is not shown if it appears that the witnesses are known and available to the party moving for their production.

7. ———: ———. Good cause requiring the production of a written statement by a witness is ordinarily not shown because of a long lapse of time since the taking of the statement where it appears that statements were taken at substantially the same time by both parties and the memory of the witness can be refreshed from one statement as well as the other.

8. ———: ———. Where a statement of a witness contains specific facts available to him but not to the witnesses of the other party, which are essential to the establishment of his case, an order for production of the statement is usually warranted in the interest of justice.

9. ———: ———. Where a witness is unavailable or hostile, a statement made by such witness may be required to be produced where it is shown that there is a reasonable probability of materiality or that it may afford clues to relevant evidence essential to the establishment of the cause of action.

10. ———: ———. A showing that a statement of a witness was obtained by an adjustment agency on the day of a collision between two trucks did not constitute a showing of good cause in view of the fact that movant took a statement from the witness 3 days later and no reasons were shown why the second statement would be any less reliable than the first in refreshing the memory of the witness.

11. ———: ———. The possibility that a witness might make two statements in different language, or restrict or extend them in different degrees, does not constitute a showing of good cause. A holding to the contrary would have the effect of requiring production of the statement in every case.

12. Evidence. It is generally the rule that written statements in the exclusive possession of an adverse party, and therefore unavailable to movant, does not constitute good cause where

substance of the statement is discoverable by depositions, interrogatories, or personal interview.

13. **Evidence: Trial.** While it is an objective in discovery proceedings to eliminate surprise in the trial of the issues of a case, it is not its purpose to strip an adversary of the means of insuring truth in the trial of a contested case except where it is shown that the demands of justice are paramount thereto. A contested law suit remains an adversary proceeding.

Appeal from the district court for Lincoln County: HUGH STUART, Judge. Reversed.

Rush C. Clarke and James E. Schneider, for appellants.

Maupin, Dent, Kay & Satterfield, Clinton J. Gatz, Jr., Donald E. Girard, and Rady A. Johnson, for appellee.

Heard before WHITE, C. J., CARTER, SPENCER, BOSLAUGH, BROWER, SMITH, and MCCOWN, JJ.

CARTER, J.

This is an appeal from a judgment of the district court for Lincoln County finding each of the defendants in contempt of court and assessing a fine of $25 against each defendant for refusing to produce a written statement for inspection which was made by one Truman L. Brandt, and which was ordered by the court to be so produced.

On February 26, 1960, at about 2:30 a.m., a tractor-trailer belonging to plaintiff and operated by Brandt in Lincoln County was struck while parked on the shoulder of U. S. Highway No. 30 by a tractor-trailer owned by Merchants Motor Freight, Inc., which was being operated by Oliver B. Gordon. Substantial damage was done to both vehicles. Plaintiff brought this action against Merchants Motor Freight, Inc., and Gordon on June 9, 1960. Merchants Motor Freight, Inc., answered and filed its cross-petition for damages against the plaintiff. Questions of negligence and contributory negligence are the primary issues to be resolved.

On January 29, 1965, plaintiff filed its motion, pursuant to section 25-1267.39, R. R. S. 1943, for an order requiring defendants to produce for inspection a state-

ment in the possession of defendants made by Brandt to the representative of a claim adjustment service on or about February 26, 1960. After a hearing, the trial court directed defendants to produce the statement. Defendants refused to comply with the court's order and the fines from which this appeal is taken were imposed.

The affidavit in support of the motion is sworn to by C. J. Gatz, one of plaintiff's attorneys, and recites that the statement was taken on or about February 26, 1960, that Brandt is charged in the counterclaim with specific acts of negligence which are imputable to the plaintiff, that the statement is believed to contain a narrative account of the events leading up to, at the time of, and subsequent to the accident, that Brandt was not given a copy of the statement, and that 5 years have elapsed since the giving of the statement. It is stated also that Brandt, it is believed, does not have a full and complete recollection of the facts and that it is of paramount importance to the plaintiff that he obtain a copy of the statement to refresh Brandt's recollection of such facts.

Gatz was called for cross-examination by defendants' counsel and testified that plaintiff took a statement from Brandt at Fort Morgan, Colorado, on February 29, 1960. He stated that Brandt was an employee of plaintiff at that time and that he knows where Brandt presently resides.

The motion to produce the statement was filed pursuant to section 25-1267.39, R. R. S. 1943, which reads in part: "Upon motion of any party showing good cause therefor and upon notice to all other parties, and subject to the provisions in section 25-1267.22, the court in which an action is pending may (1) order any party to produce and permit the inspection and copying or photographing, by or on behalf of the moving party, of any designated documents, papers, books, accounts, letters, photographs, objects, or tangible things, not privileged, which constitute or contain evidence relating to any of the matters within the scope of the examination permitted

by section 25-1267.02 and which are in his possession, custody, or control; * * *." Sections 25-1267.02 and 25-1267.22, R. R. S. 1943, refer to depositions and, although they purport to define the extent and limitation upon their taking, they are not important in determining good cause required to be shown to compel the production of statements by witnesses under section 25-1267.39, R. R. S. 1943. Whether or not good cause was shown as required by the statute constitutes the crux of the case.

Section 25-1267.39, R. R. S. 1943, is in all respects identical with Rule 34 of the Federal Rules of Civil Procedure except for the renumbering of statutes required to integrate the rule into the Nebraska statutes. The adoption of a rule of another jurisdiction ordinarily requires that great weight be given to the construction of the rule at the time of its enactment by the courts of the jurisdiction from which it was taken unless such construction is violative of some established state policy. Mecke v. Bahr, 177 Neb. 584, 129 N. W. 2d 573. In previous cases this court has not found it necessary to clarify the words "good cause" contained in section 25-1267.39, R. R. S. 1943, and, consequently, the question is one of first impression in this state.

The rule does not contemplate that any and all information, oral or written, can be obtained from an adverse party as a matter of right. The necessity of "good cause" in section 25-1267.39, R. R. S. 1943, was intended as a restriction upon any such action. As we said in Mecke v. Bahr, *supra:* " 'Under the guise of liberal construction, we should not emasculate the rules by permitting something which never was intended or is not within the declared objects for which they were adopted.' " See, also, Jeppesen v. Swanson, 243 Minn. 547, 68 N. W. 2d 649.

In the instant case, Brandt, the person whose statement is sought to be produced, was the employee of the plaintiff and the operator of plaintiff's tractor-trailer that was a participant in the accident. Brandt is not a party

to the action and, in the consideration of the issue before us, is in the category of a witness. It must be borne in mind that plaintiff knows the whereabouts of Brandt and he is, therefore, available to the plaintiff for the purpose of obtaining and perpetuating his evidence. It should not be overlooked that the accident occurred some 5 years prior to plaintiff's demand for the production of the statement given on the day of the accident. In addition, the evidence shows that plaintiff took a statement from Brandt 3 days after the accident. It is upon this factual situation and the showing of good cause made that constitute the basis for a decision by this court.

The production of statements of witnesses under section 25-1267.39, R. R. S. 1943, cannot be required as a matter of right. They may be obtained only upon a showing of good cause. Relevancy to the issues must appear, but relevancy alone is not sufficient. If it were, the requirement that good cause must be shown would be a meaningless provision. "Good cause" was intended as a restriction upon the obtaining of any and all documents, papers, books, accounts, letters, photographs, objects, or things, not privileged, which are in the custody and control of the adverse party. It is contended that the purpose of discovery is to require the parties to disclose all the facts in order that more perfect justice will be attained and that the bad features of the competitive trial be eliminated; that a trial become less a game of wits, skill, or energy. But litigants being what they are, with their known tendency to put their best foot forward in their own interest, the adversary must use counteracting methods to arrive at the unvarnished truth. It would not serve the cause of justice to strip a party of the means of protecting against these human tendencies by cross-examination, impeachment, and other devices, which have been long demonstrated as effective methods of insuring the ultimate discovery of truth.

It is not the purpose of rules of discovery to supplant our adversary system. Their purpose is to implement

it and when, under all the circumstances, the reason for the use of discovery procedures outweighs the harm imposed upon the adversary, justice requires their use. But unless such a proper use can be shown, which section 25-1267.39, R. R. S. 1943, has designated as "good cause," the statute is not available.

The proper meaning of the statute requiring that good cause be shown as a condition to the issuance of an order to produce a statement of a witness in the hands of an adverse party is of great importance in this area of the law. While the courts have not always been consistent in interpreting its meaning, the facts of each case are important in solving each particular problem.

As a general rule, the work-product of an attorney is free from discovery. Where relevant and nonprivileged facts remain hidden in an attorney's file and where production of those facts is essential to the establishment of one's case, discovery may properly be had. Even though they may not be admissible in evidence, they may be a proper subject of discovery when the witnesses are unavailable or they give clues to the existence or location of relevant facts. Alltmont v. United States, 177 F. 2d 971. But the court is not justified in ordering the production of documents simply on the theory that the facts sought are relevant and are not privileged. Hickman v. Taylor, 329 U. S. 495, 67 S. Ct. 385, 91 L. Ed. 451. Nor will the production of statements be ordered merely to help counsel to prepare himself to examine witnesses and to make sure he has overlooked nothing. Hickman v. Taylor, *supra*. In Hauger v. Chicago, R. I. & P. R.R. Co., 216 F. 2d 501, the court said: "Even though that lawyer hopes or believes, based upon guess, conjecture or suspicion, that a reading of the statements would reveal a basis for impeachment, or give him other valuable information, it has never been the practice of courts generally to require the production of such statements under such circumstances."

Some of the considerations involved have been ex-

pressed as: (1) The availability of the person whose statement is sought for having his deposition taken. (2) The relation of the time the statement was made to the event involved in the litigation. (3) The ability of movant to match technical skills with the maker of the statement. (4) The hostility of the witness to the movant. Scuderi v. Boston Ins. Co., 34 F. R. D. 463.

In Wilson v. David, 21 F. R. D. 217, the court said: "In regard to statements made by witnesses to the opposite party it seems to be generally held that good cause for their production is not shown when it appears that the witnesses are known and readily available to the moving party. This entire matter has been reviewed in Scourtes v. Fred Albrecht Grocery Co., D. C., 15 F. R. D. 55, where the court said at page 59: 'Where discovery of materials not the "work product" of an attorney is sought, the requirement is one of "good cause" for production under Rule 34. "Good cause" is present where the information is within the exclusive knowledge of an adversary, or where there is inequality of investigative opportunity, or where the adversary has taken the statement of a witness and that witness is hostile or is no longer available to the party seeking discovery. These factors, standing alone or in combination, will justify discovery if the other requirements of Rule 34 have been met. The Rule clearly contemplates that "good cause" shall consist of something greater than a mere showing of relevancy.' "

The burden is on the movant to demonstrate to the court from the facts in the record that good cause existed for requiring the production of the statement. Movant is not entitled to an order as a matter of right; he must show special circumstances which will sustain the granting of the order. Any discretion exercised by the court in the matter must be a judicial and not a whimsical one.

The witness, Brandt, gave his statement to defendants on February 26, 1960. Three days later he gave a

statement concerning the accident to plaintiff. His recollection of the incident was certainly as good in the one instance as in the other. The evidence shows that plaintiff knows the whereabouts of Brandt and it does not show that any attempt to take his deposition has been made. There is no evidence that Brandt is hostile to plaintiff or that he has in any way failed to cooperate. The statement was given 5 years ago, as was the statement given to the plaintiff. It is not urged that the statement taken by defendants is any different than the one taken by plaintiff. It is not shown why Brandt cannot refresh his memory of the accident by the statement he gave to the plaintiff. Whether or not Brandt recalls the facts appears to be a matter of surmise, certainly there is nothing to indicate that steps had been taken to ascertain the extent of his knowledge. The defendants contend that these facts show no special circumstances requiring them to produce the statement.

Plaintiff argues, however, that Brandt, as the driver of the tractor-trailer, is chargeable with negligence imputable to the plaintiff, that any admissions by Brandt can be used against plaintiff, and that he is entitled to know such facts. He contends also that Brandt was not represented by counsel when he gave the statement to the defendants and that he was not given a copy.

The facts indicate no special circumstances amounting to good cause necessary to bring section 25-1267.39, R. R. S. 1943, into operation. The lapse of 5 years time, while ordinarily an important consideration, is not important here because each took a statement at about the same time. The record does not show that Brandt's memory is faulty, the fact being, so far as the record shows, that no attempt has been made to find out. For 5 years the plaintiff had failed to discover and preserve the extent of Brandt's knowledge. It is true, of course, that a witness giving a statement may not state the same things in one as he does in another. But the fact remains, the adversary should not be deprived of the only

means he has against colored or false testimony unless good cause be shown which overrides the usual purposes of such evidence. It involves a balancing of interest. The trial of a law suit is still an adversary proceeding and our discovery statutes do not require a party to disclose all his evidence, including that which tends to restrain the unscrupulous, unless justice under the name of good cause requires it.

The right to discovery under section 25-1267.39, R. R. S. 1943, is dependent upon the facts and circumstances in each particular case. In the instant case the witness gave a written statement to the plaintiff 3 days after giving one to the defendants. The production of defendants' statement to refresh the memory of the witness under such circumstances does not constitute good cause. The showing in the instant case does not show that the witness' deposition has been taken or that he has been interviewed, although his whereabouts was known. The necessity for refreshing the memory of the witness asserted in the record is admittedly a matter of surmise even though the ascertainment of the fact was available. The mere fact that the work of preparation for trial can be made less laborious by the use of statements obtained by the adversary does not constitute good cause. To permit the production of written statements of witnesses solely to aid in the examination or cross-examination of the witness or to avoid impeachment of a witness is not within the scope of section 25-1267.39, R. R. S. 1943. A party is not entitled, under the guise of discovery, to look over the shoulder of his adversary in preparing for trial in an adversary proceeding. It is only when evidence necessary to the establishment of facts essential to his case is in the exclusive control of the adverse party that section 25-1267.39, R. R. S. 1943, may be resorted to. The fact that the witness whose statement is sought is an employee of one of the parties and, being a participant in the alleged wrong, is in somewhat the same position of a party, does not absolve the movant from showing good

cause. Under the facts contained in the record and herein recited, we find no special circumstances that require the production of the statement for the use of the adverse party. Undoubtedly it would be helpful to plaintiff's counsel to have the statement in examining the witness and in avoiding the possibility of impeachment. But these considerations alone do not amount to good cause. These views are generally supported in Guilford National Bank of Greenboro v. Southern Ry. Co., 297 F. 2d 921.

The order to produce the written statement of the witness Brandt is not supported by a showing of good cause. The order of the court finding the defendants guilty of contempt and assessing fines against them is reversed.

REVERSED.

WHITE, C. J., not participating.

SPENCER and BOSLAUGH, JJ., dissenting.

While we are in agreement with many of the general statements in the opinion, it is our conviction that we should not emasculate discovery by thwarting its purpose by an unduly strict construction.

It is pertinent to observe that section 25-1267.39, R. R. S. 1943, reads in part: "* * * the court in which an action is pending *may* * * *." (Italics supplied.) This can only be interpreted as importing a broad discretion in the trial court.

The purpose and intent of discovery statutes is to leave their application to the sound discretion of the trial court. Sound discretion is one controlled and governed not only by the statutory enactments but also by considerations of policy, necessity, propriety, and expediency in the particular case at hand. Necessarily the trial judge is in a better position to judge these matters than an appellate court.

Does the record before us show an abuse of discretion on the part of the trial court? In our judgment it does not. We recognize that Brandt's statement is in the category of a witness, but his statement in this situa-

tion is akin to that of a party to the litigation. While there is no unanimity in the various jurisdictions, statements obtained from the parties are frequently considered to be in a different category than those of a mere witness.

In Pasterak v. Lehigh Valley R.R. Co., 28 F. R. D. 383 (1961), where the court specifically found that there was no allegation or insinuation that the plaintiff was in any way misled or taken advantage of by the defendant's representative in taking a statement where he was not represented by counsel and was not furnished with a statement, the court said: "The plaintiff maintains simply that under these circumstances in which a party has given a statement to an adverse party, he is entitled to be furnished with a copy of such statement. The weight of authority supports the plaintiff's position. Neff v. Pennsylvania R. Co., D. C. E. D. Pa. 1948, 7 F. R. D. 532; Hayman v. Pullman Company, N. D. Ohio 1948, 8 F. R. D. 238; Moore's Federal Practice, Vol. 4, pp. 1147 through 1149. Cf. Safeway Stores, Inc. v. Reynolds, 1949, 85 U. S. App. D. C. 194, 176 F. 2d 476."

It is apparent to us that the trial court could readily have determined that there is present in this case a special circumstance which distinguishes it from the ordinary situation where the plaintiff and counsel would like to examine statements taken on behalf of the opposing party. Where, as here, an employer to whom an employee's negligence may be imputed seeks to see a statement that the employee may have incautiously, ignorantly, or inadvisedly signed, particularly where that statement is in narrative form, where the statement is taken the day of the accident by a representative of a claim adjustment service, and particularly where the employee was not given a copy of it, it would appear to us different considerations are involved.

The majority opinion summarily brushes off these considerations because a statement was given to the employer 3 days after the accident. The employer cannot

possibly know the particular phraseology used by the investigator in a narrative statement secured at a time when the employee may still be suffering from the effects of the accident. This particular phraseology, which would be that of the investigator, unexplained could be very prejudicial. It is not a question of impeachment. Its purpose is to accomplish the very thing for which discovery statutes were adopted.

MFA MUTUAL INSURANCE COMPANY, A CORPORATION, APPELLANT, V. DUANE SAILORS ET AL., APPELLEES.
141 N. W. 2d 846

Filed April 22, 1966. No. 36071.

Insurance. An insurer cannot assert a breach of the cooperation clause as a policy defense in the absence of a showing of prejudice or detriment to the insurer.

Appeal from the district court for Richardson County: WILLIAM F. COLWELL, Judge. Affirmed.

Baylor, Evnen, Baylor & Urbom, Dwight Griffiths, and Robert T. Grimit, for appellant.

Boland, Mullin, Walsh & Cooney and Harold L. Gurske, for appellees Pupkes et al.

Heard before WHITE, C. J., CARTER, SPENCER, BOSLAUGH, BROWER, SMITH, and MCCOWN, JJ.

BOSLAUGH, J.

This is an action for a declaratory judgment brought by MFA Mutual Insurance Company to determine its rights and liabilities under an automobile liability insurance policy issued by the plaintiff to Jerry J. Janko. The policy insured a 1955 Ford automobile.

On September 10, 1960, Duane Sailors was operating the insured automobile when it was involved in a collision with an automobile owned by Ervin Pupkes and

operated by Mildred Pupkes. Donald Pupkes and Deborah Pupkes are minor children who were passengers in the Pupkes automobile at the time of the accident. The defendants in this action are Sailors, the Pupkes, and their children.

The policy issued by the plaintiff contained a provision extending the coverage of the policy to any person using the automobile with the permission of the named insured. The policy also contained provisions requiring the insured to give written notice of accident or loss to the plaintiff as soon as practicable, and to forward immediately every demand, notice, or summons received by the insured. The policy further provided that "the insured shall cooperate with MFA Mutual, disclosing all pertinent facts known or available to him, and upon MFA Mutual's request, shall attend hearings and trials and assist in effecting settlements, securing and giving evidence, obtaining the attendance of witnesses and in the conduct of any legal proceedings in connection with the subject matter of this insurance."

The record shows that Sailors had been drinking at the time of the accident on September 10, 1960. After the accident Sailors and Janko agreed that they would represent that Janko had been operating the insured automobile at the time of the accident. This was done, and the plaintiff did not ascertain the true facts concerning the identity of the driver of the insured automobile from Janko and Sailors until January 31, 1961.

On June 19, 1962, Mildred Pupkes commenced an action against Sailors to recover damages arising out of the accident of September 10, 1960. Sailors did not notify the plaintiff that this action had been commenced and did not forward any summons to the plaintiff. The plaintiff received notice of the suit in November 1962 by a letter from the attorney for Mrs. Pupkes.

On January 8, 1963, the plaintiff wrote to Sailors stating that he had failed to cooperate, that the plaintiff wanted to investigate the accident, and that it reserved

its rights under the policy. On January 22, 1963, Dwight Griffiths, an attorney employed by the plaintiff, wrote to Sailors requesting that he contact Griffiths imediately. On January 30, 1963, Griffiths again wrote to Sailors. On January 31, 1963, Sailors called Griffiths and said that he would come to Griffiths' office on the following Monday. Sailors did not keep the appointment and has not contacted Griffiths since that time.

This action was then commenced and further proceedings in the Pupkes v. Sailor action stayed until the determination in this case.

The trial court found that Sailors was an additional insured under the insurance policy issued by the plaintiff to Janko; that Sailors had failed to notify the plaintiff that Mildred Pupkes had commenced an action against him and that he had failed to cooperate with the plaintiff as required by the policy; that Sailors had materially and substantially breached the terms of the policy but that there was no showing of prejudice or detriment to the plaintiff; that there was no evidence of any collusion on the part of Mr. or Mrs. Pupkes; and that the plaintiff was required to defend the action against Sailors brought by Mildred Pupkes. The plaintiff's motion for new trial was overruled and it has appealed.

The plaintiff questions whether Sailors was driving the insured automobile with the permission of Janko at the time the accident happened. Although there is some evidence that Janko was reluctant about allowing Sailors to operate the automobile, we think the evidence sustains the finding of the trial court that Sailors was operating the automobile with Janko's permission at the time of the accident.

The principal issue in the case involves the finding that the evidence did not show that Sailor's breach of the terms of the policy had resulted in prejudice or detriment to the plaintiff. The plaintiff contends that no showing of prejudice is required, and that, in any event,

prejudice will be presumed from a material breach of the terms of the policy.

There appears to be a substantial division of authority upon these questions. See, 7 Am. Jur. 2d, Automobile Insurance, § 176, p. 508; Annotation, 34 A. L. R. 2d 264; Annotation, 60 A. L. R. 2d 1146; 8 Appleman, Insurance Law and Practice, § 4773, p. 106; 14 Couch on Insurance (2d Ed.), § 51:101, p. 599.

The more recent cases appear to hold that an insurer cannot assert a breach of the cooperation clause as a policy defense in the absence of a showing of prejudice or detriment to the insurer. White v. Boulton, 259 Minn. 325, 107 N. W. 2d 370; Allen v. Cheatum, 351 Mich. 585, 88 N. W. 2d 306; Campbell v. Allstate Ins. Co., 60 Cal. 2d 303, 384 P. 2d 155. See, also, Camire v. Commercial Ins. Co., 160 Me. 112, 198 A. 2d 168.

The purpose of the cooperation clause is to prevent collusion between the injured and the insured and to facilitate the handling of claims by the insurer. Where there is no evidence of collusion between the injured and the insured and it is not shown that the insurer has been prejudiced in its handling of the claim, we think the better rule is that the breach of the policy is not a defense. It has been suggested that liability contracts are, at least in part, third party beneficiary contracts, and it is in the public interest to see that those injured who are themselves free from fault should recover except where a miscarriage of justice would otherwise result.

In determining whether a breach of the policy has resulted in prejudice to the insurer, some consideration must be given to the facts and circumstances of the accident which is the basis for the claim against the insured. The evidence in this case is that the insured automobile, operated by Sailors, failed to stop at a stop sign and struck the left side of the Pupkes automobile while it was proceeding at a lawful rate of speed upon an arterial street.

The record sustains the finding of the trial court that

there has been no showing that the breach of the policy has resulted in substantial prejudice to the insurer. Consequently, the plaintiff at this time remains obligated to defend the action brought by Mildred Pupkes against Sailors.

The judgment of the district court is affirmed.

AFFIRMED.

WHITE, C. J., not participating.

CONSTANCE JOANNE RIPP, ADMINISTRATRIX OF THE ESTATE OF RICHARD F. RIPP, DECEASED, APPELLANT, V. CHARLES RIESLAND ET AL., APPELLEES.

141 N. W. 2d 840

Filed April 22, 1966. No. 36101.

1. **Automobiles: Evidence.** In an action growing out of a motor vehicle accident, any evidence of the conditions and circumstances leading up to and surrounding the accident which will throw light upon the conduct of the parties and the care, or lack of care, exercised by them, is, as a general proposition, admissible.
2. ———: ———. Opinion evidence as to the distance within which a motor vehicle can be stopped is competent and admissible where such evidence is material and relevant to the issues and is given by a witness qualified to give such an opinion.
3. ———: ———. This court, recognizing the difficulties attending an offer of evidence of illustrative experiments, has adopted the rule that in such cases discretion is conferred upon the trial court and that, unless there is a clear abuse of discretion, a judgment will not be reversed on account of the admission or rejection of such evidence.
4. **Evidence: Appeal and Error.** When testimony is offered and admitted in evidence without objection being made thereto, error cannot be predicated thereon on appeal.
5. **Judgments.** All matters decided expressly or by necessary implication in an opinion reversing a judgment become the law of the case in any future trial.
6. **Appeal and Error.** Where errors are assigned but are not discussed in the appellant's brief and another is discussed which is not assigned, none of which are plain errors, they will not be considered by this court on appeal.

Appeal from the district court for Hall County: DONALD H. WEAVER, Judge. Affirmed.

John A. Wagoner and Baylor, Evnen, Baylor & Urbom, for appellant.

Luebs, Tracy & Huebner, for appellees.

Heard before WHITE, C. J., CARTER, SPENCER, BOSLAUGH, BROWER, SMITH, and MCCOWN, JJ.

BROWER, J.

The appellant Constance Joanne Ripp, as adminstratrix of the estate of Richard F. Ripp, deceased, brought this action as plaintiff to recover for the alleged wrongful death of her husband in a collision between a 1950 Ford driven by the decedent Richard F. Ripp and a 1954 Ford operated by the defendant and appellee Charles Riesland, whose negligence, if any, is imputed by law to the other defendant Elmer Riesland. Where defendant is mentioned in the singular, it will refer to the driver, Charles Riesland.

The jury returned a verdict for the defendants and from an order refusing to grant a new trial the plaintiff has appealed to this court.

This is the third appearance of this case before this court. In Ripp v. Riesland, 170 Neb. 631, 104 N. W. 2d 246, a judgment on a verdict for the plaintiff was reversed and a new trial ordered. In Ripp v. Riesland, 176 Neb. 233, 125 N. W. 2d 699, a judgment on a verdict for the defendants was likewise reversed and a new trial ordered.

The facts are fully outlined in our first opinion, Ripp v. Riesland, 170 Neb. 631, 104 N. W. 2d 246, and will not be set forth here except as this decision requires a further statement.

The plaintiff assigns error to the trial court in receiving in evidence the opinion of defendants' expert witness, a professor emeritus of professional engineering at the University of Nebraska, at times herein called the

professor, relating to the minimum stopping distance of the decedent's 1950 Ford upon the road immediately east of the intersection which was the scene of the accident upon which the decedent's car was approaching westward.

The qualifications of the expert witness are not questioned in the plaintiff's brief. The witness first was asked and answered the following question: "Q. I will ask you again, if at a time when the road conditions were the same as you observed them on the day you were out at the scene of the accident, the 1950 Ford automobile was approaching the intersection where the accident involved in this case happened from the east on the east-west road at a speed of 50 miles an hour and the brakes were applied so as to cause all wheels to skid, do you have an opinion as to the minimum distance the automobile would travel from the point that the wheels began to skid until it came to a stop? A. Yes." He was then asked what that opinion was and, over objection of the plaintiff that the same was irrelevant and immaterial, that there was no sufficient foundation therefor, and that it assumed facts not in evidence, he answered 180 feet.

We will first discuss the objection as it relates to relevancy and materiality. The evidence shows the deceased was approaching the intersection, where the fatal accident occurred, from the east. The defendant was going north on the road that extends to the intersection from the south. The east side of the road, south of the intersection, was so lined with trees, brush, and weeds as to entirely shut off the vision of a driver going north thereon except in three short spaces, and the vision to the left of the decedent as he approached the intersection was little better. The decedent's car, therefore, was on the right. Plaintiff argues this stopping distance could not have been material and relevant in the case, and that the distance in which skid marks would be laid down by the decedent's vehicle was not involved and

had nothing to do with the issues since there is no evidence of skid marks or of an attempt to stop.

The speed of the decedent's car was estimated at 50 miles per hour by the only eyewitness, who said she saw it approaching the intersection, as she says, when it was a block or a block and a half therefrom, and that the accident occurred but 2 or 3 seconds thereafter. There is evidence from an engineer which, if given credence, shows that the point referred to by this witness was 371 feet east of the center of the intersection. The eyewitness also saw the car of the defendant at a point shown to be 117 feet south of this intersection and its speed was then estimated by her at 50 miles per hour. There is a conflict in the evidence as to whether it proceeded at that rate to the point of impact of the two cars at about the middle of the intersection, or whether it was slowed down to 20 miles per hour before it entered the intersection. The defendant testified it had been slowed as stated and that on passing a line of large trees at the fence line he drove into the intersection and saw the decedent's car approaching 75 feet to the east. Defendant says he previously had but a momentary vision to his right at three slight breaks in the dense obstruction of vegetation and trees.

The deceased was thoroughly familiar with the intersection, having driven over it many times from his home to the east to the farm of his father on the west, a portion of which he operated. The answer of the defendants, aside from allegations that the decedent failed to see the defendant's 1954 Ford, alleged the deceased failed to have his car under reasonable control and alleged he was driving at an excessive speed considering the condition of the road. These questions were therefore in issue. The expert had testified that the reaction time of the driver upon seeing danger ahead was ¾ of a second and in that interval a vehicle driven at 50 miles per hour would travel 56 feet from the time the driver's mind was alerted until the brakes actually could take

hold. We think the stopping distance of decedent's vehicle had some relevancy and materiality in that it tended to show that the speed of the decedent's vehicle in approaching the intersection might be more than reasonable considering that the intersection he was approaching was either a blind one, or almost so. It also had some relevancy and materiality to show what the defendant could or should have done in approaching the intersection. In Ripp v. Riesland, 170 Neb. 631, 104 N. W. 2d 246, this court quoted from Spaulding v. Howard, 148 Neb. 496, 27 N. W. 2d 832, saying: " 'It is a question of fact as to the negligence of the parties as to what they did or did not see, or what they should or could have seen.' See, also, Bell v. Crook, *supra* (168 Neb. 685, 97 N. W. 2d 352, 74 A. L. R. 2d 223)." We think in the present case there was not only a question of fact as to the negligence of the parties with respect to what they saw or could have seen, but also of what they did which contributed to the accident or what they could have done to prevent it.

In 8 Am. Jur. 2d, Automobiles and Highway Traffic, § 934, p. 482, the text states: "In an action growing out of a motor vehicle accident, any evidence of the conditions and circumstances leading up to and surrounding the accident which will throw light upon the conduct of the parties and the care, or lack of care, exercised by them, is, as a general proposition, admissible." Further, the same text says: "It has been held quite generally that opinion evidence as to the distance within which a motor vehicle can be stopped is competent and admissible, where such evidence is material and relevant to the issues and is given by a witness qualified to give such an opinion." 8 Am. Jur. 2d, Automobiles and Highway Traffic, § 987, p. 539. The cases with respect to "Opinion evidence as to distance within which automobile can be stopped," are assembled in the annotation beginning at 135 A. L. R. 1404. It is stated there that it has been quite generally held that opinion evidence

as to the distance within which an automobile may be stopped is competent and admissible. The case of Blado v. Draper, 89 Neb. 787, 132 N. W. 410, is there cited in which this court followed the general rule. We think the evidence was relevant and material.

The plaintiff further contends that there was no sufficient foundation for the expert's opinion and that the opinion assumed facts not in evidence. The professor testified that in determining stopping distance, the basic factor taken into account is known as the friction factor of tires with the road. He termed this the "coefficient of friction." He attempted to explain what that coefficient of friction was, but over objection of plaintiff he was not allowed to answer. He testified further that he went out upon that road more than a year thereafter. He took with him another witness who had been the first to arrive at the scene of the accident. This witness farmed land bordering the road in question. This same witness was called previous to the professor and had testified the road was in the same condition when he and the professor were upon it as it was at the time of the accident. The professor testified he had made tests for more than 30 years to determine the ordinary distance a motor vehicle would stop on a certain type of road. He had conducted experiments on the same type of road with an automobile of the same type involved in this particular case. He stated he knew the coefficient of friction involved. He explained the grade of the road is insignificant unless it was steep. If skid marks are laid down the quality of the brakes need not be considered. Also, the temperature has nothing to do with the results of the test, and the tread of the tires makes no difference except a slight advantage might occur when performed with bald tires, which might vary from .83 for smooth tread tires to .72 for ribbed. He stated he used average tires, which may be assumed to be the mean, or .775. He stated the difference in air pres-

sure in the tires and the weight of the car make no significant difference.

Plaintiff contends that without the coefficient of friction being explained to the jury, there was no sufficient foundation supplied. The professor, however, testified he, himself, knew the coefficient of friction involved. His testimony in the end plainly appears to relate to the tests made by him. We think the question was allowed to be answered on the basis of the tests and it was sufficient that the expert understood the underlying principles. The plaintiff points out that the professor said that bent or distorted wheels would make a difference and if they were skidding sideways there would be a difference. No such condition was shown, however.

An annotation appears with respect to the "Admissibility of experimental evidence, skidding tests, or the like, relating to speed or control of motor vehicle," at 78 A. L. R. 2d 218. Stopping tests are set out at page 225 and tests with respect to skid marks at page 228 of the annotation. It is quite apparent in reviewing the cases cited that generally the exactly similar conditions are not required if they are approximately the same. No tests could be exactly similar. Crecelius v. Gamble-Skogmo, Inc., 144 Neb. 394, 13 N. W. 2d 627, was a case where, over objection of the defendants, the trial court permitted witnesses to give the results of the experiments and photographs of skid marks produced on the pavement as a result of the experiments conducted more than 2½ years later. In reviewing the cited case on appeal, this court stated: "This court recognizing the difficulties attending an offer of evidence of illustrative experiments has adopted the rule that in such cases a discretion is conferred upon the trial court and that unless there is a clear abuse of discretion a judgment will not be reversed on account of the admission or rejection of such evidence." Other cases adhering to that principle were there cited, including City of Ord v. Nash, 50 Neb. 335, 69 N. W. 964; Davis v. State, 51

Neb. 301, 70 N. W. 984; Lillie v. State, 72 Neb. 228, 100 N. W. 316; Falkinburg v. Prudential Ins. Co., 132 Neb. 831, 273 N. W. 478. Following the decision of this court in Crecelius v. Gamble-Skogmo, Inc., *supra,* in the present case we cannot say the trial court abused its discretion in admitting the results of the professor's experiments. The error assigned by the plaintiff to the admission of the opinion of the expert cannot be sustained.

Plaintiff contends that the trial court erred in failing to instruct the jury to disregard certain testimony of the defendant as a matter of law. It is argued that defendant, in the different trials heretofore had in this case, had given contradictory versions of certain events in controversy, that the changes in his testimony occurred because of the necessities of the particular occasion, and that his testimony should be discredited as a matter of law. Certain differences in defendant's testimony in the several hearings are pointed out by the plaintiff in her brief. The brief of the defendants, on the other hand, points out that the variances were slight in some instances and in others, when the record is considered, there was really no variance at all. It is, however, unnecessary for us to resolve this factual dispute. No objection was made to the testimony of the defendant in this respect, nor was any motion made to strike any such evidence. "When testimony is offered and admitted in evidence without objection being made thereto, error cannot be predicated thereon on appeal. This rule applies to the district court when reviewing its own proceedings on motion for a new trial." Law v. Gilmore, 171 Neb. 112, 105 N. W. 2d 595.

The plaintiff maintains that the trial court erred in giving its instruction No. 9 which instructed the jury that the failure of a driver of a vehicle to see a car in a favored position was evidence of negligence. She contends that the jury should have been instructed in the present case that one who fails to see a car in a favored position is guilty of negligence as a matter of law. This

contention was heretofore made in the plaintiff's brief in the second appeal of this case before this court in Ripp v. Riesland, 176 Neb. 233, 125 N. W. 2d 699. The judgment of the trial court was reversed for other reasons and plaintiff's claim of error was not discussed. It was considered to have been one of those "other errors, assigned," having no merit. This was because this issue was one of those passed upon in the first appeal, Ripp v. Riesland, 170 Neb. 631, 104 N. W. 2d 246. The substance of the instructions to the jury given at the first trial with respect to control and lookout were there stated as follows: "The substance of a part of the charge to the jury was that it was the duty of a motorist to have his vehicle under reasonable control so as to enable him to avoid colliding with other vehicles if the drivers thereof were exercising due care. It was the duty of a motorist to keep a reasonably careful lookout so that he might be able to avoid a collision with other vehicles lawfully upon the highway. It was for the jury to find from the evidence whether these duties were violated by the deceased (Ripp) or appellant (Riesland); and if the jury found that there was such a violation, it would not in and of itself constitute negligence but would be a circumstance which the jury could take into consideration in deciding whether the deceased or appellant was guilty of negligence." The instructions were there attacked by the defendant who contended the evidence showed he had entered the intersection first, but as given by the trial court it applied to both drivers of the vehicles involved. These instructions were approved by this court and in the discussion it was stated: "It is also true, as the instruction of the trial court stated, that the violation of a safety regulation established by statute or ordinance is not generally negligence as a matter of law but such a violation is a fact which may be considered in connection with all the other evidence in the case in deciding the issue of negligence. Armer v. Omaha & C. B. St. Ry. Co., 151

Neb. 431, 37 N. W. 2d 607. The complaint of appellants (Rieslands) under the circumstances of this case is without foundation." With respect to the evidence, the court then further stated: "The evidence is such that a finding that either the deceased or appellant had the right-of-way at the intersection would have been sustained. It was an important question and one for jury determination." There are some differences in the evidence disclosed in the present record and that detailed in our first opinion, but that presently before us would still amply justify a finding either that the deceased or the defendant had the right-of-way at the intersection. It is obvious that this court in our previous discussion determined that the question of which driver had the right-of-way at the intersection was a question of fact to be determined by the jury, and likewise the failure of the driver to see the favored vehicle, whichever the jury determined it to be, was evidence of negligence under the circumstances rather than negligence as a matter of law. "All matters decided expressly or by necessary implication in an opinion reversing a judgment become the law of the case in any future trial." Bohmont v. Moore, 141 Neb. 91, 2 N. W. 2d 599. The plaintiff's contention has no merit.

The plaintiff asserts the judgment is not supported by the evidence and is contrary to law. It is obvious that this contention is advanced in conjunction with the claim of the plaintiff that the trial court should have excluded the evidence of the defendant and instructed the jury to disregard it. This has already been discussed herein. It is urged that without his testimony there was insufficient evidence by way of defense to support the verdict. No other argument is advanced and the record before us is in substance so similar to that detailed in the first appeal, Ripp v. Riesland, 170 Neb. 631, 104 N. W. 2d 246, as to obviate a further résumé thereof. There is no foundation for the complaint.

Further errors are assigned which are not discussed

and there appears a discussion of an alleged error that is not assigned. None of these are plain errors affecting the result. Where errors are assigned but are not discussed in the appellant's brief and another is discussed which is not assigned, none of which are plain errors, they will not be considered by this court on appeal. Ritter v. Drainage District No. 1, 148 Neb. 873, 29 N. W. 2d 782.

Failing to find error in the judgment of the trial court, the same is affirmed.

AFFIRMED.

WHITE, C. J., not participating.

IN RE ASSESSMENT OF THE PERSONAL PROPERTY OF SVOBODA AND HANNAH, A PARTNERSHIP.
SVOBODA AND HANNAH, A PARTNERSHIP, APPELLANT, V. BOARD OF EQUALIZATION OF PERKINS COUNTY ET AL., APPELLEES.
142 N. W. 2d 328

Filed April 22, 1966. No. 36153.

1. **Taxation.** Section 77-1216, R. S. Supp., 1963, makes it the duty of the county board to determine where within the county personal property shall be assessed when questions arise, and its decision will not be disturbed unless an abuse of discretion is shown.
2. **Courts.** "Discretion," when applied to a court of justice, means sound discretion guided by law. It must be governed by rule, not by humor; it must not be arbitrary, vague, and fanciful, but legal and regular. It means that the court in its ruling must be guided and governed by applicable law. It means the application of statutes and legal principles to all the facts of a case.
3. **Partnership: Taxation.** For taxation purposes a partnership is a distinct entity, and neither the residence of the partners nor their abstract intent is material in determining taxable situs.
4. **Taxation.** Section 77-1204, R. R. S. 1943, and section 77-1205, R. S. Supp., 1963, established specific statutory exceptions to the general rule that personal property shall be listed and assessed where the owner resides, as provided in section 77-1202, R. S. Supp., 1963. The residence of the taxpayers is determina-

tive of the place where livestock and other personal property connected with a farm will be taxed only if such property does not come under section 77-1204, R. R. S. 1943, or section 77-1205, R. S. Supp., 1963.

5. ———. The term "farm" as used in Chapter 77, R. R. S. 1943, means a tract of land used for cultivation or production of crops of any nature, or the raising of any animal embraced within the term "livestock."

6. ———. The operation of multiple tracts of land as a unit under the government Soil Bank Program (7 U.S.C.A., § 1801, p. 432, et seq.), although binding upon the contracting parties, does not bind or affect the rights of taxing authorities in the determination of applicable taxing statutes.

7. **Partnership: Taxation.** Evidence held to sustain the findings of the trial court that taxpayer partnership was operating a wheat farm in one taxing district, and a stock farm or ranch in two other taxing districts, rather than one integrated farming operation; and further that the partnership had no principal place of business on the farm.

8. **Taxation.** We cannot say as a matter of law that the county board abused its discretion under section 77-1216, R. S. Supp., 1963, when it listed farm machinery and equipment used in connection with the production of wheat on the wheat farm; and listed the machinery and other equipment used in connection with the production of row crops, and also the cattle, on a ranch located in two other taxing districts, and divided the cattle, and the row crop machinery and equipment between such other districts.

Appeal from the district court for Perkins County: VICTOR WESTERMARK, Judge. Affirmed.

Frank B. Svoboda, for appellant.

Frederick E. Wanek, for appellees.

Heard before CARTER, SPENCER, BOSLAUGH, BROWER, SMITH, and MCCOWN, JJ., and BRODKEY, District Judge.

BRODKEY, District Judge.

This is an appeal from the judgment of the district court for Perkins County sustaining the decision of the county board of equalization of that county, which had approved the action taken by the county assessor in assessing taxpayer's tangible personal property consisting

of farm machinery and livestock in three different taxing districts in that county rather than in the single taxing district in which taxpayer had originally listed all of said property.

Appellant, Svoboda and Hannah, is a farming partnership formed in 1959, consisting of the mother, Anna Svoboda, her two sons, Frank B. Svoboda and Don T. Svoboda, and her son-in-law, James Hannah, the husband of her daughter, Rosanne. In 1964 the partnership owned 1,760 acres of land in school district No. 50 and 320 acres in school district No. 33A. As part of its operation, it also leased land from Liberty Farms, Inc., a family corporation, whose shareholders were the aforesaid Anna Svoboda, her sons, Frank B. Svoboda and Don T. Svoboda, and her daughter, Rosanne Hannah. Of the land leased by the partnership, 1,520 acres were in school district No. 33A and 800 acres were in school district No. 12C. The partnership also owned 2,720 acres of land in school district No. 84 in Perkins County, and also some grazing land in Chase County, not involved in this action. It should also be added that of the 1,760 acres owned by the partnership in school district No. 50, approximately 400 acres were under lease to an employee of the partnership, one Steve Woitalewicz, who farmed the lands leased to him by the partnership in his own name, and not as a part of the partnership operation except as to the rent arising from the lease.

It appears from the evidence that the land owned by the partnership in the western part of Perkins County, including the land located in school district No. 50, was almost exclusively devoted to producing wheat. Of the 1,918 acres planted in 1964, all of the wheat produced came from land lying in school districts Nos. 84 and 50, except for 158 acres in two other sections. It also appears clear from the report of the partnership's accountant, used in the preparation of its income tax return, that the principal source of income of the partnership was realized from the sale of grain. The partnership was also en-

gaged in the raising and wintering of cattle. The majority of the grain storage was located in school district No. 50 with the remainder being stored in school district No. 84. There was a residence and home buildings located on what is referred to as the "home place" in school district No. 50. The bulk of the farm machinery "dollar-wise" was stored on the home place. This was machinery adapted to and used in connection with the production of wheat. Some of the machinery was stored on the separate farm leased by the partnership to Steve Woitalewicz, also in school district No. 50.

The wheat operation referred to was located a short distance west of the town of Grant. Approximately 16 miles to the east of the wheat farm and lying south and east of Grant, the partnership also conducted what was principally a stock farm or cattle raising operation on land both owned and leased by it, located in both school districts Nos. 33A and 12C. The lands in these two districts are contiguous but are separated by a county road which happens to be the boundary line between the two districts. There was a farm residence (unoccupied during the years 1963 and 1964) located upon the property in school district No. 33A, together with other farm buildings, feeding bunks, pens, etc. Likewise there were a barn and feeding facilities located in school district No. 12C, adjacent to the property in school District No. 33A. Most of the partnership's feeding facilities and bunks were on the ranch south of Madrid, and the evidence is uncontroverted that a substantial number of cattle were fed there during the winter months. According to the testimony of the partners, the cattle were generally moved to Chase County for pasturing after March of each year. They also testified that the livestock business of the partnership was principally used to utilize roughages on the farm. The partnership had another employee, one John Kosmicki, who was in charge of the livestock on the ranch and also handled the irrigation wells there. He occasionally did work on the wheat farm

also. He did not live on the farm, however, but lived in the town of Madrid.

The county assessor and another witness for the appellees testified that during their inspection of appellant's operations in April and December of 1963, and also in the early part of 1964, they found all the cattle located on the ranch in both school districts 33A and 12C in varying numbers. They found none of the cattle in school district No. 50, although there was testimony that on occasions cattle were also kept on the wheat farm. Some row crops were also raised on the ranch and the tax schedules filed by the partnership for 1964 list grain production of milo, millet, and wheat. In addition there were approximately 900 acres of grassland in school district No. 33A, and between 90 and 100 acres of irrigated grassland in school district No. 12C. There was no grassland on the west farm. Some of the hay and crops raised on the ranch was sold and the rest was fed to the cattle. There was also machinery stored on the ranch, which was used in connection with the ranch operations.

The partnership operated the wheat farm and the stock farm as a single unit under the government Soil Bank Program. 7 U.S.C.A., § 1801, p. 432, et seq. Under its contract with the government it was assigned certain bases with which it was required to comply in order to be in the government program. Frank B. Svoboda testified that the farm was operated in such a way that the wheat allotment could be moved to the eastern part of the county or western part of the county according to their wishes and that they were also able to move the feed grain base any place on the farm that they saw fit.

With regard to the partners themselves, and their conduct of the partnership business, the evidence discloses the following: Frank B. Svoboda had his residence in Ogallala, Keith County, where he also maintained his office. Don T. Svoboda lived in Lincoln, Lancaster County, but generally came out to the farm around May 20th and stayed until about September 20th. At such

times he stayed in a house in Grant owned by Frank, the sister Rosanne Hannah, and himself. James Hannah was a resident of Los Gatos, California. He came out to the farm about June 15th each year and left about August 25th. At such times he and his family stayed on the home place with his mother-in-law, Anna Svoboda. Anna Svoboda, the mother, lived in California with a sister from September 20th to June 1st of each year. She came out to the farm about June 1st and usually left after the livestock was moved, which was about the 15th or 20th of September. While in Nebraska she made her home at the home place in school district No. 50, which is where the father, Frank Svoboda, lived when he was alive. No one other than the mother, Anna Svoboda, and James Hannah, and his family, ever stayed on the home place, and they only did so for a few months during the summertime. There was testimony, however, that Anna Svoboda filed a personal property tax return in Perkins County and voted there; and also that she had her furniture and personal possessions in school district No. 50. The partners Frank B. Svoboda and Don T. Svoboda testified that they considered the residence in school district No. 50 as the principal place of business of the partnership. There was a telephone listed in the name of the mother in the home place and also another telephone on the property leased by Steve Woitalewicz, but this phone was listed in his name. Svoboda and Hannah did not maintain a listing in the telephone directory in its own name. There was no telephone in the residence on the ranch property. There was evidence that some records of the partnership were stored in the home in school district No. 50. However these appear to have been largely old income tax records turned over to the partners by their accountant after he completed the preparation of their income tax returns about February 15th every year, and also some records with reference to the kind of crops planted. Some business conferences were held in the house, but they were also held in the

fields or anywhere else on the land owned and leased by the partnership. Frank B. Svoboda testified that he conducted quite a bit of the business of the partnership from his office in Ogallala, but that his brother, Don T. Svoboda, who lived in Lincoln, operated the partnership the greater portion of the year. All of the partners were authorized to write checks on the checking account in the First National Bank in Ogallala. There was no partnership checkbook nor did they use printed checks, but only counter checks. Certain bills were submitted to Anna Svoboda in California for payment. Don T. Svoboda paid the electric account from Lincoln. The bank statements were sent to Frank B. Svoboda, who looked them over and then sent them to Don T. Svoboda who eventually turned them over to their accountant in Lincoln for the preparation of the income tax returns. Any mail addressed to Svoboda and Hannah at Grant was sent to Don T. Svoboda in Lincoln.

The partnership filed its personal property tax return for the year 1964 in school district No. 50, listing all the farm machinery, equipment, and livestock in that district for taxation. The county assessor subsequently filed revised separate schedules for the partnership listing such personal property according to its use and location, and dividing it up between school districts Nos. 50, 33A, and 12C. He left the machinery and equipment for the production of wheat in school district No. 50, but split up the row crop machinery and equipment between school districts Nos. 33A and 12C. He also divided the cattle evenly between school district No. 33A and school district No. 12C. The partnership filed objections before the Perkins County board of equalization, which board affirmed the action of the county assessor as reflected by his schedules. Appellant then perfected an appeal to the district court for Perkins County, which affirmed the action of the county board of equalization and dismissed appellant's petition. Appellant's motion for new trial

was overruled and it appealed to this court. We affirm the judgment of the lower court.

It is the contention of appellant that the county board of equalization abused its discretion in taxing the tangible personal property in the three taxing districts, that it operated only one farm, that the principal place of business on said farm was the home place in school district No. 50, and that under the statutes of Nebraska all of the property should have been taxed at that place.

Before discussing the claims of appellant on these points, it is appropriate to notice first the provisions of section 77-1216, R. S. Supp., 1963, as follows: "Questions that may arise as to the proper place to list personal property shall be determined as follows: (1) If between several places in the same county, the place for listing and assessing shall be determined and fixed by the county board; and (2) If between different counties, the place for listing and assessing shall be determined by the Tax Commissioner * * *. When fixed in either case, it shall be as binding as if fixed by specific statutory provision."

Under the foregoing section where questions arise as to the proper place to list personal property, if between several places in the same county, it is the duty of the county board of equalization to fix the place for listing and assessing such property, and its action in that regard will not be disturbed on appeal, unless an abuse of discretion is shown. Diemer & Guilfoil v. Grant County, 76 Neb. 78, 107 N. W. 216; Goebel v. County of Holt, 172 Neb. 81, 108 N. W. 2d 406; Ramm v. County of Holt, 172 Neb. 88, 108 N. W. 2d 808. It is first necessary to determine, therefore, whether the action of the county board of equalization was an abuse of discretion on its part. If it was not, then the above-quoted section effectively disposes of this appeal, and the action of the county board will not be disturbed.

In Goebel v. County of Holt, *supra*, we approved the definition of "discretion" set out in Greenberg v. Fire-

man's Fund Ins. Co., 150 Neb. 695, 35 N. W. 2d 772, as follows: "The word 'discretion' is one of variable meanings depending on its use. In Tingley v. Dobly, supra (13 Neb. 371, 14 N. W. 146), we quoted with approval this definition by Lord Mansfield: 'Discretion when applied to a court of justice means sound discretion guided by law. It must be governed by rule, not by humor; it must not be arbitrary, vague, and fanciful, but legal and regular.' As used in the connection here presented it means that the court in its ruling must be guided and governed by applicable law. It means the application of statutes and legal principles to all the facts of a case." We held in the Goebel case that the above definition applied to actions of the county board of equalization under section 77-1216, R. S. Supp., 1963. Therefore we must necessarily examine the provisions of Chapter 77, R. R. S. 1943, relative to the assessment and taxation of personal property and must determine whether any other statutes are clearly applicable under the facts of this case, or whether, on the contrary, the facts presented valid and legitimate "questions" to the board of equalization as to the proper place of listing the personal property for assessment, and justified it in making its own determination under section 77-1216, R. S. Supp., 1963.

Among the statutes which must be considered in this connection are section 77-1204, R. R. S. 1943, and sections 77-1202 and 77-1205, R. S. Supp., 1963.

Section 77-1202, R. S. Supp., 1963, states the general rule that personal property shall be listed and assessed where the owner resides, except that property having a local situs shall be listed and assessed at that situs.

Section 77-1204, R. R. S. 1943, provides: "When the owner of livestock or other personal property connected with a farm does not reside thereon, the same shall be listed and assessed in the county, township or precinct where the farm is situated. If the farm is situated in several townships or precincts, it shall be listed and assessed in the township or precinct in which the prin-

cipal place of business on such farm shall be."

Section 77-1205, R. S. Supp., 1963, provides: "Livestock in charge of an agister, caretaker, or nonresident owner, on January 1, at 12:01 a.m. of the year for which the property is required to be listed, and not connected with the farm, shall be assessed where so kept; and any livestock which shall be brought into any county of this state for grazing purposes between January 1, at 12:01 a.m. and July 1 of any year shall be assessed by the county assessor or county clerk, where he is ex officio county assessor in such county, and in the proper taxing district unless the owner of said livestock produces a certificate from the county clerk, or other proper officer, showing that such property has been assessed elsewhere."

Examining the above statutes, therefore, we note that the first and primary test for determining tax situs is the residence of the owner. § 77-1202, R. S. Supp., 1963. The owner in this case is Svoboda and Hannah, a partnership. Under both the statutory and case law in this state, a partnership has long been considered as an entity, separate and apart from the individual partners. State v. Pielsticker, 118 Neb. 419, 225 N. W. 51; §§ 67-304 (4) and 67-306 (1), R. R. S. 1943. It is also considered such for tax purposes in Nebraska. § 77-113, R. R. S. 1943; Clay, Robinson & Co. v. Douglas County, 88 Neb. 363, 129 N. W. 548, L. R. A. 1915C 922, Ann. Cas. 1912B 756.

It is a general rule that partnership property is taxable as an entity at the domicile of the firm rather than at the residences of the several owners, and the domicile of a partnership, for the purposes of taxation, is its place of business. 2 Cooley on Taxation (4th Ed.), § 473, p. 1060; Tax Review Board v. Belmont Laboratories Co., 392 Pa. 473, 141 A. 2d 234. Neither the residence of the partners nor their abstract intent is material in determining taxable situs. Walter G. Hougland & Sons v. McCracken County Board of Supervisors, 306 Ky. 234, 206 S. W. 2d 951. See, also, 84 C. J. S., Taxation, § 328, p. 662.

General rules for determining situs of property for taxation are, however, subject to statutory modification. With reference to section 77-1202, R. S. Supp., 1963, we have heretofore held that section 77-1204, R. R. S. 1943, and section 77-1205, R. S. Supp., 1963, establish specific statutory exceptions to the general rule that personal property shall be listed and assessed where the owner resides, and that the residence of the taxpayers is determinative of the place where livestock and other personal property connected with a farm will be taxed only if such property does not come under section 77-1204, R. R. S. 1943, or section 77-1205, R. S. Supp., 1963. Goebel v. County of Holt, *supra.*

In this case the partnership does not claim, nor is there any evidence, that it maintained an office or any place of business anywhere else other than on the home place in school district No. 50, although there is evidence that the partnership business was handled by the individual partners in their respective offices at various places, as previously related. We therefore conclude that section 77-1202, R. S. Supp., 1963, is not applicable to this case, and turn next to a consideration of section 77-1204, R. R. S. 1943, which provides that where the owner of livestock or other personal property connected with a farm does not reside thereon it shall be assessed where the farm is situated, and, if situated in several townships or precincts, it shall be listed and assessed in the township or precinct in which the principal place of business on such farm shall be.

Appellant claims that the provisions of the above statute are applicable and controlling. It is, therefore, first necessary to determine whether the partnership was operating one integrated farm, or multiple operations, consisting of a wheat farm and a ranch.

The term "farm" as used in Chapter 77, R. R. S. 1943, means a tract of land used for cultivation or production of crops of any nature, or the raising of any type of animal embraced within the term "livestock." Goebel

v. County of Holt, *supra;* Ramm v. County of Holt, *supra.* Whether multiple tracts of land, under common ownership or control, are to be considered as a single farm or as separate farms is a question of fact in each case. Many factors are considered by the court in making this determination, but among the elements deemed of importance in this connection are the nature of the operations conducted on such tracts, and also the degree of contiguity or separation of the tracts involved. See, Goebel v. County of Holt, *supra;* Ramm v. County of Holt, *supra;* Delatour v. Smith, 116 Neb. 695, 218 N. W. 731; Diemer & Guilfoil v. Grant County, *supra.* See, also, People ex rel. Tyler v. Scheifley, 252 Ill. 486, 96 N. E. 890.

In the present case, therefore, keeping in mind the distinct and different nature of the operations conducted on the two tracts of land—that is to say, a clearly defined wheat operation on the west farm and a stock raising or ranch operation on the east farm—and keeping in mind further that the two tracts of land are approximately 16 miles apart, and notwithstanding the claim of the partners that they have always operated the tracts as a farming unit and considered it as such, we conclude that the trial court was correct in its finding that the partnership was operating a wheat farm in school district No. 50 and a stock farm in school districts Nos. 33A and 12C. Appellant stresses the fact that it operated its properties as a unit under the government Soil Bank Program, previously referred to. As indicated, this was done under a contract with the government in order to facilitate the shifting of bases and grain production from one part of its properties to another. We do not believe that fact is of controlling importance in this case. Although such a contract may be binding as between the partnership and the United States government, it would not be binding upon or affect the rights of taxing authorities in the determination of the applicable taxing statutes. See Landis Machine Co. v. Omaha

Merchants Transfer Co., 142 Neb. 389, 6 N. W. 2d 380, on rehearing, 142 Neb. 397, 9 N. W. 2d 198.

Did the partnership have a "principal place of business" on the farm in school district No. 50, or for that matter on either farm?

On the basis of the previously related evidence the trial court found that appellant failed to establish that the dwelling house located in school district No. 50 was the principal place of business of the partnership, but found, on the contrary, that the business of the partnership was transacted by each of the partners at their several places of residence. We conclude the trial court was correct and that there is ample evidence in the record to sustain such finding. If the above facts did not make the residence on the home place in school district No. 50 the principal place of business for the partnership, then it had no principal place of business. No claim is made that the vacant house on the ranch southeast of Grant was a place of business of the partnership.

Returning now to a consideration of section 77-1204, R. R. S. 1943, since we have concluded that the partnership was operating a separate wheat farm in school district No. 50, and a ranch or stock farm in school districts Nos. 33A and 12C, we have concluded that the county board in effect complied with that section so far as the wheat farm is concerned, as it assessed all the personal property connected with that farm in school district No. 50 where the farm was situated. With respect to the ranch located in both school districts Nos. 33A and 12C, this section would not be applicable because there was no principal place of business on the ranch. Faced with this situation, the county board listed and assessed the livestock and other property connected with the ranch on the ranch, as it had a right to do under section 77-1216, R. S. Supp., 1963. The assessor in his schedules had divided the row crop machinery and equipment between school districts Nos. 33A and 12C because he found it was customarily located and used in both districts. He

also split the cattle evenly between the two school districts comprising the ranch because he, and another, had seen approximately 650 cattle on both portions of the ranch at various times. Mathematical exactness in the division of the numbers between the districts was neither possible nor necessary, as the number of cattle in each of those districts varied from time to time.

It is apparent that real, valid, and substantial problems faced the county board of equalization in the determination of where to list the partnership property, and we cannot say as a matter of law that in affirming the action of the assessor it was guilty of an abuse of discretion.

We comment in passing upon section 77-1205, R. S. Supp., 1963, which provides so far as material herein, that livestock in charge of an agister, caretaker, or nonresident owner, on January 1, at 12:01 a.m. of the year for which the property is required to be listed, and not connected with the farm, shall be assessed where so kept. This section is by its terms applicable only to livestock which is not connected with the farm and does not apply to farm machinery or other property. We conclude that this section is not applicable to the facts of the present case, as here the cattle were connected with the ranch referred to; but even if it were otherwise, the statute requires the livestock to be assessed where kept. This the county board did to the best of its ability under the discretion afforded it under section 77-1216, R. S. Supp., 1963.

Finally, the taxpayer complains of the fact that the transcript fails to show that a copy of the proceedings of the county board of equalization in this matter was sent to the Tax Commissioner as required by section 77-1502, R. S. Supp., 1963. We deem this assignment to be without merit.

For the reasons stated, we conclude that the judgment entered by the trial court was in all respects correct and should be affirmed.

AFFIRMED.

MARY ULBRICK ET AL., APPELLANTS, V. CITY OF NEBRASKA CITY, OTOE COUNTY, NEBRASKA, APPELLEE.

141 N. W. 2d 849

Filed April 22, 1966. No. 36211.

1. **Statutes.** In construing a statute, effect must be given, if possible, to every word, clause, and sentence therein. In other words, a statute should be so construed as to make all its parts harmonize with each other and render them consistent with its general scope and object.
2. **Appeal and Error.** An appeal under the provisions of section 16-110, R. S. Supp., 1963, must be taken as in other civil actions (sections 24-544, 27-1302, and 27-1303, R. R. S. 1943), and in addition thereto, notice of appeal must be given and a copy of the petition on appeal must be served as required by the act.
3. ———. In a case where the appellate court has jurisdiction of the subject matter, the failure to object to procedural defects does not have the effect of a judicial construction of the statute providing the manner and method of appeal.

Appeal from the district court for Otoe County: VICTOR H. SCHMIDT, Judge. Affirmed.

Spencer & Hoch, for appellants.

Moran & James and William F. Davis, for appellee.

Heard before CARTER, SPENCER, BOSLAUGH, BROWER, SMITH, and MCCOWN, JJ., and BURKE, District Judge.

CARTER, J.

This is an appeal from an order of the district court for Otoe County sustaining a motion to dismiss for failure to comply with section 16-110, R. S. Supp., 1963.

On March 27, 1965, the city council of the city of Nebraska City enacted city ordinance No. 1183 annexing certain described lands, including lands of plaintiffs, to that city. The effective date of the ordinance was March 28, 1965. On April 22, 1965, a petition on appeal was filed in the district court for Otoe County. Notice of appeal was served on April 23, 1965. A summons and copy of the petition were served on the mayor of the city on April 22, 1965. On May 21, 1965, a motion to dis-

miss the appeal was filed. The appeal was dismissed on September 13, 1965, and an appeal thereafter perfected to this court.

The appeal from the enactment of ordinance No. 1183 annexing lands of plaintiffs was taken pursuant to section 16-110, R. S. Supp., 1963, which provides in part: "Any legal owner of any territory annexed may appeal from the annexation ordinance to the district court of the county in which such city is situated. Such appeal may be taken from the enactment of the ordinance as in other civil actions, but notice of appeal must be given within thirty days from the effective date of such annexation ordinances by filing written notice with the city clerk and by causing a copy of the petition on appeal to be served upon the city in the manner provided by law for service of a summons in a civil action."

The plaintiffs contend the words "such appeal may be taken from the enactment of the ordinance as in other civil actions" is a reaffirmation of the right to appeal contained in the first sentence of the quoted portion of the statute, and that the balance of the sentence provides the exclusive manner and method of appeal. The defendant, on the other hand, contends that the first sentence of the quoted portion of the statute grants the right to appeal and that the second sentence provides the method and manner of appeal, to wit, that the appeal may be taken as in other civil actions, and in addition thereto, notice of appeal must be given within 30 days from the effective date of the annexation ordinance and a copy of the petition on appeal served on the city.

It is fundamental that in the construction of a statute meaning must be given, if possible, to every word, clause, and sentence. In State ex rel. First Nat. Bank v. Bartley, 39 Neb. 353, 58 N. W. 172, 23 L. R. A. 67, this court said: "It is an elementary rule of construction that effect must be given, if possible, to every word, clause, and sentence of a statute. In other words, a statute must receive such construction as will make all its parts har-

monize with each other and render them consistent with its general scope and object." In State ex rel. Marrow v. City of Lincoln, 101 Neb. 57, 162 N. W. 138, this court said: " 'In the construction of a statute * * * no sentence, clause or word should be rejected as meaningless or superfluous, if it can be avoided; but the subject of the enactment and the language employed, in its plain, ordinary and popular sense, should be taken into account, in order to determine the legislative will.' " See, also, School Dist. No. 228 v. State Board of Education, 164 Neb. 148, 82 N. W. 2d 8; Belgum v. City of Kimball, 163 Neb. 774, 81 N. W. 2d 205, 62 A. L. R. 2d 1295.

Under the foregoing rule of statutory construction, we must give meaning to the words "as in other civil actions" rather than to assume that it was a mere reiteration of the grant of the right to appeal as plaintiffs contend. It can mean but one thing; the appeal was to be taken as in other civil actions; that is, as provided by sections 24-544, 27-1302, and 27-1303, R. R. S. 1943. In re Petition of School District of Omaha, 151 Neb. 304, 37 N. W. 2d 209. The foregoing sections require the filing of a bond and transcript which was not done in the instant case.

We conclude that an appeal under section 16-110, R. S. Supp., 1963, requires the filing of a bond as required by section 27-1302, R. R. S. 1943, a transcript as required by section 27-1303, R. R. S. 1943, and a notice of appeal within 30 days and the serving of a copy of the petition on appeal upon the city in addition thereto, as required by section 16-110, R. S. Supp., 1963. If this be not true, the words "as in other civil actions" are a meaningless and superfluous provision. To give it such a meaning is violative of a fundamental rule of statutory construction. It must be presumed that the Legislature intended that the clause has meaning if a meaning can be found that harmonizes with the general intent and object of the statute.

Previous appeals under this statute have been before

this court in two cases. Shields v. City of Kearney, 179 Neb. 49, 136 N. W. 2d 174; Read v. City of Scottsbluff, 179 Neb. 410, 138 N. W. 2d 471. In neither of these cases was the procedure on appeal questioned. The opinions in those cases are authority only for the holdings therein made. Since the district court had jurisdiction of the subject matter, any failure to comply with procedural rules is deemed to have been waived and do not in any way affect the validity of those decisions.

It is argued, however, that it is a rule of this court, many times applied, that the court may on its own motion raise questions of jurisdiction and, not having done so in the two previous cases before the court, the procedures followed in those cases constitute a conclusive construction of the statute. No authority has been cited, and we have found none, that sustains this contention. Jurisdiction of the subject matter cannot be waived, but procedural requirements may. This court may on its own motion take notice of them. The fact that this court did not take notice of procedural defects in the Shields and Read cases can give no aid to the plaintiffs in the instant case when procedural defects were timely raised.

The trial court came to this same conclusion and its order dismissing the appeal is therefore correct. The judgment of the district court is affirmed.

AFFIRMED.

LUCILLE ELIZABETH VACANTI, A MINOR CHILD, BY AND THROUGH HER FATHER AND NEXT FRIEND, ANTHONY G. VACANTI, APPELLANT, V. PAUL FLORES MONTES, APPELLEE.
142 N. W. 2d 318

Filed April 29, 1966. No. 36084.

1. **Trial: Appeal and Error.** **In reviewing the evidence where a jury has returned a verdict for the defendant, the defendant must have the benefit of any and all reasonable inferences deducible from the proof.**

2. **Automobiles: Negligence.** The duty to sound a signal warning of the approach of a motor vehicle depends largely on the circumstances of the particular case.
3. ———: ———. Until the driver of an automobile has notice of the presence or likelihood of children near his line of travel, he is bound only to the exercise of reasonable care, and has the right to assume that others will do likewise; and until he has such notice the rule is the same as respects children and adults.
4. **Infants: Negligence.** The age when an infant during its minority may be capable of understanding and avoiding dangers encountered while traveling upon a public street in a city cannot be fixed by arbitrary rule, and is generally a question of fact for the jury.
5. **Infants: Trial.** Whether or not an infant between 9 and 10 years of age is of sufficient knowledge, discretion, and appreciation of danger that he may be subject to the defense of contributory negligence is generally a question of fact and not of law.
6. **Infants: Negligence.** What is required of an infant is the exercise of that degree of care which an ordinary prudent child of the same capacity to appreciate and avoid danger would use in the same situation.
7. **Trial: Appeal and Error.** In determining whether or not there was error in a sentence or clause of an instruction, it will be considered with the instruction of which it is a part and the other instructions, and the true meaning thereof will be determined not from the sentence or clause alone but by a consideration of all that is said on the subject.
8. ———: ———. One may not complain of alleged misconduct of adverse counsel if, with knowledge of such alleged misconduct, he does not ask for a mistrial but consents to take the chances of a favorable verdict.

Appeal from the district court for Douglas County: DONALD BRODKEY, Judge. Affirmed.

Sodoro & Meares, for appellant.

John J. Respeliers, for appellee.

Heard before WHITE, C. J., CARTER, SPENCER, BOSLAUGH, BROWER, SMITH, and MCCOWN, JJ.

BROWER, J.

This was an action by the appellant Lucille Elizabeth Vacanti, a minor, brought by her father and next friend, as plaintiff, to recover for personal injuries as the re-

sult of an automobile-pedestrian impact accident which occurred in Omaha, Douglas County, Nebraska. The vehicle was operated by the appellee and defendant Paul Flores Montes. There was a second cause of action for medical and hospital expenses which had been assigned by the father to the minor.

A trial to a jury in district court resulted in a verdict and judgment for the defendant on both causes. From an order overruling a motion for new trial, the plaintiff has brought the case to this court by appeal.

"In reviewing the evidence where a jury has returned a verdict for the defendant, the defendant must have the benefit of any and all reasonable inferences deducible from the proof." Schmeeckle v. Peterson, 178 Neb. 476, 134 N. W. 2d 37. Because of the rule stated, we give a résumé of the evidence to which the jury might have given credence without giving all of the testimony, some of which might be more favorable to the plaintiff.

The plaintiff Lucille Elizabeth Vacanti, whom we will call Lucille, was a minor aged 9 years and 3 months on June 26, 1962, the day she was injured. She was struck that day about 7 or 7:30 p.m., by a 1959 Ford station wagon driven by the defendant Paul Flores Montes, causing her injuries. The impact occurred toward the westerly end of an alley extending from Seventh Street on the east to Eighth Street on the west in a block in Omaha, Nebraska, located between Pierce Street on the south and Pacific Street on the north. The alley was paved. Its surface was dry and dusty at the time of the injury. The grade of the alley ascends toward Eighth Street on the west. Except for a short distance near Eighth Street where it levels off, there is a constant rise all the way. Immediately adjoining the south side of the east end of the alley on Seventh Street, Caniglia's Pizzaria is located. On the north side of the alley at its west end on Eighth Street at the time of the accident was the residence of Virginia Torres. There was a fence along the alley side of this property. A portion of

it near its east end had been bent over by the children playing until it could be crossed by stepping or skipping over it without much trouble. There were several trees along this fence, just inside of it, one of which was quite large.

Defendant was a bartender at the Golden Goose bar. He worked from 6 a.m. to 2 p.m. as such. He returned on this day at 6 p.m. On the afternoon in question the baseball team sponsored by the Golden Goose had finished a game about 6 or 6:30 p.m., and some of the players had repaired to the Golden Goose. Some of them drank beer, others drank pop, and the defendant drank nothing. The players desired some pizzas. Defendant, after phoning the order, drove to Caniglia's Pizzaria to get them. He parked the car on Seventh Street in front of the pizzaria, about 10 feet south of the alley, and went in, got them, and walked right out. He backed the car far enough to the north so he could turn into the alley in question, instead of driving south to Pierce Street, for no particular reason. He was or had been familiar with the vicinity and knew that children residing therein occasionally played in the alley. On turning into the alley he proceeded through it westward toward Eighth Street. He testified he attained speed of 20 to 25 miles per hour, but was slowing toward the west to make a left turn on entering Eighth Street. Although there is testimony he attained a greater speed, many of the witnesses did not mention speed. The city ordinance in evidence provides for a maximum speed of 25 miles per hour in such cases. He saw no children in the alley until right before the impact but says he saw some in the yard of Virginia Torres. He took no particular steps on seeing them and did not sound his horn. Several children were playing marbles in the Torres' yard near the house which is not far from the alley. Lucille, the plaintiff, was playing tag with her twin sister and three other young children. Randy Williams was "it" and was chasing her. Plaintiff was behind the big tree on the north side of the

alley. She ran out into the alley just before being struck. There is some variance in her exact movements as described by various eyewitnesses of whom there were several. Some said she ran across the alley, turned about, started to run back, and was struck while returning. Others said it occurred when she was first attempting to cross. Some said she ran out and then hesitated.

Defendant testified plaintiff jumped out from behind the tree when the car was only 20 or 30 feet from her. According to him, he applied the brakes and turned to the left to avoid her but the right front fender hit the plaintiff, knocking her forward. The car did not pass over her. He said as she ran out, she neither looked to the right nor to the left but turned toward the car just as she was struck. Defendant's car laid down skid marks. An officer from the police department who came to investigate the accident testified these marks were 21 feet long. He so determined by pacing them off. The car had not been moved when he arrived. It was near the center of the alley facing in a southwesterly direction. There is evidence the automobile stopped at or near the big tree. The point of impact was considerably east of the crosswalk at the end of the alley but toward its west end.

The plaintiff first contends the trial court erred in submitting the issue of the contributory negligence of the plaintiff to the jury. Plaintiff's contentions with respect to the trial court's submission of this issue are somewhat obscure. It apparently recognized that this court has held that the question of whether a minor 9 years of age can be said to be chargeable with contributory negligence is a question of fact for the jury under proper instructions. Plaintiff cites authority from other states, however, which hold children below certain specified ages have been held incapable of contributory negligence as a matter of law and there is an indication, she contends, such a rule should be adopted with respect to the 9-

year-old plaintiff in the present case. It is also urged the plaintiff's negligence, if any, was slight as a matter of law as compared to defendant's negligence, and the fact that defendant did not sound his horn is emphasized. In the case of Adams v. Welliver, 155 Neb. 331, 51 N. W. 2d 739, this court had under consideration injuries to a 9-year-old minor received in a collision with an automobile while running diagonally across the street. This court there set out certain rules governing contributory negligence where such a minor is involved, as well as some which affect the driver of a car in those cases, as follows: "The duty to sound a signal warning of the approach of a motor vehicle depends largely on the circumstances of the particular case. * * *

"Until the driver of an automobile has notice of the presence or likelihood of children near his line of travel, he is bound only to the exercise of reasonable care, and has the right to assume that others will do likewise; and until he has such notice the rule is the same as respects children and adults.

"The age when an infant during its minority may be capable of understanding and avoiding dangers encountered while traveling upon a public street in a city cannot be fixed by arbitrary rule, and is generally a question of fact for the jury.

"Whether or not an infant between nine and ten years of age is of sufficient knowledge, discretion, and appreciation of danger that he may be subject to the defense of contributory negligence is generally a question of fact and not of law.

"What is required of an infant is the exercise of that degree of care which an ordinary prudent child of the same capacity to appreciate and avoid danger would use in the same situation." We think these rules are still proper and applicable in the present case.

Plaintiff apparently contends that the trial court's instructions in effect imposed the same duty of care and responsibility upon the plaintiff that is required of

adults. This was obviously not true. We here set out the trial court's instruction concerning the caution required on the part of the plaintiff with its relation to the defense of contributory negligence, as follows: "INSTRUCTION NO. 15

"The evidence is uncontroverted in this case that at the time of the accident in question the plaintiff was a minor of the age of 9 years and 3 months.

"You are instructed that a minor of the age of the plaintiff at the time of the accident cannot be charged with the same degree of caution required of an adult in guarding against possible accidents while traveling upon and crossing a street in a city. There is no arbitrary rule fixing the time at which a child during his minority may be declared wholly capable or incapable of understanding and avoiding dangers to be encountered while engaged in such activity. Whether or not negligence may be attributed to a minor of the age of the plaintiff is a matter for the jury to determine under all the circumstances of the case.

"The degree of care required of a minor is that which an ordinarily prudent child of the same capacity to appreciate and avoid danger would use in the same situation.

"Whether or not the plaintiff at the time of the accident in question was of sufficient knowledge, discretion and appreciation of danger that she may be subject to the defense of contributory negligence is a question of fact for the jury to determine."

This instruction quite fully and correctly sets forth the standard of duty and care required of the plaintiff as a minor and the law concerning contributory negligence as applied to her as stated in Adams v. Welliver, *supra*.

Objections are made separately to 13 instructions by number without giving any reason where any of them misstate the law except as hereinafter mentioned. Further objection is made to them collectively in which it is asserted that by needless repetition the defense of con-

tributory negligence was emphasized to the prejudice of the plaintiff. The usual stock instructions defining negligence and contributory negligence, placing the burden of the latter on the defendant, and relating it to the rules of comparative negligence, are all attributed to the prejudicial emphasis placed on contributory negligence. Some of the instructions set out the duty of a pedestrian in certain circumstances from which it is urged the defense of contributory negligence is emphasized because the court found it necessary to set out those rules which the jury might find the defendant violated. It is inferred that because the separate instruction did not repeat the rules, or some of them, regarding contributory negligence with respect to a minor plaintiff, the court was fastening upon the plaintiff the responsibility of care and caution which applies to an adult. This regardless of a later specific instruction that the jury was to consider them all together and harmonize each with the others. There were 39 instructions in all and we have examined the instructions and find that as a whole they were fairly balanced in setting forth the obligations and duties of the parties and do not indicate prejudice to the plaintiff by unnecessary repetition as asserted. "In determining whether or not there was error in a sentence or clause of an instruction, it will be considered with the instruction of which it is a part and the other instructions, and the true meaning thereof will be determined not from the sentence or clause alone but by a consideration of all that is said on the subject." Norman v. Sprague, 167 Neb. 528, 93 N. W. 2d 637.

The plaintiff further urges that there was insufficient evidence entitling the trial court to submit to the jury the particular allegations of the plaintiff's contributory negligence mentioned in the instructions. The items submitted were: In failing to keep a proper lookout for traffic lawfully proceeding in the alley; in jumping the fence into the alley in front of defendant's automobile;

in leaving a place of safety and running in front of the car; and in attempting to cross the alley at a point not marked for pedestrian traffic. The portion of the instruction with respect to crossing the alley at a point not marked for pedestrian traffic related to the portions of an ordinance of the city of Omaha admitted in evidence. No error is assigned either as to its admission or the trial court's interpretation thereof in relation to the alley. We have hitherto outlined the evidence herein. It is not necessary to do so further with respect to the contentions here stated. There was adequate evidence to infer that Lucille ran out from behind the big tree, jumped over the fence, and immediately ran into the path of defendant's car. The issues with respect to contributory negligence were properly submitted to the jury.

The plaintiff assigns error to the trial court in failing to direct a mistrial because of repeated and apparent attempts by the defendant's counsel to insert hearsay evidence into the record by way of interrogation. The attempts were made. The evidence was excluded. The jury was admonished not to consider the interrogation. Plaintiff's counsel did not move for a mistrial although he indicated he would like to do so for the record only. The trial court stated if a motion was made it would rule upon it. Plaintiff's counsel thereupon refrained from making his motion. "One may not complain of alleged misconduct of adverse counsel if, with knowledge of such alleged misconduct, he does not ask for a mistrial but consents to take the chances of a favorable verdict." Granger v. Byrne, 160 Neb. 10, 69 N. W. 2d 293. See, also, Pieper v. City of Scottsbluff, 176 Neb. 561, 126 N. W. 2d 865.

Objection was made to the trial court giving an instruction concerning the defense of sudden emergency. It is not contended the content of the instruction was wrong if the issue was properly submitted. The trial court permitted the defendant's answer to be amended

in this respect to conform to the proof at trial over objection. Plaintiff contends the emergency was caused by the defendant's own negligence. The evidence heretofore related makes it clear that the issue was properly submitted to the jury. No error is assigned to the ruling permitting the amendment of the pleading.

Having carefully considered the various contentions of the plaintiff, we find no error in the trial court's ruling. It follows its judgment should be and is affirmed.

AFFIRMED.

WHITE, C. J., not participating.

IN RE ESTABLISHMENT OF RETAIL SERVICE AREA BOUNDARIES BETWEEN THE CITY OF GERING, A MUNICIPAL CORPORATION, AND GERING VALLEY RURAL PUBLIC POWER DISTRICT. CITY OF GERING, A MUNICIPAL CORPORATION, APPELLANT, V. GERING VALLEY RURAL PUBLIC POWER DISTRICT, APPELLEE.
142 N. W. 2d 155

Filed April 29, 1966. No. 36109.

1. **Municipal Corporations: Electricity. If a municipality furnishes** electric energy at retail within its extraterritorial zoning **jurisdiction, it shall have the right to serve the zoning area except for present customers of other retail suppliers. § 70-1008 (1), R. S. Supp., 1963.**
2. **———: ———. A city which fails to file a claim in advance of hearing on the issue of service area boundaries waives the right to serve its extraterritorial zoning area, unless reasonable excuse for the failure is shown.**

Appeal from the Nebraska Power Review Board. Affirmed.

Holtorf, Hansen & Kortum and Charles F. Fitzke, for appellant.

Byron M. Johnson, for appellee.

Heard before CARTER, SPENCER, BOSLAUGH, BROWER, SMITH, and MCCOWN, JJ., and BRODKEY, District Judge.

SMITH, J.

The Nebraska Power Review Board delimited areas to be served respectively by two suppliers of electric energy at retail, Gering Valley Rural Public Power District and the City of Gering. On appeal, the city contends that it was deprived of its statutory right to serve the area within its extraterritorial zoning jurisdiction and that the conditions prescribed by the board are uncertain.

The two suppliers furnished services in overlapping areas outside the corporate limits of the city. The board established a divisional line which paralleled roughly the line bounding the corporate territory of the city on the south and the west. The two lines coincide in a few places; they are less than 1 mile apart in most places. The board designated the land between the two lines as the service area of the city, and the land beyond as the service area of the district. The extraterritorial zoning jurisdiction of the city extends 1 mile. § 16-901, R. R. S. 1943.

The overlap of the zoning area and the service area of the district is said to be contrary to the right of the city. By statute a municipality operating a retail system within its extraterritorial zoning jurisdicton shall have the right to serve that area except for present customers of other suppliers, but right and duty are correlative. See §§ 70-1008 (1) and 70-1017, R. S. Supp., 1963. Although the language is provocative, other provisions soften it.

Timely assertion of the municipal right was intended to be a part of the legislative program for elimination of wasteful competition and duplication of facilities. Suppliers have been authorized to agree upon their service areas subject to approval by the board. Indeed the Legislature specifically encouraged agreement. In case of nonagreement every supplier was required to file with the board prior to July 1, 1964, a statement containing the following information: Its service area and cus-

tomers; its claims; the reason for failure of agreement; and the nature and extent of any dispute. The Legislature authorized the board on notice and hearing to establish service areas in event of nonagreement. See §§ 70-1001 to 70-1008, R. S. Supp., 1963.

The city procrastinated assertion of its right to serve the area now in dispute. The district began negotiations early, but no reason for the nonagreement was given. The city failed to file the statement required by statute, and it failed to furnish the information subsequently. At commencement of the hearing its position was doubtful. Near the end of the hearing the mayor testified to the area requested by the city, but his testimonial claim was untimely. A city which fails to file a claim in advance of hearing waives the right, unless reasonable excuse for the failure is shown. The waiver in the present case is clear.

The board established the service areas subject to identical conditions except for the reversible positions of the suppliers. The city insists that the conditions are inoperable for uncertainty in designation of suppliers. Although the language in the order is imprecise, the city exaggerates the defects. In view of the argument we paraphrase conditions applicable to the service area of the district. The city must limit its service to its present customers and loads. The district may not serve a new customer or a new load if the customer or the load is located closer to a line of the city than to a line of the district. Exceptions to the conditions may be approved by the board on application of either supplier. We conclude that the board sufficiently identified the parties.

The order is affirmed.

AFFIRMED.

WESTINGHOUSE ELECTRIC SUPPLY CO., A DIVISION OF WESTINGHOUSE ELECTRIC CORPORATION, A CORPORATION, APPELLEE, V. JACK BROOKLEY, DOING BUSINESS AS BROOKLEY ELECTRIC, APPELLANT, IMPLEADED WITH AMERICAN CASUALTY COMPANY, A CORPORATION, APPELLEE.

142 N. W. 2d 308

Filed April 29, 1966. No. 36137.

1. **Appeal and Error: Parties. An appeal by a party from a judgment of the district court invokes the jurisdiction of the Supreme Court over the cause and all persons made parties in the district court.**
2. **Appeal and Error. A mandate which incorporates the opinion of the Supreme Court is to be interpreted in conjunction with the opinion.**
3. **———. A judgment against multiple defendants may be reversed as to one defendant alone, unless the reversal would be prejudicial or inequitable because of a special factor, such as interdependent rights of all defendants.**

Appeal from the district court for Douglas County: PATRICK W. LYNCH, Judge. Affirmed.

George B. Boland, John R. Fike, and A. J. Whalen, for appellant.

Crawford, Garvey, Comstock & Nye, John H. Trenerry, Jr., and James R. McGreevy, for appellee Westinghouse Electric Supply Co.

Heard before CARTER, SPENCER, BOSLAUGH, BROWER, SMITH, and MCCOWN, JJ., and BRODKEY, District Judge.

SMITH, J.

This appeal involves interpretation of our opinion on a former appeal in the same case, 176 Neb. 807, 127 N. W. 2d 465. Subsequent to our mandate the district court dismissed plaintiff's action as to defendant American Casualty Company but not as to defendant Jack Brookley, the present appellant.

We are guided more by the reality of the record than by symmetry of concepts. The action was based on

materials furnished by plaintiff to Brookley, who was performing a public works contract bonded by American Casualty Company. Brookley filed in district court a separate answer consisting of a general denial. After trial on the merits plaintiff recovered a money judgment against both defendants. Brookley failed to move for a new trial or to appeal. The surety appealed, attacking only the judgment against it; however, its action invoked appellate jurisdiction over Brookley. See Madison County v. Crippen, 143 Neb. 474, 10 N. W. 2d 260.

The action on the bond being statutory, we held that the right was barred by a 1-year statute of limitations. Our mandate provided in part: "it was considered * * * that the judgment rendered by you be reversed * * * and the cause dismissed."

Brookley reads into the quoted language a reversal of the judgment against him. We examine also the opinion, which was incorporated in the mandate. See Asbra v. Dean, 160 Neb. 6, 68 N. W. 2d 696. All issues converged upon the judgment against the surety, and we paid no attention to undisclosed complaints of Brookley, who was a contented party on the face of the record. We overlooked the procedural complication.

Because of the close question of interpretation we consider the principle which ought to have governed the first appeal. A judgment against multiple defendants may be reversed as to one defendant alone, unless the reversal would be prejudicial or inequitable because of a special factor, such as interdependent rights of all defendants. Fick v. Herman, 161 Neb. 110, 72 N. W. 2d 598. A reversal does not follow the single circumstance that a satisfied defendant, similarly situated, would have prevailed if the district court had correctly applied the law.

Brookley has not been prejudiced. The judgment determined his liability for the materials. His position has not been worsened by the reversal of judgment

against the surety. Justice and equity are set against this belated claim.

The judgment is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JAMES HENRY MCCLARITY, ALIAS ANTHONY LEROY TURNER, APPELLANT.
142 N. W. 2d 152

Filed April 29, 1966. No. 36148.

1. **Criminal Law.** Discrepancies within the evidence as to description and identification of the defendant will not impair the probative force of other positive evidence as to description and identification to the extent of rendering the evidence insufficient to support a verdict of guilty.
2. **Robbery.** The elements of the crime of robbery are (1) the taking of property from the person, (2) by the use of force, (3) with intent on the part of defendant to steal, and (4) without consent by the one from whom the property was taken.
3. **Robbery: Assault and Battery.** The crimes of assault with intent to commit robbery and assault and battery are included within a charge of robbery.
4. **Criminal Law.** When defendant requests the trial court to submit a lesser included offense in the instructions, the trial court must submit all included offenses as to which the evidence is sufficient to support a verdict.
5. **Criminal Law: Constitutional Law.** A finding of guilt of an offense included within the charge of a greater offense is proper under Article I, section 11, Constitution of Nebraska.

Appeal from the district court for Douglas County: DONALD BRODKEY, Judge. Affirmed.

Adolph Q. Wolf, Fred T. Montag, Michael McCormack, and Bennett Hornstein, for appellant.

Clarence A. H. Meyer, Attorney General, and Calvin E. Robinson, for appellee.

Heard before CARTER, SPENCER, BOSLAUGH, BROWER, SMITH, and MCCOWN, JJ., and KUNS, District Judge.

KUNS, District Judge.

Defendant was tried upon an information charging that on April 3, 1965, he committed the crime of robbery against Anton Paikar in Douglas County, Nebraska. The jury returned a verdict finding him guilty of the offense of assault with intent to commit robbery. Defendant was sentenced to a term of 7 years penal servitude in the Nebraska Penal and Correctional Complex and has appealed to this court.

The appellant has assigned two errors: (1) That the evidence was not sufficient to support the verdict, and (2) that the jury should not have been permitted to consider the offense of assault with intent to commit robbery.

In the consideration of the first assignment, it is necessary to review the evidence offered by the State; the defendant offered no evidence. Paikar, the complaining witness, testified that he was 83 years old, a retired railroad employee living in Omaha; that about 1:30 p.m. on April 3, 1965, while he was walking along North Sixteenth Street, someone came up behind him, put one arm about his body and, with the other hand, took from his pocket a pocketbook containing about $400; that the defendant was the man who robbed him; that defendant ran down California Street, while witness ran after him, "hollering"; and that he next saw and identified the defendant at the police station. At one point he referred to his assailant as an Indian, which led to cross-examination on the subject of identification and description, in the course of which he gave some confused replies. Urlaub testified that while he was driving down Sixteenth Street, he saw two men scuffling on the sidewalk, one of whom he identified as the defendant: that he parked his car and followed defendant up California Street into a dead end alley between Sixteenth and Seventeenth Streets; and that defendant turned, threatened him, and then went west down California Street, then north on Seventeenth Street where defendant had an-

other scuffle. Nuzum testified that as he was walking down Sixteenth Street, he heard Paikar call for help and saw a colored man holding Paikar with one arm and with his other hand in Paikar's pocket; that defendant was the colored man; that defendant ran away, the witness following him until the police arrived; and that he was present when the police officer arrested defendant while he was trying to climb a fence. Sorbello, a police officer, testified that, in response to a radio call, he found defendant in an alley off Seventeenth Street, trying to climb a fence; that defendant's face was moist with perspiration; and that he was breathing heavily.

It is to be expected that when several persons testify to their observations of the same event, their testimony based upon varying points of view will not be entirely free from discrepancy. There is testimony identifying the defendant as the assailant, describing an assault together with acts from which an intent to rob might be inferred; there was no support from other witnesses as to the taking of Paikar's money, and apparently it was not found on the defendant at the time of his arrest. The evidence is sufficient to support the verdict and findings of the jury. Defendant's assignment of error in this respect is overruled.

Defendant's second assignment of error relates to the submission to the jury of the offenses of assault with intent to commit robbery and of assault and battery. At the conclusion of the introduction of evidence, the State made an oral request to the trial court to submit assault with intent to commit robbery; the defense did not object to the request, but countered with a statement that an instruction would be offered requesting submission of the offense of assault and battery. Thereupon, the trial court submitted both offenses in the instructions, correctly defining each and stating the elements necessary to be established to justify a finding of guilt.

The crime of robbery is defined by section 28-414, R. R. S. 1943, as follows: "Whoever forcibly, and by vio-

lence, or by putting in fear, takes from the person of another any money * * * with the intent to rob or steal, shall be deemed guilty of robbery, * * *." The elements of the crime are (1) the taking of property from the person, (2) by the use of force, (3) with intent to steal on the part of defendant, and (4) without consent by the one from whom the property is taken. 77 C. J. S., Robbery, § 2, p. 449. When some of the elements of the crime charged in the information, without the addition of any element irrelevant to the original crime charged, may constitute another crime or crimes, such other crime or crimes are included within the crime charged. This court has held that the offense of larceny from the person is included within a charge of robbery, Bunge v. State, 87 Neb. 557, 127 N. W. 899, Brown v. State, 33 Neb. 354, 50 N. W. 154, on rehearing, 34 Neb. 448, 51 N. W. 1028; that assault and battery is included within a charge of shooting with intent to wound, Moore v. State, 147 Neb. 390, 23 N. W. 2d 552; and that assault and battery is included within a charge of assault with intent to commit rape, McConnell v. State, 77 Neb. 773, 110 N. W. 666. In McConnell v. State, *supra,* it was stated: "'* * * we are satisfied, that the general rule is, that, where a higher and more atrocious crime fully embraces all the ingredients of a lesser offense, and when the evidence requires it, the jury may convict of the latter.'" The refusal to instruct upon a lesser included offense after request by the defense has been held to constitute reversible error. Moore v. State, *supra.* In this case, both the crimes of assault with intent to commit robbery and assault and battery include only elements contained within the crime of robbery; such elements find support in the evidence; and the trial court acted correctly in submitting both included offenses upon request. There was no departure from the original charge and defendant was not called upon to defend against any charge outside the scope of the original charge.

Defendant claims further that the conviction is contrary to Article I, section 11, Constitution of Nebraska, granting to the accused the right to demand the nature and cause of the accusation. A conviction of a crime not included within the original charge is void. In re McVey, 50 Neb. 481, 70 N. W. 51. In this case, it has been demonstrated that the offense of which defendant was found guilty was included within the original charge, and the constitutional requirement has been met. Defendant's second assignment of error is overruled.

We find the record to be free from prejudicial error and the judgment of the district court is affirmed.

AFFIRMED.

BERNHARD POPKEN ET AL., APPELLEES, V. THE FARMERS MUTUAL HOME INSURANCE COMPANY OF HOOPER, DODGE COUNTY, NEBRASKA, APPELLANT.

142 N. W. 2d 309

Filed April 29, 1966. No. 36158.

1. **Trial.** When, upon a jury trial, defendant at the conclusion of all the evidence moves for a directed verdict in its favor or for dismissal, such motion must be treated as an admission of the truth of all material and relevant evidence admitted favorable to the plaintiffs, and they are entitled to the benefit of all proper inferences that can reasonably be deduced therefrom.
2. **Evidence: Trial.** Circumstantial evidence is insufficient to warrant a recovery in a civil case unless the circumstances proved are of such a nature and so related to each other that only one conclusion can be reasonably drawn therefrom.
3. **Trial.** In every case, before the evidence is submitted to the jury, there is a preliminary question for the court to decide, when properly raised, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the parties producing it, upon whom the burden of proof is imposed.
4. ———. Where several inferences are deducible from facts presented, which inferences are opposed to each other but equally consistent with the facts proved, the plaintiffs do not

sustain their position by a reliance alone on the inferences which would entitle them to recover.

Appeal from the district court for Dodge County: ROBERT L. FLORY, Judge. Reversed and remanded with directions.

Sidner, Gunderson, Svoboda & Schilke, for appellant.

Homer E. Hurt, Jr., and Eugene R. Retz, for appellees.

Heard before CARTER, SPENCER, BOSLAUGH, BROWER, SMITH, and MCCOWN, JJ., and BURKE, District Judge.

BURKE, District Judge.

Twenty-three Black Angus steers owned by the plaintiffs were drowned in a creek on June 16, 1964.

This action was brought by the plaintiffs against the defendant insurance company under a policy of insurance insuring the steers against "loss or damage by Fire and Lightning, Tornado and Windstorm," but specifically excluding loss or damage by hail, whether accompanied by wind or not. Loss by drowning falls outside the coverage set forth in the contract.

The case was tried to a jury and the jury returned a verdict for the plaintiffs. Judgment was entered thereon.

Defendant appealed from an order overruling its motion for a judgment notwithstanding the verdict, or in the alternative, for a new trial.

The facts, as distinguished from the inferences deducible from the facts, are not in serious dispute.

In the spring of 1964, the plaintiffs, Bernhard Popken and Duane Popken, took 44 head of Angus steers from their farm to a pasture for grazing. The pasture is nearly square in shape and contains 47 acres.

The creek enters the pasture from the northwest corner, angles in a southeasterly direction, and exits near the center of the south border of the property. The creek is one that normally can be stepped across.

There is a large hill near the center of the north border of the pasture which is about 75 feet above the

lowest point in the creek. The west side of the hill rises sharply from the creek. There is also a hill in the southwest corner of the pasture and high ground along the east side of the pasture. The well where the cattle are watered is near the southeast corner of the pasture and is 10 or 15 feet higher than the point where the creek leaves the pasture. There are two valleys running through the pasture from the north which meet and run down to the flat area of the creek. The pasture is fenced with the height of the fence along the south border estimated at 4 feet. Willow trees are located along the creek east of the hill in the southwest corner of the pasture.

Joseph Kaup, called as a witness by the plaintiffs, farms the land directly north of the pasture and there is a common division fence between his land and the plaintiffs' pasture. Approximately 5 minutes before the storm he was working on this fence near the northwest corner of the plaintiffs' pasture at the point where the creek leaves his property and enters the pasture. Mr. Kaup testified that his cattle followed him down to this area and the plaintiffs' cattle all came down to where his cattle were. At this time he testified that the plaintiffs' cattle were: "Right east of the creek on the side hill on the east side." They were still there when he left.

A windstorm of unusual violence occurred minutes thereafter. Mr. Kaup testified that the storm came straight from the north and it sounded "like a couple of freight trains coming." He ran to his basement as he did not believe "there's anybody that would have been able to stand on his feet." The wind came first, then hail followed by a rain that "really poured." It was estimated by Mr. Kaup that the rain started within "one or two minutes" after the wind and hail. The storm lasted 45 minutes.

The windstorm in the immediate area resulted in trees being blown down, limbs being broken from trees, roofs being blown from buildings, sheds collapsing, and a high-

voltage light pole being broken. Approximately 150 feet of fence along the south border of the pasture was washed out by the water.

Immediately after the storm the plaintiffs went to the vicinity of the pasture to look for the cattle. The creek was flooded. Bernhard Popken estimated the depth of the main channel of the creek to be 12 feet and the width of the flood area to be 20 rods. Duane Popken estimated the depth of the water in the creek bed near the willow trees to be 5 or 6 feet and the width of the flood area to be 100 feet. Duane Popken estimated that "probably thirty to forty per cent" of the pasture was flooded.

Four head of cattle were found on a hill in the pasture and the remaining 40 steers were scattered down stream a mile or more south of the pasture. Twenty-three head were drowned.

At the time of the storm the average weight of the steers was 750 pounds. One surviving steer suffered a slight scratch on its stomach, but otherwise the remaining steers, dead or alive, showed no marks of violence. The hail resulted in crop damage to the area adjoining the pasture and hail was found in the area immediately after the storm.

The plaintiffs rely essentially on the case of Jordan v. Iowa Mutual Tornado Ins. Co., 151 Iowa 73, 130 N. W. 177, Ann. Cas. 1913A 266, in which the court held that a policy insuring against loss of livestock by windstorm, cyclone, or tornado is not limited to loss due to a direct physical injury to the stock as by throwing them to the ground, driving them against some obstacle or hurling some object against them. The court added that if windstorm is the efficient cause of the loss of livestock covered by a policy insuring against loss by windstorm, the fact that other causes may have contributed to that loss does not relieve the insurer from liability.

In the case of Parish v. County Fire Ins. Co., 134 Neb.

563, 279 N. W. 170, 126 A. L. R. 703, we agreed with this as a statement of the law, but distinguished the facts from the case then under consideration.

From the facts set forth above, the plaintiffs contend that it is reasonable to infer that the steers worked to high ground and then the windstorm frightened or drove the steers from the high ground of the hill into the low area of the flooded creek where they were drowned.

In support of this theory, the plaintiffs adduced opinion evidence concerning the reaction of cattle in a storm. Joseph Kaup testified that cattle "kind of start running when you get a wind storm or something." In a wind, he added that cattle "usually work to high ground." When it hails, he stated "they stand in a bunch."

Duane Popken testified that normally "cattle will go with the wind" and "put the wind to their back."

Herb Bergt, who lives in Wayne County, is a cattle feeder of 42 years' experience and runs about 2,500 head of cattle a year. He was called as an expert witness by the defendant and gave his opinions concerning the reaction of cattle in a storm. With respect to hail, he stated that "hail will drift the cattle with the wind. It will probably drift them down along the fence line * * *." With respect to a windstorm, he stated that he had "never seen a wind storm drift cattle," and "They will turn their back to it." In answer to a question concerning the immediate reaction of cattle to wind, hail, and rain coming at them from the direction as described in the evidence, Mr. Bergt stated that it was his opinion that "cattle will not move until this violent rain and hail and wind hit them and they will start to travel with the wind." He then added: "They would drift down as far as the fence and they would stop." It was his opinion that loud noises would not cause the cattle to drift.

The threshold question to be answered is whether there was any evidence to support the verdict.

For the purpose of determining the sufficiency of the evidence to support the verdict, we must consider the

evidence in the light most favorable to the plaintiffs and give the plaintiffs the benefit of all inferences that may reasonably be drawn from the evidence. Mills v. Aetna Ins. Co., 168 Neb. 612, 96 N. W. 2d 721.

The plaintiffs may establish their case by circumstantial evidence as well as by direct evidence.

However, circumstantial evidence is not sufficient to sustain a verdict depending solely thereon for support, unless the circumstances proved by the evidence are of such nature and so related to each other that the conclusion reached by the jury is the only one that can fairly and reasonably be drawn therefrom. Mullikin v. Pedersen, 161 Neb. 22, 71 N. W. 2d 485.

The evidence must be such as to make the plaintiffs' theory of causation reasonably probable, not merely possible.

In every case, before the evidence is submitted to the jury, there is a preliminary question for the court to decide, when properly raised, not whether there is literally no evidence, but whether there is any evidence upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the burden of proof is imposed. Weston v. Gold & Co., 167 Neb. 692, 94 N. W. 2d 380.

Where several inferences are deducible from the facts presented, which inferences are opposed to each other, but equally consistent with the facts proved, the plaintiffs do not sustain their position by a reliance alone on the inferences which would entitle them to recover. Shamblen v. Great Lakes Pipe Line Co., 158 Neb. 752, 64 N. W. 2d 728.

Conjecture, speculation, or choice of quantitative possibilities are not proof. There must be something more which would lead a reasoning mind to one conclusion rather than to the other.

If, as plaintiffs contend, inferences may be fairly and reasonably drawn from the evidence that the cattle worked their way to high ground, and the windstorm

frightened or drove them from the high ground of the hill into the low area of the flooded creek where they were drowned, equally justifiable inferences, consistent with the facts proved and inconsistent with the plaintiffs' right to recovery, may be fairly and reasonably drawn that the steers were within the flood plain of the creek when the storm commenced, remained in the flood plain during the storm, and were eventually swept downstream and drowned.

In short, the proven facts go no further than to give equal support to at least two inconsistent inferences and the judgment must go against the parties upon whom rests the burden of proof.

The judgment of the trial court is reversed and the cause is remanded to render judgment notwithstanding the verdict in favor of the defendant.

REVERSED AND REMANDED WITH DIRECTIONS.

ANOKA-BUTTE LUMBER COMPANY, A CORPORATION, APPELLEE AND CROSS-APPELLANT, V. MIKE MALERBI ET AL., APPELLANTS AND CROSS-APPELLEES.
142 N. W. 2d 314

Filed April 29, 1966. No. 36195.

1. **County Courts: Appeal and Error.** In all cases of appeal from the county court or a justice of the peace, the plaintiff in the court below shall, within 50 days from and after the rendition of the judgment in the court below, file his petition as required in civil cases in the district court, and the answer shall be filed and issue joined as in cases commenced in such appellate court.
2. ———: ———. The provision relative to the showing of good cause in section 27-1307, R. R. S. 1943, does not apply to a plaintiff who is an appellee.
3. ———: ———. The remedy for the failure on the part of a plaintiff appellee to comply with the provisions of section 27-1306, R. R. S. 1943, is the entry of an order nonsuiting the plaintiff unless a petition on appeal is filed within the time specified.

4. ———: ———. In re Estate of Grblny, 147 Neb. 117, 22 N. W. 2d 488, and Rice v. McGrath, 162 Neb. 511, 76 N. W. 2d 428, insofar as they are in conflict with this opinion, are overruled.
5. **Principal and Agent.** Apparent or ostensible authority or agency for which a principal may be liable must be traceable to him and cannot be established by the acts, declarations, or conduct of the agent. The principal is only liable for appearance of authority caused by himself. Ostensible and apparent agency have been treated in this jurisdiction as being synonymous.
6. **Costs: Attorney and Client.** Allowances made under section 25-1801, R. R. S. 1943, within the limitations provided, are within the sound discretion of the trial court.

Appeal from the district court for Madison County: FAY H. POLLOCK, Judge. Affirmed.

James F. Brogan, for appellants.

Moyer & Moyer, for appellee.

Heard before CARTER, SPENCER, BOSLAUGH, BROWER, SMITH, and MCCOWN, JJ.

SPENCER, J.

This is an action by plaintiff, Anoka-Butte Lumber Company, to recover the cost of materials furnished to repair a portion of the roof of a building owned by the defendants, Mike Malerbi and Genola Malerbi, husband and wife. The action originated in the county court of Madison County, where it was tried to a jury. Defendants appealed to the district court from a judgment rendered against them for $81.09, interest, and costs. Jury was waived in the district court, and after a trial to the court, judgment was entered against the defendants in the amount of $81.09, interest, costs, and an attorney's fee of $26.20. Defendants have perfected an appeal to this court.

Defendants, who live in Madison, Nebraska, own a building known as the M and G Cafe in Butte, Nebraska. The material in question was purchased to repair the roof of a lean-to built up against the main building. The repair was under the direction of one Edwin R. Ell-

wanger, a carpenter at Butte, Nebraska. The materials were purchased from the plaintiff by Ellwanger. The amount of the bill, after allowing credit for the merchandise returned, was $81.09.

There is a substantial dispute between the defendants and Ellwanger as to the nature of the repair which was to be made. There is no dispute that the conversation which resulted in the repair took place in the cafe building at Butte, Nebraska. Mike Malerbi testified he asked Ellwanger if Ellwanger would get a strip of roofing paper and overlap it 8 or 10 times over the back end of the roof to keep snow from seeping in, and that nothing was said as to where Ellwanger was to secure the material. Mike Malerbi's testimony is corroborated by his wife.

Ellwanger testified that while he was drinking coffee in the cafe with two companions who were also carpenters, Mike Malerbi came over to the table and asked him if he would fix the roof. He testified that Malerbi told him to fix the roof so it didn't leak, and to get the materials to do the job from the plaintiff. It was his further testimony that to make the repair it was necessary to entirely replace the roofing paper on the roof of the lean-to. One of the two carpenters who were sitting with Ellwanger also testified to the conversation. He testified that the defendants came over to the table and that Mike Malerbi asked Ellwanger to repair the roof and to get the material needed from the plaintiff. This witness, who helped Ellwanger make the repair, also testified to the condition of the roof and the repair which was made. On cross-examination he testified that what Mike Malerbi told Ellwanger about getting the material was "to order it from the local yard," but that Anoka-Butte had the only yard in town.

Defendants perfected their appeal from the county court by delivering the transcript and having the appeal docketed within 30 days from the rendition of the judgment in the county court. The plaintiff, however, through

the neglect of its attorney, did not file a petition on appeal within the time provided by section 27-1306, R. R. S. 1943, which reads: "In all cases of appeal from the county court or a justice of the peace, the plaintiff in the court below shall, within fifty days from and after the date of the rendition of the judgment in the court below, file his petition as required in civil cases in the district court, and the answer shall be filed and issue joined as in cases commenced in such appellate court."

The plaintiff filed its petition on appeal approximately 4 months after the judgment was entered in the county court. Defendants filed a motion to nonsuit the plaintiff, which motion was overruled. Defendants urge that the showing made in support of the failure to file the petition after 50 days does not meet the requirements of good cause, and that the trial court abused its discretion in permitting plaintiff to file the petition on appeal.

It is to be noted that section 27-1306, R. R. S. 1943, does not specify any penalty for failure to comply with the statute. Section 27-1307, R. R. S. 1943, specifically covers the situation where a plaintiff who is the appellant fails to file a petition on appeal. That statute, so far as material, is as follows: "If the plaintiff in the action before the justice shall appeal from any judgment rendered against such plaintiff, and after having filed his transcript and caused such appeal to be docketed according to the provisions of this article, shall fail to file his petition within fifty days from the date of the rendition of such judgment by the justice, unless the court, on good cause shown, shall otherwise order, or otherwise neglect to prosecute to final judgment, the plaintiff shall become nonsuited; * * *."

The present action, however, involves the failure by a plaintiff who is an appellee to file a petition on appeal within the 50 days. The defendants cite the case of Rice v. McGrath, 162 Neb. 511, 76 N. W. 2d 428, in support of their contention that this situation is covered by the provisions of the statute. Rice v. McGrath, *supra*,

involved an appeal by the defendant in a replevin action in the county court. The plaintiff appellee did not file a petition on appeal within 50 days. Plaintiff subsequently filed an application for leave to file a petition on appeal, supported by a much stronger showing than is present in the instant case. The trial judge denied the application and this court, holding that the trial court did not abuse its discretion, affirmed the holding.

In re Estate of Grblny, 147 Neb. 117, 22 N. W. 2d 488, also involved a situation where the defendant attempted to nonsuit the plaintiff appellee. In that case this court said: "No authorities are cited directly in point but it will be observed that the transcript confers jurisdiction upon the district court which is vested with sound judicial discretion in such matters, and we find no statute providing that the court loses jurisdiction if the appellee, being plaintiff, fails to file his petition within the time required."

In In re Estate of Grblny, *supra,* the plaintiff appellee was permitted to file a petition out of time, and this court said: "We conclude that the applicable rule in cases similar to the one at bar should be that where the district court, on an appeal perfected by defendant from the county court, permits plaintiff upon application therefor to file his petition on appeal out of time it will be presumed on appeal to this court, in the absence of a record to the contrary, that good cause was shown and that the district court thereby exercised a sound judicial discretion." This case would therefore seem to hold that good cause must be shown by the plaintiff appellee to permit the filing of a petition out of time.

Reviewing the applicable statutes, we are unable to find any provision in the statutes which requires a showing of good cause on the part of the appellee. A litigant should not be deprived of a hearing upon the merits of his case unless the law requires such action. There is no question that section 27-1306, R. R. S. 1943, is intended to prevent unnecessary delay in the admin-

istration of justice. Unless the statute is enforced in some manner by the court, it would be within the power of a litigant to continue the litigation almost without end. Where the provisions of the statute provide for a showing of good cause, good cause must be required. Here, however, there is no such requirement. The proper procedure in such situation would appear to be for the appellant to direct the court's attention to the fact that the appellee has not filed a petition on appeal within the time required. The court should then order that the plaintiff be nonsuited unless a petition on appeal is filed within a time specified. Insofar as In re Estate of Grblny, 147 Neb. 117, 22 N. W. 2d 488, and Rice v. McGrath, 162 Neb. 511, 76 N. W. 2d 428, hold to the contrary, they are overruled.

The trial court specifically found $81.09 to be the fair and reasonable value of the materials purchased; that the purchases were made by Ellwanger as defendants' agent; and that he exceeded his authority in that capacity. Defendants do not contest the finding on reasonable value, but do contest the finding on agency. It is true, as urged by defendants, that the declarations of an alleged agent are not admissible in evidence for the purpose of establishing or enlarging his authority. Le Bron Electrical Works, Inc. v. Livingston, 130 Neb. 733, 266 N. W. 589.

"Apparent or ostensible authority or agency for which a principal may be liable must be traceable to him and cannot be established by the acts, declarations, or conduct of the agent. The principal is only liable for appearance of authority caused by himself. Ostensible and apparent agency have been treated in this jurisdiction as being synonymous." Rodine v. Iowa Home Mutual Cas. Co., 171 Neb. 263, 106 N. W. 2d 391.

Here the testimony of the only disinterested witness is in substance to the effect that Ellwanger was hired to repair the roof of defendants' building, and was specifically directed by the defendants to purchase the neces-

sary materials from the plaintiff. The evidence is undisputed that all of the materials purchased were used on the defendants' building. The record supports the finding of agency, and the judgment rendered herein.

Plaintiff by cross-appeal raises the adequacy of the attorneys' fee allowed plaintiff in the trial court. Plaintiff was limited to about the minimum allowed under section 25-1801, R. R. S. 1943. Allowances within the limitations provided by the statute are within the sound discretion of the trial court. We see no reason to interfere with the allowance. There is no merit to plaintiff's cross-appeal.

For the reasons stated, the judgment of the trial court is affirmed. As provided by section 25-1801, R. R. S. 1943, a fee of $75 is allowed for the services of plaintiff's attorneys in this court.

AFFIRMED.

ELIZBETH M. CARLSON ET AL., APPELLANTS, V. CITY OF FREMONT, DODGE COUNTY, NEBRASKA, ET AL., APPELLEES.
142 N. W. 2d 157

Filed April 29, 1966. No. 36222.

1. **Municipal Corporations: Deeds.** Where lands are conveyed to a municipality by absolute gift or purchase from the general fund, without restriction or condition of any kind, the municipality may devote it to such public use as its needs require.
2. ———: ———. Where lands are conveyed to a municipality in fee simple and thereafter used as a public park, the municipality may at any time thereafter change the use to one required by the welfare and necessities of the municipality.
3. **Deeds: Trusts.** It is only where property is dedicated or donated for some specific use, conveyed with some restriction or condition, or where payment is provided by assessment on property benefited by the contemplated use, that a different use may be enjoined.

Appeal from the district court for Dodge County: ROBERT L. FLORY, Judge. Affirmed.

Edward J. Robins, for appellants.

Max A. Powell and Ray C. Simmons, for appellees.

Heard before CARTER, SPENCER, BOSLAUGH, BROWER, SMITH, and MCCOWN, JJ., and RONIN, District Judge.

CARTER, J.

This is a suit for an injunction in which plaintiffs sought to enjoin the city of Fremont and its officers from converting any part of a city park to use as a fire engine station or any other use incompatible with its use as a public park. The trial court denied an injunction and plaintiffs have appealed.

Plaintiffs are lot owners across the street from the park, who claim their properties will be irreparably damaged in value and use by the construction of the fire station. The city admits that it will construct the fire station in the park area unless restrained by the court.

On January 6, 1857, a plat of the Town of Fremont was certified by a surveyor. The plat showed the Town of Fremont as being laid out by streets, blocks, and lots. Two city blocks were shown as a park. On October 1, 1860, two patents were issued by the United States to E. H. Rogers, chairman of the board of trustees of the Town of Fremont covering two areas of 160 and 120 acres which included the park involved in this litigation. The patents granted the land to the chairman of the board of trustees in trust for the several use and benefit of the occupants of the town according to their several interests in accordance with an act of Congress enacted in 1844. No park was mentioned in either of the patents.

The chairman of the board of trustees deeded part of the lots to private owners in 1860. In 1861 the board of trustees moved the park one block east of its then location by including the city block to the east and vacating the city block constituting the west half of the park as

it was first shown on the plat. This action by the board of trustees was approved by the Territorial Legislature on January 9, 1862. The park has remained in its present location since the happening of the foregoing events. On June 8, 1965, the city council of the city of Fremont adopted a resolution directing the construction of a fire station in a designated portion of the existing park, resulting in the litigation now before this court.

For the purposes of the case it will be conceded that plaintiffs as the owners of property adjacent to the park will suffer some permanent damage by the construction of the fire station on the park property. The primary issue is whether or not the park area has been dedicated in perpetuity as a park in a manner requiring that it be used exclusively as a public park.

It appears that in 1861 the Town of Fremont did not have legislative authority to vacate parks and close streets and alleys, hence the confirming legislative action in 1862. A suit was subsequently brought to test the validity of the action of the board of trustees and the confirming legislative action. It was sustained in this court. Kittle v. Fremont, 1 Neb. 329. In that case this court said: "It is, as has been urged, that the action of the town board in making this change was entirely without authority of law, and therefore void, and being void, the act of the legislature ratifying and confirming their acts, can have no binding force or effect whatever. Now, without any reference to the effect, if any, of this confirmatory statute upon private rights and interests, we are quite clear that so far as the public are concerned, it was entirely competent and proper for the legislature to enact it, and that to this extent full effect must be given to its provision." The effect of this decision is to hold that the park was not at that time exclusively dedicated to park use, a conclusion borne out by the patents issued by the United States which made no reference to park use. It is evident that the Town of Fremont was originally established on the public lands of the United

States and that patents were issued to the chairman of the board of trustees for the sole purpose of conveying title to occupants of the town according to their several interests, as provided by an act of Congress.

It is ordinarily the rule that where a municipality receives lands by outright grant, purchase, or absolute gift, its use or sale is for the determination of such municipality. See City of Gering v. Jones, 175 Neb. 626, 122 N. W. 2d 503. The conveyance of the property by patent in the instant case was in effect a transfer of the fee title. It was not dedicated to any specific use which was a condition of the grant. Under such circumstances a municipality, as any fee owner, may make such use of it as may be desired, or convey it in such manner as the statutory law provides. It is only when land is received by gift or purchase, conditioned for a specified public use, that a trust for the benefit of the public arises.

In Reichelderfer v. Quinn, 287 U. S. 315, 53 S. Ct. 177, 77 L. Ed. 331, 83 A. L. R. 1429, the court said: "It has often been decided that when lands are acquired by a governmental body in fee and dedicated by statute to park purposes, it is within the legislative power to change the use (citing cases). The abutting owner cannot complain; the damage suffered by him 'though greater in degree than that of the rest of the public, is the same in kind.' (Citing cases)."

In Collins v. Board of Commissioners, 20 Wyo. 517, 126 P. 465, the Wyoming court had a very similar case before it. In that case the court said: "The patent purports to convey the fee; and neither the Act of Congress nor the patent contains any words of limitation, condition or restriction; nor is there anything in either limiting or restricting the use of the premises to any particular purpose. We are clearly of the opinion that by the terms of the Act of Congress and the patent, the County of Big Horn became the owner of the courthouse square in fee simple and that the title would not revert

to the government in case the county should cease to use it as a courthouse square. It has been repeatedly held that, 'where a deed purports on its face to be a grant absolute and in fee, the expression in the deed of a purpose respecting the particular use to which the property is to be appropriated will not of itself make the estate conditional.'" See, also, Keatley v. County Court, 70 W. Va. 267, 73 S. E. 706, Ann. Cas. 1913E 523.

It appears to be the contention of the plaintiffs that the designated use of the two city blocks as a park for a long period of time has the effect of creating a park in perpetuity. The city is the owner of the fee title without conditions attached and, under such circumstances, it may make such public use of it as it sees fit. The dedication of land for a specified purpose by a third person may, under proper circumstances, restrict the future use of the property. See City of Gering v. Jones, *supra*. But real property of a municipality owned in unconditional fee may generally be put to such public use as the municipality may determine.

A text writer states the rule as follows: "A municipal corporation may receive lands on condition that they continue to be used for park purposes, and when they cease to be so used they revert to the grantor. But where lands are conveyed to a municipality in fee simple, free from any trusts or conditions, and afterwards used for park purposes, the municipality may sell and convey the lands to any grantee that it may choose, under its charter power to sell and dispose of any property owned by it, or it may devote the property to other public uses, and where property is acquired and paid for by a city from the general fund, with the intention of using it for a particular purpose specified in the ordinance authorizing the taking, such contemplated use may be changed by the city to another and entirely different use as the requirements and needs of the city may demand." 10 McQuillan, Municipal Corporations, (3d Ed.), § 28.52, p. 126.

We think the correct rule is stated in Seattle Land & Improvement Co. v. City of Seattle, 37 Wash. 274, 79 P. 780, wherein the court said: "An examination of the authorities cited by the respective parties hereto, and such others as we have been able to examine, shows that a clear distinction is observed between those cases where the fee of the property is acquired (by purchase, condemnation, or otherwise), and those cases wherein the city obtains merely an easement; also, between cases where the full purchase price is paid by the city from its general fund, and those cases where the property is dedicated or donated for some specific public use, or conveyed with some restriction, or where payment is provided by assessment upon neighboring property specially benefited by the contemplated use. In the case at bar the city acquired the full and complete legal title in fee to this property, without restriction of any kind; and paid, so far as the record shows, the full value therefor from the general fund. It was not a dedication or donation, or a conveyance to the city with any limitations or restrictions. The city having thus acquired the property, and, in its wisdom, decided thereafter that the contemplated use should be changed, and that its welfare and necessities required a use for economic purposes, we are unable to find any authority authorizing the appellant to interfere with the respondents' actions in this direction. Brooklyn Park Com'rs v. Armstrong, 45 N. Y. 234, 6 Am. Rep. 70; Curran v. Louisville, 83 Ky. 628."

The city in the instant case was the owner of the fee title to the city park. No restrictions or conditions were attached to the grant. Under such circumstances, the use of the park property is within the discretion of the city. The trial court having reached this same conclusion, its judgment is correct.

AFFIRMED.

NORTHWESTERN BELL TELEPHONE COMPANY, A CORPORATION, APPELLANT, V. CONSOLIDATED TELEPHONE COMPANY OF DUNNING, A CORPORATION, APPELLEE.

142 N. W. 2d 324

Filed May 6, 1966. No. 36168.

1. **Telecommunications.** A telephone toll line serves a "territory" and the extent of the territory served is a question of fact.
2. ———. Extended area telephone service is exchange service and not toll service.
3. **Public Service Commissions: Telecommunications.** The object and purpose of commission control of common carriers is to secure adequate sustained service for the public at the lowest reasonable cost, and to protect and conserve investments made for that purpose.
4. ———: ———. The invasion by a telephone company of the territory of another telephone company, either in service or construction, was intended to be prohibited unless the invading company first applied for and received a certificate of convenience and necessity.
5. ———: ———. Duplicate lines of transportation by competing common carriers are ordinarily incompatible with public interest. Such a competing line will be authorized only for compelling reasons.

Appeal from the Nebraska State Railway Commission. Reversed.

Edward Sklenicka, Walter D. James, Jr., and Edward F. Barnicle, Jr., for appellant.

Charles F. Adams and Larry G. Carstenson, for appellee.

Heard before CARTER, SPENCER, BOSLAUGH, BROWER, SMITH, and MCCOWN, JJ., and BURKE, District Judge.

MCCOWN, J.

This case involves the question of whether a telephone company holding certificates of public convenience and necessity for furnishing local exchange service to a number of communities within an overall area can displace an existing long distance telephone common carrier service and duplicate long distance facilities between

its own local exchanges and exchange areas.

The defendant, Consolidated Telephone Company, furnishes the local exchange service to the municipalities of Merna, Anselmo, Dunning, Thedford, Seneca, Mullen, Brewster, and Brownlee. Complainant, Northwestern Bell Telephone Company, owns lines and furnishes local and long distance telephone service in many areas throughout the State of Nebraska. Hereafter, they will be referred to as Consolidated and Northwestern respectively. One of Northwestern's long distance toll lines extends northwest from Broken Bow to Mullen, Nebraska, and for over 40 years has furnished long distance service to the local exchanges now owned by Consolidated at Merna, Anselmo, Dunning, Thedford, Seneca, and Mullen; and also, to Purdum, where the local exchange is not owned by either party. Brownlee and Brewster are local exchanges owned by Consolidated receiving long distance service over Consolidated owned lines which connect with Northwestern's toll line at Thedford for Brownlee toll, and at Dunning for Brewster toll. In addition, Consolidated furnishes extended area telephone service between Seneca, Brownlee, and Thedford, and between Merna and Anselmo; and plans extended area service for Halsey and Dunning. Extended area telephone service is toll free service between two or more exchanges which is furnished to the subscribers for the exchange service charge.

On August 27, 1963, Consolidated filed an application for authority to borrow $400,000. Among the purposes of the borrowing were the establishment of a separate toll circuit and extending trunk and toll lines to the edge of its exchange areas. Northwestern formally protested this application upon the ground that a large part of the proposed investment would duplicate and render valueless Northwestern's investment in toll plant in the area. On the same date, Consolidated also filed an application to establish message toll tariffs between Consolidated's exchanges not served by extended area

service. The application for borrowing was continued on motion of Consolidated, but on February 5, 1964, the commission entered an order authorizing Consolidated to establish extended area service as set forth in its application, and authorizing it to establish a local exchange tariff, a general exchange tariff, and a message toll service tariff between those of its exchanges which are not connected by extended area service. On February 27, 1964, Northwestern filed a complaint requesting an order prohibiting Consolidated from building or establishing a toll line or facility which would duplicate Northwestern's toll facility.

Sometime prior to August 5, 1964, Consolidated had constructed a new line between Seneca and Thedford. On August 3, 1964, Consolidated notified Northwestern that the Seneca exchange would start dial operation on August 5, 1964, and that long distance service to Seneca subscribers would be furnished over two circuits which would also handle the extended area service, and the new point of connection with Northwestern's toll line for long distance service to and from Seneca would be at Thedford.

The evidence shows no inadequacy of toll service over Northwestern's lines. The present toll arrangements by Consolidated for Seneca are inadequate, and the evidence is also uncontradicted that combining extended area and toll circuits into one group does not conform to present traffic practice and results in unsatisfactory service both by reason of the stimulation factor of extended area service, and the problems of noise and increase in volume gain. On June 30, 1965, the commission entered its findings. Among them it stated that from a billing standpoint, extended area service is more comparable to local service, but from the standpoint of physical plant, the service is quite similar to toll service. The commission also found that it appears reasonable that Consolidated be entitled to construct lines within its territory connecting its exchanges without

prior approval of the commission, whether calls between said exchanges are paid for as part of the monthly rental or individually. The amended complaint of Northwestern was dismissed, and this appeal followed.

Section 75-604, R. S. Supp., 1963, provides in part: "No person, firm, partnership, corporation, cooperative, or association shall offer telephone service or shall construct a new telephone line in or extend an existing telephone line into the territory of another telephone company without first making an application for and receiving from the commission a certificate of convenience and necessity, after due notice and hearing under the rules and regulations of the commission."

It is essentially the position of Consolidated, and apparently of the commission, that a telephone company having only a toll line "has no territory," and that section 75-604, R. S. Supp., 1963, does not apply. The contention is that certificates for multiple local exchanges and the filing of exchange area maps establish the territory and the authority to furnish both exchange service in, and toll service between, all the exchanges of a company, even though the toll service duplicates the existing toll service and lines of another common carrier telephone company. This implies that there is no longer any distinction between toll service and local exchange service and that the same geographic territory cannot be the territory of one local exchange company and at the same time be the territory of a separate toll telephone company. A telephone toll line in service obviously serves a "territory" and the extent of the territory served is a question of fact. See Mountain States Tel. & Tel. Co. v. Suburban Tel. Co., 72 N. M. 411, 384 P. 2d 684. For over 40 years this territory along this telephone toll line has been Northwestern's toll line territory.

Traditionally in the telephone industry there have been two well-defined branches of the business, one the long distance system and the other the local exchanges.

See 86 C. J. S., Tel. & Tel., Radio & Television, § 4, p. 15. The Federal Communications Act contains specific definitions both of telephone exchange service and telephone toll service. Title 47, U. S. C. A., § 153, p. 67, provides in part: "(r) 'Telephone exchange service' means service within a telephone exchange, or within a connected system of telephone exchanges within the same exchange area operated to furnish to subscribers intercommunicating service of the character ordinarily furnished by a single exchange, and which is covered by the exchange service charge.

"(s) 'Telephone toll service' means telephone service between stations in different exchange areas for which there is made a separate charge not included in contracts with subscribers for exchange service."

The character and classification of extended area service in this situation as between these two branches of telephone service is critical. Extended area service, under the above definitions and under the definitions of courts of other states, is exchange service and not toll service. See, Barnes v. Arkansas Public Service Commission, 235 Ark. 683, 362 S. W. 2d 1; Ohio Central Tel. Corp. v. Public Utilities Commission of Ohio, 166 Ohio St. 180, 140 N. E. 2d 782; Southwestern Bell Tel. Co. v. United States, 45 F. Supp. 403.

Even though extended area service may replace toll service between the particular local exchanges connected, it does not eliminate the need for toll lines leading to a toll center under modern telephone practice. The extended area service is exchange service and the toll carrier cannot justifiably object, nor does Northwestern here. The justifiable complaint arises when toll lines and service are duplicated, either by the use of extended area circuits for toll purposes, or by the construction or addition of toll circuits or facilities. It is important to note that Consolidated does not propose to merge the Seneca and Thedford exchanges, but has maintained the identity of the Seneca exchange as a

separate exchange, including its status as a toll point for municipalities other than Thedford or Brownlee. The exchange areas are not merged for toll purposes. Under such circumstances, Consolidated did not have the right to unilaterally change the point at which it exchanges long distance messages with Northwestern when the effect is to impair or destroy the value of the toll company's lines and business.

This court has said that the object and purpose of commission control of common carriers is to secure adequate sustained service for the public at the lowest reasonable cost, and to protect and conserve investments made for that purpose. Chambers Rural Tel. Co., Inc. v. K. & M. Tel. Co., Inc., 179 Neb. 735, 140 N. W. 2d 400.

We have also said: "It is clear that the invasion by a telephone company of the territory of another telephone company, either in service or construction, was intended to be prohibited unless the invading company first applied for and received a certificate of convenience and necessity." Sherdon v. American Communications Co., 178 Neb. 454, 134 N. W. 2d 42.

This court, even in the absence of a statute regarding duplication of facilities, has stated: "Duplicate lines of transportation by competing common carriers are ordinarily incompatible with the public interest. Such a competing line will be authorized only for compelling reasons." In re Application of Effenberger, 150 Neb. 13, 33 N. W. 2d 296. See, also, The Greyhound Corp. v. American Buslines, Inc., 178 Neb. 9, 131 N. W. 2d 664.

Where the specific problem raised in this case has been considered in other states, it seems to have been uniformly held that duplication of toll telephone lines and service, in the manner proposed and partially accomplished by Consolidated, is contrary to law and sound public regulatory policy. See, Clifton Forge-Waynesboro Tel. Co. v. Commonwealth ex rel. Chesapeake & Potomac Tel. Co. of Virginia, 165 Va. 38, 181 S. E. 439; In re Citizens Telephone Co., Inc., 57 P. U. R. 3d 81.

Under the circumstances here, Consolidated did not have the authority to establish toll service without complying with the provisions of section 75-604, R. S. Supp., 1963, and Northwestern was entitled to the order requested in its complaint.

For the reasons stated, the action of the commission was in error, and its order of dismissal is reversed.

REVERSED.

EVERETT SATTERFIELD, APPELLANT, V. JOHN F. DUNNE ET AL., APPELLEES.
142 N. W. 2d 345

Filed May 6, 1966. No. 36193.

1. **Easements: Adverse Possession.** The use and enjoyment which will create title by prescription to an easement are substantially the same in quality and characteristics as the adverse possession which will give title to real estate. The use and enjoyment must be adverse, under claim of right, continuous, notorious, exclusive, with the knowledge and acquiescence of the owner of the servient tenement, must continue for the full prescriptive period, and must be substantially identical.
2. **Easements.** To establish a prescriptive right to an easement, all of the elements of a prescriptive use and enjoyment must be established by clear, convincing, and satisfactory evidence.
3. **Highways.** If the owner of land encloses it with a fence and installs gates therein at the entrance and exit where the right-of-way is claimed across the tract, it is evidence that he recognizes the right of those who use the road to continue to use it.
4. ———. It is not indispensable to the establishment of a highway by prescription that there has been no deviation in the line of travel. If the course of travel has remained substantially unchanged for the full period, it is sufficient even though at times, to avoid encroachments, obstructions, or the like upon the road, there have been slight changes in the line of travel.
5. ———. It is not indispensable to the establishment of a road by prescription that there be an expenditure of public funds or work by the public authorities for its improvement or maintenance. Where there is an irreconcilable conflict on a material issue in such an action and where there has been such an expenditure of public funds or work on such road with the knowl-

edge of the owner, then such public expenditure or work may have the legal effect of the owner's acknowledgment of the right of the public to use such road.

6. **Appeal and Error.** When an action in equity is appealed, it is the duty of this court to try the issues de novo and to reach an independent conclusion without reference to the findings of the district court. Where in such a case the trial court has made a personal examination of the physical facts, and where, in the same case, the oral evidence in respect of material issues is so conflicting that it cannot be reconciled, this court will consider the fact that such examination was made and that such court observed the witnesses and their manner of testifying, and must have accepted one version of the facts rather than the opposite.

Appeal from the district court for Loup County: NORRIS CHADDERDON, Judge. Affirmed.

Robert V. Hoagland and Vogeltanz & Kubitschek, for appellant.

Julius D. Cronin, for appellees.

Heard before CARTER, SPENCER, BOSLAUGH, BROWER, SMITH, and MCCOWN, JJ., and RONIN, District Judge.

RONIN, District Judge.

This is an action in equity brought by the appellant as plaintiff against the appellees as defendants to establish a public road by prescription to an easement across the defendants' land and to enjoin defendants from interfering with his right to use said road. Upon completion of trial at the request of the plaintiff the trial judge visited the premises by traveling the entire length of the alleged road. The district court found for the defendants and dismissed the petition. The plaintiff's motion for new trial was overruled and the plaintiff appealed.

This being an appeal in an action in equity, this court will try the issues of fact complained of de novo, and reach an independent conclusion as to what findings are required. § 25-1925, R. R. S. 1943; Toelle v. Preuss, 172 Neb. 239, 109 N. W. 2d 293. Plaintiff states in his brief that the only substantial question involved in his appeal

is whether or not a public road by prescription has been established across defendants' property by the evidence in this case.

A review of the evidence is necessary to determine if the plaintiff has sustained his required burden of proof in this action. Plaintiff introduced into evidence as exhibit 1 an engineer's map of Loup County, Nebraska, dated January 1, 1949. This exhibit identifies the portion of defendants' lands involved herein as being generally in the northwest corner of Loup County and including an alleged road running across Sections 2, 3, and 11 and immediately south of the Calamus River which flows in a general southeasterly direction and through these sections. Plaintiff is an adjoining landowner to the south and east of defendants' lands and both parties are engaged in the cattle ranch business. Exhibit 1 depicts the location of state highways, county roads, and trail roads, but the disputed road was not located thereon, and was drawn by plaintiff in red on the exhibit.

Plaintiff testified that he has used this road across defendants' land since 1920 for hunting, fishing, and ranching purposes until stopped by defendants on April 29, 1965; that there were gates on this road wherever the fences crossed the road; and that this road course has been the same all through the years since 1920 to the present time. Plaintiff stated that the south Calamus River road was approximately 20 miles long, beginning with its junction with State Highway No. 183, proceeding in a northwesterly direction, and ending with the county line between Loup and Rock Counties.

Four witnesses for the plaintiff testified as to the alleged road and travel thereon. Art Roggasch lived in the south part of the county and testified that he first drove over this route in the 1920's when he was duck hunting. He was married to one of the Dunne girls and that he saw people using the road years ago but did not know their names. Ray Birch testified that he carried mail to the Ovitt store in the 20's but did not travel on

this disputed road or trail more than once or twice and did not testify there was a road over the land in question or that he saw anyone traveling on it. Jack Kraus, an employee of plaintiff, testified he had never been over the Dunne land until the last 2 or 3 years after the county closed the road on the Buell property. Robert Howard, another employee of plaintiff, testified as to meeting cars driven by fishermen but could not state that he saw any other use of the road.

Roy A. Copp testified for plaintiff by deposition that while he lived at Taylor, he had traveled on a publicly used trail on the south side of the Calamus River up to and beyond the Dunne property during the period of 1911 to 1946. He went up there to hunt and always went to the Dunne house and asked permission. He did not know where all the Dunne property was, but that he saw rural users of this road during this period of time. The deposition of Alice Dieleman states that she had traveled over this road from about 1932 to 1945 and that it was well defined; and that she had attended neighborhood dances which necessitated travel over the disputed road at times.

Plaintiff alleges in his petition that a portion of the alleged road "has been graded and maintained by Loup County." The record does not support this contention. The only evidence on this point is one isolated instance in October 1964, when a grader operator made one trip over the trail from the county road line south to Dunne's buildings to smooth the trail at the request of a contractor hauling gravel donated by Dunne from his place to be used on the said county road. Both the contractor and the blade operator involved therein testified for the defendants and stated that this one instance of blading was without the knowledge of defendants.

The testimony of the defendants and their witnesses is in direct conflict with those of the plaintiff as to whether any road or trail ever existed across defendants' land that was used by the public. Defendants' witnesses tes-

tified that for many years there has been a river road running in a general northwesterly direction on the south side of the Calamus River beginning at a point just north of Taylor and connecting the Harropp and Ovitt post offices, and proceeding about a mile west of the Ovitt post office located in Section 22, but instead of continuing further toward defendants' property, this road turned due north and crossed the river over the Fox Bridge and continued north a few miles to the graded county line road dividing Loup and Rock Counties. Exhibits 1 and 12 confirm the existence of this road. The point where the road turns north to cross the Fox Bridge is approximately 3 miles east of the east boundary of defendants' property.

Exhibit 11 is an aerial photograph of defendants' land made by the Soil Conservation Service in 1954. No trail or road as claimed by plaintiff is visible on the exhibit, although trails from defendants' buildings to the section line road to the north thereof and dividing Loup and Rock Counties are plainly identifiable.

Defendants also introduced in evidence exihibt 12, which is a soil survey of Loup County prepared by the United States Department of Agriculture in 1934, which contains a Loup County soil map. This map shows types of soils, drainage, secondary roads, and trails. It is significant that this map fails to show any road or trail across the Dunne property as contended herein by plaintiff.

A neighboring rancher, Bernard T. Buell, testified that he lived 3½ miles northeast of Dunne's buildings; that he is 45 years of age, was born and raised there, has been familiar with the territory around the Dunne place all of his life, and was down there frequently; that there has never been a well-defined road used by the public through the Dunne place; and that he has never seen any travel on any trail roads south of the Calamus River on the Dunne property. L. A. Goochey testified that he moved into the Dunne neighborhood in 1907 and was

road overseer in the 1920's under three different commissioners; that no work was ever done by the county on roads or trails on the Dunne land; and that there was no trail traveled by the public across the Dunne land but there were trails going "most any direction to where people lived." Robert Schrup testified that he had been a county commissioner of Loup County for 6 years and rented land near the Dunne land for 8 years starting in 1954; that the mail carrier to the Ovitt store used the Fox Bridge and did not therefore cross Dunne's land; and that in 1947 when he went to Dunne's place to help eradicate prairie dogs that he saw a "no trespassing" sign, but no roads or trails or any traffic on his premises.

John F. Dunne, one of the defendants, testified that he is one of the commissioners of Loup County; that he is 49 years of age; that there is no traveled road as alleged by plaintiff; that the gate on the alleged road on the east line of their property had been there 6 or 7 years; that he does not know who placed it there; that there has never been "any road along the red line drawn by Mr. Satterfield on the map, Exhibit 1, through my land or my brother's"; that there have been "no trespassing" signs in numerous places along the Dunne property about as long as he can remember; and that "there has never been any auto gates on our property and what gates there are, are wire gates that you have to get out and open." The defendant, William E. Dunne, is 59 years of age and has lived all his life on the Dunne ranch through which the alleged road crosses. His testimony generally corroborates that of his brother, John F. Dunne, and is in direct conflict with plaintiff's testimony; and positively states that there never was a road, nor a trail road across his land as testified to by plaintiff.

The substantive law applicable to this case we find stated in State ex rel. Game, Forestation & Parks Commission v. Hull, 168 Neb. 805, 97 N. W. 2d 535, wherein this court said: "The use and enjoyment which will create title by prescription to an easement are substan-

tially the same in quality and characteristics as the adverse possession which will give title to real estate. The use and enjoyment must be adverse, under claim of right, continuous, notorious, exclusive, with the knowledge and acquiescence of the owner of the servient tenement, must continue for the full prescriptive period, and must be substantially identical.

"To establish a prescriptive right to an easement, all of the elements of a prescriptive use and enjoyment must be established by clear, convincing, and satisfactory evidence.

"If the owner of land encloses it with a fence and installs gates therein at the entrance and exit where the right-of-way is claimed across the tract, it is evidence that he recognize the right of those who use the road to continue to use it.

"It is not indispensable to the establishment of a highway by prescription that there has been no deviation in the line of travel. If the course of travel has remained substantially unchanged for the full period, it is sufficient even though at times, to avoid encroachments, obstructions, or the like upon the road, there have been slight changes in the line of travel."

Our court reaffirmed the law cited in the Hull case in the recent case of Pierce v. Rabe, 177 Neb. 745, 131 N. W. 2d 183. Applying the law to the sharp conflict in the facts in the instant case, it appears that plaintiff has not sustained his required burden of proof.

In determining whether an alleged road is a public one, the matter of whether or not any governmental authority has maintained or improved it with the knowledge of the owner is most important. In State ex rel. Game, Forestation & Parks Commission v. Hull, *supra*, it is indicated that Cherry County had improved and maintained the alleged road at Hull's request and claims were submitted by Hull for road work which strongly indicated that he acknowledged this to be a public road. In Pierce v. Rabe, *supra*, the record reflects that the

owner requested the county construct a bridge on a road leading to his land; that the bridge was constructed by the county on condition that the owner would convey enough land for a 40-foot road; and that the owner Rabe would give Pierce the accommodation road in question. In each of the above-cited cases the expenditure of public funds on road improvement or maintenance with the knowledge of the owner was held to remove the question either of the identity of the line of travel or the continuity of its use, and had the legal effect of an acknowledgment of a public interest being vested in the road. It is not, however, indispensable to the establishment of a road by prescription that there be an expenditure of public funds or work by the public authorities for its improvement or maintenance. It is where there has been an irreconcilable conflict on a material issue in such an action that such public expenditure or work with the knowledge of the owner may have the legal effect of the owner's acknowledgment of the right of the public to use such road. The facts do not warrant such a finding in this case.

The record discloses that at the request of the plaintiff the trial court, accompanied by the attorneys for both parties, traveled by automobile the entire distance of the alleged road across the defendants' property and even proceeded for several miles to the southeast beyond the road in controversy. Plaintiff contends that the trial court should have viewed the entire south river road from its alleged beginning on the west to its junction with State Highway No. 183 on the east. We reject this contention of plaintiff for the reason that the proposed additional travel for the trial court would obviously be immaterial to the issues of this action.

When an action in equity is appealed, it is the duty of this court to try the issues de novo and to reach an independent conclusion without reference to the findings of the district court. Where in such a case the trial court has made a personal examination of the physical facts,

and where, in the same case, the oral evidence in respect of material issues is so conflicting that it cannot be reconciled, this court will consider the fact that such examination was made and that such court observed the witnesses and their manner of testifying, and must have accepted one version of the facts rather than the opposite. City of Wilber v. Bednar, 123 Neb. 324, 242 N. W. 644; Lackaff v. Bogue, 158 Neb. 174, 62 N. W. 2d 889. We will consider the findings of the trial court in arriving at a decision in this case on appeal, and we hold that the evidence is sufficient to sustain the judgment.

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

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. CHARLES WOODS, APPELLANT.
142 N. W. 2d 339

Filed May 6, 1966. No. 36223.

1. **Criminal Law.** Under the Post Conviction Act, the sentencing court has discretion to adopt reasonable procedures for determining what the motion and the files and records show, and whether any substantial issues are raised, before granting a full evidentiary hearing.
2. ———. Where no controverted material issues of fact are presented, the facts as shown by the record are undisputed, the taking of oral testimony on the motion could not add to or detract from the information shown by the court's files and records, and the court is satisfied that the prisoner is entitled to no relief, no hearing is required under the provisions of the Post Conviction Act.
3. ———. Under the Post Conviction Act, a defendant may not be prevented from testifying in support of a claim under circumstances where his testimony would be material. However, the mere filing of a motion under the Post Conviction Act, alleging a denial or infringement of constitutional rights does not automatically entitle a petitioning prisoner to a trip to the sentencing court, even where an evidentiary hearing is required.

Appeal from the district court for Douglas County: JOHN E. MURPHY, Judge. Affirmed.

Fred J. Montag, for appellant.

Clarence A. H. Meyer, Attorney General, and Richard H. Williams, for appellee.

Heard before CARTER, SPENCER, BOSLAUGH, BROWER, SMITH, and MCCOWN, JJ., and RONIN, District Judge.

McCOWN, J.

On March 4, 1963, an information was filed charging the defendant, Charles Woods, with the crime of robbery. On March 5, 1963, the defendant was present in court with counsel; he was advised of his right to preliminary hearing and jury trial; he waived filing of complaint and preliminary hearing; and he waived statutory service of a copy of the information and consented to be arraigned. The defendant entered a plea of guilty to the information and sentence was deferred. On the 28th of March 1963, a judgment and sentence of 10 years in the Nebraska State Penitentiary was entered against the defendant.

On March 12, 1965, the defendant filed a motion for modification of sentence in the district court. On July 13, 1965, the district court having properly treated the motion as invoking the post-conviction procedure provided by Laws 1965, c. 145, p. 486, entered an order requiring the county attorney to appear and show cause why a hearing should not be had and also appointed the public defender of Douglas County as counsel for the defendant in the proceedings. Said hearing was ordered for July 26, 1965. Hearing was had, counsel appeared, and the matter was heard and taken under advisement by the court. On September 17, 1965, an order was entered by the court which overruled and denied the defendant's motion for modification.

The defendant's contention is that he is entitled to a full evidentiary hearing on any motion alleging a de-

nial or infringement of his constitutional rights, and that a hearing on an order to show cause directed to the prosecuting attorney is not such a hearing.

A portion of Laws 1965, c. 145, § 1, p. 486, provides: "Unless the motion and the files and records of the case show to the satisfaction of the court that the prisoner is entitled to no relief, the court shall cause notice thereof to be served on the county attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto."

The motion and the files and records in this case affirmatively show that the petitioner's motion was based solely on the allegation that he received a different and more severe sentence than a codefendant charged and convicted of the same crime. The defendant raises no issue, constitutional or otherwise, bearing upon his conviction. He charges only that his constitutional rights were violated when he was sentenced to the longer term. It is important to note also that for purposes of the court's consideration of the defendant's motion, the allegations of fact made by the defendant were accepted as true and correct. It is clear that the sentencing court has discretion to adopt reasonable procedures for determining what the motion and the files and records show, and whether any substantial issues are raised, before granting a full evidentiary hearing. Where no controverted material issues of fact are presented, the facts as shown by the record are undisputed, the taking of oral testimony on the motion could not add to or detract from the information shown by the court's files and records, and the court is satisfied that the prisoner is entitled to no relief, no hearing is required under the provisions of the Post Conviction Act.

The defendant apparently also takes the position that he is entitled to be personally present at any hearing had, whether it is a full evidentiary hearing or otherwise.

A portion of Laws 1965, c. 145, § 1, p. 486, specifically

provides: "A court may entertain and determine such motion without requiring the production of the prisoner, whether or not a hearing is held." This does not mean that a defendant may be prevented from testifying in support of a claim under circumstances where his testimony would be material. However, the mere filing of a motion under the Post Conviction Act, alleging a denial or infringement of constitutional rights, does not automatically entitle a petitioning prisoner to a trip to the sentencing court, even where an evidentiary hearing is required. The act itself points up the fact that there are occasions when allegations of facts outside the record can be fully investigated and developed without requiring the personal presence of the prisoner.

For the reasons stated, the action of the district court was correct and is affirmed.

AFFIRMED.

M. MARJORIE BOBBITT, APPELLANT, V. THE ORDER OF UNITED COMMERCIAL TRAVELERS OF AMERICA, APPELLEE.
142 N. W. 2d 351

Filed May 6, 1966. No. 36232.

1. **Trial: Judgments.** Where there is a genuine issue of material fact it is error to render a summary judgment, but where the only question involved is one of law, summary judgment is proper.
2. **Contracts.** Every contract is made with reference to and subject to existing law, and every law affecting such contract is read into and becomes a part of the same.
3. **Insurance.** An exclusionary proviso in an accident insurance policy covering death from intracranial hemorrhage is not violative of the public policy of this state.

Appeal from the district court for Douglas County: DONALD BRODKEY, Judge. Affirmed.

Gaines, Spittler, Neely, Otis & Moore, for appellant.

Schmid, Ford, Snow, Green & Mooney, for appellee.

Heard before CARTER, SPENCER, BOSLAUGH, BROWER, and MCCOWN, JJ., and RONIN, District Judge.

SPENCER, J.

This is an action brought by M. Marjorie Bobbitt, hereinafter referred to as plaintiff, a surviving widow and the beneficiary in an insurance certificate issued to James Carroll Bobbitt in 1956 by The Order of United Commercial Travelers of America, a fraternal beneficiary society, hereinafter referred to as defendant.

The certificate provided benefits for death due to accidental means alone and independent of all other causes in the amount of $5,000. The application signed by the deceased provided that he accepted any certificate issued on the application: "* * * subject to all the provisions of the Constitution and By-Laws of said Order as they now exist, or as they may hereafter be amended, and agree on behalf of myself and my beneficiaries that benefits to be paid shall be those only which may be provided for in the Constitution and By-Laws of the Order in force and effect at the time any accident occurs."

The certificate itself provides such member: "* * * is entitled to all the rights and benefits which may be provided for such 'Class A' Insured Members in and by the Constitution of said Order in force and effect *at the time any accident occurs.*" (Italics supplied.) The certificate also makes the application for insurance, a copy of which is attached to the certificate, a part of the contract.

The parties specifically agreed that the issue involved herein could be presented to the court as a matter of law on the documentary evidence and a stipulation of the parties. This was to be done by a motion for a summary judgment, notwithstanding the fact that a motion for summary judgment had earlier been presented to the court on the documentary evidence. The trial court, on the theory presented by the parties, sus-

tained the motion for summary judgment, and the plaintiff is now trying to shift position and to urge that where there is a genuine issue of material fact it is error to render a summary judgment. See Vackiner v. Mutual of Omaha, 179 Neb. 300, 137 N. W. 2d 859.

The trial court questioned plaintiff's counsel on handling the matter as a summary judgment, and there can be no doubt but that the plaintiff desired to proceed on that basis. As we view the issue here presented, we agree with the trial court there was no issue of material fact involved in the decision, and the procedure used was proper. It was not a question as to the evidence being in conflict but as to whether, assuming an accident, it is within the terms of the contract which is a question of law, in which instance summary judgment is proper.

For the purpose of a decision herein, we accept the plaintiff's contention that the deceased died as the result of an accidental fall in his bathtub which resulted in a subarachnoid hemorrhage. The plaintiff, in answer to a request for admission, stated: "* * * the proximate cause of the death of James C. Bobbitt was the blow received on his head when he slipped and fell in the bath tub on June 21, 1963, which blow caused an aneurysm of an internal carotid artery to rupture and thus produce a massive subarachnoid hemorrhage." In addition to plaintiff's admission, it is established without contradiction by the coroner's report as well as the testimony of two doctors by deposition in evidence that death was due to a massive intracranial hemorrhage. We assume, therefore, that the intracranial hemorrhage which caused insured's death was caused by the accident alone and independent of all other causes.

The problem arises because of an amendment to defendant's constitution, which became effective September 1, 1962, and was in full force and effect at the time of insured's death. This provision, so far as material herein, reads as follows: "Nor shall the Order be liable to

any person for any benefits for death, * * * by reason of any of the following conditions, *whether caused by accidental means or not,* to-wit: * * * any intracranial hemorrhage, cerebral thrombosis, and taking (voluntarily or involuntarily) of any poison." (Emphasis supplied.)

This constitutional provision was adopted subsequent to the issuance of the insurance certificate but prior to the accident. Although the application specifically provides that the contract is subject to all subsequent constitutional amendments, the plaintiff urges that the provision is contrary to public policy.

Plaintiff argues: "It is horn-book law that neither a fraternal organization nor any other type of insurance company, by an amendment of its constitution or by-laws, deprive an insured or his beneficiary of rights accruing under an original agreement. Certainly, the United Commercial Travelers cannot take away from Marjorie Bobbitt, beneficiary under the 1956 insurance certificate, benefits to which she was entitled under that contract." The difficulty with plaintiff's position is that the contract at its inception specifically provided this right as a provision of the contract.

If a violation of public policy exists, it must be in the nature of the exception itself and not in the fact it is embraced in a subsequent constitutional amendment. It certainly cannot be maintained that the inclusion of the provision making the contract subject to subsequent constitutional amendments is in itself contrary to public policy, because our statute, section 44-1035, R. R. S. 1943, specifically provides, so far as material herein: "Any changes, additions or amendments to said charter or articles of incorporation, or articles of association, if a voluntary association, constitution or laws, duly made or enacted subsequent to the issuance of the benefit certificate, shall bind the member and his beneficiaries, and shall govern and control the agreement in all respects the same as though such changes, additions or amend-

ments had been made prior to and were in force at the time of the application for membership."

Every contract is made with reference to and subject to existing law, and every law affecting such contract is read into and becomes a part of the same. Turpin v. Standard Reliance Ins. Co., 169 Neb. 233, 99 N. W. 2d 26.

Plaintiff argues that when uncertainty exists as to the meaning of an insurance contract and it is illegal and against public policy of the state, the agreement will not be enforced as made. The difficulties with plaintiff's argument are the premises that the meaning of the contract is uncertain and that it is illegal and against public policy. We see no uncertainty or ambiguity. The language of the application and certificate is intelligible and free from doubt. The constitutional provision incorporated into the contract provides that death caused by any intracranial hemorrhage is not covered by the contract even though produced by an accident. It, therefore, would make no difference whether or not the intracranial hemorrhage is the result of trauma, as the exclusion is absolute and there is no coverage if the death is due to an intracranial hemorrhage.

If, as suggested above, the contract is against public policy, it must be on the basis that the inclusion of such provision so limits the contract that it constitutes a fraud on the public. This premise is untenable in this situation. The contract is a very limited one. The undisputed medical testimony, in the record by deposition, is to the effect that subarachnoid hemorrhages in this area are fairly common, and that the general consensus is that when one does occur, in practically all instances it is a spontaneous hemorrhage and not the result of an accident. This would constitute a very good reason why a limited accident policy would include such exclusion. While it is immaterial, because of the assumption we have made herein, it is of interest to note that the pathologist who performed the autopsy was of the opinion that the death could not have been accidental. We con-

clude that the exclusionary proviso in this instance does not violate public policy.

Plaintiff argues that fraternal orders for years have sought to decrease their obligations to policyholders by the use of inhibitory provisos in their insuring agreements. This may be true, and while the contract will be strictly construed against the fraternal order, we cannot make a new agreement for the parties.

Plaintiff takes comfort from the case of Moon v. Order of United Commercial Travelers, 96 Neb. 65, 146 N. W. 1037, 52 L. R. A. N. S. 1203, Ann. Cas. 1916B 222, which involved this same defendant. The constitution involved in that case required the accident to be the proximate, sole, and only cause of the injury, and excluded deaths resulting wholly or in part from bodily infirmity or disease. Moon had a variety of physical infirmities, including a heart difficulty, at the time of the accident. This court held that a jury question was presented as to whether death was due to the accident or to the heart condition, and affirmed a judgment for the plaintiff.

In Long v. Railway Mail Assn., 145 Neb. 623, 17 N. W. 2d 675, a constitutional provision provided: " 'There shall be no liability whatever unless death or disability results wholly from the injury, nor when any disease, defect or bodily infirmity is a contributing cause of death or injury, * * *.' "

In that case, we held: "If a disease, while existing, be but a condition and an accident the active, efficient and precipitating cause, the accident will be deemed the cause of death within the meaning of the policy and the agencies set in motion by the accident will be treated as effects or passive allies of the accident in bringing about the death," and a jury question was presented to determine whether the heart condition was but a condition.

We do not have an analogous situation in the instant case. The plaintiff concedes, and all of the evidence sustains, the fact that death was caused by an intracranial

hemorrhage. Plaintiff insists, and we assume that an accident caused the hemorrhage, so no fact question is presented. The sole issue presented is whether coverage is provided by the policy where an accident produces an intracranial hemorrhage which causes the death. This is solely a question of law. The trial court held accidental death from an intracranial hemorrhage is specifically excluded from coverage, and we sustain that conclusion. To hold otherwise is to ignore section 44-1035, R. R. S. 1943; to read the exclusionary proviso out of the policy; and to make a new contract for the parties.

We affirm the judgment of the trial court.

AFFIRMED.

MARTHA ESSAY, APPELLEE, V. EDWARD J. ESSAY, APPELLEE, BUSINESS CAPITAL, INC., OF IOWA, INTERVENER-APPELLANT.
142 N. W. 2d 337

Filed May 6, 1966. No. 36235.

Appeal and Error. An appeal will be dismissed as premature where no judgment has been rendered or final order made in the district court.

Appeal from the district court for Box Butte County: ALBERT W. CRITES, Judge. Appeal dismissed.

Reddish, Fiebig & Curtiss, Robert L. Jeffrey, and Richard L. Goos, for appellant.

Wright, Simmons & Hancock, for appellee Martha Essay.

Wade H. Ellis, for appellee Edward J. Essay.

William H. Hein, for receiver Jones.

Heard before CARTER, SPENCER, BOSLAUGH, BROWER, SMITH, and MCCOWN, JJ., and RONIN, District Judge.

BOSLAUGH, J.

This action was commenced for the dissolution of a partnership, an accounting of its operations, and the appointment of a receiver to wind up its affairs. This is an appeal by the intervener, Business Capital, Inc., of Iowa, from an order of the district court made on September 8, 1965, approving the final account of the receiver, allowing the fees of the receiver and his attorney, and ordering the distribution of the assets.

This is the third appeal to this court in this action. In Essay v. Essay, 175 Neb. 689, 123 N. W. 2d 20, we held that the partnership which had existed between the plaintiff, Martha Essay, and the defendant, Edward J. Essay, was dissolved on April 13, 1960; and that the defendant was liable to the plaintiff for one-half of the amount by which his partnership investment account was overdrawn. A supplemental opinion, 175 Neb. 730, 123 N. W. 2d 648, directed that a division of the profits earned after dissolution should not be made until after there had been a final accounting of the capital and assets of the partnership.

In Essay v. Essay, *ante* p. 47, 141 N. W. 2d 436, we affirmed the judgment of the district court finding and determining that the defendant had no interest in the assets of the partnership on April 13, 1960, and no interest in the profits earned after that date. The order confirming the sale of the business to the plaintiff was also affirmed.

On July 16, 1965, the receiver filed his final account and petition for distribution. The petition alleged that the receiver should be allowed an additional fee of $22,900 and his attorney $12,500. A copy of the account and petition was forwarded to Alan Curtiss, one of the attorneys representing the intervener, with a request that the attorney for the receiver be notified of any objection that the intervener might have to the fees requested for the receiver and his attorney.

Thereafter, Mr. Curtiss notified the attorney for the

receiver that the intervener would object to the fees proposed for the receiver, and an inquiry was made as to how the fees would be allocated. No written objections to the account or petition were filed by the intervener.

A hearing on the final account and petition of the receiver was held on September 8, 1965. Mr. Curtiss was ill on that day and unable to appear in court. Another member of his firm appeared and moved in open court for a continuance of the hearing. The motion was dictated into the record and supported by the stipulation of the parties that Mr. Curtiss had become ill during the early morning hours of that day and was unable to appear; and that there was no one else available who was sufficiently familiar with the facts and pleadings of the case to proceed with the hearing on behalf of the intervener at that time. The motion for continuance was overruled and the hearing proceeded with no one appearing in behalf of the intervener.

The district court found that the final account and petition for distribution of the receiver should be allowed; that the receiver should be allowed an additional fee of $22,900; that his attorney should be allowed an additional fee of $12,500; that after payment of the fees, the balance on hand should be distributed according to the previous order of the court; that $41,000 of the fees allowed the receiver should be charged as cost of operating of the business; that $13,500 of the fees allowed the attorney for the receiver should be charged as a cost of operation of the business; that the balance of the fees should be charged as costs and assessed against the defendant; and that a proposed order of distribution should be submitted by September 15, 1965.

The receiver filed a proposed order of distribution on September 15, 1965. On the same day, an order was entered approving the proposed distribution subject, however, to written objections to be filed by any party on or before September 30, 1965. On September 16, 1965, a motion for a new trial and to vacate the order of Sep-

tember 8, 1965, was filed by the intervener.

On September 23, 1965, the plaintiff filed objections to the proposed distribution alleging that chargeable costs accruing after April 20, 1964, should be charged jointly against both the defendant and intervener. On September 30, 1965, written objections to the proposed distribution were filed by the intervener and the defendant.

A hearing on the objections was had on October 12, 1965, and testimony was taken. The court took the matter under advisement and allowed the parties to file briefs. The intervener's motion for new trial, filed September 16, 1965, was overruled on this same day. The intervener filed a notice of appeal on November 8, 1965. The record does not show the decision of the trial court, if any, upon the objections of the intervener to the proposed order of distribution.

The assignments of error relate to the overruling of the intervener's motion for continuance on September 8, 1965; the amount of fees allowed the receiver and his attorney; and the allocation of the fees between court costs and the cost of operation of the business.

The intervener contends that the overruling of its motion for a continuance on September 8, 1965, was an abuse of discretion and deprived it of due process of law. It is unnecessary to determine this question. The order of September 15, 1965, which approved the proposed distribution subject to the filing of written objections, eliminated any prejudice that might otherwise have resulted from the overruling of the intervener's motion for a continuance on September 8, 1965.

The effect of the order of September 15, 1965, was to leave the matter pending and subject to the further order of the district court. The objections filed by the intervener on September 30, 1965, incorporated the objections contained in the motion for new trial filed on September 16, 1965. The objections further specifically attacked the fees allowed to the receiver and his attor-

ney and the apportionment of the costs of the receivership and the court costs. These are the issues raised by this appeal.

It is fundamental that there can be no appeal to this court until there has been a judgment or final order in the district court. § 25-1911, R. R. S. 1943.

The record before us does not show that there has ever been a ruling upon the objections which were filed by the intervener. The situation is similar to that which occurs when a motion for new trial has been filed but there has been no ruling upon it. See, Harkness v. Central Nebraska Public Power & Irr. Dist., 154 Neb. 463, 48 N. W. 2d 385; Mueller v. Keeley, 163 Neb. 613, 80 N. W. 2d 707.

Upon the state of the record before us, we conclude that the appeal should be dismissed.

APPEAL DISMISSED.

HERMAN ENGELMEYER, APPELLANT, V. S. A. MURPHY ET AL., APPELLEES.
142 N. W. 2d 342

Filed May 6, 1966. No. 36283.

1. **Constitutional Law: Interest.** The 1965 Nebraska Installment Sales Act held constitutional. Laws 1965, c. 268, p. 756.
2. **Constitutional Law.** In construing constitutional amendments, consideration should be given to the circumstances leading to their adoption and the purpose sought to be accomplished.
3. ———. A constitutional amendment should not be construed so as to defeat its evident purpose, but rather so as to give it effective operation and suppress the mischief at which it was aimed.

Appeal from the district court for Cuming County: FAY H. POLLOCK, Judge. Affirmed.

Moodie & Moodie, for appellant.

Kerrigan, Line & Martin, for appellees.

Heard before CARTER, SPENCER, BOSLAUGH, BROWER, SMITH, and MCCOWN, JJ., and BURKE, District Judge.

BOSLAUGH, J.

This is an action for a declaratory judgment to determine the validity of an installment sale contract made in conformity to the 1965 Nebraska Installment Sales Act. Laws 1965, c. 268, p. 756. The trial court found that the act was constitutional and that the contract was valid.

The parties have stipulated the facts necessary to a determination of the issues, and the record presents only a question of law.

The plaintiff, Herman Engelmeyer, purchased a rotary hoe from the defendant, Lubker's, Inc., on October 6, 1965. The plaintiff executed a contract which provided for a downpayment and the payment of the balance of the purchase price in installments. The time price differential included in the balance of the purchase price is in excess of 9 percent simple interest. The contract was assigned by Lubker's, Inc., to the defendant, S. A. Murphy, who is licensed as a sales finance company.

The defendants allege that the contract conforms to the provisions of the 1965 Nebraska Installment Sales Act and is valid and enforceable. The plaintiff alleges that the 1965 Nebraska Installment Sales Act is unconstitutional; and that the contract is in violation of the Installment Loan Act and the plaintiff is not required to pay any part of the time price differential. The case turns on the validity of the 1965 Nebraska Installment Sales Act. If the act is constitutional, the contract is enforceable and the judgment of the district court must be affirmed.

The history of the previous installment sales acts in Nebraska is important here. The first installment sales act was enacted in 1959. Laws 1959, c. 218, p. 753. This act was held to be special legislation in violation of Article III, section 18, of the Nebraska Constitution, and

declared invalid in Elder v. Doerr, 175 Neb. 483, 122 N. W. 2d 528.

A second installment sales act was enacted by the 1963 Legislature, Seventy-third Session. Laws 1963, c. 270, p. 805. This act was held to be special legislation in violation of Article III, section 18, of the Nebraska Constitution, and declared invalid in Stanton v. Mattson, 175 Neb. 767, 123 N. W. 2d 844.

The opinion in Stanton v. Mattson, *supra,* was filed on October 18, 1963. The Seventy-fourth (Extraordinary) Session of the Legislature convened on October 21, 1963. The Legislature had been called into special session to consider, among other things, remedial legislation made necessary by the decision in Elder v. Doerr, *supra,* and other litigation then pending in this court. Legislative Journal, p. 3, Seventy-fourth (Extraordinary) Session. On October 22, 1963, a bill (L.B. 9) proposing an amendment to Article III, section 18, of the Nebraska Constitution, was introduced. The bill was passed on final reading on November 22, 1963. The proposed amendment was submitted to the electorate in November 1964 and adopted by the people.

The 1965 Nebraska Installment Sales Act became effective May 24, 1965, and was in force on October 6, 1965, the date on which the plaintiff entered into the contract for the purchase of the rotary hoe.

The plaintiff alleges that the 1965 Nebraska Installment Sales Act is invalid in that it is a grant of special privileges in violation of Article I, section 16, of the Nebraska Constitution; that it is a special law regulating interest where a general law could be made applicable; and that it is an unreasonable classification in violation of Article III, section 18, of the Nebraska Constitution, as amended.

Article I, section 16, of the Nebraska Constitution, provides: "No bill of attainder, ex post facto law, or law impairing the obligation of contracts, or making any

irrevocable grant of special privileges or immunities shall be passed."

Prior to the 1964 amendment, Article III, section 18, of the Nebraska Constitution, provided in part: "The Legislature shall not pass local or special laws in any of the following cases, that is to say: * * * Regulating the interest on money. * * * Granting to any corporation, association, or individual any special or exclusive privileges, immunity, or franchise whatever. In all other cases where a general law can be made applicable, no special law shall be enacted."

The 1964 amendment to Article III, section 18, of the Nebraska Constitution, deleted the prohibition against special laws "regulating the interest on money" and added a proviso to the last paragraph of the section so that it now provides: "Granting to any corporation, association, or individual any special or exclusive privileges, immunity, or franchise whatever; Provided, that notwithstanding any other provisions of this Constitution, the Legislature shall have authority to separately define and classify loans and installment sales, to establish maximum rates within classifications of loans or installment sales which it establishes, and to regulate with respect thereto. In all other cases where a general law can be made applicable, no special law shall be enacted."

In construing constitutional amendments, consideration should be given to the circumstances leading to their adoption and the purpose sought to be accomplished. Swanson v. State, 132 Neb. 82, 271 N. W. 264. It is apparent that the 1964 amendment to Article III, section 18, of the Nebraska Constitution, was designed and intended to authorize legislation regulating installment sales. One of its purposes was to furnish a constitutional basis for the enactment of a valid installment sales act.

The situation in this case is similar to that which was presented in State ex rel. Meyer v. County of Lancaster, 173 Neb. 195, 113 N. W. 2d 63. There, the 1953 Indus-

trial Development Act had been declared invalid in State ex rel. Beck v. City of York, 164 Neb. 223, 82 N. W. 2d 269. The Constitution was then amended so as to authorize such legislation. In 1961, a new Industrial Development Act was passed. §§ 18-1614 to 18-1623, R. R. S. 1943. In State ex rel. Meyer v. County of Lancaster, *supra,* the 1961 act was held valid except as to one provision. We held that the new act had to be viewed in the light of the constitutional amendment which had changed the Constitution in an attempt to permit legislation which previously had been held to be invalid.

The language of the proviso in the 1964 amendment to Article III, section 18, of the Nebraska Constitution, which authorizes the Legislature to separately define and classify loans and installment sales "notwithstanding any other provisions of this Constitution" disposes of the arguments based upon Article I, section 16, and the last sentence of Article III, section 18, of the Constitution, as amended. The purpose of the 1964 amendment was to authorize installment sale legislation by removing all of the constitutional objections to such legislation that had previously existed.

The plaintiff contends that the authority to separately define and classify loans and installment sales is not unlimited, and that the Legislature cannot make classifications which are unreasonable, arbitrary, or capricious. The plaintiff argues that the classification which is made by the 1965 Installment Sales Act is unreasonable and is, therefore, invalid under the Constitution as amended.

There can be no presumption that the people of this state did not intend to accomplish something by adopting the 1964 amendment to Article III, section 18, of the Nebraska Constitution. Swanson v. State, *supra.* The amendment should not be construed so as to defeat its evident purpose, but rather so as to give it effective

operation and suppress the mischief at which it was aimed.

The purpose of the 1964 amendment to Article III, section 18, of the Nebraska Constitution, was to permit the Legislature to exercise broad powers in regard to legislation concerning classification and regulation of loans and installment sales. It was intended to remove the restrictions that had previously existed and to permit legislation that had been prohibited by the Constitution previous to its amendment.

The 1965 Nebraska Installment Sales Act defines an installment sale as any transaction in which a buyer acquires goods or services from a seller pursuant to an agreement which provides for a time price differential and under which the buyer agrees to pay all or part of the time sales price in one or more installments and within 85 months. Laws 1965, c. 268, § 2 (5), p. 757. See, also, Laws 1965, c. 266, p. 752. The classification is very comprehensive and generally excludes only installment sales of real estate or installment sales where the payments will extend over more than 85 months.

The plaintiff argues that the failure to require that the seller retain the title to or a lien upon the goods makes the classification unreasonable. The classification which is made by the act is more general than that which the plaintiff suggests. As between the two, it would seem that the more general classification which the Legislature has adopted is a more reasonable classification.

The plaintiff refers to a number of other laws enacted by the 1965 Legislature and argues that they create unreasonable classifications within the finance industry. It is unnecessary to consider these acts in detail at this time. Their validity is not now before the court. It is sufficient here to observe that they do not make the classification established in the 1965 Nebraska Installment Sales Act unreasonable.

The plaintiff suggests that if the parties had entered

into a contract containing other and different provisions, then their rights and liabilities would have been different and the contract would have been regulated by a different statute. This is precisely what the 1964 amendment to Article III, section 18, of the Nebraska Constitution contemplates. By that amendment the Legislature is authorized to separately define and classify loans and installment sales, establish maximum rates within classifications of loans or installment sales, and to regulate with respect thereto.

The classification which is made by the 1965 Nebraska Installment Sales Act is not unreasonable, arbitrary, or capricious. The act is a valid exercise of legislative power.

The judgment of the district court is affirmed.

AFFIRMED.

HAROLD FOOS ET AL., APPELLEES, V. JACOB REUTER, APPELLANT.

142 N. W. 2d 552

Filed May 13, 1966. No. 36103.

1. **Boundaries.** Either the plaintiff or defendant may, by proper plea, put in issue the fact that certain alleged boundaries or corners are the true ones, or that such have been recognized and acquiesced in by the parties or their grantors for a period of 10 consecutive years.
2. **Adverse Possession.** The claim of title to land by adverse possession must be proved by actual, open, exclusive, and continuous possession under a claim of ownership for the statutory period of 10 years.
3. ———. The claim of adverse possession is founded upon the intent with which the occupant has held possession, and this intent is ordinarily determined by what he has done in respect thereto.
4. ———. The burden of proving adverse possession is on the person asserting it. He must recover upon the strength of his own claim and not upon the weakness of his adversary's title.

5. **Boundaries.** An owner of property does not recognize and acquiesce in the ownership by an adjoining landowner of any part of his property merely because he does not construct his fence on his property line.
6. **Appeal and Error.** While the law requires this court, in determining an appeal in an equity action involving questions of fact, to reach an independent conclusion without reference to the findings of the district court, this court will, in determining the weight of the evidence, where there is an irreconcilable conflict therein on a material issue, consider the fact that the trial court observed the witnesses and their manner of testifying.

Appeal from the district court for Scotts Bluff County: TED R. FEIDLER, Judge. Affirmed.

Robert M. Harris, for appellant.

W. H. Kerwin, for appellees.

Heard before WHITE, C. J., CARTER, SPENCER, BOSLAUGH, BROWER, SMITH, and MCCOWN, JJ.

BROWER, J.

This action was brought by the plaintiffs and appellees Harold Foos and Ann Foos as joint owners of the west half of the southwest quarter of Section 25, Township 22 North, Range 53 West of the 6th P.M., in Scotts Bluff County, Nebraska, for a judgment establishing the east boundary to said property and to enjoin the defendant from removing the survey stakes placed thereon. The defendant and appellant Jacob Reuter is the owner of the east half of said quarter section. When the plaintiff is referred to either in the singular or as Foos, the reference is to Harold Foos.

The defendant filed an answer and cross-petition in which he admitted the plaintiffs were the owners of the land described in the petition except a certain tract described by metes and bounds in the answer and designated therein as Blackacre. It alleged the defendant was the owner of the east half of said quarter section in Section 25, together with Blackacre as to which it was alleged defendant had acquired title by adverse posses-

sion. The cross-petition asked to have his title to Blackacre quieted. The reply denies the defendant's ownership of Blackacre.

At the conclusion of the trial of the issues the district court found for the plaintiffs, and by its judgment established the line of the survey of the county surveyor as the boundary between the two tracts and dismissed the defendant's cross-petition.

The defendant alleges the trial court erred in finding the true boundary between the land of the plaintiff and defendant was that surveyed by the county surveyor, in finding the plaintiff was the owner of Blackacre, and in not quieting the title thereto in defendant by reason of his claimed adverse possession. This requires a careful review of the evidence.

Blackacre consists of 2.2 acres of land lying along the length of the west side of the surveyed division line between the lands of the parties. It is irregular in shape. In 1963 the parties quarreled over the boundary line. Plaintiff employed the county surveyor, who surveyed and platted the line. Defendant was not satisfied with the line so determined and had another survey run which resulted in confirmation of that made by the county surveyor. Nails with red cloth attached were driven down this line and lath placed between them at intervals by the county surveyor. No attempt is made to question that the survey reestablished the original line between the two tracts. The defendant relies wholly on adverse possession to establish his claim of title to Blackacre.

Defendant purchased his farm, described in the deed as the east half of the southwest quarter of said section, in December 1922. The plaintiff bought his land by deed dated December 23, 1950, in which it is designated as the west half of said quarter section, from one Steele. He seems to have gone into possession in the spring of 1951. The adverse possession claimed by the defendant

originated when the plaintiffs' property belonged to Steele.

Steele testified he bought his land in 1945. That spring he had a survey made by one Cooper, the then county surveyor. A plat of that survey, defendant's exhibit 2, dated March 24, 1945, is in evidence. The survey was made primarily to establish Steele's north line with respect to a third party's private road located there. It did, however, incidentally purport to show the line between the two premises in controversy here. The evidence showed the line so surveyed did not correspond with the government survey. It indicated, however, the division line as then used on the north was 16 to 24 feet over on the Steele land. The next year Reuter, at Steele's suggestion, moved the fence back to the east 14 feet. When Steele purchased the land a drainage ditch came from the west into his premises and went south through it. In the spring of the second year of his ownership Steele, with the cooperation of the defendant, changed the course of the ditch by extending it eastward to the division fence. This was removed and the ditch dug south down the fence line to the south boundary of the premises where it was turned east. The water came down later in the season and the ditch washed down and "zigzagged quite a little bit." They attempted to correct this with horse-drawn implements. The next spring, however, they got a dragline which straightened it. Another drainage ditch, referred to as the "stub ditch" was then dug to the north a short distance on Steele's land. It connected with the former one, near the division line. From that time during his ownership Steele farmed from the west up to the drainage ditch on the south and to the fence north of it, and at that time defendant farmed the land to the east. Steele said the water originally had caused the ditch to erode and meander somewhat, but he thought that when straightened with the dragline it was on approximately the same line as the fence had been. The next spring after the

ditch was straightened up Reuter put a row of trees on the ditch bank. Steele had never returned to the land after he sold it in 1951.

The defendant's testimony was substantially the same as that of Steele with respect to the period in which those two were adjoining landowners. There is a considerable conflict in the evidence after the plaintiff purchased the west half of the quarter section from Steele.

Defendant's exhibit 4 is a plat made by defendant's surveyor, one Roberts, admitted in evidence without the maker's testimony. It shows Blackacre which adjoins the surveyed division line to the west through its entire length. Its western boundary is quite irregular.

The southern portion of Blackacre, extending about 1,165 feet north from the south property line of the parties, is where the original drainage ditch was dug. This portion of Blackacre is referred to in the evidence as part A. It is 9 feet in width at the road on the south measured from the survey line to the center of the ditch on the west. It becomes wider as it extends to the north and is 45 feet wide at the point 1,165 feet from the south road. The row of trees hitherto referred to as planted by the defendant after the ditch was dug is on the east bank of the drainage ditch. Strands of barbed wire were later nailed to the trees to form a fence. The defendant testified he farmed continuously up to this row of trees after digging the ditch in 1947. When it was in alfalfa hay he cut it close to the trees. When in row crops running east and west he used it for turning space and as a road. From time to time he was forced to cut off the lower branches of the trees so as to get up close. Plaintiff testified he pastured up to these trees from the west in 1955 and 1956. He repaired the fence along the trees while so pasturing. Its use was unsatisfactory because the erosion would wash underneath the fence and it would not hold his cattle. The defendant claims title to the center of the ditch, but there is no evidence of substance that he ever made use of any

ground to the west of the trees which were on the east bank. Defendant testified plaintiff did not cultivate or use the ground east of the trees. Plaintiff stated this narrow neck, 6½ feet wide to the south and only 27 feet in width at any point, could not be utilized with modern machinery. At the south end of part A was a wooden check which the plaintiff tore out and replaced with a new concrete one at his own expense in 1955. Defendant's exhibit 13 is a photograph showing the ditch area taken from the south of the check and looking north toward and beyond it. On both sides the area appears to be thick with dense underbrush much higher than the defendant's son standing on the concrete structure. The county surveyor testified they were unable to see through the brush in this area in surveying the line and were compelled to run an offset line and measure back from this to the division line which he established. The defendant admitted the plaintiff had pastured this portion of Blackacre in 1955 and added a line of barbed wire to the fence in the trees. At one point defendant states he gave plaintiff permission to so use it and at another says permission was not given.

To the north of part A hitherto discussed is part B, beginning in the vicinity of the concrete check and extending about 750 feet northward. This is a bog and unsuitable for cultivation. In this area is the so-called "stub ditch" dug by Steele. Defendant placed a fence on the east ditch bank to get on higher ground where the posts would hold. Defendant testified he pastured this area up to the fence. Plaintiff said there had been fences in this area from time to time but they were never in the same place and there never was an established line fence. The fence was never in a straight line, the posts were scattered about and staggered, and in places there were no posts at all. The plat, exhibit 4, shows two parallel fences in most of this area. Both parties claim to have pastured this disputed area. The

photograph, exhibit 13, seems to show the southern portion of the area immediately north of the concrete check and this appears wooded also.

The northern portion of Blackacre west of the surveyed line is referred to in the testimony as part C. This appears from the evidence to be level, irrigated farmland used for cultivated crops. From the plat, exhibit 4, the area is about 695 feet in length. Defendant testified he built through part C a permanent fence on the line established between Steele and himself in 1947 or 1948. It blew full of dirt and debris and was removed by him although the date of removal is not shown. Thereafter only temporary fences were used to keep the livestock in while crops were being pastured or roughed down. No fences existed or had for some time been on the line there when the controversy between the parties arose in 1963. Defendant testified he claimed the disputed area in part C of Blackacre and testified it was farmed with crops by him or his tenants ever since he moved the fence back at Steele's suggestion. He had not personally farmed it since the return of his son. The son, Leo Reuter, testified he went away in 1951 and returned in 1958. He testified to harvesting crops thereon from 1958 to 1962 inclusive. The plaintiff had a corn crop west of the surveyed line in 1962. It did not extend eastward to include the disputed area. There was, however, a space used by the plaintiff immediately east of the corn for a road to tend his crop. Further east of that was an alfalfa field in part C. The defendant and his son testified it was all theirs. The plaintiff said part of it had been left by him when he had plowed up a previous stand. He maintained he had alfalfa there for 3 years before and had previously plowed up small grain to plant the alfalfa. Plaintiff testified that defendant kept moving the temporary fences further west and they were never placed in the same place. He stated defendant kept pushing the line over. The plaintiff said he farmed further east in 1954. There being no fence on

the boundary claimed by the defendant in part C, defendant and Leo Reuter relate the line to which they farmed in part C to fixed objects. They point out that they farmed from the east to a point south of a post in the north quarter line. Leo in particular relates the western extent of defendant's farming to that post. Neither the plaintiff nor the defendant set this post. The fence of which it was a part was installed by the owner of land to the south to mark the boundary of his road. The road at that point is curved. It was built when Leo was away and the rest of the fence was removed before his return. He testified it was in the same place as a former marker existing before he left in 1951. He said that the farmer who installed the fence told him in 1958 the post was close to the proper line. The other marker is an irrigation box on the canal on defendant's south property line. It is east of Blackacre, but the distance from it is repeatedly referred to although no accurate measurements are given. Defendant testified they had farmed to a point 50 or 60 feet west of it.

Several witnesses, living in the vicinity, testified on behalf of the defendant. Most of them relate only what they saw from driving along the road to the south or north of the premises on different occasions. They do not refer to specific dates of their observations. With the exception of one witness who assisted at harvest on one or two occasions, they had not entered upon the premises.

A great deal of the evidence relates to the controversy which arose between the parties at and before the two surveys were run. The parties quarreled at the time. Each tried to build a fence on what he claimed to be the line. Each attempted to take out that built or being built by the other. Each accuses the other of making threats of violence. This testimony has little relevance to the question of adverse possession for the statutory period. It is of some significance as to the defendant's intention of claiming title to the visible line set forth in

his answer. After plaintiff's survey defendant asserted the same was wrong and procured another. The western boundary presently claimed is quite irregular and it is obvious no survey of the original government line would coincide with it.

In McDermott v. Boman, 165 Neb. 429, 86 N. W. 2d 62, this court held: "Either the plaintiff or defendant may, by proper plea, put in issue the fact that certain alleged boundaries or corners are the true ones, or that such have been recognized and acquiesced in by the parties or their grantors for a period of 10 consecutive years.

"The claim of title to land by adverse possession must be proved by actual, open, exclusive, and continuous possession under a claim of ownership for the statutory period of 10 years.

"The claim of adverse possession is founded upon the intent with which the occupant has held possession, and this intent is ordinarily determined by what he has done in respect thereto."

Further rules are set out in Linch v. Nichelson, 178 Neb. 679, 134 N. W. 2d 796, as follows: "The burden of proving adverse possession is on the person asserting it. He must recover upon the strength of his own claim and not upon the weakness of his adversary's title.

"An owner of property does not recognize and acquiesce in the ownership by an adjoining landowner of any part of his property merely because he does not construct his fence on his property line."

We now apply these rules to the evidence outlined in the present case. The defendant claims title to Blackacre by adverse possession which, according to his own testimony, began in 1947 when the fences were moved back at Steele's request. The quarrel concerning the line began in 1963. The burden rests upon the defendant to prove his possession continued uninterrupted for 10 years. His possession for those years must have been actual, open, exclusive, and continuous. It must have

been under claim of ownership. The evidence here is conflicting. A great deal of Blackacre was embraced in the drainage ditch and stub ditch. It was not suitable for growing crops and had little value for pasture. Its principal value appears to have been for drainage. The plaintiff had entered into the area and removed and replaced the check at his own expense. He utilized part of its waters for irrigation. Both parties had at times pastured up to the fence along the trees. The banks of the ditch had at first been subject to being undermined and washed away. It is reasonable to infer the trees were planted to prevent further erosion. The cultivated lands to the north were not enclosed but for brief periods. Plaintiff testified the line was constantly changing and that he had farmed part of the land in question in 1955 or 1956. His alfalfa was growing upon a portion of it in 1963 and had for 3 years previously. The trial court saw and heard the witnesses and found in favor of the plaintiff. " 'While the law requires this court, in determining an appeal in an equity action involving questions of fact, to reach an independent conclusion without reference to the findings of the district court, this court will, in determining the weight of the evidence, where there is an irreconcilable conflict therein on a material issue, consider the fact that the trial court observed the witnesses and their manner of testifying.' " Higgins v. Adelson, 131 Neb. 820, 270 N. W. 502. We conclude, as did this court in Wells v. Tietge, 143 Neb. 230, 9 N. W. 2d 180, that an examination of the record discloses that the defendant failed to prove, by clear and convincing evidence, adverse possession as alleged in his cross-petition.

We find no error in the judgment of the trial court and the same is affirmed.

AFFIRMED.

WHITE, C. J., not participating.

AIME LEMIEUX, APPELLEE, V. PRESTON LEE SANDERSON, APPELLANT.
142 N. W. 2d 557

Filed May 13, 1966. No. 36167.

1. **Trial.** In a jury case where different minds may draw different conclusions or inferences from the evidence adduced, or if there is a conflict in the evidence, the matter at issue must be submitted to the jury, but where the evidence is undisputed, or but one reasonable inference or conclusion can be drawn therefrom, the question is one of law for the court.
2. **Trial: Appeal and Error.** If different instructions are given on the same subject, or there be separate paragraphs in one instruction, they should be considered together, and if they fairly submit the case, the judgment will not be reversed for indefiniteness or ambiguity.
3. **Damages: Appeal and Error.** Instructions which authorize a double recovery for the same element of loss are prejudicially erroneous.
4. ———: ———. A paragraph of an instruction which informs the jury of the extent of the recovery authorized by another instruction, or another paragraph of the same instruction, is not ordinarily erroneous as submitting a double recovery for the same element of loss.
5. **Damages: Evidence.** Where there is competent evidence of future pain and suffering that is reasonably certain to continue into the future, the amount of damages is for the jury. If the damages awarded bear a reasonable relationship to the injuries sustained, the court will not interfere with the verdict of the jury.
6. **Appeal and Error.** Where a party agrees in open court to the manner of correcting an alleged error which the court adopts, such party after taking his chances on a favorable verdict will not be permitted to reassert the error after receiving an unfavorable result.

Appeal from the district court for Douglas County: RUDOLPH TESAR, Judge. Affirmed.

Swenson, Erickson & Nelson, for appellant.

Kelley, Grant & Costello and Michael J. Dugan, for appellee.

Heard before CARTER, SPENCER, BOSLAUGH, BROWER, SMITH, and MCCOWN, JJ., and BURKE, District Judge.

CARTER, J.

The plaintiff brought this action to recover for personal injuries and property damages resulting from an automobile collision between his automobile and that of the defendant. The trial court sustained plaintiff's motion for a directed verdict on the question of liability and submitted only the question of the amount of plaintiff's damages. The jury returned a verdict for $9,652.99 in favor of the plaintiff. The defendant has appealed.

The collision occurred on July 17, 1963, at about 9 a.m., at the intersection of Forty-first and Saratoga Streets in Omaha. Both streets were two-way streets about 25 feet wide. Plaintiff was driving his automobile south on Forty-first Street. It was a bright, sunny day, and the streets were dry. The evidence is that plaintiff approached Saratoga Street at a speed of 10 miles an hour. He was driving up a moderate incline. When he was about 10 feet from the north edge of the intersection he looked to the west, his right, and then to his left. He saw no traffic in either direction. His vision was limited by a bank and tree on the northwest corner of the intersection. At a point 10 feet north of the north edge of the intersection plaintiff could see 35 to 40 feet west on Saratoga Street. He saw no automobile when he looked at that point. He proceeded into the center of the intersection where his automobile was struck broadside by defendant's automobile coming from the west on Saratoga Street. The evidence further shows that Forty-first Street was protected by Yield Right of Way signs on Saratoga Street.

The evidence of defendant is that he lived near the middle of the block west of the intersection. He, accompanied by his wife, drove away from their home in their standard-shift automobile and when he reached the incline down to Forty-first Street he lifted his foot from the accelerator and coasted slowly down to the intersection. He testified that he watched to the left until he was within a car length from the west edge of

the intersection where he could see one or two car lengths to the north of the intersection. He saw no traffic coming. He then looked right and saw no one. When he looked back to the left plaintiff's automobile was right in the middle of the intersection immediately in front of him. He struck the automobile and stopped almost immediately. Plaintiff's automobile struck the east curb of Forty-first Street and traveled about 15 feet beyond the intersection. Defendant said that he did not see plaintiff's car until just before the impact in the middle of the intersection.

The applicable ordinance provides: "RIGHT OF WAY BETWEEN VEHICLES. (c) The driver of a vehicle approaching a YIELD RIGHT OF WAY sign shall yield right of way to all vehicles approaching from the right or left on the intersecting street which are so close as to constitute an immediate hazard. (d) Any driver involved in a collision at an intersection or interfering with movement of other vehicles after driving past a YIELD RIGHT OF WAY sign is deemed prima facie in violation of this section." § 35.28.140, Omaha Municipal Code.

Plaintiff alleged that defendant was negligent in failing to yield the right-of-way, in failing to keep a proper lookout, and in failing to keep his automobile under proper control. Defendant denied any negligence on his part and asserted that the sole and proximate cause of the accident was the contributory negligence of the plaintiff, which was more than slight. No specific acts of contributory negligence were charged or proved by the defendant.

The trial court sustained the plaintiff's motion for a directed verdict on the issue of liability. The defendant asserts this was error.

The defendant in this case testified that he approached Forty-first Street at a slow rate of speed. He knew of the Yield Right of Way sign. He knew that his vision was limited to the north. When he was a car length

from the west edge of the intersection he looked to the north and could see one or two car lengths north of the north edge of the intersection. He did not look again until plaintiff's automobile was in the center of the intersection. It was then too late to avoid the collision. The plaintiff approached from the north and entered the intersection at a speed of 10 miles an hour. Defendant failed to yield the right-of-way to plaintiff as he was required to do. Plaintiff under these circumstances was of necessity within the range of danger and the duty was thereby imposed upon defendant to yield the right-of-way and avoid the accident. He failed to see the plaintiff's automobile until it was in the center of the intersection. Defendant failed to respect plaintiff's right-of-way and was negligent as a matter of law. Defendant's evidence alone was sufficient to sustain the action of the trial court in sustaining plaintiff's motion for a directed verdict on the question of liability. The only reasonable conclusion that can be drawn from the evidence is that defendant was negligent.

The controlling rule is: "In a jury case involving issues of negligence where different minds may draw different conclusions or inferences from the evidence adduced, or if there is a conflict in the evidence, the matter at issue must be submitted to the jury, but where the evidence is undisputed or but one reasonable inference or conclusion can be drawn therefrom, the question is one of law for the court." Colton v. Benes, 176 Neb. 483, 126 N. W. 2d 652.

The defendant complains that the trial court erroneously instructed as to damages for pain and suffering. It is contended that instruction No. 6 does not limit future pain and suffering to such as is shown with reasonable certainty. The instruction provides in part: "If the evidence shows with reasonable medical certainty that some of the pain and injury is continuing and may in the future continue, and the duration thereof, you will consider and allow for that also." The instructions must

be considered together. We think the quoted paragraph in instruction No. 6 properly informs the jury that it may allow damages for pain and suffering only to the extent that it is shown to a reasonable certainty. It is not necessary that the admonition be repeated in every instruction. The rule is stated in Brown v. Hyslop, 153 Neb. 669, 45 N. W. 2d 743, as follows: "The meaning of an instruction, not the phraseology, is the important consideration, and a claim of prejudice will not be sustained when the meaning of the instruction is reasonably clear. If different instructions are given on the same subject they should be considered together, and if they fairly submit the case, it will not be reversed for indefiniteness or ambiguity in one of the instructions. In determining whether or not there was error in a sentence or clause of an instruction, it will be considered with the instruction of which it is a part and the other instructions, and the true meaning thereof will be determined not from the sentence or phrase alone but by a consideration of all that is said on the subject. Myers v. Willmeroth, 151 Neb. 712, 39 N. W. 2d 423; Bolio v. Scholting, 152 Neb. 588, 41 N. W. 2d 913." The instruction complained of clearly limits the damages for future pain to those proved to a reasonable certainty. The instruction is not objectionable on that ground.

Defendant also asserts that the instructions are erroneous in that they permit recovery twice for the same loss, in other words, that there is a duplication of one element of recovery. It is the law that a duplication of an element of recovery constitutes prejudicial error. Singles v. Union P. R.R. Co., 173 Neb. 91, 112 N. W. 2d 752. In addition to that part of the instruction heretofore quoted, the trial court instructed that if the accident aggravated or accelerated a latent or dormant condition, defendant would be liable for the whole of such result. The instruction goes to the extent of the liability and does not involve a double submission for the same element of damage. We fail to see any prejudice to

the defendant in the manner the elements of damage were submitted.

Some evidence got into the record concerning a heart condition which developed in plaintiff at some undisclosed time after the accident. No contention was made in the pleadings that the heart condition was attributable to the accident. The admissibility of the evidence was raised at the conclusion of the evidence. After discussion with the court the parties agreed that the evidence of plaintiff's heart condition should be withdrawn from the consideration of the jury and that the trial would proceed. The trial court advised the jury that the evidence of plaintiff's heart condition was withdrawn from the jury's consideration.

It is fundamental that a party may not be heard to complain of an alleged error which was corrected in a manner to which he agreed in open court. One may not waive an error, take his chances on a verdict, and when he loses, reassert the error. See, Ballantyne v. Parriott, 172 Neb. 215, 109 N. W. 2d 164; O'Dell v. Goodsell, 152 Neb. 290, 41 N. W. 2d 123; Sorter v. Citizens Fund Mut. Fire Ins. Co., 151 Neb. 686, 39 N. W. 2d 276.

Defendant alleges that the judgment for $9,652.99 is excessive. The evidence sustains a finding of $205.36 for work lost, $127.50 for tips lost, doctor bills in the amount of $241, and $628.85 for repairing his automobile; a total of $1,202.71. The balance of the judgment was for his injuries and pain and suffering from the date of the accident to the date of trial and for future pain and suffering. Any excessiveness of the verdict necessarily is in the award of $8,450.28 for the items of physical injury and pain and suffering.

The evidence shows that plaintiff went to Dr. D. H. Bendorf on the day of the accident. Dr. Bendorf found the plaintiff suffering from pains in the neck, the left shoulder, the lower back, and the lower rib area. He took X-rays and found no bone injury, fracture, or dislocations. He did find an arthritic condition of the

spine in the neck area. He found evidence of much spurring of the vertebrae due to arthritis which was present before the accident. Plaintiff received diathermy treatments to relieve pain and spasms on 15 occasions and 15 B-12 injections and medicine for internal consumption to relieve pain and headaches. The evidence shows that these pains and headaches continued from the date of the accident to the time of trial. It is the testimony of Dr. Bendorf that the arthritic condition was aggravated by the accident and that the pains and headaches resulting therefrom will continue and are permanent. Dr. Joseph F. Gross, an orthopedic surgeon, examined the plaintiff on February 24, 1964, and found evidences of pain due to cervical strain caused by the aggravation of the arthritis and resultant spurring of the vertebrae. It was the opinion of Dr. Gross that the pain would continue for an indefinite time into the future, that the headaches would continue intermittently into the future, and that in his opinion the injuries aggravating the arthritic condition are permanent.

The plaintiff was 57 years of age at the time of trial with a life expectancy of about 18 years. He and his wife both testified that he had been in excellent health and he testified he had never been to a doctor since he broke an arm when he was 7 years of age. He had no knowledge of his arthritic condition or the spurring of his vertebrae until after the accident. Both doctors testified that it was the aggravation caused by the accident that caused the pains and headaches which he has suffered and will suffer indefinitely into the future.

The amount of damages for pain and suffering, both that suffered and that which will reasonably be suffered in the future, is peculiarly for the determination of the jury. There is no yardstick by which damages for pain and suffering can be measured and compensated. If the verdict of the jury bears a reasonable relationship to the injuries sustained, the court will not disturb it. Peacock v. J. L. Brandeis & Sons, 157 Neb. 514, 60

N. W. 2d 643; Morford v. Lipsey Meat Co., Inc., 179 Neb. 420, 138 N. W. 2d 653. We find no basis under the evidence for interfering with the verdict of the jury on the ground of its excessiveness.

We find no prejudicial error in the record. The judgment is affirmed.

AFFIRMED.

MULLER ENTERPRISES, INC., APPELLANT, V. SAMUEL M. GERBER ET AL., APPELLEES.
142 N. W. 2d 593

Filed May 20, 1966. No. 36122.

1. **Appeal and Error.** An opinion of the Supreme Court, which by reference is made a part of the mandate, must be examined to determine the judgment to be entered or the action to be taken by the trial court on remand.
2. **Judgments: Appeal and Error.** After remand, the lower court has the power and duty, by execution or otherwise, to enforce a judgment which is in that court by reason of its judgment having been affirmed, or which has been entered by it in pursuance of a mandate of the appellate court, or which has been sent back to it for execution.
3. **Equity.** Where a court of equity has obtained jurisdiction of a case for any purpose, it will retain it for all, and will proceed to a final determination of the case, adjudicate all matters in issue, and thus avoid unnecessary litigation.
4. **Judgments: Appeal and Error.** Public interest requires that there shall be an end to litigation, and when a cause has received the consideration of this court, has had its merits determined, and has been remanded with specific directions, the court to which such mandate is directed has no power to do anything other than to enter judgment in accordance with such mandate.

Appeal from the district court for Douglas County: JOHN E. MURPHY, Judge. Reversed and remanded with directions.

Haney, Walsh & Wall, for appellant.

Howard B. Westering, for appellees.

Heard before CARTER, SPENCER, BOSLAUGH, BROWER, SMITH, and MCCOWN, JJ., and KOKJER, District Judge.

BROWER, J.

This is the second appearance of this case in this court. Our previous opinion appears in Muller Enterprises, Inc. v. Gerber, 178 Neb. 463, 133 N. W. 2d 913.

In our previous opinion Muller Enterprises, Inc., and Robert Muller were designated as plaintiff or Muller, and Samuel M. Gerber and Samuel Gerber Advertising Agency, Inc., were referred to as defendant or Gerber. Those parties will be designated in the same manner herein.

The facts are outlined in the former opinion and only those necessary to explain our present decision will be mentioned.

At the previous trial in district court, the court entered judgment on August 23, 1963, which found the plaintiff and defendant had on December 8, 1960, entered into a valid and binding agreement whereby Gerber was to pay plaintiff Muller a "finders fee" of 10 percent of the closure fees received by Gerber as a result of Gerber's advertising program for Service Life Insurance Co., hereinafter referred to as Service Life. The trial court then referred the matter to a referee for an accounting of the balance due on the closure fees received by Gerber. The referee reported a balance of $10,926.80 due Muller on closures from March 1961 through December 1963, and the trial court on April 13, 1964, entered judgment against defendant therefor. The district court in its judgment of April 13, 1964, sustained in part a motion of the defendant and held that any transactions occurring between Gerber and the Service Life under a new contract between them entered into February 27, 1964, after original decree and order of reference would not be subject to the 10 percent finders fee. The decision of this court in Muller Enterprises, Inc. v. Gerber, *supra,* affirmed the judgment of the district

court in finding the parties had entered into a valid and binding agreement whereby Gerber was obligated to pay Muller 10 percent of the closure fees as well as the judgment for $10,926.80 entered on the referee's report.

However, on consideration of the cross-appeal, that part of the judgment of the trial court which held that any transactions under the new contract between Gerber and Service Life were not subject to the "Finders Contract" of December 8, 1960, was deemed by this court not to be responsive to the issues raised by the pleadings, inconsistent with the previous judgment, and not within its jurisdiction, and the same was reversed.

The mandate of this court was issued April 9, 1965, and filed in the district court April 12, 1965. It stated that no error was found in the judgment of the district court except with respect to that portion of the judgment which sustained in part the motion of Gerber asking approval of a new contract between Gerber and Service Life, and in that respect the judgment was reversed and in all other respects affirmed. It directed the trial court to proceed in conformity to the judgment and opinion of this court.

On April 13, 1965, Muller made and filed an application to the trial court for a further hearing to determine the additional liability of Gerber accruing since the previous order of reference and for modification of the judgment of the trial court of April 13, 1965, in the light of the mandate of this court.

On April 19, 1965, the trial court entered an order vacating its determination mentioned with respect to the subsequent contract between Gerber and Service Life. It directed the garnishees to pay into court a sufficient amount held by them under a temporary injunction to satisfy the judgment and interest. Payment in full thereof was made and defendant's supersedeas exonerated.

On April 30, 1965, plaintiff filed a second application for a further hearing to determine the amount of the defendant's accruing liability arising subsequent to the

referee's report. It had meantime issued new garnishment process against Service Life and the Omaha National Bank. Plaintiff also served notice to take the deposition of one Jay Bercovici.

Defendant moved to quash the summons in garnishment, dissolve the garnishment, and filed a resistance to the taking of the deposition, and plaintiff, pursuant to permission of the court, filed a resistance to defendant's several motions.

On June 3, 1965, the trial court entered its order finding it was without jurisdiction to consider or adjudicate the controversy between the parties without the consideration of the contract between defendant and Service Life of February 27, 1964, which this court had held was without the issues. The order thereupon quashed the two summonses in garnishment and the notice to take the deposition, and dismissed the application for a determination of accruing liability of the plaintiff without prejudice to any future action by either party.

From this order of June 3, 1965, the plaintiff appeals to this court, contending the trial court erred in concluding it was without jurisdiction to consider or adjudicate the accruing liability of the defendant to plaintiff by reason of the original contract of the parties set forth in our previous opinion.

We sustain the assignment of error.

An opinion of the Supreme Court, which by reference is made a part of the mandate, must be examined to determine the judgment to be entered or the action to be taken by the trial court on remand. Master Laboratories, Inc. v. Chesnut, 157 Neb. 317, 59 N. W. 2d 571. Our previous opinion affirmed the judgment of the trial court in all respects except as hitherto noted. The original judgment of the trial court of August 23, 1963, to which a copy of the agreement of December 8, 1960, was attached, held the same was a valid and existing contract between the parties. It determined plaintiff was entitled to receive from the defendant 10 percent of the amount re-

ceived by the latter for leads or closures pursuant thereto but not for renewals. It appointed a referee to take and render an accounting in accordance with the findings. It expressly found it "should retain jurisdiction of the subject matter and of the parties, Muller Enterprises, Inc., Samuel M. Gerber and Samuel Gerber Advertising Agency, Inc., for the purpose of hearing and determining such other and further matters by way of accounting as may in the future be required by the passage of time and the presently executory nature of the contract, such hearing or hearings to be upon such notice as the Court shall direct after written application therefor."

The judgment of April 13, 1964, contained the following: "It is therefore ordered and decreed that any bona fide transaction or transactions past or future, by or between the defendant Samuel Gerber Advertising Agency, Inc. and Service Life Insurance Company of Omaha pursuant to the agreement referred to as Exhibit A (the contract of February 27, 1964) in said motion would not be subject to the contract sued on herein, a copy of which is attached to the original decree herein; and that payments made or to be made as a result of such transactions are not subject to the reservation of jurisdiction in the decree herein." These quoted provisions of the judgments, affirmed by this court except as hitherto stated, clearly reserved jurisdiction to enforce necessary accounting in the future.

In our previous decision, this court stated: "The contract is executory on Gerber's part and it seems to us that it clearly contemplates that the duration of the obligation is commensurate with Gerber's performance, which he may terminate at any time." Muller Enterprises, Inc. v. Gerber, 178 Neb. 463, 133 N. W. 2d 913.

The opinion of the trial court and of this court clearly recognized the possible necessity of further accounting to carry out the purpose and intent of the judgment. "After remand, the lower court has the power and duty,

by execution or otherwise, to enforce a judgment which is in that court by reason of its judgment having been affirmed, or which has been entered by it in pursuance of a mandate of the appellate court, or which has been sent back to it for execution; and, generally, it has no power to stay, enjoin, or interfere with, the enforcement of the judgment." 5B C. J. S., Appeal & Error, § 1977, p. 614. If a re-reference is necessary to carry into effect the enforcement of the judgment of the trial court affirmed by this court, the trial court has power to so do. See 5B C. J. S., Appeal & Error, § 1976, p. 613. It is clear that the judgment of the trial court and the opinion of this court contemplated the completion of the accounting with respect to the agreement between the plaintiff and the defendant. The plaintiff is entitled to receive 10 percent of all closure fees received by defendant which arise under the contract of the parties of December 8, 1960.

"Where a court of equity has obtained jurisdiction of a case for any purpose, it will retain it for all, and will proceed to a final determination of the case, adjudicate all matters in issue, and thus avoid unnecessary litigation." Zwink v. Ahlman, 177 Neb. 15, 128 N. W. 2d 121. "Public interest requires that there shall be an end to litigation, and when a cause has received the consideration of this court, has had its merits determined, and has been remanded with specific directions, the court to which such mandate is directed has no power to do anything other than to enter judgment in accordance with such mandate." Berg v. Midwest Laundry Equipment Corp., 178 Neb. 770, 135 N. W. 2d 457.

The trial court erred in finding it had no jurisdiction to consider or adjudicate the accruing liability of the defendant to the plaintiff under the contract entered into on December 8, 1960.

Its judgment is therefore reversed and the cause remanded for further proceedings, with leave to file addi-

tional pleadings, if necessary, in accordance with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

HAROLD E. SCOFIELD, APPELLEE, V. JOHN HASKELL, APPELLANT.
142 N. W. 2d 597

Filed May 20, 1966. No. 36191.

1. **Trial: Evidence.** In this state the strict rule of cross-examination has been adopted and it is not ordinarily permissible to cross-examine a witness upon a matter not related to his testimony-in-chief simply because such matter is relevant to the issues.
2. ———: ———. However, within the meaning of this rule, cross-examination is proper as to anything tending to affect the accuracy, veracity, or credibility of witnesses.
3. ———: ———. Where testimony is given by a witness on direct examination from which an inference of fact arises favorable to the party producing him, anything within the knowledge of the witness tending to rebut that inference is admissible on cross-examination, and the opposing party is entitled to pursue that line of cross-examination as a matter of right.
4. **Witnesses: Trial.** Where plaintiff offers evidence of his physical condition, he thereby waives the right conferred by section 25-1206, R. R. S. 1943, as to any physician who shall have attended him, even though such physician attended him before the time fixed by plaintiff's testimony as the beginning of his disability.
5. **Automobiles: Negligence.** The rule that generally it is negligence as a matter of law for a motorist to drive a motor vehicle on the highway in such a manner that he cannot stop in time to avoid a collision with an object within the range of his vision has no application to an operator of a vehicle who undertakes to pass another.
6. ———: ———. A left-hand turn across a public highway into a private road is fraught with danger, and one making such a move is required to exercise a degree of care commensurate with the danger.

Appeal from the district court for Valley County: WILLIAM F. MANASIL, Judge. Reversed and remanded with directions.

Vogeltanz & Kubitschek, for appellant.

Wagoner & Grimminger, for appellee.

Heard before CARTER, SPENCER, BOSLAUGH, BROWER, SMITH, and McCOWN, JJ., and KUNS, District Judge.

SPENCER, J.

This is an appeal from a judgment for $6,162.17 from the district court for Valley County, rendered on a verdict in favor of Harold E. Scofield, plaintiff, and against John Haskell, defendant, for personal injuries and property damage sustained because of the alleged negligence of the defendant.

Plaintiff, driving his GMC pickup to the south and east on highway No. 11 at a speed of 50 to 60 miles per hour, approached the defendant's 1948 Dodge from the rear. Plaintiff testified that at a point 1½ miles southeast of Ord, when plaintiff was 30 to 40 feet behind the defendant, the passing lane being clear, the plaintiff honked his horn to pass and then pulled out to pass the defendant. The defendant suddenly made a left-hand turn without warning, and came to a stop astraddle the road. Plaintiff attempted to make a right turn to avoid hitting the defendant, went down an embankment on the south, and his car rolled over two and one-half times. Defendant was turning into what the evidence clearly indicates was a private road usually closed off with a gate or cable, and on which the owner testified he had posted a "No Trespassing" sign.

Defendant's version of the occurrence is that he put on his turn signal 100 feet before the road; that he pulled to the right; and started to turn, but came to an abrupt stop before crossing the centerline because a car was approaching. He does admit, however, that his car was diagonal and in a northeasterly direction when he stopped. His companion, who was sitting in the front seat, did not observe the car defendant said was approaching, and the plaintiff testified positively

that no car was approaching. In any event, it is evident that the jury accepted plaintiff's version of the facts.

Defendant urges several assignments of error, only one of which has merit. We will discuss that one first, and, because the judgment is being reversed and the cause remanded for a retrial on the issue of damages only, we will briefly discuss the other assignments. Defendant's assignment of error No. 2 concerns the restriction on the cross-examination of Doctor House, plaintiff's orthopedic specialist. The following exact quotation from the record poses the problem: "Q. Had he had any previous injuries prior to August 14, 1963? A. Not to his neck as far as my knowledge is concerned. Q. And therefore the first examination you made as to his injury was about a year and a half after August 14, 1963, is that not correct? A. That is correct. Q. Is any of this part that you have examined the arthritic condition caused by something else not connected with the accident? BY MR. WAGONER: Objected to as improper cross examination; not limited to any of the evidence of the medical injury brought out on direct examination in the absence of foundation so the witness can not intelligently answer the question. BY THE COURT: Overruled, you may answer. A. My opinion is that the findings observed clinically and on X-ray are the result of trauma or injury. Q. Did I understand that he had a previous injury which you treated him for prior to August 14, 1963? A. He had a previous injury not directly related to the— Q. When was that? A. This could be privileged communication. BY THE COURT: Yes, it is. BY MR. WAGONER: Objection, this is not brought out in direct examination; there has been no claim on the plaintiff for any other injuries to any other part of the body not defined and described in his testimony and we feel the doctor would not be in a position to answer the treatment other than connected with the accident of August 14, 1963. BY THE COURT: Sustained. BY MR. VOGELTANZ: We have no further cross exam-

ination. (JURY EXCUSED.) BY MR. VOGELTANZ: At such time the defendant offers to prove by the witness Dr. House that there was a previous injury and that part, if any, of the inability and the inability to function and pain that now exists is a matter of the previous injury which Dr. House treated and this defendant is entitled to show the same to the jury as is the extent of such injury, when it occurred, what it was and the result there of and the result thereof and the result of the treatment thereof. BY MR. WAGONER: To which the plaintiff objects for the reason it is improper cross examination; that it is not examination directed or calculated to impeach the testimony of the witness and for the reason that the witness testified prior to counsel's question that any treatment performed upon the plaintiff prior to August 14, 1963 was to a different part of the body and not to the area of the body testified to by the witness on direct examination and shown to have no connection with the present condition of the plaintiff."

Plaintiff urges that the trial court in this instance strictly observed and properly applied the rule of practice that a party should not be permitted to cross-examine a witness as to a matter foreign to the scope of his direct examination, and that the rule of strict cross-examination has been adopted and is in force in this state. See Grosse v. Grosse, 166 Neb. 55, 87 N. W. 2d 900.

In Zelenka v. Union Stock Yards Co., 82 Neb. 511, 118 N. W. 103, we said: "In this state the strict rule of cross-examination has been adopted, and it is not ordinarily permitted to cross-examine a witness upon a matter not related to his testimony in chief, simply because such matter is relevant to the issues. This does not, however, mean that a cross-examination must be confined to the questions asked upon the direct examination. Any question concerning the matter which is the subject of the direct examination may be inquired into."

The difficulty in this case is that the cross-examination

could be within the scope of the direct examination. No record was made as to the nature of the previous injury nor the time thereof. The plaintiff, from the first objection made, was apparently prepared for an attempt to elicit information on the previous injury. The doctor said that plaintiff had a previous injury "not directly related to" and then stopped. His testimony, however, is that the plaintiff's condition is the result of trauma. We determine that the restriction on cross-examination was prejudicial. Defendant was certainly entitled to know the nature of the previous injury to test the credibility of the witness and his inference that the present disability was solely the result of the injury involved in this action.

In Zimmerman v. Lindblad, 154 Neb. 453, 48 N. W. 2d 415, the plaintiff complained because the defendant was permitted to elicit information as to a previous injury on cross-examination. In that case we said: "The general rule is that a party has no right to cross-examine a witness except as to facts and circumstances connected with matters testified about on his direct examination. Atwood v. Marshall, 52 Neb. 173, 71 N. W. 1064. However within the meaning of this rule cross-examination is proper as to anything tending to affect the accuracy, veracity, or credibility of the witness. Citizens Bank of McCook v. Warfield, 85 Neb. 328, 123 N. W. 315. Also where testimony is given by a witness on direct examination, from which an inference of fact arises favorable to the party producing him, anything within the knowledge of the witness tending to rebut that inference is admissible on cross-examination, and the opposing party is entitled to pursue that line of cross-examination as a matter of right. Larson v. Hafer, 105 Neb. 257, 179 N. W. 1013. Again, anything within the knowledge of a witness tending to rebut evidence given on direct examination is admissible as a matter of right on cross-examination. Blue Valley State Bank v. Milburn, 116 Neb. 131, 216 N. W. 299."

There is no merit to any claim of privileged communication. When the plaintiff called the medical witness to testify as to the extent of his injuries and to sustain his allegations of permanent injury, he waived any privilege as to that witness, and the defendant is permitted to cross-examine on any point that could have any bearing on plaintiff's disability and the cause thereof.

Section 25-1207, R. R. S. 1943, specifically provides, so far as material herein: "Any person who institutes any action in any court to recover damages for personal injuries or in which his physical or mental condition is one of the issues involved in such action, shall be deemed to have waived the right and privilege conferred by section 25-1206 as to any physician or surgeon who is presently attending or who has attended such person for the physical or mental injuries or conditions involved in such action." See, also, Ansnes v. Loyal Protective Ins. Co., 133 Neb. 665, 276 N. W. 397, in which we held: "Where plaintiff offers evidence of his physical condition, he thereby waives the right conferred by section 20-1206, Comp. St. 1929, as to any physician who shall have attended him, even though such physician attended him before the time fixed by plaintiff's testimony as the beginning of his disability."

Defendant argues that this case is controlled by the rule that generally it is negligence as a matter of law for a motorist to drive a motor vehicle on the highway in such a manner that he cannot stop in time to avoid a collision with an object within the range of his vision. This rule clearly has no application to the facts in this case. We held in Warren v. Bostock, 170 Neb. 203, 102 N. W. 2d 55: "This rule, recognized in certain situations, has no application to an operator of a vehicle who undertakes to pass another."

Defendant's assignment of error No. 3 is to the effect that the assessment of damages was grossly excessive. While the assignment is now immaterial, it is without merit. Plaintiff's medical evidence indicates injuries of

a permanent character. The verdict bears a reasonable relationship to the injuries sustained. See Peacock v. J. L. Brandeis & Sons, 157 Neb. 514, 60 N. W. 2d 643.

Defendant's assignment of error No. 4 insists the verdict of the jury is clearly against the weight and reasonableness of the evidence; and assignment of error No. 5 is that the court erred in failing to direct a verdict in favor of the defendant. Clearly, a jury question was presented. Defendant attempted a sudden turn across a public highway into a private road. A left-hand turn across a public highway into a private road is fraught with danger, and one making such a movement is required to exercise a degree of care commensurate with the danger. The jury could have determined defendant made such movement without prior warning and without exercising the degree of care commensurate with the danger. See Petersen v. Schneider, 153 Neb. 815, 46 N. W. 2d 355.

Defendant's assignment of error No. 8 is directed to the giving of instructions Nos. 15 and 16, probably upon defendant's assumption that the plaintiff was bound by the rule of stopping within the range of his vision referred to previously. There is no merit to this assignment. Instructions Nos. 15 and 16 state the law applicable in this jurisdiction to the facts in this case.

Defendant's assignment of error No. 9 complains of the use by the trial court in instruction No. 20 of the words "in finding for the plaintiff," rather than the words, "If you find for the plaintiff." The choice of words was very poor, but when the instruction is read in context there can be no question as to its meaning.

We are convinced that the jury has settled the issue of liability herein fairly and upon sufficient evidence. We determine the only error to be the restriction of the cross-examination of a medical witness. This went only to the issue of damages. There is, therefore, no need to retry the issue of liability.

In Caster v. Moeller, 176 Neb. 446, 126 N. W. 2d 485,

where negligence of the defendant and contributory negligence of the plaintiff were involved, we held: "Where the court is convinced upon a review of the whole case that the jury has settled the issue as to responsibility fairly and upon sufficient evidence, so that dissociated (sic) from other questions it ought to stand as the final adjudication of the rights of the parties, and that there has been such error in the determination of damages as to require the setting aside of the verdict, a new trial as to damages alone may properly be ordered."

We reverse the judgment and remand the cause, but limit the new trial to the issue of damages. The finding on liability has determined that the plaintiff was not guilty of contributory negligence more than slight, if any. We direct that the jury should be instructed that if it finds that the plaintiff was guilty of contributory negligence, such shall be considered by it only in mitigation of damages and in proportion to the amount of contributory negligence which it may attribute to the plaintiff. § 25-1151, R. R. S. 1943.

REVERSED AND REMANDED WITH DIRECTIONS.

See *post* p. 406, for dissenting opinion.

CITY OF GRAND ISLAND, A MUNICIPAL CORPORATION, APPELLEE, V. RUDOLPH L. EHLERS ET AL., APPELLEES, IMPLEADED WITH ISLAND SUPPLY COMPANY, A CORPORATION, ET AL., APPELLANTS.

142 N. W. 2d 770

Filed May 27, 1966. No. 36110.

1. **Statutes.** In construing a statute, the court must look to the objective to be accomplished, the evils and mischiefs sought to be remedied, or the purpose to be served, and place on it a reasonable construction which will best effect its purposes, rather than one which will defeat it.
2. ———. In determining the legislative intent, all statutes relating to the same subject should be construed and considered together.

3. ———. The court takes judicial notice of the contents of legislative journals.
4. ———. Courts will assume that the Legislature acted with full knowledge of the facts on which the legislation is based, particularly as to statutes passed at the same session.
5. ———. Where statutes involve the same general field and where they are enacted at the same session of the Legislature, the last of the two enacted supersedes the former.
6. ———. All statutes in pari materia must be considered together and construed as if they were one law, and, if possible, effect given to each provision.

Appeal from the district court for Hall County: DONALD H. WEAVER, Judge. Reversed and remanded.

Wagoner & Grimminger, Walter P. Lauritsen, Chesley S. Baker, and Kenneth H. Elson, for appellants.

Franklin L. Pierce and Duane A. Burns, for appellee City of Grand Island.

Heard before CARTER, SPENCER, BOSLAUGH, BROWER, SMITH, and MCCOWN, JJ., and DITTRICK, District Judge.

MCCOWN, J.

This is a suit by the plaintiff, City of Grand Island, a city of the first class, against the members of the county board of Hall County and numerous owners of real estate in three separate tracts designated as "industrial areas" by the county board, for a declaratory judgment declaring and determining the rights, status, and duties of the plaintiff and the county board under the Suburban Development Act and the Industrial Areas Act, respectively sections 16-901 to 16-904, R. R. S. 1943, and sections 19-2501 to 19-2508, R. R. S. 1943.

The principal issue is whether the county board had the power or authority to designate industrial areas within 1 mile beyond and adjacent to the corporate boundaries of the City of Grand Island.

On March 16, 1957, the Suburban Development Act for cities of the first class became law. It authorized a first-class city to extend its zoning regulations to the

area 1 mile beyond and adjacent to its corporate boundaries.

On April 2, 1957, the Industrical Areas Act became effective. The act provided a procedure under which county boards were authorized to designate industrial areas outside the boundaries of any incorporated city or village, except cities of the metropolitan class.

On May 20, 1958, the county board designated area No. 3 as an industrial area. On July 17, 1958, area No. 1 was so designated. On July 29, 1961, the City of Grand Island enacted an ordinance designating all land within 1 mile beyond and adjacent to its corporate boundaries as residence "A" districts. On June 20, 1963, the county board entered an order designating area No. 2 as an industrial area. On July 17, 1963, this action was commenced by the city.

It is undisputed that each of the three areas here involved was outside the boundaries of the City of Grand Island, but within the 1-mile limit. It is also clear that each of the three areas was designated as an industrial area in compliance with the procedures provided by sections 19-2501 to 19-2508, R. R. S. 1943.

The plaintiff City of Grand Island asked for a judgment declaring and determining that the county board had no right, power, or authority to zone as an industrial area any land in the area 1 mile beyond and adjacent to the corporate boundaries of Grand Island, and that the orders of the county board as to the three industrial area tracts here involved were void.

Following trial in the district court, judgment was entered finding that the county board was without authority to establish industrial areas within 1 mile beyond and adjacent to the corporate boundaries of Grand Island, and that the purported establishment of these industrial areas was void. This appeal on behalf of certain of the property owners followed.

Since 1927, cities of the first class in Nebraska have had authority to regulate and restrict the use of land

located *within* the boundaries of the municipality under the provisions of what are now sections 19-901 to 19-914, R. R. S. 1943. Since 1937, cities and villages of all classes have had authority to carry out municipal planning and create a planning commission "to make and adopt plans for the physical development of the municipality, including any areas outside its boundaries which, in the commission's judgment, bear relation to the planning of such municipality" under the provisions of what are now sections 18-1301 to 18-1307, R. R. S. 1943.

County boards have been empowered to adopt a zoning resolution and to zone territory within their jurisdiction under section 23-114, R. R. S. 1943, and to regulate and restrict land use under sections 23-161 to 23-174, R. R. S. 1943, which provisions have been in effect since 1941.

Effective April 12, 1957, section 23-114, R. R. S. 1943 (the statute granting county boards the authority to adopt zoning resolutions), was amended to provide that "the powers created by this section shall not be exercised within the limits of any incorporated village nor within the area over which zoning jurisdiction has been granted to any city." In 1961, section 23-161, R. R. S. 1943 (the statute granting jurisdiction to county boards for regulation and restriction of land use), was amended to provide that the powers granted by that section shall not be exercised within the limits of any incorporated city or village and shall not apply "within the area over which zoning jurisdiction has been granted to any city or village."

On March 16, 1957, the Suburban Development Act was enacted which, for the first time, granted to cities of the first class the authority "to extend and apply by ordinance its zoning regulations, property use regulations, building ordinances, electrical ordinances, and plumbing ordinances, to the area one mile beyond and adjacent to its corporate boundaries with the same force and effect, as if such outlying area were within the

corporate limits of such city; Provided, no such ordinance shall be extended or applied so as to prohibit, prevent, or interfere with the conduct of normal farming, livestock operations, existing businesses, or industry." § 16-901, R. R. S. 1943.

The foregoing provisions constitute the general zoning authority granted to cities and counties.

On April 2, 1957, the Industrial Areas Act became effective. These statutes are now codified as sections 19-2501 to 19-2508, R. R. S. 1943. This act provided that the owners of any contiguous tract of real estate containing 20 acres or more, "no part of which is within the boundaries of any incorporated city or village," may file with the county clerk of the county in which the real estate is situated an application requesting the county board to designate such contiguous tract "as an industrial area." § 19-2501, R. R. S. 1943. The statutes require the giving of notice by publication and a public hearing before the county board. "After such hearing, if the county board shall find from the evidence produced that (1) such tract is suitable for use as an industrial area, (2) it will be generally beneficial to the community, and (3) the owners of all the land embraced therein have consented to such designation, such board shall designate such tract as an industrial area * * *." § 19-2503, R. R. S. 1943.

"Upon designation of such tract as an industrial area by the county board, such designated area shall thereupon be reserved for use for industrial purposes only." If the tract has an assessed valuation of more than $100,000, it is not subject to annexation by any first or second class city or village. § 19-2504, R. S. Supp., 1963.

"During the period any area is designated as an industrial area as provided by sections 19-2501 to 19-2508, the county board shall have exclusive jurisdiction for zoning and otherwise regulating the use of the industrial area in such a way as to confer upon the owners

and users thereof the benefits of a designated tract to be held and reserved for industrial purposes only; Provided, such authority shall not be granted to the county board if the zoning of such designated area is within the jurisdiction of any city or village." § 19-2505, R. R. S. 1943.

During the time any tract is designated as an industrial tract, the owners "shall provide at their expense for water, electricity, sewer, and fire and police protection." § 19-2507, R. R. S. 1943.

Other sections of the act deal with additions to an industrial area and with discontinuance or termination.

It is essentially the city's position that the Industrial Areas Act is a law "to regulate and restrict the location and use of land for trade or industry and as such constitute laws limited to 'zoning.' " The essence of the city's position is that if the county board had no jurisdiction or authority under general zoning statutes to "zone" areas 1 mile beyond and adjacent to the city's boundaries, then it also had no authority to "designate an industrial area" under the Industrial Areas Act. To a large degree, the position is premised on the rule that there cannot be at the same time within the same territory two distinct municipal corporations exercising the same powers, jurisdiction, and privileges. This rule applies in a territory in which two municipal corporations of like kind and powers attempt to function coincidentally. However, this inhibition is limited to a situation where the jurisdiction, powers, and privileges conferred on the conflicting governmental agencies are substantially coextensive in scope and objective, and no objection exists to the power of the Legislature to authorize the formation of two municipal corporations in the same territory at the same time for different purposes. The same territory may be occupied by a city and a county. In cases of conflict between jurisdiction of a city and a county, in some instances it has been held that the one serving the superior right of the people must prevail over the

one serving a subordinate purpose; and in various situations, counties have been authorized to exercise control over property within a village or city. See, 2 McQuillan (3d. Ed.), Municipal Corporations, § 7.08, pp. 270 to 273; Incorporated Village of Lloyd Harbor v. Town of Huntington, 4 N. Y. 2d 182, 149 N. E. 2d 851.

It is quite evident here that the Legislature knew that both cities and counties had general jurisdiction and authority for zoning. In adopting the Industrial Areas Act, it enacted provisions which were specific, dealing with the designaton of "industrial areas," and had the right within constitutional limits to specify the jurisdiction.

In construing a statute, the court must look to the objective to be accomplished, the evils and mischiefs sought to be remedied, or the purpose to be served, and place on it a reasonable construction which will best effect its purposes, rather than one which will defeat it. Rebman v. School Dist., 178 Neb. 313, 133 N. W. 2d 384.

The Industrial Areas Act is clear as to the real estate which may be designated as industrial areas; which governmental subdivision has authority to designate; the procedure to be followed; the findings required; the effect of designation upon the right of a city to later annex; and the obligation of owners as to utilities and police and fire protection. Section 19-2501, R. R. S. 1943, requires only that it be "any contiguous tract of real estate containing twenty acres or more, no part of which is within the boundaries of any incorporated city or village, * * *." If the Legislature had wished to provide that the land to be designated an "industrial area" must be outside the general zoning jurisdiction of any city or village as well as outside the corporate boundaries, it could have said so. The intention of the Legislature that the provisions with respect to designation of an industrial area and its effect should be primary to and imposed upon any general zoning provisions is apparent

from the language of section 19-2505, R. R. S. 1943. Where the county board has exclusive jurisdiction for zoning and otherwise regulating the use of the industrial area upon designation, it was specifically required to be exercised "in such a way as to confer upon the owners and users thereof the benefits of a designated tract to be held and reserved for industrial purposes only." In determining the legislative intent, all statutes relating to the same subject should be construed and considered together. State ex rel. Menard v. Nichols, 167 Neb. 144, 91 N. W. 2d 308. It is quite apparent that as to general zoning jurisdiction as between a city and a county, the problem was considered by the Legislature, both before and after the passage of the Industrial Areas Act as well as in the act itself. A thorough consideration of the sometimes overlapping and sometimes conflicting provisions of the statutes dealing with general zoning jurisdiction and authority of cities and counties persuades us that the Legislature specifically contemplated that industrial areas to be designated by the county board could be located within the general zoning jurisdiction of cities. An examination of the legislative history and background also persuades us that the designations of industrial areas and the effect on matters other than zoning was the primary consideration of the legislation.

The court takes judicial notice of the contents of the legislative journals. Omaha National Bank v. Jensen, 157 Neb. 22, 58 N. W. 2d 582. The Legislative Journal of 1957 is illuminating. The following amendment was offered to change section 3 of L.B. 70 (the Industrial Areas Act, now section 19-2503, R. R. S. 1943), by adding a proviso after the last word, the proviso reading as follows: "Provided, if such tract is located in whole or in part in the area over which any city or village exercises zoning jurisdiction outside of its corporate limits, no such designation of such tract shall be made unless first approved by the majority vote of the city council

or village trustees." The proviso amendment was adopted on March 6, 1957. More significant, however, on March 15, 1957, the entire proviso amendment was stricken by the Legislature. The bill then proceeded without further significant changes and was enacted unanimously on March 28, 1957, and signed by the Governor on April 2, 1957. If the bill had been passed with the proviso amendment, it would have been expressly clear that the county board had authority to designate an area as an industrial area within the zoning jurisdiction, but outside the corporate boundaries of a city, but approval by the city would have been first required. The city argues that the rejection of the proviso meant that the Legislature had determined that the county had no authority to proceed under the act as to land within the general zoning jurisdiction of the city in the absence of the proviso amendment. We believe it establishes not only that the Legislature contemplated that industrial areas could be created within the zoning jurisdiction of cities and villages, but also that the county board had authority and sole jurisdiction to designate them.

Courts will assume that the Legislature acted with full knowledge of the facts on which the legislation is based, particularly as to statutes passed at the same session. Omaha National Bank v. Jensen, *supra*. Even where the statutes involve the same general field, where they are enacted at the same session of the Legislature, the last of the two enacted supersedes the former. Johnson Fruit Co. v. Story, 171 Neb. 310, 106 N. W. 2d 182.

All statutes in pari materia must be considered together and construed as if they were one law, and, if possible, effect given to each provision. State ex rel. Menard v. Nichols, *supra*. In the case at bar, the county board of Hall County, Nebraska, had the power and authority to designate industrial areas within 1 mile beyond and adjacent to the corporate boundaries of the City of Grand Island. The findings required to be made by the county board before designating these areas as "indus-

trial areas" are fully supported by the evidence. Which governmental subdivision had jurisdiction for general zoning regulation was to be determined as of the respective dates each of the areas was designated as an industrial area. The city's general zoning jurisdiction then attached upon designation by the county board, subject to the reservation for use of the area for industrial purposes provided by the Industrial Areas Act.

It is significant to note that a large part of the city's argument, and many of its objections, are directed at the legislative policy involved in what is referred to as "strangulation of the city or village," the prohibition against subsequent annexation of "industrial areas," and the consequent inability of the city to tax the area. It is quite apparent that these considerations are the root core of the conflict here. If the city's position were accepted, the conflict would only be postponed as well as intensified. Whether this legislation was wise or not is a question for the Legislature and not for this court to decide.

For the reasons stated, the judgment of the district court is reversed and the cause remanded with directions to enter judgment in accordance with this opinion.

REVERSED AND REMANDED.

CITY OF BELLEVUE, NEBRASKA, A MUNICIPAL CORPORATION, APPELLEE, V. EASTERN SARPY COUNTY SUBURBAN FIRE PROTECTION DISTRICT, APPELLANT.

143 N. W. 2d 62

Filed May 27, 1966. No. 36205.

1. **Municipal Corporations.** Generally, a city may annex territory that is also a part of the territory of a district or public corporation formed for a limited purpose.
2. ———. The rule against distinct municipal corporations exercising the same powers, jurisdiction, and privileges within the same territory at the same time applies to municipal corpora-

tions whose jurisdiction, powers, and privileges are substantially coextensive in scope and objective.

3. ———. The Legislature has provided for the automatic detachment of a part of the territory of a fire protection district upon its annexation by a city or village. § 31-766, R. R. S. 1943.

4. **Constitutional Law: Municipal Corporations.** Section 31-766, R. R. S. 1943, held constitutional.

Appeal from the district court for Sarpy County: VICTOR H. SCHMIDT, Judge. Affirmed.

Richard G. Stehno, for appellant.

John E. Rice, for appellee.

Heard before CARTER, SPENCER, BOSLAUGH, BROWER, SMITH, and MCCOWN, JJ., and RONIN, District Judge.

BOSLAUGH, J.

Beginning in 1959, the city of Bellevue, Nebraska, annexed 24 tracts of land which, also, were a part of the Eastern Sarpy County Suburban Fire Protection District. The city brought this action under section 31-766, R. R. S. 1943, against the fire protection district to determine the rights, duties, and obligations of the parties.

The district court found that the territory annexed by the plaintiff city should be detached and excluded from the defendant and its boundaries changed accordingly; that the defendant should retain all of its assets; and that the defendant should have no further duty to furnish fire protection within the area annexed by the plaintiff. From that judgment the defendant has appealed to this court.

The defendant contends that the plaintiff has no authority to annex territory that is part of a suburban fire protection district; that section 31-766, R. R. S. 1943, is unconstitutional; and that the method prescribed in Chapter 35, article 5, R. R. S. 1943, as amended, for changing the boundaries of a fire protection district is exclusive.

A city of the first class is authorized to annex territory which is contiguous or adjacent to it if it is urban or suburban in character and not agricultural land that

is rural in character. § 16-106, R. S. Supp., 1963. Generally, a city may annex territory that is also a part of the territory of a district or public corporation formed for a limited purpose. City of Pelly v. Harris County Water Control & Improvement Dist., 145 Tex. 443, 198 S. W. 2d 450; State ex rel. East Lenoir Sanitary Dist. v. City of Lenoir, 249 N. C. 96, 105 S. E. 2d 411; In re Annexation of City of Anchorage, 129 F. Supp. 551.

The rule against distinct municipal corporations exercising the same powers, jurisdiction, and privileges within the same territory at the same time applies to municipal corporations whose jurisdiction, powers, and privileges are substantially coextensive in scope and objective. See, 62 C. J. S., Municipal Corporations, § 85, p. 202; 2 McQuillan, Municipal Corporations (3d Ed.), § 7.08, p. 269.

In this state the Legislature has provided the procedure for adjusting the rights, duties, and obligations of sanitary and improvement districts, road improvement districts, and fire protection districts whenever all or any part of the territory of such a district is annexed by a city or village. Section 31-766, R. R. S. 1943, provides that if a part of the territory of such a district is annexed by a city, and the city and district do not agree upon the proper adjustment of all matters growing out of the annexation, either party may apply to the district court of the county where the major portion of the district is located for an adjustment of such matters.

Section 31-766, R. R. S. 1943, further provides that after a hearing upon the application, the district court may enter an order fixing the rights, duties, and obligations of the parties. The division of the assets, liabilities, maintenance, and other obligations of the district is to be equitable and must not prejudice the rights of any bondholder or creditor of the district. In every such case the order "shall require a change of the district boundaries so as to exclude from the district that por-

tion of the territory of the district which has been annexed."

The defendant contends that section 31-766, R. R. S. 1943, is invalid because it is an unlawful delegation of legislative power. The defendant argues that the statute permits the district court to revise the boundaries of the district which is a legislative and not a judicial function.

The authority conferred upon the district court by section 31-766, R. R. S. 1943, is to adjust matters growing out of the annexation. The statute contemplates that the annexation shall be complete at the time the application is filed. Although the order of the district court must recite the change in boundaries which then becomes effective upon the entry of the order, the district court has no discretion as to how the boundaries shall be changed. The statute requires that the order exclude from the district the territory of the district which has been annexed. The annexation by the city determines how the boundaries of the district shall be changed. There is no delegation of authority to the district court to fix boundaries.

The defendant further contends that section 31-766, R. R. S. 1943, is invalid because the act of which it was a part was amendatory of section 16-106, R. R. S. 1943, and did not contain the section which it amended.

Section 16-106, R. R. S. 1943, relates to the authority of cities of the first class to annex territory. Section 31-766, R. R. S. 1943, relates to the adjustment of the rights, duties, and obligations of the district and a city where the city has annexed a part of the territory of the district. Although section 31-766, R. R. S. 1943, recognizes the right of a city of the first class to annex territory which may be a part of a fire protection district, the power to annex is conferred by section 16-106, R. R. S. 1943. Section 31-766, R. R. S. 1943, is a part of an independent act that provides for the automatic detachment of the territory of certain districts when annexed by

cities and villages and the adjustment of the respective rights and obligations of the city and district. It is not amendatory of section 16-106, R. R. S. 1943.

Section 35-513.02, R. S. Supp., 1963, provides a method for the withdrawal of land from a fire protection district upon the petition of the legal voters in the area proposed for withdrawal. In Village of Niobrara v. Tichy, 158 Neb. 517, 63 N. W. 2d 867, this court stated that the method of withdrawal then prescribed by section 35-515, R. R. S. 1943, was exclusive. The Village of Niobrara case was decided in 1954. Since that time, section 35-515, R. R. S. 1943, has been repealed and section 31-766, R. R. S. 1943, has been enacted. The procedure now prescribed in section 35-513.02, R. S. Supp., 1963, is not exclusive.

The judgment of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. LEE C. CLINGERMAN, APPELLANT.

142 N. W. 2d 765

Filed May 27, 1966. No. 36225.

1. **Criminal Law: Constitutional Law.** Laws 1965, c. 145, p. 486, specifically authorizes the trial court to examine the files and records to determine whether a prisoner may be entitled to the relief he seeks.
2. ———: ———. A mere declaration or self-serving statement by a prisoner that his constitutional rights were violated does not entitle him to a hearing on a motion to vacate his conviction or sentence.
3. ———: ———. A petitioner is required to allege facts which if proved would constitute an infringement of his constitutional rights.
4. **Criminal Law.** A motion to set aside a judgment of conviction or a sentence cannot serve the purpose of an appeal to secure a review of the conviction.
5. **Criminal Law: Constitutional Law.** We interpret Laws 1965, c. 145, p. 486, to be intended to provide relief in those cases

where a miscarriage of justice may have occurred and not to be a procedure to secure a routine review for any defendant dissatisfied with his sentence.

Appeal from the district court for Hall County: DONALD H. WEAVER, Judge. Affirmed.

William G. Blackburn, for appellant.

Clarence A. H. Meyer, Attorney General, and Richard H. Williams, for appellee.

Heard before CARTER, SPENCER, BOSLAUGH, BROWER, SMITH, and MCCOWN, JJ., and MURPHY, District Judge.

SPENCER, J.

This is a proceeding by Lee C. Clingerman, hereinafter referred to as defendant, invoking the provisions of Laws 1965, c. 145, p. 486, commonly referred to as the post-conviction procedure, to vacate and set aside his conviction and sentence.

On September 29, 1960, defendant, after a trial to a jury, was convicted in the district court for Hall County, Nebraska, of the crime of breaking and entering a motor vehicle. After hearing on November 4, 1960, defendant was sentenced to 15 years in the Nebraska State Penitentiary as an habitual criminal. No appeal was ever perfected from the order overruling defendant's motion for a new trial. Subsequently, and after time for appeal had passed, defendant made several filings in the district court for Hall County, all obviously attempting to secure a review of his conviction.

On July 20, 1964, the United States District Court for the district of Nebraska appointed counsel for defendant for the presentation of matters raised by his petition for a writ of habeas corpus in that court. That petition embraced some of the allegations included herein. After a hearing thereon, defendant's petition for a writ was denied.

The district court issued an order to show cause on defendant's motion, and appointed counsel for him. The

State made a return to the order to show cause, and a hearing was held thereon. On the hearing, each of 11 allegations of defendant's motion was specifically controverted from the record of his trial and conviction. Defendant alleges five assignments of error, which are as follows: "1. The Court erred in finding that the allegations of Defendant in his Amended Motion are not well taken and that the Defendant is entitled to no relief under the terms and provisions of LB 836.

"2. The Court erred in refusal to vacate and set aside the judgment and discharge the prisoner or re-sentence him or grant a new trial, as may appear appropriate.

"3. The Court erred in finding that under the terms and provisions of said Legislative Bill 836 that the previous convictions of the Defendant may not be attacked in this proceeding.

"4. The Court erred in refusing to continue this hearing to permit the taking of the deposition of said Defendant and of an alleged material witness and in refusing to authorize the expenditure of public funds to pay for such depositions.

"5. The Court erred in refusing to allow bond for Defendant pending appeal in this matter."

The first two assignments of error involve the question as to whether defendant's allegations are sufficiently answered by the record itself to show them to be without merit. The allegations are as follows: (1) Petitioner was held incommunicado and repeatedly denied permission to telephone an attorney or his family; (2) petitioner's arrest was made in Merrick County by the sheriff of Hall County and outside the jurisdiction of the Hall County sheriff; (3) petitioner was denied the assistance of counsel despite his requests; (4) the court failed during the trial to advise the petitioner of his procedural rights; (5) one of the petitioner's witnesses was converted into a State's witness; (6) hearsay and other incompetent evidence was admitted by the trial court; (7) the trial court prevented the petitioner from

proving a fact which petitioner sought to prove; (8) the trial court gave weight to a materially incorrect criminal record; (9) improper reference was made to the past criminal record of the petitioner; (10) petitioner was arrested without the jurisdiction of a valid warrant, and was not taken promptly before a magistrate; and (11) petitioner did not have sufficient prior criminal convictions to be deemed an habitual criminal, because said convictions were obtained in violation of petitioner's constitutional rights.

The record clearly indicates that defendant was represented by competent counsel at his preliminary hearing before the justice of the peace, at his arraignment in the district court, and at every stage of his trial, as well as at the hearing on the habitual criminal charge and on the sentencing. Counsel appear of record for the defendant at least within 24 hours of his arrest and no statements, if any were made by defendant, were offered in evidence against him. The record is a sufficient answer to allegations Nos. 1 and 3.

Defendant was arrested under a warrant issued by a justice of the peace in and for Hall County on the 17th day of May 1960, and appeared before such justice of the peace on the 18th day of May 1960, with counsel. The warrant for the arrest of defendant was directed to the sheriff of Hall County, Nebraska, who made the arrest. Under the terms and provisions of section 29-407, R. R. S. 1943, such warrant may be executed by the party therein named within any county in the State of Nebraska. The record itself is a sufficient answer to the second and tenth allegations.

Defendant's fourth allegation is answered by the following from his arraignment in the district court, where he appeared with counsel: " 'Q. This information has been served on you for a period of more than twenty-four hours? A. Yes, sir. (By witness) A. Yes, sir. (By counsel for defendant) Q. Mr. Clingerman, you are represented by counsel here? A. Yes, sir. Q. And

your counsel has explained the charges which the county attorney's office has charged you with? A. Yes, sir. Q. And your counsel has explained the penalty to you? A. Yes, sir. Q. And you have heard the reading of the information, how do you plead, guilty or not guilty? A. Not guilty, sir.' "

The defendant's fifth allegation is that one of his witnesses was converted into a State's witness. If defendant is suggesting the witness was coerced in some manner, the record is devoid of any such indication. The witness, who was a minor under 18 years of age, was at the time of trial confined in the Boys' Training School at Kearney, Nebraska. The transcript shows that this witness was the only witness who testified for the State at the preliminary hearing, which was held more than 4 months before the trial. Further, the name of the witness was endorsed on the complaint and the record indicates that he was fully cross-examined by defendant's counsel.

It should be obvious that defendant's sixth allegation cannot be raised in this proceeding. In any event, we have read the record and can find no ruling which could be considered prejudicially erroneous.

The seventh allegation is that the trial court prevented defendant from proving a fact which defendant sought to prove. He makes no showing to indicate what this might be. From a statement made herein by his counsel, we infer defendant claims he was unable to secure the testimony of one Patrick G. Mullen who would have testified to something in the nature of an alibi, and that Patrick G. Mullen was incarcerated in the Michigan penitentiary. The name of Patrick G. Mullen does not appear any place in the record. Nor is there any indication therein of any attempt to secure testimony which was not produced. Defendant did have three witnesses who accounted for his whereabouts during the critical period in an attempt to establish an alibi. If

Mullen's testimony had been available, it would have been merely cumulative.

The ninth allegation is directed to the fact that defendant was asked if he had ever previously been convicted of a felony, to which he answered, "Yes, I have." This is the only testimony in the record on this point, and the question was strictly in accord with the provisions of section 25-1214, R. R. S. 1943.

The eighth and eleventh allegations refer to defendant's previous criminal convictions. These convictions were specifically described in the amended complaint, and were proved at the hearing on November 4, 1960, by the introduction in evidence of three certified transcripts. One was from the district court of Iowa in and for Marshall County, bearing the seal of the clerk of the district court and showing a conviction for a felony. The other two were certified copies of previous felony convictions in the district court in and for Hall County, Nebraska, certified by the clerk of the district court in and for Hall County. This is strictly in accord with the procedure set out in section 29-2222, R. R. S. 1943, to constitute prima facie evidence of such former judgments and commitments. It is to be noted that section 29-2221, R. R. S. 1943, requires but two previous convictions. Two of the convictions used were in the same court from which defendant was sentenced as a habitual criminal. It is also to be noted that the defendant, in response to questions from the court previous to sentencing, did confirm the fact that he served 3 full years in the Nebraska State Penitentiary on his conviction of April 27, 1953, and on his conviction of May 22, 1956, he served 28 months of a 3-year sentence. This latter conviction was less than 1 month after defendant's release from prison on the previous sentence.

It is apparent to everyone that Laws 1965, c. 145, p. 486, affords a prisoner an opportunity to file a frivolous or false claim for relief. To deal with this situation, the act specifically authorizes the trial court to examine the

files and records to determine whether the prisoner may be entitled to the relief he seeks. In this case, out of an abundance of caution, the trial court issued an order to show cause, and held a hearing. As we view the record made on the motion, we find it conclusively shows that defendant's allegations are without merit.

Defendant's third assignment of error is directed to his contention that he should have been permitted to review all of his previous convictions in this attack on his present conviction and sentence. The only allegation in defendant's motion pertaining to his previous convictions is as follows: "That Petitioner did not have sufficient prior criminal convictions to be deemed a habitual criminal, insomuch as said convictions were obtained in violation of Petitioner's United States Constitutional rights and thus must be deemed invalid and not sufficient to support a finding that the Petitioner is a 'Habitual Criminal.'" It is obvious that this allegation is a mere conclusion, and is insufficient to raise the objection. A mere declaration or self-serving statement by a prisoner that his constitutional rights were violated does not entitle him to a hearing on a motion to vacate his conviction or sentence.

Laws 1965, c. 145, § 1, p. 486, provides in part: "A prisoner in custody under sentence * * * may file a verified motion at any time *in the court which imposed such sentence, stating the grounds relied upon,* and asking the court to vacate or set aside the sentence." (Italics supplied.) This requires the petitioner to allege facts which if proved would constitute an infringement of his constitutional rights.

It is obvious that defendant is attempting to use Laws 1965, c. 145, p. 486, to give him the appeal he failed to take from his last conviction. A motion to set aside a judgment of conviction on a sentence cannot serve the purpose of an appeal to secure a review of the conviction. Our appellate review procedures are adequate and must be used if an appeal is desired. We interpret

Laws 1965, c. 145, p. 486, to be intended to provide relief in those cases where a miscarriage of justice may have occurred, and not to be a procedure to secure a routine review for any defendant dissatisfied with his sentence. To hold otherwise will be to permit defendants to misuse and abuse a remedy intended to provide relief for those exceptional cases where the rights of a defendant have been ignored or abused.

Defendant's fourth assignment of error concerns the refusal of the trial court to continue the hearing to permit the taking of his deposition, and the refusal to authorize the expenditure of public funds for that purpose. Laws 1965, c. 145, § 1, p. 486, provides in part as follows: "Unless the motion and the files and records of the case show to the satisfaction of the court that the prisoner is entitled to no relief, the court shall cause notice thereof to be served on the county attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto."

We have previously suggested that it is evident that the files and records in this instance are sufficient to show that the defendant was entitled to no relief. The most the defendant could do in a deposition would be to dispute the record. Defendant's motion suggests he is at least reckless with the truth. It is hard to understand how anyone under the circumstances could consider the word of a four-time loser rather than the record made while he was represented by competent counsel. On the record herein, the court did not abuse its discretion.

What has been said heretofore obviates any need to discuss defendant's fifth assignment of error.

For the reasons given, the judgment herein is affirmed.

AFFIRMED.

VERNON F. SCHMECKPEPER, APPELLANT, V. PANHANDLE COOPERATIVE ASSOCIATION, A CORPORATION, ET AL., APPELLEES.

143 N. W. 2d 113

Filed June 3, 1966. No. 36139.

1. **Statutes.** A statute is not to be read as if open to construction as a matter of course. Where the words of a statute are plain, direct, and unambiguous, no interpretation is needed to ascertain the meaning. It is not within the province of a court to read a meaning into a statute that is not warranted by the legislative language. Neither is it within the province of a court to read anything plain, direct, and unambiguous out of a statute.
2. **Cooperative Associations.** Subsection (4) of section 21-1302, R. R. S. 1943, requiring the accumulation of an amount of surplus equal to 20 percent of its paid capital stock, does not restrict the corporation from providing a greater amount.
3. ———. Under the provisions of section 21-1302, R. R. S. 1943, a cooperative corporation, after making distribution under subsections (3) and (4) thereof, may distribute the rest of its earnings and savings by prorating them among its patrons and paying them in cash, stock, stock credits, deferred credit certificates, or certificates of participation as determined by the board of directors when its by-laws so provide.

Appeal from the district court for Scotts Bluff County: JOHN H. KUNS, Judge. Affirmed.

Wright, Simmons & Hancock, for appellant.

Orie C. Adcock and Robert M. Harris, for appellees.

Heard before CARTER, SPENCER, BOSLAUGH, BROWER, SMITH, and MCCOWN, JJ., and BRODKEY, District Judge.

BROWER, J.

The plaintiff and appellant Vernon F. Schmeckpeper brought this action as stockholder, patron, and member of the defendant and appellee Panhandle Cooperative Association, a corporation. The other defendants and appellees, Masami Sakurada, Harold Morrison, Tellford Ewing, Alex Welsch, Valden Rundell, Rolland Roberts, Harvey Darnall, Adam Walter, and Ed Kennedy, are

joined with the corporation defendant as its directors. The plaintiff will be referred to as such or as Schmeckpeper, and Panhandle Cooperative Association as the defendant or Coop.

The trial court sustained a general demurrer filed by all the defendants to plaintiff's second amended petition and dismissed the petition. The facts hereinafter set out are the allegations thereof.

Plaintiff is a stockholder, patron, and member of the defendant Coop. Plaintiff alleges he brings this action on his own behalf and seeks to maintain it as a class action for the benefit of others similarly situated also. As such he seeks to require an accounting and distribution of all the earnings and savings of the defendant which exceeds 20 percent of its capital stock, which is alleged to be required by statute, section 21-1302, R. R. S. 1943, before its amendment in 1963.

Defendant was incorporated May 6, 1942, under sections 21-1301 to 21-1307, R. R. S. 1943, as those statutes existed prior to the amendment effective on October 19, 1963. Three of those sections were then amended and as they presently exist are set forth in sections 21-1301 to 21-1303, R. S. Supp., 1963. Plaintiff has 5 shares of stock which he acquired in 1959 and has been a patron longer, the duration of that period not being alleged. On September 30, 1963, the last day of the fiscal year, before commencing suit there were 8,166 patrons owning 13,551 shares of $10 each capital stock.

Between the date of incorporation of Coop and September 30, 1963, Coop accumulated from earnings, assets of book value, after allowing for depreciation, of $1,128,430.35 of which $614,967.59 was acquired since plaintiff became a stockholder therein.

On September 30, 1963, Coop's records indicated paid-up capital stock of $316,590 although it is alleged if its articles of incorporation and by-laws had been complied with, it should only have capital stock of $135,510, and that a surplus of 20 percent thereof would be only

$27,102. It is alleged that this capital stock and surplus is all that Coop is permitted to acquire as capital assets and that the Coop is required to pay out in cash the excess to its stockholders, members, and patrons which has not been done.

This excess, however, was listed on Coop's books as capital stock and "surplus reserve," $241,925.29; "deferred patronage refunds," $391,771.05; "capital surplus and equity reserve," $21,524.30; and "savings," $292,129.71.

The prayer of the petition is for an accounting to the stockholders, members, and patrons of Coop for all net earnings and savings of the corporation since organization; to enter judgment in favor of plaintiff and other stockholders, members, and patrons for any sum required to be distributed under Chapter 21, article 13, R. R. S. 1943, as the same existed prior to October 19, 1963; to enjoin Coop from further using the net earnings and savings contrary to said statutes; and for an attorney's fee.

Plaintiff assigns error to the trial court in sustaining the demurrer and dismissing the proceedings.

Plaintiff first contends that section 21-1302, R. R. S. 1943, as it existed prior to the amendment in 1963, required payment in cash to the patrons of all the earnings and savings of Coop after its surplus funds equaled 20 percent of its capital stock paid. We think section 21-1301, R. R. S. 1943, throws some light on the questions before us and here set out the pertinent portions of both sections. Section 21-1301, R. R. S. 1943, provides: "Any number of persons, not less than twenty, or any number of cooperative companies, not less than five, may form and organize a cooperative corporation for the transaction of any lawful business by the adoption of articles of incorporation in the same manner and with like powers and duties as is required of other corporations except as herein provided."

Section 21-1302, R. R. S. 1943, provides: "Every such

cooperative company shall provide in its articles of incorporation: * * * (4) That the company shall set aside each year to a surplus fund not less than five per cent of the earnings or savings of the company over and above all expenses and dividends or interest upon capital stock as provided in subdivision (3) of this section, until such surplus fund equals at least twenty per cent of the capital stock paid, which surplus may be used for conducting the business of the corporation;

"(5) That the net earnings or savings of the company remaining after making the distribution provided in subdivisions (3) and (4) of this section shall be distributed on the basis of or in proportion to the amount or value of property bought from or sold to members, or members and other patrons, or of labor performed, or other services rendered to the corporation; Provided, that this subdivision shall not be so interpreted as to prevent a cooperative company from declaring patronage dividends at different rates upon different classes or kinds or varieties of goods handled; and provided further, that nothing in subdivisions (3), (4) and (5) of this section shall be so interpreted as to prevent a company from appropriating funds for the promotion of cooperation and improvement in agriculture; and

"(6) That the by-laws of the company shall give a detailed statement of the method followed in distributing earnings or savings."

It is plaintiff's contention that subsection (4) of section 21-1302, R. R. S. 1943, which directs the accumulation of a surplus fund "*until* such surplus fund equals *at least* twenty per cent of the capital stock paid" (italics supplied), not only directs the accumulation of surplus to 20 percent of the capital stock, but restricts further accumulation thereof. Plaintiff argues at length concerning the meaning of the word "until" as used in the quoted sentence. The parties cite authorities from texts and dictionaries, and cases from other jurisdictions with respect to its meaning. Plaintiff urges it is a

word of limitaton, and presupposes that when the condition following such word shall become operative, the precedent condition or status shall fail. Bud Hoard Co. v. F. Berg & Co., 137 Okl. 16, 278 P. 273. See, also, 91 C. J. S., Until, p. 509; In re Wiegand, 27 F. Supp. 725; Tolle v. Superior Court, 10 Cal. 2d 95, 73 P. 2d 607.

Defendant cites among other authorities, Webster's Third New International Dictionary of the English Language, Unabridged (1961), where it is stated on page 2513, "until" is "used as a function word to indicate continuance (as of an action, condition, or state) up to a particular time, * * * up to the time that." As so used, subsection (4) might mean: "* * * the company shall set aside * * * not less than five per cent of the earnings * * * *up to the time that* such surplus fund equals at least twenty per cent * * *."

The difference in the meanings in the authorities cited is not of great significance as applied here. It is clear that as used here, "until" describes a time after which a cessation occurs. A cessation of what? The plaintiff claims the *right* to set aside the surplus ceases; the defendant claims that the duty to set *aside* such a surplus ends. In an interpretation of the whole phrase "until such surplus fund equals *at least* twenty per cent of the capital stock paid," the words "at least" are of great significance. Defendant cites Webster's Third New International Dictionary, Unabridged (1961), defining "least" on page 1286, as the lowest in importance or position, smallest in size or degree, smallest possible. "At least" is there defined on page 1287 as "at the lowest estimate: as the minimum."

Defendant also cites certain cases from the courts of other states. The case of City of Olive Hill v. Howard (Ky.), 273 S. W. 2d 387, involved the construction of the publication of an ordinance required by law to be published for not less than 3 weeks. It was held that there was no distinction between the phrases "at least" and "not less than." The court stated: "It is to be seen

from the decision in Fisher v. Booher, supra, that a week means seven days. In the light of the above decisions, there is no distinction between 'at least' and 'not less than,' each meaning that the prescribed amount of publication is a mandatory minimum." Miller v. State ex rel. Russell, 130 Miss. 564, 94 So. 706, was an action involving the Constitution of the State of Mississippi which provided that a public school should be maintained in each school district "at least four months" during each scholastic year. In the cited case it was contended that this provision permitted the Legislature to authorize state aid for only 4 months. In rejecting this contention, the court stated: "When they (the framers of the Constitution) said 'at least four months' we understand they meant that four months was to be the minimum term; or, to put it in another way, there must be not less than four months of schooling, and, inferentially, there may be a longer term, or at least a longer term was not intended to be prohibited, either expressly or by implication." Barron v. Green, 13 N. J. Super. 483, 80 A. 2d 586, involved the time in which petitions to nominate officers were required to be filed before election. The court there quoted from 7 C. J. S. 165, as follows: "The phrases 'at least' and 'prior to' must be defined in their accepted meanings. 'At least' is an adverbial phrase meaning at the lowest estimate; at the smallest concession or claim; in the smallest or lowest degree; at the smallest number; and sometimes used in the sense of clearly. It is a phrase of emphasis, expressive of a minimum, and implies the possibility of more. Sometimes it imports uncertainty, taking its meaning from the context, and hence, under particular circumstances, has been held equivalent to 'at most,' 'at the least,' 'fully,' 'not less than,' and 'not to exceed.'"

Several cases are cited by the plaintiff which he contends are authority for interpreting the words "at least" as used in subsection (4) of section 21-1302, R. R. S. 1943,

as really, at most, or a maximum. Among them is Santow v. Ullman, 39 Del. Ch. 427, 166 A. 2d 135. The matter before the court concerned the construction of a zoning statute which directed notice to be published at least seven days before the date of the hearing in a newspaper of general circulation in the county. The question being considered was whether the court should adhere to previous rulings which had held that where a notice was directed to be given for a certain number of days, "clear days" were intended. On the question before us, the court in the cited case held: "Now, the prefixing of the phrase 'at least' before the number of days required simply means, on its face, that the specified time (e.g., seven days) is the minimum time. Suppose a statute provides that 'a minimum of seven days' notice' shall be given. Would it be contended that it required seven clear days? The only difference that we can see between 'seven days' notice' and 'at least seven days' notice' is that in the latter phrase there is the implication that a longer notice may be given if desired." Plaintiff calls attention to Warren Manuf. Co. v. Hoffman, 62 Md. 165, which did construe "at least" as used there to mean "at most." Both parties were lessees of a common owner of lands on a stream with rights to dam the stream to obtain power. Defendant's lease gave it as much land as would be flooded by a dam "at least twelve feet in height at common water mark." It built a higher dam and flooded the plaintiff's mill above. It was obvious that if the defendant's lease permitted it to build a dam of any height over 12 feet, defendant's leasehold could be increased, depending only on the height of the dam. Such a description of the land conveyed would be vague and uncertain. In construing "at least" as "at most" the court put both leases in proper perspective. We think this ruling was required by the context of the leases and the circumstances before the court, and justified that interpretation.

A review of the cases discussed and those cited which

are not discussed indicates that the ordinary and usual meaning of the term "at least" is expressive of a minimum and implies the possibility of more. Its definition in Webster's New Third International Dictionary, Unabridged (1961), we have cited. As set out in 7 C. J. S. 165, quoted in Barron v. Green, *supra,* however, in certain instances it does have a different meaning taken from the context in which it occurs, and under particular circumstances it is held to be equivalent to "at most" or "not to exceed" as contended by the plaintiff. We, however, think the usual and ordinary meaning should first be applied to the phrase as it is used in section 21-1302, R. R. S. 1943. If that is done the intent of the Legislature clearly appears to mean that a minimum surplus equal to 20 percent of the capital was to be accumulated as therein provided and that more might be provided. We do not think the usual and ordinary meaning of "at least" should be set aside by judicial construction when the context of the statute and the circumstances before the court do not require it. "A statute is not to be read as if open to construction as a matter of course. Where the words of a statute are plain, direct, and unambiguous, no interpretation is needed to ascertain the meaning. It is not within the province of a court to read a meaning into a statute that is not warranted by the legislative language. Neither is it within the province of a court to read anything plain, direct, and unambiguous out of a statute." Bachus v. Swanson, 179 Neb. 1, 136 N. W. 2d 189.

Plaintiff calls attention to this statute as it existed prior to its amendment in 1925, Laws 1921, chapter 28, section 2, page 161, which permitted the accumulation of surplus without either requiring it to be done or restricting the amount thereof, and similar provisions now contained in the subsequent amendment not applicable to the case, now appearing as section 21-1302, R. S. Supp., 1963. He argues that the Legislature by enacting the statute in 1925, Laws 1925, chapter 79, page

243, in the form presented here certainly intended to make a change. This, of course, is true but it does not follow that its purpose was, as contended by plaintiff, to restrict the accumulation of surplus. It seems more reasonable to conclude the Legislature intended to require at least a minimum surplus to be provided without restricting such accumulation further. Section 21-1301, R. R. S. 1943, hitherto set out, permits cooperative corporations to be organized without the payment of any capital. Yet section 21-1302, R. R. S. 1943, following, clearly shows such corporations are to acquire capital and that which comes from surplus is to be used in the conduct of its business. Section 21-1303, R. R. S. 1943, gives such cooperative corporations power to engage in enterprises requiring capital. We do not think the Legislature intended to condemn such corporations to mediocrity. It is apparent that the Legislature could have easily and clearly provided that only surplus to the extent of 20 percent of the capital could be set aside if it had desired. Subsection (4) of section 21-1302, R. R. S. 1943, requiring the accumulation of an amount of surplus equal to 20 percent of its paid capital stock, does not restrict the corporation from providing a greater amount.

Plaintiff further contends that under subsection (5) of section 21-1302, R. R. S. 1943, the articles of incorporation, and the by-laws of the Coop the earnings remaining after the distribution provided for in subsections (3) and (4) should annually be paid in cash to the patrons. Subsection (5), however, does not state that payment or payment in cash, as contended, shall be made. Instead it provides that the remaining earnings or savings "*shall be distributed on the basis of or in proportion* to the amount or value of property bought from or sold to members, or members and other patrons, or of labor performed, or other services rendered to the corporation; Provided, that this subdivision shall not be so interpreted as to prevent a cooperative company from

declaring patronage dividends at different rates upon different classes or kinds or varieties of goods handled; and provided further, that nothing in subdivisions (3), (4) and (5) of this section shall be so interpreted as to prevent a company from appropriating funds for the promotion of cooperation and improvement in agriculture; * * *." (Italics supplied.)

Plaintiff cites authorities from which he claims the word "distribute" means to pay in cash. Among them is the case of Stoddard v. Montgomery, 169 Neb. 252, 98 N. W. 2d 875. That case involved the apportionment of attorneys' fees in a partition action in which the court quoted from Webster's New International Dictionary which defined the word "distribute" as meaning, "To divide among several or many." A synonym for "distribute" being there stated as "divide." The quotation does not reach further. Other authorities are mentioned by each of the parties to sustain their interpretation of the word. It would appear, however, that the context of the provision being considered is determinative of its exact meaning. If as mentioned in subsection (5) of section 21-1302, R. R. S. 1943, "divide" meant to pay out in cash, as contended by the plaintiff, it would not have been necessary to add subsection (6), providing: "That the by-laws of the company shall give a detailed statement of the method followed in distributing earnings or savings."

The amended acticles of incorporation as they appeared in the office of the Secretary of State on February 27, 1962, are attached to the second amended petition as exhibit A. A copy of the amended by-laws of the corporation are attached thereto, also, as exhibit B.

Of the articles of incorporation, article IV provides that capital stock may be issued to the amount of $500,000, divided into 50,000 shares of $10 each, but business may be commenced on not less than $3,000 being subscribed and paid. Thereafter it provides: "No dividends shall be paid on this stock. Of the savings of the Associa-

tion over and above all expenses five (5) per cent shall be set aside to a surplus fund each year until said surplus fund equals twenty (20) per cent of the paid up share capital."

Article V of these articles follows: "DISTRIBUTION OF EARNINGS. All of the patrons' net margins received by this Association shall, as received by it, belong to and be held by it for and be paid to its patrons at least annually and on the basis of their respective patronage, all as may be more particularly defined and provided in the By Laws."

Plaintiff's contentions concerning these articles quoted are much the same as those directed to the statute. He maintains the articles do not contain what is to be done with respect to the earnings over and above the amount equal to 20 percent of the capital as he has hitherto contended. He points out that the articles of incorporation, article V, provides that the earnings are to be paid to its patrons at least annually as may be provided in the by-laws. It does not, however, provide they be paid in cash. Section 21-1302, R. R. S. 1943, directs that the articles shall contain a provision concerning the accumulation of surplus, as set forth in article IV. Section 21-1302, R. R. S. 1943, does not require the articles to contain the method used in the further distribution of earnings. Article V provides that they be paid to the patrons annually but significantly states that the net margins of patrons shall *belong to the association and be held by it* and be paid to the patrons as may be more particularly defined and provided in the by-laws. Section 21-1302, R. R. S. 1943, expressly directs the articles to provide that the method of distribution be spelled out in the by-laws. The plaintiff's contention that the by-laws can be no broader or detailed than the articles of incorporation in this respect is contrary to the statute.

Referring now to the by-law, provisions respecting distribution in great detail are set out in article IV. After setting forth the costs, expenses, and charges, in-

cluding ordinary business reserves which are to be deducted from the total income, it provides the remainder shall be known as net margins. It thereafter in part states: "Section 1. * * * From this net margin five (5) per cent of the balance then remaining shall be set aside to a surplus fund each year until such surplus fund equals at least twenty (20) per cent of the paid up capital stock of the corporation. * * * The remaining net earnings or savings shall be prorated among the patrons of the corporation in proportion to the amount or value of commodities bought from or sold to the corporation or handled for them by the corporation and shall be paid to the patrons in *cash, stock, stock credits, deferred credit certificates, or certificates of participation as determined by the Board of Directors.*

"Section 2. Redemption of deferred patronage refunds may be in cash, bonds, preferred stock, common stock or stock credits, certificates of participation, other equities of the Association, or any combination thereof, as determined by the Board of Directors." (Italics supplied.)

The subject of cooperatives, including both corporate cooperatives and those formed by associations, is discussed at length in 18 Am. Jur. 2d, Cooperative Associations, beginning at page 259. The subject of revolving capital fund and equity credits which is quite common to cooperatives is set out in 18 Am. Jur. 2d, Cooperative Associations, section 15, page 275, as follows: "Statutes regulating the structure of cooperative associations, and bylaws of such associations adopted pursuant thereto, frequently provide for the retention by the association of all or a portion of the operating profit of the association in order to furnish capital for the association, and in evidence of this each member of the association is credited with his proportionate part on the books of the association, and is generally issued a certificate showing such credit. This plan is known as the revolving fund plan, or equity plan, and the credits are known

as equity credits. These credits are in effect the capital of the cooperative, and it has been said that the plan for raising capital in this way is the most equitable means by which a cooperative can acquire its capital from its patrons.

"It is well settled that equity credits allocated to a patron on the books of a cooperative do not reflect an indebtedness which is presently due and payable by the cooperative to such patron. Such equity credits represent patronage dividends which the board of directors of a cooperative, acting under statutory authority so to do, has elected to allocate to its patrons, not in cash or other medium of payment, which would immediately take such funds out of the working capital of the cooperative, but in such manner as to provide or retain capital for the cooperative and at the same time reflect the ownership interest of the patron in such retained capital." Among the cases cited under the quoted section is Clarke County Coop. v. Read, 243 Miss. 879, 139 So. 2d 639, where the rules set forth in the text are followed. It must be conceded that the Mississippi statute set forth in the cited case is more fully detailed than that now under consideration. It spells out more fully the power of a cooperative corporation to accumulate surplus, and to hold and use the funds assigned and distributed as patronage dividends after their allocation.

It is apparent from a general reading of the article concerning Cooperative Associations in 18 Am. Jur. 2d, that such corporations usually raise the capital required for the business and expansion as outlined in the section quoted from page 275. Its use in agricultural communities is quite general. It is not to be supposed that the Legislature in passing the statutes now under consideration was oblivious to the manner of development and growth of such corporations. The provisions of the statutes under consideration were enacted and should be interpreted in the light of the general development of cooperative corporations. The legislative intent, when

apparent from the whole statute, is not to be thwarted by strained and unusual interpretations of particular words not required under the circumstances, nor because the statute previously was different in detail, or that a subsequent amendment has changed it in some respects. We think when given its usual accepted meaning, the language of the statute and the intent of the Legislature are clear. We conclude that under the provisions of section 21-1302, R. R. S. 1943, a cooperative corporation, after making distribution under subsections (3) and (4) thereof, may distribute the rest of its earnings and savings by prorating them among its patrons and paying them in cash, stock, stock credits, deferred credit certificates, or certificates of participation as determined by the board of directors when its by-laws so provide.

We find on error in the trial court sustaining the demurrers and dismissing plaintiff's second amended petition, and its judgment is therefore affirmed.

AFFIRMED.

JOE BLANCO, APPELLANT, V. GENERAL MOTORS ACCEPTANCE CORPORATION, A CORPORATION, ET AL., APPELLEES.
143 N. W. 2d 257

Filed June 3, 1966. No. 36142.

1. **Appeal and Error.** A judgment of the district court brought to this court for review is supported by a presumption of correctness, and the burden is upon the party complaining of the action of the district court to show by the record that it is erroneous.
2. ———. Where the record contains no authentic bill of exceptions, or the bill of exceptions has been quashed, no question will be considered by this court, the determination of which necessarily involves an examination of the evidence adduced in the trial court, and in such a situation, if the pleadings are sufficient to support the judgment it will be affirmed.
3. ———. In the absence of a bill of exceptions, it is presumed that an issue of fact raised by the pleadings was sustained by the evidence and that it was correctly determined.

4. ———. An affidavit used as evidence in the district court cannot be considered on an appeal of a cause to this court unless it is offered in evidence in the trial court and preserved in and made a part of the bill of exceptions.
5. ———. The fact that an affidavit used as evidence in the district court was filed in the office of the clerk of the district court and made a part of the transcript is not important to a consideration and decision of an appeal in the cause to this court. If such an affidavit is not preserved in the bill of exceptions, its existence or contents cannot be considered by this court.
6. **Pleading: Judgments.** In determining whether or not the pleadings support the judgment, they must be taken as a whole, and construed so as to support the judgment, if capable of such construction. The presumption is that the relief granted is authorized by the pleadings, and the burden is upon him who attacks the judgment to show that it was not.
7. **Declaratory Judgments.** The granting of declaratory relief is discretionary with the court, and there is no absolute mandate compelling it to exercise its jurisdiction to grant such relief.
8. **Appeal and Error.** It is not within the province of this court to determine moot questions.
9. **Declaratory Judgments.** A declaratory judgment will be refused, where, in the court's opinion, it is inexpedient for some reason outside the record, such as public policy, or where the question involved might be raised again in some other way.
10. ———. Courts should exercise a maximum of caution where a ruling in a declaratory judgment action is sought that would reach far beyond the particular case.

Appeal from the District Court for Scotts Bluff County: TED R. FEIDLER, Judge. Affirmed.

Bertrand V. Tibbels, for appellant.

Wright, Simmons & Hancock, for appellees.

Heard before CARTER, SPENCER, BOSLAUGH, BROWER, SMITH, and MCCOWN, JJ., and BRODKEY, District Judge.

BRODKEY, District Judge.

This is an appeal from the action of the district court for Scotts Bluff County sustaining the motion of the defendants for a summary judgment in their favor and dismissing plaintiff's petition for a declaratory judgment.

In his petition plaintiff, Joe Blanco, alleges in sub-

stance that on or about July 21, 1964, he entered into a contract with the defendants for the purchase of a certain used Chevrolet automobile upon a printed form furnished by defendant General Motors Acceptance Corporation, a New York corporation doing business within the State of Nebraska (hereinafter referred to as "GMAC"); and that GMAC claims to own the purported contract. Plaintiff further alleges that GMAC engages in a "general loan-shark business" in Nebraska; that the installment purchase of vehicles, furniture, and appliances has become so common as to become a part of the way of life of the people of the state; that the great majority of the people are compelled to deal with the defendant GMAC in order to maintain their standard of living, but that they are not free agents in entering into such contracts; and further that many of the conditions forced upon the plaintiff and the public generally are not the result of meeting of minds or of contracts entered into voluntarily. Plaintiff specifically alleges that when he signed the contract he was not advised that there were any provisions on the reverse side of same, but that he executed the contract on the front page in triplicate copies which were still attached to each other, and that he did not read the reverse side of the contract at any time prior to signing; and that his mind never met that of the defendants in the execution of the contract as to any provision or condition appearing on the reverse side of the instrument. Plaintiff further alleges that the contract is void because it is ambiguous and unintelligible: that it shows upon its face an intent to defraud all who might sign the same, including the plaintiff, and also an intent to subvert the law and public policy of the state and the criminal statutes of the state, and to authorize GMAC to commit the crimes of larceny and burglary and to exempt it from the consequences of such crime; and that the form attempts to permit GMAC to construe the contract in various ways for various purposes with the intent to defraud the purchasers and

creditors generally, and shows an intent to relieve GMAC of all the restrictive provisions of the law applicable to it.

Plaintiff prays for a declaratory judgment construing said contract, determining whether the same be valid or invalid, and adjudicating the respective rights of the parties "in the circumstances"; and for such other relief as may appear just and equitable. He attaches a copy of the contract as an exhibit to the petition.

In their answer to plaintiff's petition, defendants acknowledge the corporate existence of the separate defendants, and generally deny each and every allegation not admitted therein. Defendants also allege that on July 21, 1964, Joe Blanco and his wife Barbara Blanco negotiated with Kramer Motors, Inc., for the purchase of the Chevrolet automobile in question; and that plaintiff entered into a contract for the purchase of same with John A. Plaster, the authorized representative of defendant Kramer Motors, Inc. A copy of the same contract is attached to their answer as the copy attached to plaintiff's petition. Defendants also allege that the aforesaid John A. Plaster explained certain provisions of the contract to the plaintiff and his wife; that they were given the opportunity to read and examine the contract but declined to do so; that they were never prevented from examining the entire contract, made no inquiry concerning the provisions of it, and did not examine it further; and that immediately after the signing of the contract an exact duplicate copy was given to the plaintiff, but that no further inquiry concerning its terms and conditions were made by the plaintiff or his wife. Defendants further allege that the title to the automobile covered by the contract was taken in the name of "Joe or Bobby Blanco"; and a copy of the certificate of title was attached to the answer as an exhibit and incorporated by reference.

Finally, defendants allege that after the filing of the petition of the plaintiff in this action, a replevin action

was filed in the district court for Scotts Bluff County, Nebraska, being case No. 18385, the object and prayer of which was to replevin the vehicle described in said contract; that thereafter said vehicle was "replevined" from Joe Blanco and Bobby Blanco, the defendants, in that action; and that GMAC is now in possession of the vehicle.

Defendants pray that the petition of the plaintiff be dismissed, that they recover damages, and for any other relief which may to the court be just and equitable.

Thereafter defendants filed a motion asking that the court enter an order granting them a summary judgment in their favor upon all issues presented by the pleadings; and that the court dismiss plaintiff's petition, the motion further stating: "These defendants present herewith the affidavit of John A. Plaster in support of their motion." The affidavit referred to was not attached to the motion as a part thereof, but was filed in the office of the clerk of the district court.

A hearing was had on said motion on May 19, 1965, and on June 8, 1965, the court entered its judgment as follows:

"NOW on this 8th day of June, 1965, this matter came on for decision, the Court having previously heard the Motion for Summary Judgment of Defendants and taken the matter under advisement.

"THE COURT FINDS, after due consideration of the evidence, that the motion of Defendants for summary judgment should be sustained and the action dismissed at the Plaintiff's cost.

"THE COURT FURTHER FINDS that on the date of the hearing, May 19, 1965, Plaintiff asked for and obtained permission to file an affidavit and other matters of evidence, which were not then available, the Court granting him that right, but that said additional evidence has not been forthcoming and the case has been decided against the Plaintiff without consideration of those matters.

"WHEREFOR IT IS ORDERED that the Motion for Summary Judgment heretofore filed by the Defendants, be, and it hereby is, sustained, and the Plaintiff's action is dismissed at Plaintiff's cost."

In his appeal from the foregoing judgment, plaintiff claims error by the trial court in rendering a summary judgment, in dismissing the action, in overlooking issues of fact tendered, and in failing to decide each of the issues tendered by the petition.

It has long been the rule that a judgment of the district court brought to this court for review is supported by a presumption of correctness and the burden is upon the party complaining of the action of the former to show by the record that it is erroneous. It is presumed that an issue decided by the district court was correctly decided. The appellant to prevail in such a situation must present a record of the cause which establishes the contrary. Bulger v. McCourt, 179 Neb. 316, 138 N. W. 2d 18; Brierly v. Federated Finance Co., 168 Neb. 725, 97 N. W. 2d 253; Peterson v. George, 168 Neb. 571, 96 N. W. 2d 627.

We do not have the benefit of a bill of exceptions in this case as the one filed by plaintiff was quashed by this court upon motion of defendants and pursuant to stipulation of the parties.

The law is well established that where the record contains no authentic bill of exceptions, or the bill of exceptions has been quashed, no question will be considered by this court the determination of which necessarily involves an examination of evidence adduced in the trial court, and in such a situation, if the pleadings are sufficient to support the judgment it will be affirmed. Benson v. General Implements Corp., 151 Neb. 234, 37 N. W. 2d 223; Neighbors & Danielson v. West Nebraska Methodist Hospital, 162 Neb. 816, 77 N. W. 2d 667; Dryden & Jensen v. Mach, 150 Neb. 629, 35 N. W. 2d 497; State ex rel. Weasmer v. Manpower of Omaha, Inc., 161 Neb. 387, 73 N. W. 2d 692. In the absence of a bill of

exceptions, it is presumed that an issue of fact raised by the pleadings was sustained by the evidence and that it was correctly determined. Palmer v. Capital Life Ins. Co., 157 Neb. 760, 61 N. W. 2d 396; Peterson v. George, *supra;* Brierly v. Federated Finance Co., *supra.*

Moreover, since the bill of exceptions in this case was quashed we may not consider the affidavit of John A. Plaster referred to in defendants' motion for summary judgment. The fact that an affidavit used as evidence in the district court was filed in the office of the clerk of the district court and made part of the transcript is not important to a consideration and decision of an appeal of a cause to this court. If such an affidavit is not preserved in the bill of exceptions its existence or contents cannot be known by this court. Peterson v. George, *supra;* Brierly v. Federated Finance Co., *supra;* Bulger v. McCourt, *supra.*

The condition of the record prevents this court from knowing the evidence presented to the trial court or which part of the evidence before it was accepted and acted upon. It must therefore be presumed that the conclusion of the court was justified by the evidence and that it is correct. The fact that the trial court made no findings in its decree also makes it difficult for this court to know what issues were actually considered in the hearing on the motion for summary judgment. In his briefs the plaintiff contends that none of the issues presented were considered, whereas the defendants claim that certain issues specified in their brief were considered and ruled upon. We have no way of resolving this dispute and, under the authorities cited above, must decide this case solely upon the issue of whether the pleadings sustain the action of the trial court.

Nowhere does the plaintiff question the sufficiency of the pleadings to support the judgment, but we have examined them and conclude that they were sufficient. In determining whether or not the pleadings support the judgment, they must be taken as a whole, and con-

strued so as to support the judgment, if capable of such construction. The presumption is that the relief granted is authorized by the pleadings, and the burden is on him who attacks the judgment to show that it was not. 49 C. J. S., Judgments, § 48, p. 108; Solt v. Anderson, 67 Neb. 103, 93 N. W. 205. In making this determination the facts alleged in the pleadings will be accepted as true.

Assuming without deciding that the facts alleged in plaintiff's petition were sufficient to state a cause of action for an interpretation of the contract in question and a declaration of the rights of the plaintiff thereunder, and also presented a "justiciable issue," we note that the answer of the defendants, although admitting the execution of the contract in question by the parties, contains a general denial of the facts, and in addition allegations that the plaintiff did have an opportunity to read the entire contract before signing it and had certain provisions explained to him. It also contained allegations to the effect that after the commencement of this action, a subsequent replevin action was filed to repossess the automobile referred to in said contract, and that said automobile was in fact repossessed.

Considering for a moment the allegations last referred to, it may well have been that the "justiciable issue" between the plaintiff and the defendants was disposed of in that action, and that the question has now become moot. It would obviously have been possible for the plaintiff to raise the same issues and defenses in that replevin action that he attempts to raise in this action, and, if so, said issues must be considered as having been decided against him by the trial court. Since the bill of exceptions in this case was quashed we have no way of knowing what evidence was adduced by the plaintiff and received by the trial court with reference to the pleadings in the replevin action or the defenses raised in said action by the plaintiff herein who was a defendant in the replevin action. The point is that the pleadings, or more specifically the answer of the

defendants herein, is broad enough to permit a consideration of such defense by the trial court in the hearing on the motion for summary judgment. Of interest in this connection is the case of Zendman v. Harry Winston, Inc., 196 Misc. 924, 94 N. Y. S. 2d 878, in which the court held that a judgment declaring the right to ownership and possession of a ring was unnecessary where defendant counter-claimed in replevin demanding the ring or payment of its value, since the issue in both actions was the same and disposition in the replevin action of the question of ownership and right to possession would determine all issues between the parties.

It must also be remembered that the granting of declaratory relief is discretionary with the court and there is no absolute mandate compelling it to exercise its jurisdiction to grant such relief. Carlson v. Bartels, 143 Neb. 680, 10 N. W. 2d 671, 148 A. L. R. 658; Haynes v. Anderson, 163 Neb. 50, 77 N. W. 2d 674; 22 Am. Jur. 2d, Declaratory Judgments, § 9, p. 845, et seq. While the Uniform Declaratory Judgments Act provides that any person interested under a written contract or other writing constituting a contract may have determined any question of construction or validity arising under the contract and obtain a declaration of rights, status, or other legal relations thereunder, yet under certain conditions the courts will refuse to render declaratory judgments with reference to contracts and the rights growing out of them. Thus, a declaratory judgment will not be granted where there is no actual controversy, where the questions involved have become moot, where the judgment, if rendered, would not terminate the controversy, or where there is another adequate remedy available. 22 Am. Jur. 2d, Declaratory Judgments, § 21, p. 864, et seq. We have held that it is not within the province of this court to determine moot questions. Banning v. Marsh, 124 Neb. 207, 245 N. W. 775; State ex rel. Smrha v. General American Life Ins. Co., 132 Neb. 520, 272 N. W. 555.

The declaration will also be refused, where, in the court's opinion, it is inexpedient for some reason outside the record, such as public policy, or where the question involved might be raised again in some other way. Borchard, Declaratory Judgments (2d Ed.), pp. 302 to 304; Recall Bennett Committee v. Bennett, 196 Or. 299, 249 P. 2d 479.

We note that plaintiff alleges in his petition that the contract in question contravenes the public policy of this state, that the defendant GMAC holds $76,000,000 worth of contracts executed upon the form in question, and that the annual volume of the contracts entered into with this defendant, and with others upon forms with similar provisions, is somewhere between $300,000,000 and $500,000,000. If true, it is obvious that a general declaration of the invalidity of such contracts in this case might have widespread effects, reaching far beyond this particular case. In Custer Public Power Dist. v. Loup River Public Power Dist., 162 Neb. 300, 75 N. W. 2d 619, quoting from E. K. Buck Retail Stores v. Harkert, 157 Neb. 867, 62 N. W. 2d 288, 45 A. L. R. 2d 774, we stated: "The power of courts to invalidate contracts for being in contravention of public policy is a very delicate and undefined power which should be exercised only in cases free from doubt. It is not the province of courts to destroy the right to contract by enabling parties to escape their contractual obligations on the ground of public policy unless the preservation of the public welfare imperatively so demands." While courts should not be reluctant or niggardly in granting declaratory relief in the cases for which it was designed, they must be alert to avoid imposition upon their jurisdiction through obtaining futile or premature interventions, and should exercise a maximum of caution where a ruling is sought that would reach far beyond the particular case. Public Service Commission of Utah v. Wycoff Company, Inc., 344 U. S. 237, 73 S. Ct. 236, 97 L. Ed. 291.

In Graham v. Beauchamp, 154 Neb. 889, 50 N. W. 2d 104, we stated: "The use of a declaratory judgment, while discretionary with the court, is nevertheless dependent upon facts and circumstances rendering it useful and necessary. The court's discretion should be exercised with caution."

The trial court may well have determined under the facts before it that it was inexpedient to issue a declaration in the present case and that a determination on the merits should be deferred for some future action "free from doubt" in which the specific issues could be more clearly decided.

We conclude that the trial court did not err in sustaining the motion of the defendants for a summary judgment in this case and that its judgment dismissing the action should be affirmed.

AFFIRMED.

WILLARD HUNT, APPELLEE, V. CHICAGO, BURLINGTON AND QUINCY RAILROAD COMPANY, A CORPORATION, APPELLANT.
143 N. W. 2d 263

Filed June 3, 1966. No. 36162.

1. **Damages: Property.** Damages for the temporary injury to real property are measured by the loss sustained by the owner, and may include cost of restoration and repair not exceeding the diminution in value of the real estate, and reduction in value of the use or in rental value.
2. ———: ———. Damages for injury to personal property are measured by the value before injury of property destroyed; as to property injured but not destroyed, damages are measured either by its diminution in value or by the cost of restoration or repair, whichever is less.
3. **Trial: Damages.** An instruction which fails to state correctly all of the items and elements necessary to be considered by the jury in assessing damages is erroneous.

Appeal from the district court for Chase County: VICTOR WESTERMARK, Judge. Affirmed in part, and in part reversed and remanded.

Curtis & Curtis, for appellant.

Daniel E. Owens, for appellee.

Heard before CARTER, SPENCER, BOSLAUGH, BROWER, SMITH, and MCCOWN, JJ., and KUNS, District Judge.

KUNS, District Judge.

Plaintiff brought this action against defendant to recover damages alleged to have been caused by the negligent maintenance of a drain under defendant's railroad track in Enders, Nebraska. Defendant denied liability. Upon evidence introduced by the plaintiff only, the case was submitted to the jury, which returned a verdict for plaintiff in the amount of $2,500. Defendant's motion for new trial was overruled, and it has appealed, assigning error in the instructions relating to the measure of damages.

Briefly, plaintiff's evidence indicated that he was the owner of land abutting the railroad, purchased in 1956; the drain then existing was small and clogged frequently; he had made numerous requests to defendant to correct this condition, without success; and whenever a substantial rain occurred, the drain clogged and backed water upon his property. In a single cause of action, he complained of two particular occasions—in May 1962, and July 1963,—when damage was caused. In May 1962, flooding ruined a cesspool, and he disconnected it from his basement house and closed the opening through which water had come. Two power mowers and an electric motor were rendered valueless, the value thereof being stated at $235. In July 1963, his well was contaminated and numerous tools were rusted after the waters subsided. Plaintiff stated that the tools had been worth $1,000 before and $500 after the flooding. Plaintiff testified that, in his opinion, his property had been worth $2,500 before it was flooded and $500 afterwards.

Defendant interposed objections to the testimony regarding the depreciation in value of the real estate on

the ground that it did not reflect the proper measure of damages. The trial court overruled the objections and instructed the jury in instruction No. 9, that the measure of damages to the real estate was the difference between the market value immediately before the flooding on the several occasions and immediately thereafter. This instruction would be appropriate if the injury to plaintiff were permanent and not susceptible of correction. Plaintiff, however, had grounded his action upon the failure and neglect of defendant to clean the drain or to enlarge it so that it would clean itself as water passed through it. This constituted a temporary condition, even though it might have continued for a relatively long period. Whenever defendant provided adequate drainage, further injury to plaintiff's property would cease. Plaintiff was entitled to show the expense and the value of his labor in restoration of his property and also not exceeding the diminution in value of the real estate, loss of use, and other elements of temporary damage.

The general rule as to the measure of damages for injuries to real property is stated in 25 C. J. S., Damages, § 84, p. 920: "The measure of damages for a permanent injury to real property is usually the (difference between the) fair value of the property immediately before and immediately after the injury. The recovery for a temporary injury to real property is measured by the loss sustained by the owner, and may include the cost of restoration if less than the difference in value, and the diminution in the value of the use and enjoyment or rental value of the property during the time the injury exists." See, also, Koyen v. Citizens National Bank, 107 Neb. 274, 185 N. W. 413; Cattin v. City of Omaha, 149 Neb. 434, 31 N. W. 2d 300. The portion of instruction No. 9 relating to the measure of damages to the real property erroneously failed to state the rule as to temporary injury.

Defendant further complains of the statement in said

instruction that the measure of damage to personal property destroyed was its fair value immediately before destruction. As an abstract statement, this portion of the instruction is correct. It does not, however, take into consideration the evidence that some personal property was destroyed and that other personal property was depreciated. The general rule as to the measure of damage to property injured but not destroyed is stated in 25 C. J. S., Damages, § 83b, p. 907: "The measure of damages for an injury to personal property which has not been entirely destroyed is the difference between its value at the place immediately before and immediately after the injury, or, if such sum be less, the reasonable cost of repairs to restore the property to its previous condition." Numerous decisions by this court support this rule. The omission to state the rule as to the measure of damage to personal property injured but not destroyed was erroneous. The trial court should have instructed the jury correctly upon all of the items or elements of damage necessary to be considered in arriving at its verdict. See Linch v. Hartford Fire Ins. Co., 138 Neb. 110, 292 N. W. 27, 129 A. L. R. 1063.

The jury was correctly instructed upon the issues of negligence and causation, and its verdict against the defendant is amply supported by the evidence. To this extent, the judgment is affirmed. The judgment is reversed and the cause remanded, however, for a new trial upon the question of damages only.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED.

HELENE MEYER, SPECIAL ADMINISTRATRIX FOR HARVEY MEYER, DECEASED, ET AL., APPELLEES, V. BERNARD D. MEYER ET AL., APPELLANTS.
142 N. W. 2d 922

Filed June 3, 1966. No. 36231.

1. **Specific Performance: Frauds, Statute of.** In an action brought for specific performance of an alleged oral contract to convey land, the proof as to the alleged oral contract must meet the exacting test as to the quality of being clear, satisfactory, and unequivocal.
2. ———: ———. Acts of part performance necessary to enforce an oral contract to convey land must not only relate to the contract but must further constitute part performance of it to the extent that its nonfulfillment would amount to a fraud on the party who has partly performed.
3. **Executors and Administrators.** A special administrator has the power to initiate litigation to preserve the assets of the estate, and his authority in maintaining litigation is a continuing one until the appointment and substitution of a general administrator or executor.
4. **Equity: Appeal and Error.** Actions in equity on appeal to this court are triable de novo, subject, however, to the rule that when evidence on material questions of fact is in irreconcilable conflict, this court will, in determining the weight of the evidence, consider the fact that the trial court observed the witnesses and their manner of testifying, and must have accepted one version of the facts rather than the opposite.
5. **Equity.** A court of equity having obtained jurisdiction of a cause will retain it for all purposes, and render such a judgment as will protect the rights of the parties before it.

Appeal from the district court for Dodge County: ROBERT L. FLORY, Judge. Affirmed.

Richard L. Kuhlman and Ray C. Simmons, for appellants.

Lyle B. Gill, for appellees.

Heard before CARTER, SPENCER, BOSLAUGH, BROWER, SMITH, and McCOWN, JJ., and RONIN, District Judge.

RONIN, District Judge.

This is an action in equity wherein plaintiffs seek

specific performance of an alleged oral contract for the conveyance of the 160-acre home farm of the parties. This is a family controversy arising immediately after the accidental death of the only son of the Meyer family on January 15, 1963.

The facts essential to an understanding and disposition of the issues of this case are these: The defendants Bernard D. Meyer and Anna Meyer are husband and wife and the parents of five children, four of whom were daughters and constitute the remaining four defendants herein. All daughters were married and had left the home farm prior to the marriage of their brother, Harvey, who was the only son of Bernard and Anna. Bernard had owned and operated a 300-acre farm in Dodge County, Nebraska. Until his marriage at age 23 Harvey lived at home and farmed for his father without wages other than his keep and spending money. Harvey married Helene on January 20, 1938, and they lived on the home farm of 160 acres and farmed another adjoining 40-acre tract. Bernard and Anna moved at that time to the improvements on the remaining 100-acre tract. There was a close relationship between father and son and the father considered his son a good farmer. Harvey and Helene lived on the home place continuously for 25 years until the unfortunate accidental death of Harvey on January 15, 1963. Plaintiffs Lowell Meyer, Layne Meyer, and Lowene Meyer Uehling are the children of Harvey and Helene who survived him. Helene Meyer is also named plaintiff as an individual as well as in her capacity as special administrator of the estate of Harvey Meyer, deceased.

Plaintiffs allege in their petition that at the time of his death, Harvey had an oral contract with defendants Bernard D. Meyer and Anna Meyer, by the terms of which the said defendants were required to convey their interest in the home farm of 160 acres together with an adjoining strip of land comprising the windbreak for the farm house. In consideration of said promise of his

parents, Harvey agreed to continue to live on and to farm the land and further agreed to pay said defendants $17,600, which time of payment had been determined prior to Harvey's death to be March 1, 1963.

The trial court in its judgment entered after trial canceled the deed from Bernard and Anna to the four Meyer daughters and ordered specific performance of the oral contract by the defendants Bernard and Anna as to the 160-acre farm, but not including the adjoining windbreak tract. The conveyance was conditioned upon payment of the plaintiffs of the sum of $17,600 to the clerk of the district court for the said defendants. A showing was made that payment of this sum was made by plaintiffs. The motion for new trial filed by defendants was overruled by the court and the defendants thereafter perfected their appeal to this court.

In an action brought for specific performance of an alleged oral contract to convey land, the proof as to the alleged oral contract must meet the exacting test as to the quality of being clear, satisfactory, and unequivocal. Lunkwitz v. Guffey, 150 Neb. 247, 34 N. W. 2d 256; Overlander v. Ware, 102 Neb. 216, 166 N. W. 611. The principal issue in this lawsuit is whether the provisions of the oral contract in the instant case comply with the strict burden of proof required. We hold that it does.

A more detailed narration of the facts here is necessary for an understanding of the determination of this controversy. The record discloses that Harvey Meyer exercised complete control over the home place, being the southeast quarter of Section 22, Township 20 North, Range 7 East of the 6th P.M., Dodge County, Nebraska, from the time he assumed full possession in 1938 to the time of his death. In 1943 he built a large machine shed and later a dairy barn. He put in corn cribs with concrete bases and made general repairs to the house, buildings, and fences. He hired and paid contractors to do work, and used repairs as a deduction on his federal

income tax returns. In 1959 he had the land appraised for loan purposes. Exhibit 4 is an aerial photograph of the farm house with extensive and substantial improvements, most of which were constructed or substantially repaired by Harvey. The record shows that Bernard Meyer spent very little money on the place and gave Harvey a free hand in his farm operations.

Plaintiffs placed in evidence a 1943 check in the sum of $4,000 from Harvey to Bernard which they state was in full payment of all personal property and farm equipment of Bernard that Harvey purchased from his father in 1938.

These investments and operations of Harvey on the home farm were with the approval of his parents and support the contentions of the plaintiffs of an agreement that Harvey was eventually to have the home farm, rather than that of the usual landlord-tenant relationship which the defendants assert herein. In 1940 Harvey and Bernard entered into a formal written 1-year lease. In this regard plaintiffs' evidence is that by the provisions of the oral contract Harvey was to continue paying his parents on a rental basis until his father requested payment of the agreed sale price of $17,600, which sum represented the 160-acre home farm at $110 per acre. The lease entered into by and between the parties is not inconsistent with the alleged oral agreement of the parties to sell the premises.

Subsequent actions of the defendants after Harvey's death denote a complete change in their plans for future ownership of the home farm. On March 1, 1963, a written 1-year lease was prepared by Bernard Meyer which Helene Meyer executed at his request. On July 8, 1963, Bernard and Anna executed a deed to their entire 300-acre farm, which included the home farm, to their four daughters. Plaintiffs were not informed of this conveyance until they saw the account of it in the newspaper and after they had received a notice to quit on August 27, 1963. In September 1963, the plaintiffs

testified they called on Bernard and Anna at their home in Scribner for the purpose of discussing the alleged oral agreement that Harvey had with his parents.

Plaintiffs testify as to certain admissions made to them by Anna, but that Bernard became nervous and stated he might have a heart attack. It is noted that the defendants Bernard and Anna did not testify at the time of trial except by deposition. Bernard testified that he did not recall plaintiffs visiting him in September 1963. Anna remembered the visit, but stated that the farm was not discussed. In March 1964, after service of a 3-day notice to vacate, a complaint in forcible detention was brought by Bernard Meyer on April 14, 1964. On April 27, 1964, the present action was filed by plaintiffs.

All the plaintiffs except the youngest son, Layne, testified as to admissions of the defendants as to existence of the alleged oral contract between Harvey and his parents. Henry A. Gunderson, who had served as Harvey's attorney in the past, testified that Bernard and Harvey came to his office in about 1958 to consult with him as to how to annex the windbreak area to the home farm; that Bernard told him that he wanted Harvey to have the windbreak tract as well as the home farm; and that Harvey was his only son and that was why Harvey could build improvements just the way he wanted them.

Ray L. Schulze testified that he was an appraiser for the Federal Land Bank and that Harvey had him appraise the home farm for loan purposes in 1959. Earl Fauss also testified that he was a general contractor and had built the machine shed, crib, and granary, closed in the porch, and had done other work in the farm house for Harvey from 1945 to 1947.

The only defendant to testify at the time of trial was Irene Havekost, daughter of Bernard and Anna, who was present at the time Helene signed the lease at Bernard's request. She denied the testimony of Helene as to the fact that the papers were to be in Harvey's name. The depositions of Bernard and Anna, who were

85 and 81 years of age at the time of trial, were read into evidence. The county clerk identified the 1940 farm lease between Bernard and Harvey. No further evidence was offered by defendants.

Defendants contend that it is incumbent upon the plaintiffs to prove acts of part performance which relate solely to the oral contract to be enforced by specific performance. § 36-106, R. R. S. 1943; Gerard v. Steinbock, 169 Neb. 828, 101 N. W. 2d 194. We agree as to this statement of the law, but hold that plaintiffs have proved acts of part performance necessary to be entitled to specific performance of the oral contract, to the extent that its nonfulfillment would amount to a fraud on them. Herbstreith v. Walls, 147 Neb. 805, 25 N. W. 2d 409. Harvey remained in possession and farmed the home place for his parents for 25 years in compliance with his oral agreement with his parents. It is to be noted that the agreement for the sale price of the farm at $110 per acre was not nearly the bargain in 1938 as it obviously is at the present time. The fact that Harvey made extensive permanent improvements at his expense and far in excess of those of the usual farm tenant indicates his reliance on the agreement with his parents rather than its actual performance. His management of the farm was never interfered with or questioned, and the entire actual circumstances of the relationship of the parties over a 25-year period are not that of an ordinary farm tenancy, but that of the right to ownership as well. Cobb v. Macfarland, 87 Neb. 408, 127 N. W. 377.

Another assignment of error of the defendants is that an oral contract by a husband and wife to convey homestead land is void as provided in section 40-104, R. R. S. 1943. This issue was not asserted by defendants in the district court and they will not be heard in this court to urge that defense. O'Connor v. Waters, 88 Neb. 224, 129 N. W. 261. In this connection it is significant that plaintiffs' evidence is to the fact that in 1955 the oral agreement of the parties was modified at the request of

Bernard to reduce the acreage involved from the 200 acres that Harvey was farming since 1938 to the 160 acres of the home farm. At this time the evidence is quite clear that Bernard and Anna no longer had a homestead interest in the home farm; in fact it is manifest that they abandoned it at the time of the marriage of Harvey and Helene. Martin v. Norris Public Power Dist., 175 Neb. 815, 124 N. W. 2d 221.

We concur in the finding of the trial court that the windbreak tract was not included within the provisions of the oral contract to convey real estate. There is nothing in the record as to the exact size, location, or legal description of the windbreak tract and we hold that this later alleged modification of the provisions of the oral contract fails to comply with the necessary burden of proof.

Defendants assign as error that the district court had no jurisdiction in this case because of a defect of parties plaintiff, for the reason that Helene Meyer in her capacity as special administrator was not a proper party. In this connection section 30-318, R. R. S. 1943, authorizes a special administrator to commence and maintain suits and shall preserve the assets of the estate for the executor or administrator who may afterwards be appointed. It is clear that Helene Meyer had the power to initiate this litigation.

Section 30-321, R. R. S. 1943, provides that the power of the special administrator shall cease upon granting letters testamentary or of administration "and the executor or administrator may be admitted to prosecute to final judgment any suit commenced by such special administrator." We reject this assignment of error by defendants as the record does not disclose any general administrator or executor has ever been appointed, and by construction of the foregoing statutes the power of the special administrator herein is a continuing one until legally substituted for or terminated.

Defendants assign as error the determination of heir-

ship and the interests of the plaintiffs in the real estate in issue by the district court, it being a matter for determination exclusively by the county court. The first six paragraphs of plaintiffs' petition pertaining to the interests of plaintiffs in the property of Harvey Meyer, deceased, were expressly admitted by defendants' answer and therefore stand judicially admitted as far as the parties to this action are concerned, and the defendants are in no position to make complaint herein. A court of equity having obtained jurisdiction of a cause will retain it for all purposes, and render such a judgment as will protect the rights of the parties before it. Hackbarth v. Hackbarth, 146 Neb. 919, 22 N. W. 2d 184.

This is an action in equity and the law requires this court on appeal to try the issues of fact complained of de novo and to reach an independent conclusion without reference to the findings of the district court. This review and examination of the record is subject to the rule that when evidence on material questions of fact is in irreconcilable conflict, this court will, in determining the weight of the evidence, consider the fact that the trial court observed the witnesses and their manner of testifying and must have accepted one version of the facts rather than the opposite. Lortscher v. Winchell, 178 Neb. 302, 133 N. W. 2d 448; Stibor v. Farrell, 177 Neb. 437, 129 N. W. 2d 449.

For the reasons stated, the action of the district court was correct and is affirmed.

AFFIRMED.

EVERETT SATTERFIELD, APPELLANT, V. LESTER WATLAND, APPELLEE.

143 N. W. 2d 124

Filed June 3, 1966. No. 36237.

1. **Appeal and Error.** **In reviewing the evidence where a jury has returned a verdict for the defendant, the defendant must have**

the benefit of any and all reasonable inferences deducible from the proof.

2. **Venue: Appeal and Error.** Unless an abuse of discretion is shown, this court will not disturb the ruling of the trial court upon a motion for a change of venue.
3. **Trial: Evidence.** A jury is not required to accept as absolute verity every statement of a witness not contradicted by direct evidence. The persuasiveness of the evidence may be destroyed even though not contradicted by direct evidence.
4. **Appeal and Error.** A jury verdict based upon conflicting evidence will not be set aside unless it is so clearly wrong as to induce the belief on the part of the reviewing court that it must have been found through passion, prejudice, mistake, or some means not apparent in the record.
5. ———. It is not the province of this court in reviewing the record in an action at law to resolve conflicts in or weigh the evidence.
6. ———. A party requesting instructions on a certain theory cannot be heard to complain on appeal that the trial court gave other instructions on the same theory.

Appeal from the district court for Loup County: WILLIAM F. MANASIL, Judge. Affirmed.

Vogeltanz & Kubitschek, for appellant.

Leo F. Clinch, for appellee.

Heard before CARTER, SPENCER, BOSLAUGH, BROWER, SMITH, and MCCOWN, JJ., and MURPHY, District Judge.

MURPHY, District Judge.

This was an action brought by the plaintiff, Everett Satterfield, against the defendant, Lester Watland, to recover for personal injuries and property damages resulting from a collision between motor vehicles owned and operated by the respective parties. A jury trial in district court resulted in a verdict and judgment for the defendant. Plaintiff appeals from the order overruling a motion for new trial. Although we held in Vacanti v. Montes, *ante* p. 232, 142 N. W. 2d 318, that: "In reviewing the evidence where a jury has returned a verdict for the defendant, the defendant must have the benefit of any and all reasonable inferences deducible

from the proof," it is here appropriate to point out at least the principal factual disputes between the parties, since plaintiff assigns as error the overruling by the trial court of his motion for a change of venue.

The accident occurred about 10 o'clock a.m., November 24, 1963, on U. S. Highway No. 183, approximately 18 miles northwest of Taylor, Nebraska. The road, at least 20 feet wide, had a graveled surface which at the time was slippery on account of frost which had settled. Both vehicles had traveled northwest from Taylor. The front of plaintiff's Ford Ranchero pickup collided with the rear of defendant's Chevrolet truck, when both vehicles were on the right half of the highway. After the impact, plaintiff testified he observed skid marks about 20 feet long behind his pickup and leading up to it. A highway patrolman called by plaintiff to testify stated that the distinguishable skid marks were 50 feet long and were made by plaintiff's vehicle. The highway in the vicinity is level and straight except for a slight curve several hundred yards northwest of the point of impact.

Plaintiff testified concerning the accident generally as follows: As he left Taylor he saw defendant's truck ahead of him and followed it at speeds of 40 to 50 miles per hour. After traveling about 9 miles, he approached close enough to defendant's truck to be able to identify it, within 200 yards or less. He never saw, and defendant never made, any signal of an intent to stop or turn. Shortly before the accident, when his pickup was approximately 150 yards behind defendant's truck, he observed the truck start to slow down. He slowed down also because he did not know what defendant intended to do, and then decided to pass defendant's truck. He accelerated, and when he reached a point about 40 feet behind the truck, pulled to the left to pass. His pickup was traveling 5 or 10 miles per hour faster than the truck, which was traveling 20 or 25 miles per hour. His vision was obscured somewhat by the approaching curve

and foliage. As he came even with defendant's truck he observed an oncoming car driven by Carroll Bohy some 400 yards ahead, decided he did not have sufficient time to pass, so braked his pickup and fell in approximately 25 or 30 feet behind defendant's truck. Defendant, still without signaling, almost immediately stopped his truck, and although plaintiff applied his brakes, he was unable to avoid the collision. After the impact defendant moved his truck forward a distance which plaintiff estimates was some 20 feet, but which the highway patrolman's testimony would indicate was 48 feet. Defendant, at the scene, stated he did not see plaintiff behind him.

The highway patrolman, in addition to describing measurements he made at the scene, testified that he observed that defendant's turn signals or taillights were broken out, and that defendant stated he was going to stop and talk to Carroll Bohy.

Carroll Bohy, called as a witness on behalf of plaintiff, testified that he was driving toward Taylor on U. S. Highway No. 183, that he observed defendant's oncoming truck, that he did not observe plaintiff's pickup until he was almost to the truck, and that when he did observe the pickup it was six or seven car lengths behind the truck. He did not see the accident, but he did stop some 200 feet beyond it and returned to the scene where he observed the vehicles 50 or 60 feet apart.

Defendant testified that he was driving his truck north from Taylor on U. S. Highway No. 183 at a speed of 40 or 50 miles per hour. He observed the oncoming car of Carroll Bohy and started to slow down by applying his brakes. When he had slowed to approximately 25 miles per hour he heard a noise, from which he concluded something had happened. He continued slowing and stopped. He only stopped once. His taillights, which are activated by applying his brakes, were in good working order before the accident and were broken as a result of the accident. Afterwards he replaced them

and they worked. Defendant did not testify, and was not asked, as to whether or not he ever observed plaintiff's pickup prior to the accident.

Plaintiff separately states six assignments of error, which may, however, be summarized as follows: (1) The court erred in overruling plaintiff's motion for change of venue; (2) the verdict of the jury appears to have been given under the influence of passion and prejudice, was clearly against the weight and reasonableness of the evidence, and was clearly contrary to the law; and (3) the court erred in giving the first half of instruction No. 6 and in giving instruction No. 11.

Plaintiffs motion for a change of venue alleged that "most of" the 600 potential jurors in Loup County, Nebraska, would be partial and biased against him as the result of a suit brought by him against the members of the county board of commissioners in 1955, and because of his extensive holdings. The motion was supported by plaintiff's affidavit that he had unsuccessfully tried to obtain a number of witnesses to testify concerning the issues, but they refused to testify or sign an affidavit because of prejudice or fear of offending county officials, and that he would be unable to obtain a fair and impartial jury trial because of animosity toward him. The motion was also supported by identical affidavits of four other individuals who stated that they were acquainted with plaintiff, that they knew there were about 600 voters in the county, and that they believed, because plaintiff had filed tax actions and road actions in which the county board of supervisors was involved, "that it would be impossible because of strong feeling of animosity against the said Everett Satterfield, for him to have a fair and impartial trial before a jury in the above case." Defendant filed a written objection to the motion. The matter was heard, apparently on the motion, objection, and affidavits, and the motion denied.

"Unless an abuse of discretion is shown, this court will not disturb the ruling of the trial court upon a

motion for a change of venue." Heiden v. Loup River Public Power Dist., 139 Neb. 754, 298 N. W. 736.

The record here does not reflect the proceedings with regard to the selection of the jury. Particularly, it shows nothing concerning the voir dire examination or the exercise of challenges. It does reflect that the verdict was unanimous. It further reflects that on the day plaintiff filed his petition in Loup County, he sought service of summons on defendant in Garfield County, and thereafter obtained such service. The four identical affidavits referred to above do not state any sources of information. See Hinton v. Atchinson & N. R. R. Co., 83 Neb. 835, 120 N. W. 431. The action by plaintiff against the county board of commissioners in 1955 is quite remote in point of time. The burden here is on plaintiff. From a careful examination of the entire record, we are of the opinion that the order of the trial court overruling the motion for change of venue was the proper one. No abuse of discretion has been shown, and none is implicit in the jury's verdict. The evidence requires neither a finding of negligence on the part of defendant, nor of freedom from negligence on the part of plaintiff.

The trial court submitted the issues of defendant's negligence and plaintiff's contributory negligence to the jury by instructions of which plaintiff makes no complaint other than as above stated.

A jury is not required to accept as absolute verity every statement of a witness not contradicted by direct evidence. The persuasiveness of the evidence may be destroyed even though not contradicted by direct evidence. Ripp v. Riesland, 176 Neb. 233, 125 N. W. 2d 699. Though plaintiff himself testified he attempted to pass defendant's truck, the witness Bohy testified that he never saw plaintiff's pickup in a passing position, and plaintiff's own testimony indicates that defendant never saw plaintiff's pickup in a passing position. The jury may well have disregarded plaintiff's direct testimony,

and determined that plaintiff did not in fact attempt to pass.

Under the rule quoted from the case of Vacanti v. Montes, *supra*, it can also be said that the jury was at liberty to, and may have, reached any one or more of the following conclusions: Plaintiff failed to observe defendant's rear signal lights; plaintiff failed to observe the oncoming vehicle driven by Carroll Bohy at a time when he should have observed it; and plaintiff failed to keep his pickup under proper control, particularly in view of the slippery condition of the highway and his knowledge that defendant was slowing the speed of his truck. It cannot be said that the verdict of the jury was against the weight of the evidence, or was so clearly wrong as to induce the belief that it was the result of passion and prejudice, or was contrary to law. Grimminger v. Cummings, 176 Neb. 142, 125 N. W. 2d 613. It is not the province of this court in reviewing the record in an action at law to resolve conflicts in or weigh the evidence. Hopwood v. Voss, 174 Neb. 304, 117 N. W. 2d 778.

The issues tried and presented for review here were of disputed fact and for determination by the jury. It follows therefore that the assignments of error now under consideration may not be sustained.

Plaintiff's final assignments of error, relating to the giving by the trial court of certain instructions, do not attack the instructions as incorrect statements of law. Rather, plaintiff argues that the instructions concern the duties and obligations of one motorist following another, a fact situation not reflected by the evidence. What has been stated above regarding the acceptance by the jury of plaintiff's testimony upon this fact issue should be sufficient to dispose of these assignments. It should be further pointed out, however, that even if the jury accepted plaintiff's testimony, there was a period of time when plaintiff's pickup was behind defendant's truck after the attempt to pass. Whether or not that

period of time was sufficient to constitute "following" would, in any event, be a question for the jury to determine. Finally, and dispositive of the issue, the transcript reflects that prior to trial plaintiff filed the following requested instruction, which he never withdrew: "The driver of an automobile following another, while he must obey the law, is not bound to anticipate that the driver of the car ahead is going to come to a sudden and abrupt stop." A party requesting instructions on a certain theory cannot be heard to complain on appeal that the trial court gave other instructions on the same theory. Stevens v. County of Dawson, 172 Neb. 585, 111 N. W. 2d 220.

The judgment of the trial court is correct and is affirmed.

AFFIRMED.

W. E. ONSTOTT ET AL., APPELLANTS, V. ILER L. OLSEN ET AL., APPELLEES.
142 N. W. 2d 919

Filed June 3, 1966. No. 36238.

1. **Boundaries: Adverse Possession.** Where a fence is constructed as a boundary fence between two properties, and where the parties claim ownership to the fence for the full statutory period of 10 years, and are not interrupted in their possession or control during that time, they will, by adverse possession, gain title to such land as may have been improperly enclosed with their own.
2. **Appeal and Error.** While the law requires this court, in determining an appeal in an equity action involving questions of fact, to reach an independent conclusion without reference to the findings of the district court, this court will, in determining the weight of the evidence where there is an irreconcilable conflict therein on a material issue, consider the fact that the trial court observed the witnesses and their manner of testifying, and must have accepted one version of the facts rather than the other.
3. **Adverse Possession.** The claim of title to land by adverse pos-

session must be proved by actual, open, exclusive, and continuous possession under a claim of ownership for the statutory period of 10 years. The possession is sufficient if the land is used continuously for the purpose to which it may be in its nature adapted.

Appeal from the district court for Banner County: TED R. FEIDLER, Judge. Affirmed.

Van Steenberg, Winner & Wood, for appellants.

W. H. Kirwin, for appellees.

Heard before CARTER, SPENCER, BOSLAUGH, BROWER, SMITH, and MCCOWN, JJ., and SCHEELE, District Judge.

SPENCER, J.

This action involves two principal questions. First, whether a fence now existing between Sections 3 and 4 in Township 19 North, Range 55 West of the 6th P. M. in Banner County is a division fence; and, second, whether either a public or private easement exists for the use of a road west of the fence line.

Plaintiffs are the record owners of the southwest quarter of the southwest quarter of Section 3, hereinafter called the Onstott forty. Defendants are the record owners of the southeast quarter of the southeast quarter of Section 4, hereinafter called the Olsen forty.

A survey by the county surveyor on January 14, 1961, indicates that the fence in question is actually 10.4 feet east of the section line on the southernmost point of the section, and 69.5 feet east of the section line on the north boundary of the north line of the two forties. It is to be noted that on exhibit No. 1, which is a drawing furnished by the county surveyor on his survey, a 1½-inch pipe and stone were found in the southwest corner of the Onstott forty, 9.4 feet east of the marker placed by the county surveyor to mark the southernmost point of the section line, suggesting some early survey had placed the section line at that point.

Plaintiffs' evidence is to the effect that William N.

Onstott purchased the Onstott forty in 1925. There was a fence which was supposed to be on the section line separating the two forties. At that time the Olsen forty was being farmed but the Onstott forty was used for grazing cattle. In 1927 William N. Onstott built a new fence, and to "get out of that ridge of sand" that had blown into the fence line he testified he placed it east of the old fence, entirely on the Onstott forty. At that time, plaintiffs' evidence would indicate that there was a trail road west of the fence from ½ mile north to the south section road, with gates at the south and north ends of the Olsen forty. The Onstotts testified they replaced the gates on occasion, but that they usually were left open. Plaintiffs testify to the hauling of machinery, gravel, and farm produce across this road from 1925 to 1959. Plaintiffs also adduced evidence to the effect that the road was on occasion also used by the general public. The fence, rebuilt in 1927, remained until November 1959, when it was taken down by William E. Onstott, who had entered into a contract to purchase the Onstott forty from his parents in 1950. The fence was later replaced by Iler L. Olsen, one of the defendants, in the some location except for a slight jog to avoid a power pole. When the fence was replaced, the defendants completely closed off any access to the purported trail road, and plowed it up.

Defendants contend that the fence has always been on the line of the original government survey, and refer to a stone near the south road as marking the southernmost point of the section line between the forties. This would place it approximately on the line where the 1½-inch pipe and stone were found 9.4 feet east of the section line, as shown by the last survey.

Defendants' witnesses testified that there never was a trail road west of the fence on the Olsen forty, but that one did exist east of the fence and it was used until the Onstott forty was plowed in recent years. The trail road went west of the fence in the forty, north of the Olsen

forty. Defendants, who acquired their forty in 1927, farmed it east and west as close to the fence as possible, and used the end for a turn row. It is their testimony that when they acquired the forty in 1927 it was being farmed clear to the fence. Defendants' evidence also indicates that there was a fence on the south of the Olsen forty so that it was completely enclosed, and that there was no gate in the southeast corner until they put one there in 1943 to provide access to land across the county road to the south owned by Iler Olsen's brother.

In 1956 a bridge across Pumpkin Creek, which was located north of the respective forties and south of the Onstott buildings, washed out. Thereafter, the plaintiffs drove across the east end of the Onstott forty to haul produce from their lands to the north, without objection from the defendant until a dispute developed in 1959. William E. Onstott attempted to get the county commissioners of Banner County to open a road west of the fence, but they refused to do so. In November 1959, he removed the fence. After the fence was removed, defendants stopped the plaintiffs from crossing what they considered their property, and replaced the fence. In doing this, they eliminated the gate at the southeast corner, excluding the plaintiffs from the area. This action resulted.

Each of the parties produced several witnesses to sustain their respective contentions. It will serve no useful purpose to detail that evidence further herein. Suffice it to say that it is in irreconcilable conflict. The court made a personal inspection of the area involved, but this was 5 years after the fence was replaced, and any road, if one existed, would have been completely effaced.

It is defendants' contention that the fence is a division fence between the two forties. William N. Onstott did testify that the fence he replaced in 1927 was supposed to be on the section line separating the two forties. Defendants insist the recent surveys were incorrect and contend that the fence is directly over the government sur-

vey line. It is their further contention that all the land west of the fence has been enclosed by fences since they purchased their forty in 1927; and that they have used it exclusively for their own purposes under a claim of ownership since 1927.

In Ohme v. Thomas, 134 Neb. 727, 279 N. W. 480, we held: "Where a fence is constructed as a boundary fence between two properties, and where the parties claim ownership to the fence for the full statutory period of ten years, and are not interrupted in their possession or control during that time, they will, by adverse possession, gain title to such land as may have been improperly inclosed with their own."

While the law requires this court, in determining an appeal in an equity action involving questions of fact, to reach an independent conclusion without reference to the findings of the district court, this court will, in determining the weight of the evidence where there is an irreconcilable conflict therein on a material issue, consider the fact that the trial court observed the witnesses and their manner of testifying, and must have accepted one version of the facts rather than the other. Mentzer v. Dolen, 178 Neb. 42, 131 N. W. 2d 671. It is apparent that the trial court accepted the defendants' version of the facts in determining that the fence was a division fence, and constituted the east boundary of the Olsen forty. We affirm this finding.

The evidence is undisputed that the fence has been in its present location since 1927. There is a dispute as to whether or not at that time William N. Onstott rebuilt the fence in its then location, or moved it slightly to the east. Defendants claim that their forty was completely enclosed during this entire period. Plaintiffs dispute this. Plaintiffs' evidence, however, indicates some enclosure because they testify that there was a gate at the southern end which permitted access to the area west of the fence. Defendants' evidence is to the effect that there was no gate permitting access to the Olsen forty

from the south until they put one in for their own convenience in 1943.

While an inspection of the premises by the trial court may not have been helpful in determining whether a trail road ever existed west of the fence, he did have an opportunity to observe the witnesses and their manner of testifying, and on the record herein we cannot say that he did not reach the right conclusion in determining that the fence was a division fence between the two forties.

There is ample evidence from which it can be determined that the defendants claimed title to the land to the fence line since 1927; that they maintained actual, open, exclusive, and continuous possession during that period under a claim of ownership; and that any use made of the land by others during that period was purely permissive.

In Krimlofski v. Matters, 174 Neb. 774, 119 N. W. 2d 501, we held: "The claim of title to land by adverse possession must be proved by actual, open, exclusive, and continuous possession under a claim of ownership for the statutory period of 10 years. The possession is sufficient if the land is used continuously for the purpose to which it may be in its nature adapted."

What has been said heretofore also disposes of plaintiffs' claim of a public or private easement for the use of a road west of the fence line. We affirm the trial court's finding that the plaintiffs failed to prove the existence of a road or a road easement west of the fence line over the Olsen forty.

Of the Onstott witnesses, four of them testified to use of the property about the time the bridge over Pumpkin Creek was out. Of the others, other than the Onstotts, the brother of one testified for the Olsens; one claimed to have used the road for 6 or 7 years in the 1930s, but did not recall any fence; and the other testified that he used the road first in 1913 when he had worked for former owners, that he had used it occasionally while employed by the Onstotts, and had last used it in 1961.

The testimony is undisputed that the area was completely closed off early in 1960. All of the Olsen witnesses testified positively that there was no trail road west of the fence across the Olsen property. On the record, it cannot be said that the plaintiffs sustained their burden of proof on the existence of a road or an easement.

For the reasons given, we affirm the judgment herein.

AFFIRMED.

EDA V. ROAN, APPELLANT, V. JAMES BRUCKNER, APPELLEE.
143 N. W. 2d 108

Filed June 3, 1966. No. 36244.

1. **Landlord and Tenant.** In the absence of express contract to the contrary, a tenant takes demised premises as he finds them, and there is no implied warranty by the landlord that they are safe or fit for occupancy.
2. ———. A landlord is under no duty to change the visible form and mode of construction of leased premises in order to make the premises safe for his tenant, nor is he bound to remove obvious sources of danger; as to these the tenant assumes the risk.
3. ———. The general rule is that guests and invitees of a tenant derive their right to enter upon leased premises through the tenant, and have the same but no greater right to proceed against the landlord for personal injuries resulting from alleged defects on the premises than the tenant has.
4. ———. Subject to specific exceptions, the lessor of land is not liable for bodily harm caused to his lessee, or others upon the demised land with the consent of the lessee or sublessee, by any dangerous condition, whether natural or artificial, which existed when the lessee took possession.
5. **Negligence.** A licensee may be defined as a person who is privileged to enter or remain upon the premises of another by virtue of the possessor's express or implied consent, but who is not a business visitor.
6. ———. The real difference between an invitee and a licensee lies in the purpose of the invitation. If the invitation relates to the business of the one who gives it or for the mutual advantage of both parties of a business nature, the party receiving it is an invitee. If it is an invitation for the convenience, pleasure,

or benefit of the person enjoying the privilege it is only a license and the person receiving it is a licensee.

Appeal from the district court for Douglas County: DONALD J. HAMILTON, Judge. Affirmed.

Frost, Meyers & Farnham and Frederick J. Stoker, for appellant.

Gross, Welch, Vinardi, Kauffman & Schatz, for appellee.

Heard before CARTER, SPENCER, BOSLAUGH, BROWER, SMITH, and MCCOWN, JJ., and SCHEELE, District Judge.

SCHEELE, District Judge.

This is an action in which plaintiff seeks to recover damages for personal injuries sustained by her on July 25, 1962, when she fell down the basement stairway in a house owned by defendant and leased by him to plaintiff's granddaughter, Joanne Schoenfeld.

The case proceeded to trial before a jury and at the conclusion of plaintiff's evidence, defendant moved for a dismissal or in the alternative for a directed verdict. The trial court sustained defendant's motion and dismissed the action. Plaintiff's motion for a new trial was overruled and plaintiff has perfected her appeal.

In sustaining defendant's motion to dismiss, the trial court made specific findings in substance, that plaintiff's status was that of a licensee on the premises; that the duties and liabilities of a landlord to persons on leased premises by invitation of the tenant are ordinarily the same as those owed to the tenant; that a landlord is not liable for bodily harm caused to his tenant, or others upon the demised land with consent of the tenant, by reason of any dangerous condition, whether natural or artificial, which existed when the tenant took possession, but only for wanton or willful acts or for failure to warn of a hidden peril or an unknown danger; that the condition on the premises was not a hidden peril or unknown dangerous condition and that plaintiff had knowl-

edge and notice of the condition; that defendant was not guilty of negligence; and that plaintiff's contributory negligence was the proximate cause of the accident.

Plaintiff assigns as error the findings and ruling of the trial court in dismissing her action and in overruling her motion for a new trial.

The undisputed evidence introduced by plaintiff at the trial may be summarized as follows:

On July 25, 1962, plaintiff who was 79 years old at the time, accepted the invitation of her granddaughter, Joanne Schoenfeld, to visit the latter's home at 3603 Corby Street, Omaha, Nebraska. The occasion was a family gathering attended by several of plaintiff's children and grandchildren. The invitation included giving plaintiff a home permanent. Plaintiff brought her own preparation and was given the home permanent by one of her daughters and several granddaughters in the kitchen of Joanne's home. After the permanent plaintiff offered her granddaughters some money to pay for the permanent and put some money on the kitchen table. There is evidence that the granddaughters did not accept the money. Neither Joanne nor her husband were in the hairdressing business nor did they or anyone else conduct any type of business in the home.

When plaintiff first arrived at the premises, for her first visit, Joanne showed her around the house and showed her the bathroom and unhooked and opened the door to the basement which adjoined the door to the bathroom. Plaintiff then commented on how steep the basement stairway was. In order to show the basement stairway to plaintiff it was necessary to unhook the door and after showing plaintiff the basement stairway, Joanne again hooked the door shut.

The basement door and bathroom door were practually identical. They were 6 inches to 8 inches apart, on the same level, and both swung inward. The door knobs were right together. Both were of the same white color. They were in the hallway between the

kitchen and dining room and there was no artificial light in the hallway although windows in an outside door in the hallway and in adjoining rooms admitted some natural light. Both doors opened inward. The basement door opened directly onto a flight of steps which had no landing or handrails. Light switches for both the basement stairway and bathroom were inside each door.

Shortly after the permanent was completed, plaintiff, who had been sitting at the kitchen table, asked Joanne where the bathroom was. Joanne said, "Around the corner." Plaintiff then came out of the kitchen, opened the hook on the basement door, took one step and disappeared in the stairwell, sustaining severe injuries in the fall. She did not recognize it was the door to the basement.

Joanne and her husband had rented the five room frame house from defendant in the spring of 1962. Defendant had purchased the house about 1949 and had lived in it about 10 years before renting it out. When he bought the house, it had a dirt basement with the entry to the basement on the outside. He remodeled the house about 1952 by building a wooden block foundation on the southern part of the house and adding a kitchen and bathroom, doing most of the work himself. He installed the hook on the basement door. No structural changes or remodeling were done after the premises were rented to Joanne and her husband. There were no changes in the doorways to the bathroom or basement and none were requested.

It is well established in this jurisdiction that: "In the absence of express contract to the contrary, a tenant takes demised premises as he finds them, and there is no implied warranty by the landlord that they are safe or fit for occupancy. * * *

"A landlord is under no duty to change the visible form and mode of construction of leased premises in order to make the premises safe for his tenant, nor is he bound to remove obvious sources of danger; as to

these the tenant assumes the risk. * * *

"A landlord is not liable to his tenant for any defects existing in the demised premises at the time of the lease that are perceptible to the senses or that can be discovered by reasonable inspection or examination." Roberts v. Rogers, 129 Neb. 298, 261 N. W. 354.

In Van Avery v. Platte Valley Land & Investment Co., 133 Neb. 314, 275 N. W. 288, this court held: "It is therefore unquestionably the rule generally that guests and invitees of the tenant derive their right to enter upon the premises leased, through the tenant, and have the same but no greater right to proceed against the landlord for personal injuries resulting from alleged defects on the premises than the tenant has." See, also, Sipprell v. Merner Motors, 164 Neb. 447, 82 N. W. 2d 648.

In the latter case with reference to the lessee and others it was said: "Subject to specific exceptions, the lessor of land is not liable for bodily harm caused to his lessee, or others upon the demised land with the consent of the lessee or sublessee, by any dangerous condition, whether natural or artificial, which existed when the lessee took possession." See, also, Anderson v. Valley Feed Yards, Inc., 175 Neb. 719, 123 N. W. 2d 839.

Plaintiff complains of the trial court's finding that she was a licensee.

A licensee may be defined as a person who is privileged to enter or remain upon the premises of another by virtue of the possessor's express or implied consent, but who is not a business visitor.

A business visitor is a person who is expressly or impliedly invited or permitted to enter or remain on premises in possession of another for a purpose directly or indirectly connected with the business of the possessor or with business dealings between them.

In Von Dollen v. Stulgies, 177 Neb. 5, 128 N. W. 2d 115, this court said: "The law places those who come upon the premises of another in three classes: Invitees to whom an affirmative duty exists to anticipate their

presence and keep the premises safe; a licensee who comes on the premises by virtue of the possessor's consent, whether given by invitation or permission, to whom no duty is owed except not to willfully or wantonly injure; and, last, trespassers who are neither suffered or invited to enter. Lindelow v. Peter Kiewit Sons', Inc., supra; Malolepszy v. Central Market, Inc., supra."

In Lindelow v. Peter Kiewit Sons', Inc., 174 Neb. 1, 115 N. W. 2d 776, it is said: " 'An "invitee" is defined as a person who goes on the premises of another in answer to the express or implied invitation of the owner or occupant on the business of the owner or occupant or for their mutual advantage.' 65 C. J. S., Negligence 43 (1), p. 508. The same rule appears to be recognized in Restatement, Torts, § 332, p. 897. * * *

"The authorities cited and the cases clearly hold however that a license may result from an invitation making one a licensee or, on the other hand, may be such as to make one an invitee. The real difference is the purpose of the invitation. If the invitation relates to the business of the one who gives it or for the mutual advantage of both parties of a business nature, the party receiving it is an invitee. If it is an invitation for the convenience, pleasure, or benefit of the person enjoying the privilege it is only a license and the person receiving it is a licensee.

"Many courts speak of those who receive invitations for matters not connected with business as social guests. They are however but licensees. The matter is discussed in 38 Am. Jur., Negligence, § 117, p. 778. * * *

"It appears from an examination of the authorities that in order to be an invitee on the premises of another the invitation of the owner or occupant must be related with the business of the owner or occupant or to their mutual advantage."

While plaintiff in this case was on the premises as the result of an "invitation" in the layman's sense of that word, it would appear from the evidence that her legal

status was that of a licensee.

In the terminology adopted by some courts plaintiff would be described as the "social guest" in the home of her granddaughter. But even in those jurisdictions her legal status in circumstances similar to those presented here has been held to be that of a licensee. See Annotation, 25 A. L. R. 2d, § 2, p. 600, and § 3, p. 601.

The evidence in this case does not establish that the invitation related to the business of the one who gave it or for the mutual advantage of both parties *of a business nature.* Instead the evidence does establish that the invitation was for the convenience, pleasure, or benefit of the plaintiff. Therefore we hold that plaintiff was a licensee and not an invitee on the premises.

The evidence further establishes that when plaintiff first arrived on the premises she was shown the bathroom and basement doors which were adjacent and then she commented on how steep the basement stairway was. This visible form and mode of construction existed at the time of the lease and for many years prior thereto. The condition was perceptible to the senses and could be discovered by reasonable inspection or examination. Since the plaintiff was made aware of the condition the defendant had no duty to warn her of it.

In the light of our determination that the plaintiff was a mere licensee on the premises at the time of the accident and that no duty was owed her except not to injure her by willful and wanton conduct, it is unnecessary to discuss the other questions raised in this appeal. The district court came to the same ultimate conclusion by sustaining defendant's motion to dismiss. Its judgment is correct and is affirmed.

AFFIRMED.

HAROLD E. SCOFIELD, APPELLEE, V. JOHN HASKELL, APPELLANT.

143 N. W. 2d 120

Filed June 10, 1966. No. 36191.

See *ante* p. 324, for majority opinion.

KUNS, District Judge, dissenting.

Although I concur entirely with the rules of law stated in the majority opinion, as expressed in the several syllabi and as applied to the facts in the case, I respectfully dissent from the portion of the court's opinion and order with reference to the limitation of the retrial to the issue of liability.

The record in this case shows that the court properly submitted to the jury appropriate issues both as to the negligence of the defendant and as to the contributory negligence of the plaintiff. The jury returned a general verdict for the plaintiff without any indication whether it had found plaintiff to have been slightly negligent and defendant grossly negligent or that the defendant's negligence was the sole proximate cause. This did settle the question of general responsibility, but it certainly did not settle the question of the application of the doctrine of comparative negligence.

Section 25-1151, R. R. S. 1943, provides: "In all actions brought to recover damages for injuries to a person or to his property caused by the negligence of another, the fact that the plaintiff may have been guilty of contributory negligence shall not bar a recovery when the contributory negligence of the plaintiff was slight and the negligence of the defendant was gross in comparison, but the contributory negligence of the plaintiff shall be considered by the jury in the mitigation of damages in proportion to the amount of contributory negligence attributable to the plaintiff; and all questions of negligence and contributory negligence shall be for the jury."

In Brackman v. Brackman, 169 Neb. 650, 100 N. W.

2d 774, it was held that degrees of negligence whether slight or gross, were to be determined by the comparison of the negligence of the parties, one with the other. This is a qualitative determination necessarily involving the consideration of all of the various acts of negligence entering into the proximate cause of the injury.

In Sgroi v. Yellow Cab & Baggage Co., Inc., 124 Neb. 525, 247 N. W. 355, the following statement concerning the procedure of mitigation of damages is made on page 528: "It is clear that the comparison was to be made between the negligence of the two parties, and if plaintiff was entitled to recover, then her recovery should be reduced in the proportion that her negligence contributed to the injury. If defendant's negligence was four times as great as plaintiff's negligence, the proportion would be four to one. The combined negligence of the two causes the total damage sustained. It is plain in such case that plaintiff's own negligence caused one-fifth of her injury and defendant's negligence four-fifths, and that plaintiff would be entitled to a judgment for only four-fifths of the total amount of damage sustained as a result of the combined negligence of the two."

This case was followed and the rule was restated in Murray v. Pearson Appliance Store, 155 Neb. 860, 54 N. W. 2d 250, as follows: "When plaintiff is entitled to recover under this rule it then becomes the duty of the jury to deduct from the total amount of any damages which it determines he has sustained such an amount as his contributory negligence bears to the entire negligence of the parties which contributed thereto. * * * After the parties establish and the jury, under proper instructions, finds the respective parties guilty of actionable negligence and contributory negligence the responsibility is then on the jury to make the comparison as contemplated by the statute. *This comparison is to determine the rights of the parties to recover, if at all, and the extent thereof.*" (Emphasis supplied.)

From the foregoing, it appears that it is necessary

for the jury to keep in mind the results of its initial comparison of the negligence of the parties, and to take the further step of making a quantitative determination of the proportion which the negligence of each party bears to the total negligence of both together.

According to the direction of the majority opinion, it is apparently required that the trial court direct the jury that no more than slight negligence has been established, with the attendant possibility that the jury might find no negligence at all as to plaintiff. To have a basis for mitigation, however, the jury necessarily would have to consider all the previous evidence of negligence and causation. There is an attendant possibility of an absurdity, in the event that the jury, notwithstanding the direction to find no more than slight negligence, might find a proportion of contributory negligence so high that it would mitigate by half or more. In view of the provisions of the statute, the court has no power to limit the scope of an award of damages, when the determination of the issue is properly for the jury.

I submit that the provision of the majority opinion limiting the retrial to the sole question of an amount of liability would not be effective to simplify or to shorten the trial, and that it would present a most difficult problem to the trial court in the formulation of appropriate instructions upon the subject of the possible mitigation of damages. The previous general finding of responsibility, correct under the evidence and instructions, simply cannot provide the necessary specific determination of the issues of comparative negligence and mitigation, as a prerequisite to the determination of an amount of liability.

DURAND, JACKSON & ASSOCIATES, INC., A CORPORATION, APPELLEE, V. FRED G. NASR, APPELLANT.
143 N. W. 2d 122

Filed June 10, 1966. No. 36121.

1. **Trial: Evidence.** Audits or statements of account prepared for use at the trial are not ordinarily admissible, but the trial court may, in the exercise of its judicial discretion, admit them when they are merely abstracts, tabulations, or summaries of other evidence capable of calculation which has been properly admitted.
2. **Appeal and Error.** An assignment of error that the court erred in overruling a motion for new trial is too indefinite where there are several grounds of error set forth in such motion. A party who claims error in a proceeding is required to point out the factual and legal basis that shows the error.

Appeal from the district court for Douglas County: RUDOLPH TESAR, Judge. Affirmed.

Shrout, Hanley, Nestle & Corrigan, for appellant.

Fitzgerald, Brown, Leahy, McGill & Strom, for appellee.

Heard before CARTER, SPENCER, BOSLAUGH, BROWER, SMITH, and MCCOWN, JJ., and MURPHY, District Judge.

MCCOWN, J.

This is an action at law for the fair and reasonable value of architectural services rendered and expenses incurred at the oral request of the defendant. Pursuant to this request, certain design work was performed and certain designs and drawings were created and prepared for the defendant and various printing and miscellaneous expenses incurred. Plaintiff prayed judgment for $2,996.58. The jury returned a verdict in favor of the plaintiff in the sum of $2,604.58 and the defendant has appealed.

The defendant assigns error in the failure of the trial court to sustain his objection to the admission of exhibit 19 into evidence. Exhibit 19 was an abstract or summary of certain business records of the plaintiff which

were offered and received in evidence. It is a complete summary of all of the time that was spent by all employees pertaining to the work done for the defendant. Exhibits 16 and 16A consisted of employees' daily time records which included both the defendant's project and those of other clients. These records consisted of more than 180 3x5 inch cards. Exhibit 18 contained substantially the same information as exhibit 19 except that it was a month-by-month summary of defendant's project rather than a day-by-day summary. Both exhibit 18 and exhibit 19 were prepared from exhibits 16 and 16A, and in their respective forms are abstracts of information contained on exhibits 16 and 16A.

The defendant has assigned as error only the failure to sustain the objections to the admission of exhibit 19. No claim is made here that either exhibit 16 or 16A was improperly received into evidence by the court.

The defendant contends that audits or statements of account prepared for use at a trial are not admissible when they are summaries of records which have not been admitted or where it is not shown that the records are voluminous or complicated as to require clarification or where it is not shown that the records themselves are competent. The case of Rose v. Kahler, 151 Neb. 532, 38 N. W. 2d 391, involved instruments which were, generally speaking, simply abstracts, tabulations, or summations of previous stipulations, evidence, and instruments such as bank deposits, canceled checks, and bank ledger sheets, all of which evidence was properly admitted by the trial court. This court said: "The applicable rule is that audits or statements of account prepared for use at the trial are not ordinarily admissible, but the trial court court may, in the exercise of its judicial discretion, admit them when they are merely abstracts, tabulations, or summaries of other evidence capable of calculation which has been properly admitted."

32 C. J. S., Evidence, § 698, p. 958, states: "Written statements prepared for use at a trial are not ordinarily

admissible in evidence. However, they may be received where they are merely in the nature of summaries of voluminous records which are in evidence, or are admissible in evidence * * *." See, also, 20 Am. Jur., Evidence, § 449, p. 398.

It is clear and without dispute that exhibit 19 is merely an abstract of exhibits 16 and 16A pertaining to that portion dealing with the defendant's project. Both of these exhibits, together with exhibit 18, were offered and received in evidence. No claim is now made that they were improperly received, and the court did not err in admitting exhibit 19.

The only other assignment of error is that the trial court erred in denying defendant's motion for a new trial. The motion for new trial charged, in general terms, errors of law and errors of fact and misconduct of counsel committed at the trial. This court's attention is not directed to any specific reason why it should have been sustained. An assignment of error that the court erred in overruling a motion for new trial is too indefinite where there are several grounds of error set forth in such motion. A party who claims error in a proceeding is required to point out the factual and legal basis that shows the error. Lemmon v. State, 173 Neb. 387, 113 N. W. 2d 525.

No other error is assigned and those advanced cannot be sustained. The judgment of the trial court was correct and is affirmed.

AFFIRMED.

PAULINE MILLS, EXECUTRIX OF THE ESTATE OF ROBERT DAVIS MILLS, ALSO KNOWN AS R. D. MILLS, DECEASED, APPELLANT, V. LAVERNE L. BAUER, APPELLEE.
143 N. W. 2d 270

Filed June 10, 1966. No. 36151.

1. **Trial. A motion for directed verdict or for judgment notwithstanding the verdict must be treated as an admission of the**

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

2. **Negligence: Trial.** The negligence of a person charged with responsibility for an accident cannot be inferred from a presumption of due care on the part of a person killed in an accident. A presumption of due care in the performance of duty attends a person so charged as well as a person so killed.
3. ———: ———. Negligence is not presumed; the mere happening of an accident does not prove negligence.
4. ———: ———. The burden of proving negligence is on the party alleging it.
5. ———: ———. The burden of proving a cause of action is not sustained by evidence from which negligence can only be surmised or conjectured.
6. ———: ———. If defendant pleads that the plaintiff was guilty of contributory negligence, the burden is upon him to prove that defense and this burden does not shift during the trial. However, if the evidence adduced by the plaintiff tends to prove that issue, the defendant is entitled to receive the benefit thereof.
7. **Automobiles: Negligence.** 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.
8. ———: ———. The driver of an automobile entering an intersection of two highways is obligated to look for approaching automobiles and to see any vehicle within the radius which denotes the limit of danger.
9. **Negligence: Evidence.** Negligence is a question of fact and may be proved by circumstantial evidence and physical facts. However, the law requires that the facts and circumstances proved, together with the inferences that may properly be drawn therefrom, indicates with reasonable certainty the negligent act charged.
10. **Trial.** Where several inferences are deducible from facts presented, which inferences are opposed to each other but equally consistent with the facts proved, the plaintiff does not sustain his position by a reliance alone on the inference which would entitle him to recover.

Appeal from the district court for Cheyenne County: JOHN H. KUNS, Judge. Affirmed.

Martin, Davis, Mattoon & Matzke, for appellant.

Maupin, Dent, Kay & Satterfield, Clinton J. Gatz, Donald E. Girard, and Rady A. Johnson, for appellee.

Heard before CARTER, SPENCER, BOSLAUGH, BROWER, SMITH, and MCCOWN, JJ., and BRODKEY, District Judge.

BROWER, J.

This action was brought by Pauline Mills, executrix of the estate of Robert Davis Mills, also known as R. D. Mills, deceased, plaintiff, against LaVerne L. Bauer, defendant, for damages for the wrongful death of said R. D. Mills.

The parties will be designated as they were in district court and the decedent R. D. Mills as the decedent or Mills.

The decedent Mills died as a result of an automobile collision at approximately 2:15 p.m., on May 8, 1962. Plaintiff brings the action as his executrix on behalf of Pauline Mills, the decedent's widow.

Plaintiff's decedent was driving his 1958 Ford 4-door sedan automobile northward on a north-south county graveled road. Defendant was driving a 1962 Chevrolet 4-door sedan in a westerly direction on an east-west county graveled road. Neither road was favored over the other and there were no stop signs at their intersection. The collision between the two vehicles occurred at the intersection of the two roadways at a point 9.2 miles east and 5.6 miles north of Sidney in Cheyenne County, Nebraska. Mills died instantly. Defendant was rendered unconscious for several days and has no recollection of the events. Both drivers were alone. There were only the two vehicles involved and no other eyewitnesses. Decedent's automobile as equipped weighed 3,652 pounds, and was 207 inches long and 78 inches wide. Decedent weighed 189 pounds. De-

fendant's car as equipped weighed 3,585 pounds, and was 209.6 inches long and 79 inches wide. Defendant, himself, weighed 200 pounds.

A state trooper, who had been called, arrived at the scene some 30 minutes after the accident. He checked over those injured and, after taking care of them, at approximately 2:55 p.m., he took pictures and measurements at the intersection. The photographs as then taken show several other cars had arrived at the scene and were parked on the highway at the time.

The north-south road was 22 feet wide and the east-west road 18 feet 10 inches in width. Both roads were straight, level at the immediate scene, dry, and with graveled surfaces. There was a hill 0.4 of a mile south of the intersection and another 0.8 of a mile east of it. The day was clear and the sun was shining, but a southeast wind was blowing. There were no obstructions on the southeast corner of the intersection. A driver coming from the east had an unobstructed view for 0.8 of a mile and the view of the one proceeding from the south was unobstructed for 0.4 of a mile.

The trooper testified there were two sets of tire marks leading into the intersection and that one of these extended to the east a little way beyond the east edge of the intersection and the other back to the edge of the intersection on the south. Both were tire marks and not skid marks. The right-hand wheels of the decedent's northbound auto were approximately in the middle of the road. The tire marks of defendant's westbound car appeared to straddle the center of the road. The two sets of tire marks met in the intersection. The trooper placed a red flag in the intersection as near as he could determine at the point where the tire marks met. The flag thus placed was 24 feet from the northeast corner, 28 feet from the southeast corner, 29 feet from the northwest corner, and 27 feet from the southwest corner of the intersection. The flag was placed just a little west of decedent's right tire mark and south

of defendant's left tire mark. From an area near the flag, slide marks went off to the northwest. One set indicated that something had skidded and had gone through the ditch on up into the field. Another set also had gone into the field. Both cars were located in the field. The Mills vehicle had overturned. It had come to rest after the impact on its left side, facing southeast in the plowed field. It was 53.8 feet northwest of the flag. The defendant's car was in the field also but closer to the east-west ditch than the other. It remained on its wheels facing westerly. It was 44 feet from the flag.

Several photographs of both vehicles are in evidence. The front of defendant's car was damaged. The most severe damages occurred to its left front. There were, however, some marks on its left side where the metal was bent. The front two-thirds of the Mills car on its right side was badly damaged with the most severe damage occurring in the area of the door post on the right-hand side. The frame and body were bent in a "V" shape at the door post.

A witness was working in a field about ½ mile northwest from the intersection. The wind was coming from the southeast. He heard an unusual noise, but it was not a loud noise.

There was a windbreak of considerable width north of the intersection on the east side of the road. The trooper testified he had driven south on the north-south road and could see to the east around the windbreak at a point 0.4 of a mile to the north. He had not driven from the east to observe from what point one could look around it. There is also testimony that a portion of the windbreak came within 160 feet of the east-west road. The photographs show the windbreak from the intersection, but the distance to it cannot be estimated with any accuracy therefrom, although it appears much closer than 0.4 of a mile.

A trial was had in district court. At the close of plaintiff's evidence, the defendant made a motion to

direct a verdict for defendant or dismiss the plaintiff's petition, which was overruled. The same motion being renewed at the close of all the evidence was sustained by the trial court and plaintiff's action dismissed.

Plaintiff has appealed to this court from an order overruling her motion for a new trial. She assigns error to the trial court in dismissing plaintiff's action, overruling her motion for a new trial, and refusing to admit evidence of the volume of traffic normally upon the county road on which the deceased was driving.

Plaintiff alleged many acts of negligence on the part of the defendant. We consolidate and restate them as follows: Defendant failed to yield the right-of-way to decedent's vehicle at the intersection; drove his automobile at a high and dangerous rate of speed; failed to apply his brakes, slow his car, or turn to the right to avoid the accident; and failed to maintain a proper lookout.

Defendant denied his negligence and, claiming the right-of-way, alleged the decedent was guilty of contributory negligence more than slight in comparison with that of the defendant in practically the same respects as was alleged by the plaintiff against him.

"A motion for directed verdict or for judgment notwithstanding the verdict must be treated as an admission of the truth of all material and relevant evidence submitted on behalf of the party against whom the motion is directed. Such party is entitled to have every controverted fact resolved in his favor and to have the benefit of every inference that can reasonably be deduced from the evidence." Egenberger v. National Alfalfa Dehydrating & Milling Co., 164 Neb. 704, 83 N. W. 2d 523.

In the consideration of the present case certain rules set forth in the syllabi in Wolcott v. Drake, 162 Neb. 56, 75 N. W. 2d 107, will now be stated: "The burden of proving negligence is on the party alleging it.

"If defendant pleads that the plaintiff was guilty of contributory negligence, the burden is upon him to

prove that defense and this burden does not shift during the trial. However, if the evidence adduced by the plaintiff tends to prove that issue, the defendant is entitled to receive the benefit thereof.

"The negligence of a person charged with responsibility for an accident cannot be inferred from a presumption of due care on the part of a person killed in an accident. A presumption of due care in the performance of duty attends a person so charged as well as a person so killed.

"Negligence is not presumed; the mere happening of an accident does not prove negligence.

"The burden of proving a cause of action is not sustained by evidence from which negligence can only be surmised or conjectured."

In Wolstenholm v. Kaliff, 176 Neb. 358, 126 N. W. 2d 178, it was stated: "Negligence is a question of fact and may be proved by circumstantial evidence and physical facts. However the law requires that the facts and circumstances proved, together with the inferences that may properly be drawn therefrom, indicates with reasonable certainty the negligent act charged.

"The driver of an automobile entering an intersection of two highways is obligated to look for approaching automobiles and to see any vehicle within the radius which denotes the limit of danger.

"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."

Under section 39-728, R. S. Supp., 1963, the defendant who approached the intersection from the right of the Mills automobile had the right-of-way unless the evidence is sufficient for it to be inferred that the decedent drove his vehicle into the intersection first, or that the action of the defendant forfeited the right-of-way.

Plaintiff contends the marks left upon the highway and the position and condition of the cars after the impact are sufficient to raise an inference that the decedent's automobile first entered the intersection. This the plaintiff attempts to show from these asserted premises. She argues that the point where the tire marks met as shown by the flag was in approximately the center of the intersection from north to south. She claims the vehicle of the decedent was struck by the front end of the defendant's car at about the door post since that is the point of the vehicle's greatest damage. She calls attention to the tire marks of the defendant's car which were outlined with a grease pencil by the trooper on the photographs. These marks so outlined indicate the defendant's right wheels were only 3 feet from the north edge of the road and when the width of defendant's car, 6 or 7 feet, are added it appears the defendant's left wheel which was damaged was at or close to the center of the east and west road. She argues from this that the decedent's vehicle was more than half way through the intersection and contends the defendant's car was not. The defendant points out, however, and the photographs show that the right front wheel and the whole front end of the decedent's vehicle was badly damaged also. This, he urges, indicates the initial impact of the two cars was between the extreme right front of the decedent's car and the left front of the defendant's car. Moreover, the right-hand tire marks of the Mills vehicle were about in the center of the north-south road near the flag. The road was 22 feet wide. It therefore is contended by the defendant that the front end of his car was 11 feet, or half way, into the intersection. Moreover, the trooper testified the defendant's automobile was straddling the center of the east-west road, which seems to conflict with the grease marks, and its width was 79 inches. Defendant therefore contends that half of this width should be subtracted from the distance the decedent's car had entered into the intersection, and

when this is done, he argues, it follows that the defendant's car and not the decedent's car had proceeded further into the intersection. It is apparent that the speed of each vehicle, which will hereafter be discussed, would have to be considered on the question of which entered the intersection first. The ultimate damage to an automobile which has been rolled over as a result of an accident is not always conducive to a proper determination of its original point of impact in the collision. Neither is a computation and comparison of the exact distance vehicles had traversed the intersection always decisive. This court in Costanzo v. Trustin Manuf. Corp., 176 Neb. 136, 125 N. W. 2d 556, in considering a similar problem, stated: "We realize that, under our decisions construing the right-of-way statute, section 39-728, R. R. S. 1943, the mathematical determination of who reaches an intersection first by a few feet should not be controlling. Gernandt v. Beckwith, supra (160 Neb. 719, 71 N. W. 2d 303); Long v. Whalen, supra (160 Neb. 813, 71 N. W. 2d 496)." We conclude the evidence in the present case does not establish which of the vehicles entered the intersection first.

The plaintiff claims the evidence is sufficient to raise an inference that the defendant's automobile was being operated at unreasonable speed under the circumstances. She urges the defendant thereby forfeited any right-of-way which he might otherwise have had under section 39-751, R. S. Supp., 1963. She bases her argument on four propositions which are asserted to raise the inference. She calls attention to the fact that the decedent's vehicle weighed some 50 pounds less than that of the defendant and that either car weighed but a little less than 2 tons. Her reasoning that the weights of the cars is of significance is not clearly set forth, but we gather she contends that cars of such weight would not have skidded to the extent they did unless the impact was of great force. Plaintiff maintains the sound of the crash heard by the witness ½ mile away is significant. It was

an "unusual" noise but not a "real loud" noise. We think the noise of the impact as described is of no import. Plaintiff's principal contention is that the decedent's heavy vehicle "traveled or was propelled" after the impact 53 feet 8 inches into the field, overturned, and was badly wrecked. This, she says, is proof that it was struck with great force and she attributes this force to that applied by the defendant's car. Yet this cannot be said to always follow. If a vehicle has its course diverted by an impact with another car, might not it proceed on and overturn either because of its own speed or its driver having lost control? Defendant calls attention to the fact that his car traveled without being diverted in its course to so great an extent and was not so badly damaged. From this he infers it was proceeding at a lesser speed. We do not ascribe to the theories of either party as to who entered the intersection first, or with respect to which vehicle was proceeding at the greater speed, or whether the speed of either was the more reasonable.

"Where several inferences are deducible from facts presented, which inferences are opposed to each other but equally consistent with the facts proved, the plaintiff does not sustain his position by a reliance alone on the inference which would entitle him to recover." Shamblen v. Great Lakes Pipe Line Co., 158 Neb. 752, 64 N. W. 2d 728.

We think in the present case many inferences may be drawn from the physical evidence presented and none are sufficiently supported from which a fair and reasonable conclusion can be drawn. Defendant had the directional right-of-way unless the decedent entered the intersection first, in which event decedent obtained it by so doing. Who entered the intersection first? From the evidence one cannot tell. In case of excessive speed the right-of-way of either might be forfeited. Was there excessive speed, and if so which driver maintained it? The circumstantial evidence is insufficient to re-

solve any of these questions fairly and reasonably. It presents nothing but conjecture and speculation, and that should not be submitted to a jury. The trial court committed no error in sustaining the motion to dismiss.

The plaintiff finally contends that the trial court erred in refusing to admit evidence that the traffic normally was greater on the north and south road than on the other. It seems to have been offered in an effort to alter the statutory rule under section 39-728, R. S. Supp., 1963, with respect to the vehicle on the right having the right-of-way under ordinary conditions. There was no traffic on either road at the time of the accident. What traffic might have been on them at other times is not material.

After a review of the evidence in the light of the rules stated, we find no error attributable to the judgment of the trial court and it is affirmed.

AFFIRMED.

FRANCES DAY CALLEN, EXECUTRIX OF THE ESTATE OF ERNEST GLENN CALLEN, DECEASED, APPELLANT, V. LOUIS F. KNOPP ET AL., APPELLEES.

143 N. W. 2d 266

Filed June 10, 1966. No. 36253.

1. **Trial.** The party against whom a motion to dismiss is made is entitled to have every controverted fact resolved in his favor and to have the benefit of every inference that can reasonably be drawn from the evidence.
2. **Automobiles: Negligence.** Gross negligence within the meaning of the motor vehicle guest statute means gross and excessive negligence or negligence in a very high degree; the absence of slight care in the performance of duty; an entire failure to exercise care; or the exercise of so slight a degree of care to justify the belief that there was an indifference to the safety of others.
3. ———: ———. Momentary inattention in the operation of a motor vehicle does not ordinarily amount to gross negligence.
4. ———: ———. The driver of a motor vehicle has the duty to keep a proper lookout and watch where he is driving even

though he is rightfully on the highway and has the right-of-way or is driving on the side of the highway where he has a lawful right to be. He must keep a lookout ahead or in the direction of travel or in the direction from which others may be expected to approach and he is bound to take notice of the road, to observe conditions along the way, and to know what is in front of him for a reasonable distance.

5. ———: ———. Although a driver is traveling upon an arterial street, he is required to look for approaching vehicles and see those which are in plain sight.

Appeal from the district court for Lancaster County: BARTLETT E. BOYLES, Judge. Affirmed in part, and in part reversed and remanded.

Baylor, Evnen, Baylor & Urbom and Robert T. Grimit, for appellant.

Chambers, Holland & Dudgeon, for appellee Knopp.

Healey & Healey, for appellee Waddell.

Heard before CARTER, SPENCER, BOSLAUGH, BROWER, SMITH, and MCCOWN, JJ., and SCHEELE, District Judge.

BOSLAUGH, J.

The plaintiff, Frances Day Callen, and her husband, Ernest Glenn Callen, were injured in an automobile accident on May 30, 1964. At the time of the accident the Callens were passengers in an automobile operated by the defendant, Marion Senn Waddell, which became involved in a collision with an automobile operated by the defendant, Louis F. Knopp. This action was brought by the plaintiff, as executrix of her husband's estate, to recover the damages which were sustained in the accident.

At the close of the plaintiff's evidence, the district court sustained motions to dismiss made by the defendants. The plaintiff's motions for new trial were overruled and she has appealed.

The accident occurred at about 10:15 a.m., at the intersection of Fifty-sixth Street and Leighton Avenue in Lincoln, Nebraska. Fifty-sixth Street is 26 feet wide.

Leighton Avenue is 24 feet wide. There is a stop sign at the west side of the intersection which requires traffic on Leighton Avenue to stop before crossing Fifty-sixth Street. The speed limit on both streets at this location is 35 miles per hour. It was a clear day and the streets were dry.

A frame house is located at the southwest corner of the intersection. There are bushes growing near the house and shade trees in the yard. At a point 50 feet south of the intersection, the view from the intersection to a point 50 feet west of the intersection is unobstructed. At a point 50 feet west of the intersection, the view from the intersection to a point 50 feet south of the intersection is unobstructed.

Mr. and Mrs. Waddell were planning to drive to Nehawka, Nebraska, and had invited Dr. and Mrs. Callen to ride with them. Dr. Callen was sitting in the front seat beside the driver. Mrs. Callen and Mrs. Waddell were sitting in the rear seat of the automobile.

After leaving the Callen home, Waddell turned onto Leighton Avenue at Forty-ninth Street. As he drove east on Leighton Avenue at about 25 miles per hour, Waddell noticed that Leighton Avenue was an arterial street protected by stop signs. Although Waddell knew that there was a stop sign on Leighton Avenue at Fifty-sixth Street, he did not see the stop sign and did not stop before entering the intersection. As Waddell entered the intersection he was looking to the left and did not see the Knopp automobile approaching from the south until the collision occurred.

The defendant Knopp had attended Memorial Day services at a cemetery and was returning to his home when the accident occurred. He was driving north on Fifty-sixth Street at about 30 miles per hour. He did not see the Waddell automobile at any time before the accident.

The point of impact was south and east of the center of the intersection. The front of the Knopp automobile

struck the front right side of the Waddell automobile. Both vehicles then came to rest near the northeast corner of the intersection, headed to the northeast.

The party against whom a motion to dismiss is made is entitled to have every controverted fact resolved in his favor and to have the benefit of every inference that can reasonably be drawn from the evidence. Willey v. Parriott, 179 Neb. 828, 140 N. W. 2d 652. If there was any evidence upon which the jury could have properly found for the plaintiff against either of the defendants, then that defendant's motion to dismiss should have been overruled.

Before the plaintiff was entitled to recover as against the defendant Waddell, it was necessary to establish that he had been guilty of gross negligence. § 39-740, R. R. S. 1943. Gross negligence within the meaning of the motor vehicle guest statute means gross and excessive negligence or negligence in a very high degree; the absence of slight care in the performance of duty; an entire failure to exercise care; or the exercise of so slight a degree of care to justify the belief that there was an indifference to the safety of others. Schlines v. Ekberg, 172 Neb. 510, 110 N. W. 2d 49. Momentary inattention in the operation of a motor vehicle does not ordinarily amount to gross negligence. Holliday v. Patchen, 164 Neb. 53, 81 N. W. 2d 593.

There is no fixed rule for the ascertainment of what is gross negligence. Whether gross negligence exists must be determined from the facts and circumstances in each case. Schlines v. Ekberg, *supra*.

The petition alleged that Waddell was guilty of gross negligence in failing to maintain a proper lookout; in operating his automobile at a rate of speed greater than was reasonable and prudent under the existing circumstances; in failing to stop at the stop sign before entering the intersection; in failing to yield the right-of-way to the Knopp automobile; and in failing to maintain reasonable control over his automobile.

There is evidence in this case that the defendant Waddell failed to see the stop sign and the Knopp automobile; that he entered the intersection without stopping; and that he failed to yield the right-of-way to the Knopp automobile.

There is evidence that Waddell was confused by the fact that Fifty-fifth Street does not intersect Leighton Avenue and that he did not realize that he was entering the intersection of Fifty-sixth Street where he knew there was a stop sign. This evidence characterizes his negligence as momentary in nature rather than persisting over a period of time.

There is no evidence showing a course of negligent conduct extending over a period of time, or a protest by any passenger in the Waddell automobile. The evidence does not show an entire failure to exercise care, or the exercise of so slight a degree of care as to justify the belief that there was an indifference to the safety of others. From our examination of the record we conclude that the evidence failed to establish gross negligence and that the motion to dismiss of the defendant Waddell was properly sustained.

With respect to the defendant Knopp, the plaintiff was required to produce evidence of negligence that was a proximate cause of the accident. Since the plaintiff's decedent was a passenger in the Waddell automobile, the negligence of the defendant Waddell could not be imputed to him. Willey v. Parriott, *supra*. There is no contention made that there was sufficient evidence of contributory negligence to bar recovery as a matter of law.

The petition alleged that the defendant Knopp was negligent in failing to maintain reasonable control over his automobile; in failing to maintain a proper lookout; in failing to turn away from the Waddell automobile; in driving at a rate of speed greater than was reasonable and prudent under existing conditions; and in failing to make timely application of his brakes.

There was evidence that the defendant Knopp was negligent in failing to see the Waddell automobile and in making no effort to avoid the accident.

Although Knopp was traveling upon an arterial street, this did not excuse him from the duty to maintain a proper lookout. He had a right to assume that Waddell would stop before entering the intersection only until there was some warning that Waddell would not do so.

The driver of a motor vehicle has the duty to keep a proper lookout and watch where he is driving even though he is rightfully on the highway and has the right-of-way or is driving on the side of the highway where he has a lawful right to be. He must keep a lookout ahead or in the direction of travel or in the direction from which others may be expected to approach and he is bound to take notice of the road, to observe conditions along the way, and to know what is in front of him for a reasonable distance. Bear v. Auguy, 164 Neb. 756, 83 N. W. 2d 559. Notwithstanding his favored position, Knopp was required to look for approaching vehicles and see those which were in plain sight. Bell v. Crook, 168 Neb. 685, 97 N. W. 2d 352, 74 A. L. R. 2d 223.

The defendant Knopp relies upon Giebelman v. Vap, 176 Neb. 452, 126 N. W. 2d 673, and Colton v. Benes, 176 Neb. 483, 126 N. W. 2d 652. The cases cited involved an issue as to whether there was evidence of contributory negligence. The plaintiffs were traveling on arterial streets or highways and did not receive sufficient warning that the defendants would not stop before entering the intersection. In the Giebelman case the plaintiff's vision was obstructed by a high bank. In the Colton case the plaintiff observed the defendant slowing down and properly assumed that he would stop. The cases are not applicable here.

In this case there was evidence from which the jury could have found that Knopp was negligent and that his negligence was a proximate cause of the accident. The

motion to dismiss made by the defendant Knopp should have been overruled.

That part of the judgment of the district court dismissing the action as to the defendant Waddell is affirmed; and the part of the judgment dismissing the action as to the defendant Knopp is reversed and the cause remanded for a new trial.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED.

EMMA E. DIXON ET AL., APPELLEES, V. PAUL J. O'CONNOR ET AL., APPELLANTS, IMPLEADED WITH YORK STATE BANK, YORK, NEBRASKA, ET AL., APPELLEES.

143 N. W. 2d 364

Filed June 17, 1966. No. 36228.

1. **Deeds: Escrows.** Where a deed is deposited in escrow subject to conditions, the title remains in the grantor until performance of the conditions.
2. **Vendor and Purchaser: Crops.** Under an executory contract for the sale of real estate where the purchaser is given no right to the possession until a specified time, he acquires no interest in the growing crops which mature and are harvested before he is entitled to possession.
3. **Vendor and Purchaser.** Under an executory contract for the sale of real estate where a purchaser is not entitled to possession, he is not entitled to the rentals accruing prior to the time he becomes entitled to possession.
4. **Landlord and Tenant: Crops.** An action by a landlord against his tenant for an accounting for the rent share of crops is properly brought as an action in equity.
5. **Equity.** Where a court of equity obtains jurisdiction of a cause for any purpose, it may retain it for all and may proceed to a final determination of the case, adjudicate all matters in issue, and thus avoid unnecessary litigation.
6. **Declaratory Judgments.** In a declaratory judgment action on a contract, the court may not only construe the contract, but is authorized to enter judgment for the amount due in the light of the interpretation made.

Appeal from the district court for York County: H. EMERSON KOKJER, Judge. Affirmed.

John E. Dougherty, for appellants.

Robert B. Waring and Herman Ginsburg, for appellees Dixon.

Maynard M. Grosshans, for appellee York State Bank.

Gerald F. Beaver, for appellee Bourke Grain Co.

Heard before CARTER, SPENCER, BOSLAUGH, BROWER, SMITH, and MCCOWN, JJ., and MURPHY, District Judge.

MCCOWN, J.

This is a declaratory judgment action in which the plaintiffs sought determination of the status and relations of the plaintiffs and the defendants O'Connors, hereinafter referred to as defendants or O'Connors, arising out of a certain real estate contract entered into between the parties. Plaintiffs contended that the relation of landlord and tenant existed between the parties and in the action sought an accounting for the landlords' share of the crops growing upon the real estate involved at the time of the contract of sale and recovery of a judgment for the amount due on such accounting. The trial court held that the relation between the plaintiffs and defendants was that of landlord and tenant, and that the defendants, as tenants, were obligated to account to the plaintiffs for the landlords' share of the growing crops and for the accruing rentals prior to March 1, 1965; and entered judgment in favor of the plaintiffs upon such accounting in the sum of $8,241.16 and costs. Thereafter this appeal was perfected.

Prior to September 15, 1964, the plaintiffs, Lloyd and Emma E. Dixon, owned approximately 320 acres of improved irrigated land in Fillmore County. At that time and for some years prior thereto, the defendants O'Connors, appellants here, were tenants of the plaintiffs as to approximately 215 acres of this property, and J. R.

Warren was a tenant of approximately 105 acres of the property. The rental terms under the O'Connors' lease were two-fifths of the crops and $1,000 cash, plus $10 an acre for the alfalfa land. Sometime prior to September 15, 1964, the plaintiffs advertised the entire property for sale by newspaper advertisements and sale bills. The published terms of the sale provided: "The above land will be sold on contract as follows: 15% down payment on date of sale. An additional payment of 10% of the purchase price to be made on March 1, 1965, when possession will be given. The unpaid balance to be carried by the owner for a period of ten years, with equal annual payments on principal, due on March 1 of each year until the balance is paid in full, with interest at the rate of 5% per annum. Buyer shall have the option of paying off the unpaid balance in full after 5 years from and after March 1, 1965. Deed and abstract to be left in escrow with the York State Bank where payments are to be made until unpaid balance is retired."

The publications also contained the statement: "We invite you to inspect this top irrigated farm, which will positively be sold to the highest bidder the day of sale, without reservations."

The auctioneer announced the terms in accordance with the newspaper advertisement and the sale bills. At the auction, the entire property was sold to the defendants O'Connors. On September 17, 1964, a contract of sale was entered into between the plaintiffs as sellers and the defendants O'Connors as purchasers for the sale of the property, which included the property leased by the O'Connors as well as the property leased by J. R. Warren. The contract contained the same terms as the published notices and paragraph 6 of the contract stated: "Possession of said real estate shall be given on March 1, 1965, the present leases thereon to be in full force and effect until such date." The downpayment as provided by the real estate contract was paid and the payment

due on March 1, 1965, was paid. The warranty deed required by the contract was placed in escrow at the York State Bank and contained no reservations or exceptions. After the execution of the contract of sale involved in this case, the O'Connors refused to account for or pay any rent to the plaintiffs for the remainder of the year 1964 and accruing prior to March 1, 1965, and in addition, the O'Connors took the landlords' share of the crops due from J. R. Warren.

Essentially, the defendants' argument boils down to two basic contentions. First, that the execution of the contract for the sale of the real estate automatically carried with it to the buyer under the contract the growing crops and accruing rentals, and, second, that the form of the action instituted was improper. The defendants cite rules of law that growing crops upon lands are a part of the real estate and pass to a purchaser unless reserved, and that an auction sale can be a valid and binding sale. With these general rules we do not disagree. However, the contract between the parties stipulated that the seller reserved possession until March 1, 1965, and also that the present leases were to remain in full force and effect until such date. We find no support for the position that either title or possession passed prior to March 1, 1965. In Nebraska the law is well established that by the deposit of a deed in escrow subject to delivery upon the satisfaction of certain conditions, the title does not vest in the grantee named in the deed until the fulfillment of the conditions. As early as the case of Patrick v. McCormick, 10 Neb. 1, 4 N. W. 312, this court said: "An escrow is a conditional delivery to a stranger, to be kept by him until certain conditions are performed, and then to be delivered to the grantee. * * * But until the condition is performed and the deed delivered over, the estate does not pass, but remains in the grantor."

In Pike v. Triska, 165 Neb. 104, 84 N. W. 2d 311, at page 119, we said: "Until the performance of the con-

dition the legal title to the land to be conveyed remains in the grantor." The grantor retains legal title and its concomitants until performance of the conditions of the escrow contract by the grantee. See Valentine Oil Co. v. Powers, 157 Neb. 71, 59 N. W. 2d 150.

The contract here provided that "possession of said real estate shall be given on March 1, 1965." A purchaser of land under a contract of sale is not entitled to possession until full performance by him. Stukenholtz v. Parriott, 113 Neb. 296, 202 N. W. 873.

As to the rights of a purchaser under a contract of sale to receive crops and rentals accruing prior to the date fixed by the contract for the vesting of possession in the purchaser, the law seems well settled. The rule is stated in 21 Am. Jur. 2d, Crops, § 12, p. 591, as follows: "The general rule that growing crops pass with a transfer of the title to the land ordinarily applies where the title to the land is transferred by virtue of a contract of sale. Thus, on the theory that equity treats things agreed to be done as actually performed, where real estate is agreed to be conveyed by a valid contract of sale, without reservation, and the vendee has the right to possession, the equitable title passes at once to the vendee and with it title to all crops growing on the land. If, however, the purchaser is given no right to the possession until the time for conveyance arrives, he acquires no interest in the growing crops which mature and are harvested before the time for the conveyance and his right to possession arrives."

In Stukenholtz v. Parriott, *supra,* this court pointed out that: "If neither Austin nor his vendee was entitled to possession, they had no right to lease the land to Parriott, and the latter simply held over as the tenant of Bennett (the vendor)." The case clearly recognizes that where a purchaser is not entitled to possession, he is not entitled to the rentals accruing prior to the possession date. It is presumably the position of the defendants that at least as to the land they were leasing, their

possession as tenants constitutes possession under the purchase contract as well as under the lease. Paragraph 6 of the contract specifically states: "Possession of said real estate shall be given on March 1, 1965, the present leases thereon to be in full force and effect until such date." The defendants' right to possession was only as tenants under the lease and not as owners under the purchase contract. A purchaser under a contract of sale such as involved here has no rights in or to the sellers' interest under any existing leases until the time of possession specified in the contract of sale.

The defendants also contend that they were entitled to a jury trial, and that that right cannot be destroyed by bringing an action for declaratory judgment. The court here specifically and properly found that the relation existing between the parties was that of landlord and tenant, and that the defendants, as tenants, were obligated to account for the landlords' share of the growing crops and for the accruing rentals prior to March 1, 1965. An action by a landlord against his tenant for an accounting for the rent share of crops is properly brought as an action in equity. In Schmidt v. Henderson, 148 Neb. 343, 27 N. W. 2d 396, it is stated: "This court in Wendt v. Stewart, 74 Neb. 855, 105 N. W. 550, said: 'Where, by the terms of a lease, rent is reserved in a share of the crops, the landlord and tenant are tenants in common of the growing crops * * *.' Taking into consideration the facts of this case we are convinced that an adequate remedy was available only within the equitable jurisdiction and that the court did not err in its refusal to grant a jury trial."

The question of what the relationship of the parties was after the making of the contract of sale was clearly a question to be settled by a declaratory judgment proceeding. Where a court of equity obtains jurisdiction of a cause for any purpose, it will retain it for all and will proceed to a final determination of the case, adjudicate all matters in issue, and thus avoid unneces-

sary litigation. See Corn Belt Products Co. v. Mullins, 172 Neb. 561, 110 N. W. 2d 845.

In Richardson v. Waterite Co., 169 Neb. 263, 99 N. W. 2d 265, this court said: "In a declaratory judgment action on a contract, the court may not only construe the contract but it is authorized to enter judgment for the amount due thereunder in the light of the interpretation made." See, also, United Services Automobile Assn. v. Hills, 172 Neb. 128, 109 N. W. 2d 174, 2 A. L. R. 3d 1422.

Here a declaratory judgment was proper for the determination of the rights, status, and relations of the parties. Where the trial court adopted the plaintiffs' contention that the relationship was that of landlord and tenant, the plaintiffs' subordinate demand for an accounting was then properly within the equitable jurisdiction of the court. Having properly obtained jurisdiction for one purpose, the trial court quite properly retained it for all, granted complete relief between the parties, and avoided the necessity for further litigation.

The judgment of the district court was proper and is affirmed.

AFFIRMED.

FRANK A. BRODINE ET AL., APPELLANTS, V. STATE OF NEBRASKA, DEPARTMENT OF ROADS, APPELLEE.

143 N. W. 2d 361

Filed June 17, 1966. No. 36249.

1. **Eminent Domain.** The petition by which proceedings for condemnation of rights of ingress and egress over land are instituted must accurately describe the property and such a description is necessary to confer jurisdiction.
2. ———. The property must be described, not with meticulous exactness, but with a reasonable degree of accuracy, or substantial accuracy—that certainty by means of which a reasonably competent person could take the description and any accompanying map to which it refers, and locate the identical property.

Appeal from the district court for Buffalo County: S. S. SIDNER, Judge. Affirmed.

O. A. Drake, for appellants.

Clarence A. H. Meyer, Attorney General, Harold S. Salter, Warren D. Lichty, Jr., and Thomas H. Dorwart, for appellee.

Heard before CARTER, SPENCER, BOSLAUGH, BROWER, SMITH, and MCCOWN, JJ., and SCHEELE, District Judge.

SCHEELE, District Judge.

The defendant, State of Nebraska, Department of Roads, instituted condemnation proceedings before the county judge of Buffalo County to condemn and prohibit all rights of ingress and egress over a line located in certain land owned by the plaintiffs as joint tenants and located in Section 28, Township 9 North, Range 18 West of the 6th P.M. in Buffalo County, Nebraska. Plaintiffs admit that they own a tract of about 5 acres in said section which they had acquired by warranty deed in 1944, which deed used a metes and bounds description.

Instead of using the metes and bounds description by which plaintiffs acquired title to the tract, defendant in the condemnation proceedings described a portion of "Tax Lot 42" located in the west half of said section. A map or diagram accompanied this description.

In their amended petition in the district court the plaintiffs alleged that they were the owners of the property described by the metes and bounds description by which they acquired title and that no Tax Lot 42 was ever established, platted, or dedicated of record to the public in said Section 28 by an original government survey, by any owner or by any person who was legally authorized to do so.

In its amended answer defendant alleged that the plaintiffs were the owners of the property described by metes and bounds as alleged by plaintiffs and further alleged that this property so described is also known

as Tax Lot 42 located in the southeast quarter of the northwest quarter of said section. Defendant further alleged that on February 27, 1964, the plaintiffs conveyed by warranty deed to the State of Nebraska a tract of land located in Tax Lot 42 in the west half of said section consisting of .71 acres for right-of-way purposes which was also a part of the same property owned by plaintiffs.

On the foregoing issue a hearing was had to the court alone, jury trial having been waived. The trial court held that the description used by the defendant was sufficient for the purpose as between the parties and descriptive enough to locate the land in question for the purpose of this action. The case was set for jury trial on the question of damages.

The plaintiffs filed objections to proceeding to jury trial on this issue and moved to dismiss the condemnation proceedings. On the date set for jury trial the plaintiffs refused to adduce any evidence on the issue of damages and renewed their objection to trial and motion to dismiss. The trial court thereupon overruled plaintiffs' objection and motion and entered judgment affirming the award of the appraisers in the county court.

The sole question raised in this appeal is whether or not the description of the plaintiffs' property used in the condemnation proceedings is sufficient to confer jurisdiction. Plaintiffs claim that it is not and that the entire proceedings are void.

It is contended by the plaintiffs that the original government survey made in 1868 and recorded in the office of the register of deeds of Buffalo County contains no reference to Tax Lot 42 and is the only plat involving Section 28 that has been recorded, and that Tax Lot 42 does not exist.

At the hearing in the trial court on the issue of the sufficiency of the description, the deputy county surveyor testified that tax lot numbers have appeared on the surveyor's records since prior to 1912. A map which was

prepared by him in 1963 from records on file in his office, which showed various tax lots, including Tax Lot 42, was received in evidence. This map was based in part on a plat and attached field notes taken from the original surveyor's record book. The witness located on the map the place of beginning of the metes and bounds description contained in the deed by which plaintiffs acquired title to the land and traced out the metes and bounds description contained in said deed on the map. He then testified that the legal description as given in the deed and Tax Lot 42 as shown on the map were one and the same piece of property.

The county assessor testified that Tax Lot 42 appeared on his records of real estate assessments. These records for the years 1954 through 1964 show Tax Lot 42 has been assessed in the names of the plaintiffs and that .71 acres of this tract was sold to the State in 1964. The assessor testified that he could locate Tax Lot 42 from the legal description contained in plaintiffs' deed.

The county treasurer testified that Tax Lot 42 appears on the tax ledger sheets in his office. The ledger for the years 1958 through 1965 listed plaintiffs as the owners of Tax Lot 42 and showed the assessed values and the amount of taxes levied and collected on said lot for those years. The treasurer testified that he could locate Tax Lot 42 on the maps in the register of deeds' office.

On October 1, 1963, plaintiffs entered into a right-of-way contract with the State of Nebraska for the sale of land located in said section. This contract contained a parenthetical reference to Tax Lot 42. On February 27, 1964, plaintiffs executed a warranty deed conveying the tract referred to in the contract to the State of Nebraska. This deed described a .71-acre tract of land located in Tax Lot 42 in said section. Both of these instruments were received in evidence.

In Blue River Power Co. v. Hronik, 112 Neb. 500, 199 N. W. 788, it was stated: "There is little, if any, conflict in the decisions of any of the courts with respect to

the fact that the petition by which such proceedings are instituted must accurately describe the property sought to be taken and that such a description is necessary to confer jurisdiction. This in our judgment does not mean meticulous accuracy, but substantial accuracy—that certainty by means of which a reasonably competent person could take the instrument and therefrom, aided by such inquiries as it suggests, locate the identical property."

In Consumers Public Power Dist. v. Eldred, 146 Neb. 926, 22 N. W. 2d 188, this court again reiterated the principle that the property to be taken must be described with a reasonable degree of accuracy and that such description is necessary to confer jurisdiction. In the opinion the court approved the following statement: "This does not mean the exactness required by deeds of conveyance but substantial accuracy and a certainty by reason of which the identical property can be definitely located." See, also, Kansas-Nebraska Natural Gas Co. v. Village of Deshler, 192 F. Supp. 303, affirmed 288 F. 2d 717.

In Fremont, E. & M. V. R. R. Co. v. Mattheis, 39 Neb. 98, 57 N. W. 987, the description contained in the petition plus "an accompanying plat" was held sufficient to confer jurisdiction.

The description of plaintiffs' property which was used by defendant in the condemnation proceedings was accompanied by a map of Tax Lot 42 to which it referred. This map showed the quarter section line together with the lot lines. It showed a small outline of the entire section.

The issue raised by the pleadings in this case was simply whether the metes and bounds description by which plaintiffs acquired title and the tax lot description used by the defendant did in fact describe the same property. If they did, then certainly plaintiffs cannot claim to have been misled or deceived by the description used. If they did, then plaintiffs would know the exact location of the line located on their property over which defend-

ant proposed to prohibit all rights of ingress and egress without reference to anything outside of the pleadings and the attached map. Plaintiffs are hardly in a position to claim that they were confused or deceived as to where defendant claimed that line was located.

The evidence offered by the defendant simply tended to establish the allegations of defendant that there was a Tax Lot 42 of public record and that it described the exact tract of land owned by the plaintiffs under their metes and bounds description.

In view of the record here presented, plaintiffs cannot seriously contend that they could not determine with a reasonable degree of accuracy from the description used and the accompanying map the control of access that the defendant intended to acquire. We hold that the description used in the pleadings together with the attached map are sufficiently accurate and that they afford that certainty by which a reasonably competent person could take them and locate the identical property.

The trial court in effect came to the same conclusion and we affirm its judgment.

AFFIRMED.

NICK JAMSON, APPELLANT, V. CITY OF GRAND ISLAND, NEBRASKA, A MUNICIPAL CORPORATION, ET AL., APPELLEES.
143 N. W. 2d 877

Filed June 24, 1966. No. 36165.

1. **Zoning: Municipal Corporations.** The validity of a zoning ordinance must be determined by an examination of the facts presented in the particular case. Whether a zoning ordinance is arbitrary and unreasonable, or illegal, must be determined by the evidence of the special surrounding conditions and circumstances.
2. ———: ———. The validity of a zoning ordinance will be presumed in the absence of clear and satisfactory evidence to the contrary. The burden is on the party who attacks the

validity of a zoning ordinance to prove facts which establish its invalidity.

3. ———: ———. Where the validity of the legislative classification for zoning purposes is fairly debatable, the legislative judgment must be allowed to control. What is the public good as it relates to zoning ordinances affecting the use of property is primarily a matter lying within the discretion and determination of the municipal body to which the power and function of zoning is committed; and unless an abuse of discretion has been clearly shown, it is not the province of the court to interfere.

Appeal from the district court for Hall County: DONALD H. WEAVER, Judge. Affirmed as modified.

Cunningham & Blackburn, for appellant.

Franklin L. Pierce and Duane A. Burns, for appellees.

Heard before CARTER, SPENCER, BOSLAUGH, BROWER, SMITH, and MCCOWN, JJ., and BURKE, District Judge.

BOSLAUGH, J.

This is an action to determine the validity of the zoning of a tract of land in the city of Grand Island, Nebraska, owned by the plaintiff, Nick Jamson. The defendants are the city and the members of the city council.

The trial court found that the zoning was not arbitrary, unreasonable, discriminatory, or illegal and dismissed the action. The plaintiff's motion for new trial was overruled and he has appealed.

The tract of land owned by the plaintiff is described as Lot 5 and the north 3 acres of Lot 8, in Home Subdivision. Home Subdivision is an area of approximately 70 acres which has been divided into 17 lots. It is located in the northern part of Grand Island near the city limits. It is bounded on the west by Broadwell Avenue and on the south by State Street. Eddy Street runs southeast from the intersection of Broadwell Avenue and State Street, which is known as "Five Points." U. S. Highway No. 281 and State Highway No. 2 are routed on Broadwell Avenue north of Five Points. There

has been commercial development along Broadwell Avenue north of Five Points, along State Street east of Five Points, and along Eddy Street southeast of Five Points.

Home Subdivision is bounded on the east by Wheeler Avenue which runs parallel to Eddy Street. Home Subdivision is approximately 434.5 feet wide at its northern boundary and 1,873 feet wide at its southern boundary.

All of Home Subdivision is zoned Residence A except a rectangular area in the southwestern part fronting on Broadwell Avenue and State Street and composed of Lots 6, 15, 16, and 17. Lots 6 and 17 are zoned Business B. Lots 15 and 16 are zoned Business A. Lot 5 fronts on Broadwell Avenue and is located directly north of the rectangular area which had been zoned for business. The property on the west side of Broadwell Avenue, except the first block north of State Street, is zoned Business B.

The area adjoining the plaintiff's property to the north, consisting of Lots 1, 2, 3, 4, and 7, is occupied by a hospital operated by the Veterans Administration. The main hospital building is a large structure approximately 5 stories high. There are other buildings, some of which are residential, and parking areas located on the property.

Lot 8 lies directly east of Lot 5 and fronts on Wheeler Street. The north 3 acres of Lot 8 are vacant at this time. The south 2 acres of Lot 8 are used for residential and agricultural purposes.

Lots 9, 12, 13, and 14, which lie directly south of Lot 8, are owned by the Blessed Sacrament Church. Church and school buildings are located upon the south part of this property. The northern part of this property is vacant at this time. The church may construct additional school buildings and an athletic field in this area.

Lots 10 and 11 in the southeastern corner of Home

long into an area that is otherwise zoned for residential use.

The evidence does not establish that the north 3 acres of Lot 8 are not suitable for residential use. The fact that the plaintiff does not propose to rezone the east 137 feet of the property is a recognition that residential use may be made of that part of the property. The record fails to establish that the zoning classification of the north 3 acres of Lot 8 is unreasonable and arbitrary.

The judgment of the district court should be modified to the extent that it did not determine that the zoning classification of Lot 5 was arbitrary and unreasonable. The judgment as modified is affirmed.

AFFIRMED AS MODIFIED.

GOLDIE M. KUTA, APPELLANT, V. EMIL L. KUTA, APPELLEE.
143 N. W. 2d 751

Filed June 24, 1966. No. 36239.

1. **Divorce. A divorce case is for trial de novo on the record in the Supreme Court which is required to reach independent conclusions of fact without reference to findings made by the trial court.**
2. **———. A court of equity will not grant a divorce to one whose conduct has been such as to furnish sufficient grounds for divorce even if the conduct of the other party has been grossly more culpable. In such case, the court will deny relief to either.**
3. **———. In any action for divorce, if the evidence is principally oral and is in irreconcilable conflict, and the determination of the issues depends upon the reliability of the respective witnesses, the conclusions of the trial court as to such reliability will be carefully regarded by this court on review.**

Appeal from the district court for Hall County: DONALD H. WEAVER, Judge. Affirmed.

Kelly & Kelly, for appellant.

Wagoner & Grimminger, for appellee.

Heard before CARTER, SPENCER, BOSLAUGH, BROWER, SMITH, and MCCOWN, JJ., and COLWELL, District Judge.

SPENCER, J.

This is a divorce action brought by Goldie M. Kuta, hereinafter referred to as plaintiff, against Emil L. Kuta, hereinafter referred to as defendant. The defendant filed a cross-petition. The trial court found that both parties were equally guilty, and dismissed the petition and the cross-petition.

Plaintiff accused the defendant of extreme physical and mental cruelty, the use of violent and obscene language, excessive use of alcoholic liquors, and with locking the plaintiff out of the house on certain occasions. Plaintiff's corroboration was very meager. Her only corroborating witness was her mother, who testified to the use of alcohol by the defendant, the use of obscene language, and to having observed bumps on plaintiff's head and ankles which she interpreted to be the effects of physical violence used by the defendant on the plaintiff.

The parties were married June 19, 1950, and have five children. From 1959, after the birth of the last child, until shortly before the trial, the plaintiff was employed in supper clubs in and around Grand Island. This employment took her out of the home during the evening from 9 p. m. until approximately 1:45 a. m. Defendant testified that plaintiff on many occasions did not reach home until after 3 or 3:30 a. m., and on some occasions did not reach home until 5 or 6 a. m.; that she was not a very good housekeeper; and that she was unduly familiar with another man who was called as a witness by the defendant. Defendant testified to seeing plaintiff in the car of this witness on two separate occasions. He also testified to seeing plaintiff's car parked within a half block of the witness' apartment between 2 a. m. and 6 a. m. on one occasion. This witness admitted that he had coffee with the plain-

Subdivision and the area east of Wheeler Street have been developed as residential areas.

A brick building that is used as a supermarket and which has a floor area of more than 13,000 square feet is located upon Lot 5. The building and adjacent parking areas were constructed before the land was annexed by the city and, apparently, are a nonconforming use.

In 1963, the plaintiff filed an application to rezone Lot 5 and the north 3 acres of Lot 8 to Business B. Action was deferred on this application and it was abandoned.

On December 2, 1964, the plaintiff filed an application requesting that Lot 5 and the north 3 acres of Lot 8, except the east 137 feet thereof, be rezoned Business A. The application was approved by the planning commission on two occasions. On January 25, 1965, the application was denied by the city council. This action followed.

In support of his contention that the zoning of the tract in question was arbitrary and illegal, the plaintiff produced witnesses who testified that in their opinion the most appropriate use of the property would be business or commercial. These witnesses included four real estate brokers, a contractor, and the pastor of Blessed Sacrament Church. Two of the witnesses were members of the planning commission that approved the plaintiff's application to rezone.

The validity of a zoning ordinance must be determined by an examination of the facts presented in the particular case. Whether a zoning ordinance is arbitrary and unreasonable, or illegal, must be determined by the evidence of the special surrounding conditions and circumstances. Bucholz v. City of Omaha, 174 Neb. 862, 120 N. W. 2d 270.

The validity of a zoning ordinance will be presumed in the absence of clear and satisfactory evidence to the contrary. The burden is on the party who attacks the validity of a zoning ordinance to prove facts which estab-

lish its invalidity. Bucholz v. City of Omaha, *supra*.

Where the validity of the legislative classification for zoning purposes is fairly debatable, the legislative judgment must be allowed to control. What is the public good as it relates to zoning ordinances affecting the use of property is primarily a matter lying within the discretion and determination of the municipal body to which the power and function of zoning is committed; and unless an abuse of discretion has been clearly shown, it is not the province of the court to interfere. Bucholz v. City of Omaha, *supra*.

With respect to Lot 5, the evidence shows that it is located in an area of commercial development that extends along the highway north from Five Points. The property to the west has been zoned Business B. Lot 6 which is directly south of Lot 5 was rezoned to Business B within the last 2½ years. The property to the north is occupied by the hospital. Although a hospital use may be consistent with residential use, the circumstances in this case do not require that Lot 5 be restricted to residential use.

The character of the use of Lot 5 was determined by the action of the city in zoning the property opposite it as Business B, and in rezoning the property immediately adjacent to it as Business B. The record in this case establishes that a zoning classification which restricts Lot 5 to residential use is arbitrary and unreasonable and cannot be enforced.

With respect to the north 3 acres of Lot 8, the evidence shows that it is surrounded by property which is zoned for residential use. Much of this property has been developed for residential use, or a use that is consistent with residential use. None of the property lying east of the east boundary of Lot 5, in the immediate area, has been zoned for business use or developed for business purposes. If the north 3 acres of Lot 8 were zoned for business use, it would amount to extending a zone for business use approximately 200 feet wide and 400 feet

tiff approximately two or three nights a week after she got off work, but that it was always in public places. Plaintiff admitted that she had on occasions had coffee with the witness, but denied any indiscretions, and particularly denied that she had ever been at the apartment of the witness.

This cause is before us for trial de novo on the record, and this court is required to reach independent conclusions of fact without reference to findings made by the trial court. Thompson v. Thompson, 176 Neb. 852, 127 N. W. 2d 729.

The evidence, while the corroboration is very weak, if accepted would sustain a finding of extreme cruelty on the part of the defendant. The evidence would equally justify a finding that the plaintiff has been guilty of indiscretions sufficient to constitute extreme cruelty. This then is a situation where the record supports a finding that both parties are not without fault. In Studley v. Studley, 129 Neb. 784, 263 N. W. 139, we said: "'A court of equity will not grant a divorce to one whose conduct has been such as to furnish sufficient grounds for divorce, even if the conduct of the other party has been grossly more culpable. In such case the court will deny relief to either.'"

Plaintiff seeks to avoid the operation of this rule by reference to Cowan v. Cowan, 160 Neb. 74, 69 N. W. 2d 300, in which we held that the physical abuse and cruelty by the defendant of the plaintiff transcended and outweighed the other alleged acts of the parties. The cases are not comparable. Further, the physical abuse herein is not sufficiently corroborated to justify the application of that rule.

The evidence herein is in conflict. The observations of the trial judge indicate that he gave credence to portions of the testimony of both of the parties. In any action for divorce, if the evidence is principally oral and is in irreconcilable conflict and the determination of the issues depends upon the reliability of the respec-

tive witnesses, the conclusion of the trial court as to such reliability will be carefully regarded by this court on review. Scholz v. Scholz, 172 Neb. 184, 109 N. W. 2d 156.

The conclusion of the trial judge that both parties are equally guilty is sustained by the record. The judgment herein is affirmed.

AFFIRMED.

CLARENCE WITTLER, APPELLEE, V. CARL W. BAUMGARTNER ET AL., APPELLANTS, IMPLEADED WITH LOUP RIVER PUBLIC POWER DISTRICT, A CORPORATION, ET AL., APPELLEES, BURT COUNTY PUBLIC POWER DISTRICT ET AL., INTERVENERS-APPELLANTS, WILLIAM H. FITZPATRICK ET AL., INTERVENERS-APPELLEES.

144 N. W. 2d 62

Filed June 24, 1966. No. 36269.

1. **Trial.** A motion for judgment on the pleadings, like a demurrer, admits the truth of all well-pleaded facts in the pleadings of the opposing party, together with all reasonable inferences to be drawn therefrom. The party moving for judgment on the pleadings necessarily admits, for the purpose of the motion, the untruth of his own allegations insofar as they have been controverted.
2. ———. The making of a motion for judgment on the pleadings is not a waiver of the right to trial of an issue of fact. Such a motion is available where the pleadings present only a question of law.
3. **Constitutional Law: Corporations.** L.B. 764, Laws 1965, chapter 404, page 1292, is a special act inhibited by Article XII, section 1, Constitution of Nebraska, in that it purports to create a public corporation by special law rather than by a general law as the provision requires.
4. ———: ———. An act which relates exclusively to a particular public corporation and none of its provisions apply, or are intended to apply, to any other public corporation in the state, is a special law.
5. ———: ———. If the provisions of a law establishing a class of public corporations based on the extent of the area in which they operate are such that other public corporations may in

the future, without additional legislation, enter the specified class, the law is general.

6. ———: ———. Article XII, section 1, Constitution of Nebraska, is applicable alike to private and public corporations.

7. **Electricity: Corporations.** A public corporation organized for the purpose of generating, transmitting, and distributing electrical energy operates in a proprietary as distinguished from a governmental capacity.

8. **Constitutional Law: Corporations.** Article I, section 22, and Article VI, section 1, Constitution of Nebraska, have no application to a public corporation or political subdivision where it operates solely in a proprietary capacity.

9. ———: ———. The Legislature may provide for the election of directors of a public corporation engaged solely in a proprietary capacity and prescribe the qualification of such electors, but in so doing the classification of electors must not be arbitrary or unreasonable.

10. ———: ———. A classification of electors for the purpose of electing directors of a public corporation engaged solely in a proprietary capacity must rest upon some reason of public policy, some real differences of situation and circumstances, that would naturally suggest the justice or expediency of diverse legislation relative to the subject of the legislation which renders appropriate its enactment.

11. ———: ———. Where the Legislature in creating a public corporation engaged solely in a proprietary function designates some members of a class as electors for electing directors and denies the right to others in the same class, it constitutes a grant of special privileges, constitutes an unlawful splitting of a class for purposes of legislation, and is violative of Article I, section 16, and Article III, section 18, of the Constitution of Nebraska.

12. ———: ———. The provision in L.B. 764, Laws 1965, chapter 404, page 1292, limiting the appointment of directors by the Governor to a single person in each of several districts and to a few persons in others is an encroachment upon the executive department and is violative of Article IV, section 6, of the Constitution of Nebraska.

Appeal from the district court for Platte County: C. THOMAS WHITE, Judge. Affirmed.

Clarence A. H. Meyer, Attorney General, and Richard D. Wilson, for appellants.

Kenneth M. Olds and Clarence A. Davis, for interveners-appellants.

Lester A. Danielson, for appellee Wittler.

Bert L. Overcash, Allen L. Overcash, Woods, Aitken & Aitken, and Lyle Winkle, for appellee Loup River Public Power Dist.

Mathews, Kelley & Cannon and Wood, King, Dawson & Logan, for appellees The Omaha Nat. Bank et al.

Schmid, Ford, Snow, Green & Mooney, for interveners-appellees.

Heard before CARTER, SPENCER, BOSLAUGH, BROWER, SMITH, and MCCOWN, JJ., and SCHEELE, District Judge.

CARTER, J.

This is an action by the plaintiff, Clarence Wittler, as an elector residing in Platte County and an owner of bonds issued by Loup River Public Power District, asserting the unconstitutionality of Legislative Bill 764, Laws 1965, chapter 404, page 1292, enacted by the Legislature at its Seventy-Fifth Session, which we shall hereafter refer to as the "Act."

The parties defendant are the 11 appointed and acting directors of the public corporation created by the Act; the Loup River Public Power District, a public corporation engaged in the generation, transmission, and distribution of electrical energy, hereafter referred to as Loup; and The Omaha National Bank of Omaha and the American National Bank and Trust Company of Chicago, trustee and co-trustee of Loup's bonds under an agreement and trust indenture dated May 1, 1949, hereafter referred to as the "trustees."

A petition in intervention, in the form of a class action was filed by William H. Fitzpatrick, a resident of Sarpy County, and Edward H. Elstun, a resident of Douglas County, adopting the second amended petition of the plaintiff. A petition in intervention was also filed by 22 rural public power districts and an electric membership association who assert the validity of the Act.

All parties to the action filed pleadings making up the issues, including the questioned constitutionality of the Act. The directors of the public corporation created by the Act, whom we will subsequently refer to as the grid system directors, thereupon filed a motion for judgment on the pleadings. Interveners Elstun and Fitzpatrick also moved the court for a judgment on the pleadings on the ground that the Act was unconstitutional. The trial court, after hearing, sustained the motion of interveners Elstun and Fitzpatrick for a judgment on the pleadings, held the Act to be unconstitutional, and enjoined the grid system directors from effectuating the purposes of the Act. All other motions for judgment on the pleadings were denied. The directors of the grid system, and 23 interveners have appealed.

It is contended that the motion for judgment on the pleadings is insufficient in the instant case to sustain a holding of unconstitutionality of the Act. A motion for judgment on the pleadings, like a demurrer, admits the truth of all well-pleaded facts in the pleadings of the opposing party, together with all reasonable inferences to be drawn therefrom. The party moving for judgment on the pleadings necessarily admits, for the purpose of the motion, the untruth of his own allegations insofar as they have been controverted. Board of Trustees of York College v. Cheney, 160 Neb. 631, 71 N. W. 2d 195. A motion for judgment on the pleadings does not waive a trial on disputed issues of fact. Under the foregoing rules and the pleadings, the unconstitutionality of the Act could properly be determined on a motion for judgment on the pleadings.

The public power issue in Nebraska has resulted in many problems. After the enactment of Laws 1933, chapter 86, page 337, the Platte Valley Public Power and Irrigation District and the Loup River Public Power District were organized. In 1939 Consumers Public Power District was organized under existing statutory authority to supply a market for power developed by the

first two public corporations. Existing statutes permitted each of these three public corporations to render service outside their district boundaries, with the result they became so competitive as to seriously impair the best interests of the public. All attempts to solve the problem failed and the Legislature in 1965 passed the Act with which we are here concerned, in an attempt to solve the problems of the public power industry in Nebraska.

The Act provided substantially for the creation of a public corporation and political subdivision described in the Act as the grid system. All public power districts serving more than 15 counties within the state on July 1, 1966, were required to be members of the grid system. Two counties, Douglas and Sarpy, were not included in the election districts created by the Act. The powers of the district were to be those prescribed in Chapter 70, article 6, R. R. S. 1943, and amendments thereto. The 91 counties of the 93 in the state, excluding Douglas and Sarpy, were divided into 9 districts from each of which a director was first to be appointed during fixed staggered terms, after which they were to be elected from their respective districts. The boards of directors of member power districts were to be superseded by the grid system board. The grid system board was to carry out all obligations of members without any impairment thereof. By the unification of control of the public power districts required to become members of the grid system, it appears to have been the purpose of the Legislature to eliminate harmful competition, avoid duplication of lines and service, and reduce the cost of electrical energy to the public. Other pertinent details of the Act will be discussed in connection with the questions of constitutionality raised.

It is the contention of the plaintiff that the Act is unconstitutional for the following reasons: (1) Because it creates a corporation by special law; (2) because it grants to a corporation, if lawfully created, special and

exclusive privileges; (3) because it grants to individuals special and exclusive privileges; (4) because it is special and class legislation which freezes the class; (5) because the Legislature unlawfully encroached on the powers of the executive department; and (6) because it impairs the obligations of Loup's contract with its bondholders.

The public corporations required by the Act to become members of the grid system are subject to the plenary control of the Legislature. In the exercise of such power the Legislature may authorize, limit, control, or even destroy such public corporations. City of Auburn v. Eastern Nebraska Public Power Dist., 179 Neb. 439, 138 N. W. 2d 629; City of O'Neill v. Consumers Public Power Dist., 179 Neb. 773, 140 N. W. 2d 644. The grid system is to perform proprietary functions as distinguished from those that are governmental. The Act was passed for the purpose of carrying out the public policy of the state as it relates to public power. It deals with a matter of statewide concern. It is fundamental that the Legislature has the right to classify public power districts for the purposes of legislation if a reasonable basis for the classification exists. It may not classify public power districts on an arbitrary and unreasonable basis. We cannot say that legislation dealing with all public power districts in the state which operate in more than 15 counties is unreasonable where it operates upon all alike that are within the class.

It is provided in part by Article XII, section 1, Constitution of Nebraska, as follows: "The Legislature shall provide by general law for the organization, regulation, supervision and general control of all corporations, * * *. No corporations shall be created by special law, nor their charters be extended, changed or amended, except those corporations organized for charitable, educational, penal or reformatory purposes, which are to be and remain under the patronage and control of the state. All general laws passed pursuant to this section

may be altered from time to time, or repealed." The Act is not within the exception contained in the foregoing section.

The defendant grid directors cite authorities from other states which hold that similar constitutional provisions apply only to private corporations. But whatever the law may be in those states, this court has held that Article XII, section 1, Constitution of Nebraska, applies to both private and public corporations. If this was not the meaning of the provision, it would have been a simple matter to have placed an indication of such intent in the provision. This the people in adopting the provision did not do, and it is not the province of this court to add language to its plain terms to restrict or extend its meaning.

In Clegg v. School Dist. No. 56, 8 Neb. 178, an act of the Legislature, authorizing school district No. 56 to issue bonds for the erection of a school building, was held void as special legislation. In the course of that opinion this court said: "It cannot be doubted that the act in question is a special act. It relates exclusively to school district No. 56, in Richardson county. None of its provisions apply, or are intended to apply to any other district or subdivision of the state, or the people thereof. It was published only as a special law.

"It is equally clear that the powers intended to be conferred by said act—that of issuing bonds, to be binding upon, and the principal and interest thereof to be paid by the said district—are corporate powers within the meaning of the said section of the constitution.

"It was evidently the intention of the framers of the constitution to put an end to an universally admitted and then growing evil, that of local and special legislation, in all cases where the beneficial results of such legislation could be reached by general laws, and they thereby adopted a policy which it is the duty of this court to uphold." See, also, Hallo v. Helmer, 12 Neb. 87, 10 N. W. 568; Dundy v. Board of County Commissioners of

Richardson County, 8 Neb. 508, 1 N. W. 565.

In School District No. 56 v. St. Joseph Fire & Marine Ins. Co., 103 U. S. 707, 26 L. Ed. 601, a case arising under Nebraska law, the court said: "It is next argued that the constitutional provision was only intended to apply to private corporations, as distinguished from those which are part of the body politic, such as counties and towns. But we see no warrant for this distinction.

"There is certainly nothing in the words of the provision to suggest any such distinction or limitation. Nor do we see any reason why the local corporate bodies discharging public functions should not be governed by general and uniform laws as well as those for private enterprises. In fact, the weight of the argument seems to be the other way, for it can very well be seen that the aggregation of individual capital and energy into an associated organization may require different powers for each enterprise so established, while the powers to be exercised by cities, towns, townships and school districts in the same State may or should be uniform in character all over the State. If any such rule is defensible at all, of which it is not our province to judge, its application to the latter class of corporations seems the more appropriate of the two."

Section 2 of the Act before us provides: "There is hereby established for the purpose of carrying out the policy of the state, a public corporation and political subdivision thereof which shall be officially named by resolution of its board of directors and which is referred to in this act as the grid system. The name chosen by the board of directors shall not be the same as the name of any district controlled by the grid system." This section creates a single public corporation. It delegates the naming of the corporation to the board of directors which clearly indicates an intention to establish a single public corporation by a legislative act which relates solely to the corporation it purports to create.

It is evident from the Act itself that the Legislature

was attempting to create a single public corporation by a special act rather than by general law. The Act applies only to the public corporation which is designated as the grid system. It can apply to no other. This it may not do. State ex rel. Wheeler v. Stuht, 52 Neb. 209, 71 N. W. 941. In Board of Directors of Alfalfa Irr. Dist. v. Collins, 46 Neb. 411, 64 N. W. 1086, we approved the following, involving a similar constitutional provision, from In re Bonds of Madera Irr. Dist., 92 Cal. 296, 28 P. 272, 27 Am. S. R. 106, 14 L. R. A. 755: "It is contended that the act is unconstitutional for the reason that it is a delegation of the legislative power to create a corporation. If by this is meant that only the legislature can create such corporation, the answer is that the constitution prohibits such action. If it is meant that because the corporation is not 'created' until the voters of the district have accepted the terms of the act, the answer is, that such proceeding is in direct accord with the principles of the constitution. Having the power to create municipal corporations, but being prohibited from creating them by special law, the only mode in which such corporations could be created under a general law would be by some act on the part of the district or community seeking incorporation, indicative of its determination to accept its terms." In Lincoln Street Ry. Co. v. City of Lincoln, 61 Neb. 109, 84 N. W. 802, this court said: "Under the constitution and laws of this state, special charters to corporations, with the exceptions mentioned, are prohibited." See, also, Anderson v. Lehmkuhl, 119 Neb. 451, 229 N. W. 773; State ex rel. Patterson v. County Commissioners of Douglas County, 47 Neb. 428, 66 N. W. 434; State Water Conservation Board v. Enking, 56 Idaho 722, 58 P. 2d 779. It is quite apparent that by virtue of Article XII, section 1, Constitution of Nebraska, the Legislature may prescribe the method and manner of establishing public corporations by general law, but it may not create a public corporation by special law. The Act purports to create a public corporation by a special

law and contravenes Article XII, section 1, of the Nebraska Constitution.

It is contended by the interveners Fitzpatrick and Elstun that the Act is unconstitutional in that it disfranchises the electors of Douglas and Sarpy counties in violation of Article I, sections 1 and 22, Constitution of Nebraska, and for the further reason that it discriminates between persons, and grants special or exclusive privileges, immunities, and franchises in violation of Article I, section 16, and Article III, section 18, Constitution of Nebraska. In this connection the Act recites that all facilities for the generation, transmission, and distribution of electric energy in this state are owned by the people. It further recites that the long-range welfare of electric users in the state requires that all public power districts operating in more than 15 counties should be unified under a single management. Districts are created from which directors are to be first appointed and then elected. In establishing the 9 districts, all counties of the state are included except Douglas and Sarpy counties. The two excluded counties contain approximately 30 percent of the population of the state. The Act purports to operate statewide, but excludes the electors of Douglas and Sarpy counties from voting for grid system directors or holding office as a grid system director. The Loup and Platte districts have electric facilities in each of the 2 excluded counties. The Omaha Public Power District (OPPD) operates in more than 15 counties, including Douglas and Sarpy, and is a potential member of the grid system which will become effective under the Act on July 1, 1966. It is contended that the electors of Douglas and Sarpy counties are discriminated against by their disfranchisement. It is asserted that the Act grants special privileges to the electors of 91 counties which it denies to the electors of the 2 excluded counties. The record shows that Loup and Platte extend their operations into Douglas and Sarpy counties but the electors of those counties are denied

the right to vote for directors of the grid system, while some counties whose electors are permitted to vote are not served at all by a public corporation operating in more than 15 counties.

The Act establishes a new public corporation and political subdivision. It invests the grid system with the powers of a public power district organized under the provisions of Chapter 70, article 6, R. R. S. 1943. It is a governmental subdivision invested with the powers of a private corporation. When a governmental subdivision is engaged in an enterprise, commercial in nature, it does not lose its character as a public corporation. Platte Valley Public Power & Irr. Dist. v. County of Lincoln, 144 Neb. 584, 14 N. W. 2d 202, 155 A. L. R. 412; United Community Services v. The Omaha Nat. Bank, 162 Neb. 786, 77 N. W. 2d 576.

The Legislature may, of course, provide for the selection of directors of a public power district by appointment of the Governor, or by election. It is fundamental that, when they are to be elected by the people, the classification of electors must be a reasonable one. We agree with the grid system directors that constitutional provisions, Article I, section 22, and Article VI, sections 1 and 2, are not applicable to public corporations exercising only proprietary functions. This has been determined by this court many times. See, State ex rel. Harris v. Hanson, on rehearing, 80 Neb. 738, 117 N. W. 412; Cunningham v. Ilg, 118 Neb. 682, 226 N. W. 333: City of Curtis v. Maywood Light Co., 137 Neb. 119, 288 N. W. 503. But this does not free the Legislature from compliance with other sections of the Constitution.

It is also fundamental that, although it is competent for the Legislature to classify for purposes of legislation, the classification, to be valid, must rest on some reason of public policy, some substantial difference of situation or circumstance, that would naturally suggest the justice or expediency of diverse legislation with respect to the objects to be classified. Safeway Stores, Inc.

v. Nebraska Liquor Control Comm., 179 Neb. 817, 140 N. W. 2d 668. In State ex rel. Taylor v. Hall, 129 Neb. 669, 262 N. W. 835, we said: "The legislature may legislate in regard to a class of persons, but they cannot take what may be termed a natural class of persons, split that class in two, and then arbitrarily designate the dissevered fractions of the original unit as two classes, and enact different rules for the government of each." The same principle was involved in State ex rel. Wright v. Brown, 131 Neb. 239, 267 N. W. 466, where we said: "It is unthinkable that under our constitutional provisions the election of a judge for Lancaster county (justice of the peace district No. 10) should be limited to the electors of the city of Lincoln, to the exclusion of the electors of the balance of the territory within the jurisdiction. If the legislature can enact a valid law to accomplish this purpose, it may change the justice of the peace districts and substitute the municipal court of Lincoln over a larger territory, including many counties in the state. This is not to say that judges must be elected. But if elected, they must be elected by all the electors of their district. The plan of electing officers by a part of the electors of the district has certainly been condemned."

The grid system applies to all public power districts in the state which operate in more than 15 counties. The Act indicates no basis for classifying the electors of 91 counties for the purpose of electing grid system directors and excluding the electors of 2 counties similarly situated. Nor are we able to find any reason why the directors of a public corporation operating statewide must come from 91 counties to the exclusion of the other 2. We conclude that the Act is violative of Article I, section 16, and Article III, section 18, Constitution of Nebraska.

It is contended that the Act is in violation of the Constitution in that the Act constitutes an encroachment by the Legislature upon the exclusive prerogatives of the Governor in violation of the distribution of powers sec-

tion of the Constitution. Art. II, sec. 1, Constitution of Nebraska. This contention is based on the limitations imposed on the Governor in the appointment of directors to the grid system board of directors on the establishment of the grid system. The pertinent part of section 6 of the Act provides: "In the first instance the directors of the grid system shall be appointed by the Governor from among the directors of member districts whose management it assumes under the provisions of this act; Provided, that there is an eligible board member in a district, and if there is no eligible board member then the Governor shall appoint an elector of the district. * * * The terms of the members appointed from Districts 1, 4, and 7 shall expire on January 1, 1969; the terms of the members appointed from Districts 2, 5, and 8 shall expire on January 1, 1971, and the terms of the members appointed from Districts 3, 6, and 9 shall expire on January 1, 1973. * * * After appointment of the original board of directors from the districts, their successors shall be nominated and elected as nearly as may be as by law provided for the nomination and election of members of the Legislature and shall take office for six-year terms."

Under the Constitution of Nebraska the supreme executive power is vested in the Governor. Art. IV, sec. 6, Constitution of Nebraska. The Constitution further provides that the Governor, with the advice and consent of the Legislature shall appoint all officers whose offices are established by the Constitution, or which may be created by law, and that no such officer shall be appointed or elected by the Legislature. Art. IV, sec. 10, Constitution of Nebraska. It is contended that the foregoing sections of the Constitution are violated in that the Legislature encroached upon the powers of the Governor by unduly restricting the field from which the directors of the grid system could be appointed. The grid system directors in their answer admit that Carl W. Baumgartner is the only person who could be ap-

pointed in District 1. It is admitted also that Bernard M. DeLay, Harold F. Boehner, Guy L. Cooper, and Frederick H. Wagener are the only persons whom the Governor could appoint as grid system directors under the provisions of the Act in Districts 4, 7, 8, and 9, respectively.

In State ex rel. Beck v. Young, 154 Neb. 588, 48 N. W. 2d 677, this court said: "The power of the Legislature in the creation of an office, admittedly a legislative function, is limited to those matters which are defined as ingredients of the office. * * * It is within the power of the Legislature to create an office, define its powers, limit its duration, and provide for the compensation of the occupant. The power of appointment and removal is in the Governor except as limited by Article IV, section 12, of the Constitution, and the legislative or judicial branches may not properly trench upon the executive power thus granted."

The appointive power here involved is executive or administrative in character. The power of the Legislature to consent or confirm executive appointments is also executive or administrative rather than a legislative function. But the Constitution itself transgresses the division of powers provision contained in it and, so far as it does, the separate departments have the power constitutionally granted. State ex rel. Johnson v. Hagemeister, 161 Neb. 475, 73 N. W. 2d 625; State ex rel. Horne v. Holcomb, 46 Neb. 88, 64 N. W. 437.

In State ex rel. Hensley v. Plasters, 74 Neb. 652, 105 N. W. 1092, 3 L. R. A. N. S. 887, we said: "Again, there can be no doubt that the legislature, after it has established an office, or in the act of establishing it, may provide for filling the office either by election by the people or, in a proper case, by appointment by some designated authority. The legislature, however, cannot itself fill the office. It cannot elect or appoint the officer. Const. art. V, sec. 10; State v. Stanley, 66 N. Car. 59, 8 Am. Rep. 488; State v. Holcomb, 46 Neb. 88. And it

seems to us to follow that it cannot by direct legislation for that sole purpose cause an office to be held for the term, or any period of the term, by any particular individual. * * * So that attempted legislation, which has for its sole purpose to determine who shall be the incumbent of the office for another definite period of time, is infringing upon the rights of the people, and is void."

We conclude that the power of appointment of grid system directors was the prerogative of the Governor. The right of the Legislature to prescribe reasonable qualifications of one to be appointed to office is not disputed. But the Legislature is prohibited by constitutional provision from appointing officers whose offices are created by law, either directly or indirectly. The provisions of the Act which limit the appointment of grid system directors by the Governor to a certain unnamed individual or to a limited few, is an encroachment by the Legislature upon the powers of the Governor and is void as violative of Article IV, section 10, of the Constitution of Nebraska.

It is argued by the directors of the grid system that OPPD advised the Legislature it intended to reduce the number of counties in which they would operate to 15 or less before July 1, 1966. It is contended that this in some way justified the exclusion of Douglas and Sarpy counties from the designated districts and removes questions of reasonable classification of electors and the discriminations against the electors of these two counties. We find nothing to support such a contention. Section 9 of the Act permits potential districts to reduce the number of counties in which they operate to 15 or less before July 1, 1966, and thereby exclude themselves from the grid system. By compliance with this section, OPPD could exclude itself from the grid system without regard to the inclusion or exclusion of Douglas and Sarpy counties, and without improperly classifying electors or discriminating against the electors of those two counties. It is asserted that although

the grid system involves a matter of statewide concern, it does not mean that it necessarily must operate statewide. This is, of course, true. Omaha Parking Authority v. City of Omaha, 163 Neb. 97, 77 N. W. 2d 862. But we again point out that the grid system is to include all public power districts in the state which operate in more than 15 counties. No counties were excluded in terms. Certainly OPPD is included if it operates in more than 15 counties including Douglas and Sarpy counties. The grid system was clearly to include all public power districts in the state operating in more than 15 counties on July 1, 1966. It is necessarily a statewide public power district as created. The construction contended for by the grid system directors cannot be read into the Act. There are statements in the briefs that the Legislature intended to exclude OPPD. But this cannot be found by any language in the Act. We must construe the Act as it was written and enacted, not from extraneous evidence of purpose or intent. In State ex rel. Graham v. Bratton, 90 Neb. 382, 133 N. W. 429, we said: "While the equities of the case seem to be with the relator, it is not within our power to set aside or amend by construction an act of the legislature which is free from all ambiguity and clear and explicit in its terms, simply because to do so would appear to be equitable; nor can we do so upon the theory that, in our judgment, the legislature made a mistake and did not intend to do that which its language clearly imports. To adopt such a course would be establishing a dangerous precedent. If the legislature has blundered, it is simply proof of its fallibility, and it is for it to make the correction." The Act provides that the electors of 91 counties have the right of franchise no matter what happens in the future and without regard to the source of their electric service. On the other hand, the voters of Douglas and Sarpy counties are barred from their right to vote regardless of future events or the source of their electric service. The discrimination is

not based on any reasonable classification of voters, and certainly the fact that OPPD may or may not become a member of the grid system on July 1, 1966, will not affect or support a basis for reasonable classification.

The trustees and Loup, as well as the plaintiff, argue that the Act impairs the obligations of the bonds that have been issued by Loup and the indenture under which bondholders purchased Loup's bonds. The question of impairment of the bonds is argued pro and con by most of the parties to the action. Our holding that the Act is unconstitutional makes it unnecessary for us to discuss this question. A discussion of all the questions alleged relating to contract impairment would unduly extend this opinion without serving any useful purpose. Other questions presented are in a similar situation.

We conclude that L.B. 764, Laws 1965, chapter 404, page 1292, is violative of the Constitution in that it creates a public corporation by special law; because it grants special privileges to persons in the same class which it denies to others of the class; and because the Legislature in enacting the Act unlawfully encroached upon the powers of the Governor. We therefore hold L.B. 764, Laws 1965, chapter 404, page 1292, to be void and of no force and effect. The trial court having come to this same conclusion, its judgment is affirmed.

AFFIRMED.

BOSLAUGH and SMITH, JJ., dissenting in part.

We respectfully dissent from the part of the majority opinion which holds that the grid system law contravenes Article XII, section 1, Constitution of Nebraska, our concurrence in the other parts being noted. The majority opinion announces that a law creating a single public corporation is necessarily special within the constitutional prohibition, and it strips the Legislature of power to cast a state instrumentality in the form of a public corporation, though the corporation be under a duty to serve equally every person and every locality.

The conclusion in the majority opinion is extreme.

It is not thrust upon us by our decisions involving local corporations. It breaks with our settled definition of general and special laws. It is a far cry from the purpose of the constitutional provision, from the elimination of logrolling, and other well-known evils of special legislation. See, State ex rel. Kauer v. Defenbacher, 153 Ohio St. 268, 91 N. E. 2d 512; Ennis v. State Highway Commission, 231 Ind. 311, 108 N. E. 2d 687; Indiana State Toll Bridge Commission v. Minor, 236 Ind. 193, 139 N. E. 2d 445; Orbison v. Welsh, 242 Ind. 385, 179 N. E. 2d 727; State ex rel. Carter v. Harris, 273 Ala. 374, 377, 141 So. 2d 175, 177. We regret the mistake—the majority opinion placing form ahead of substance. See, State ex rel. Johnson v. Consumers Public Power Dist., 143 Neb. 753, 10 N. W. 2d 784, 152 A. L. R. 480; State ex rel. Wheeler v. Stuht, 52 Neb. 209, 71 N. W. 941.

CITY OF O'NEILL, NEBRASKA, A MUNICIPAL CORPORATION, ET AL., APPELLANTS, V. CONSUMERS PUBLIC POWER DISTRICT, A PUBLIC CORPORATION AND POLITICAL SUBDIVISION OF THE STATE OF NEBRASKA, ET AL., APPELLEES, LOUP RIVER PUBLIC POWER DISTRICT, A PUBLIC CORPORATION, INTERVENER-APPELLANT.

143 N. W. 2d 741

Filed July 1, 1966. No. 36090.

Appeal from the district court for Holt County: WILLIAM C. SMITH, JR., Judge. On rehearing. See 179 Neb. 773, 140 N. W. 2d 644, for original opinion. Original opinion adhered to.

Norman Gonderinger, for appellants.

Wilson, Barlow, Neff & Watson, Julius D. Cronin, and Robert G. Simmons, for appellees.

Schmid, Ford, Snow, Green & Mooney and Lyle Winkle, for intervener-appellant.

Crosby, Pansing, Guenzel & Binning, for amicus curiae.

Heard before WHITE, C. J., CARTER, SPENCER, BOSLAUGH, BROWER, SMITH, and MCCOWN, JJ.

MCCOWN, J.

The original opinion in this cause is found at 179 Neb. 773, 140 N. W. 2d 644. Motion for rehearing was granted. After reargument and upon reconsideration, the court adheres to its original opinion.

ORIGINAL OPINION ADHERED TO.

WHITE, C. J., CARTER and SPENCER, JJ., dissenting.

We respectfully dissent from adherence to the former opinion herein. We are now convinced that our former opinion was wrong and should be withdrawn. The contract in question is unauthorized or ultra vires as to the City of O'Neill, and consequently is null and void.

A city has only such powers as are granted by statute. A recent restatement of the rule is appropriate here. In City of Milford v. Schmidt, 175 Neb. 12, 120 N. W. 2d 262, we said: "A city of the second class has no power except that conferred by statute. As we said in Dell v. City of Lincoln, 170 Neb. 176, 102 N. W. 2d 62: '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.'"

It cannot be questioned that a muncipality, such as O'Neill, is a creature of the Legislature, derives its powers and authority solely from the state, and can only exercise the powers expressly granted to it, together with those necessarily incidental thereto. A statute granting powers to a municipality must be strictly construed and, in case of doubt, such doubt must be resolved against the grant of the power. Nelson-

Johnston & Doudna v. Metropolitan Utilities Dist., 137 Neb. 871, 291 N. W. 558; 37 Am. Jur., Municipal Corporations, § 113, p. 725.

We cannot agree with the superficial way the opinion construes sections 70-501 and 70-502, R. R. S. 1943, and overrules Interstate Power Co. v. City of Ainsworth, 125 Neb. 419, 250 N. W. 649, so far as it is in conflict with the opinion.

Section 70-501, R. R. S. 1943, provides in part as follows: "Any city, * * * which may own or operate, or hereafter acquire or establish, any * * * plant, distribution system and transmission lines *may, at the time of or at any time after such acquisition or establishment,* extend the same beyond its boundaries, and for that purpose is authorized * * * to * * * acquire, * * * plants, distribution systems and transmission lines, outside of the boundaries of such city, * * *." (Italics supplied.)

Section 70-502, R. R. S. 1943, so far as pertinent here, provides: "For the purpose of * * * purchasing electrical energy * * * any city, * * * is * * * authorized to enter into agreements to connect and interconnect its * * * distribution system and transmission lines with the * * * system or transmission lines of any * * * public power districts."

Sections 70-501 and 70-502, R. R. S. 1943, were adopted in 1930 as Initiated Law No. 324. Laws 1931, c. 116, p. 336. We go to the title of the act to determine its scope and operation. In Schroll v. City of Beatrice, 169 Neb. 162, 98 N. W. 2d 790, in construing these statutes, we said: "It is a familiar rule that a legislative act is limited in its scope and operation by its title, and a like rule is applicable to a law adopted by the initiative method."

We quote the title to the act as far as pertinent here: "An Act relating to *cities,* villages, and public electric light and power districts *engaged in the generation, transmission, distribution, purchase and/or sale of electrical*

energy for lighting, heating and power purposes; *to provide for the extension, by any city, village,* or public electric light and power district of its electric light and power plants, *transmission lines and service outside of the boundaries of such municipality or district; to provide for interconnection of electric light and power plants, lines, systems and service* by and *between cities,* villages and public electric light and power districts in this state * * *." (Italics supplied.)

Section 70-501, R. R. S. 1943, specifically provides: "* * * at the time of or at any time after such acquisition or establishment."

In Schroll v. City of Beatrice, *supra,* the contention was made that section 70-502, R. R. S. 1943, gave unlimited authority for any type of contract or purchase of electricity by the city. Beatrice did not own or operate any electrical generating plant and was not engaged in the electrical business in any way. Our court adhered to its previous holding in Interstate Power Co. v. City of Ainsworth, 125 Neb. 419, 250 N. W. 649, and said as follows: "Defendants here quote several provisions from sections 70-501 and 70-502, R. R. S. 1943, which they contend authorize the contract between Norris and Beatrice, regardless of the language of its petition for creation. The above sections are the first two sections of Initiated Law No. 324, Laws 1931, c. 116, p. 336. * * * We had a like contention advanced as to these provisions in Interstate Power Co. v. City of Ainsworth, 125 Neb. 419, 250 N. W. 649. What was said there is peculiarly appropriate here: 'There are expressions and language used in the body of the act which would seem to sustain the contention of defendants, but the scope of the act must be determined from its title. It is a familiar rule that a legislative act is limited in its scope and operation by its title, and a like rule is applicable to a law adopted by the initiative method. A careful examination of the title to the act, which is quite lengthy, *clearly discloses that*

it applies only to such cities or villages as are engaged in the generation, transmission or distribution of electrical energy, and provides that such cities may extend, improve and add to their plants and pay the cost of such extensions, additions or improvements by pledging the future earnings of such plants.' *The decision has been accepted as the settled construction of the act.* * * * We amplify somewhat the analysis of the title of the act. *It relates to cities, villages, and public electric light and power districts 'engaged' in enumerated activities. It then recites that it is an act to provide for the 'extension' of facilities* and service outside the boundaries of the district; to provide for the 'interconnection' of facilities; * * *." (Italics supplied.)

In construing these sections of the act in Interstate Power Co. v. City of Ainsworth, *supra,* we further specificially held: *"Clearly, the act does not apply to a city which does not own any electric light or power plant or distribution system. Neither express nor implied power is conferred by chapter 116 to acquire an electric light and power plant* and pay for it by pledge of future earnings." (Italics supplied.)

The City of O'Neill does not own or operate any electric light or power plant or distribution system; nor is the agreement connected with an extension of facilities outside of the city limits of O'Neill; nor is the agreement concerned with an "interconnection" agreement by which there would be an exchange of power between O'Neill and Consumers. We adhere to the construction placed on these acts in Schroll v. City of Beatrice, *supra,* and Interstate Power Co. v. City of Ainsworth, *supra.* They appear to be the settled construction of these two statutes, sections 70-501 and 70-502, R. R. S. 1943, and we see no reason to depart from these holdings.

Consequently, we insist that neither of these statutes grant any power to O'Neill to enter into a wholesale power contract for the supplying of electricity to a distribution system which it does not own at the time the

contract was entered into, March 17, 1964. To read a prospective intention into the act is contrary to our opinions, which constitute the settled construction of the act, and is a rewriting of the act. It is our duty, in the construction of a statute, to give effect to all of its several parts. No sentence, clause, or word should be rejected as meaningless or superfluous, if it can be avoided and the plain, ordinary meaning of the language should be taken into account in order to determine the legislative will. Rose v. Hooper, 175 Neb. 645, 122 N. W. 2d 753; Pierce Co. v. Century Indemnity Co., 136 Neb. 78, 285 N. W. 91.

Section 17-528, R. R. S. 1943, provides that a city of the second class, such as O'Neill, may make a contract not to exceed 5 years, "for the furnishing of light for the streets, lanes, alleys and other public places and property of said city or village, and the inhabitants thereof."

The contract here involved is a 25-year wholesale power contract coupled with a retail section that has no termination date. By its terms the statute limits the power of the city to make such a contract to 5 years. The retail portion of the agreement which covers the parties' total relationship, before the acquisition of the electric system by O'Neill, implicitly gives Consumers the right to furnish light for the streets, public places, and inhabitants thereof. The furnishing of electricity by Consumers under the retail portion of the agreement will require that Consumers use the public ways, streets, and alleys for the maintenance and operation of the distribution system. The opinion holds that the power contract does not apply to the furnishing of light for the streets, lanes, and alleys and other public places and property of the city and the inhabitants thereof. We were in error in so holding because, as stated above, it is implicit in the contract that Consumers is granted the right to use the streets, alleys, and public ways in conformity with the statutory language. Consequently, we believe that sections 17-528 and 17-528.03, R. R. S. 1943,

apply and limit O'Neill's power to make such a contract to 5 years.

Our opinion holds that sections 17-528 and 17-528.03, R. R. S. 1943, do not apply to the contract for the reason that both of these sections are general sections dealing with franchises and the agreement herein is not a franchise. We point out that since sections 70-501 and 70-502, R. R. S. 1943, confer no power to O'Neill to enter into this contract, it is really unnecessary to consider the effect of sections 17-528 and 17-528.03, R. R. S. 1943. However, we do not agree with the accuracy of the bland statement in the opinion. The first portion deals with the retail operation, and exhibit A, the wholesale power contract, we would deem to be the second part. The wholesale power portion becomes operative when and after the City of O'Neill elects, after January 1, 1972, to acquire the distribution system.

The retail portion, or the first part of the agreement, provides for the payment of 2 percent of the gross retail revenues until December 31, 1971, and, ignoring the question of public policy, it is certainly the inducement for signing the contract. It also provides for the payment of at least 7 percent of the retail revenues after December 31, 1971, so long as Consumers operates the distribution system. While it is true that the City of O'Neill does not in the agreement provide that Consumers is to carry on the retail operation after January 1, 1972, until such time as the city exercises it option to take over the distribution system, and it has to take affirmative action to do so which it may never do, Consumers continues to operate the retail system and will pay at least 7 percent of the gross to the city. We have difficulty in understanding why this should not be interpreted as a franchise agreement within the purview of section 17-528, R. R. S. 1943.

We also call attention to the provisions of section 17-903, R. R. S. 1943, which, so far as material herein, provides: "Before any city of the second class or village

shall make any contract with any person or corporation within or without such city or village for the furnishing of electricity, power, steam or other product to such city or village, or any such municipal plant within such city or village, the question shall be submitted to the electors voting at any regular or special election upon the proposition; * * *." This statute, read in conjunction with sections 17-901 and 17-902, R. R. S. 1943, would require that the contract in question would need to be submitted to the election process before it could be executed.

In summary, neither sections 70-501 nor 70-502, R. R. S. 1943, grant the City of O'Neill the necessary power to enter into a power contract and agreement such as is at issue here; nor does any power to enter into a contract for a period of 25 years flow from the application of sections 17-528 or 17-528.03, R. R. S. 1943. Such power does not exist unless conferred by statute and a city has no inherent powers or authority outside the statutes. No statutory authority or power has been called to our attention that would authorize the contracts in issue here. We find ourselves in the same position as the court in Schroll v. City of Beatrice, *supra*. There the court said: "In State ex rel. Johnson v. Consumers Public Power Dist., 143 Neb. 753, 10 N. W. 2d 784, 152 A. L. R. 480, we held: 'It seems clear that an express proviso that a corporation shall not do certain acts is no stronger than the failure to give authority, express or implied, to do them, for powers not granted either expressly or impliedly, are impliedly prohibited.' "

IN RE VALUATION AND EQUALIZATION OF REAL PROPERTY IN THE STATE OF NEBRASKA FOR 1965. COUNTY OF BLAINE, APPELLANT, V. STATE BOARD OF EQUALIZATION AND ASSESSMENT OF THE STATE OF NEBRASKA, APPELLEE.

143 N. W. 2d 880

Filed July 1, 1966. No. 36178.

1. **Taxation.** A notice issued by the State Board of Equalization and Assessment, pursuant to sections 77-508, R. R. S. 1943, and 77-509, R. S. Supp., 1963, should specify the percentage adjustment which the board proposes to make in that county.
2. ———. The State Board of Equalization and Assessment has a wide latitude of judgment and discretion in equalizing the assessment of property between counties and may adopt any reasonable method.
3. **Taxation: Appeal and Error.** Where the record of the proceedings before the State Board of Equalization and Assessment shows that the order of the board was unreasonable and arbitrary, it will be reversed.

Appeal from the State Board of Equalization and Assessment. Reversed and remanded.

Joseph J. Divis and Johnson, Kelly, Evans & Spencer, for appellant.

Clarence A. H. Meyer, Attorney General, and Homer G. Hamilton, for appellee.

Kennedy, Holland, DeLacy & Svoboda, amicus curiae.

Heard before CARTER, SPENCER, BOSLAUGH, BROWER, SMITH, and MCCOWN, JJ., and DITTRICK, District Judge.

BOSLAUGH, J.

This is an appeal by Blaine County, Nebraska, from the order of the State Board of Equalization and Assessment increasing the valuation of rural land and improvements as shown by the 1965 abstract of assessment for Blaine County. The county also appeals from the denial of its application to amend the bill of exceptions.

The county contends that the Administrative Procedures Act applies to the proceedings of the state board; that the order of the state board must be reversed because the proceedings of the state board failed to comply with the requirements of the Administrative Procedures Act; and that the action of the state board was arbitrary and capricious. The record does not show that any objection was made by anyone concerning the procedure of the board before or at the time of the hearing.

The Administrative Procedures Act, which was adopted in 1959, now appears as sections 84-901 and 84-909 to 84-919, R. S. Supp., 1963. The purpose of the act is to establish a minimum administrative procedure for administrative agencies. § 84-916, R. S. Supp., 1963. The act applies, generally, to each board, commission, department, officer, division, or other administrative office or unit of state government which is authorized to make rules. § 84-901, R. S. Supp., 1963.

The State Board of Equalization is an administrative board which is authorized by statute to make rules and regulations. See, § 77-502, R. R. S. 1943, and §§ 77-1311 and 77-1314, R. S. Supp., 1963. Upon this basis, the county contends that the Administrative Procedures Act is applicable to the proceedings of the state board.

The county complains that the order and notice requiring the representatives of Blaine County to appear before the state board failed to state the issues that were to be considered at the hearing. The Administrative Procedures Act requires that the notice of hearing in a "contested case" shall state the issues involved. § 84-913, R. S. Supp., 1963.

Section 77-508, R. R. S. 1943, provides that if the state board finds that it is necessary to change the valuation of real or personal property as returned by any county, the board shall issue a notice to the county and set a date for hearing. Section 77-509, R. S. Supp., 1963, provides that the legal representatives of the county

may appear at the hearing and show cause why the valuation of the property in the county should not be changed.

The issue at the hearing before the state board, so far as Blaine County is concerned, was whether the valuation of the urban and rural real estate in Blaine County should be changed so that a just, equitable, and legal assessment of the property in the state could be made. The notice which was sent to Blaine County stated that the hearing was to be in regard to the valuation of urban and rural real estate. The term "real estate" is broad enough to include both improved and unimproved lands. The notice further stated that representatives of the county would be given an opportunity to show why the assessed valuation of that class of property should not be increased or decreased as might be found necessary to equalize the assessment of the various counties of the state. Although the form of the notice which was given has been approved by this court, we now think that the notice should state the percentage adjustment which the board proposes to make in that county. See County of Lancaster v. State Board of Equalization & Assessment, *post* p. 497, 143 N. W. 2d 885. In this case the county appeared and participated in the hearing without objection. It cannot now complain about the notice which was given.

The Administrative Procedures Act prescribes the procedure that administrative agencies must follow in hearing and deciding "contested cases." A contested case is defined as a proceeding before an agency in which the legal rights, duties, or privileges of specific parties are required by law or constitutional right to be determined after an agency hearing. § 84-901, R. S. Supp., 1963.

An agency is required to make an official record containing all of the factual information or evidence which the agency considers in the determination of a contested case. §§ 84-913 and 84-914, R. S. Supp., 1963.

This includes records and documents in possession of the agency; facts which are judicially cognizable; and general, technical, or scientific facts within the specialized knowledge of the agency. The act further provides that every decision and order adverse to a party in a contested case shall be in writing and accompanied by findings of fact and conclusions of law. § 84-915, R. S. Supp., 1963.

The procedure which the Administrative Procedures Act prescribes for use in contested cases by administrative agencies is essentially that which is normally used in adversary proceedings. In applying the Administrative Procedures Act to the proceedings of the State Board of Equalization and Assessment, some consideration must be given to the particular nature of the state board including its purpose and function.

The primary duty of the State Board of Equalization and Assessment is to establish uniformity in taxation between the various counties. Carpenter v. State Board of Equalization & Assessment, 178 Neb. 611, 134 N. W. 2d 272. The purpose of the hearing before the state board is to give the legal representatives of each county an opportunity to appear and show cause why the valuation of their counties should not be changed. § 77-509, R. S. Supp., 1963; County of Antelope v. State Board of Equalization & Assessment, 146 Neb. 661, 21 N. W. 2d 416.

It is apparent that a procedure which might be suitable for a hearing involving relatively few parties would not be practicable where the parties are numerous and the issues complex. There are practical difficulties which prevent a strict and literal application of the Administrative Procedures Act to the proceedings of the state board where the board is attempting to equalize the valuation of real estate in all 93 counties.

In our previous decisions we have emphasized the wide latitude of judgment and discretion which is vested in the state board. We have held that the board may

adopt any reasonable method of procedure in equalizing the assessment of property between the various counties; and that the board may act upon the abstracts of assessments returned by the various counties, the knowledge of its own members as to value, or any other information which is satisfactory to it. County of Grant v. State Board of Equalization & Assessment, 158 Neb. 310, 63 N. W. 2d 459. We have also held that the state board does not have unlimited power to exercise its discretion; that it is subject to the fundamental rule that the order of the board will be set aside if the evidence which was before the board demonstrates that the order was arbitrary. Fromkin v. State, 158 Neb. 377, 63 N. W. 2d 332. If the state board fails to follow the statute and acts without authority, proper evidence, or due investigation or for any other reason renders a decision which is not based upon the facts, or is not according to law, its order will be reversed. State ex rel. Sorensen v. State Board of Equalization & Assessment, 123 Neb. 259, 242 N. W. 609.

The review by this court of the action of the state board is necessarily limited to the matters which appear in the record of the proceedings of the board. Thus, the issue upon an appeal to this court is whether the record of the proceedings before the board shows that the order of the board is unreasonable and arbitrary. As stated in Fromkin v. State, *supra,* if the record demonstrates that the order of the board was arbitrary, it will be reversed.

On August 9, 1965, the state board adopted a resolution which directed that the valuation of rural property in Blaine County, as reflected by the 1965 abstract of assessment, be increased 90 percent. The resolution provides in part as follows: " 'Upon consideration of: (1) the sworn testimony of county officials of all 93 counties; of individual taxpayers and representatives of interested organizations; (2) a sales-assessment ratio which had been substantially revised from previous years wherein the infor-

mation had been checked by the State Tax Commissioner's office, the counties given two opportunities to comment on the sales before the hearings and additional opportunities during and after the hearings, and where the statistical approach used was reviewed by an expert statistician; (3) a comparison of assessed values of land between counties, which devoted primary attention to values within one mile of the county lines; (4) the personal knowledge of each and every member of the State Board of Equalization and Assessment; (5) the decisions of the Nebraska Supreme Court, particularly that of Carpenter v. State Board of Equalization and Assessment, 178 Neb. 611; (6) the provisions of Article 5 of Chapter 77, R. R. S. 1943, and other applicable laws and constitutional requirements; (7) other information satisfactory to the State Board of Equalization and Assessment, the State Board of Equalization and Assessment finds that the valuations as reflected by the 1965 Abstracts of Assessment returned by certain counties of the State of Nebraska do not conform to law and in order to equalize assessments between the various counties to conform to law pursuant to Article 5, Chapter 77, R. R. S. 1943, that the valuations as reflected by the 1965 Abstracts of Assessment as submitted by the following counties as to total urban and rural property be increased or decreased by the percentages indicated below: * * *.'" The board made no other findings of fact or conclusions of law.

The order of the state board increased the valuations in some counties, decreased valuations in others, and left the valuations in others unchanged. There is no explanation in the record as to how the board arrived at its decision other than that contained in the resolution of August 9, 1965.

The testimony with respect to Blaine County shows that the county was reappraised in 1959 by the county commissioners; that the valuation of the county was raised roughly 7 or 8 percent as a result of the reap-

praisal; that the land was valued upon the basis of what it was selling for and what it would return upon a 4 percent basis; that the valuations have been changed as improvements were added to the land; that except as to Brown County, the land in adjacent counties along the county line is assessed at approximately the same amount as the land in Blaine County along the county line; that the land in Brown County which is adjacent to the Blaine County line is somewhat better land; that the sales-assessment ratio for Blaine County is 19.03 for rural and 24.68 for urban; that there were six rural sales which could be considered and that the ratio was computed by using three sales; and that most of the sales consist of tracts which are not large enough to be operating units and are purchased as additions to other farming units.

There is some basis in the record for an increase in the valuation of rural land and improvements in Blaine County. Blaine County, in its brief, admits that some increase in its valuation may be justified. The problem here is the extent of the increase which was ordered.

The state board ordered a 90 percent increase in the valuation of rural property in Blaine County. The effect of the order was to raise the sales-assessment ratio for rural property in Blaine County to 36.157 which appears to be more than 8 percent above the average or median ratio for all of the counties as adjusted by the state board.

From our examination of the entire record we have been unable to discover any basis upon which the order directing a 90 percent increase in the valuation of rural land and improvements in Blaine County can be sustained. Necessarily, we conclude that the order of the State Board of Equalization and Assessment, so far as Blaine County is concerned, is arbitrary and capricious and must be reversed.

We determine only that upon the record before us at this time the order of the State Board of Equalization and Assessment directing a 90 percent increase in the

value of rural land and improvements in Blaine County as shown by the 1965 abstract of assessment must be reversed. The order of the State Board of Equalization and Assessment as to Blaine County is reversed and the cause remanded to the State Board of Equalization and Assessment for further proceedings according to law.

It is unnecessary to consider the other errors urged by the appellant.

REVERSED AND REMANDED.

CARTER and SPENCER, JJ., concur in result.

IN RE VALUATION AND EQUALIZATION OF REAL PROPERTY IN THE STATE OF NEBRASKA FOR 1965.
COUNTY OF LOUP, APPELLANT, V. STATE BOARD OF EQUALIZATION AND ASSESSMENT OF THE STATE OF NEBRASKA, APPELLEE.

143 N. W. 2d 890

Filed July 1, 1966. No. 36176.

Taxation: Appeal and Error. Where the record of the proceedings before the State Board of Equalization and Assessment does not show that the order of the board was unreasonable, arbitrary, or prejudicial, it will be affirmed.

Appeal from the State Board of Equalization and Assessment. Affirmed.

A. F. Alder, for appellant.

Clarence A. H. Meyer, Attorney General, and Homer G. Hamilton, for appellee.

Heard before CARTER, SPENCER, BOSLAUGH, BROWER, SMITH, and MCCOWN, JJ., and DITTRICK, District Judge.

BOSLAUGH, J.

This is an appeal by Loup County, Nebraska, from the order of the State Board of Equalization and Assessment increasing the valuation of rural land and improvements

as shown by the 1965 abstract of assessment for Loup County.

The county contends that the order of the state board increasing the valuation of rural property was arbitrary and capricious.

The testimony with respect to Loup County shows that Loup County was reappraised in 1957; that new improvements have been assessed by the county board in accordance with the guide left by the appraisal company; that, except in Custer County, the land along the county line in adjacent counties is assessed approximately the same as the land in Loup County along the county line; that the land in Loup County adjacent to Custer County is assessed at a higher value because it is irrigated land; that the sales-assessment ratio for Loup County is 15.7 for rural and 40.07 for urban; that most sales of rural property are tracts which are purchased as additions to operating units; and that, generally, rural land sells at a price in excess of what the value might be if considered upon the basis of its productivity.

The order of the state board directed that the valuation of rural property in Loup County, as reflected by the 1965 abstract of assessment, be increased 52 percent.

The evidence relating to the sales-assessment ratio indicates that some increase in the value of rural real estate in Loup County should have been made. The increase which was made brought the sales-assessment ratio for rural property in Loup County to 23.86 which appears to be well below the average or median ratios for all counties as adjusted by the state board.

The county contends that the state board placed too much emphasis upon sales-assessment ratios and sale prices and did not give proper consideration to section 77-112, R. R. S. 1943, which provides as follows: "Actual value of property for taxation shall mean and include the value of property for taxation that is ascertained by using the following formula where applicable: (1) Earning capacity of the property; (2) relative location; (3)

desirability and functional use; (4) reproduction cost less depreciation; (5) comparison with other properties of known or recognized value; and (6) market value in the ordinary course of trade."

For purposes of taxation, the terms actual value, market value, and fair market value mean exactly the same thing. Richards v. Board of Equalization, 178 Neb. 537, 134 N. W. 2d 56. Many elements enter into a determination of actual value, some of which are set out in the statute.

Ordinarily, the objection to using sale price as the standard or evidence of value is the fact that the sale may not have been in the ordinary course of trade. The character and circumstances of the sale are important in determining to what extent the sale price may be used to fix the value of the property. The same difficulty is involved in the use of sales-assessment ratios. It is important that the computation include only representative sales with the consideration of each sale accurately determined.

At the hearing before the state board, the representatives of Loup County were given an opportunity to comment concerning the sales which were used in computing the sales-assessment ratios for Loup County. The representatives of Loup County stated that they did not believe that the sales-assessment ratio was "really a true picture," but also stated that they had no specific reason to challenge any particular sale as not being a bona fide sale.

Upon consideration of the entire record, we are unable to say that the action of the State Board of Equalization and Assessment, so far as Loup County is concerned, was arbitrary and capricious or prejudicial. The order is, therefore, affirmed.

AFFIRMED.

SPENCER, J., dissenting.

I respectfully dissent herein, and incorporate herein by reference the dissent filed in County of Lancaster v.

State Board of Equalization & Assessment, *post* p. 497, 143 N. W. 2d 885.

Additionally, I make the following observations. The Tax Commissioner's sales-assessment ratio for Loup County is: Urban - 40.07; rural - 15.7. Loup County was given a 52 percent increase on its rural property, but no deduction or decrease was given on its urban property, although it is far above the other counties. This county had a scientific appraisal in 1957, and used the appraisal figures at 100 percent as representing actual value. The appraisal has been maintained and there have been no decreases since that time, although the State Board of Equalization and Assessment did subsequently increase the valuation figures 24 percent.

The assessed value of Loup County land bordering Custer County has an assessed value approximately twice as high as the adjoining land in Custer County, which received only a 20 percent increase. Loup County land bordering other adjoining counties is assessed at approximately the same level as in those counties which, with the exception of Blaine, all received substantially lower increases. There is nothing in the record on the sales used to determine the ratio, except the statement that the prices paid were exorbitant. It would seem, however, that with a scientific appraisal in 1957, and a subsequent 24 percent raise, there must be factors present in the sales used which need explaining. The county contends that the State Board of Equalization and Assessment placed too much emphasis upon sales-assessment ratios, and did not give proper consideration to section 77-112, R. R. S. 1943, which sets out the criteria to be used to determine actual value for purposes of taxation. So far as the record herein is concerned, it is impossible to determine what the board did consider.

CARTER, J., joins in this dissent.

IN RE VALUATION AND EQUALIZATION OF REAL PROPERTY IN THE STATE OF NEBRASKA FOR 1965.
COUNTY OF KIMBALL, APPELLANT, V. STATE BOARD OF EQUALIZATION AND ASSESSMENT OF THE STATE OF NEBRASKA, APPELLEE.

143 N. W. 2d 893

Filed July 1, 1966. No. 36177.

1. **Taxation.** The State Board of Equalization and Assessment has a wide latitude of judgment and discretion in equalizing the assessment of property between counties and may adopt any reasonable method.
2. **Taxation: Appeal and Error.** Where the record of the proceedings before the State Board of Equalization and Assessment does not show that the order of the board was unreasonable, arbitrary, or prejudicial, it will be affirmed.

Appeal from the State Board of Equalization and Assessment. Affirmed.

Thomas D. Brower, for appellant.

Clarence A. H. Meyer, Attorney General, and Homer G. Hamilton, for appellee.

Kennedy, Holland, DeLacy & Svoboda, amicus curiae.

Heard before CARTER, SPENCER, BOSLAUGH, SMITH, and McCOWN, JJ., and DITTRICK, District Judge.

BOSLAUGH, J.

This is an appeal by Kimball County, Nebraska, from the order of the State Board of Equalization and Assessment increasing the valuation of both urban and rural land and improvements as shown by the 1965 abstract of assessment for Kimball County.

In its reply brief, the county contends that the proceedings of the state board were void because of its failure to comply with the provisions of the Administrative Procedures Act, sections 84-901 and 84-909 to 84-919, R. S. Supp., 1963. The objection is raised for the first time in this court. Kimball County appeared before

the board and participated in the hearing without objecting to the notice or the procedure of the board.

In County of Blaine v. State Board of Equalization & Assessment, *ante* p. 471, 143 N. W. 2d 880, we held that there are practical difficulties which prevent a strict and literal application of the Administrative Procedures Act to the proceedings of the state board where the board is attempting to equalize the valuation of real estate in all 93 counties. Upon an appeal to this court from the State Board of Equalization and Assessment, the issue is whether the record of the proceedings before the board shows that the order was unreasonable and arbitrary. If the record demonstrates that the order of the board was arbitrary, it will be reversed. Fromkin v. State, 158 Neb. 377, 63 N. W. 2d 332.

The county contends that the order of the state board increasing the valuation of both urban and rural property was arbitrary and capricious. The order of the state board directed that the valuation of urban property in Kimball County, as reflected by the 1965 abstract of assessment, be increased 7 percent, and that rural property be increased 29 percent.

The testimony with respect to Kimball County shows that Kimball County was reappraised in 1957; that the county board reduced the value of rural lands 20 percent from the appraised values; that until a year ago, professional appraisers were employed to keep the appraisals up to date; that an employee of the county, who was trained by the appraisal company, now does this work; that the land around the city of Kimball was revalued 2 years ago; that the land in Cheyenne County along the county line is assessed somewhat higher than the land in Kimball County; that the land in Kimball County along the Banner County line is assessed higher than the land in Banner County; that the difference in assessed value is due to the difference in the quality and type of land; that the sales-assessment ratio for Kimball County is 21.21 for rural and 27.01 for urban; and that

most sales of rural property are of tracts which are purchased as additions to operating units.

The testimony does not show how the sales-assessment ratio which appears in the record was computed. The county objected to some of the sales, and it is not clear whether these sales were used in computing the ratio. Upon this state of the record, we must assume that the ratio was computed accurately and that the sales used were representative.

The evidence relating to the sales-assessment ratio indicates that some increase in the value of rural property should have been made. The increase which was made brought the sales-assessment ratio for rural property in Kimball County to 27.36, which appears to be the median for all counties as adjusted by the state board.

Much of the county's brief is devoted to a comparison of the valuation of Cheyenne County land with that in Kimball County. The sales-assessment ratio for Cheyenne County, as shown by the record, is 31.83 for rural.

The county argues that any increase in the valuation of rural property should have been restricted to land and that no increase should have been made in the value of improvements. The argument assumes that the state board could not do more than restore the 20 percent reduction in the value of rural land which was made at the time of the 1957 reappraisal. The justification for the 1965 increase, that may be found in the record, is the sales-assessment ratio. Equalization based upon a comparison of sales-assessment ratios must include both land and improvements since, usually, there is no way to apportion consideration between land and improvements.

The increase in the value of urban property in Kimball County brought the sales-assessment ratio for that property to 28.9. This appears to be slightly above the average and the median for all counties as adjusted by the state board.

The county calls attention to the fact that 18 counties with sales-assessment ratios approximately the same or

less than Kimball County were not changed or the valuation was reduced. Attention might also be directed to counties with sales-assessment ratios higher than Kimball County which were not changed or the value increased.

Although the record does not explain why the state board took this particular action, this court should not interfere with the discretion of the board when the discrepancy appears to be slight. Mathematical exactness can never be obtained, and substantial compliance with equality and uniformity is all that is required.

Upon consideration of the entire record, we are unable to say that the action of the State Board of Equalization and Assessment, so far as Kimball County is concerned, was arbitrary and capricious or prejudicial. The order is, therefore, affirmed.

AFFIRMED.

BROWER, J., not participating.

SPENCER, J., dissenting.

I respectfully dissent herein, and incorporate herein by reference the dissent filed in County of Lancaster v. State Board of Equalization & Assessment, *post* p. 497, 143 N. W. 2d 885.

Additionally, I make the following observations. The sales-assessment ratio given by the Tax Commissioner for this county is: Rural - 21.21; urban - 27.01. The rural lands were raised 29 percent, and the urban 7 percent. Evidence was adduced to show that the four sections of land in Kimball County, surrounding state school lands which were revalued last year and which are required to be valued at market value, were in each instance valued at a figure higher than the state school lands.

On the rural sales, evidence was adduced that six of them were incorrect or out of line, and it does not appear that this evidence was considered. Only one of the sales involved was of an operating unit, and that involved an exchange of properties where inflated values

are sometimes used. The portion of the perimeter map showing Cheyenne County, in which no change was made, indicates that the Kimball County land, which is comparable to that across the county line in Cheyenne County, is valued at a higher figure than Cheyenne County land. If Cheyenne County is at actual value, then a gross injustice is being done Kimball County by increasing the inequality.

Some of the urban sales were disputed. One which was used involved the sale of a liquor store with an admitted $10,000 "Blue Sky" for the business. The evidence indicates that Kimball County, at the time of the hearing, had 16 to 19 vacant buildings in a 5-block area. The following comparison of counties in which no change made with an urban sales ratio less than Kimball County's 27.01, clearly demonstrates the arbitrariness of the urban increase:

COUNTY	SALES RATIO
Banner	25.20
Blaine	24.68
Boyd	26.85
Brown	25.76
Cedar	25.70
Furnas	26.96
Garden	23.72
Hamilton	25.92
Hayes	22.77
Kearney	25.83
Logan	23.75
Rock	26.08
Thomas	22.12
York	26.71

In spite of the fact that each of the counties above had a lower figure than the 27.01 of Kimball County, which received a 7 percent increase, they received none. Cheyenne County, with a 27.09; Garfield County, with a 27.24; and Madison County, with a 27.41, received no in-

crease; and Otoe County, with a 25.61, received a 7 percent decrease.

CARTER, J., joins in this dissent.

IN RE VALUATION AND EQUALIZATION OF REAL PROPERTY IN THE STATE OF NEBRASKA FOR 1965.
COUNTY OF BROWN, APPELLANT, V. STATE BOARD OF EQUALIZATION AND ASSESSMENT OF THE STATE OF NEBRASKA, APPELLEE.
143 N. W. 2d 896

Filed July 1, 1966. No. 36180.

1. **Taxation.** A notice issued by the State Board of Equalization and Assessment, pursuant to sections 77-508, R. R. S. 1943, and 77-509, R. S. Supp., 1963, should specify the percentage adjustment which the board proposes to make in that county.
2. ———. The State Board of Equalization and Assessment has a wide latitude of judgment and discretion in equalizing the assessment of property between counties and may adopt any reasonable method.
3. **Taxation: Appeal and Error.** Where the record of the proceedings before the State Board of Equalization and Assessment does not show that the order of the board was unreasonable, arbitrary, or prejudicial, it will be affirmed.

Appeal from the State Board of Equalization and Assessment. Affirmed.

Samuel C. Ely, J. Marvin Weems, and C. Russell Mattson, for appellant.

Clarence A. H. Meyer, Attorney General, and Homer G. Hamilton, for appellee.

Heard before CARTER, SPENCER, BOSLAUGH, BROWER, SMITH, and MCCOWN, JJ., and DITTRICK, District Judge.

BOSLAUGH, J.

This is an appeal by Brown County, Nebraska, from the order of the State Board of Equalization and Assessment increasing the valuation of rural land and improvements as shown by the 1965 abstract of assessment for Brown County.

The county contends that the order of the state board should be reversed because the hearing order and notice issued by the state board did not comply with the statute; that the board should not have directed that the valuation of rural property in Brown County be increased; and that the order of the board discriminates against the rural property owners in Brown County.

Section 77-508, R. R. S. 1943, provides that if the state board finds that it is necessary to increase or decrease the valuation of real or personal property as returned by any county, the board shall set a date for hearing and issue a notice to the counties which the board deems either undervalued or overvalued. The county contends that the statute requires the state board to first determine which counties are undervalued or overvalued, and then notify those counties to appear before it to show cause why the valuation of the property in their counties should not be changed.

The procedure which the state board adopted was to direct the Tax Commissioner to notify all counties to appear before the state board for a hearing regarding the valuation of urban and rural real estate and show cause why the valuations of that class of property should not be increased or decreased as might be found necessary to equalize the assessment of the various counties of the state.

The representatives of Brown County appeared before the state board and participated in the hearing without making any objection in regard to the notice that had been issued by the board. Although we are now of the opinion that a notice issued pursuant to sections 77-508, R. R. S. 1943, and 77-509, R. S. Supp., 1963, should specify the percentage adjustment which the state board proposes to make in that county, the county cannot object to the notice for the first time in this court. See County of Lancaster v. State Board of Equalization & Assessment, *post* p. 497, 143 N. W. 2d 885.

The order of the state board directed that the valua-

tion of rural property in Brown County, as reflected by the 1965 abstract of assessment, be increased 50 percent.

The testimony with respect to Brown County shows that the county was reappraised in 1960; that the rural property was valued upon the basis of the type of soil rather than productivity; that since that time the county has hired professional appraisers to appraise new property and improvements; that the county adopted 82 percent of all appraised value as actual value; that the land along the county line in adjacent counties is assessed approximately the same as the land in Brown County along the county line when the quality and type of land involved are considered; that the sales-assessment ratio for Brown County is 16.42 for rural and 25.76 for urban; that there has been an increase in the sale price of real estate since 1960; that most sales of rural property are of tracts which were purchased as additions to operating units; that there has been an increased demand for residence property by persons in the medium income bracket which has resulted in an increased sale price for homes in the $9,000 price range; and that the more expensive homes sell at approximately the value at which they were appraised.

The evidence relating to the sales-assessment ratio indicates that some increase in the value of rural real estate in Brown County should have been made. The increase which was made brought the sales-assessment ratio for rural property in Brown County to within approximately 1 percent of the sales-assessment ratio for urban property in the county. The sales-assessment ratio for rural property in Brown County, after the increase, appears to be below the average or median ratio for all counties as adjusted by the state board.

The county contends that the increase in the valuation of rural property only will result in a discrimination against the rural property owners. The contention is based upon the assumption that the values established by the 1960 appraisal have continued the same, or in-

creased by the same proportion. The evidence relating to the sales-assessment ratio indicates that the values were not proportionate in 1965 and that rural property in Brown County, generally, was undervalued in comparison to urban property.

Upon consideration of the entire record, we are unable to say that the action of the State Board of Equalization and Assessment, so far as Brown County is concerned, was arbitrary and capricious or prejudicial. The order is, therefore, affirmed.

AFFIRMED.

SPENCER, J., dissenting.

I respectfully dissent herein, and incorporate herein by reference the dissent filed in County of Lancaster v. State Board of Equalization & Assessment, *post* p. 497, 143 N. W. 2d 885.

Additionally, I make the following observations. The Tax Commissioner's figures for this county are: Rural—16.42; urban—25.76. The rural figure was increased 50 percent. Brown County had a scientific appraisal in 1960, and it has been kept current by a representative of the Brandt Appraisal Company. The perimeter figures would indicate that Brown County land is valued higher than the adjoining counties where the land is comparable. The evidence indicates that 32,000 acres are being leveled for irrigation purposes, but until the development is in operation the land is less valuable than it was in its original state. There is nothing in the record pertaining to the rural sales used or the number of them, so it is impossible to know how the figure given was determined. It does test credulity, however, to believe that actual rural values in Brown County could have increased 50 percent in 5 years, if the 1960 scientific appraisal in any way reflected actual value.

CARTER, J., joins in this dissent.