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IN RE ESTATE OF PARK M. CRUSINBERRY, DECEASED. EVA A. CRUSINBERRY, APPELLEE, V. VERLA M. MERRYMAN, EXECUTRIX OF THE ESTATE OF PARK M. CRUSINBERRY, DECEASED, APPELLANT.

126 N. W. 2d 481

Filed February 28, 1964. No. 35582.

1. **Trial.** The party against whom a motion for directed verdict 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. ———. Where different minds may draw different inferences or conclusions from facts proved, or if there is a conflict in the evidence, the matter at issue must be submitted to the jury to be determined.
3. **Trial: Evidence.** In the absence of the elements of estoppel, extrajudicial statements of fact are, ordinarily, not conclusive and may be explained, rebutted, or contradicted and thereafter are to be given such weight as the trier of facts deems them entitled.
4. **Evidence.** Evidence that a statement is in the handwriting of a deceased person in a ledger in which the deceased kept his accounts, and that the ledger was found in the home of the deceased after his death, is sufficient foundation for the introduction of the statement into evidence as an admission of the deceased.

Appeal from the district court for Buffalo County: WILLIAM F. MANASIL, Judge. Reversed and remanded.

H. L. Blackledge, for appellant.

Munro, Parker & Munro, for appellee.

Heard before WHITE, C. J., CARTER, MESSMORE, YEAGER, SPENCER, BOSLAUGH, and BROWER, JJ.

BOSLAUGH, J.

This action was commenced by the filing of a claim against the estate of Park M. Crusinberry, deceased. Eva A. Crusinberry, the claimant and appellee, is the widow of the deceased. Verla Merryman, the appellant, is a daughter of the deceased and the executrix named in his will.

The claimant alleged that the deceased was indebted to her in the amount of $1,600.40 on March 1, 1958; that on October 20, 1958, she credited the deceased with the sum of $240.90; that on September 10, 1959, she loaned the deceased the sum of $138; and that the balance due her from the deceased was $1,497.50. The answer of the executrix denied that the deceased was indebted to the claimant in any amount.

At the close of all of the evidence, the trial court directed a verdict for the claimant in the amount of $1,497.50. The motion of the executrix for a new trial was overruled and she has appealed. The principal assignments of error relate to the direction of the verdict for the claimant.

In support of her claim, the claimant produced a statement in the handwriting of the deceased, exhibit No. 5, which read as follows:

"March 1st 1958

"Eva has coming to her to make us even $1,600.40 and will take it out of rent until Pd then we will even except taxes and payvement (sic) payments"

The statement appears in a ledger in which the deceased kept his accounts. The claimant admitted that she did not know of the existence of the statement until some time after the death of the deceased.

There was also evidence that the claimant and the deceased had transacted business with each other; that the claimant owned rental property in Kearney, Nebraska; that she conveyed an interest in some of this property to the deceased in 1958; that the deceased painted some houses for the claimant and that the credit of $240.90 on October 20, 1958, represented payment for this labor; and that the claimant advanced $138 to deceased on September 10, 1959, to pay taxes.

On the day after the funeral of the deceased, Nelle N. Brown, a daughter of the deceased, Leslie A. Brown, her husband, the executrix, and the claimant all met at the claimant's home. The will of the deceased was

read and there was some discussion concerning his affairs. Mrs. Brown testified that at this meeting the claimant said that the deceased owed her $138; that the executrix then asked the claimant, "Is that all?"; and that the claimant replied, "Yes, that is all he owed me, $138.00."

The claimant testified that she did not make any statement concerning the indebtedness of the deceased to her at the meeting on the day after the funeral. However, in determining whether the claimant was entitled to a directed verdict, the executrix is entitled to have every controverted fact resolved in her favor and have the benefit of every inference that can reasonably be drawn from the evidence. Kiser v. Christensen, 163 Neb. 155, 78 N. W. 2d 823. The claimant testified that she had said that the deceased owed her $138, but that the statement had been made in a telephone conversation with the executrix several days later.

There was a conflict in the evidence in this case concerning the amount of the indebtedness of the deceased to the claimant. The evidence introduced by the executrix tended to contradict the evidence introduced by the claimant. If the claimant made the statement attributed to her and it was true, then the indebtedness of the deceased to the claimant did not exceed $138 at the time of his death. Where different minds may draw different inferences or conclusions from facts proved, or if there is a conflict in the evidence, the matter at issue must be submitted to the jury to be determined. Hancock v. Parks, 172 Neb. 442, 110 N. W. 2d 69. The evidence presented a question of fact for the jury and it was error for the trial court to direct a verdict.

The claimant argues that since the executrix did not rely upon payment as an affirmative defense, there was no issue to which the evidence offered by the executrix could be relevant. This argument overlooks the nature of the evidence upon which both of the parties rely. The statement taken from the ledger of the deceased and

the statement which the claimant is alleged to have made on the day following the funeral are admissions. They are evidentiary in nature, are not conclusive, may be explained, rebutted, or contradicted, and are to be given such weight as the jury believes that they are entitled to receive. In the absence of the elements of estoppel, extrajudicial statements of fact are, ordinarily, not conclusive and may be explained, rebutted, or contradicted and thereafter are to be given such weight as the trier of facts deems them entitled. Aye v. Gartner, 172 Neb. 162, 108 N. W. 2d 798.

Exhibit No. 5 did not establish, conclusively, that the deceased was indebted to the claimant in the amount shown as of that date. Consequently, the executrix was entitled to contradict this evidence and was not limited to proof of subsequent payment.

The executrix contends that the foundation for the admission of exhibit No. 5 into evidence was incomplete because there was no evidence of delivery to the claimant. The evidence is that the statement appears in a ledger in which the deceased kept his accounts; that it is in the handwriting of the deceased; and that the ledger was kept in the home of the deceased and was found there after his death. This evidence was sufficient foundation for the admission of exhibit No. 5. See, Bratt v. Wishart, 127 Neb. 836, 257 N. W. 258; Maca v. Sabata, 150 Neb. 213, 34 N. W. 2d 267; 31A C. J. S., Evidence, § 371, p. 896.

The claimant alleged that she had purchased a 1948 Studebaker automobile but that the deceased, without her knowledge or consent, had caused the certificate of title to be issued in his name. The claimant prayed that the executrix be directed to convey the title of the automobile to the claimant. The executrix alleged that the claimant was estopped to assert any claim of ownership to the automobile. The journal entry is silent concerning this portion of the claim, and the executrix assigns as error the failure of the trial court to make any deter-

mination concerning the issues in reference to the automobile.

The claimant concedes that there was a failure of proof as to the allegations of the claim concerning the automobile and has abandoned this part of the claim. There is no finding or judgment in regard to the automobile which is adverse to the executrix or about which she can complain. The assignment of error is without merit.

The judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

C. E. COLTON, APPELLANT, v. MATTHEW BENES ET AL., APPELLEES.

126 N. W. 2d 652

Filed March 6, 1964. No. 35427.

1. **Automobiles: Highways.** A motorist approaching a highway protected by stop signs must stop before going upon the highway, must look to his left and to his right, and must permit a motor vehicle which is proceeding along the highway protected by stop signs to pass if it is at a distance and is traveling at a speed making it imprudent for the motorist to proceed into the intersection.
2. ———: ———. A motorist traveling on a favored highway protected by a stop sign of which he has knowledge may properly assume that oncoming traffic will obey it.
3. **Highways.** A user of highways may assume that other users thereof will use them in a lawful manner and govern his acts in accordance with such assumption unless or until he has warning, notice, or knowledge to the contrary.
4. **Negligence.** Negligence, which is the moving or effective cause of a happening, is the proximate cause thereof.
5. **Trial: Appeal and Error.** The trial court is required to submit to the jury for its determination only the issues of fact presented by the pleadings and supported by evidence, and it is generally prejudicial error for the trial court to present to the

jury for its determination any issue of fact for which there is no proof.

6. **Automobiles.** Although it is the duty of a driver of a motor vehicle to keep a lookout in the direction of anticipated danger he cannot be expected to maintain a constant lookout in one direction.
7. **Negligence: Trial.** 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.
8. ———: ———. 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.
9. **Negligence.** It is essential to the existence of negligence that there be some fault on the part of the person sought to be held liable.
10. **Damages.** It has been generally recognized that the plaintiff's duty of reasonable care to seek a cure does not require him to submit to treatment which involves substantial hazard of death or injury, nor even unduly painful treatments, and also that he need not pursue methods which offer only a possibility of cure.
11. **Torts: Damages.** In an action in tort for personal injuries the question of whether or not the injured party should have mitigated his damages by submitting to an operation should not be submitted to the jury in the absence of evidence showing the extent of the hazards of death or injury and of the pain or suffering involved.
12. **Damages.** Mitigation of damages being defensive in nature the burden of proving the plaintiff should submit to an operation to lessen his damage is upon the defendant.

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

John A. Wagoner, for appellant.

Luebs, Elson, Tracy & Huebner and Wear, Boland, Mullin & Walsh, for appellees.

Heard before WHITE, C. J., CARTER, MESSMORE, SPENCER, BOSLAUGH, and BROWER, JJ., and LYNCH, District Judge.

BROWER, J.

This action was brought by the plaintiff and appellant, C. E. Colton, against the defendants and appellees, Matthew Benes and Louis Benes, in the district court for Hall County, Nebraska, to recover damages which resulted from an automobile accident which took place at the intersection of Eddy and Division Streets in the City of Grand Island, Nebraska.

The plaintiff will be designated as such, or as Colton, and the defendants either as such or when necessary by their respective names.

The plaintiff's petition alleged that the automobile of the defendants at the time of the accident was driven by Matthew Benes; and that Matthew and Louis Benes were the joint owners thereof. It attributed negligence to the defendants in several respects among which are the following which were submitted to the jury by the court in its instructions, to wit: That the defendant driver failed to keep a proper lookout; failed to keep his vehicle under reasonable control; failed to yield the right-of-way to the plaintiff's vehicle driven on Eddy Street, an arterial street designated as such by city ordinance; and failed to give timely warning of his intention to usurp the intersection. Other allegations of negligence were stated and submitted to the jury which are not necessary to be mentioned in the absence of a cross-appeal.

The defendants' separate answers admitted the time and place of the accident and that it involved a vehicle driven by plaintiff with that of one driven by Matthew Benes. They denied any negligence on the part of the driver of defendants' automobile and alleged contributory negligence on the part of the plaintiff in several respects, including the following which were submitted to

the jury: That he failed and neglected to keep a sufficient lookout; that he failed to keep his vehicle under reasonable and proper control; that upon seeing the approach of defendants' vehicle he failed and neglected to timely apply his brakes to avoid colliding with it; and that he failed to turn to the left so as to avoid the accident. The plaintiff by reply traversed these allegations of the defendants.

The trial court by its instructions submitted the issues as to the negligence of the defendants and the contributory negligence of the plaintiff with the usual instruction permitting the reduction of the amount of the verdict in case the jury should find plaintiff guilty of slight contributory negligence and the negligence of the defendants gross in comparison therewith.

The jury returned a verdict for the plaintiff in the amount of $3,376.40. Plaintiff filed a motion for new trial which was overruled and he has brought the cause to this court by appeal.

The plaintiff assigns error in the giving of instructions Nos. 3, 4, and 5. These instructions are complained of because the issue of the plaintiff's contributory negligence was through them submitted to the jury. Plaintiff's first contention is that there was no evidence in the case which permitted that issue to be considered by the jury. If that contention is sustained by this court it will be unnecessary to consider the particular errors with respect to the several instructions.

To determine this assignment of error it is first necessary to review the evidence as disclosed by the bill of exceptions.

Eddy and Division Streets cross at right angles. Though both run at a considerable variance with the directions of the compass they will be treated herein as if Eddy Street ran north and south and Division Street east and west. Both streets and their intersection were paved. Eddy Street where the collision occurred was an arterial street which was protected by stop signs. Eddy Street

is 37.1 feet wide to the north of the intersection. Division Street is 41 feet wide on the west thereof. There is a slight variance without significance here in the width of each street respectively on the opposite side of this intersection. Stop signs are present at the northeast and southwest of the intersection requiring vehicles on Division Street to stop before entering Eddy Street. The one at the southwest corner of the intersection is approximately 9 feet west of the west curb of Eddy Street and 5.8 feet south of the south curb of Division Street. It is 6 feet in height from the ground to the base of the octangle sign itself. The sign is similar as to size to the usual stop sign and bears white lettering upon a red background. From the photographs in evidence there appears no obstruction to impair the vision of a driver approaching it from the west on Division Street.

At approximately 11:30 o'clock on Sunday morning, September 27, 1959, the plaintiff Colton was driving his own 1950 Chevrolet panel truck, approaching this intersection from the north.

At the same time the defendant Matthew Benes was driving a 1959 Ford two-door sedan eastward on Division Street toward the same intersection. He was accompanied by his brother Louis Benes, the other defendant, who sat to his right on the front seat. The sedan was owned by the two brothers who were partners engaged in farming operations near Chapman, Nebraska. At the time of the accident it was a nice clear day and the streets were dry.

No other automobile at that time preceded or followed either vehicle and no witness who actually saw the accident testified except the parties themselves. Their testimony is here summarized. On direct examination by his counsel the plaintiff stated that he knew as he approached the intersection that Eddy Street was an arterial highway. When he was probably a car length from the intersection he noticed an automobile, afterwards identified as belonging to the defendants, approaching from the west.

It was then probably 3 or 4 car lengths from the intersection. He also observed people walking across Eddy Street in the block to the south. His own panel truck was then proceeding about 20 miles an hour. This speed could have varied 1 or 2 miles either way. As he continued and moved into the intersection he saw that the defendants' car wasn't going to stop. He immediately applied the brakes and was successful in stopping his car. There was a collision however. His panel truck was struck on its right side just on the trailing edge of the door and back of it. After the accident he was lying on his right side on the right of the truck seat. After a short interval he got out on the left side of the car and walked around to the back. The defendants' automobile was still against the panel truck but was starting to back away. It backed up approximately even with the stop sign and clear of the sidewalk there. The defendants got out of their sedan and came around together, and he had a conversation with one of them, probably Matthew Benes. This defendant said they didn't see the stop sign. Plaintiff called the police and later officer Robert L. Starr came to the scene.

On cross-examination he testified his windshield and windows were clear; and that he knew at times others went through stop signs. The defendants' automobile was first noticed when the plaintiff was a car length and a half from the intersection. This was when he first looked to the west and was the first time one was able to see any material amount of that street because of "houses and things." He thought his truck was 20 or 25 feet long and he was that distance or maybe more from the north line of Division Street when he first noticed the defendants' car. Defendants' sedan was then 3 or 4 car lengths west of the intersection. He admitted he might have said this distance was 2 or 3 car lengths distant in a previous deposition. The defendants' automobile then appeared to be slowing down. Plaintiff's truck was then proceeding at 18 to 20 miles an

hour. He did not know in what distance he could bring his truck to a stop at that speed. When he saw the defendants' automobile he simultaneously saw people walking in the next block. He looked up the street and saw these people walking and then turned his attention back to approaching traffic. He admitted stating in a deposition he had turned his attention to them because he was on an arterial highway protected by stop signs. His brakes were not applied when he first saw defendants' car. After he looked back and saw defendants' car was coming on he applied them. Although he did not know precisely, he thought his truck probably traveled 40 feet more or less before it collided with defendants' car. In driving as he approached the intersection he had his hands on the steering wheel. After observing the pedestrians he looked back and saw defendants' sedan coming towards him in the intersection and he realized it was going to strike his automobile unless he could get stopped. There was no time to sound his horn as he was too busy trying to stop.

Matthew Benes, on direct examination in his own behalf, stated he had driven automobiles and trucks for 21 years. The mechanical condition of his 1959 Ford at the time of the accident was good. As they approached Eddy Street from the west they were on the south or righthand side of Division Street. No cars were ahead of them. He was not familiar with the intersection. A half block back from the intersection his automobile was proceeding at 20 or 25 miles an hour. Its speed was slowed to 10 or 15 miles an hour as it approched the intersection. He first looked south and then north and "spotted" Colton's truck when the speed of his own automobile was 10 or 15 miles an hour. Colton's truck was then about 10 or 15 feet north of the north curb of *"Eddy"*; he applied his brakes; he did not know how fast Colton's panel truck was going; defendants' sedan slid into the "side of him" at which time it was going less than 5 miles on hour; and the contact resulted in a slight

bump like bumping a curb in parking vertically. Defendants' car was then traveling east. Colton's truck was going south, possibly a little east. The left front fender or left front of defendants' sedan collided with the right side of plaintiff's truck behind the door panel and the fender. After the accident he backed his automobile back of the curb and both defendants got out and went to Colton's panel truck. Police officer Starr came and a complaint was filed against him by the plaintiff for running a stop sign. He did not see the stop sign before the accident.

On cross-examination he said he first looked to the south; that the stop sign was located at the southwest corner; and that he was not prevented from seeing it by obstructions. His speed when he put on the brakes was 10 or 15 miles an hour. He did not stop before entering Eddy Street. The panel truck appeared to have been moved about a foot east after the accident. Colton's truck was moving slightly at the time of the impact. Defendants' sedan was skidding as it went into the intersection. The paving was dry and no traffic was approaching from the east. His automobile was about 5 feet from the intersection when he applied the brakes. It was then traveling 10 or 15 miles an hour. He made no effort to turn his car to the right or left but it proceeded straight east. The collision took place south of the centerline of Division Street and west of the centerline of Eddy Street. He pleaded guilty to the charge of "violating the stop sign."

Louis Benes testified on his own behalf. He said he was riding next to his brother in the front seat on the right-hand side. The automobile was going about 20 miles an hour as they approached the intersection. He noticed Colton's truck when their automobile was 10 or 15 feet from the intersection. He observed Matthew applying the brakes. The witness was looking straight ahead following Colton's automobile coming in, and the collision took place. When they collided the defend-

ants' car was going 5 miles an hour. He saw Colton holding the wheel getting ready for the collision.

On cross-examination he stated he couldn't feel the sedan turn to the right or left prior to the collision, but could have felt it if it had. His brother did not stop at the stop sign.

Robert L. Starr, a police officer of the city of Grand Island, at that time operating a patrol car, testified for the plaintiff. He had come to the scene of the accident in pursuance of a call received at 11:35 o'clock, arriving there at 11:45 or 11:50 o'clock. He found the Chevrolet panel truck of plaintiff sitting in the street where it was hit. The defendants' Ford had been moved. The drivers of both vehicles were interviewed by the officer. He stated Benes, when asked how the accident happened, said he was driving east on Division Street, that he didn't see the stop sign, that he ran through it, and that he hit the Chevrolet truck. Colton told him he was traveling south on Eddy Street and "looked up and there he was and I could not get out of his road." The defendants' automobile was damaged on the front bumper. There was debris in the street and he measured from this to the curb of the two streets. The debris was 20 feet north of the south curb of Division Street and 15 feet east of the west curb of Eddy Street. The panel truck was headed in a southerly direction but the back end had been pushed a little to the east.

Charles Beers, an engineer, made a survey of the intersection and a plat drawn to scale is in evidence which shows the width of the streets, the locations of the curbs, and the stop signs. By scaling 20 feet from the south curb of Division Street and 15 feet east of the west curb of Eddy Street, he marked thereon a point 1 foot south and approximately 3½ feet west of the center of the intersection.

There was no evidence given either as to the presence or absence of skid marks. Photographs of the two vehicles are in evidence. Plaintiff's panel truck shows a

considerable dent in the body. The damage extended from the rear edge of the right-hand door to the front portion of the back fender. The photograph of defendants' car is an enlargement showing the left front. It is not very clear and shows little damage.

In Nichols v. McArdle, 170 Neb. 382, 102 N. W. 2d 848, the following rules are set forth which we consider are pertinent to the cause before us: "A motorist traveling on a favored highway protected by a stop sign of which he has knowledge may properly assume that oncoming traffic will obey it.

"A user of highways may assume that other users thereof will use them in a lawful manner and govern his acts in accordance with such assumption unless or until he has warning, notice, or knowledge to the contrary.

"A motorist approaching a highway protected by stop signs must stop before going upon the highway, must look to his left and to his right, and must permit a motor vehicle which is proceeding along the highway protected by stop signs to pass if it is at a distance and is traveling at a speed making it imprudent for the motorist to proceed into the intersection.

"Negligence, which is the moving or effective cause of a happening, is the proximate cause thereof.

"The trial court is required to submit to the jury for its determination only the issues of fact presented by the pleadings and supported by evidence, and it is generally prejudicial error for the trial court to present to the jury for its determination any issue of fact for which there is no proof."

In Gross v. Johnson, 174 Neb. 273, 117 N. W. 2d 534, it was held that though it is the duty of a driver of a motor vehicle to keep a lookout in the direction of anticipated danger he cannot be expected to maintain a constant lookout in one direction.

In a jury case involving issues of negligence where different minds may draw different conclusions or in-

ferences 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. Kuska v. Nichols Constr. Co., 154 Neb. 580, 48 N. W. 2d 682.

The foregoing summary of the evidence shows the parties are in substantial agreement as to what took place. The defendants' automobile did not stop as required at the stop sign. Both defendants testified their Ford sedan as it proceeded towards the intersection was slowed from a speed of 20 to 25 miles an hour to 10 or 15 miles per hour. The plaintiff does not state its speed but does say he saw it slowing as it approached Eddy Street at least 2 and possibly as much as 4 car lengths away. It then of necessity was west of the stop sign which it was approaching. From the rules stated it is obvious that the plaintiff could assume the defendants' car would stop before entering the street unless he had warning or notice or knowledge to the contrary. Neither was he required to give his constant attention to the defendants' car alone. For a space of time which could only have been a fleeting instant, he regarded the pedestrians in the next block to whom he was also obligated. There is nothing to show his speed was excessive under the circumstances. When Colton first saw defendants' sedan, his truck was from one to one and a half car lengths from the intersection. The defendants first saw the truck when it was 10 or 15 feet from it. Matthew Benes applied his brakes. The whole movement across the intersection, had it been completed, would have taken a very few seconds. Glancing back after observing the pedestrians, plaintiff saw defendants' Ford was not going to stop. He applied his brakes at once and he stopped his truck before the impact, according to the plaintiff's testimony. According to Matthew Benes it was moving slightly. Considering the record there is no evidence

that the plaintiff failed or neglected to keep a sufficient lookout, or that his vehicle was not under reasonable and proper control, or that after observing the defendants' vehicle was not stopping as required, he did not timely apply his brakes, or that he could thereafter have avoided the collision by turning to the left or had an opportunity to do so. These were the questions submitted by the trial court to the jury as to the plaintiff's contributory negligence.

This court in Wolcott v. Drake, 162 Neb. 56, 75 N. W. 2d 107, laid down certain rules that are applicable here: "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.

"It is essential to the existence of negligence that there be some fault on the part of the person sought to be held liable."

Under these rules the defendants failed in their proof of the plaintiff's contributory negligence. In truth it would appear the collision was caused by the failure of the defendant driver to observe the stop sign and his assumption that his automobile had the directional right-of-way. Further that his action on that assumption was not called to Colton's attention until it was too late for him to stop his truck or alter its course in time to avoid the collision. It was error for the trial court to submit the issue of contributory negligence to the jury.

The plaintiff assigns as error the inadequacy of the verdict returned by the jury. The trial court by submitting the issue of contributory negligence instructed the jury that it might reduce its verdict in accordance with our comparative negligence statute. Because of this a new trial with respect to damages must be had.

The plaintiff assigns error to the trial court in failing to sustain his motion for a mistrial based on defendants'

counsel asking questions concerning the plaintiff "for the last two years having been on retirement pension." The question was never answered and the trial court promptly cautioned the jury to disregard it. Similar objection is made to an unfinished statement of Doctor Yost, a medical witness of the defendants, which plaintiff's counsel concludes was also intended to refer to plaintiff receiving a pension. On the retrial all reference to the plaintiff receiving a pension should be carefully avoided.

There remains plaintiff's contention that the trial court erred in giving instruction No. 10. Because a retrial of the issue of damages will be involved it should be given consideration. The instruction as given by the trial court is here set out. "If you find from a preponderance of the evidence that plaintiff sustained injuries arising out of the motor vehicle accident, it was plaintiff's duty to take all reasonable care of such injuries, and if he failed to take such care, and conducted himself in a manner to aggravate and enhance the alleged injuries, and on account of his failure the injuries were increased or enhanced, he is not entitled to such damages as resulted from his failure to take proper and reasonable care. However, the mere fact that a competent physician may have advised plaintiff to submit to a serious operation does not justify an inference that plaintiff was negligent or unreasonable in failing to have the operation performed. Other factors as they confronted plaintiff must be considered in determining whether or not he exercised reasonable diligence in caring for himself and his injuries. Such other factors are plaintiff's condition in relation to the risks of the proposed operation; the degree of seriousness and danger, if any, involved in the operation; whether or not it would or might permanently maim or otherwise disable him; whether or not possible benefits from the operation are almost certain or are only probable or doubtful; whether or not any alternative method of treat-

ment is available, and, if so, what the comparative possibilities and probabilities are between it and the operation; and whether or not physicians and surgeons agree among themselves as to the advisability of the operation. After considering all or any such factors as are shown by the evidence the jury must decide whether or not the failure of plaintiff to undergo an operation constituted a failure to exercise reasonable diligence in the care of his injuries."

The first sentence of this instruction was the defendants' requested instruction No. 7. One substantially similar was approved by this court in Swift & Co. v. Bleise, 63 Neb. 739, 89 N. W. 310, 57 L. R. A. 147. In the cited case the facts before the court are not disclosed, other than to state that there was some evidence received, which the plaintiff therein conceded, if the proper issues had been raised by answer, might have entitled the defendant therein to have submitted to the jury whether or not the injury was aggravated by the plaintiff's own conduct. The opinion discussed whether such matters raised an issue of contributory negligence, which were required to be pleaded affirmatively, or were matters going only to the mitigation of damages. The court in the cited case held them to be in mitigation of the injuries requiring no affirmative pleading and reversed the judgment, giving as one of its reasons the failure to give this instruction. In the cited case there is no indication that the plaintiff therein required an operation.

In the case before us the parties do not suggest and we do not find anything in the record which suggests the plaintiff's want of care of his injuries aside from evidence which might tend to show he should have submitted to an operation. The trial court apparently took this view also and therefore gave the instruction adding the remaining portions thereto.

We are cited to no cases of this court where such an issue was submitted to a jury in a personal injury action and can find none. However, the case of Simmerman

v. Felthauser, 125 Neb. 795, 251 N. W. 831, throws some light on that question. It was a workmen's compensation case. The court therein said: "The unreasonableness of the refusal of an injured employee to permit an operation to be performed is a question of fact to be determined by the evidence, and the burden of proof to establish that the tendered operation is simple, safe, and reasonably certain to effect a cure is upon the employer. Frost v. United States Fidelity & Guaranty Co., 109 Neb. 161; * * *."

An extended annotation beginning at 48 A. L. R. 2d 346, discusses the duty of an injured person to minimize tort damages by medical or surgical treatment and cites many cases involving the problem. The general rule of substantive law which is the basis for such instructions in those cases which submit the question involved to the jury is set out in this annotation at page 349 as follows: "Those cases are agreed that one injured by another's tort is required to exercise ordinary care to seek medical or surgical treatment so as to effect a cure and minimize damages, on pain of not being allowed to recover from defendant for consequences of the injury which could have been averted by the exercise of such care. * * *

"It has been generally recognized that the plaintiff's duty of reasonable care to seek a cure does not require him to submit to treatment which involves substantial hazard of death or injury, nor even unduly painful treatments, and also that he need not pursue methods which offer only a possibility of cure."

A review of the many cases in this note indicates that in some of the cases the courts have determined whether a person injured by another's tort is required to mitigate his damages by submitting to an operation as a matter of law. Others have submitted it to the jury as a question of fact as to what a reasonably prudent man would do under the circumstances. In the later cases there appears a definite trend to submit the question to the jury where the evidence is sufficient to author-

ize it. This trend arises no doubt from the great strides in surgical procedure by which many operations have become and are becoming increasingly safe and free of hazard. The cases cited in the supplemental service of A. L. R. to this note practically all approve the submission of the question to the jury under proper instructions. Lorenc v Chemirad Corp., 37 N. J. 56, 179 A. 2d 401; Baglio v. New York C. R. R. Co., 344 Mass. 14, 180 N. E. 2d 798; Dark v. Brinkman (La.), 136 So. 2d 463; Martin v. Foss Launch & Tug Co., 59 Wash. 2d 302, 367 P. 2d 981. These cases agree in principal with Simmerman v. Felthauser, *supra.*

The testimony concerning the contemplated operation was related by Dr. House, an orthopedic surgeon and medical witness for the plaintiff. He testified that in his opinion the plaintiff had a nerve root irritation the result of a bony impingement or encroachment between the fifth and sixth cervical vertebrae, causing a narrowing of the joint space, particularly on the right side; and that the plaintiff would require a fusion operation on his neck. The fee therefor according to a certain Nebraska fee schedule would be $300. Such an operation would require future hospitalization of 10 days to 2 weeks and would not be 100 percent effective. This would have a reasonable chance of success based on percentages but he did not state what those percentages were; and that there was a reasonable chance that upon a recovery therefrom he could go back to work and all of his complaints would be taken care of. The doctor said a fusion operation involved the stabilization or growing together of two vertebrae. It would consist of taking a portion of bone, preparing the area of the neck in which to place it, and allowing bone taken from the hip to grow in the neck, where so placed, making this area all one piece. He had recommended such an operation to the plaintiff as early as 1960. Plaintiff testified at the trial in February 1962, that he had been so advised and intended to

have the operation but had not because he could not afford it.

Plaintiff contends there was no evidence upon which the court might have submitted several of the matters for consideration of the jury designated in this instruction as "factors." He asserts there was no evidence as to the risks of the proposed operation; the seriousness and danger involved; or the possibility of the plaintiff being permanently maimed or disabled.

In the cited annotation in 48 A. L. R. 2d 346, many of the different decisions are arranged with respect to the various hazards that arose in the particular cases under paragraphs which have headings corresponding to the propositions set out as "factors" in this instruction. The trial court submitted most of these factors as set out in the headings to those paragraphs without relating the particular hazards to the evidence before it. An instruction should be given in the present case only if there is evidence showing the extent of the hazards to the plaintiff growing out of the operation contemplated. It should then be related only to the risks shown to be involved and which are covered in the evidence without undue repetition.

In the record before us there appears no evidence in the testimony from which the jury might determine the risks and hazards to the plaintiff incident to the proposed operation. The substantive law applicable does not require the injured person to undergo such an operation where the hazards to him are great. In an action in tort for personal injuries the question of whether or not the injured party should have mitigated his damages by submitting to an operation should not be submitted to the jury in the absence of evidence showing the extent of the hazards of death or injury and of the pain or suffering involved.

Further objection by the plaintiff to instruction No. 10 is made because he asserts the evidence does not show the chances or prospects of the plaintiff being benefited

if the operation is performed. Though his doctor does not equate the chances in percentages he does indicate they were reasonable and the plaintiff himself must have deemed them sufficient because he intends to take them. We do not regard the instruction defective in this regard.

In the evidence before us there is no medical testimony in disagreement with that of Dr. House with respect to the contemplated operation. The plaintiff's condition and the other treatment given him however are testified to at length.

It appears from Simmerman v. Felthauser, *supra*, that mitigation of damages being defensive in nature the burden of proving the plaintiff should submit to an operation to lessen his damage is upon the defendant.

The plaintiff further objects to the instruction in that the trial court did not include as an element for the jury to consider the inability of the plaintiff to pay for the same. This is based on his testimony that he could not afford it. There was no further factual evidence in the record. The annotation in 48 A. L. R. 2d at page 371 cites cases holding that where an unreasonable expenditure would be required to undergo the treatment, the injured person is justified in refusing to undergo it. The plaintiff's pecuniary situation is within his own peculiar knowledge and could not be shown by the defendants in the first instance. Under such circumstances the plaintiff's financial condition should be shown if he asserts it as a reason for avoidance of surgery and such testimony should be subject to cross-examination.

Because of the submission of the issue of contributory negligence to the jury herein, the judgment must be reversed and the cause remanded for new trial. The issue of liability having been determined the cause should be tried only as to the damages involved.

The judgment is reversed and the cause remanded for new trial in accordance with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

IN RE APPLICATION OF MISSOURI PACIFIC RAILROAD COMPANY. MISSOURI PACIFIC RAILROAD COMPANY, APPELLANT, V. ZIMMERMAN FEED YARDS ET AL., APPELLEES.

126 N. W. 2d 679

Filed March 6, 1964. No. 35506.

1. **Public Service Commissions.** The prime object and real purpose of Nebraska State Railway Commission control is to secure adequate sustained service for the public at minimum cost and to protect and conserve investments already made for that purpose, and in doing so primary consideration must be given to the public rather than to individuals.
2. **Railroads.** The services and facilities to be furnished by a railroad company at any station need only be just, reasonable, and adequate to the requirements of the station, and should in a measure be commensurate with the patronage and receipts from that portion of the public to whom such service is rendered. Whether or not such company may discontinue its agency service at any of its stations depends upon the facts and circumstances of the particular case.
3. **Public Service Commissions: Railroads.** The matter of time necessary to be devoted to the performance of duties by an agent of a railroad is a matter of importance in determining whether or not the Nebraska State Railway Commission acted arbitrarily and unreasonably in denying an application for the discontinuance of an agency.
4. ———: ———. The ruling of the Nebraska State Railway Commission or of this court on the question of discontinuance of an agency at any given time does not amount to an adjudication for the future. It is only a judgment on the condition presented by the application and relates only to the time and conditions presented.
5. ———: ———. It is the duty of a carrier to seek, and of regulatory agencies to permit, the elimination of those services and facilities that are no longer needed or used by the public to any substantial extent.
6. **Public Service Commissions: Appeal and Error.** On appeal to the Supreme Court from an order of the Nebraska State Railway Commission, while acting within its jurisdiction, the question for determination is the sufficiency of the evidence to prove that the order is not unreasonable or arbitrary.
7. **Public Service Commissions: Railroads.** It is not reasonable to require the maintenance of a full-time agency station when the cost of such service is out of proportion to the revenue derived

from that portion of the public benefited thereby, especially where a substitute service may be provided which will afford the same essential service but is less convenient.

Appeal from the Nebraska State Railway Commission. Reversed.

Kennedy, Holland, DeLacy & Svoboda, for appellant.

Crossman, Barton & Norris, for appellees.

Heard before WHITE, C. J., CARTER, MESSMORE, YEAGER, SPENCER, BOSLAUGH, and BROWER, JJ.

BROWER, J.

This is an appeal by the Missouri Pacific Railroad Company, appellant, from an order of the Nebraska State Railway Commission denying appellant the authority to close its station at Springfield, Nebraska, and discontinue its agent there, and from an order refusing to grant a rehearing thereof.

The appellant will be designated as such or as the applicant, the protestants as such when they are referred to together, and the Nebraska State Railway Commission as the Commission.

The appellant contends, among other things, that the Commission's order is contrary to the law and the evidence and is unreasonable, unjust, arbitrary, and capricious.

We sustain these assignments of error.

The applicant operates a branch line from Omaha, Nebraska, to Otoe in Cass County, Nebraska, which passes through Springfield. The service is daily except in the winter months when it is triweekly, Monday, Wednesday. and Friday southbound, and Tuesday, Thursday, and Saturday northbound. Appellant has maintained a full-time agent 8 hours a day, 5 days a week. The agent is paid approximately $20 a day. Appellant maintains a telephone and wire service there. By rail Omaha is 22 miles northward and Louisville 6 miles to the south. Paved highways extend from Springfield to both places.

By highway it is 19 miles to Omaha and 6 miles to Louisville. Half the distance to Omaha is by interstate. There is no passenger service involved at Springfield and the mail is handled by Star Route. The Interstate Commerce Commission has made an order forbidding less than carload shipments of under six thousand pounds to or from Springfield in interstate commerce.

Springfield has a population of 510 by the census of 1960. It appears to have grown somewhat and the protestants who appeared in opposition to the granting of the application claim its present population is somewhere between six hundred and seven hundred. It has service by truck, including that of a local concern, Springfield Transfer. The general nature of the business of the community in the area is agricultural, cattle feeding, and related occupations. It has two feedyards handling cattle, an elevator, bank, general store, post office, hardware store, and feed store.

The basis of the application of the appellant was that the agent and station at Springfield were not justified by the business handled and were maintained as a loss to the applicant. The applicant contended this was shown by exhibits 1, 2, 3, and 4, which its chief statistician in revenue accounting, one E. F. Rau, identified and testified with respect to their preparation.

Exhibit 1 shows the revenue attributed to the station. It is all freight and there is no revenue from passenger service or milk, cream, or egg shipments. The total revenue of the station was $20,982.59 for 1961; $16,995.01 for 1960; $18,351.21 for 1959; $77,406.33 for 1958; and $16,197.02 for 1957. The revenue for the first 3 months of 1962 was $2,813.69. The larger income in the year 1958 arose from the shipment of 420 cars of cement during the construction of highway No. 50, which the testimony shows was abnormal and nonrecurring. Cement shipped in other years was in 1959, 7 cars; 1960, 9 cars; and in 1961, 4 cars. The less than carload shipments sent out from Springfield were 10 in 1957; 6 in 1958; 9

in 1959; 2 in 1960; 5 in 1961; and 1 in the first 3 months of 1962. These will be designated hereafter as L.C.L. shipments as they were termed in the evidence. There were 220 of L.C.L. shipments received in the 5 years and 3 months, or a little less than 4 such shipments a month.

Exhibit 2 gave the carload shipments forwarded and received. Aside from cement, by far the largest receipts in carload lots were cattle which showed a steady decline from 166 cars in 1957, to 25 cars in 1961, and 7 in the first 3 months of 1962. The cement and cattle represented 80 percent of the carload shipments received over the whole period. The total receipts by carloads showed a steady decline except for the cement in 1958. The outbound carload shipments were largely grain, the principal items being corn and wheat. There was a considerable variance in those shipments which the evidence shows depended upon the times in which corn held by the federal government was shipped. There were 448 cars in all shipped between January 1, 1957, and April 1, 1962.

Exhibit 3 disclosed the actual expenses paid out for hiring the agent and station supplies. They were given by years. There was no great difference in them but there is a small, constant increase each year, that of the first year 1957 being $5,166.98, and the last year 1961, $6,050.78.

Exhibit 4 shows by means of a formula the expense to the applicant arising outside of the station attributable to that business. The steps by which this was shown are here set out. First, the receipts of operating freight revenue for the whole railroad system were shown for each of the years 1957 to 1961. Next shown was the total expense of the freight operation for the same years after the expense of maintaining the stations thereon was deducted. From this year by year computation was determined the percentage of each dollar of freight income that was paid out in operational expense

exclusive of the expense of maintaining the various stations. This ratio of freight revenue to expense was then applied to the receipts allocated to the Springfield station for each full year. The percentage ratio of expense to the applicant per dollar received by it and the amount allocated to the total receipts of the station involved were 71.97 percent or $11,657 in 1957; 71.92 percent, or $55,670 in 1958; 73.27 percent or $13,446 in 1959; 74.02 percent or $12,580 in 1960; and 76.10 percent or $15,968 in 1961. Combining the actual expense at the station with the applicant's outside expense determined by this formula and deducting this total from the receipts at the station showed a net loss in maintaining the station for the year 1957 of $627; for 1959 of $806; for 1960 of $1,535; and for 1961 of $1,036. It however showed a profit of $16,194 for the year 1958 when the 420 cars of cement were received.

The formula by which the expense of freight operations outside Springfield were apportioned to this particular station was shown by the evidence to be the method accepted and approved by the Interstate Commerce Commission and the States of Arkansas, Oklahoma, Colorado, and Kansas. The witness Rau testified that it was a fair basis on which to determine the cost of operation. Further testimony concerning shipments for the full first 10 months of 1962, not shown on the exhibits, showed that those carload shipments in and out of the Springfield station were 177 cars as compared with 176 cars in the like period in 1961. The witness Rau testified that in his opinion on the basis of these figures and applying the same formula, the year 1962 would show a net loss in the operations of this station also.

Edwin Long, the district superintendent of stations and claim provisions of the appellant for the district, including Springfield, testified that he had made a study of that station, its records, and the business handled. He had also personally investigated the functions and

duties of the agent there. He testified it would take the agent approximately 10 minutes to handle either a carload or L.C.L shipment. The total of both such items handled in 1961 was 256, or approximately one every working day. There were other duties such as cleaning the station and making monthly reports. These reports are cumulative in character, allowing them to be made a portion at a time. Adding the time attributed to the reports and care of the station he estimated it would take the agent on an average 1 hour and 20 minutes a day to do the complete work involved. On recourse to the tables of other years shown by the exhibits it would appear that the time involved would be approximately the same except as to the year 1958. The agent is paid $20 a day for this service.

The appellant proposes to close its station, including telephone and telegraph service. The business of Springfield will be handled by the agency at Omaha, Nebraska. The applicant has offered to accept at its expense all telephone calls pertaining to railroad business at either Omaha or Louisville, 6 miles away. When a consignor anticipates the need of a car he can call the agent at Omaha and so inform him. The yardmaster at Omaha will be notified and he will see that the car is placed on the train and set out at Springfield. The conductor on the train will spot the car. Consignor will give to the agent on making a phone call the information for the bill of lading. The bill of lading would be executed at Omaha and the train conductor informed at Louisville or some other similar station to pick up the car.

With respect to inbound shipments the consignee would be notified before arrival and could on occasion be notified after arrival by telephone or postal service whichever is necessary at the time. When necessary to trace a car, a call could be made to the Omaha agent who would through the sales department have the proper

clerks trace the shipment and give back the information to the consignee or consignor.

Inbound L.C.L. shipments would be placed in the applicant's station or a suitable container provided and there held at the consignee's risk. Outbound L.C.L. shipments would be handled as carload shipments except no interstate L.C.L. shipments under six thousand pounds would be received. Such interstate shipments must be loaded by consignor and unloaded by the consignee, under the order of the Interstate Commerce Commission which was procured on request of the appellant. Several stations now have this regulation. On inbound cattle shipments the consignee will continue to weigh his shipment as previously. Applicant will accept consignee's statement in regard to cripples. The conductor will handle spotting of cars. Applicant from its experience does not anticipate loss of revenue from the proposed closing. If telephone service with Omaha is interrupted the customer may call or contact the agent at Louisville who is only 6 miles distant.

Those of the protestants who joined in the formal protests filed in the proceeding were quite numerous. However, most of them did not appear to testify. The evidence received on their behalf includes that of James P. Latham, a member of each of three partnerships, all of which were protestants: The Zimmerman Feed Yards; the Latham Lumber Company; and Latham Elevator Company. Latham was connected in some undisclosed way with Ragan and Thomas who were also shippers. He testified that these organizations constituted practically all the business of the station; and that the proposed change would work a hardship on these organizations. At present those connected with them could contact the agent who would make out the bills of lading at Springfield. Telephone service was not the best and sometimes they had to make calls repeatedly to make long distance connections, taking at times 30 or 40 minutes. Placing calls to Omaha therefore would not

be satisfactory. Sometimes it was necessary to wait at his office for replies by telephone. At present the agent would keep track of trains for them. The witness stated that grain cars sometimes are defective and would not hold grain; that the agent trades cars for them; and that if the cars are not delivered promptly his employees stand around waiting and causing expense. The agent could assist in forwarding and processing claims for losses. While admitting there is not more than one carload a day to be handled and L.C.L. shipments are insignificant, he thought the agent should remain to handle them. Latham felt that though the agent works but a short period each day, her expense to the applicant is justified; and that many cattle which were brought to Omaha by rail were brought to Springfield by truck because the shippers could not afford to stand the shrinkage which occurred at Omaha if they waited for a train. He stated the appellant did not consider the time its agent took in driving up to his home to get waybills signed and the extra time in spotting cars at noon hours and evenings when they loaded corn late.

A witness Leo Timmerman, also a feeder, who had just started business in a new yard near Springfield in April 1962, testified. He had however moved some cattle there. He testified about troubles he had had with the applicant and another carrier at a prior location which required his sending trucks for cattle because he could not stand the shrinkage caused by delays while waiting for a train. On occasion the agent at Springfield had assisted in weighing cattle and had informed him the train was late. The agent could be of great assistance in such matters in the future. He was sure that his new yard would develop a great deal of business. Figures testified to by him, and later supplied, showed shipments of cattle but some were over other railroads and in years prior to opening his yard at Springfield.

Protestant Quinten Mahlock, a real estate dealer residing in Omaha, had bought 390 acres of land near

Springfield and has platted a large tract. He testified that there will be in the future many residences built thereon. Thirteen have been built so far of which 10 were occupied. Some residents are commuters who were working in Omaha and at Western Electric; another works at Council Bluffs; and others work at Springfield. Mahlock further testified that parks and business areas were platted also.

Other witnesses representing the local American Legion Club and the Springfield Boosters, the village trustees, and other citizens, including the president of the bank, testified concerning their hope and expectancy of growth in the village and of efforts to attract new business there. They admitted however that they had been unable so far to attract new enterprises.

The commander of the American Legion said they needed the railroad there for the good of the people to come in the future and that the applicant should help share that responsibility.

The district chairman of the Order of Railroad Telegraphers at Omaha testified that the station agent, a telegrapher herself, should be retained at Springfield. It was the witness' present duty to transmit by telegraph the list of all cars in the train to the agent and to inform her of the time the train is called and the time it departs; and that to remove the agent to some other station not covered by the rule of the telegraphers is in violation of the rule of the organization. He felt the agent should be retained for the 8 hours regardless of the time that it took her to do the work.

This is the substance of the evidence in the case. The applicable law in such instances has been laid down in the previous decisions of this court.

In the case of In re Application of Union P. R. R. Co., 149 Neb. 575, 31 N. W. 2d 552, this court said: "The prime object and real purpose of Nebraska State Railway Commission control is to secure adequate sustained service for the public at minimum cost and to protect and

conserve investments already made for that purpose, and in doing so primary consideration must be given to the public rather than to individuals.

"The services and facilities to be furnished by a railroad company at any station need only be just, reasonable, and adequate to the requirements of the station, and should in a measure be commensurate with the patronage and receipts from that portion of the public to whom such service is rendered. Whether or not such company may discontinue its agency service at any of its stations depends upon the facts and circumstances of the particular case.

"The matter of time necessary to be devoted to the performance of duties by an agent of a railroad is a matter of importance in determining whether or not the railway commission acted arbitrarily and unreasonably in denying an application for the discontinuance of an agency.

"The ruling of the railway commission or of this court on the question of discontinuance of an agency at any given time does not amount to an adjudication for the future. It is only a judgment on the condition presented by the application and relates only to the time and conditions presented."

In Chicago, B. & Q. R. R. Co. v. Keifer, 160 Neb. 168, 69 N. W. 2d 541, it was said: "The services and facilities to be furnished by a railroad company at any station need only be just, reasonable, and adequate to the requirements of the station, and should in a measure be commensurate with the patronage and receipts from that portion of the public to whom such service is rendered.

"It is the duty of a carrier to seek, and of regulatory agencies to permit, the elimination of those services and facilities that are no longer needed or used by the public to any substantial extent.

"On appeal to the Supreme Court from an order of the Nebraska State Railway Commission, while acting within its jurisdiction, the question for determination

is the sufficiency of the evidence to prove that the order is not unreasonable or arbitrary."

In the cause before us the record establishes that with the exception of the year 1958, the station at Springfield has been maintained at a loss. This is not refuted by the protestants. Though there is a tendency at times to be critical of the evidence proffered by the applicant, the protestants do not appear to claim that the station at Springfield operated profitably except in 1958. There is no evidence tending to refute that this year's business was nonrecurring as testified to by the applicant's witness. It is claimed that this one-year's profit should have been spread over the full period involved in the evidence and the losses of other years absorbed thereby. If such were true any profitable business hitherto enjoyed at the station would be lost to the appellant eventually. Moreover, the time of the hearing before the Commission was more than 3 years thereafter. That is the time which should have determined the issues before the Commission.

The principal contention of the protestants is not that the present service is profitable but they hope that their community will grow and that the station will become self-sustaining or profitable. They contend that until then it should be maintained to benefit those who come in the future. Again we must hold that the cause at hand deals with the present. It is common knowledge that most small towns are growing smaller instead of larger. It is also common knowledge that highway transportation facilities are making the delivery of freight by truck much more convenient. Such service is available here. A new highway going through Springfield appears to have been paved recently. Paved roads run to Omaha and Louisville. The latter is only 6 miles distant.

Unquestionably the present service to Springfield is more convenient than that which is proposed, particularly to a very few shippers. However, as said in Thom-

son v. Nebraska State Railway Commission, 141 Neb. 697, 4 N. W. 2d 756: " 'It is not reasonable to require the maintenance of a full-time agency station when the cost of such service is out of proportion to the revenue derived from that portion of the * * * public benefited thereby, especially where a substitute service may be provided which will afford the same essential service but is less convenient.' "

Protestants contend that there will be no saving to the applicant because the agent now employed at Springfield will have a right to obtain employment elsewhere. It is however clear that there will be one less employee for the whole system and that her going elsewhere will relieve other employees and will make one less upon the payroll.

We conclude on reviewing the entire record that continuance of the station and its agent in Springfield is not justified by the business there handled. The duty of regulatory bodies is to keep the business of the railroads it regulates in a sound condition so they can provide adequate service to the public which needs and can support it.

The elimination of the station and its agent will be some incovenience to the patrons at Springfield but the loss of revenue to the carrier does not justify their continuance and the inconvenience involved appears not to be great.

The action of the Commission in refusing to grant the applicant authority to close its station and discontinue its agent was in view of the evidence unreasonable, arbitrary, and unjust, and its action must be reversed.

REVERSED.

RICHARD L. MCLEOD ET AL., APPELLEES, V. H. R. CRAWFORD ET AL., APPELLANTS.

126 N. W. 2d 663

Filed March 6, 1964. No. 35515.

1. **Trademarks and Trade Names.** The right to the exclusive use of a trademark or a trade name continues in a trademark owner despite expiration of the patent required to be used in connection with the trademark or trade name.
2. **Contracts.** It is assumed that parties to a contract know best what was meant by its terms and that whatever is done by the parties during the period of performance is done as they intended it should be.
3. ———. The interpretation given contracts by the parties themselves, while engaged in their performance of it, is one of the best indications of their true intent and should be given great, if not controlling, influence and the courts ordinarily should enforce such construction.
4. ———. Generally, the assertion of the invalidity of a contract is nullified by the subsequent acceptance of benefits growing out of the contract claimed to have been breached.
5. **Patents.** Generally, parties to a patent licensing agreement may contract for the payment of royalties beyond the expiration of the patent, unless such contract, under the circumstances, constitutes a device to evade the patent laws or a violation of the principle of combinations in restraint of trade.
6. **Trademarks and Trade Names.** A trademark licensor has not only the right, but the duty to control the circumstances under which the name is used.
7. ———. Preservation of the unique value of a trademark and the retention of the enjoyments of it require a trademark owner to include controls over the nature, quality, type of machines, and the method of production of the finished product associated with the trade name.
8. **Contracts.** A provision in a contract giving a party the right to terminate for failure of the other party to make required payments under the contract is not an exclusive remedy.
9. **Patents.** Generally, contract disclosure of a patent expiration date, which is of public record, is not required.

Appeal from the district court for York County: H. EMERSON KOKJER, Judge. Affirmed.

Miles N. Lee, C. L. Robinson, and Ray L. Svehla, for appellants.

Robert L. Jeffrey and Richard L. Goos, for appellees.

Heard before WHITE, C. J., CARTER, MESSMORE, SPENCER, BOSLAUGH, and BROWER, JJ., and LYNCH, District Judge.

WHITE, C. J.

This is an action for breach of contract growing out of three territorial agreements in the State of Nebraska between the plaintiffs, McLeods, and the defendants, Crawfords, as to the use of the "Dairy Queen" soft ice cream trademark and the soft ice cream machine used in connection therewith, being described herein as Patent No. 2080971. The questions presented in this case arise out of the defendants' claim that the territorial contracts entered into were illegal, being a "patent misuse" because they were agreements against public policy in extending the patent monopoly beyond the expiration date of the patent. These contracts gave the use of the Nebraska trademark "Dairy Queen" and the use of the machine to the defendants. The defendants agreed to operate "Dairy Queen" stores and to make payments to the plaintiffs according to the number of gallons of soft ice cream mix used and sold in the "Dairy Queen" stores. The amounts actually used were stipulated and agreed to so no question arises in this respect. The district court rejected the defense of illegality, held the contracts enforceable to the extent of the actual use by the defendants of the trademark and the machines in the territories contracted for, and entered judgment for the plaintiffs in the sum of $18,357.30, interest, and costs. Defendants' counterclaim for payments that had been made on the contracts was also dismissed. The defendants appeal.

The material facts as to the issues presented are not essentially in dispute. On June 24, 1950, June 4, 1951, and March 3, 1953, the parties executed agreements covering the respective territories of Harlan and Hamilton, Saline, and York Counties. From these almost identical contracts, we extract the pertinent recitals and

provisions with respect to the issues presented. They are:

1. The plaintiffs have purchased from McCulloughs Dairy Queen of Geneseo, Illinois, the right to use the registered Nebraska trademark "Dairy Queen" and the right to use the freezing and dispensing machine connected therewith, being Patent No. 2080971. The right to the use of the machine was acquired by McCulloughs Dairy Queen from the patent owner, Ar-Tik Systems, Inc., Miami, Florida.

2. For the right to use the trade name "Dairy Queen" and the dispensing machines, the defendants agree to pay a cash sum (about which there is no controversy), and "the sum of sixteen (16¢) cents a gallon on each and every gallon of mix used, or sold within said territory, *hereinafter*." (Emphasis supplied.) The second and third contracts for Saline and York Counties provided for 26¢ and 23¢ per gallon of mix, respectively.

3. The defendants, Crawfords, agree to keep records of the amount of mix used, and the Crawfords have the right to subcontract their rights, which they did, with the consent of the plaintiffs, McLeods.

4. The defendants, Crawfords, agree not to sell any other frozen or semifrozen dairy product, nor to use any other type of dispensing machine without obtaining the consent of the McLeods.

5. The Crawfords agree to maintain standards as to quality of mix, dress, and uniform by the "Dairy Queen" store operators, and agree as to when the first store will be in operation and when the first freezer will be purchased.

6. On failure to make the required payments for mix used, plaintiffs may terminate the contract on 30 days' notice.

7. The plaintiffs, McLeods, agree to pay the patent owner, Ar-Tik Systems, Inc., 4¢ per gallon of mix used. The defendants assume no obligation in this respect.

The record reveals the following facts as to the contracts and their performance:

1. Patent No. 2080971 (the dispensing machine), in full force and effect at the time of the execution of the contracts, expired May 18, 1954.

2. The defendants, Crawfords, opened "Dairy Queen" stores, bought and used the dispensing machines, and operated "Dairy Queen" stores in the territories contracted for through the year 1961. The petition in this case was filed January 2, 1959.

3. Crawfords paid the mix "royalty" or gallonage fee until about November 1957, and have not paid since, although operating "Dairy Queen" stores using the trademark and the dispensing machine in connection therewith through the year 1961.

4. No fixed time is specified in the contracts. The obligation of the Crawfords is measured by how long and how much of the mix is used and sold "hereinafter." There is no obligation to use in point of time or amount, only to pay on the contingency of voluntary use of the trademark and machine.

5. The plaintiffs, McLeods, neither guarantee the validity of the patent, nor do they have a right to terminate the contract at any time, except for nonpayment of the mix fee on mix actually used.

6. No dispute exists as to how long the stores were operated, the use of the trademark "Dairy Queen," the use of the machine, or the amount of mix used. The amounts were stipulated to, showing amounts used under the terms of the contract including and through the year 1961.

As mentioned before, the court found the contracts enforceable, and entered judgment for the mix fee due under their terms in the sum of $18,357.30.

The defendants cite numerous propositions of law and list many assignments of error. They all flow from, or boil down to, one fundamental contention that the contracts were illegal and unenforceable because they

licensed or contracted for the use of Patent No. 2080971 beyond the 17-year period of the patent monopoly granted by the United States. The patent expired May 18, 1954, several years after the first contract was executed and a little over a year after the last one of March 3, 1953. They argue that the contracts required payments beyond the patent expiration date and were therefore illegal and against public policy; and then they proceed to consecutively argue failure of substantial performance, their innocence as to the claimed illegality, their right to use the trademark and machines free of the mix charge, and their affirmative right to recover all back payments made under the contract. This contention is based primarily on the doctrine of patent misuse and illegality set out in Ar-Tik Systems, Inc. v. Dairy Queen, Inc., 302 F. 2d 496, and the cases cited therein supporting it. Scott Paper Co. v. Marcalus Mfg. Co., Inc., 326 U. S. 249, 66 S. Ct. 101, 90 L. Ed. 47; American Securit Co. v. Shatterproof Glass Corp., 268 F. 2d 769; and on the effect of illegality, United States Gypsum Co. v. National Gypsum Co., 352 U. S. 457, 77 S. Ct. 490, 1 L. Ed. 2d 465.

Substantially similar, if not identical, "Dairy Queen" franchise contracts have been construed as to aspects of these same issues in Ar-Tik Systems, Inc. v. McCullough, 133 F. Supp. 807; Medd v. Boyd Wagner, Inc., 132 F. Supp. 399; Temperato v. LaBrot (Mo. App.), 358 S. W. 2d 106; Capital Dairy Queen v. McCullough Dairy Queen, 125 U. S. P. Q. 540, and the federal district court decision in Ar-Tik Systems, Inc. v. Dairy Queen, Inc., *supra.*

All of the "Dairy Queen" cases cited above have found it necessary, as we do, to review the history of the development of the "Dairy Queen" trademark and the tie-in with the use of the soft ice cream machine. A case very aptly reviewing this development and history, and meeting the same issues we have before us here, is Medd v. Boyd Wagner, Inc., *supra.* There, the McCulloughs

had granted franchise rights to the plaintiffs, the same as they had to the plaintiffs here who, in turn, under contracts similar to the ones here, had subcontracted to parties in the same status as the defendants, Crawfords, here who were in turn granted the right to subcontract.

The defense was the same as here, based on the expiration date of Patent No. 2080971 on May 18, 1954. The court stated the issues as follows: "From all of the foregoing, we take it, therefore, that defendants, first, deny ownership of the trade name in plaintiffs and, second, contend that, with the *expiration of the patent,* plaintiffs lost all right to the exclusive use of the trade name 'Dairy Queen'. * * * The foregoing contentions designated A, B, C, D and E, which are set forth in defendants' brief, when grouped together, seem to contest the right of plaintiffs in the name and *conclude that somehow,* after the expiration of the patent, property in the name became lodged in the defendants." (Emphasis supplied.)

The court reviewed the history of the same trademark "Dairy Queen" that we are dealing with here as follows: "McCullough opened the first 'Dairy Queen' store in the year 1939 and thereafter, until the close of the year 1946, he opened and operated some twenty-one stores dispensing ice milk and operating under the trade name 'Dairy Queen'. These stores were located in the States of Iowa and Illinois. Therefore, at the time that he acquired the patent license from Ar-Tik in 1946, *he had already established a trade name at least in the States of Iowa and Illinois.* He had a right, by license, to introduce his trade name and create a demand for his variety of goods in a new territory by licenses. E. F. Prichard Co. v. Consumers Brewing Co., supra. The fact that he licensed the use of the name in connection with a license of the patent right renders his position much stronger. He was not entering into a mere naked license agreement. See E. I. DuPont De Nemours & Co. v. Celanese Corporation of America, 167 F. 2d 484, 35

C.C.P.A., Patents, 1061, 3 A. L. R. 2d 1213. * * * When McCullough licensed plaintiffs to the use of the patent and the trade name in the State of Ohio in December of 1946, he had established the trade name 'Dairy Queen' as being distinctive of a style and mode of operation in the sale of an ice milk product. *Plaintiffs, by virtue of their license agreement, set out immediately to extend their business, to exploit the patent and the trade name in the State of Ohio by way of sub-licenses to district operators.* Some twenty-two such sub-licenses were issued to district operators in the State of Ohio before the district operator's license was extended to Boyd Wagner, Incorporated, and during this time plaintiffs themselves operated some four or five stores in the State of Iowa. In less than eight years, from January of 1947 to May 18, 1954, plaintiffs and their licensors, McCulloughs, extended the business, *not only throughout the States of Ohio, Illinois and Iowa, but into most of the States of the Union, until the 'Dairy Queen' enterprise numbered last year some 2,600 retail stores scattered throughout the country, 200 of which were in the State of Ohio.*" (Emphasis supplied.)

Then, going to the stated issue in the case, the court said: "We believe from all of this, that plaintiffs were offering more than a naked license to these store operators. Through their district operator, they were offering an established name that had property value of great worth from which they should not be divested without their consent. * * * We are here confronted with a situation where the defendants knowingly entered into a license agreement to use the trade name and the trade phrase and paid compensation therefor over a period of years. *We believe that they are precluded from taking possession of the trade name and the trade phrase without compensation therefor and without the consent of the rightful owners.*" (Emphasis supplied.)

This case also meets head-on the basic contention of patent monopoly, misuse, and illegality strenuously as-

serted by the defendants here. The court said: "We turn now to the second named defense, to wit, that, with the expiration of the patent on the freezer machine, plaintiffs' rights to the exclusive use of the trade name 'Dairy Queen' and the trade phrase 'The Cone with the Curl on Top' ceased to exist. * * * Defendants, in advancing the second defense, place reliance chiefly on Singer Manufacturing Co. v. June Manufacturing Co., 163 U. S. 169, 16 S. Ct. 1002, 41 L. Ed. 118; Kellogg Co. v. National Biscuit Co., 305 U. S. 111, 59 S. Ct. 109, 83 L. Ed. 73; Scott Paper Co. v. Marcalus Manufacturing Co., Inc., 326 U. S. 249, 66 S. Ct. 101, 90 L. Ed. 47; and Checker Cab Mfg. Corporation v. Green Cab Co., 6 Cir., 35 F. 2d 631. * * * The above cases are not convincing and are not determinative of the issue raised here by the defendants. We are convinced, from the evidence, that the trade name 'Dairy Queen' and the trade phrase 'The Cone with the Curl on Top' are not associated in the public mind with the patented freezer machine, and that no attempt was made to so associate them; and there is not here an attempt to extend the life of the patent by use of the trade name and the trade phrase. * * * *the right to the exclusive use of the trade name continues in the patentee despite expiration of the patent.* Telechron, Inc. v. Telicon Corp., 3 Cir., 198 F. 2d 903; Ironite Co. v. Cement Waterproofing & Ironite Co., D. C., 20 F. Supp. 603; Prest-O-Lite v. Davis, 6 Cir., 215 F. 349. * * * If an accounting of all gains and profits made by defendants by reason of the acts complained of and damages that may have been suffered by plaintiffs are claimed, then that matter may be pursued in due time." (Emphasis supplied.)

But, we need not look solely to the construction placed on this trademark and the contract as construed by the Medd case, *supra*. We are aided by the conduct of the defendants and the interpretation they *placed on these* contracts themselves.

It is to be assumed that parties to a contract *know best what was meant* by its terms, and that whatever

is done by the parties *during the period of performance is done as they intended it should be.* The interpretation given a contract, by the parties themselves while engaged in their performance of it, is one of the best indications of *their true intent,* should be given great, if not controlling influence, and the courts ordinarily should enforce such construction. Dunn v. Mutual Ben. Health & Acc. Assn., 135 Neb. 506, 282 N. W. 487; 12 Am. Jur., Contracts, § 249, p. 787; C. W. Hull Co. v. Westerfield, 107 Neb. 705, 186 N. W. 992, 29 A. L. R. 105; 4 Neb. Law Bulletin 149; Ord Hardware Co. v. J. I. Case Threshing Machine Co., 83 Neb. 353, 119 N. W. 682. Correlated to and following this basic principle is the rule that the assertion of the invalidity of a contract is nullified by the subsequent *acceptance of benefits growing out of the contract* claimed to have been breached. Wegner v. West, 169 Neb. 546, 100 N. W. 2d 542; Einot, Inc. v. Einot Sales Co., Inc., 154 Neb. 760, 49 N. W. 2d 625; Dakota County v. Central Bridge & Constr. Co., 136 Neb. 118, 285 N. W. 309.

The defendants, Crawfords, were already operating ice cream and frozen food stores, and desired to acquire and operate "Dairy Queen" stores. They wanted the trade name and the use of the machine that was tied in with it. The McLeods could not grant this, nor could the defendants secure what they wanted unless they got the right to use the machine, McCulloughs controlling both the trademark and the use of the machine down through the line of contractees. McCulloughs, *not the patent owner,* required the use of the machine. The contracts entered into were the only way the parties could put their scheme of operation into effect *at the time of the original contracts.* If we assume, as defendants argue, that both parties were free to use the machine on May 18, 1954, the defendants could have abandoned the machines and the trade name and ceased operating "Dairy Queen" stores. Or, they could have attempted to purchase the machine independently for

some other type of operation. This latter they did not and could not do because the trademark owner required that "Dairy Queen" trademark and the machine go together. This, both the McCulloughs and the McLeods, the trademark owners, had a right to do whether the machine or product was patented or not. So, being free to choose their own course of action at all times, what did the defendants actually do? They fixed their own obligation under the contracts by their own voluntary performance. They operated the stores, used the required machine in connection therewith, and performed and received the benefits of the contract through the year 1961, over 7 years after the patent expiration. The defendant, H. R. Crawford, testified that the first time he became concerned about the patent was approximately January 10, 1958. There is no evidence in this case that the expiration of the patent affected the defendants' business in any way. The increase in the amount of mix sold would indicate the opposite. The plaintiffs did not agree to guarantee or to bear the risks of the competitive use of the machine by others. And, there is no evidence that when the patent expired that the machines were used at all in defendants' territories, much less any evidence as to damage from competitive use. The defendants own continued performance demonstrates that they realized that the required tie-in of the trademark with the machine actually protected them from the imaginary competitive assault that they now, on hindsight, complain could have existed. It not only protected them, but the defendants' voluntary performance prevented the plaintiffs from contracting the use of the trademark to other parties. It is clear, therefore, that the defendants voluntarily took advantage of a trademark business scheme with the incidental right and duty to use a particular type of machine. The plaintiffs performed everything necessary for the defendants' actual use and enjoyment of the benefits growing out of the contracts.

This retroactive attack on the expiration date of the patent amounts to no more than a claim that someone other than the defendants could have used the machine after May 18, 1954. There is no evidence that anyone did. To sum it up, the conduct of the defendants, their acceptance of benefits, and their continued use demonstrate conclusively that they themselves interpreted the contracts squarely consistent with the interpretation and the reasons therefor set out in Medd v. Boyd Wagner, Inc., *supra;* Ar-Tik Systems, Inc. v. McCullough, *supra;* Capital Dairy Queen, Inc. v. McCullough Dairy Queen, *supra;* Estate of Gowdey v. Commissioner of Internal Revenue, 307 F. 2d 816.

Defendants, nevertheless, strenuously urge Ar-Tik Systems, Inc. v. Dairy Queen, Inc., *supra,* asserting it is the latest (March 1962, 3rd Circuit) and highest federal decision. We note that it was a three-judge decision with one judge dissenting, who agreed with the lower court decision and the holding in Medd v. Boyd Wagner, Inc., *supra.*

In Ar-Tik Systems, Inc. v. Dairy Queen, Inc., *supra,* relied upon by the defendants, the patent owner, *not the franchise grantor,* sued a subcontractee of McCulloughs, the same as the McLeods here, for the 4¢ per gallon mix fee or "royalty" due it on mix used after the expiration date of the patent, May 18, 1954. This follows the contract provision requiring, as the McLeods were here, that each franchise grantor pay that amount direct to the patent owner for the use of the machine. The suit was brought as a third party beneficiary and against a franchise grantor, the same as the McLeods were here. In none of these franchise contracts are the "Dairy Queen" store operators required to pay this; it is a liability imposed on the franchise grantor. The court held that the 4¢ payment to Ar-Tik Systems was a severable consideration in the contract, and as such condemned as illegal relying on Scott Paper Co. v. Marcalus Mfg. Co., Inc., *supra.* Said the court, one judge

dissenting: "As stated heretofore *a separate consideration is set forth in paragraph 4 of the agreement of October 18, 1949, supra, for this right. The obligation to pay the four cent royalty is found in paragraph 3 of the said agreement and is solely for the use of the patented machines.* * * * After the expiration of Patent No. 2080971 on May 18, 1954, the grant of patent monopoly was spent. An attempt to extend that monopoly by the exaction of royalties thereafter was unenforceable. Such action clearly appears to be interdicted by Scott Paper Co. v. Marcalus Co., supra, and American Securit Co. v. Shatterproof Glass Corp., supra." (Emphasis supplied.)

The majority opinion in the above case marked the clear difference between that case, the Medd case, *supra,* and the present case before us. It said: "The marked distinction between that case (Medd v. Boyd Wagner, Inc., *supra)* and this is that it revolved completely around the ownership of the trade name and trade phrase. Ar-Tik did not appear in the suit and the issue of the payment to it of royalties on the freezer was not raised."

In further distinguishing the two cases, the majority opinion said: "There is no evidence in this case to support any claim that Ar-Tik was vested with any ownership or interest in the trade name Dairy Queen, in Pennsylvania. The name was created by McCullough and has been exploited in Pennsylvania by the defendant, Dairy Queen, Inc., under the title it acquired stemming originally from McCullough. Ar-Tik's royalty as contracted for by the McCulloughs and their assigns down to the defendant was solely for the use of its patent. * * * The continued payments by defendant (here the defendants, Crawfords) to its assignors and the McCulloughs (here the plaintiffs, McLeods) under its obligations to them *only indicates the recognition of its duty to pay for the right to develop the described terri-*

tory for its operation of Dairy Queen stores." (Emphasis supplied.)

It seems to us that this case is authority for the holding that the patent holder may not collect royalties beyond the expiration date, but that a licensee may couple a valid trademark with the required use of a specific machine, patented or not, and enforce such an agreement. No case has been cited holding the "Dairy Queen" trademark franchise contracts invalid. The validity of the "Dairy Queen" agreements has been upheld in Medd v. Boyd Wagner, Inc., *supra;* Ar-Tik Systems v. McCullough, *supra;* Temperato v. LaBrot, *supra;* Capital Dairy Queen v. McCullough Dairy Queen, *supra;* and the quoted portions of Ar-Tik Systems, Inc. v. Dairy Queen, Inc., *supra.*

Beyond this, the restricted holding in Ar-Tik Systems, Inc. v. Dairy Queen, Inc., *supra,* of illegality as to collection by the patent owner beyond patent term, seems to be contrary to authority and the best reasoning, and has already been refused acceptance by the courts. In that case, the court noted that the general rule seemed to be to the contrary and cited to this effect: Walker, Patents, p. 456 (1961 Supp. to Vol. II Deller's ed.); Ellis Patent Licenses, § 109, p. 128 (3rd ed. Deller, 1958) and 69 C. J. S., Patents, § 262, p. 802. The court then proceeded to analyze the cases supporting the rule and, resting its decision on Scott Paper Co. v. Marcalus Mfg. Co., *supra,* and American Securit Co. v. Shatterproof Glass Corp., *supra,* reached an opposite conclusion and, therefore, held Ar-Tik's severable 4¢ royalty illegal.

This issue, including the validity of the holding in Ar-Tik Systems, Inc. v. Dairy Queen, Inc., *supra,* has been met in a very recent (June 1963, Washington) case, Thys Company v. Brulotte, 382 P. 2d 271. In that case, the contract was direct with the patent holder, no tieing-in with a trademark franchise was involved, and it was for a fixed term extending beyond the expiration date of the patent. The court held: "The next contention is

that the contracts were unenforcible because they licensed the use of patents beyond the 17-year period of monopoly granted by the sovereign. * * * The great weight of authority, as well as the stronger reasoning, is that parties to a licensing agreement may contract for the payment of royalties beyond the expiration of the patent, although, in the absence of such an agreement, a license contract expires when the licensed patent expires. Among the authorities so holding are E. R. Squibb & Sons v. Chemical Foundation, Inc., 2 Cir., 93 F. 2d 475; Starke v. Manufacturing Nat. Bank of Detroit, D. C., 174 F. Supp. 882; Tate v. Lewis, D. C., 127 F. Supp. 105; H-P-M Development Corp. v. Watson-Stillman Co., D. C., 71 F. Supp. 906; and Six Star Lubricants Co. v. Morehouse, 101 Colo. 491, 74 P. 2d 1239. * * * *We are aware of a recent contrary decision in Ar-Tik Systems, Inc. v. Dairy Queen, Inc.,* 302 F. 2d 496 (C. A. 3d 1962). In that case the payment of royalties was required throughout the life of the machines sold. This was held to be a misuse of patents. We may assume that the agreement was enough like those involved in this case to make the rule applicable. We find the reasoning of the earlier cases more appealing, however, and we are not obliged to follow decisions of lower federal courts." (Emphasis supplied.)

At the risk of belaboring the point, the Thys case, *supra,* and Medd v. Boyd Wagner, Inc., *supra,* analyze the *supporting cases* of Scott Paper Co. v. Marcalus Mfg. Co., Inc., *supra,* and American Securit Co. v. Shatterproof Glass Corp., *supra,* which are the basis of the Ar-Tik Systems, Inc. v. Dairy Queen, Inc., *supra,* holding. We shall not extend this opinion by an analysis of these holdings. They all involve the attempt to recreate a patent monopoly on completely expired patents, or an attempt to tie in a group of patents in violation of the principle of combinations in restraint of trade. The distinction between legitimate "tie-ins," such as a trademark with products or machines, and a device to evade

the rules against combinations in restraint of trade or monopoly, is pointed out in Automatic Radio Mfg. Co. v. Hazeltine Research, Inc., 339 U. S. 827, 70 S. Ct. 894, 94 L. Ed. 1312; Susser v. Carvel Corp., 206 F. Supp. 636; Warner-Lambert Pharm. Co. v. John J. Reynolds, Inc., 178 F. Supp. 655; Morse-Starrett Products Co. v. Steccone, 86 F. Supp. 796; Brosious v. Pepsi-Cola Co., 155 F. 2d 99.

We point out in this case that there was a valid trademark and live patent when the parties entered into the contracts; that the exact patent by number was disclosed to defendants and recited in the contracts; and that there was no obligation for the defendants to use the condemned "tie in" agreement for any period of time and certainly not beyond May 18, 1954. *We point out that defendants' obligation to pay the mix fee was coextensive* with their voluntary decision to enjoy the benefits of the contracts. It terminated when the defendants decided not to enjoy the benefits accruing thereunder. The defendants either had actual or constructive notice of the expiration date of May 18, 1954, it was disclosed, published of record, and ascertainable by them at any time. No cases are cited requiring contract disclosure of a patent expiration date which is of public record and required to be so. See, 40 Am. Jur., Patents, § 9, p. 537; Sontag Chain Stores Co. v. National Nut Co., 310 U. S. 281, 60 S. Ct. 961, 84 L. Ed. 1204. The defendants received the benefits for over 7 years after the patent expiration date. Moreover, they were given the right to subcontract, which they did, and there is no evidence of any nature whatsoever that they were injured by any competitive use of the machines or the trademark. *Plaintiffs were thus, in effect, effectively prevented from contracting the trademark franchise to others because of the conduct of the defendants in continuing the performance of the contracts and the use of the trademark.* Under these circumstances, defendants are estopped to set up the invalidity of these contracts.

Medd v. Boyd Wagner, Inc., *supra;* E. F. Prichard Co. v. Consumers Brewing Co., 136 F. 2d 512; Smith v. Dental Products Co., Inc., 140 F. 2d 140.

We point out further that plaintiffs' claim is not the product of a veiled technique to create a patent monopoly case in the form of a "tie-in" agreement to extend its date. Plaintiffs forced defendants to do nothing in relation to the patent. After May 18, 1954, they were free to use the machine alone, and freed of the patent restriction. What they were forbidden to do was to use the machine in a "Dairy Queen" store, unless they paid a mix fee on whatever amount they voluntarily used. That the plaintiffs had the right to require certain products or machines, patented or unpatented, as a condition of the use of the trademark, cannot be questioned. It may be that the fact the patent didn't expire until May 18, 1954, was an inducing incentive for them to enter into the contracts. But, it becomes no more than just that. The defendants could be relieved at any time by voluntary nonuse. The undisputed testimony as to the large amount of mix sold, the continued operation of the stores, and the use of the name "Dairy Queen" for many years after May 18, 1954, refute completely any claim of damage. Turning the situation around, the defendants would have us believe that they had a right to buy and use the machines, use the trademark name, operate the stores, and be completely free of their voluntary assumed obligation under the contracts. All this because the patent on the machine required to be used with the trademark expired as a matter of public record on May 18, 1954. Such a position is untenable.

As an addendum to their basic argument as to patent misuse and illegality, defendants argue that the contracts were void and illegal because of the restrictions placed in the contracts on the use of the machines. The patent license cases cited are not in point. A trademark licensor has not only the right, but the duty, to control the circumstances under which the name is used. Capital

Dairy Queen v. McCullough Dairy Queen, *supra;* Brosious v. Pepsi-Cola Co., *supra.* As we have pointed out, the plaintiffs, in addition to controls over the quality of the mix and uniforms of operators, could control the type of freezers to be used in the stores in connection with the trademark, even if there had been no patent on the freezers at any time. The fact that they had the exclusive rights to the patent at the time they made the agreements is entirely incidental. The "Dairy Queen" restrictive agreements on the defendants' use of the machines have been attacked in several cases, and have been held valid, substantially on the same grounds as given herein. See, Engbrecht v. Dairy Queen Co. of Mexico, Missouri, 203 F. Supp. 714, Moberg v. Baker, 217 Or. 551, 342 P. 2d 828; Medd v. Boyd Wagner, Inc., *supra;* Susser v. Carvel Corp., *supra.* Preservation of the unique value of the trademark and the retention of the enjoyments of it require a trademark owner to include controls over the nature, quality, and the method of production of the finished product associated with the trade name. Morse-Starrett Products Co. v. Steccone, *supra;* Brosious v. Pepsi-Cola Co., *supra.*

Defendants further plead fraud and yet in their brief abandon this defense. They further argue that illegality taints the whole contracts and yet they are severable as far as defendants are concerned, giving them as innocent parties a right to recover back payments made. This, in effect, would amount to a right to collect a forfeiture, based on the contention of illegality. What we have said on the basic issues in the case eliminates these assertions from further consideration.

Defendants, in a many sided and shifting defense, further argue that when the defendants ceased payments after 1957, they therefore terminated the contracts and are not liable for mix used in the operation of the stores after that date. This, they argue, is true because of paragraph 11 of the contracts which provides that if they cease to make payments, the plaintiffs may notify the

defendants in writing and, if payments are made in 30 days, no further action may be taken. It then provides, *"but if payments are not made then the First Party (plaintiffs) shall have the right to terminate this agreement."* (Emphasis supplied.) The answer to this argument is almost apparent from the emphasized language quoted. Provisions of this nature do not furnish an exclusive measure of the remedy. 18 Am. Jur., Election of Remedies, § 36, p. 155.

Substantially the same provision in a "Dairy Queen" contract was construed in Moberg v. Baker, *supra,* exactly contrary to defendants' contention. Further, such a construction would give defendants a right, despite operation of the stores and use of the "Dairy Queen" trade name, to terminate liability by their own breach. There is no merit to this contention.

Defendants argue the failure of the McLeods, at least at this time, to have paid all of the 4¢ mix royalty they (the McLeods) are obligated to pay Ar-Tik. As pointed out, this is no obligation of the defendants. It flows to Ar-Tik as third party beneficiary under the contracts and is not an issue in this case. It is a severable and distinct separate obligation of the plaintiffs and not the defendants. Ar-Tik Systems, Inc. v. Dairy Queen, Inc., *supra.* But, it is further apparent that the contracts only call for this payment in event defendants pay, which they have not done. In any event, there is a complete absence of showing of any damage to defendants.

From what has been said, these contracts are valid, enforceable agreements. They are not tainted with illegality. The defendants voluntarily measured their obligation by the extent they used the trademark and the machine in operating "Dairy Queen" stores. No reason exists why they should not pay for the benefits they received and the obligations they caused themselves under the contracts. The trial judge in this case came to the correct conclusion. The judgment is affirmed.

AFFIRMED.

DIAMOND FLORY, ADMINISTRATRIX OF THE ESTATE OF HAROLD W. FLORY, DECEASED, APPELLANT, V. WALTER HOLTZ, APPELLEE.

126 N. W. 2d 686

Filed March 6, 1964. No. 35563.

1. **Automobiles: Evidence.** A qualified expert upon laying a proper foundation may give his opinion as to the minimum speed which a vehicle must have been traveling to lay down the skid mark shown in the evidence.
2. **Witnesses: Appeal and Error.** Whether a witness' qualification to state his opinion is sufficiently established rests largely in the discretion of the trial court, and its ruling thereon will not ordinarily be disturbed on appeal unless there is a clear showing of abuse.
3. **Automobiles: Evidence.** Various factors, such as skid marks, distance traveled after impact, and force of impact, constitute pertinent evidence in arriving at an estimate of the rate of speed of an automobile.
4. ———: ———. For a hypothetical question to be sufficient to permit a qualified expert to give an estimate on the rate of speed of a vehicle at any particular point, all necessary factors needed to suggest a reasonably accurate opinion must be included in the question and supported by the evidence. There must not be any room for speculation in the factors on which the opinion is to be based.
5. **Trial.** A motion for a directed verdict must be treated as an admission of the truth of all material and relevant evidence submitted on behalf of the party against whom the motion is 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.
6. **Negligence.** The burden of proving negligence is on the party alleging it.
7. ———. Negligence is never presumed and it cannot be inferred from the mere fact that an accident happened.
8. ———. Actionable negligence herein on the part of the defendant cannot be inferred from a presumption of due care on the part of the deceased.
9. ———. The presumption of due care raised by the instinct of self preservation benefits the defendant as well as the deceased.
10. **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 there-

from, indicate with reasonable certainty the negligent act charged.

11. **Automobiles: Highways.** Motor vehicles traveling upon public highways shall give the right-of-way to vehicles approaching along intersecting highways from the right and shall have the right-of-way over those approaching from the left when said vehicles shall reach the intersection at approximately the same time. In all other cases the vehicle reaching the intersection first shall have the right-of-way. § 39-728, R. S. Supp., 1961.

12. ———: ———. This statute is intended to avoid collision between vehicles at intersections and the right-of-way is not to be determined by the single test of which vehicle actually entered the intersection first, if the vehicles approached or entered the intersection at approximately the same time.

13. ———: ———. The drivers of vehicles approach an intersection at approximately the same time whenever the two vehicles are in such relative position that upon appraisal of all factors it should appear to a man of ordinary prudence approaching from the left that there is danger of collision if he fails to yield the right-of-way.

14. **Negligence.** The facts and circumstances herein, and the inferences which may be drawn therefrom, are not sufficient to indicate with reasonable certainty actionable negligence on the part of the defendant.

15. **Set-Off and Counterclaim: Trial.** Where a motion for a directed verdict or dismissal is sustained, the counterclaim or cross-petition shall be continued as a separate cause and trial thereon had at a subsequent jury the same as if it had been filed as a separate action.

Appeal from the district court for Buffalo County: S. S. SIDNER, Judge. Affirmed.

Dryden & Jensen, Tye, Worlock & Knapp, Andrew J. McMullen, and Paine & Paine, for appellant.

Luebs, Elson, Tracy & Huebner, for appellee.

Heard before WHITE, C. J., CARTER, MESSMORE, YEAGER, SPENCER, BOSLAUGH, and BROWER, JJ.

SPENCER, J.

This is an action to recover damages for the death of Harold W. Flory, as the result of the alleged negligence of Walter Holtz. The action was brought by Diamond

Flory, widow of the deceased, as administratrix of the estate of Harold W. Flory. The parties will hereinafter be referred to as follows: Diamond Flory, administratrix, as plaintiff; Walter Holtz as defendant; and Harold W. Flory as deceased.

Defendant's motion at the close of plaintiff's evidence to dismiss plaintiff's petition was sustained, and a trial on the defendant's cross-petition was continued to a subsequent jury. Upon the overruling of her motion for new trial, plaintiff perfected her appeal to this court.

The collision resulting in the death of deceased occurred at about 3:30 p. m., on October 2, 1961, in Buffalo County, at an unprotected county road intersection 1 mile west and 1 mile north of Shelton, Nebraska. Both roads were level, dry, graveled, and approximately 20 feet wide. Deceased was driving a 1959 Chevrolet pickup truck, hereinafter referred to as pickup, weighing 4,164 pounds, on the east-west road, traveling toward the west. Defendant was operating a 1960 Chevrolet truck, hereinafter referred to as truck, weighing 8,950 pounds, on the north-south road, traveling toward the south. The view of the intersection was obstructed for both vehicles by a cornfield at the northeast corner of the intersection. The evidence is that the corn at that time was from 10 to 12 feet high.

There were no eyewitnesses to the collision. Both drivers were alone, and the defendant has no recollection of it. One of plaintiff's witnesses, who was disking 1,000 feet away from the north-south road, saw the defendant's truck for aproximately 300 feet through an opening in the corn rows, and when it went out of sight it was then about 300 feet from the intersection. He testified: "* * * it wasn't going real slow and it wasn't going excessively fast; it was just driving normal." This witness did not see the deceased as he could not see the east-west road because of the corn, but he testified he was aware that another car was in the vicinity because as he was disking east he had observed a

little dust about 1,200 feet from the corner on the east-west road. At that time he estimates he was about 100 feet from his turn, traveling about 4½ miles per hour. He made his turn to the west and had returned about 100 feet when he saw the defendant's truck.

The investigating officer found a skid mark of 45 feet extending straight east from the center of the intersection, but found none running north and south. He found sliding or scuff marks from the center of the intersection where the skid mark stopped and going off to the southwest corner of the intersection. While he made certain measurements, he did not make any measurements of the slide marks or of the distances the vehicles traveled after the collision. He did testify, however, that the Holtz truck rolled over during the procedure. He estimated that the Flory pickup stopped approximately 25 to 30 feet, and the Holtz truck 80 to 100 feet southwest of the center of the intersection. The truck was south of the pickup, facing mostly east and a little north. The pickup was facing north and west. The front of the pickup apparently struck the left side of the truck, just ahead of the back dual wheels. The truck's stock rack was broken and there was a dent in the steel band around the truck as well as some green paint from the pickup on the truck and on the frame at this point. Green paint was also found on the back part of the front fender of the Holtz truck, and some black tire marks, apparently from the truck, were found on the right front fender of the pickup.

The investigating officer took several pictures at the scene. These were received in evidence without objection. These photos were of the intersection and the approaches to it. They showed the position of the vehicles after the impact as well as the extent of the damage to each vehicle. They also indicated a large scuff mark in the southwest corner directly behind the pickup, the nature of the gravel, and the skid and slide marks. Except for the scuff mark, which is unexplained

and is directly behind the pickup, the testimony is that there were no skid or slide marks between the southwest corner of the intersection where the slide marks end and the Holtz truck, which, under the investigating officer's estimate would be from 50 to 70 feet south. The photos show some marks which must be assumed to have no connection with the collision, as no explanation of them appears in the plaintiff's evidence.

Plaintiff alleges four assignments of error: First, the refusal to admit certain evidence by her expert witness; second, dismissal of her petition; third, permitting defendant's cross-petition to be continued as a separate cause of action; and fourth, the overruling of her motion for a new trial. We will discuss these assignments in the order listed.

Plaintiff called a University of Nebraska mechanical engineering professor who was qualified as an expert witness as to motor vehicle speeds. The witness testified that he had experience with the determination of speed and the calculation of physical happenings in automobile accidents. He employed two laws of physics, the law of conservation of energy and the law of conservation of momentum. He explained them as follows: "The law of conservation of energy states that energy cannot be created or destroyed, with the exception of atomic energy; and the law of conservation of momentum states that the momentum of a body before collision—or perhaps I should say the momentum of two bodies before collision is the same before and after collision; there is no change due to the collision." He also testified that he had conducted experiements on gravel to determine the coefficient of friction between rubber and a gravel surface. There is no evidence in the record as to what this figure might be. No experiments were conducted by him at the place where the collision occurred.

The witness was permitted to give his estimate of a minimum speed of 25 miles per hour for the pickup truck driven by the deceased when at a point 45 feet

east of the center of the intersection. This obviously was based upon the fact that the pickup had laid down a skid mark of 45 feet from that point, and its speed could not have been less than 25 miles per hour. We have held that a qualified expert, upon laying a proper foundation, may give his opinion as to the speed of an automobile, based on the length of skid marks made by it when brakes were applied. McKinney v. Wintersteen, 122 Neb. 679, 241 N. W. 112. This rule has been followed in several subsequent cases. However, an analysis of the cases in each instance indicates a situation where the speed testified to would be at least the minimum. Probably an accurate statement of the rule would be: "A qualified expert upon laying a proper foundation may give his opinion as to the minimum speed which a vehicle must have been traveling to lay down the skid mark shown in the evidence."

Plaintiff's expert was not permitted to give his opinion as to the speed of the Holtz truck before the impact, or to give his opinion as to the speed of the two vehicles at the time of the impact. These rulings constitute the basis of plaintiff's first assignment of error.

The question does not involve the qualification of the expert as such. If sufficient facts are present to permit an answer by an expert, the witness presented was qualified. Our rule is: "Whether a witness' qualification to state his opinion is sufficiently established rests largely in the discretion of the trial court, and its ruling thereon will not ordinarily be disturbed on appeal unless there is a clear showing of abuse." Elliott v. Swift & Co., 151 Neb. 787, 39 N. W. 2d 617.

The expert was permitted to examine the photos in evidence showing the intersection, type of gravel surface, skid and slide marks, position of the vehicles after the impact, the marks upon them, and the extent of the damage sustained by them. He was given the weight of the vehicles, the estimated distance they stopped from the intersection, information on the weather, the type of

surface, the condition of the vehicles, the length of the skid mark from the east, and the information that the brakes and tires on the pickup were in good condition. He was then asked if, assuming all these facts to be true, he could from them form an opinion as to the speed of the pickup when it reached the center of the intersection. His answer was "Yes." When asked for the opinion, defendant's objection was sustained.

The witness was then asked if he had an opinion as to the speed of the truck prior to the collision. He answered in the affirmative. An objection was sustained when he was asked for his opinion. An offer was then made to prove that if permitted to testify, the witness would state the speed of the truck both before and at the time of the colliison.

We have said on several occasions: "Various factors, such as skid marks, distance traveled after impact, and force of impact, constitute pertinent evidence in arriving at an estimate of the rate of speed of an automobile." Tate v. Borgman, 167 Neb. 299, 92 N. W. 2d 697. These matters are pertinent for the consideration of the jury in determining the speed. However, for a hypothetical question to be sufficient to permit a qualified expert to give an estimate of the rate of speed of a vehicle at any particular point, all necessary factors needed to suggest a reasonably accurate opinion must be included in the question and supported by the evidence. There must not be any room for speculation in the factors on which the opinion is to be based.

It is evident from this record that there is considerable speculation involved in the factors on which the opinions sought to be elicited must be based. The stopping distances of the vehicles after the accident, given in the hypothetical question, are merely estimates. The highway patrolman estimated the distance the pickup traveled after the accident, assuming the point of impact to be the center of the intersection, at from 25 to 30 feet, and the truck from 80 to 100 feet. Using an estimate,

and certainly one with a range as great as these, creates a very serious doubt as to the accuracy of any opinion. The question also assumes that nothing happened in the collision, other than the impact itself, which could have affected the distance the vehicles traveled after the impact. There are several factors which could make a difference. We have a situation where we are merely basing one guess upon another.

There is no testimony in this record as to the coefficient to be used by the witness, or any data as to how it was obtained. There is no evidence of the tire pressure of any of the tires on the vehicles; of the depth or intensity of the skid mark; of the temperature of the surface; nor of the effect, if any, of a recently dragged surface with loose gravel in the center, both of which conditions are observable in the exhibits in evidence.

It would seem obvious that the coefficient to be used would depend considerably upon the type and condition of the vehicles involved and the exact condition of the surface where the collision occurred. The witness testified that he had performed experiments or had seen experiments performed on a like surface and knew the coefficient to be used. There is no testimony that he had seen experiments involving a pickup and a truck. Nor is there any evidence from which it could be ascertained that the experiments he had performed or witnessed had been performed on an exactly similar surface. The variance between a like surface and an exactly similar surface could be very great.

In this case, the truck, which rolled over, was more than twice as heavy as the pickup which struck its left side. The truck, which was traveling south, after the impact and after rolling over was upright and facing east and north. Where the truck rolled over does not appear in the evidence. There is green paint from the pickup on the frame of the truck, which would indicate that the pickup submarined the truck at the point of impact. Would this have any effect on the distance

traveled? Did any experiments performed to obtain a coefficient involve a similar situation? There are other questions of similar import which cannot be answered from this record.

We are in the realm of pure speculation. The testimony is dependent upon too many assumptions. We should not confuse inferences drawn from facts and inferences which are based upon mere assumptions. There is a vast difference between permitting an expert to give an opinion when all of the factors necessary to base an estimate of minimum speed are present and in permitting an estimate of actual speed based on assumptions that have no adequate foundation in the evidence. The apparent competency of the expert would merely aggravate the error.

To permit the introduction herein of the opinions sought on the inadequate foundation laid would be to turn the trial of a collision case into a guessing contest for an expert. The trial court did not abuse its discretion in excluding the opinions sought.

Plaintiff's second assignment of error relates to the dismissal of her petition at the close of her evidence. A motion for a directed verdict must be treated as an admission of the truth of all material and relevant evidence submitted on behalf of the party against whom the motion is 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. See Egenberger v. National Alfalfa Dehydrating & Milling Co., 164 Neb. 704, 83 N. W. 2d 523. We review the record with this rule in mind.

The burden of proving negligence is on the party alleging it. Plaintiff, therefore, had the burden to prove by a preponderance of the evidence some actionable negligence on the part of the defendant. Negligence is never presumed and it cannot be inferred from the mere fact that an accident happened. Howell v. Robinson Iron & Metal Co., 173 Neb. 445, 113 N. W. 2d 584.

There were no eyewitnesses to the collision herein. The deceased was killed, and the defendant has no recollection of it. Actionable negligence on the part of the defendant cannot be inferred from a presumption of due care on the part of the deceased. The presumption of due care raised by the instinct of self preservation benefits the defendant as well as the deceased. It must be overcome by direct evidence. One presumption cannot be built upon another. See Wolcott v. Drake, 162 Neb. 56, 75 N. W. 2d 107.

We have said 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, indicate with reasonable certainly the negligent act charged. Wolstenholm v. Kaliff, *ante* p. 358, 126 N. W. 2d 178. Are the facts and circumstances herein, and the inferences to be drawn therefrom, sufficient to indicate with reasonable certainty actionable negligence on the part of the defendant who had the directional right-of-way?

Plaintiff's entire case must be built upon the fact that the pickup laid down a skid mark of 45 feet to the center of the intersection. There were no skid marks from the defendant's truck to this same point. From this and the necessary reaction time incident thereto, plaintiff would draw the inference that the pickup was closer to the intersection than the truck when the deceased first observed the truck. She seeks thus to overcome the effect of defendant's directional right-of-way.

Section 39-728, R. S. Supp., 1961, reads in part as follows: "* * * motor vehicles traveling upon public highways shall give the right-of-way to vehicles approaching along intersecting highways from the right, and shall have the right-of-way over those approaching from the left when said vehicles shall reach the intersection at approximately the same time. (2) In all other cases

the vehicle reaching the intersection first shall have the right-of-way."

This statute is intended to avoid collision between vehicles at intersections and the right-of-way is not to be determined by the single test of which vehicle actually entered the intersection first, if the vehicles approached or entered the intersection at approximately the same time. The driver of a vehicle who does not have the right-of-way is not justified in taking close chances and if there is reasonable danger of collision if both vehicles proceed then it is his duty to yield the right-of-way. See Long v. Whalen, 160 Neb. 813, 71 N. W. 2d 496. In that case we said: "The drivers of vehicles approach an intersection at approximately the same time whenever the two vehicles are in such relative position that upon appraisal of all factors it should appear to a man of ordinary prudence approaching from the left that there is danger of collision if he fails to yield the right-of-way."

To permit the jury under the factual situation in the instant case to find that the deceased had the right-of-way would permit it to resort to speculation or guess work, for there is no sufficient evidence on which the jury could properly base such conclusion.

Plaintiff would also draw the inference that the defendant did not see the deceased approach the intersection because of the absence of skid marks. It is a known fact that a vehicle may be slowed down by some braking pressure before the vehicle leaves a mark on the surface. There is also the matter of reaction time. The only testimony adduced directly as to defendant's speed is that 300 feet north of the intersection defendant "was just driving normal." Plaintiff does not contend that defendant was exceeding the speed limit but that his speed, whatever it might have been, was unreasonable and imprudent under the existing circumstances. There is no reasonable basis apparent in the evidence for this assumption.

Without some evidence as to where defendant's truck

might have been when it was first observed by the deceased, or without some fact from which an inference could be drawn as to its approximate position, we cannot accept plaintiff's assumption without entering into the realm of speculation. It is entirely possible that the defendant, who was driving "just normal," had eased his speed for the intersection, and that before he became aware that the deceased was not going to respect his right-of-way he had insufficient time to act. The evidence is that the deceased was driving down the center of the road rather than being entirely on the north half of it. The point of impact was apparently near the center of the intersection. The pickup struck the truck just in front of its back duals. This would indicate that the defendant was almost past the middle of the intersection when hit.

We come to the conclusion that the facts and circumstances herein, and the inferences to be drawn therefrom, are not sufficient to indicate with reasonable certainty actionable negligence on the part of the defendant. The action of the trial court in sustaining defendant's motion was correct.

Plaintiff's third assignment of error involves the continuance by the trial court of the defendant's cross-petition as a separate cause of action for trial to a subsequent jury. This was strictly in accord with section 25-834, R. S. Supp., 1961, which provides in part: "(2) Notwithstanding the provisions of subsection (1) of this section, a motion for directed verdict or dismissal may be made by a defendant without withdrawing a counterclaim or cross-petition. In the event such motion for directed verdict or dismissal is overruled the trial may proceed to final submission of the cause including the counterclaim or cross-petition. In the event such motion for directed verdict or dismissal is sustained, the counterclaim or cross-petition shall be continued as a separate cause and trial thereon had at a subsequent jury the same

as if it had been filed as a separate action." The statute is clear and requires no discussion herein.

Plaintiff's fourth assignment of error is that the court erred in overruling plaintiff's motion for a new trial. What has been said heretofore sufficiently disposes of this assignment.

For the reasons given, we come to the conclusion that the trial court's ruling in each instance was correct. The action of the trial court is in all respects affirmed.

AFFIRMED.

IN RE ELECTION CONTEST OF CHESTER NEIL SUTTON. CHESTER NEIL SUTTON, APPELLANT, V. ROY I. ANDERSON, APPELLEE.

126 N. W. 2d 836

Filed March 6, 1964. No. 35579.

1. **Elections.** The right conferred by statute on a candidate for public office to contest the apparent election of his rival is a special statutory proceeding and all conditions prescribed for its exercise must be followed.
2. **Courts: Elections.** Courts do not have jurisdiction of election contests except insofar as it has been conferred by statute.
3. **Elections.** Strict compliance with the conditions contained in a statutory proceeding for the contest of an election is essential since such compliance is an integral part of the existence of the right.
4. **Actions.** A plaintiff's right to recover depends upon his right at the inception of the suit, and the nonexistence of a cause of action when the suit was begun is a fatal defect, which cannot be cured by the accrual of a cause of action pending suit.
5. **Elections.** The premature filing of an election contest has no validity for any purpose. Its defectiveness is not cured by a subsequent amendment filed after the cause had accrued, since an amendment to a notice of contest relates back to the original notice and, being subject to dismissal, it carries the amendment with it.
6. ———. The filing of a cost bond within 10 days after the filing of the notice of contest, as required by section 32-1001.31, R. S. Supp., 1961, is essential to invest the district court with authority to hear an election contest.

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

Webb, Kelley, Green & Byam, for appellant.

O'Hanlon & O'Hanlon, for appellee.

Heard before WHITE, C. J., CARTER, MESSMORE, YEAGER, SPENCER, BOSLAUGH, and BROWER, JJ.

CARTER, J.

This is a contest of the election of Roy I. Anderson to the office of county attorney of Washington County, Nebraska. The trial court sustained the validity of the election and dismissed the complaint of the contestant. The contestant appeals.

The record shows that Roy I. Anderson and Chester Neil Sutton were candidates for the office of county attorney at the general election held on November 6, 1962. On November 15, 1962, the county canvassing board certified the election of Anderson to the office of county attorney.

The record shows that Sutton filed his complaint contesting the election on November 13, 1962. On November 15, 1962, Sutton filed a cost bond which was duly approved. On November 23, 1962, Sutton filed an amended notice of the contest of election. On the same day notice of the filing of the contest was served on Anderson by the sheriff of Washington County. On December 10, 1962, Anderson filed a special appearance asserting that, under the provisions of section 32-1001.31, R. S. Supp., 1961, a cost bond must be filed within 10 days after filing the complaint, which was not done. Anderson contends that the bond filed on November 15, 1962, is inadequate in that it was filed in a proceeding prematurely commenced. The trial court overruled the special appearance. Anderson asserts this was error.

Section 32-1001.18, R. S. Supp., 1961, provides that to contest the election of a person to a county office a notice of such contest must be given to the opposite party within

20 days after the votes have been officially canvassed. Such notice shall specify the grounds upon which the contestant intends to rely, and if any objection be made to the qualifications of any voters, the names of such voters and the objections shall be stated therein. Section 32-1001.31, R. S. Supp., 1961, provides that the contestant shall file in the proper court within 10 days after filing of the complaint a bond to be approved by the clerk of the district court conditioned to pay all costs if the election is confirmed.

This court has held that the statutes governing proceedings for the contest of an election are special proceedings and that all conditions prescribed for its exercise must be strictly followed. Wilson v. Matson, 110 Neb. 630, 194 N. W. 735; Landgren v. Hamilton, 133 Neb. 668, 276 N. W. 659. Compliance with the statute is mandatory and jurisdictional. Compliance with the statute is a part of the right to contest and noncompliance is destructive of the right. Otherwise stated, unless the conditions imposed by the statute are strictly met, the right itself does not exist. The limitations or conditions contained in the statute relate not merely to the remedy, but to the existence of the right itself. Dorshorst v. Dorshorst, 174 Neb. 886, 120 N. W. 2d 32; Billiter v. Parriott, 128 Neb. 238, 258 N. W. 395.

The applicable statute requires that notice of contest of the election be given within 20 days after the official canvass of the votes. The original notice in the instant case was prematurely given. It was ineffective for any purpose. Sutton contends that the amended notice filed and served within the 20-day period constituted a compliance with the statute.

The premature notice of contest was deficient in that it failed to state the names of the voters alleged to be disqualified, as required by section 32-1001.18, R. S. Supp., 1961. To correct this deficiency in the notice Sutton filed and served an amended notice of contest. It is fundamental that the election contest must be

brought within the time specified, as such condition is an integral part of the right itself. Unless this condition is complied with the court is without authority to hear the contest. 29 C. J. S., Elections, § 258, p. 370.

A premature filing of an election contest is not cured by subsequent amendments filed after the cause of action accrued. An amended notice of contest relates back to the original notice, and if the original proceeding was filed prematurely it must be dismissed carrying the amendments with it. Lilly v. O'Brien, 224 Ky. 474, 6 S. W. 2d 715; American Bonding & Trust Co. v. Gibson County, 145 F. 871. In the latter case the court said: "Plaintiff's suit was prematurely brought, and no amendment declaring upon a cause of action which did not exist when the suit was commenced would cure such a defect. If no cause of action existed when the suit was started, there was nothing to amend, and when this fact appeared, and objection was made, the suit should have been dismissed without prejudice to an action upon the cause of action which did accrue when the architect audited the claim. It was not a case of a cause of action defectively stated. Such a defect is amendable. Neither was it a case of a new cause of action brought in by amendment, which existed when the suit was brought. It was an effort to declare and recover upon a cause of action which arose pending the suit. Plaintiff's right to any recovery depended upon its right at the inception of the suit, and the nonexistence of a cause of action when the suit was started is a fatal defect, which cannot be cured by the accrual of a cause pending suit."

It is the general rule that the fact that a cause of action has accrued pending a suit will not cure the nonexistence of a cause of action at the commencement of the suit. We necessarily conclude that contestant's contest of the election was prematurely brought and did not invest the district court with jurisdiction to hear and determine it.

If, as here asserted, the filing of the amended notice of contest could be construed as the commencement of a new proceeding within the time specified by statute, the contestant finds himself on the other horn of a dilemma. He failed to file a new bond, or to refile the old one, within 10 days after the commencement of the proceeding, as required by section 32-1001.31, R. S. Supp., 1961. The filing of the cost bond within the time specified is a condition precedent to the obtaining of jurisdiction by the court. Wilson v. Matson, *supra;* Landgren v. Hamilton, *supra.*

The right of an unsuccessful candidate to contest the election of his rival is purely statutory. Courts have no authority to hear and determine an election contest except to the extent authorized by statute. The power is a limited one in which all conditions and limitations in the authorizing statute must be complied with. Such statutes are to be strictly construed since the right and remedy contained therein are created conditionally and are inseparably united. The bringing of the proceeding within the prescribed time is a condition to the exercise of the right and, if the condition is not strictly complied with, there is neither right nor remedy. The condition relates not merely to the remedy but to the very existence of the right itself.

The trial court came to the same conclusion as does this court, although on a different ground. The judgment is therefore affirmed.

AFFIRMED.

DIANE BOISMIER, A MINOR, BY AND THROUGH ARTHUR L. BOISMIER, HER FATHER AND NEXT FRIEND, APPELLEE, V. VINCENT MARAGUES ET AL., APPELLANTS.
126 N. W. 2d 844

Filed March 6, 1964. No. 35587.

1. **Automobiles: Negligence.** Under the terms of section 39-740,

R. R. S. 1943, a guest passenger in an automobile may recover damages on account of negligence of the operator only if the evidence is sufficient to support a finding that the negligence was gross.

2. ———: ———. Gross negligence within the meaning of the statute is great and excessive negligence, or negligence in a very high degree, or negligence which indicates the absence of slight care in the performance of a duty.
3. ———: ———. What amounts to gross negligence must be ascertained from the facts and circumstances of each particular case, and not from any fixed definition or rule.
4. **Negligence: Trial.** In a case where the court is required as a matter of law to determine whether or not there is evidence of gross negligence any doubt in relation thereto must be resolved in favor of its existence, and in the event of such resolution the question becomes one for a jury.
5. ———: ———. In determining whether or not the evidence is sufficient for the submission of the question of gross negligence to the jury, the meaning of gross is to be arrived at by means of reference to decisions where the term has been defined and to the diction employed in the definitions.

Appeal from the district court for Douglas County: ROBERT L. SMITH, Judge. Reversed and remanded with directions.

Joseph P. Cashen, Donald E. Parker, and Kennedy, Holland, DeLacy & Svoboda, for appellants.

Martin A. Cannon and S. Caporale, for appellee.

Heard before WHITE, C. J., CARTER, MESSMORE, YEAGER, SPENCER, BOSLAUGH, and BROWER, JJ.

YEAGER, J.

This is an action set forth in two causes of action by Diane Boismier, a minor, by her father and next friend, plaintiff, appellee here, against Vincent Maragues and Vincent J. Maragues, Jr., defendants, who are appellants here. The first cause of action is for damages for personal injuries to the plaintiff. The second is for medical and hospital expenses. The basis of the action is alleged gross negligence on the part of the defendant Vincent J. Maragues, Jr., in the operation of an auto-

mobile belonging to Vincent Maragues, his father, which was being used at the time as a family purpose automobile, in which the plaintiff was at the time involved here riding as a guest passenger.

The case was tried to a jury and a verdict was returned in favor of the plaintiff on the first cause of action for $5,000 and on the second for $440.

Judgment was rendered on the verdict in favor of the plaintiff. Motion for new trial or in the alternative for judgment notwithstanding the verdict was filed. This motion was overruled and the defendants have appealed.

It is pointed out here that on this appeal the defendants do not contend that this was not a family purpose automobile or that at the time it was not being used as such, or that if there was liability on the part of the operator that the owner would not be also liable. It is further not contended that the plaintiff was not within the meaning of law a guest passenger in the automobile. Also the size or amount of the verdict is not a matter for consideration by the court on this appeal.

The only basically controverted question presented by the appeal is that of whether or not the evidence adduced at the trial was sufficient proof of gross negligence on the part of the defendant Vincent J. Maragues, Jr., to require the submission of that question to a jury for determination.

The defendants contend that it was not so sufficient and for that reason they assert by their assignments of error that the court erred in refusing to direct a verdict in favor of defendants and to dismiss the action at the close of plaintiff's case; that the court erred in overruling defendants' motion for a directed verdict or in the alternative for a dismissal made at the close of all the evidence; and that the court erred in overruling defendants' motion for a new trial or in the alternative for a judgment notwithstanding the verdict.

As a guest passenger the plaintiff could recover on her pleaded causes of action only in case of establish-

ment of gross negligence on the part of the operator of the automobile in which she was a passenger. Her rights are declared by section 39-740, R. R. S. 1943. The statute contains no definition of the meaning of "gross negligence" as the term is employed in the statute. From the numerous instances wherein the meaning has been considered and discussed only a general conclusion has been reached. That conclusion is that the matter is one for application to the common understanding of "gross" in relation to negligence.

In Holliday v. Patchen, 164 Neb. 53, 81 N. W. 2d 593, it is said: "Gross negligence within the meaning of the motor vehicle guest statute is great and excessive negligence or negligence in a very high degree. It indicates the absence of slight care in the performance of a duty."

In Robinson v. Hammes, 173 Neb. 692, 114 N. W. 2d 730, it is said: "What amounts to gross negligence must be ascertained from the facts and circumstances of each particular case, and not from any fixed definition or rule."

The plaintiff predicates her causes of action on the following charges of gross negligence against the defendant driver: In driving the automobile at a highly dangerous and excessive rate of speed under the circumstances; in failing to slow down at the approach of a dangerous intersection when the defendant driver knew of the existence of the dangerous intersection; in failing to have his automobile under proper control; in failing to keep a proper lookout; and in failing to apply his brakes in time to avoid a collision when he had ample opportunity to do so.

The defendants contend that the defendant driver was not guilty of gross negligence in any of the respects asserted by the plaintiff, and that there was no question of fact for submission to a jury and that accordingly they are entitled to a judgment in their favor notwithstanding the verdict.

The rule of law which is the basis for this contention

is stated in Holliday v. Patchen, *supra,* as follows: "When the evidence is resolved most favorably toward the existence of gross negligence and the facts thus determined, the question of whether or not they support a finding of gross negligence is one of law." The substance of this rule is repeated in the following cases: Montgomery v. Ross, 156 Neb. 875, 58 N. W. 2d 340; Robinson v. Hammes, *supra;* Cole v. Wentworth, 175 Neb. 325, 121 N. W. 2d 567.

A summary of the pertinent evidence in the record in proof of the charge of gross negligence against the defendants is the following: On the evening of March 30, 1962, the defendant Vincent J. Maragues, Jr., was engaged in the operation of a 1950 Dodge automobile belonging to the defendant Vincent Maragues, his father. This was with the consent of the father and it was being operated in the status of a family purpose automobile. At the time the plaintiff was riding with the defendant Vincent J. Maragues, Jr., as a passenger in the front seat. The rear seat was occupied by a young man and two young ladies. They went for a drive to an area west of the populous portion of Omaha, Nebraska. The area was somewhat familiar to this defendant. In this area is a street known as One Hundred Forty-Fourth Street which extends north and south. The entire area involved was unlighted. Extending westward but not eastward from One Hundred Forty-Fourth Street is a street known as F Street. Each was a two-lane street. The surface of each was described as black-top. The surface was comparatively even and F Street was practically level westward from One Hundred Forty-Fourth Street for at least three-fourths of a mile. At about 11 p.m. this defendant entered F Street some distance to the west of One Hundred Forty-Fourth Street, at least three-fourths of a mile, and proceeded in an easterly direction. The plaintiff adduced no evidence as to the speed of the eastward movement. About 10 feet east of the east curb line of One Hundred Forty-Fourth Street

and at a point which would have been about the center of F Street if it had been extended was a sign about 2 feet square indicating that F Street did not extend eastward beyond One Hundred Forty-Fourth Street. The sign was yellow with two arrows, one pointing north and one south. It had no illumination qualities. There is evidence the effect of which is that the arrows could be seen when exposed to the rays of automobile lights earlier than the yellow background. There was evidence that it could be seen about 1,500 feet. There was evidence that there was a sign alongside F Street which indicated a stop ahead but where it was located was not clearly disclosed. It was not illuminated in any way. There was evidence that there was a regular stop sign at the intersection of One Hundred Forty-Fourth and F Streets which was placed about 15 feet back west of the intersection and on the south side. It was not illuminated. As indicated there are given distances in relation to objects in the evidence on behalf of the plaintiff but these are estimates and not measurements made at the time or thereafter. Testimony as to distances in the case does not depend upon measurements, except in one instance, but only on estimates. Attention will be called to this instance later herein.

On the evening of the date involved it had rained, but prior to the accident the rain had ceased and at the time the air had cleared. The road was wet but there was no obstruction to vision ahead as this defendant operated the automobile eastward on F Street. He was driving at the time of the accident on the right or south side with the left wheels about 1 foot to the north of the center. The only evidence of speed on the eastward movement was an estimate made by this defendant which was 40 miles an hour. While the automobile was being operated as described the attention of this defendant was attracted to the intersection but he was unable to stop and instead he drove across One Hundred

Forty-Fourth Street and into a ditch on the east side thereof where the automobile came to rest.

There is no evidence in the testimony of any witness wherein complaint is made of the conduct of this defendant in his control and operation of the automobile. There is no complaint relating to the conduct of any of the occupants of the automobile. This defendant testified that he was at the time keeping a lookout ahead, and that he put on his brakes to stop as soon as he recognized danger ahead. The testimony of other witnesses indicated that his efforts caused the automobile to skid 108 feet. This is the one instance of measured distance mentioned above. The evidence indicated that the defendant had some previous knowledge of this intersection but at the time did not remember it.

The automobile was in good operating condition with good brakes and lights, and at the time the lights were on high beam.

From the evidence here summarized the answer must flow to the question of whether or not this was a case requiring a determination by the jury as to the existence or nonexistence of gross negligence, or by the court as a matter of law.

Already herein are set forth the general definitions of gross negligence within the meaning of the statute. The rule is that in each case the existence or nonexistence of gross negligence must be ascertained from the facts of each particular case, and that in case of doubt the existence of evidence as to gross negligence must be resolved in favor of its existence in which event the question is for the jury, otherwise it is one of law for the court.

As is made apparent by the cases on the subject, the line of demarcation between gross and ordinary negligence is not always clear. The cases however are clear in their declaration that negligence to be gross must be great or excessive; must be in a very high degree; not alone a momentary distraction of attention; and not alone the

absence of slight care in the performance of a duty. See, Bishop v. Schofield, 156 Neb. 830, 58 N. W. 2d 207; Ottersberg v. Holz, 159 Neb. 239, 66 N. W. 2d 571; Holliday v. Patchen, *supra;* Pester v. Nelson, 168 Neb. 243, 95 N. W. 2d 491; Cole v. Wentworth, *supra.*

It does not appear out of place to express the view that, in instances of use of words having an elastic significance such as is true with the term "gross" as used in this statute, the court within reasonable limits should properly be permitted to as a matter of law declare the meaning and effect of such words. The effect of the diction of the decisions of this court is to say that the courts do have this right in cases coming within the purview of the statute being considered herein.

In the light of what has been said the burden is on the plaintiff in order to have sustained the judgment which she received in the district court to demonstrate by the record here that her evidence was sufficient to have submitted to a jury the question of gross negligence of the defendants in one or more of the five particulars charged in her pleaded causes of action.

The answer which flows from the record is that the evidence was not so sufficient. It may not be said that the rate of speed under the circumstances could have amounted to gross negligence. It may not be said that the approach to the intersection could have amounted to gross negligence. It may not be said that a proper lookout was not maintained. It may not be said that the control exercised could have amounted to gross negligence. Finally it may not be said the failure to apply the brakes under the circumstances could have amounted to gross negligence.

In the light of the record made the defendants were entitled to have their motion for judgment notwithstanding the verdict sustained and to a judgment dismissing the plaintiff's action.

The judgment of the district court in favor of the plaintiff and against the defendants is reversed and the

cause remanded to the district court with directions to sustain the motion of the defendants for judgment notwithstanding the verdict, and for dismissal of plaintiff's action.

REVERSED AND REMANDED WITH DIRECTIONS.

BETTY JO HALL, APPELLANT, V. HERBERT RICHARD HALL, APPELLEE.

126 N. W. 2d 839

Filed March 6, 1964. No. 35735.

1. **Appeal and Error.** An appeal to the Supreme Court does not operate as a stay of proceedings unless the appellant shall have superseded the judgment or final order in the manner provided by law.
2. ———. The statute providing for the superseding of judgments and final orders must be regarded as an express legislative enactment that the judgment or final order shall, in the absence of a supersedeas bond, retain its vitality and be capable of execution during the pendency of an appeal.
3. ———. The trial court may in its discretion grant supersedeas in cases not specified in section 25-1916, R. R. S. 1943. An allowance of supersedeas in such a case may be granted in such an amount and on such conditions as the court determines necessary for the protection of the parties.
4. **Divorce: Appeal and Error.** The trial court in a divorce action may in its discretion grant supersedeas. An absolute right to supersedeas does not exist except when it is allowable under the express provisions of section 25-1916, R. R. S. 1943.
5. ———: ———. A trial court may in its discretion allow supersedeas of its order contained in a divorce decree awarding the custody of a minor child to one of its parents or to a third person.
6. **Divorce.** Where the divorce decree awarding custody of a minor child has not been superseded, such award may be enforced by the trial court, as in the case of any other nonsuperseded judgment.
7. ———. Temporary orders in the district court allowing alimony, child support, or the custody of minor children terminate with the rendition of a final decree of divorce.
8. ———. The trial court is invested with authority to enforce

its nonsuperseded judgment awarding the custody of a minor child by contempt proceedings notwithstanding an appeal to this court.

9. **Divorce: Contempt.** An order of the district court quashing a citation for contempt for failure to comply with the child-custody award of a nonsuperseded divorce decree for want of jurisdiction is erroneous, even though an appeal from the divorce decree has been lodged in the Supreme Court.

10. **Divorce: Appeal and Error.** A motion by the wife for an order for temporary child support from the husband, pending appeal, will be denied where it appears that the wife is not entitled to the care and custody of the child.

Appeal from the separate juvenile court of Lancaster County: WILFRED W. NUERNBERGER, Judge. Motions overruled.

Kier, Cobb & Luedtke and Donald R. Grant, for appellant.

Ginsburg, Rosenberg & Ginsburg and Marti, O'Gara & Dalton, for appellee.

Heard before WHITE, C. J., CARTER, MESSMORE, YEAGER, SPENCER, BOSLAUGH, and BROWER, JJ.

CARTER, J.

The matters considered herein arise as the result of the filing of two motions in this court pending the determination of the merits of an appeal in a divorce action. Because of the importance of the issues raised and the lack of precedent dealing therewith in the decisions of this court, we deem it necessary to dispose of the motions by formal opinion.

On November 15, 1963, plaintiff was granted a decree of divorce from the defendant on the ground of extreme cruelty. A division of the property owned by the parties was made. The court found that plaintiff and defendant were unfit persons to have the care and custody of Courtney Lynne Hall, the 9-year-old child of the parties. The decree awarded the custody of the child to Mr. and Mrs. Mark M. Baldwin, uncle and aunt of the

child, and ordered the defendant to pay $100 per month into court for the support of the child. Plaintiff filed a motion for a new trial, which was overruled on December 27, 1963. Plaintiff appealed.

On January 24, 1964, plaintiff filed a motion in this court for an allowance of $150 per month for the support of the child, pending the appeal. On January 30, 1964, defendant filed a motion for an order requiring plaintiff to show cause why she should not be punished for contempt for failure to deliver the custody of the child into the care and custody of Mr. and Mrs. Mark M. Baldwin in accordance with the provisions of the divorce decree.

The record shows that on January 2, 1964, defendant filed a motion in the trial court for an order citing plaintiff for contempt for failure to transfer the custody of the child to Mr. and Mrs. Mark M. Baldwin in accordance with the provisions of the divorce decree. After a hearing the trial court quashed the citation for contempt on the ground that an appeal had been taken from the divorce decree and that the Supreme Court had the exclusive jurisdiction of the contempt proceeding.

We point out that no application was made to supersede the divorce decree and, consequently, no supersedeas was granted. The first question to be determined is the effect of the appeal upon the powers of the trial court as it relates to the issues raised by the motions before this court.

It is provided by section 42-340, R. R. S. 1943, that a decree of divorce shall not become final until 6 months after trial and decision, except for the purpose of review by appeal and for such purpose only the decree shall be treated as a final order as soon as rendered, provided if appeal has been instituted such decree shall not become final until such proceedings are finally determined. It is the general rule in this state that an appeal to the Supreme Court does not operate as a stay of proceedings unless the appellant shall execute a supersedeas bond

within 20 days as required by section 25-1916, R. R. S. 1943. Dovey v. McCullough, 60 Neb. 376, 83 N. W. 171; Rice v. Parrott, 76 Neb. 501, 107 N. W. 840. In the last case cited this court said: "The second ground is that the appeal vacated the judgment of the district court and deprived it of jurisdiction over the cause by transferring the entire controversy to this court. Although in some respects and for some purposes an appeal has such an effect, it cannot be said to have it unqualifiedly in all cases and in all regards, for, otherwise, the mere docketing of an appeal would operate as a supersedeas and dispense with the necessity for the undertaking prescribed by statute upon the subject. That statute must itself be regarded as an express legislative enactment that the judgment shall, in the absence of the undertaking, retain its vitality and be capable of execution during the pendency of the appeal, and this court has held that even after supersedeas has been effected it may, for sufficient cause, be set aside and the judgment of the lower court restored to its original status and enforceability. Tulleys v. Keller, 42 Neb. 788. As we have pointed out no supersedeas was given in this case, and the judgment for costs remained enforceable against the plaintiff until it was vacated by the order granting the motion for a new trial, * * *. It follows, we think, as a necessary consequence, that the district court retained its jurisdiction over the judgment, and of process and procedure founded upon it, and its power to vacate it, in all respects as it would have done if no appeal had been taken, except that it could not interfere or impair the procedure in this court so long as the judgment remained in existence."

It may be argued that a suit for a divorce is a statutory proceeding and, supersedeas not having been specifically provided by statute in such case, the right to supersede does not exist. This court has held, however, that supersedeas may be granted in cases not specified in section 25-1916, R. R. S. 1943. The grant of

supersedeas in such cases is discretionary with the court and not a matter of right. Such allowance may be granted on such conditions and in such an amount as the court determines to be proper and necessary for the protection of the parties. Carson v. Jansen, 65 Neb. 423, 91 N. W. 398. That supersedeas may be properly granted in appeals from divorce decrees is recognized in State ex rel. Beard v. Cook, 51 Neb. 822, 71 N. W. 733, and State ex rel. Walton v. Cornish, 48 Neb. 614, 67 N. W. 481.

The rule is that a trial court in a divorce action may in its discretion grant supersedeas of its order placing the custody of the child where it did. No absolute right to supersedeas exists and mandamus will not lie to obtain it. When a court having jurisdiction is called upon to determine the best interests of a child, particularly as to who shall have its custody, the child becomes the ward of the court. Where the court does not allow supersedeas after awarding its custody to a person named in the decree of the court, the custodian of the child is in a sense the agent of the court. In the absence of an allowance of supersedeas, the person to whom custody of the child is granted is entitled to its custody forthwith. Ex parte Roberts, 17 Ala. App. 538, 85 So. 871. It would be very illogical, to say the least, for the trial court to find both the parents unfit to have the custody of a child, and then be compelled to leave it with an unfit parent solely because an appeal is taken to the Supreme Court. Where the decree awarding custody of a minor child has not been superseded, such order will be enforced as in the case of any other nonsuperseded judgment. The Louisiana court stated the rule in this precise language: "Neither party in a suit for the custody of a minor child is entitled, as a matter of right, by appealing to this court, to stay execution of an order giving to the other party the care and custody of the child." Tate v. Tate, 163 La. 1047, 113 So. 370.

Under a very similar situation to the one we have be-

fore us, the Oklahoma court stated: "The order of November 28th, directing that the custody of the child be delivered to its mother, was not one which defendants had a right to supersede under section 5251, Rev. Laws 1910, as said order does not belong to any one of the classes therein enumerated which may be superseded under that section; and, this being true, it was within the discretion of the trial court to allow a supersedeas or stay on such terms as it might prescribe or to refuse the same." Kelly v. Kemp, 63 Okl. 103, 162 P. 1079.

While it is true that many cases holding to this effect were habeas corpus cases involving the custody of infants, the rule to be applied in divorce cases is the same in principle. We therefore conclude that in a divorce decree which grants the custody of a child to one of two parents or to a third person in a proper case, the divorce decree with respect thereto should be enforced by the district court irrespective of an appeal, except where the trial court in the exercise of its discretion allows supersedeas pending the appeal. We think this holding is consistent with the legislative intent as expressed in sections 42-310, 42-311, and 42-312, R. R. S. 1943.

We point out that the rule here announced applies only to the provisions of the final decree of divorce. Temporary orders in the district court allowing alimony, child support, attorneys' fees, the expenses of litigation, and the custody of minor children terminate with the rendition of a final decree of divorce or the overruling of a motion for a new trial if one be filed. Wolfe v. Wolfe, 144 Neb. 55, 12 N. W. 2d 368.

In the instant case the defendant sought the aid of the district court in the enforcement of the custody order contained in the divorce decree by a contempt proceeding. The trial court quashed the citation on the theory that it was divested of jurisdiction by the appeal.

The enforcement of nonsuperseded orders and judgments is in the district court and not in this court, except on review. While this is not the rule in all juris-

dictions, we think it will best serve litigants in this type of case. The custody of children can be better handled by trial courts who have seen and heard the parties, and thereby have a better opportunity to determine the best interests of children and properly award their custody pending appeal. We hold that the trial court was in error in quashing the citation for contempt against the plaintiff in the instant case.

The plaintiff requests by motion that this court allow her $150 per month as temporary child support. It is evident from the divorce decree that plaintiff is not entitled to the custody of the minor child pending appeal and consequently she is not entitled to temporary support for the child.

For the reasons stated, the motions are overruled.

MOTIONS OVERRULED.

FRANCIS J. PIEPER ET AL., APPELLEES, V. CITY OF SCOTTSBLUFF, NEBRASKA, A MUNICIPAL CORPORATION, APPELLANT.

126 N. W. 2d 865

Filed March 13, 1964. No. 35501.

1. **Eminent Domain.** The measure of damages 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. **Constitutional Law: Eminent Domain.** The words, "or damaged," in Article I, section 21, of the Constitution of Nebraska, include all actual damages resulting from the exercise of the right of eminent domain which diminish the market value of private property.
3. **Eminent Domain: Witnesses.** In condemnation proceedings, where persons are shown to be familiar with the particular land in question, they may be permitted as witnesses to testify as to the value of the tract immediately before and immediately after the appropriation.

4. **Eminent Domain: Trial.** The general rule is that the burden of showing the damages which the landowner will suffer rests upon him while the burden is on condemner to show matters which tend to reduce or mitigate the damages.
5. **Eminent Domain: Evidence.** In determining the reasonable market value of land in a condemnation proceeding it is proper to consider the condition of the property and all its surroundings, as well as its adaptability for any particular use. If it has a peculiar adaptation for certain uses which adds to its value the owner is entitled to the benefit of it.
6. ———: ———. The evidence as to the adaptability of property for certain uses must be limited to uses reasonably anticipated in the immediate future.
7. **Eminent Domain: Damages.** The amount of damages sustained by a landowner for the taking of land by eminent domain for a public improvement and the difference in the fair and reasonable market value for the remainder of the land before and after the taking is peculiarly of a local nature to be determined by a jury, and its verdict will not ordinarily be interfered with if it is based on the testimony.
8. **Eminent Domain: Evidence.** The owner of real estate which is taken in condemnation proceedings who is familiar with its value can testify as to its value.
9. **Eminent Domain: Trial.** In a condemnation action the weight and credibility of testimony of either lay or expert witnesses regarding value of land taken or value of remainder immediately before and immediately after taking is for the jury.
10. **Eminent Domain: Landlord and Tenant.** In a case where land condemned is under lease to and in possession of a third person, and by the taking or damaging the lessee is deprived of his use in whole or in part, he is entitled to recover from the condemner on the same character and quality of proof as would entitle the condemnee to recover.
11. ———: ———. In a case where a lessee of the owner of land which has been condemned has established a right of recovery for damage for deprivation of right to produce crops, the measure of his right of recovery is the difference between the value of his share of the crops at maturity and what would have been the cost of production of the entire crop.
12. ———: ———. Where a lessee of the owner of land which has been condemned has established a right of recovery for damage for deprivation of the right to graze and sell cattle on the market, such fact may be taken into consideration in assessing the damages suffered by the lessee.
13. **Trial.** One may not complain of the misconduct of counsel

if with knowledge of such misconduct he does not ask for a mistrial.

14. **Trial: Appeal and Error.** When the evidence is conflicting the verdict of the jury will not be set aside, unless it is shown to be clearly wrong.

15. **Trial.** In testing the sufficiency of evidence to support a verdict it must be considered in the light most favorable to the successful party, that is, every controverted fact must be resolved in his favor and he should have the benefit of every inference that can reasonably be deduced therefrom.

16. **Eminent Domain: Judgments.** Evidence examined, and the verdict and judgment held not to be excessive under the circumstances.

Appeal from the district court for Scotts Bluff County: TED R. FEIDLER, Judge. Affirmed.

Loren G. Olsson and Marvin L. Holscher, for appellant.

Rush C. Clarke and Neighbors, Danielson & Van Steenberg, for appellees.

Heard before WHITE, C. J., CARTER, MESSMORE, YEAGER, SPENCER, BOSLAUGH, and BROWER, JJ.

MESSMORE, J.

The City of Scottsbluff, a municipal corporation, brought this action in the county court of Scotts Bluff County to condemn certain land owned jointly by Francis J. Pieper and Louise Pieper, husband and wife as joint tenants in fee simple of said land. The purpose of the taking was to enable the city to construct, maintain, and operate on the land taken several sewer lagoons, mains, structures, and equipment appurtenant thereto, to be used in supplying public sewer service to the inhabitants of the city and others to whom the city by law is authorized to supply such service. The city sought to take the fee simple title to a certain part of the Pieper land. Appraisers were appointed by the county judge and made a report in writing assessing the damages sustained by the Piepers in the amount of $50,470, and the damages sustained by the tenant, Leo Stricker, at $5,775. The

city deposited the amounts of these awards in the county court. The city appealed to the district court. The case was tried to a jury in the district court resulting in a verdict in favor of the Piepers in the sum of $64,170, and in favor of Leo Stricker, the tenant, in the sum of $5,775. The city filed a motion for new trial which was overruled. The city perfected appeal to this court.

Judgment was rendered upon the verdict in favor of the plaintiffs for the sum of $41,411.87, being the sum of $64,170, less $25,000 previously withdrawn by the Piepers from the amount that had been deposited by the city, pursuant to the city's offer to stipulate therefor, plus interest, and costs. Judgment was rendered in favor of Leo Stricker, tenant, for $6,074.01, being the sum of $5,775 plus interest, and costs.

We will refer to Francis J. Pieper as Pieper or plaintiff, and on occasions, if required, we will refer to Pieper and his wife as plaintiffs; to Leo Stricker as tenant; and to the City of Scottsbluff as the city or defendant.

The only issue tried was the amount of damages sustained by the plaintiffs and the amount of damages sustained by the tenant as a result of the taking.

The defendant set forth many assignments of error which need not be enumerated. Such assignments as necessary to a determination of this appeal will be taken up in the opinion.

The farm owned by the Piepers at the time of the taking by condemnation by the city on March 20, 1962, consisted of approximately 266.53 acres adjoining the North Platte River on the north, and 2½ miles southeast of the city. In addition to the cultivated land, the farm consisted of pasture, wetland range, marshland, channels of the North Platte River, gravel deposits, and an area occupied by the main irrigation canal and subject to an easement in favor of the Minatare Mutual Canal and Irrigation Company. The farm consisted of two tracts of land, one lying north and the other south of the tracks of the Chicago, Burlington, and Quincy Rail-

road Company which owned a 150 to 200 foot right-of-way.

Pieper's father bought this land in 1910, and Pieper has lived on it for 49 years. The plaintiff's father leveled the land north of the railroad tracks. When the plaintiff became the owner of the land, he rearranged the whole farm so that it would irrigate better. The land is now all level so that he can run water 80 rods without cross ditches. There was a four-room house on the Pieper farm which the plaintiff's father made into a two-story house by adding four bedrooms upstairs. A kitchen with a basement under it was also added. This construction took place about 1914. A year or so prior to the trial, a new foundation was built under this house, and it was completely insulated and remodeled. There is a granary with a machine shed attached, a brooder house, a garage and television repair shop, a chicken house which accommodates 300 to 400 laying hens, and a dairy barn of a 20-cow capacity with a shed and calf barn attached thereto. A tenant house was built in 1950, and a substantial addition made to it. The size of the tenant house was almost doubled by the addition. The tenant house has two bedrooms, bathroom, dining room, living room, kitchen, utility room, and a 24 x 24-foot basement. Pictures of the plaintiff's residence and the tenant house in evidence disclose that they are well constructed and modern in every respect.

The land taken by the condemnation proceeding was a tract lying south of the right-of-way of the railroad consisting of approximately 138.24 acres, including 30.92 acres of cultivated land; 33.63 acres of irrigated pasture; 1 acre of marshland; 5 acres of land occupied in part by the canal and subject to the easement of the canal company, being 5 of the 9.51-acre right-of-way of the canal company; 9.9 acres of high pasture; 36.64 acres of wetland range, including islands in the North Platte River; 13.55 acres of river channels; and 7.6 acres comprising an area in which there are two lakes and gravel deposits.

The tract was severed approximately midway between its northern and southern boundaries by the marshland and the canal. Of the 9.51 acres comprising the canal, its excavated banks and adjoining land, the west 4.51 acres were owned by the canal company, but approximately 3.5 acres of the east 5 acres that were subject to the easement of the canal company were useable by the plaintiffs.

All of the improvements heretofore mentioned were north of the railroad tracks and were not taken in the condemnation proceeding. This tract consisted of 128.29 acres of cultivated land and the improvements thereon.

The lagoons were to be operated and maintained by the city within the area lying between the railroad right-of-way and the right-of-way of the canal company. Sewage from the city would enter the lagoons at the bottom. The bottom and dikes would be sealed with an impervious coating to prevent seepage, and the sewage solids would be destroyed by a natural, odor-free process of photosynthesis.

William L. Bredar, a consulting engineer engaged in sanitary engineering, testified that the odor ordinarily would be limited to a faint musky smell that would be noticeable when standing on the bank; that usually there would be no odor at 100 feet distance; that there might be some additional odor for a 2-to-4-week period in the spring while ice was melting; that the odor is mild and ordinarily would not be detectable beyond a distance of 500 to 600 feet; that in the case of a strong wind the odor would not travel more than 1,000 feet; that lagoons constructed in the manner in which the city would construct the same would not create objectionable odors; and that the lagoons would be approximately half a mile distant from the buildings on the land not taken and would not be visible from them. It appears that freedom from odor apparently depends on the level at which the sewage is kept. If the sewage falls below or rises above the depth of 3 feet, this expert believes such varia-

tion would have a bearing on the odor problem. He further testified that the lagoon or sewage lake is designed to handle all sanitary sewage, consisting of human excretions and waste, including industrial waste, originating in the city of Scottsbluff, a city of 13,000 or 14,000 population. The lagoon is designed to handle the increasing population of the city during a 20-year period.

George J. Wright, an expert witness properly qualified to testify as to values, testified in behalf of the plaintiffs. He gave as his opinion that the fair and reasonable market value of the real estate taken by the city on March 20, 1962, was $32,000. In fixing this amount he did not include the presence of gravel on such land, but stated that it would have an effect upon his opinion as to the value. As to the 128.29 acres not taken in the condemnation proceeding, he gave as his opinion that the market value of such land before the taking was $91,974, $76,974 for the land and $15,000 for the buildings. He stated that the fair and reasonable market value of the land after the taking, including the improvements, in his opinion was $71,645, which did not include severance damage, the difference in value before and after the taking being $20,329. Relating to the depreciation by reason of the separation of the farm, this witness testified that a combination unit consisting of a farming activity and a livestock program is in demand by top farmers and businessmen who finance that type of program, and that by losing the livestock program from the land actually taken, it puts the farm into a direct farming program. This being so, the farm cannot be operated as a unit, consequently it cannot support the cost as it could when used as a unit. The loss of the acres taken would depreciate the value of the acres not taken. The unit being dropped down to 128.29 acres could not support the amount of improvements on the land. On cross-examination this witness was asked about and testified concerning other sales where comparable prices were paid and one sale where the price paid was $1,000 an

acre. He did not consider that land comparable to the Pieper land.

William S. Bitner testified for the plaintiffs that he is a licensed realtor in Nebraska and Wyoming; that he has known the Pieper land since before engaging in the real estate business; that he had bought and sold real estate in the immediate vicinity of the Pieper land; that he sold two farms right across the road from such land; that the land lying north of the railroad tracks on which the buildings and irrigation well are located is equal to any land in the valley; that the production of this land is excellent; that the lay of it is excellent; and that it could be irrigated clear through for farming if one desired to make it so. This witness further testified that the reasonable market value of the farm before the taking was $143,672.50; that the 128.29 acres of highly productive land north of the railroad tracks he valued at $600 an acre, the total being $76,974; the cultivated land south of the railroad tracks, 30.92 acres, he valued at $475 an acre, total $14,687; the 33.63 acres of irrigated pasture he valued at $300 an acre, total $10,089, without leveling such land; the 9.9 acres of high pasture land he valued at $250 an acre, total $2,475; and he valued the 57.79 acres of wet pasture and gravel at $250 an acre, total $14,447.50, plus loss of the right to lease for hunting $4,000, total $18,447.50; making the value of the land south of the railroad tracks a total of $45,698.50.

Amos Morrison who had lived in the Mitchell valley since 1908, had engaged in farming and feeding livestock, was a landowner, and who had bought land but not sold any, testified for the plaintiffs that he had observed the sale prices of real estate in the vicinity in which he lives and over the county. He was one of the appraisers appointed by the county court to appraise the Pieper land and assess the damages, and was familiar with such land. This witness did not take into consideration all of the uses which might be made of the land, nor did he take into consideration the gravel de-

posits. Without considering the value of the land by reason of the gravel deposits, he gave as his opinion that the total value of the land taken was $40,970. He testified that in his opinion the land not taken had a value of $600 an acre before the taking and $500 an acre after the taking. He valued the improvements at $15,000 before the taking and $7,500 after the taking. He also pointed out that the land north of the tracks would be reduced in value because in the general practice of farming and feeding such combination is important for the reason that the farmer can use cheaper feeds and at the same time be able to feed cattle on the pasture; that a tenant would be more interested in the land if he had a pasture on which to run some cattle; and that by reducing the acreage, as was done by the condemnation proceeding, and dividing the land when it had been used as one unit, this would lessen its value. This witness also stated that his figures did not include what he considered to be severance damages.

Pieper in his testimony used 120 acres for the cultivated land north of the railroad tracks instead of 128.29 acres, and 30 acres for the cultivated land south of the railroad tracks instead of 30.92 acres. He fixed the fair market value of the farm before the condemnation proceeding as follows: 30 acres of cultivated land south of the railroad tracks at $600 an acre, total $18,000; 33 acres of irrigated pasture at $350 an acre, $11,550; 10 acres of high pasture at $150 an acre, $1,500; 3.5 acres of Minatare canal right-of-way at $150 an acre, $525; 56 acres of wetland range $61,000; total market value of the land actually taken $92,575. He fixed the value of the land north of the railroad tracks, not taken, 128.29 acres of cultivated land at $600 an acre, $76,974; the Pieper home $10,000; the tenant house $11,000; all other buildings $10,000; and the total value of the land north of the tracks, including improvements, $107,974. This witness testified that in his opinion the fair and reasonable market value after the taking was $450 an acre; that the

diminution in the value of the buildings and improvements, by reason of the taking, was $15,500. The reasons given by Pieper as to his opinion that the land not taken was diminished in value by the taking to the extent of $34,743.50, were because the farm, being a combination farm, was made smaller and eliminated the dairy prospects which would cause the farm not to be operated efficiently; that the same amount of equipment was there but could not be used to make the equipment pay off; that the farm thus divided would be insufficient to support two families and two sets of improvements; that there would be no use for one house; that it would be difficult to obtain a tenant for a farm of this nature; that a tenant would be required to live next door to an open lagoon; and that the loss of the pasture land had taken approximately half of the income of the farm. Pieper gave as his opinion that the reasonable market value of the wetland range which the city took south of the railroad tracks to be used for a sewage disposal plant was $61,000.

The tenant, Leo Stricker, who had lived all his life on farms in Scotts Bluff County, testified that he was acquainted with other farms in the county; that the Pieper farm was a number one farm for the reason that the irrigated pasture is real good pasture and more cattle can be run on this land than on land not irrigated; that the irrigated pasture has strawberry clover and other types of grasses and has been regularly irrigated; that the wetland range contains good grasses with plenty of submoisture; that he ran from 100 to 125 head of cattle on this land; that the crops were rotated on the land north of the railroad tracks in a scientific manner, and the land was highly productive; that he would be unable to find another place like the Pieper farm to rent; that in his opinion the difference between the rental value of this farm for the remainder of the 1-year term, March 1962 to March 1963, and the rent called for by the lease was $10,000; and that for the past 5 years half of his income

had come from the land south of the tracks. He further testified that he had been running 100 or more head of cattle for 5 months each year on the pasture land, which had put an average of a 225-pound gain on each animal during those 5 months. On this basis, he was putting on $61.31 worth of gain on each steer during the time the animals were on this grass. He further testified that he cleared $5,731 out of the pasture over and above his rent during the year. The rent on the pasture land was $400 a year. He further testified that the beet crop ran 12 tons to the acre and that he would have received three-fourths of this or 9 tons on 20 acres at $15 a ton, or $2,721.60, plus $120 for half of the beet tops at $1 a ton, making a total of $2,841.60. His expenses would have been $610, leaving him a profit of $2,231.60. He further testified that there would have been 10 acres of beans which would have yielded 40 bushels or 1,800 pounds an acre, worth $130.50 an acre, or $1,305 altogether, less the expense of $122.50, leaving a profit of $1,182.50 on the 10 acres of beans; and that the total, considering the cattle, the beans, and the beets would amount to $9,145.35. He gave as his opinion, considering all of these matters regarding his lease, that he sustained damages in the amount of $10,000.

Wright further testified that in his opinion, concerning the difference between the rental value of the Pieper farm during the 1-year term and the rent provided for in the lease, the difference or damage to the tenant would amount to $6,005.30.

Morrison further testified with reference to the lease, that the tenant would lose $5,775, which the tenant would have a reasonable chance of netting from the land taken, had the taking not occurred; and that the lease, including the provisions for rent, was standard in the community.

The city produced competent witnesses with experience relating to all phases of real estate and farm lands, and who were familiar with the Pieper land and other

real estate in the county, the sales made therein, and who had inspected the Pieper land and the improvements thereon. Orville Brandt testified that the fair market value of the 128.29 acres, together with the improvements thereon north of the railroad tracks, before the taking by the city, was $620 an acre, or a total of approximately $79,540, and after the taking $580 an acre or a total of approximately $74,410; and that the total difference in value of the land and buildings before and after the taking would be $40 an acre or a total of $5,130. This witness further testified that the Pieper land was good land. He fixed the value of the land taken and the decrease in the value of the land remaining at $25,175.

Howard N. Hall, a witness for the city, testified concerning the fair market value of several tracts of land which included the tracts taken and, considering all uses to which the land could be put, that is, reasonably adaptable thereto, that the fair market value of the land taken was $21,465; that the fair market value of the 128.29 acres of land, together with the buildings thereon before the taking was $550 an acre or a total of $70,559.30, and after the taking $500 an acre or a total of $64,145; and that the total difference in value of the land and the buildings before and after the taking was $50 an acre, or a total of $6,414.50.

Another witness for the city, Melvin Bennett, testified concerning the fair market value of the several tracts of land taken, having in mind all of the uses to which the land was reasonably adaptable, that the fair market value of the 128.29 acres of land, together with the buildings thereon, before the taking was $550 an acre, and after the taking was $550 an acre; and that there was no difference in the value of the land and the buildings after the taking.

Keith Eberhardt, the county highway engineer, testified concerning the existing supply of gravel in the county, the number of producing gravel pits, and the reserve supply of gravel; that the gravel to be used by

the county in that part of Scotts Bluff County lying east of the city of Scottsbluff and north of the river would be between 3,000 and 5,000 yards annually, for which the landowners would receive from $150 to $500; and that the county had a 3-year stockpile at a farm 1 mile east of the Pieper farm.

There is also evidence that there was $50 worth of gravel sold from the Pieper farm about 10 years before the trial; and that no one had tried to buy gravel from Pieper during the last 20 years, or since the air base was constructed.

With reference to the damages suffered by the tenant, Stricker, Mr. Brandt, a witness for the city, testified that the provisions for crop rent were typical of farm leases in that area; that the provisions as to pasture rent vary; that the landlord usually furnishes a share of the fertilizer; and that the provision in the Stricker lease wherein the landlord furnishes half of the fertilizer did not make such lease any more valuable than a typical farm lease in that area.

Hall further testified that the provisions of the Stricker lease were standard in comparison with the generally prevailing rents of similar farms; that such rents represented the fair rental value of the Pieper farm; and that the lease had no value as a lease and no fair market value, because it was not any better than any other lease.

Bennett further testified that the provisions of the Stricker lease were practically the same as the generally prevailing provisions of other leases in the vicinity, with the exception of the provisions as to the beet tops and the pasture rent; that with respect to the beet tops, it is quite customary for the tenant to receive all of them, whereas under Stricker's lease he received only half; that the provision for $400 pasture rent was, in his opinion, a little lower than the usual provision in a lease; and that because of this advantageous feature the Stricker lease, in his opinion, might be worth $200 to $300.

There are certain established rules in this jurisdiction relating to condemnation cases as follows.

"The measure of damages 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." Leffelman v. City of Hartington, 173 Neb. 259, 113 N. W. 2d 107. See, also, Armbruster v. Stanton-Pilger Drainage Dist., 169 Neb. 594, 100 N. W. 2d 781. In this case the court also said, quoting with approval from Quest v. East Omaha Drainage Dist., 155 Neb. 538, 52 N. W. 2d 417: " 'The words, "or damaged," in Article I, section 21, of the Constitution of Nebraska, include all actual damages resulting from the exercise of the right of eminent domain which diminish the market value of private property.' "

In Twenty Club v. State, 167 Neb. 37, 91 N. W. 2d 64, this court said: "In condemnation proceedings, where persons are shown to be familiar with the particular land in question, they may be permitted as witnesses to testify as to the value of the tract immediately before and immediately after the appropriation."

The general rule is that the burden of showing the damages which the landowner or lessee will suffer rests upon him while the burden is on condemner to show matters which tend to reduce or mitigate the damages. See Platte Valley Public Power & Irr. Dist. v. Armstrong, 159 Neb. 609, 68 N. W. 2d 200.

In Sump v. Omaha Public Power Dist., 168 Neb. 120, 95 N. W. 2d 209, quoting from Langdon v. Loup River Public Power Dist., 144 Neb. 325, 13 N. W. 2d 168, this court said: " 'The market value of property includes its value for any reasonable use to which it may be put. If, by reason of its surroundings, or its natural advantages, or its artificial improvements, or its intrinsic character, it is peculiarly adapted to some particular use, all the circumstances which made up this adaptability may be shown, and the fact of such adaptation may be taken

into consideration in estimating compensation. The proper inquiry is, what is its fair market value in view of any reasonable use to which it may be applied and all the reasonable uses to which it is adapted?' * * * The evidence, however, must be limited to the adaptability of the land for uses that may be reasonably expected in the immediate future. In 18 Am. Jur., Eminent Domain, § 244, p. 880, the rule is stated as follows: 'In other words, the owner is to be given, by way of compensation for his land, its fair price for any use for which it has a commercial value of its own in the immediate present or in reasonable anticipation in the near future.' See, also, 29 C. J. S., Eminent Domain, § 160, p. 1024."

The city contends that, over objections and motions to strike, the testimony of Pieper was permitted to the effect that 2 or 3 months after the city had taken his land, one Nietfeld offered to purchase gravel from Pieper at 9 cents a cubic yard; and that in December, following the taking of his land by the city, one Kimball wanted to put on a gravel pump and pump gravel from the wetland, for which he offered to pay 9 cents a cubic yard. Kimball testified that in his opinion there were 25 or 30 feet of gravel under the land and that he could pump 300 cubic yards a day. Stricker testified that the wetland range was underlaid with gravel beginning at a depth of 1 foot to 18 inches below the surface. Pieper testified to similar effect, and further that gravel had been pumped or otherwise observed down to 25 to 35 feet below the surface; and that in his estimation he could probably sell gravel in the amount of $7,000 to $8,000 a year from the gravel deposits on his land.

The city contends that the testimony that Nietfeld and Kimball wanted to purchase gravel and the prices offered by them was inadmissible for the reason that such evidence constituted an attempt to show loss of anticipated future profits; it constituted an attempt to value the property for a particular purpose; it constituted an attempt to show market for gravel that did not exist at the time

the land was taken; and it constituted an attempt to enhance damages because of loss of intended future use.

In Medelman v. Stanton-Pilger Drainage Dist., 155 Neb. 518, 52 N. W. 2d 328, this court cited 18 Am. Jur., Eminent Domain, § 242, p. 878, to the effect that when the land taken has valuable deposits of gravel, or is covered with growing crops, these circumstances may be considered so far as they affect the market value of the land, but part of the realty cannot be separately valued for its materials, as an item additional to the value of the land for the purpose of sale. See 29 C. J. S., Eminent Domain, § 174, p. 1043. The court went on to say that under this principle the defendants could introduce evidence to show that the lands involved contained gravel deposits of such character that they were adaptable to commercial development and show the fair market value of the lands in view thereof. This they did.

In the instant case there is evidence to the effect that the lands taken contained gravel beds adaptable for development and profitable commercial production, and such fact could be considered by a witness in placing a value on the land.

The owner may show all reasonable uses to which he thinks the lands are adaptable and what the lands are worth in view thereof. If, as a result thereof, there is conflict in whether the lands are adaptable for certain use it is up to the jurors to determine which of the two views they believe. See, State v. Dillon, 175 Neb. 444, 122 N. W. 2d 223; Edwin Moss & Sons, Inc. v. Argraves, 148 Conn. 734, 173 A. 2d 505; State v. Noble, 6 Utah 2d 40, 305 P. 2d 495.

The witness Kimball testified that after hearing of the gravel on the Pieper farm, he made an examination which he believed showed the gravel was good in quality and would meet state specifications. Based on his examination, he offered to pay 9 cents a cubic yard for the gravel that he might pump. He testified that 65

percent of the gravel pumped would be useful for road purposes; and that he had tried without success to obtain gravel elsewhere. The good faith of Kimball to buy gravel from Pieper is not challenged. Kimball had a plant that would pump 500 yards of gravel a day, and he was in a position to move onto the property and start the process of pumping.

What this evidence does is to point out that this land taken by the city contained gravel of such character, quality, and quantity that it is adaptable for commercial development. Pieper and Bitner, in their testimony, considered the presence of gravel on the land in arriving at the fair and reasonable market value of the land at the time of the taking.

The city cites the case of O'Neill v. State, 174 Neb. 540, 118 N. W. 2d 616, which states: "In a condemnation action witnesses should not be allowed to give their opinions as to the value of property for a particular purpose, but should state its market value in view of any purpose to which it is adapted." We are in accord with this statement of the law, but the evidence fails to show that any witness testified as to the value of the Pieper land for any particular purpose.

The city states that the offers made by Nietfeld and Kimball in July and December are inadmissible because such evidence constituted an attempt to show a market for gravel that did not exist at the time the land was taken, citing Lane v. Burt County Rural Public Power Dist., 163 Neb. 1, 77 N. W. 2d 773, wherein this court said: "In Platte Valley Public Power & Irr. Dist. v. Armstrong, 159 Neb. 609, 68 N. W. 2d 200, cited with approval in City of Lincoln v. Marshall, 161 Neb. 680, 74 N. W. 2d 470, we held: 'The market value of lands taken by eminent domain proceedings, together with damages, if any, to other remaining lands by severance, are computable as to the time of the taking, which is deemed to occur when the petition for condemnation is filed.' "

The petition for condemnation herein was filed March

20, 1962. We conclude that while the damages are computable as to the time of the filing of the petition in the county court, the evidence relating to the gravel deposits as heretofore set out is admissible under the authorities heretofore cited. This gravel was there prior to and at the time of the filing of the petition by the city for condemnation.

The city predicates error on the fact that the trial court failed to instruct the jury as to the date of the appropriation of the land by the city, being on March 20, 1962. The court specifically instructed the jury with reference to this matter. The contention of the city is without merit.

The city also predicates error on the proposition that due to Pieper's health he was unable to continue farming and therefore leased his land out. There is no merit to this contention.

With reference to anticipated profits as contended for by the city as constituting error within the meaning of James Poultry Co. v. City of Nebraska City, 135 Neb. 787, 284 N. W. 273, modified in 136 Neb. 456, 286 N. W. 337, it is well settled that when land occupied for business purposes is taken by eminent domain, anticipated profits from the continued carrying on of a business in its established location cannot be considered in estimating the damages.

There was no attempt on the part of Piepers to show by evidence anticipated profits. The evidence was to the effect that the land contained gravel of such character, quality, quantity, and location that it was adaptable to commercial development. Approximately 57 acres of the Pieper land contained gravel deposits 25 to 35 feet in depth. It is obvious that if anticipated profits had been asked for by the Piepers the value of the gravel based thereon would far exceed what the evidence shows with reference to the reasonable market value of the land taken. According to Pieper's testimony, he took into consideration the gravel, the grass,

the pasture, apparently the hunting privileges, and all other uses for which the land was adaptable, and gave his opinion that the land was worth $61,000. Bitner testified, using the figure of 57.79 acres, on the same basis. This evidence is previously mentioned. The jury, while not instructed to make any specification in the verdict, did specify that $39,970 of the total verdict rendered represented the fair and reasonable market value of the land taken, which is $5,728.50 less than Bitner thought it was worth and $1,000 less than Morrison thought it was worth. Morrison did not consider the presence of gravel on the land taken.

As above pointed out, anticipatory profits are not here involved.

The amount of damages sustained by a landowner for the taking of land by eminent domain for a public improvement, and the difference in the fair and reasonable market value of the remainder of the land before and after the taking, is peculiarly of a local nature to be determined by a jury, and its verdict will not be interfered with if it is based on the testimony. See, State v. Wixson, 175 Neb. 431, 122 N. W. 2d 72; Myers v. Platte Valley Public Power & Irr. Dist., 159 Neb. 493, 67 N. W. 2d 739; State v. Dillon, 175 Neb. 444, 122 N. W. 2d 223.

With reference to the severance, the true test is the effect of the severance on market value at the time of the taking. This, in turn, is based upon all of the inconveniences caused by the severance as they might affect a prospective purchaser and the effect of the severance upon every available, reasonable, and probable future use of the property, as they relate to the market value of the remainder of the property considered as a unitary whole. See State v. Dillon, 175 Neb. 444, 122 N. W. 2d 223.

"In a condemnation action the weight and credibility of testimony of either lay or expert witnesses regarding value of land taken or value of remainder immedi-

ately before and immediately after taking is for the jury." Connor v. State, 175 Neb. 140, 120 N. W. 2d 916.

The above assignments of error asserted by the city cannot be sustained.

The city predicates error in that the trial court admitted on direct examination the testimony of Stricker, the lessee, over objections of the city, with reference to the value of the crops that he could have raised and the cattle he could have grazed on the land taken in the future, and the profits he could have realized therefrom. We have heretofore set forth Stricker's testimony in this respect.

The contention of the city is that by the cases of James Poultry Co. v. City of Nebraska City, *supra,* and Ballantyne Co. v. City of Omaha, 173 Neb. 229, 113 N. W. 2d 486, the rule announced therein prohibits showing anticipated loss of future profits, therefore Stricker's testimony was erroneously allowed.

The record shows that the Piepers, as of March 1, 1962, and for prior years, had an oral lease covering all of the land involved in this proceeding whereby they leased the land to Stricker. The term of the lease was from March 1 of one year to March 1 of the succeeding year, and it provided that the Piepers were to receive one-fourth of the beets, one-half of the beet tops, one-fourth of the beans, one-fourth of the potatoes, one-third of the corn, one-third of the grain, and one-half of the hay. Stricker paid the Piepers $400 annually for pasture rent, with the understanding that he was to put his own cattle in the pasture and feed them out on the place. The Piepers were to furnish one-half of all the commercial fertilizer and reserve for themselves one house, some of the buildings, and hunting rights.

Wright's testimony was to the effect that the rental value of the Pieper farm for a period of 1 year would be $6,005.30. Morrison testified that the tenant would have received a chance of netting $5,775 on the land taken.

In State v. Dillon, 175 Neb. 350, 121 N. W. 2d 798, the court had before it an oral 1-year lease on a portion, if not all, of the land at the time of condemnation. The damage to the leasehold was appraised at $1,740. It was denied that that was the true value, and alleged that such damage was $4,000. A jury was waived, and the trial court fixed the damage to the leasehold at $414, and $40.44 interest. The judgment of the trial court was reversed and the cause remanded for new trial. This court held: "In a case where land condemned is under lease to and in possession of a third person, and by the taking or damaging the lessee is deprived of his use in whole or in part, he is entitled to recover from the condemner on the same character and quality of proof as would entitle the condemnee to recover. * * * In a case where a lessee of the owner of land which has been condemned has established a right of recovery for damage to growing crops or for *deprivation of right to produce such crops,* the measure of his right of recovery is the difference between the value of his share of the crops at maturity and what would have been the cost of production of the entire crop." (Emphasis supplied.) The court went on to say: "If, as is true in this case, land condemned is farm land and is under lease and in possession of the lessee on a share crop basis the tenant is entitled to recover damages for the loss of profits brought about by the condemnation."

The evidence in behalf of the lessee in the cited case disclosed that 25 acres of the area taken which was suitable for production of corn would have produced 70 bushels of corn an acre of the value of $1 a bushel. The witness then was permitted to disclose his expenses relating to the production and the net he would receive per acre. The court then pointed out that there was no difficulty with the question of liability but only with admissibility of evidence and the measure of the right of recovery, and that the cases were in conflict on this point, and set forth many of such cases and distinguished

them. The court said that where such damage may, on the basis of evidence, be reasonably arrived at at the time of trial the damage is the value of the crops if they had been allowed to mature less the reasonable cost of total production. The court further said: "There is another cogent and compelling reason why this should be regarded as the proper attitude to be taken toward the question of proof of damages. Any other rule would have the effect of recognizing an unequivocal right guaranteed to the lessee by the Constitution of the State of Nebraska to damages but would deny any right to recover by reason of a prohibition of evidence necessary to sustain a recovery. The reference here is to the clear terms of Article I, section 21, of the Constitution. * * * The only considerations left in this area were the questions of credibility of witnesses, weight to be given to testimony, and a computation of results, which were questions of fact for the court in view of the fact that a jury had been waived."

In the light of the above-cited case, the evidence relating to the rental value of the Pieper land and the purposes for which it was used was admissible. The evidence discloses that most of Stricker's living was made from the use of the south part of the Pieper farm which was taken by the city. The severance of the farm into two parts would leave this lessee in a position where it could be difficult for him to make a living in the future under the terms of the lease heretofore mentioned. The evidence points to the fact that the grazing of cattle on the land taken was an important part of the lessee's livelihood.

The city predicates error on the part of Piepers' counsel in his argument to the jury.

The record discloses that the argument of Piepers' counsel was preserved by the reporter in the bill of exceptions. There was no motion for mistrial made either before submission of the case to the jury or after.

In Lemmon v. State, 173 Neb. 387, 113 N. W. 2d 525, it

is pointed out that as soon as the jury retired the defendant's counsel moved for a mistrial because of alleged improper remarks of counsel in his argument to the jury. This motion was overruled by the trial court. This court said: "An objection made to the argument of opposing counsel after the jury has retired is not timely and will not be reviewed on appeal. 88 C. J. S., Trial, § 196d, p. 387; Eilola v. Oliver Iron Mining Co., 201 Minn. 77, 275 N. W. 408. This court, in Sandomierski v. Fixemer, 163 Neb. 716, 81 N. W. 2d 142, sustained such objections there found to be directed towards improper statements by counsel in his argument. In the cited case, however, they were made before the cause was submitted to the jury. The court there stated that one may not complain of the misconduct of counsel if with knowledge of such misconduct he does not ask for a mistrial, but consents to take the chances of a favorable verdict. On reading the cited case it is clear that this court also considered it necessary that such a motion be made before the cause is submitted to the jury. * * * it is necessary that an opportunity be given the court and counsel to correct the misconduct if possible. No such opportunity is given them if the motion is delayed until the jury has entered into its deliberations. Neither is the defendant in such cases permitted to gamble on a favorable verdict and at the same time reserve such an objection to be urged on appeal should the jury decide against him. The motion came too late and if it was merited, which we do not decide, it cannot be considered by this court."

The objection made by counsel in the instant case, and the admonition given by the trial court to be guided by the evidence only, with no motion on the part of counsel for the city, disposes of this assignment of error under the authority above cited.

The city predicates error on the ground that the verdict of the jury is clearly excessive, is against the weight and reasonableness of the evidence, and appears to have

been given under the influence of passion and prejudice. In the determination of this question certain legal pronouncements have been made which must be regarded as controlling.

In Langdon v. Loup River Public Power Dist., *supra,* it was said: "When the evidence is conflicting the verdict of the jury will not be set aside, unless it is shown to be clearly wrong." See, also, Biggs v. Gottsch, 173 Neb. 15, 112 N. W. 2d 396.

In Smith v. Platte Valley Public Power & Irr. Dist., 151 Neb. 49, 36 N. W. 2d 478, it was said: "In testing the sufficiency of evidence to support a verdict it must be considered in the light most favorable to the successful party, that is, every controverted fact must be resolved in his favor and he should have the benefit of every inference that can reasonably be deduced therefrom." See, also, Wischmann v. Raikes, 168 Neb. 728, 97 N. W. 2d 551; O'Neill v. State, *supra.*

In the light of the evidence and the above decisions, the assignment of error by the city cannot be sustained.

Other assignments of error raised by the city are without merit and need not be determined.

For the reasons given in this opinion the judgment of the trial court is affirmed.

This brings us to the following.

The plaintiffs filed a motion requesting this court to award them a reasonable sum for the fees of their attorneys for services rendered in the district court and for fees necessarily incurred for two expert witnesses, as provided by Legislative Bill 553 adopted by the Legislature at its seventy-third session. This motion is dated September 19, 1963.

In support of this motion is attached an affidavit concerning the extent and value of such services. The affidavit is made by Rush C. Clarke and refers to the services rendered by a firm in which the affiant was formerly associated and a firm in Scottsbluff, one of the members of which helped in the trial of the case, also the time

spent in preparation for trial; that the actual trial occupied 5 days; that he and his cocounsel spent 35½ days in preliminary work and preparation for trial and 10 days in trial work, without reference to work done by other members of the firm with which the affiant was associated; that expenses incurred totaled $487.34; that for the services rendered to the plaintiffs they were charged $5,025 plus the above-mentioned expenses, which was paid in full by them; that in addition, the affiant performed services for the plaintiffs in connection with the motion for new trial and preparation therefor of the reasonable value of $450, and incurred expenses in the amount of $57.90, all of which have been paid in full by the plaintiffs; that in addition to the attorneys' fees and expenses paid, the plaintiffs incurred and paid fees in the sum of $500 to William S. Bitner and $300 to James Wright for their services as expert witnesses, which they paid; that in the Supreme Court the affiant and his cocounsel, in the trial of the case, made preparation to present the case before this court on appeal; that this work consisted of checking the bill of exceptions, studying the brief of the city on appeal, ordering a supplemental transcript, preparing a brief for the plaintiffs on appeal, studying the reply brief, and preparation for oral argument before this court; and that the reasonable value of the services of affiant and his cocounsel in this court is the sum of $3,500, and it will be necessary to incur expenses in the amount of $150 to $250. This affidavit was sworn to on September 19, 1963.

The same affiant filed a supplemental affidavit asserting that in addition to the fees and expenses paid by the plaintiffs set out in the former affidavit, the plaintiffs paid out $615 for the taking and enlarging of aerial photographs which were received in evidence; that these photographs were essential; and that the total expenses incurred by the plaintiffs including the photographs amounted to $1,102.34.

Counsel for the city filed an affidavit in opposition to

the motion above stated, in which it was denied that all the legal services alleged in the affidavit of Rush C. Clarke were rendered or, if rendered, were reasonably necessary; denied that the legal services actually rendered were of the reasonable value alleged in such affidavit; denied that attorneys' expenses in the amounts alleged in such affidavit were incurred or, if incurred, were reasonably necessary and were reasonable in amount; and denied that the fees to two expert witnesses, as alleged in such affidavit, were reasonable in amount. This affidavit was signed on October 16, 1963.

Counsel for the city filed a supplemental affidavit wherein he asserts that he is one of the attorneys for the city; that he has been a member of the Nebraska State Bar Association since 1937; that the reasonable value of the services rendered by plaintiffs' attorneys, and reasonably necessary to be rendered by them, in the district court did not exceed $2,500, and in this court not to exceed $1,000; and denied that the expenses for aerial photographs mentioned in the supplemental affidavit of Rush C. Clarke were necessary and reasonable in amount.

Laws 1963, chapter 432, page 1448, Legislative Bill 553, insofar as necessary to consider here, provides in part: "Sec. 2. That section 76-720, Reissue Revised Statutes of Nebraska, 1943, be amended to read as follows:

"76-720. 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.

"Sec. 3. The provisions of section 76-720 shall apply to any case now or hereafter pending on appeal from the award of the appraisers as provided in section 76-710.

"Sec. 4. That original section 76-720, Reissue Revised Statutes of Nebraska, 1943, and section 76-710.01, Revised Statutes Supplement, 1961, are repealed.

"Sec. 5. Since an emergency exists, this act shall be in full force and take effect, from and after its passage and approval, according to law.

"Approved July 14, 1963."

It is the contention of the city that the relevant provisions (section 2) of Legislative Bill 553, of the seventy-third session of the Legislature, do not apply to this proceeding; that on the effective date of the act (July 14, 1963), this proceeding was already pending on appeal from the district court to this court, not on appeal from the award of the appraisers as provided by section 76-710, R. R. S. 1943; that the city's brief to this court had been filed and served on June 28, 1963; that to apply the act to this case would deprive the city of an opportunity, provided by the act, for the city to determine, while the case still was pending on appeal from the award of the appraisers to the district court, whether it would pay the award rather than risk incurring liability for fees for condemnees' attorneys and expert witnesses; that the act vests in the district court, not in this court, original jurisdiction to determine the question of attorneys' and expert witnesses' fees for services in the district court; that there are issues of fact as to fees in both the district court and this court that cannot be tried in this court on affidavits; that the award of such fees is, in any case, not mandatory, but discretionary; that in the exercise of sound discretion, this court should deny

an award for fees for any services rendered before the act became effective, as liability therefor could not have been anticipated by the city; that the act makes no provision for an award in any case until final judgment has been rendered; that even if the judgment of the district court were to be affirmed, the award of fees, if any, should take into account the fact that, on the record, the city had reasonable cause to expect that the jury's verdict would have been substantially less than it was, and then that the judgment of the district court would be reversed on appeal; and that the act makes no provision for an award of attorneys' expenses, and the request should be denied.

The award of the appraisers in the case of the plaintiffs was $50,470, and as to the lessee Stricker was $5,775. The verdict of the jury totaled $64,170 for the plaintiffs and $5,775 for Stricker. Thus the verdict of the jury was not only not less than 85 percent of the awards, but in the case of the plaintiffs was greater than the amount of the award by more than 15 percent. Therefore, it is the contention of the plaintiffs that the city, not being satisfied with the award made by the appraisers, chose to perfect an appeal to the district court, imposing a burden of expenses on the plaintiffs; and that it is unjust for the city to gamble on a smaller award at the expense of the plaintiffs.

The city contends that the act applies only to an appeal from the award of the appraisers made in the county court to the district court, and does not apply where an appeal is taken from the district court to this court.

The word "pending" means: "Begun, but not yet completed; unsettled; undetermined; in process of settlement or adjustment. Thus, an action or suit is 'pending' from its inception until the rendition of final judgment." Black's Law Dictionary (3d ed.), p. 1345. See, also, Wentworth v. Town of Farmington, 48 N. H. 207; Mauney v. Pemberton, 75 N. C. 219; Ex parte Munford,

57 Mo. 603; Cain v. French, 29 Cal. App. 725, 156 P. 518. Therefore, the act applies when an appeal is taken from the district court to this court.

We conclude that no fee or other expenses should be allowed in this court prior to the date the act became effective. This case was tried in the district court in January 1963, and the appeal to this court was made in March 1963. We conclude that an attorneys' fee of $1,000 for services rendered by the plaintiffs' attorneys in this court should be allowed. All other requests set forth in the motion by the plaintiffs should be denied.

AFFIRMED.

J. W. WAGNER, FIRST AND REAL NAME UNKNOWN, ET AL., APPELLANTS, V. STATE OF NEBRASKA, DEPARTMENT OF ROADS, APPELLEE.

126 N. W. 2d 853

Filed March 13, 1964. No. 35529.

1. **New Trial.** The district court has the power and is required to consider and determine motions for a new trial by the exercise of its judicial discretion.
2. **Courts.** In the exercise of judicial discretion, there is an abuse of that power where the reasons and rulings of the court are clearly untenable and deprive a party of a substantial right clearly and fairly established and amount to a denial of justice.
3. **New Trial: Appeal and Error.** An order of the trial court granting a new trial will not ordinarily be disturbed by this court, and not at all unless it clearly appears that no tenable ground existed therefor.
4. **Eminent Domain: Evidence.** Where a jury is permitted to view the premises involved in eminent domain litigation, the result of its observations is evidence which, in arriving at a verdict, it may consider only in connection with other competent evidence. The jury may not, however, ignore the evidence and base its verdict upon its view or its knowledge of the value of the land in the case.
5. **New Trial.** The fact that the jury has had a view presents no insuperable obstacle to the granting of a new trial on the

ground that the verdict is against the evidence, or the damages inadequate or excessive.

6. **Trial.** One of the purposes of special findings is to furnish the means of testing the correctness of the verdict rendered, and of ascertaining its extent.
7. ———. Special findings of a jury must be based upon the evidence in the trial, and a general verdict cannot stand where it is based upon erroneous special findings.
8. **Trial: New Trial.** Where special findings which constitute the foundation of a general verdict appear to be unjustified, a new trial may be ordered.

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

Bosley & Bosley, for appellant.

Clarence A. H. Meyer, Attorney General, Harold S. Salter, Warren D. Lichty, Jr., and Willis L. Strong, for appellee.

Heard before WHITE, C. J., CARTER, MESSMORE, SPENCER, BOSLAUGH, and BROWER, JJ., and LYNCH, District Judge.

LYNCH, District Judge.

This is a condemnation action. The condemnees, J. W. Wagner and Elizabeth Wagner, shall herein be referred to as the plaintiffs, and the condemner, State of Nebraska, Department of Roads, as the defendant.

The action was brought on June 7, 1962, in the county court of Hitchcock County, Nebraska. On February 5, 1963, the case was tried on appeal in the district court, during which trial the jury was permitted to view the premises. The jury returned a general verdict for the plaintiffs in the sum of $3,200; and, pursuant to the court's instructions, the jury also made a special finding fixing the value of the property taken at $1,700, and a second special finding setting the difference in the value of the remainder of plaintiff's property before and after the taking at $1,500.

On March 29, 1963, the defendant's motion for a new

trial was sustained. The trial court gave no reason for this decision.

The plaintiffs are the owners of the southwest quarter of Section 8, Township 3 North, Range 31 West of the 6th P.M., in Hitchcock County, Nebraska, which is about one-half mile west of Culbertson, Nebraska. Before the taking the plaintiff's farm included 101 acres of irrigated land and 52.57 acres of grassland or pasture. Improvements consisted of a 6-year-old, modern, ranch-type home with attached double garage, hog shed, cattle feed rack with concrete feeding floor, windmill, concrete tank, irrigation well, fencing, windbreak, landscaping, and a suitable driveway. The State took 3.88 acres along the south side of the land for highway purposes. Of the area taken there were about 3.44 acres of irrigated land and .44 acres of pasture. The plaintiffs' driveway and means of access to their property was the same after the condemnation as before and no improvements were included in the property taken.

The plaintiffs bring the matter to this court contending there was no prejudicial error in the district court proceedings and that the trial court erred in sustaining the defendant's motion for a new trial.

A review of the record reveals that the plaintiff, J. W. Wagner, and two of the plaintiff's witnesses set the value of the 3.88 acres of land acquired at $1,411, and the plaintiffs' other witness appraised this area at $1,415.60. The two witnesses who testified for the defendant gave estimates of $1,071.75 and $1,150 as the value of the land taken. The jury found specially that the 3.88 acres of plaintiffs' land actually taken for road purposes was worth $1,700.

Concerning the difference between the value of the remainder of plaintiffs' property before and after the taking, the plaintiff's witnesses gave figures ranging from $2,691.60 to $3,138.03, and the defendant's two witnesses set their estimates at $320 and $347.50. The special

finding of the jury allowed $1,500 as damage to the remainder.

The record in this case also reveals that the plaintiff, J. W. Wagner, testified that in his opinion the taking damaged the remainder of his irrigated land $15 per acre and the land south of the house about $1,000. He gave no basis or reasons for his calculations or estimates. On cross-examination Mr. Wagner testified that the condemnation did not disturb the irrigation well; that there were no buildings or other improvements on the 3.88 acres acquired by the State; that a fence was removed but not taken; that some alfalfa and brome were taken but no trees or shrubbery; that the windbreak was not altered; that the driveway is in the same place as before; that public traffic goes along the same line, the same distance from the house; that he runs the same number of cattle; that the farm yields just as much; and that there has been no change in the operation of the farm since the land was acquired for road purposes.

The plaintiffs' other witnesses gave no specific grounds for their appraisals of the damage to the remainder of the property, and they agreed generally that the farm operation and production were the same after the 3.88 acres were taken by the State as they had been before.

One of the defendant's witnesses based his $347.50 estimate of the damage to the remainder on the cost of moving 143 rods of woven wire fence and about 21 rods of barbed wire, plus the cost of rebuilding an irrigation box and earthen ditch. The defendant's other witness stated that in arriving at his opinion of the difference in the value of the remainder before and after the taking, he considered the fence which had to be moved and the fact that this alteration would put the property in about its previous condition so that it would command the same price on the open market.

The defendant contends that the special finding relative to the value of the land taken is not based on the testimony; that the special finding as to consequential

damages is clearly against the weight and reasonableness of the evidence; that the special findings are erroneous, therefore the general verdict cannot stand; that even though the jury viewed the premises the verdict is not supported by the evidence; and that clearly tenable grounds exist for the trial court's order granting a new trial, hence that order should not be disturbed.

The plaintiffs maintain that the amount of damages in a condemnation action is to be determined by the jury, and its verdict will not ordinarily be interfered with if it is based on the testimony; and that when the evidence is conflicting the verdict of the jury should not be set aside unless it is clearly wrong. State v. Dillon, 175 Neb. 444, 122 N. W. 2d 223. We have no quarrel with those statements of the law; however, we believe that the principal question here is whether or not under the law and the circumstances of this case there was an abuse of judicial discretion when the trial court sustained the defendant's motion for a new trial.

This court has held as follows: "The district court has the power and is required to consider and determine motions for a new trial by the exercise of its judicial discretion." State v. Wixson, 175 Neb. 431, 122 N. W. 2d 72. "In the exercise of judicial discretion, there is an abuse of that power where the reasons and rulings of the court are clearly untenable and deprive a party of a substantial right clearly and fairly established and amount to a denial of justice." Pettegrew v. Pettegrew, 128 Neb. 783, 260 N. W. 287. "An order of the trial court granting a new trial will not ordinarily be disturbed by this court, and not at all unless it clearly appears that no tenable ground existed therefor." Nesmith v. Clarke, 135 Neb. 117, 280 N. W. 429.

In ruling upon the motion for new trial the court had for its consideration a verdict based on: (1) A special finding allowing $1,700 for 3.88 acres of land acquired, whereas the highest estimate given by any witness for this element of damage was $1,415.60; and (2) a special

finding allowing $1,500 as the difference between the value of the remainder before and after the taking, whereas for this element of damage the plaintiffs' witnesses gave figures ranging from $2,691.60 to $3,138.03 and the defendant's witnesses stated estimates of $320 and $347.50. The trial judge also had for his thought and attention the circumstance that all of the witnesses agreed that the remainder of the plaintiffs' farm is the same after the taking as before; and that it is operated the same, irrigated the same, and produces the same. None of the plaintiffs' witnesses explained how or why the severance detracted from the market value of the remaining property. Only the cost of moving the fence supported the opinions relative to damage to the remainder.

Taking into account the foregoing, we believe it is clear from the record that tenable grounds exist to support the trial court's order and that there was not an abuse of judicial discretion in granting a new trial.

The plaintiffs also assert that when the jury is permitted by the court to view the premises, the verdict will not be set aside unless it is clear that the jury erred, citing Omaha & R. V. R.R. Co. v. Walker, 17 Neb. 432, 23 N. W. 348. This too is an accurate statement of the law; however, a view does not have the status of an evidential cure-all. In Leffelman v. City of Hartington, 173 Neb. 259, 113 N. W. 2d 107, this court said: "Where a jury is permitted to view the premises involved in eminent domain litigation, the result of its observations is evidence which, in arriving at a verdict, it may consider only in connection with other competent evidence." In 18 Am. Jur., Eminent Domain, § 361, p. 1004, it is stated: "* * * it is generally considered that the jury may take into consideration what they saw on the view in connection with their own knowledge and experience, and fix the damages by both evidence and view." And in 5 Nichols on Eminent Domain (3d ed.), § 17.1(3), p. 97, it is said: "The fact that the jury has had a view presents

no insuperable obstacle to the granting of a new trial on the ground that the verdict is against the evidence, or the damages inadequate or excessive." In the instant case the jury was properly instructed relative to the view of the premises. The knowledge thus acquired cannot, in and of itself, justify every finding or verdict, supply deficiencies in evidence, or provide support for estimates where the record includes none. The view of the premises by the jury in this case does not alter our conclusion.

In their brief the plaintiffs state: "The jury found the amount due appellants to be $3,200.00 and from the instruction of the Court that their view of the premises was evidence to be considered along with the other evidence, the jury apparently concluded that the $3,200.00 should be apportioned by them as they deemed required from all the evidence before them. The Court was not required to submit special findings and had it not done so the general verdict would be properly justified. The special findings surely cannot be in conflict with the general verdict since they clearly do not so appear." Section 25-1120, R. R. S. 1943, establishing that when "the special finding of facts is inconsistent with the general verdict, the former controls the latter," has no application here except to point out that special findings take precedence over a general verdict. The plaintiffs' conclusion that the jury fixed the general verdict and then somehow divided it between the two special findings is probably correct. However, to argue that the general verdict is acceptable, therefore the special findings are proper or faultless, is neither legal nor logical. A general verdict cannot rectify improper or erroneous special findings. See, Carlson v. Hanson, 166 Neb. 96, 88 N. W. 2d 140; Story v. Sramek, 108 Neb. 440, 187 N. W. 881; American Fire Ins. Co. v. Buckstaff Brothers Manuf. Co., 52 Neb. 676, 72 N. W. 1047; Culbertson Irr. & W. P. Co. v. Olander, 51 Neb. 539, 71 N. W. 298.

Actually, the circumstances of the instant case demon-

strate one of the functions of special findings in trial procedure. The purpose of a special finding is "* * * to furnish the means of testing the correctness of the verdict rendered, and of ascertaining its extent." 89 C. J. S., Trial, § 485, p. 140. It is stated in 53 Am. Jur., Trial, § 1063, p. 736: "Special questions are propounded to a jury to bring out some or all of the determinative facts which should be considered in the formation of a jury's general verdict. Such questions may aid in sifting the jury's reasons for their verdict; they may show how closely or otherwise the jury has followed the trial court's instructions, and they may, and often do, show the measure of sincerity with which the jury has considered the evidence on which the general verdict must rest if it is permitted to stand." And in 35 Nebraska Law Review 523, Special Findings and Special Verdicts in Nebraska, it is observed at page 545: "The special finding device merely permits the trial court to insure that the jury in its deliberation is not derailed from the traditional procedural track by prejudice, ignorance, favoritism or mistake."

If the special findings of a jury are not supported by the evidence or are against the weight of the evidence, or if they make it clear that the jury disregarded the evidence or the law, then it is not error to set aside the general verdict.

Though the power to set aside a verdict because it is not sustained by the evidence should be exercised with caution, it is our opinion that in the instant case the special findings and verdict were based upon something other than the evidence; that there was substantial evidence adduced during the district court trial to support a verdict somewhat different from the one returned; and that the trial court's discretion in sustaining the motion for a new trial was not abused but was exercised with regard to what was right and equitable under the law and the circumstances of this case.

The judgment of the trial court sustaining the de-

fendant's motion for a new trial should be and hereby is affirmed.

AFFIRMED.

JOHN BRUNO, APPELLEE, V. EDNA L. KRAMER, ADMINISTRATRIX OF THE ESTATE OF HARRY EWING KRAMER, DECEASED, APPELLANT.

126 N. W. 2d 885

Filed March 13, 1964. No. 35570.

1. **Automobiles: Witnesses.** An automobile accident is a "transaction" within the meaning of the dead man's statute, section 25-1202, R. R. S. 1943.
2. ———: ———. In an action against the estate of a decedent driver of a vehicle involved in an automobile accident, a plaintiff's testimony is barred insofar as it relates to the actions or movements of decedent driver's vehicle immediately before or at the time of the accident.
3. **Automobiles: Executors and Administrators.** The right to damages against a decedent's estate as a result of an automobile accident must originate as a claim against the decedent's estate in county court and may not be brought as an original cause of action in district court.
4. **Executors and Administrators: Actions.** In such a case, the district court's jurisdiction is appellate only and the trial of such a claim on appeal is not joinable with an original action brought in district court against another joint tort-feasor.
5. **Actions.** The statute on consolidation, section 25-703, R. R. S. 1943, requires that the actions consolidated must be such that they might have been joined in the original instance and makes the right of consolidation dependent upon an application by a defendant.
6. ———. Independent of statute, the district court has inherent power to consolidate the trial of cases if the actions could have been joined in the first instance.

Appeal from the district court for Douglas County: JOHN C. BURKE, Judge. Reversed and remanded.

Joseph H. McGroarty and Haney, Walsh & Wall, for appellant.

Schrempp, Lathrop & Rosenthal, for appellee.

Heard before WHITE, C. J., CARTER, MESSMORE, YEAGER, SPENCER, BOSLAUGH, and BROWER, JJ.

WHITE, C. J.

This is an appeal from a judgment in a personal injury case arising out of an automobile accident on North Eleventh Street in Omaha, Nebraska. It originated as a claim against the estate of the decedent Kramer, who was killed in the accident involved. On appeal from county court, the trial of the claim was consolidated with the trial of the case of Bruno v. Gunnison Contractors, Inc., *ante* p. 462, 126 N. W. 2d 477, an original action in district court. Each case was separately docketed, separate pleadings were filed, a separate verdict by the jury was rendered, and came to this court on separate records, briefs, and arguments.

A full review of the facts as to the accident may be found in our former opinion in Bruno v. Gunnison Contractors, Inc., *supra*. We will only review the facts and issues necessary to fully understand the question present in this case. An area on the west side of North Eleventh Street in Omaha was torn up for sewer construction. Decedent Kramer, going south, turned to the left and east of a barricade warning of the obstructions, proceeded about 150 feet south of the barricade on the east side of North Eleventh Street, and ran head-on into the plaintiff who was going north on North Eleventh Street.

Error is assigned in the trial court's order consolidating the cases for trial. Plaintiff Bruno was permitted to testify, over objection raised under the dead man's statute, section 25-1202, R. R. S. 1943, as to the speed, movements, location, and control by decedent Kramer of his automobile immediately preceding the accident. An automobile accident is a "transaction" within the meaning of the statute (§ 25-1202, R. R. S. 1943), and the plaintiff's testimony is barred insofar as it relates to the

actions or movements of decedent's vehicle immediately before or at the time of the accident. Fincham v. Mueller, 166 Neb. 376, 89 N. W. 2d 137. Furthermore, the action is not maintainable in district court as an original cause of action and must originate as a claim against a decedent's estate in county court which has original exclusive jurisdiction with full power to grant relief warranted and "the protection of his rights when the subject of litigation comes within the jurisdiction of the county court." Rehn v. Bingaman, 151 Neb. 196, at p. 203, 36 N. W. 2d 856. The district court's jurisdiction was appellate only in this case. It therefore was not joinable with an original action as ordinarily may be done against two alleged joint tort-feasors. It does not come within the authority for consolidation contained in section 25-703, R. R. S. 1943, because that statute requires that the actions "might have been joined," and gives the right of consolidation to a defendant. The defendant not only did not apply for consolidation of this case with the one against the contractors, but objected throughout the trial to the consolidation and on the ground that the consolidation would result in the reception of inadmissible evidence under the dead man's statute, section 25-1202, R. R. S. 1943. It is urged that the court, independent of statute, has inherent power to consolidate for the purposes of trial and no doubt this is true. This may be done to expedite the reception of evidence, eliminate the multiplicity of hearings and trials, and rests in a reviewable sound discretion of the trial court. Peters v. Meyer, 131 Neb. 847, 270 N. W. 312; 1 Am. Jur., Actions, § 92, p. 476. Both of these authorities gives the court inherent power to consolidate as to "actions that could have been joined in the first instance." As we have pointed out, these two separate cases neither were, nor could they be, joined in an original action in district court. The trial court recognized this difficulty and attempted to cure it by instructing the jury that the inadmissible evidence against decedent

could only be considered by it as against the contractor defendants in the case of Bruno v. Gunnison Contractors, Inc., *supra*. But the jury heard the prohibited evidence, and we feel that no amount of admonition could have prevented a jury from being influenced by this very material, but nevertheless inadmissible, evidence. This was prejudicial error and requires a reversal of the judgment in this case.

Error is assigned because of misconduct of counsel in final argument. The record reveals that no motion for mistrial on account of the alleged misconduct of counsel was made by this defendant and, consequently, it is not before us for consideration.

REVERSED AND REMANDED.

CARTER, YEAGER, and BROWER, JJ., dissenting.

In our opinion the dead man's statute is given too broad an application in Fincham v. Mueller, 166 Neb. 376, 89 N. W. 2d 137. We think the rule therein stated should be modified by giving a reasonable definition of the word "transaction" as used in section 25-1202, R. R. S. 1943.

MARJORIE DETTER ET AL., APPELLEES, V. SHIRLEY ERPELDING, APPELLANT, IMPLEADED WITH JAMES EDWARD ESTERLY ET AL., APPELLEES, JOSEPHINE ERPELDING, INTERVENER-APPELLEE.

126 N. W. 2d 827

Filed March 13, 1964. No. 35552.

1. **Divorce.** A child support judgment is a lien upon the real estate of the judgment debtor, both as to accrued and future installments, and can only be released by compliance with section 42-319, R. S. Supp., 1961, or section 42-323, R. R. S. 1943.
2. ———. Section 42-319, R. S. Supp., 1961, provides in part: "(1) All judgments and orders for payment of alimony or of maintenance in actions of divorce or maintenance shall be liens upon property in like manner as in other actions, and may in the same manner be enforced and collected by executions and

proceedings in aid thereof, or other action or process as other judgments. Whenever a child is committed to a parent or other person by order of the court and provision made by judgment or order for its maintenance, the parent or other person to whom the child is committed may execute a partial or total release of the judgment, either generally or upon specific property, upon obtaining approval thereof by the court that entered the judgment or order for support."

3. ———. Section 42-323, R. R. S. 1943, provides: "In all cases where alimony or other allowance shall be decreed for the wife or for the children, the court may require sufficient security to be given by the husband for the payment thereof, according to the terms of the decree. Upon the neglect or refusal of the husband to give such security, or upon his failure to pay such alimony or allowance, his real or personal estate may be sold as upon execution for the payment of any sums due upon such decree. In default of security for payment of installments in future to fall due, the court may also appoint a receiver to take charge of his real or personal estate, or both, and hold the same, and the rents, issues, interests and profits thereof for security for the payment of installments in future falling due. Judgments and decrees for alimony or maintenance shall be liens upon the property of the husband, and may be enforced and collected in the same manner as other judgments of the court wherein they are rendered."

4. ———. Where a parent of a child has not released the child support lien nor asked the court for permission to do so as set forth in section 42-319, R. S. Supp., 1961, the lien of such parent remains in full force and effect.

5. ———. Divorce and its incidents are matters of public concern over which the Legislature has authority. What policies to adopt concerning its regulation are for it to decide and are not for the courts.

6. ———. Jurisdiction of the court in matters relating to divorce and alimony is given by the statute, and every power exercised by the court with reference thereto must look for its source in the statute, or it does not exist.

7. **Judgments.** A consent decree is usually treated as an agreement between the parties. It is accorded greater force than ordinary judgments and ordinarily will not be modified over objection of one of the parties.

Appeal from the district court for Buffalo County: S. S. SIDNER, Judge. Reversed and remanded with directions.

John McArthur, for appellant.

Ward W. Minor, William J. Ross, and Andrew J. McMullen, for appellees Detter et al.

Dryden & Jensen, for intervener-appellee.

Heard before WHITE, C. J., CARTER, MESSMORE, YEAGER, SPENCER, BOSLAUGH, and BROWER, JJ.

MESSMORE, J.

This is a partition action brought by Marjorie Detter, Doris Mays, Arlene Slack, Melvin Erpelding, Bernard Erpelding, and Donald Erpelding, daughters and sons of Lawrence P. Erpelding, deceased, and their spouses, as plaintiffs, against Shirley Erpelding Esterly and James Edward Esterly, her husband, and tenants on the land owned by Lawrence P. Erpelding, deceased, at the time of his death. Default of all defendants except Shirley Erpelding Esterly was taken.

It should be pointed out that the defendant, sometimes known as Shirley Erpelding Esterly, is in fact Shirley Erpelding, and is unmarried.

The petition in partition was filed on May 28, 1962, requesting that the heirs-at-law of Lawrence P. Erpelding, deceased, as set out in the petition, receive their respective shares in the land of which Lawrence P. Erpelding died seized as set forth in the petition; and that if the land be sold the proceeds thereof be divided according to the shares of the respective heirs-at-law of Lawrence P. Erpelding, deceased.

On August 2, 1962, Shirley Erpelding filed an answer in the partition action alleging that she had a judgment lien against all of the real estate of the plaintiff Bernard F. Erpelding located in Buffalo County by virtue of a judgment in a case entitled Shirley D. Erpelding v. Bernard F. Erpelding; that said judgment was entered immediately after July 2, 1962, requiring that the proceeds of the property sold in this case (partition case) be paid to the clerk of the district court for Buffalo County

in payment of the accrued and future child support payments; that said judgment is in full force and effect; that because of the judgment lien above mentioned, and because of the judgment rendered in July 1962, this defendant is entitled to have the interest of Bernard F. Erpelding in the real estate described in the plaintiffs' petition paid to the clerk of the district court for Buffalo County in the case of Shirley D. Erpelding v. Bernard F. Erpelding, and the same be disbursed as may be ordered in said case; and that said lien attaches to the entire interest of Bernard F. Erpelding.

On August 21, 1962, the trial court rendered judgment finding the allegations of the plaintiffs' petition to be true and set forth the respective shares of the heirs-at-law in the real estate owned by their father, Lawrence P. Erpelding, deceased, at the time of his death; and that Shirley Erpelding had a lien on the interest of the plaintiff Bernard F. Erpelding and if the real estate is sold, the sale shall be made without reference to said lien, and the referees were ordered to impound and pay to the clerk of the district court the proceeds from the sale of the interest of Bernard F. Erpelding; and ordered that the clerk retain said funds until further order of the court. Judgment was entered in accordance with the findings.

On January 29, 1963, Josephine Erpelding, wife of Bernard F. Erpelding, filed an application to intervene in the partition action on the ground that she had a judgment for support money and maintenance against Bernard F. Erpelding which was a lien on all the property belonging to him; and that unless the amounts were sequestered and a receiver appointed to protect the interests of this intervener and her minor children arising out of the proposed divorce petition, said amounts would be dissipated and lost.

Josephine Erpelding was granted leave to file her petition in intervention over objections of Shirley D. Erpelding for the reason that the judgment was entered

July 2, 1962, which is a final judgment, and the petition in intervention was in effect an attempt to modify that judgment to diminish the judgment which was entered in her favor in that action. The court overruled this motion.

In the petition in intervention Josephine Erpelding alleged that she was married to Bernard F. Erpelding and has three minor children which were born of this marriage, and which are presently in her custody and control; that she brought an action in the district court for Buffalo County asking for an absolute divorce, the custody of the minor children, and for support and maintenance, including attorney's fees and costs; that the intervener has judgment for $100 a month support and maintenance, and $100 attorney's fees which are a lien on the property of Bernard F. Erpelding who has refused to make any payments adjudged against him on behalf of his first wife (Shirley Erpelding); and that unless his funds are sequestered and a receiver appointed for the same in this case such funds will be dissipated and the intervener will not be able to enforce a decree in her favor.

On January 29, 1963, hearing was had on the petition in intervention filed by Josephine Erpelding in the partition action. In support of her motion in intervention in the partition action Josephine Erpelding testified that she was married to Bernard F. Erpelding in February 1956. The evidence shows this marriage took place on February 2, 1957. She further testified that three children were born of this marriage, and there was one adopted child, all of which are minors; that she filed her divorce suit on January 7, 1963; that the petition alleged grounds for divorce and prayed for divorce, custody of the children, for an allowance of temporary alimony, suit money, and attorney's fees; and that on January 21, 1963, the trial court decreed that the defendant Bernard F. Erpelding pay into the clerk of the district court for Buffalo County $100 a month com-

mencing January 21, 1963, for the support of intervener and her minor children, that said payments should continue on the 21st day of each month thereafter until further order of the court, and that the defendant should pay, on the 21st day of January 1963, $100 for the benefit of intervener's attorneys for suit money and costs. This witness further testified that none of such sums had been paid; that there were no prospects for reconciliation; that she intended to proceed with her divorce suit; that she had been working for $10 a week at a motel; that she had been separated from her husband since December 21, 1962; and that she wanted funds due Bernard F. Erpelding applied to her judgment.

It was shown that Bernard F. Erpelding's share in the sale of the real estate in the partition action was $17,249.73.

The record shows that Shirley D. Erpelding, as plaintiff, filed an action for divorce against Bernard F.Erpelding on February 21, 1956. For convenience we will refer to Shirley D. Erpelding as Shirley and Bernard F. Erpelding as Bernard. Shirley was granted a divorce from Bernard on May 17, 1956. The six children of the parties were placed in St. Thomas Orphanage. On September 4, 1958, Shirley, in the divorce action, filed an application to modify the decree of divorce. On March 3, 1959, Bernard filed an answer to the application to modify the decree of divorce. On March 5, 1959, the court rendered judgment awarding Shirley the custody of the six minor children of the parties, with the right of Bernard to visit the children at all reasonable and proper times and to take the children to his home in the summer months, and the court reserved the matter of child support liability and made no order in reference thereto at that time. On October 30, 1959, judgment was entered awarding Shirley child support of $100 on November 15, 1959, $100 on December 15, 1959, and $125 a month until further order of the court or until said

children became self-supporting or arrived at the age of 21 years.

In March 1962, Shirley filed an application to require furnishing of security and for the appointment of a receiver, alleging that she was awarded a divorce on May 17, 1956; that the court on October 30, 1959, ordered Bernard to pay the clerk of the district court for Buffalo County, for the use and benefit of Shirley as support money for the six children of the parties, $100 on November 15, 1959, $100 on December 15, 1959, $125 on January 15, 1960, and $125 on the 15th day of each consecutive month thereafter until the further order of the court or until said children became self-supporting or arrived at the age of 21 years, and reserved the determination of liability with reference to future and accrued medical expenses of Ginger Erpelding; that Shirley had had the custody of the children since March 5, 1959; that Bernard had paid nothing to the support of the children since a date prior to May 17, 1956; that this case was the kind contemplated by section 42-323, R. R. S. 1943; and that Bernard was one of the heirs-at-law of Lawrence P. Erpelding whose estate was pending in the county court of Buffalo County, and consisted of both real and personal property. The prayer was that Bernard be required to furnish security for the payment of child support, and upon his failure to do so, a receiver be appointed to take the interest of Bernard in the estate of his father and to pay the accruing child support payments therefrom.

It appears that two of the minor children of the parties were killed in an accident.

On June 29, 1962, Bernard filed an answer and cross-petition to the above application wherein he admitted that Shirley was caring for the children and prayed that he be awarded custody of the four surviving children or, in the alternative, because of the changes of circumstances, that the child support payments be re-

duced in proportion to the number of surviving children to be supported.

Shirley filed an answer to the cross-petition of Bernard alleging that the $125 child support judgment was a compromise figure accepted by Shirley upon the assurance of Bernard that it was a figure he could and would pay, which he refused to do; and praying that the child support be increased to $250 a month.

On July 2, 1962, the matter came on for trial upon the application of Shirley praying that Bernard be required to furnish security for the payment of accruing child support installments and for the appointment of a receiver to take possession of Bernard's property in lieu of such security. It was agreed in open court by the respective parties and their attorneys that none of the child support ordered to be paid had been paid and that the interest of Bernard in the real estate inherited from his father's estate should be impounded as prayed by Shirley. The parties agreed that a partition action had been commenced wherein Bernard was a plaintiff and the other heirs-at-law were plaintiffs, which was pending, and which should be prosecuted to its conclusion and the proceeds of the interest of Bernard in and to the real estate be paid to the clerk of the district court and out of the same the accrued and accruing future child support payments should be made. The parties further agreed that Shirley should have leave to plead in the partition action; and that either party would be given leave, upon request, to reopen this case and to adduce further evidence as to the application of the proceeds of Bernard's interest in the real estate to the payment of future child support payments if the parties were unable to agree, in which event the court should have the power and jurisdiction to determine the issues in respect thereto. It was agreed that the execution sale held July 2, 1962, on a portion of the real estate be not confirmed. The same was vacated and set aside.

On January 29, 1963, the court, in a journal entry in

the partition action stated first that in the Shirley D. Erpelding case there was an application for modification of the decree of divorce with reference to child support also at that time filed and the court heard testimony. Shirley wanted to increase the amount due. Bernard desired to change the child support provisions. The court found that from that day forward, while there were four children where there were six in the previous order, the previous order should be changed to provide $31.25 for each child (each month) until said children reached the age of 18 years or were sooner emancipated. In the partition action the court found that distribution should be made of the $17,249.73 by the clerk of the district court in the following amounts: The sum of $4,825 to be paid Shirley for past-support payments; the sum of $500 should be released from the lien of all judgments and be made payable to Bernard; and the balance of said sum should be used to pay Shirley any payments due under the support order up to and including the day of distribution of the proceeds of Bernard's interest in the partition sale. Also, there should be paid out of said funds to intervener Josephine Erpelding for the support of four minor children of Josephine and Bernard under the temporary support order issued by the court, the sum of $31.25 per child that were due and payable as of the date of distribution. The court further found that a sum necessary to make the first year's payments under this order should be retained by the clerk of the district court and such payments should be made monthly as provided; and that the balance should be placed with the Guaranty Trust Company as trustee to invest in investments as provided by law for guardians to invest in. The court retained jurisdiction to make any further orders in this matter that would carry out the administrative details to put such order into effect, but stated that it should be final as to all other matters.

On January 31, 1963, Shirley filed a motion for new trial in the partition action, which was overruled.

At the hearing on the application of Shirley to modify the decree which occurred on July 2, 1962, and which is a part of the divorce case, Shirley testified that she lived at Canyonville, Oregon; that she was formerly the wife of Bernard and had custody of the children of the parties and had had since March 1959; that Richard was 13 years of age, Leonard 12, Ginger 8, and Gerald 7; that she ran a gift and flower shop; that she was not receiving and had not for some time received public assistance; that she paid $75 a month rent; that food for the children cost about $30 a week; that eggs were extra and cost about $15 a month; that utility bills varied from $25 to $30 a month; that the average cost of clothing was $25 a month; that her average medical bill for the children was about $10 a month; that at the beginning of the school year it cost approximately $200 to equip the children for the year; and that she had received no financial assistance from the father of the children at any time even though she has requested help and had asked the proper public authorities of Buffalo County to assist her in getting such support money, but had failed to obtain such assistance.

It appears from the record that Bernard has no personal property and the only manner in which he could pay child support would be from his interest in his father's estate.

Bernard testified that he was working and earning $80 a week; that when the child support order was entered in October 1959, he had had two children by his second wife, and that two other children had been born since; and that he did not pay child support because he did not have any money.

No further evidence was taken in this matter. It appears that the reason that no further evidence was taken was because the parties agreed at that time that the consent decree had been taken.

In the order entered by the court October 30, 1959, fixing the child support money to be paid Shirley at $100

a month for 2 months and $125 a month until the children became self-supporting or reached the age of 21 years, the court reserved for future determination the liability for medical expenses for one of the children upon application and notice. There was no appeal taken from this order and it became final.

It is evident that the order entered by the trial judge on January 29, 1963, was to apply to at least two different pending cases, one the divorce case of Shirley Erpelding against Bernard Erpelding, the other the partition action, which is this case. The mingling of orders in more than one case in the same journal entry, when the cases have not been properly consolidated is most confusing and is a practice that is not to be condoned. See Erpelding v. Erpelding, *ante* p. 266, 125 N. W. 2d 688.

The court granted leave to Josephine Erpelding to file a petition in intervention, and stated that the hearing held on January 29, 1963, was a continuation of the hearing which was previously held on July 2, 1962, in which testimony had already been received. Shirley's counsel stated that he would like to ask a question, and permission was granted by the court. Shirley's counsel stated that it was his impression that testimony was being taken in the partition action at that time, and the court answered that that was correct. Shirley's counsel stated that he was not aware that there was going to be any testimony taken except with reference to the propriety of the partition itself, and he wanted to be sure that they were not referring to the testimony taken in the divorce case. (Shirley D. Erpelding v. Bernard F. Erpelding.) The court stated that it believed that was correct. Shirley's counsel then made objection to the filing of the petition in intervention for the reason that the judgment entered July 2, 1962, was a final judgment, and the petition in intervention was in effect an attempt to modify that judgment to diminish the judgment that was entered in Shirley's favor

in that action. The court overruled the motion; retained jurisdiction to determine how the proceeds of the sale should be paid out and to determine what the future payments would be; and opened up the matter for the question of future payments only, not as to the lien that had ripened into a judgment. The court acknowledged that there was a lien for all unpaid support which was due then and would be due in the future. Josephine's counsel said: "Now, as I understand it, the court has made an order now permitting Josephine Erpelding, the petitioner here, to file a petition of intervention." The court replied: "That's correct."

Josephine Erpelding testified in the partition action that she was married to Bernard on February 2, 1956. However this is incorrect, as Bernard testified that it was February 2, 1957. She further testified that she had been earning about $10 a week working at a motel; and that she had been separated from Bernard since December 21, 1962.

A journal entry on Josephine's application for temporary alimony, support, maintenance, and attorney's fees, was offered in evidence, and it required Bernard to pay to the clerk of the district court $100 a month commencing January 21, 1963, for the support and maintenance of Josephine and her minor children, and to continue on the 21st day of each month thereafter until further order of the court, and required the payment of $100 attorney's fees and for suit money and costs, none of which sums had been paid.

Shirley assigns as error that the trial court erred in permitting Josephine Erpelding to intervene in the partition action; in amending a child support judgment in an entirely different case; in dissolving in part the child support judgment lien of Shirley upon the interest of Bernard in the real estate partitioned; and in requiring actual disbursement of the fund subject to Shirley's lien.

The argument in behalf of Shirley, who is the ap-

pellant herein, is to the effect that a child support judgment is a lien upon the real estate of the judgment debtor, both as to accrued and future installments, and can only be released by compliance with section 42-319, R. S. Supp., 1961, or section 42-323, R. R. S. 1943.

Section 42-319, R. S. Supp., 1961, provides in part: "(1) All judgments and orders for payment of alimony or of maintenance in actions of divorce or maintenance shall be liens upon property in like manner as in other actions, and may in the same manner be enforced and collected by executions and proceedings in aid thereof, or other action or process as other judgments. Whenever a child is committed to a parent or other person by order of the court and provision made by judgment or order for its maintenance, the parent or other person to whom the child is committed may execute a partial or total release of the judgment, either generally or upon specific property, upon obtaining approval thereof by the court that entered the judgment or order for support."

It is noted that by the above statute the parent or custodian of a child may execute a partial or total release of judgment upon obtaining approval of the court that entered the support judgment. Shirley, in this case, has not released the child support lien, nor has she asked the court for permission to do so.

Section 42-323, R. R. S. 1943, provides: "In all cases where alimony or other allowance shall be decreed for the wife or for the children, the court may require sufficient security to be given by the husband for the payment thereof, according to the terms of the decree. Upon the neglect or refusal of the husband to give such security, or upon his failure to pay such alimony or allowance, his real or personal estate may be sold as upon execution for the payment of any sums due upon such decree. In default of security for payment of installments in future to fall due, the court may also appoint a receiver to take charge of his real or personal estate,

or both, and hold the same, and the rents, issues, interests and profits thereof for security for the payment of installments in future falling due. Judgments and decrees for alimony or maintenance shall be liens upon the property of the husband, and may be enforced and collected in the same manner as other judgments of the court wherein they are rendered."

In Harrington v. Grieser, 154 Neb. 685, 48 N. W. 2d 753, the wife obtained a decree of divorce on November 1, 1945, and received the custody of two minor children. Her husband was to pay her alimony and child support according to an agreement entered into on September 20, 1945, which agreement was approved by the court. The parties owned certain real estate, and by agreement the wife gave the husband a quitclaim deed to this real estate dated November 1, 1945. The husband made application to have the decree modified so that the real estate he received under the terms of the settlement agreement of September 20, 1945, would be released from the lien of the monthly payments of alimony and child support, and alleged that it was understood that he was to get the property free of liens. By stipulation of August 7, 1946, the wife agreed to the court modifying its decree rendered November 1, 1945, so that the payments thereunder due for alimony and child support would not be a lien upon the real estate received by the husband pursuant to the settlement agreement, and the court made an order accordingly. The husband and his second wife conveyed the property to a third party on September 20, 1946. On December 1, 1949, the first wife levied an execution for the unpaid installments of alimony and child support and the subsequent purchaser of the property sought to enjoin the sheriff from selling the property on execution. This court decided that since the release of the support and child support lien was not in accordance with section 42-324, R. S. 1943, it was ineffective and the trial court had no power to enter the order releasing the property

from the alimony and child support lien. This court said: "Divorce and its incidents are matters of public concern over which the Legislature has authority. What policies to adopt concerning its regulation are for it to decide and are not for the courts.

"In this respect we have said of our power in that regard as follows: 'Jurisdiction of the court in matters relating to divorce and alimony is given by the statute, and every power exercised by the court with reference thereto must look for its source in the statute, or it does not exist.' Cizek v. Cizek, on rehearing, 69 Neb. 800, 99 N. W. 28." In conclusion this court said: "So tested we find that the court was without authority and did not have the power to enter the decree of August 8, 1946, insofar as it therein attempted to release this property from the lien for future payments of alimony and child support as ordered by the decree of November 1, 1945, and that its order doing so was void."

There are other cases cited holding that a child support judgment is a lien upon real estate of the judgment debtor in the county both as to accrued and future installments and can only be released by compliance with section 42-319, R. S. Supp., 1961, or section 42-323, R. R. S. 1943. See, McCord v. McCord, 128 Neb. 230, 258 N. W. 474; Lynch v. Rohan, 116 Neb. 820, 219 N. W. 239; Wharton v. Jackson, 107 Neb. 288, 185 N. W. 428.

The intervener, Josephine Erpelding, admits that the court cannot cut down or modify accrued child support payments. She argues that the court, under the following statutes, has the right to determine future child support payments.

The intervener cites section 42-324, R. R. S. 1943, which provides in part: "After a decree for alimony or other allowance for the wife and children, or either of them, and also after a decree for the appointment of trustees to receive and hold any property for the use of the wife or children, as before provided, the court, from time to time, on the petition of either of the parties

and hearing thereon, may revise and alter such decree respecting the amount of such alimony or allowance, or the payment thereof, and also respecting the appropriation and payment of the principal and income of the property so held in trust, and if the court shall find that it is to the best interests of the minor children affected by such decree, the court may revise and alter such decree respecting the priority of the lien, upon the real property of either party, or may revise and alter any portion of the decree for such alimony and allowance which is not yet due under the terms of such decree so as to subordinate the lien of such decree to the lien of mortgage, the terms of which are approved by the court."

Section 42-312, R. R. S. 1943, provides: "If the circumstances of the parties shall change, or it shall be to the best interests of the children, the court may afterwards from time to time on its own motion or on the petition of either parent revise or alter, to any extent, the decree so far as it concerns the care, custody and maintenance of the children or any of them."

The intervener cites cases supporting the above-cited statutes, such as Wassung v. Wassung, 136 Neb. 440, 286 N. W. 340; Sechser v. Sechser, 162 Neb. 486, 76 N. W. 2d 412; and Carlson v. Carlson, 135 Neb. 569, 283 N. W. 214.

We are in accord with the intervener's contention as to the law above set forth. However, the situation in the instant case is entirely different.

As before stated, when Shirley's application came on for trial, as reflected by the court's decree of July 2, 1962, it appears that this agreement was upon good and valid consideration. Shirley consented to have her execution sale put aside, relinquished her claim to the personal assets in the Lawrence P. Erpelding estate, permitted the sale upon partition of the real estate rather than by a receiver to be appointed by the court, and acquiesced in the appointment of the referee in parti-

tion, all of which was done in good faith and upon agreement that the money would be paid into court and applied to the payment of her judgment. The agreement between Shirley and Bernard was incorporated into the decree of the court and became final. As before stated, no appeal was taken from that decree nor any proceedings of any party asking that it be modified or changed.

The record discloses that Shirley followed section 42-323, R. R. S. 1943, and obtained a judgment, upon the consent of Bernard that the proceeds of his interest in his father's estate would be applied to the child support judgment as contemplated in said statute. This occurred on July 2, 1962.

It is obvious that the fund as ordered paid by the court would be insufficient to pay Shirley the full child support payments due her during the minority of the four minor children in her custody and care. There was due for past-support money for the children to Shirley the sum of $4,825 up to January 31, 1963.

It will be noted that by the order made by the court on January 29, 1963, in the partition action, the child support to Shirley was changed materially, that out of the proceeds of the sale of the real estate Bernard was awarded $500, and Josephine, the intervener in the partition action, was awarded a monthly allowance of $31.25 for each of the four minor children out of the same fund. All of this was done over Shirley's objections which were overruled.

We conclude that the lien of Shirley on Bernard's interest in his father's estate had previously attached and was preserved by the consent decree of July 2, 1962. The district court did not have jurisdiction to carve out a portion of this fund for the benefit of someone else in disregard of Shirley's lien, and had no authority to award Bernard $500 out of this fund.

In Kanouff v. Norton, 160 Neb. 593, 71 N. W. 2d 89, this court held: "A consent decree is usually treated as an agreement between the parties. It is accorded greater

force than ordinary judgments and ordinarily will not be modified over objection of one of the parties." See, also, Clark v. Charles, 55 Neb. 202, 75 N. W. 563; McArthur v. Thompson, 140 Neb. 408, 299 N. W. 519, 139 A. L. R. 413.

Under the circumstances as appear in the instant case, the order of January 29, 1963, made by the court in the partition action, should be vacated, and the entire proceeds of Bernard's interest in the real estate be preserved for Shirley's lien, which is a first lien, without credit to any party for any sums actually disbursed.

We hold that the judgment of the trial court should be reversed and the cause remanded with directions to render judgment in accordance with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

KENNETH M. SCHMAILZL ET AL., APPELLEES, V. STATE OF NEBRASKA, DEPARTMENT OF ROADS, APPELLANT.

126 N. W. 2d 821

Filed March 13, 1964. No. 35583.

1. **Eminent Domain.** The market value of land taken by condemnation proceedings is computable as of the time of the condemnation, which is deemed to be the date the petition for condemnation is filed.
2. ———. The actual appraisal of the property must be made near enough in point of time to furnish a test of the market value as of the date in question and is a matter within the sound discretion of the trial court.
3. **Eminent Domain: Evidence.** Whether or not evidence of a comparable sale is near enough in point of time to furnish a test of the present value is a matter within the sound discretion of the trial court.
4. ———: ———. An owner who has resided on and improved land, and testifies he knows its worth, is a competent witness on the question of value.
5. ———: ———. An owner, by virtue of the ownership relation, is qualified to give his estimate of the value of such property.

6. ———: ———. In condemnation actions, the weight and credibility of testimony of either lay or expert witnesses regarding the value of land taken is for the jury.
7. ———: ———. The matter of land values is not generally considered as a subject exclusively for experts, and one who has a reasonable familiarity with the property in question is usually competent to testify.
8. **Trial: Evidence.** Where on a trial an inspection of the premises in question is proper, but impracticable or impossible, a photographic view thereof is admissible.
9. ———: ———. The possibility that photographs might have a tendency to create sympathy in favor of one party should not render them inadmissible as proof of an issue on trial.

Appeal from the district court for Lancaster County: JOHN L. POLK, Judge. Affirmed.

Clarence A. H. Meyer, Attorney General, Harold S. Salter, Asa A. Christensen, Lyle C. Winkle, Richard L. Dunning, and William J. Orester, for appellant.

Ginsburg, Rosenberg & Ginsburg and Norman Krivosha, for appellees.

Heard before WHITE, C. J., CARTER, MESSMORE, YEAGER, SPENCER, BOSLAUGH, and BROWER, JJ.

SPENCER, J.

This is a condemnation action involving the entire taking of Lot 11, Block 5, North Lincoln Addition to the City of Lincoln, commonly described as 730 W Street, and all improvements thereon. The action was brought by the State of Nebraska, hereinafter referred to as State, to acquire the property for highway purposes involving the construction of a controlled-access highway to Interstate Highway No. 80. By the time of the trial the property had been incorporated into the interstate highway system of the state.

The owners of the property were Kenneth M. Schmailzl and Patricia M. Schmailzl, husband and wife, who will hereinafter be referred to as condemnees. The improvements on the property consisted of a seven-room

modern house and a garage. The lot was enclosed by a steel-wire and picket fence. W Street at this point was unpaved, but the street had been graveled by the condemnees. Eighth Street, which was the street to the east of the property, was paved.

The petition for condemnation was filed in the county court on March 6, 1962. The appraisers appointed by the county judge assessed the damages at $4,250. Condemnees appealed to the district court. The district court jury returned a verdict for $6,000 and the State has perfected this appeal from the judgment entered thereon.

The State alleges eight assignments of error which we condense to four, as follows: (1) The admission of the testimony of Kenneth King who appraised the property in July 1961; (2) the overruling of the objection of the State to the testimony by one of the owners of the property as to the purchase price and the cost of the materials used in making improvements; (3) the overruling of the objections on the part of the State to the testimony of one of the owners as to value; and (4) the admission in evidence of photographs of portions of the property.

Condemnee's chief witness as to value, other than condemnee Kenneth M. Schmailzl, who for convenience herein will be referred to as owner, was Kenneth King. Kenneth King at the time of the trial and at the time he made his appraisal was the secretary and loan appraiser for the Union Loan and Savings Association of Lincoln, Nebraska. He was a senior member of the Society of Residential Appraisers and had appraised in excess of 3,000 Lincoln residential properties. The State does not challenge his qualifications or that of the owner to give an opinion, but does challenge the competency and the relevancy of those opinions.

The condemnees in July 1961, secured a loan on the property involved herein from the Union Loan and Savings Association. Kenneth King appraised it for loan pur-

poses. During the course of his appraisal, he used a check list or appraisal form which was filled out by an associate who inspected the property with him. This sheet described the nature of the improvements on the property, and was admitted in evidence over the objection of the State. The property had been entirely destroyed by the time of the trial and the exhibit was properly received to describe the nature of the improvements on the premises.

Kenneth King testified that at the time of making the mortgage loan in July 1961, the property had a reasonable market value of $6,000, and the mortgage loan was based on that appraisal. It was his intention to be conservative and to appraise the property slightly under the sales market. He further testified that property values had shown a slight increase subsequent to the time of his loan appraisal. He saw the property after the date of the appraisal, and it was structurally the same on March 6, 1962, although at that time it was occupied by renters rather than the condemnees, who had purchased a new home with the proceeds of the loan. The property was the same except that the housekeeping wasn't as good as it had been. He further testified that in appraising property, he had available a list of all sales in the city and kept himself informed. He knew of no sales in the area that would cause him to change his opinion of the value. It was his personal opinion that the property was worth $6,000. As we read the record, the witness was amply qualified, and his opinion was premised on the market value and condition of the property on March 6, 1962, the day of the taking. The burden was on condemnees to prove the market value as of March 6, 1962. King's testimony meets that test.

The State produced two value witnesses, who placed a market value on the property of $4,000 and $4,100. One checked the property in September 1961, or 2 months after the King appraisal. The other did not see the property until approximately 1 month after the con-

demnation. It is apparent that the State would apply different criteria to the condemnees' witness than it would to its own. The State's appraisers, to determine their values, relied mainly on the sales of other properties, all but one of which were made in 1959, 1960, or 1961. All were prior to the appraisal made by condemnees' witness. The one which was not made prior was a sale approximately 1 month after the date of the condemnation. We see no need to discuss this evidence, but do observe that differences involved in the size of the lots, the location, and improvements suggest the possibility that the jury could readily have determined that none of the properties used by the State's appraisers were actually comparable sales.

The market value of land taken by condemnation proceedings is computable as of the time of the condemnation, which is deemed to be the date the petition for condemnation is filed. Platte Valley Public Power & Irr. Dist. v. Armstrong, 159 Neb. 609, 68 N. W. 2d 200. This does not mean the witnesses must have examined the property on that exact day. This would very rarely be the case. Even the appraisers appointed by the county judge in condemnation proceedings appraise the property on a day subsequent to the day for which the value is to be determined. The rule is that the actual appraisal must be made near enough in point of time to furnish a test of the market value as of the date in question, and is a matter within the sound discretion of the trial court. The same rule applies to comparable sales. It will be an extremely rare occasion when the dates correspond. Whether or not evidence of a comparable sale is near enough in point of time to furnish a test of the present value is a matter within the sound discretion of the trial court. See Timmons v. School Dist., 173 Neb. 574, 114 N. W. 2d 386. The trial court did not abuse its discretion in overruling the State's objection to the testimony of Kenneth King.

The owner was permitted, over objection, to testify to

the purchase price of the property 11 years previous to the condemnation and as to the improvements he had made on it subsequent to the purchase. The State contends this evidence was too remote to have probative value and was an abuse of the trial court's discretion. On the record herein, we cannot say that this was an abuse of discretion. It is true one of the State's witnesses testified conditions had changed, but there is evidence otherwise. The other expert witness called by the State testified that one of the factors considered by an appraiser is the price paid for property, and that he had made inquiry as to the purchase price on this particular property. He further testified that another factor considered by appraisers was the improvements made, and that improvements would have an influence, particularly if they lent some value to the real estate.

Our law is well settled that an owner who has resided on and improved land, and testifies he knows its worth, is a competent witness on the question of value. See Chicago, R. I. & P. Ry. Co. v. Buel, 56 Neb. 205, 76 N. W. 571. An owner, by virtue of the ownership relation, is qualified to give his estimate of the value of such property. See Johnson v. City of Lincoln, 174 Neb. 837, 120 N. W. 2d 297.

The owner testified that he had an opinion as to the fair and reasonable market value of the property as of March 6, 1962, and that value was $6,500. On cross-examination he admitted that he took into consideration in arriving at his opinion what he paid for the property and the cost of the improvements made, exclusive of labor. The factors considered by an owner do not affect his qualifications, but may affect the credibility of his testimony. In condemnation actions, the weight and credibility of testimony of either lay or expert witnesses regarding the value of land taken is for the jury. Connor v. State, 175 Neb. 140, 120 N. W. 2d 916.

The effect of the State's contention is to say that an owner will only be permitted to testify as to value when

he has in mind all of the elements upon which an opinion of value may properly be predicated. This would require him to have the qualifications of an expert witness to testify as to the value of his own property. We do not understand the law to require that the owner meet this strict test. The matter of values is not generally considered as a subject exclusively for experts, and one who has a reasonable familiarity with the property in question is usually competent to testify. See Wahlgren v. Loup River Public Power Dist., 139 Neb. 489, 297 N. W. 833. This, as suggested heretofore, is a matter for the sound discretion of the trial court.

No complaint is made that the jury was not properly instructed on the measure of damages. It was specifically told that the measure of compensation would be the fair and reasonable value of the property on the date of its taking, March 6, 1962. It was also told that fair and reasonable market value meant its actual value, "that is, the fair value of the property if offered for sale upon the open market as between one who is ready and willing to sell but is not compelled to sell, and one who is ready, able and willing to buy but is not required to buy."

The State assigns as error the introduction of certain family photographs, contending that their purpose was to arouse the sympathy of the jury. The photographs do show various members of the family of the owners, who had seven children, but each of them also shows some portion of the exterior or interior of the premises as it existed at the time of the condemnation. At the time of the trial, the improvements had been removed and the area incorporated into the highway system. It was, therefore, impossible to have the jury personally inspect the premises. The witnesses for the State tended to depreciate the effect of the improvements made on the value of the property and to disparage the suitability of the property for residential purposes. One of the witnesses testified, "the maintenance was below typical." The State also introduced several photographs of claimed

comparable sales without establishing similarity of situations. While the questioned photographs differ from those produced by the State in that they also picture members of the family of the owners, the purpose of their production is the same. The photographs show a livable home with a well-decorated interior suitable for a family residence. We said in Omaha Southern Ry. Co. v. Beeson, 36 Neb. 361, 54 N. W. 557: "Where on a trial an inspection of the premises in question is proper, but impracticable or impossible, a photographic view thereof is admissible."

The photographs offered, while taken for family purposes, did have probative value. Any notations on the back of the photographs, upon proper request, could have been adequately concealed from the jury. The information embraced in the only notation of which complaint is made was already in evidence, and could not be considered prejudicial error. The trial court did not abuse its discretion in admitting the photographs. They are within the ambit of the rule announced in Anderson v. Evans, 164 Neb. 599, 83 N. W. 2d 59: "The possibility that the photographs might have a tendency to create sympathy in favor of one party should not render them inadmissible as proof of an issue on the trial."

For the reasons given in this opinion, the judgment of the trial court is affirmed.

AFFIRMED.

CARTER, J., dissenting.

The condemnee in this case was permitted to testify, over objection, to the purchase price of the property more than 11 years prior to the commencement of the condemnation proceeding. The majority opinion holds that "we cannot say that this was an abuse of discretion." I dissent from this holding.

In a case where the measure of recovery is the market value of the property taken, the price paid for the property is wholly immaterial. It has no relation whatever to the market price of the property on the date of the

taking. Can it be said that the purchase price is material where it was purchased for little or nothing at a tax sale? Or during an economic period when values were depressed? Or if the property was acquired by prescription or accretion? On the other hand, can it be said that the purchase price is material when it was purchased at an exorbitant price and, for one reason or another, had become a "white elephant"? Or where it had been purchased at a high price for a special purpose which did materialize? The answers to these questions are obvious. The purchase price has no relation whatever to the market value at a subsequent time and the evidence should have been excluded as incompetent, irrelevant, and immaterial.

In the early case of Dietrichs v. Lincoln & Northwestern R. R. Co., 12 Neb. 225, 10 N. W. 718, this court said: "The price at which the lots in question were sold, according to the record read by counsel for the railroad company, was ridiculously small in 1877, but had it been the fair value of the lots then, that fact would furnish no criterion of their value in 1880, and the admission in evidence—substantially of the record, showing that the whole of the real property in question was once sold for a dollar and a half, was only calculated to belittle, and cast ridicule upon the claim of the claimant, and shed no intelligent light upon the question being tried." The opinion further stated: "The price at which such lots were sold but a few years ago would not furnish the slightest evidence of their market value now."

In Omaha Southern Ry. Co. v. Todd, 39 Neb. 818, 58 N. W. 289, this court said: "On the trial of an appeal from an award made by commissioners appointed to assess the damages sustained by a land-owner by reason of the appropriation of a part of his land for railroad purposes, evidence as to what such land-owner paid for the land is incompetent." See, also, Hamilton v. Allen, 86 Neb. 401, 125 N. W. 610, 28 L. R. A. N. S. 723; Raapke & Katz Co. v. Schmoller & Mueller Piano Co., 82 Neb.

716, 118 N. W. 652; Chicago, R. I. & P. Ry. Co. v. Griffith, 44 Neb. 690, 62 N. W. 868.

The foregoing holdings have never been departed from by this court so far as I have been able to determine. Their reasoning is sound, and in my judgment they should be adhered to. The rule is supported by the following cases from other jurisdictions. Levinson v. Commonwealth, 395 Pa. 613, 151 A. 2d 453; Ringer v. Wilkin, 32 Idaho 330, 183 P. 986; Martell v. Hall Oil Co., 36 Wyo. 166, 253 P. 862, 255 P. 3; Stanton v. St. Michell, 130 Wash. 449, 227 P. 737; Thompson v. Boydstun, 189 Okl. 530, 118 P. 2d 236.

There is a second reason why the evidence is inadmissible. The evidence was clearly too remote in point of time. Even in those jurisdictions which permit evidence of purchase price to be shown, the rule is limited. It must, among other limitations, have occurred relevantly in point of time. 5 Nichols on Eminent Domain (3rd ed.), § 21.2, p. 410. See, also, Raapke & Katz Co. v. Schmoller & Mueller Piano Co., *supra*.

The evidence as to the price paid for the property by the condemnee more than 11 years prior to the taking was incompetent, irrelevant, and immaterial, and the objection made thereto should have been sustained. The majority opinion summarily disposes of the matter by the bland statement that "we cannot say that this was an abuse of discretion." I submit that the trial court is not invested with discretion to admit incompetent, irrelevant, and immaterial evidence. In all my experience I have never even heard a contention for such a rule. I quite agree that the amount of damages sustained by a landowner in a condemnation proceeding is peculiarly of local nature to be determined by a jury. It is important, however, that such determination be made from competent, relevant, and material evidence, otherwise the verdict may be improperly influenced by evidence, not material, relevant, or competent, that tends to create a bias or prejudice for or against one of

the parties. I submit that the trial court erred in failing to sustain the objections to the evidence as to the amount paid for the property more than 11 years previous to the taking, and that the disposition of the question in the majority opinion is incorrect and is offensive to fundamental rules of evidence.

BROWER, J., concurs in this dissent.

SAMUEL W. MCCLARY ET AL., APPELLEES, V. COUNTY OF DODGE, APPELLANT.

126 N. W. 2d 849

Filed March 13, 1964. No. 35585.

1. **Eminent Domain: Drains.** In proceedings under Chapter 31, article 1, R. R. S. 1943, the apportionment of the cost of the ditch to each landowner is an exercise of the power to tax, but the taking of his property and the ascertainment of the damages he may suffer thereby is an exercise of the power of eminent domain.
2. **Counties: Drains.** Special assessments cannot be enforced solely upon the ground that the property involved received special benefits. The right to levy and enforce special assessments for the construction of public improvements depends upon strict compliance with the procedures prescribed by statute.
3. ———: ———. A special assessment levied under Chapter 31, article 1, R. R. S. 1943, which has been paid and is later adjudged to be void may be recovered from the county under section 77-1736.04, R. R. S. 1943.
4. **Counties: Interest.** A county is not liable for interest on claims filed under section 77-1736.04, R. R. S. 1943, prior to judgment.

Appeal from the district court for Dodge County: FAY H. POLLOCK, Judge. Affirmed as modified.

A. C. Sidner, for appellants.

Richards, Yost & Schafersman, for appellee.

Heard before WHITE, C. J., CARTER, MESSMORE, YEAGER, SPENCER, BOSLAUGH, and BROWER, JJ.

BOSLAUGH, J.

This is an action to recover a void special assessment levied in connection with the construction of a drainage project in Dodge County, Nebraska, known as the Rawhide Ditch project, under Chapter 31, article 1, R. R. S. 1943.

The plaintiffs own a 124-acre tract of land in Dodge County. In order to construct the drainage project, Dodge County paid the plaintiffs $3,045 for an 80-foot right-of-way across the plaintiffs' land. The amount paid represented damages for 2.24 acres taken for the easement and severance damages to 6.46 acres.

After the drainage project had been completed a special assessment in the amount of $1,989.39 was levied against the plaintiffs' property. In subsequent litigation all of the special assessments levied were adjudged to be void. The county board then attempted to reassess the property benefited by the construction of the drainage project and a special assessment in the amount of $1,989.39 was again levied against the plaintiffs' property. The plaintiffs paid this assessment to the county treasurer on September 21, 1957. Thereafter, the special assessments levied pursuant to the reassessment were adjudged to be void, and that judgment was affirmed by this court. Shanahan v. Johnson, 170 Neb. 399, 102 N. W. 2d 858.

On May 17, 1960, and within 30 days after the entry of the final judgment declaring the assessment void, the plaintiffs filed a claim with the county board for a refund of the assessment. The claim was filed under section 77-1736.04, R. R. S. 1943, which provides in part as follows: "That if, by judgment or final order of any court of competent jurisdiction in this state, in an action not pending on appeal or error it has been or shall be adjudged and determined that any taxes or assessment or any part thereof was illegal and such judgment or order has not been made or shall not be made in time to prevent the collection or payment of such tax

or assessment, then such tax or assessment or such part thereof as shall, at the time of such final judgment or order, be then unexpended and in the possession of the officer collecting the same, the same shall be repaid and refunded to the person paying such tax or assessment by the officer having the same in his possession. Where the levy or assessment so declared illegal is applicable either throughout the state or in taxing districts beyond the geographic jurisdiction of the court making such declaration of illegality then, for the purpose of this section, a judgment or final order shall mean a judgment or final order of the Supreme Court. If the tax or assessment has been distributed by the collecting officer, then the person claiming a refund shall file a claim with the county board for such refund within thirty days after the final judgment is entered declaring such taxes as illegal or within thirty days after June 15, 1955, whichever is the later. If such refund is found to be legal and valid, the county board shall certify the claim to the collecting officer, who shall pay the same from funds in his possession belonging to the taxing districts to the extent that such taxing districts profited from the overpayment of taxes by the claimant; * * *."

The plaintiffs' claim for a refund of the assessment was disallowed and the plaintiffs then perfected an appeal to the district court. The district court sustained the plaintiffs' motion for summary judgment. The defendant county appeals from that judgment.

The principal assignments of error relate to the contention of the defendant that it is entitled to set off the damages paid to the plaintiffs against the claim for a refund of the special assessment and that the plaintiffs are not entitled to a judgment against the county for the amount of the special assessment.

The defendant's contention that it is entitled to set off the amount of the damages paid to the plaintiffs against their claim for a refund of the assessment is based upon a theory that the plaintiffs "profited" from

the construction of the project because the amount of damages paid to them exceeded the amount of the special assessment. The theory ignores the difference between damages and special benefits resulting from the construction of such an improvement.

The distinction between the damages that the plaintiffs sustained and the special benefits which resulted from the construction of the drainage project was pointed out in Gutschow v. Washington County, 74 Neb. 794, 105 N. W. 548, in which this court said: "The apportionment of the cost of the ditch to each landowner is an exercise of the power to tax, but the taking of his property and the ascertainment of the damages he may suffer thereby is an exercise of the power of eminent domain. The statute makes no provision for the deduction of damages from the amount assessed against the land as special benefits, but the method provided is that the county authorities shall establish the apportionment according to benefits first, and afterwards examine claims for damages and allow compensation therefor. No method is provided for offsetting one against the other."

The plaintiffs' right to damages does not in any way depend upon whether their land was benefited by the drainage project. The right to damages exists because the defendant acquired an easement across their property. As a consequence thereof, the plaintiffs were entitled to recover their damages from the defendant. Morris v. Washington County, 72 Neb. 174, 100 N. W. 144. The right to damages and the amount thereof were determined before this action was commenced and are not an issue in this case.

The construction of the drainage project resulted in special benefits to the plaintiffs' land. The fact that special benefits did accrue, or the amount thereof, is not an issue in this case, but special assessments cannot be enforced solely upon the ground that the property involved received special benefits. Cullingham v. City

of Omaha, 143 Neb. 744, 10 N. W. 2d 615; Harmon v. City of Omaha, 53 Neb. 164, 73 N. W. 671. The right to levy and enforce special assessments for the construction of public improvements depends upon strict compliance with the procedures prescribed by statute. The failure of the county board to follow the prescribed statutory procedure resulted in the adjudication that the special assessment levied against the plaintiffs' property is void. If the special assessments were unpaid they could not be collected. The special assessments which have been paid may be recovered under section 77-1736.04, R. R. S. 1943.

The defendant's contention that the plaintiffs are not entitled to recover the amount of the special assessment from the county is based upon the theory that the county, as distinguished from the county board, has no responsibility in regard to drainage projects constructed under Chapter 31, article 1, R. R. S. 1943. The defendant relies upon Thompson v. Colfax County, 106 Neb. 351, 183 N. W. 571, and Hopper v. Douglas County, 75 Neb. 329, 106 N. W. 330. These cases hold that a county is not liable for the negligence of its officers and employees in the absence of a statute providing otherwise. The rule has no application in this case.

The opinion in the Thompson case contains a statement to the effect that a county board executing a contract for the construction of a drainage project under Chapter 31, article 1, R. R. S. 1943, acts as trustee for the person whose property is chargeable with the cost of the work, and not for the county. A similar statement appears in the opinion in McDonald & Penfield v. Dodge County, 41 Neb. 905, 60 N. W. 366, in which it was said that when a county executes a contract for a drainage ditch under this statute, it is not the party in interest but that it acts in the nature of a trustee for the persons whose property is chargeable with the cost of the work in hand.

So far as this case is concerned, it is not important

to determine the capacity in which the county acts when it collects and receives a void special assessment. A special assessment which was void has been paid, and the Legislature has provided the remedy by which the taxpayer may recover it. The purpose of the special assessment was to reimburse the county for the money expended in the construction of the improvement. Gutschow v. Washington County, *supra*. Since the county had no right to collect the special assessment, the county must refund it.

An important fact here is that all proceedings under Chapter 31, article 1, R. R. S. 1943, are conducted by the county. There is no drainage district that is a separate legal entity in such proceedings. The county is the only governmental or political subdivision which constructs drainage improvements under this statute. Consequently, the county is the taxing district involved within the meaning of section 77-1736.04, R. R. S. 1943.

The statute itself contemplates that invalid special assessments shall be recovered from the county. Section 31-124, R. R. S. 1943, provides that in the event of error or irregularity in the proceedings, the assessment shall be paid to the county treasurer and the "amount so paid may be recovered from the county in an action brought for that purpose in case such injunction is made perpetual." See, also, Loup River Public Power Dist. v. County of Platte, 144 Neb. 600, 14 N. W. 2d 210.

The fact that the funds received from the collection of the void special assessments have been expended is not a defense to an action to recover the amount of the assessment. To hold otherwise would defeat the purpose of section 77-1736.04, R. R. S. 1943, and permit the county to have the benefit of the void assessment.

The County Budget Act has no application to a claim filed under section 77-1736.04, R. R. S. 1943. See, § 23-903, R. R. S. 1943; 20 C. J. S., Counties, § 235, p. 1117.

The judgment entered by the trial court included in-

terest at 6 percent from May 7, 1960. The county is not liable for interest prior to judgment. See, § 23-1602, R. R. S. 1943; Central Bridge & Constr. Co. v. Saunders County, 106 Neb. 484, 184 N. W. 220.

The judgment of the district court is modified to provide for the allowance of interest at 6 percent from May 23, 1963, and is affirmed as modified.

AFFIRMED AS MODIFIED.

VIOLETTE A. ZUROSKI, APPELLEE, V. ESTATE OF W. R. STRICKLAND, DECEASED, APPELLANT.

126 N. W. 2d 888

Filed March 13, 1964. No. 35586.

1. **Landlord and Tenant.** The word "repair" means to restore to a sound or good state after decay, injury, dilapidation, or partial destruction.
2. **Landlord and Tenant: Torts.** A lessor is liable for personal injuries to the tenant, or a member of his family, caused by a dangerous condition on the premises resulting from a failure to use reasonable care to make repairs in accordance with a covenant to repair where the lessor has been notified of the needed repairs.

Appeal from the district court for Douglas County: ROBERT L. SMITH, Judge. Affirmed.

Doerr & Doerr, for appellant.

Schrempp, Lathrop & Rosenthal, for appellee.

Heard before WHITE, C. J., CARTER, MESSMORE, YEAGER, SPENCER, BOSLAUGH, and BROWER, JJ.

BOSLAUGH, J.

This is an action for damages brought by Violette A. Zuroski, the plaintiff, against W. R. Strickland. Strickland died during the pendency of the action and it was revived against The Omaha National Bank of Omaha, Nebraska, as executor of the estate of W. R. Strickland, deceased.

The jury returned a verdict in favor of the plaintiff in the amount of $4,500. The defendant's motion for judgment notwithstanding the verdict was overruled and it has appealed.

The record shows that on February 15, 1952, the plaintiff and her husband entered into an oral lease with Strickland for a residence property located at 4112 LaFayette Avenue in Omaha, Nebraska. The plaintiff produced evidence that as a part of the lease agreement Strickland agreed to take care of the repairs on the premises; that sometime in 1959 the guttering and downspout near the back door of the house became defective and allowed water to fall from the roof and collect on the concrete walk immediately outside of the rear door of the house; that Strickland was notified that the downspout was defective and needed repair but that the repairs were not made; that on February 11, 1961, water from melting snow and ice on the roof of the house had collected on the walk outside the rear door of the house and ice had formed; and that the plaintiff was injured when she slipped and fell on the ice when she stepped out of the rear door of the house.

The defendant's assignments of error relate to the sufficiency of the evidence to sustain the verdict and whether a lessor is liable for damages for personal injuries resulting from the breach of a covenant to repair.

The defendant contends that the evidence failed to show that Strickland agreed to make the repairs to the premises, that he failed to keep the premises in repair, and that the failure to repair was a proximate cause of the plaintiff's injuries.

The word "repair" means to restore to a sound or good state after decay, injury, dilapidation, or partial destruction. Quist v. Duda, 159 Neb. 393, 67 N. W. 2d 481. There was direct evidence that Strickland agreed to "take care of all the repair work on the house"; that repairs which were made on the premises were made at the direction of Strickland and at his expense; that the downspout

leading from the roof above the rear door of the house had fallen down and that water coming from the roof was discharged directly onto the walk outside of the rear door of the house; that Strickland had been notified of the defective condition of the downspout on a number of occasions but no repairs had been made; that at the time of the accident water was dripping down from the roof in front of the doorway and ice had formed on the walk; and that the plaintiff fell on the ice as she stepped out of the back door of the house.

The defendant argues that the evidence as to proximate cause is insufficient because the ice near the rear door might have been formed in part from water draining from other areas. There was evidence that on the day of the accident there was snow and ice in other places on the ground around the house, but there was no evidence that water drained from these areas toward the back door and collected on the walk outside the rear door. As we view the record, the jury could find that ice had formed near the rear door of the house as the result of the defective guttering and downspout.

The remaining question is whether a lessor is liable for personal injuries which result from the breach of a covenant to repair. The authorities disagree as to whether a lessor can be held liable for personal injuries under such circumstances.

In Fried v. Buhrmann, 128 Neb. 590, 259 N. W. 512, a lessor was held liable when the stand upon which a gas plate rested collapsed and spilled hot water upon a child of the tenant. In that case the lessor had warranted that the furniture was safe and had agreed to keep it in repair. This court held that where a lessor leases a furnished apartment, warrants the safety of the furniture, and agrees to keep it in repair, it fixes his duty and he is liable to members of the tenant's family for injuries resulting from his negligence in failing to perform this duty.

In several subsequent cases this court has indicated

that it did not consider the Fried case to be decisive of the question which we are now considering and that the question had not yet been determined in this jurisdiction. See, Van Avery v. Platte Valley Land & Investment Co., 133 Neb. 314, 275 N. W. 288; Quist v. Duda, *supra;* Sipprell v. Merner Motors, 164 Neb. 447, 82 N. W. 2d 648.

Although a majority of the early cases appears to have adopted the rule that the lessor cannot be held liable, it has been suggested that there is a modern trend toward the view that the breach of a lessor's agreement to make repairs constitutes a ground of liability for personal injuries suffered by the lessee or one of his family, and that the decisions appear to be about equally divided on the question. See Annotations, 78 A. L. R. 2d 1238 and 163 A. L. R. 300. In at least one jurisdiction an earlier case which adopted the rule of nonliability has been overruled. See Williams v. Davis, 188 Kan. 385, 362 P. 2d 641.

As was pointed out in the Van Avery case, the American Law Institute adopted the view that the landlord is liable. Restatement, Torts, § 357, p. 967, provides as follows:

"A lessor of land is subject to liability for bodily harm caused to his lessee and others upon the land with the consent of the lessee or his sub-lessee by a condition of disrepair existing before or arising after the lessee has taken possession, if

"(a) the lessor, as such, has agreed by a covenant in the lease or otherwise, to keep the land in repair, and

"(b) the disrepair creates an unreasonable risk to persons upon the land which the performance of the lessor's agreement would have prevented." The rule as stated is qualified under the heading of "Comment: * * * Nature of lessor's duty:" in part as follows: "Since the duty arises out of the existence of the contract to repair, the contract defines the extent of the duty. Unless the contract stipulates that the lessor shall inspect

the premises to ascertain the need of repairs, a contract to keep the interior in safe condition subjects the lessor to liability if, but only if, reasonable care is not exercised after the lessee has given him notice of the need of repairs."

It is our opinion that the rule as stated in the Restatement is the better view and it is the rule which we adopt as the law of this state. The reasoning which supported the decision in the Fried case supports the decision which we have reached in this case.

The judgment of the district court is affirmed.

AFFIRMED.

BROWER, J., dissenting.

I find I am unable to agree with the opinion of the court in this cause and must respectfully dissent. The evidence disclosed by the record is correctly summarized in the opinion of the court and with that I am in full accord.

I do not agree however with the rule of law applied to those facts. The opinion sets out the division of authority that exists among the courts of last resort with respect to the law. No good purpose would be served by citing the great number of cases that agree with the views hereinafter stated. It must be conceded that there are numerous authorities supporting the opinion of the court. It might not be remiss however to state that a study of the annotations cited by the court in 78 A. L. R. 2d 1238 and 163 A. L. R. 300, indicates that the majority of the courts still adhere to the opinion expressed herein. This in spite of the statements of the writers of the annotations that the authorities are about evenly divided. Neither am I impressed with the statements of the writers of the annotations that the trend appears to favor the rule adopted by the court in its second syllabus. This undoubtedly is true, as once practically all of the decisions were that a landlord who breaches his covenant or promise to make repairs is not

thereby liable in tort for personal injuries to the tenant, or one in privity with the latter, caused by a condition which the landlord neglected to remedy. Whatever breaking away from this rule there is would consequently be a trend.

To my mind the reasoning back of what I consider to be the majority rule was sound and still is. I will cite some of those cases only to illustrate that reasoning. In Jordan v. Miller (1919), 179 N. C. 73, 101 S. E. 550, the court recognized the rule that where a lessor contracts to keep the premises in repair, his breach of such promise will not ordinarily entitle the tenant, his family, servants, or guests personally injured from a defect therein, existing because of the negligence of the landlord in failing to comply with his agreement to repair, to recover indemnity for such injury, whether in contract or tort, since such damages are too remote, and cannot be said to be fairly within the contemplation of the parties.

In Spinks v. Asp, 192 Ky. 550, 234 S. W. 14, the court in its opinion stated: "The mere breach of contract by the landlord to make the repairs of a tenement does not entail upon the landlord all the consequences which might flow directly and indirectly from such failure any more than the failure of any other obligee in a contract to perform his undertaking. If one promise to pay a given sum of money at a given time and fails to make such payment, the payee may have an action for the sum due, but not for the loss which the payee suffered by reason of not having the money with which to make investments which offered large gains, because such consequences were not reasonably in contemplation of the parties to the contract at the time it was made and are entirely too remote and conjectural to be the basis of an action at law. So in a contract between a landlord and tenant, the agreement to make repairs of a defect in a floor, as in the instant case, can entail upon the landlord no consequences which do not naturally and proximately

flow from a breach of contract independently of the tort which resulted in personal injury, if any there be."

This to my mind is still sound. I do not think a landlord who agrees to keep the premises in repair contemplates or realizes that if requested repairs are not promptly made he will be made responsible for any accident or injury occasioned by them not being furnished. Furthermore to my mind the tenant is not at the time of the agreement to repair conscious of any such implication and will be surprised at his good fortune when the doctrine of this decision is explained to him after he, his family, or friends slip, trip, or fall.

Theoretically of course in a tort action the landlord might establish the affirmative defense of contributory negligence under our comparative negligence statute or perhaps of assumption of the risk and thus escape liability. As a practical matter however the mishap arises generally in his absence. Responsibility occurs not by any act of commission on his part. He has little access to the demised premises and any such asserted defense can be proved generally speaking only by testimony or admissions, if any, of the tenant or his privies. As a practical matter he is a little less liable than an insurer though he never had consciously assumed any such obligation.

A leasehold tenure of any length will sooner or later run into some feature of disrepair which in fairness has to be assumed by the landlord. Sooner or later a situation will arise where previous actions can be said to establish or at least indicate an agreement to make such repairs.

In Jacobson v. Leventhal (1930), 128 Me. 424, 148 A. 281, 68 A. L. R. 1192, the court stated: "The defendant's position is supported by what we deem the better judicial authority.

"If the lessor contracts to repair premises in the possession and under the control of his tenant, his liability is no greater or different than would be the liability of a

third party, e.g., a carpenter or other mechanic who contracts to make such repairs.

"That this is the rule prevailing in many jurisdictions is not questioned by the plaintiff's learned counsel, but he argues that by a series of decisions and dicta the court of Maine shows or indicates a disagreement with such rule. * * *

"These quoted passages cannot be objected to as unsound, but there is nothing in them nor in the cases cited indicating that a lessor who contracts to repair leased premises and thus becomes charged with the contractual duty, if he breaks the contract, is liable in tort for negligence."

It is to be hoped the court will not hereafter hold that a carpenter who does not timely perform his contract will be liable in tort for an accident occasioned by his delay. As far as a landlord is concerned he had better in the future have a written lease with his tenant requiring the tenant to make the repairs and thereafter hold to it.

It has long been the rule in this state that a tenant may not refuse to pay rent and keep possession of the leased premises, even where the landlord has failed to make repairs in accordance with the lease agreement. The principle is that the tenant by retaining possession after the lessor's breach has waived the breach and accepts the premises as they are. In other words, the only remedy of the tenant is to declare a breach and move off of the leased premises. I can see no difference in principle in the instant case. If the tenant, after a breach of the lease by the landlord in failing to make repairs, continues in possession he in effect waives the breach and accepts the premises as they are for the rent charged. It appears to me that the present opinion creates a liability which is inconsistent with the last holding previously existing on the subject. Consistent with the foregoing is our holding in Roberts v. Rogers, 129 Neb. 298, 261 N. W. 354, that a lessor is not bound to remove obvious sources of danger; as to these the

tenant assumes the risk. Even where the lessor contracted to make repairs and had notice of the defect as in the instant case, it would appear that the tenant who remains in the premises after the defect was known to him assumes the risk, and has no action in tort against the lessor for injuries arising therefrom. I submit that if a tenant cannot retain possession and enforce the contractual provisions of his lease, there is no basis for a holding that he can retain possession and sue in tort for damages resulting from the landlord's breach of the lease in failing to make repairs.

CARTER, J., authorizes me to state that he concurs in this dissent.

STATE OF NEBRASKA, APPELLEE, V. HERMAN R. JUNGCLAUS, APPELLANT.

126 N. W. 2d 858

Filed March 13, 1964. No. 35594.

1. **Obscenity.** Obscene material within the meaning of section 28-926.07, R. S. Supp., 1961, is material which deals with nudity, sex, or excretion in a manner appealing to prurient interest.
2. ———. The proper standard for judging obscenity is whether to the average person, applying contemporary community standards, the dominant theme of the material, taken as a whole, appeals to prurient interest.
3. ———. Prurient interest as defined by section 28-926.07, R. S. Supp., 1961, is such as to excite lustful thoughts or a shameful or morbid interest in nudity, sex, or excretion which goes substantially beyond the customary limits of candor.
4. ———. Possession of obscene material for the purpose of sale may properly be inferred by the jury from the conduct of the defendant and all the facts and circumstances in evidence.
5. **Criminal Law: Evidence.** The intent with which an act is done is purely a mental process and difficult to establish by direct proof. It is generally a conclusion that must be drawn after a consideration of the actions of the defendant viewed in the light of the surrounding circumstances.

6. **Obscenity: Evidence.** An offer in evidence of other materials in the possession of defendant for the purpose of sale, whether obscene or not, is not properly admissible as evidence by the defendant in a prosecution for possessing obscene materials for the purpose of sale.
7. **Obscenity: Trial.** Where obscene materials are offered for sale in a store owned by a corporation, it is not error in a prosecution against the operator of the store to instruct that an aider and abettor may be punished as if he were a principal offender.
8. ———: ———. An instruction that at least one of the materials charged as obscene must be proven to have been obscene and possessed for the purpose of sale in order to sustain a conviction is a correct statement of the law.
9. ———: ———. The words "average person," contained in section 28-926.07, R. S. Supp., 1961, are words of common meaning which need not be further defined in the court's instructions.
10. **Criminal Law: Trial.** Where a county attorney is called as a witness by the defense, he may properly interpose objections to questions propounded to him by defense counsel.
11. **Criminal Law: Costs.** In a criminal action no costs can be assessed against a defendant except where authorized by statute.
12. ———: ———. The pay, expenses, and mileage of jurors are not authorized by statute to be taxed as costs, and an order of the trial court to that effect is erroneous.

Appeal from the district court for Hall County: DONALD H. WEAVER, Judge. Affirmed as modified.

Gerald B. Buechler, for appellant.

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

Heard before WHITE, C. J., CARTER, MESSMORE, YEAGER, SPENCER, BOSLAUGH, and BROWER, JJ.

CARTER, J.

The defendant was convicted on two counts of the violation of the obscenity statutes of this state. The trial court imposed a fine of $250 on the first count and sentenced the defendant to serve 3 months in the county jail of Hall County on the second count. The defendant has appealed.

It is charged in Count 1 of the information that the

defendant did on or about April 4, 1963, in Hall County, Nebraska, unlawfully and willfully have in his possession, with the intent to sell, certain obscene, lewd, indecent, and lascivious books, pamphlets, papers, and photographs, to wit, certain magazines containing photographs of nude males and females, contrary to section 28-921, R. S. Supp., 1961. It is charged by Count 2 that defendant on the same date and place did unlawfully and willfully have in his possession for sale certain recordings and transcriptions used or intended to be used for producing or reproducing lewd and obscene songs, ballads, and other spoken and sung words, to wit, recordings identified by the following titles: "Stag Party Special Preview," "Wild Service Songs Preview," "Wild Party Songs Preview," "Nights of Love in Lesbos," "Erotica," "A Night in Bedlam," "Bert Henry in the Raw," and "The Erotic Delights of Lady C," contrary to section 28-920.01, R. S. Supp., 1961.

It is provided by section 28-926.07, R. S. Supp., 1961, that "the standard for judging obscenity to be applied as a guide by finders of fact in considering the evidence is whether to the average person the dominant theme of said material or conduct which is at issue in such civil or criminal proceedings, taken as a whole, appeals to the prurient interest, which is to excite lustful thoughts, or a shameful or morbid interest in nudity, sex, or excretion which goes substantially beyond the customary limits of candor."

The standard for judging obscenity as set forth in section 28-926.07, R. S. Supp., 1961, is a proper one. In Roth v. United States, 354 U. S. 476, 77 S. Ct. 1304, 1 L. Ed. 2d 1498, the court held in substance as follows: It is vital that the standards for judging obscenity safeguard the protection of freedom of speech and press for material which does not treat sex in a manner appealing to prurient interest. Sex and obscenity are not synonymous. Obscene material is material which deals with sex in a manner appealing to prurient interest,

that is, material having a tendency to excite lustful thoughts. The standard for judging obscenity, adequate to withstand the charge of constitutional infirmity, is whether, to the average person, applying contemporary community standards, the dominant theme of the material, taken as a whole, appeals to prurient interest. The foregoing holdings of the Supreme Court of the United States appear to have put to rest any question as to the correctness of the standards prescribed by section 28-926.07, R. S. Supp., 1961.

The evidence in this case shows that on April 4, 1963, the sheriff of Hall County, armed with a search warrant, searched the Target Grocery for obscene literature and materials. He was accompanied by two police officers of the city of Grand Island, the county attorney of Hall County, and the deputy county attorney. The defendant was in sole charge of the store at the time. The law enforcement officers examined the contents of a magazine rack situated in the store, a number of magazines kept in a cardboard box near the cash register, and a number of phonograph records sealed in their jackets which were displayed in boxes in the main part of the store. The officers took with them a part of the magazines and all of the phonograph records found on the premises. The materials taken are the basis of the prosecution in the instant case.

We have examined the magazines found in the Target Grocery. From cover to cover they are filled with photographs of nude persons, mostly females. The covers, front and back, likewise carry the photographs of nude women - a fact which indicates their contents and belies any statement by a possessor that their contents were unknown. The phonograph records, which were played in the presence of the jury, have been examined as to their content by this court. An expert witness testified that, in his opinion, the magazines and records, or some of each, convey to the average person the dominant theme, taken as a whole, which appeals

to the prurient interest, which is to excite lustful thoughts, or a shameful or morbid interest in nudity, sex, or excretion which goes substantially beyond the customary limits of candor. The testimony of the expert witness is authorized by section 28-926.08, R. S. Supp., 1961. After a consideration of the evidence, we conclude that it was ample to sustain the finding of the jury that the materials offered in evidence by the State were obscene.

Defendant contends that the evidence of possession for the purpose of sale is insufficient. The evidence shows that the Target Grocery was owned by Jungclaus Enterprises, Inc. At the time the search was made, defendant was in sole charge of the store. There is evidence that defendant was its manager and operator. When the sheriff served the search warrant, defendant was wearing a coat and apron commonly used by those engaged in the operation of a grocery store. There is no evidence that defendant was not engaged in its operation. The offending material was displayed in the store, some on a rack and some in cardboard boxes near the cash register. Several copies of each magazine were found, a clear indication that they were displayed for purposes of sale. From this evidence the jury could properly infer, as it did, that defendant was in possession of the obscene magazines for purposes of sale. The phonograph records were kept in a convenient place among other merchandise that was for sale. It is hardly conceivable that a person could be in possession of personal property without having some kind of custody or control over it, or could have it in his custody without some character of control or possession, or in his control without some measure of custody or possession. Phillips v. State, 154 Neb. 790, 49 N. W. 2d 698.

Closely associated with the question of possession is the question of intent. The defendant asserts that the proof as to the intent to sell obscene materials is insufficient to sustain a conviction. A seller of magazines

and phonograph records is ordinarily presumed to know what he is offering for sale, although it is not universally so. The operator of a book store, for instance, would not be presumed to know of every isolated obscene statement in the hundreds of books that he has for sale. But in a situation, as here, where the covers of the magazines, front and back, are occupied with pictures of nude women in various poses, it can hardly be said that the jury could not infer knowledge of their contents by the defendant and an intent to sell obscene materials.

With reference to the phonograph records, the defendant testified that he had never heard them played except in the courtroom at the trial. The denial of knowledge by the defendant of their contents is not a controlling factor. If it were, a prosecution of a violator of the statute would be well nigh impossible. The phonograph records were in covering jackets. The descriptive words on the jackets indicated clearly what their content is. They were put there for the purpose of indicating the nature of the contents to induce their sale to those who desired to purchase the dirt, filth, and sexual muck contained in them. The jury could properly infer from the evidence the intent of the defendant to engage in the sale of obscene phonograph records.

In State v. Brown, 174 Neb. 393, 118 N. W. 2d 332, this court said: "The law does not require independent evidence of the specific intent required. Krchnavy v. State, 43 Neb. 337, 61 N. W. 628. The intent with which an act is done is purely a mental process and difficult to establish by direct proof. It is generally a conclusion that must be drawn after a consideration of the actions of the defendant viewed in the light of all surrounding circumstances. Hoffman v. State, 164 Neb. 679, 83 N. W. 2d 357. Intent may be inferred from the nature of the act itself and the circumstances surrounding it. Young v. State, 127 Neb. 719, 256 N. W. 908." The evidence was clearly sufficient for the jury to infer that

defendant knowingly had obscene materials in his possession for the purpose of sale.

Defendant complains of the rulings of the trial court refusing to admit into evidence many magazines offered by him. The evidence shows that the law enforcement officers in carrying out their search selected but a few of the magazines which were in the store which were subsequently used as a basis of the charge filed in the instant case. It appears to be the argument of defense counsel that since the law enforcement officers, particularly the county attorney, selected and confiscated but a few of the magazines found, that those not taken were thereby legally declared not to be obscene. From this it is argued that since some of those not taken were as bad or worse than those taken, that those taken, for some reason beyond our comprehension, became freed of the charge of obscenity. We point out that defendant was charged with having obscene materials in his possession for the purpose of sale. The magazines were brought forth and offered in evidence against him. The question before the jury was whether or not the charge was true, that is, whether or not the magazines offered in evidence by the State were in fact obscene within the meaning of the charging statutes. Whether or not defendant had other magazines in his possession which were or were not obscene is wholly immaterial as a defense and the trial court very properly refused their admission in evidence.

Defendant's counsel further argues that what is obscene and what is not involves a most difficult decision. The trend of his argument is that there are materials which are clearly obscene and those which clearly are not, and that there is a gray area in between which is practically impossible of determination. He then argues that the confiscation of some materials and the leaving of others in the store of equal obscenity features, places all of them in the gray area, in which event a conviction cannot be sustained. The argument is an ingenious one,

but its persuasiveness is not appealing. It simply has no substance in fact. While it is true that the dividing line between what is lawful and what is unlawful cannot be left to speculation, it can properly be left to competent proof. We think that magazines, such as we have before us, are either obscene or not obscene under the statute. The line of demarcation between the two is definitely drawn by the statute. The fact that the line may be difficult to find in some cases does not mean it is not there. The burden of proof is on the State to establish beyond a reasonable doubt that the materials charged were in fact obscene within the meaning of the statute. It is for the jury to determine from all the evidence if it is of sufficient quantity and quality to sustain a conviction. If in its judgment the State has failed to show that the magazines are obscene under the applicable statute, it is its sworn duty to find the defendant not guilty. But the fact that law enforcement officers make a selection of a few allegedly obscene magazines from among many does not have the effect for which defendant contends. The sheriff, nor even the county attorney, does not give decency to obscene materials by selecting a few of many for the purpose of prosecution. Such issues are determinable by evidence submitted to a jury under proper instructions on the law by the court. The contention is without merit.

Defendant assigns as error the giving of instruction No. 5. This instruction tells the jury that whoever aids or abets any offense may be prosecuted and punished as if he were a principal offender. The evidence shows that the Target Grocery is owned by Jungclaus Enterprises, Inc. The purpose of the instruction was to tell the jury that if the business was owned and operated by the corporation, the defendant as the operator of the store could be punished as an aider or abettor. This is a correct statement of the law and it is in no way prejudicial to the rights of the defendant.

Defendant also assigns as error the giving of instruc-

tion No. 6. This instruction states the necessary elements to be proved in each count to sustain a verdict of guilty. The objection of the defendant is directed to that part of the instruction stating that to sustain a conviction at least one of the materials charged as obscene in each of the two counts was in fact obscene within the meaning of the statute. There is no error in this instruction. The possession of one magazine or phonograph record for the purpose of sale, found to be obscene, is sufficient to sustain a conviction.

Defendant complains of the failure of the court to instruct as to the meaning of the term "average person" as requested by defendant's tendered instruction No. 4. The words "average person" are words of common meaning which are readily understood by the jury. The opportunity of counsel to discuss the meaning of "average person" in his argument to the jury affords ample protection against any misuse of the term by the jury in considering the case.

We have examined the remaining instructions assigned as error, including those tendered by the defendant and not given, and we find no error in the trial court's determinations with respect thereto.

Defendant complains of the trial court's action in permitting the county attorney, while testifying, to interpose objections to questions asked of him by defense counsel. The record shows that the county attorney was handling the case for the State as was his duty. Defense counsel called the county attorney as a witness. The defendant, by calling the county attorney as a witness, does not disqualify him from handling the case as he chooses. Whether or not a deputy county attorney shall take over the case under such circumstances is the prerogative of the county attorney to determine, and not that of the court or opposing counsel. The trial court correctly ruled on defendant's objection on this matter.

Defendant complains of the amount of costs assessed

against the defendant. In assessing the costs the trial court included the following items: Meals for jurors, $23.35; cost of jury and mileage, first day, $148; and cost of jury and mileage, remaining 3 days, $219.60. The State attempts to sustain the above taxing of costs under section 29-2703, R. R. S. 1943, which states: "No costs shall be paid from the county treasury in any case of prosecution for a misdemeanor, or for surety to keep the peace, except as provided in section 29-2709." Section 29-2709, R. R. S. 1943, provides that no costs shall be allowed in misdemeanor cases unless the suit shall have been instituted with the consent of the county attorney, or, after being brought, he shall approve of such action in writing.

We find nothing in these sections of the statutes which authorize the taxing of meals, lodging, and mileage of jurors as costs in the action. The fact that the county is not required to pay costs in misdemeanor cases not brought or approved by the county attorney affords no basis for charging them as costs against a convicted defendant.

As early as Geere v. Sweet, 2 Neb. 76, the court said: "Costs are unknown to the common law. They are given only by statute, which may be changed at the will of the legislature. The recovery of costs must depend upon the statute law in force at the time the judgment was rendered."

In Langan v. Whalen, 77 Neb. 658, 110 N. W. 668, this court said: "We suppose it to be unnecessary to cite authority to the effect that nothing can be taxed as costs in an action except such items as are prescribed by the statute or are expressly authorized by the consent or agreement of the parties." See, also, City of Hastings v. Mills, 50 Neb. 842, 70 N. W. 381.

The rule as to the taxation of costs heretofore stated has been enlarged to some extent in certain types of civil cases. Higgins v. J. I. Case Threshing Machine Co., 95 Neb. 3, 144 N. W. 1037. But the costs in crim-

inal actions are statutory and, in the absence of a statute authorizing the taxing of specific items as costs, the power to do so does not exist. The trial court was in error in not sustaining defendant's motion to retax the costs by eliminating therefrom the cost of meals for jurors and the cost of the jury and mileage in the amount of $390.95. The judgment of the district court is modified by reducing the amount of costs assessed against the defendant by $390.95.

The record is free from prejudicial error. The defendant had a fair trial. The jury was properly instructed and the evidence sustains the verdict of the jury. The judgment of the district court is affirmed, except for the taxing of the costs, as hereinbefore noted.

AFFIRMED AS MODIFIED.

GAY R. GOLDSBERRY, APPELLEE, V. EDYTHE GAYLE HILE ET AL., APPELLANTS.
126 N. W. 2d 881

Filed March 13, 1964. No. 35595.

Deeds: Evidence. In a case where the only question presented for determination is the sufficiency of parol evidence to set aside a deed such evidence, to be sufficient to overcome the presumption arising from the express terms of the deed, must be clear, unequivocal, and convincing.

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

Max G. Towle and Carl H. Peterson, for appellants.

Barney, Carter & Buchholz, for appellee.

Heard before MESSMORE, YEAGER, SPENCER, BOSLAUGH, and BROWER, JJ.

YEAGER, J.

This is an action in equity instituted by petition of Gay R. Goldsberry, plaintiff and appellee, against Edythe

Gayle Hile and Joe E. Hile, Jr., defendants and appellants, the purpose of which is to require the defendants to account to the plaintiff for an interest he claimed in real estate that has been denominated as Cotner Boulevard property, and in profits accruing therefrom; to require the defendants to account for and deliver to plaintiff personal property belonging to him; and that the court declare and establish a trust in certain described real estate owned by the defendants to the extent that the plaintiff supplied the purchase money therefor, and that if necessary this real estate be sold by decree and sufficient of the proceeds applied to the satisfaction of the interest of the plaintiff in the land. There is also a prayer for general equitable relief. The pleaded cause of action was denied by the defendants. There was no request by them for any kind or character of affirmative relief.

The case was tried to the court and a judgment rendered in favor of the plaintiff and against the defendants, and therein the interests of the parties were declared. Motion for new trial was duly filed. It was overruled. From the judgment and the order overruling the motion for new trial the defendants have appealed.

By the petition it is substantially alleged that from a date prior to January 1, 1949, and up to June 1, 1953, the plaintiff was the owner of certain real estate in Lincoln, Lancaster County, Nebraska, located on Randolph Street, which was his home; that the defendant Edythe Gayle Hile, who is a daughter of the plaintiff, and Joe E. Hile, Jr., who is the husband of Edythe Gayle Hile, and their children, came to live in the home of plaintiff and continued to live there until together all of these parties moved elsewhere; that this property was sold on June 1, 1953, for $11,500; that in February 1953, the plaintiff purchased a parcel of real estate in Lincoln, Nebraska, known as 601 South Cotner Boulevard for which he paid $3,000; that on this property a new house was built and the $11,500 received was by the defendants taken and applied to the new house at 601 South

Cotner Boulevard; that the details of this transaction were handled by the defendants; that the title to the Cotner Boulevard property was taken in the name of the defendant Edythe Gayle Hile, without the knowledge of the plaintiff on March 7, 1953; that on July 20, 1953, the defendant Edythe Gayle Hile caused this property to be conveyed to herself and her husband as joint tenants without the knowledge of the plaintiff so to do; that the cost of the house was estimated at not to exceed $18,000 but it exceeded that amount and money to take care of the excess was contributed by the defendant Joe E. Hile, Jr.; that it was agreed that the taxes and the monthly cost of utilities should be paid by the defendants; that the Cotner Boulevard property was purchased, used, and occupied on this basis by the parties until June 1958, at which time it was sold and Lot 3, Garvey's Subdivision of Lots 1, 2, and 3, Woods Bros. South Acres Addition, Lincoln, Lancaster County, otherwise known as 4725 South Street was purchased, and was thereafter occupied by the plaintiff and the defendants and their family; that the money acquired from the sale of the Cotner Boulevard property was used in the purchase of this property; that in addition to the furniture, household equipment, and effects which came from the other home the plaintiff purchased for this home all equipment and furniture except a piano, a desk, and an electric stove; and that the arrangement for use and occupancy continued until March 1962. In point of fact the defendants took title to this property as joint tenants without the knowledge of the plaintiff. This is the property which is of immediate concern in this case.

The pleaded conclusion of the plaintiff is that the arrangement was one of use and not transfer of interest or title; that he was not conscious of and never intended to part with title to any of the property to which reference has been made; and that what has been done is the result of misplaced trust in the defendants flow-

ing from their intimate and confidential relation, and on this account he seeks the relief claimed in his petition.

As already pointed out the defendants did not by answer seek affirmative relief. They did however plead facts which they assert defeat a right of recovery on the cause of action pleaded by the plaintiff.

By the answer the relationship of the parties was admitted. It was admitted that the parties lived together for the period of time and in the locations declared in the petition, and that the record title of the three properties involved was correct.

By the answer to the extent necessary to state herein they deny that the title to the Cotner Boulevard property was placed in the defendant Edythe Gayle Hile without the knowledge and consent of the plaintiff; and pleaded it was later placed in her and the other defendant as joint tenants, and that the title to the property at 4725 South Street was transferred by deed of conveyance to the defendants.

They pleaded that the plaintiff purchased the Cotner Boulevard lot, took title to it in the name of the defendant Edythe Gayle Hile, and gave it to her as a present; and that the plaintiff knew about and was fully informed as to all later transactions.

They substantially denied any right or interest in the title to the real estate or personal property in the home or to the use or occupancy thereof in the plaintiff. They prayed for dismissal of the petition, for costs expended, and for general relief.

By the judgment of the district court certain personal property was ordered returned to plaintiff within 20 days from the date of judgment. A constructive trust was declared in the real estate at 4725 South Street to the extent of $16,704 and declared to be a lien subject only to accrued taxes and superior existing liens. The judgment provided for payment within 30 days and upon failure, direction was made for sale of land and improvements to provide funds for the payment of this

charge. A judgment was rendered in favor of plaintiff and against the defendants for $1,700 which the defendants could satisfy by delivering to plaintiff all household goods, furniture, equipment, and tools owned by plaintiff and wrongfully retained in the possession of the defendants within 20 days of the judgment. The plaintiff was awarded judgment in an additional amount of $1,131 for his living expenses for the period between the commencement of the action and the time of trial. The court reserved jurisdiction to carry out the provisions of the judgment.

It is pointed out here that the record does not disclose that during the period of pendency and trial in the district court and in this court that the rights which the plaintiff claimed and the theory on which the case was presented by the pleadings and proof were not of an appropriate character for presentation of his claims, and likewise it is not contended that the judgment rendered fails to respond in appropriate character to the issues presented by the pleadings and tried by the court.

In this light the only substantial question for consideration on this appeal is that of whether or not the evidence is sufficient to sustain the judgment of the district court.

In this connection the effect of the plaintiff's action was and is to have set aside a deed on the basis of parol evidence. The controlling rule under such circumstances is the following: "When the evidence to set aside a deed is in parol such evidence, in order to be sufficient to overcome the presumption arising from the express terms of the deed, must be clear, unequivocal, and convincing." Paul v. McGahan, 156 Neb. 656, 57 N. W. 2d 283. See, also, Johnston v. Johnston, 155 Neb. 222, 51 N. W. 2d 332; Vielehr v. Malone, 158 Neb. 436, 63 N. W. 2d 497; Pike v. Triska, 165 Neb. 104, 84 N. W. 2d 311.

On the issue of whether or not the plaintiff was entitled to the claimed relief with reference to the real

estate the burden was on him to establish that right by the weight of evidence contemplated by this rule.

The decision in this area depends primarily on the question of whether or not there was a gift or intended gift of the Cotner Boulevard property to the defendant Edythe Gayle Hile. The plaintiff positively stated that there was no gift and no intention to make such a gift. He claims lack of information as to how she obtained title to the property, and of the fact that title was passed to the two defendants, until a short time before the commencement of this action.

The evidence of plaintiff does not disclose the cost of this property on completion but it does disclose that the investment and expenditure in relation thereto amounted to more than $16,000. In addition to the investment made by the plaintiff it is reasonably inferable from his testimony that the defendant Joe E. Hile, Jr., made some contributions to the total cost. This evidence indicates that the details of handling of affairs relating to this matter as well as those relating to the sale of this property and the acquisition and handling of the property acquired on South Street were conducted by the defendant Joe E. Hile, Jr., and that he, the plaintiff, knew nothing at the time as to the deed taken by the defendants. His evidence was to the effect that although the money received for the Cotner Boulevard property was used in the purchase of the South Street property he never became informed as to the ultimate cost or price paid therefor.

In substance as to his understanding of the parties up to a short time prior to the commencement of the action here they lived together under a plan whereby they had mutually agreed on a plan of contribution to their interests, but that there was no gift of real estate made or agreed to by the plaintiff to the defendants or either of them.

On the part of the defendants, Edythe Gayle Hile gave testimony that the plaintiff purchased the lot on

Cotner Boulevard; that he paid for it; and that a deed was taken in her name and given to her accompanied by a statement by plaintiff by which he in substance stated that it was done in this manner because it would become hers eventually. There was evidence of like effect which came from her husband. There was no definite testimony to the time such statements were made, and there was no clear statement as to the source of delivery of the deed to or for the plaintiff. There was no evidence the effect of which was to say at any time that the plaintiff surrendered his interest in the title or use of this property, or in the property on South Street acquired following and out of the proceeds of the disposition of the Cotner Boulevard property. In truth the evidence of the defendants and the answer disclosed unequivocally that there was a continuing oral agreement that the plaintiff was entitled to continued use and occupancy at least of each and all of these properties until that agreement was violated by the defendants by letter just after the commencement of this action. A short time prior to the time of the letter of the defendants which violated the agreement the evidence discloses that the plaintiff learned of the condition of the title to the real estate and commenced this action for the purpose declared in the pleadings.

The defendants adduced no evidence the effect of which was to say that any gift either of an interest in real estate or personal property was made by the plaintiff to the defendant Joe E. Hile, Jr. His interest in real estate, if any, was through transfer from his wife and on account of payments made by him.

The evidence indicates that he made payments or contributions in these areas but there is nothing which indicates with any degree of certainty the amount or amounts. He stated that records were kept by him but they were not available. Without any evidence either documentary or based on specific recollections as to

items or total, his estimate of contributions was about $15,000.

This is not a summary of the entire evidence but of what is deemed of important and controlling significance. On this the defendants contend that they are the owners of all of the property to the exclusion of any interest of the plaintiff therein or to any right in the use thereof. This is expressed by the defendant Edythe Gayle Hile, as disclosed by the following contained in the bill of exceptions: "Q Mrs. Hile, at this moment there isn't any question in your mind that your father is asking for possession to take the property, I'm talking about the real estate, now, away from you; there isn't any question in your mind at this point about that? A No. Q You know he's not asking to take the property away from you, he's asking for his money back, don't you understand that? * * * Q At least, you understand that now? A Yes, I understand that. Q You're not willing to give him his money back? A Well, I don't feel that it is mine to give back. Q Whose is it now? A Well, I feel that it was given to us, and, I think, that we're entitled to it. Q All the money and all the property was given to us, and that is who? A Joe. Q You and Joe? A Yes. Q And you're entitled to it? A Yes. Q And you won't give it back? A No."

This evidence, coupled with that of which it is a part, demonstrates that the plaintiff had a right which originated in purchase and payment of funds accumulated by plaintiff of use and occupancy of real estate at 4725 South Street acquired in the manner outlined which he never abandoned but from which he was excluded by action of the defendants by letter dated June 4, 1962, which exclusion they proceeded to attempt to enforce by legal action. It also demonstrates that the defendants proceeded to and did assert title to personal property which belonged to the plaintiff without compensation.

The evidence of the defendants themselves is incapable

of even an inference that the plaintiff intended in his lifetime to surrender his right to use and occupancy of the real estate to them or at any time to give to them his personal estate and belongings.

At the conclusion of the trial the court made findings of fact on the questions presented which will not be repeated here but in conformity with the findings in disposition of the case, the court declared a trust in favor of the plaintiff in the real estate for the amount which the plaintiff had contributed through the various transactions to the real estate at 4725 South Street and the improvements thereto, and fixed the amount and value thereof at $16,704 and rendered judgment accordingly.

Judgment was also rendered in favor of plaintiff and against the defendants for household goods, furniture, and tools of the value of $1,700 with provision for satisfaction by delivering the articles of property within 20 days.

The plaintiff was also awarded judgment for living expenses away from 4725 South Street during the pendency of the action in the amount of $1,131, and the costs of the action.

It appears that the judgment of the district court is sustained by the record, and it is affirmed.

AFFIRMED.

SPENCER, J., not participating.

IDA MILLER, APPELLEE, V. LLOYD DIXON, APPELLANT.
127 N. W. 2d 203

Filed March 20, 1964. No. 35549.

1. **Actions: Appeal and Error.** A question will not be regarded as moot, even though the happening of some event may have rendered it moot in some respects, if there are still rights or liabilities that may be affected by its determination.
2. **Exemptions.** A combine far exceeding the value of $50 is not

exempt from levy or sale to one engaged in agriculture under section 25-1556, R. R. S. 1943, subdivision (6).

3. **———. A debtor engaged in the business of agriculture is not entitled to an exemption as a mechanic, miner, or "other person" within the statute, section 25-1556, R. R. S. 1943, subdivision (8), exempting tools and instruments of such persons.**

Appeal from the district court for Buffalo County: S. S. SIDNER, Judge. Affirmed.

C. Morris Gillespie, for appellant.

Barlow Nye and Dewayne Wolf, for appellee.

Heard before WHITE, C. J., CARTER, MESSMORE, YEAGER, SPENCER, BOSLAUGH, and BROWER, JJ.

BROWER, J.

This is an appeal from the judgment of the district court for Buffalo County, Nebraska, which denied the defendant and appellant herein, Lloyd Dixon, a claim of a specific exemption asserted as to a levy made by the sheriff of said county by virtue of an execution issued on a judgment recovered by the plaintiff and appellee, Ida Miller, in the county court of Buffalo County and transcribed to the district court for said county. The execution was issued March 8, 1963, and was delivered to the sheriff on the same day. Under it the sheriff levied on March 20, 1963, on one 33 Model Oliver Combine 1957, taken as the property of the defendant. The sheriff on April 25, 1963, published a notice of sale to be held on May 6, 1963.

On March 29, 1963, the defendant filed a claim for exemption by means of an affidavit. It alleged the defendant was the head of a family consisting of a wife and two minor children; that he was and for 30 years just past had been engaged in agriculture; that his work consisted of custom harvest work; and that the combine was used in that work. It was claimed as exempt from levy and sale on execution and attachment under section 25-1556, R. R. S. 1943, as a tool of his trade. No

claim of exemption in lieu of homestead under section 25-1552, R. R. S. 1943, is made. The affidavit closed with a prayer that the combine be specifically exempted to him under said section, that the sheriff appraise the combine, and that the plaintiff be ordered to post a bond as required by law. The sheriff thereafter called appraisers who valued the combine at $800.

On April 19, 1963, the matter was heard and on April 25, 1963, the court rendered a judgment finding the defendant on the day of the levy was a farmer; that the exemption claimed was not available to him; that the levy was sustained; and that the exemption was disallowed.

The defendant thereupon filed a motion for a new trial and has brought the matter by appeal to this court.

Meantime the transcript discloses that after the judgment of the trial court denying the exemption and sustaining the levy, the First Investment Company, a corporation, on April 30, 1963, filed a motion to intervene alleging a chattel mortgage on the combine. In the motion of the intervener, it is alleged that the mortgage was not recorded at the time of the levy but that it had the status of a purchase money mortgage. On that day, April 30, 1963, the First Investment Company filed a petition in intervention in equity, setting up its mortgage dated March 8, 1962, and seeking to establish a first lien on the combine and to stay the execution pending the determination of the rights of the parties involved. No disposition of the motion or of the petition in intervention is shown.

On May 6, 1963, the plaintiff's execution was returned into district court by the sheriff. The return of the sheriff recites the receipt of the execution, the levy thereof, and publication of the notice of sale. It further shows that on May 3, 1963, the combine was taken from him and out of his possession under a writ of replevin issued by the clerk of the district court for Buffalo County at the suit of First Investment Company; that

the sale was not held as the property was not in his possession; and that the execution was returned unsatisfied.

The plaintiff herein maintains in her brief that the defendant's appeal now presents nothing but a moot question to this court, and seeks to have the appeal dismissed therefore. She contends that upon the replevin of the combine the subject of the controversy was taken out of the sheriff's possession, and that there is nothing for this court to decide. She cites Dodge Agricultural Credit Assn. v. Tighe, 121 Neb. 458, 237 N. W. 404, a case where a receivership had been terminated and a trustee in bankruptcy appointed pending an appeal. Likewise is cited Deines v. Schwind, 89 Neb. 122, 130 N. W. 1051, where the plaintiff sought to recover the custody of his daughter from the defendant who had obtained her custody in an informal adoption proceeding. Pending the appeal, the daughter had attained her majority and thereupon could exercise her own choice. In both of these cases, this court held the record presented nothing but a moot question for determination and dismissed the appeals. A consideration of the cause before us, however, indicates the situation is to be distinguished from that in the cases cited. Here the sheriff made a levy on the combine and it was appraised and advertised for sale. Three days before the sale it was replevied from the sheriff by the First Investment Company. It would appear that this is the same First Investment Company, a corporation, which had filed a motion to intervene and a petition of intervention in equity asserting a chattel mortgage which it admits was not filed for record at the time of the levy but asserts was a first lien by reason of its nature and status as a purchase money mortgage. The intervener has subjected itself to the jurisdiction of the district court by its petition in intervention, expressly asked the court to find its rights superior to those of both the plaintiff and defendant in the property claimed, and requested a stay

of execution pending the determination of the rights of the parties. In the transcript before us, those issues appear to be undetermined and nothing is before this court with respect thereto. This however does not preclude the existence of actual issues remaining for the trial court to determine which may involve the question of the defendant's claim of exemption in the property on which the levy was made. With the combine in the possession of the intervener who has become a party and asked for an adjudication of its rights, we cannot say the issues have been decided or become moot. "A question will not be regarded as moot, even though * * * the happening of some event may have rendered it moot in some respects, if there are still rights or liabilities that may be affected by its determination." 5 Am. Jur. 2d, Appeal and Error, § 766, p. 209.

It therefore becomes necessary for us to pass upon the question presented by the defendant's appeal. Defendant concedes in his brief that the evidence shows that a substantiated levy was made and has withdrawn his motion to quash the same; and that the only question before us is his claim of exemption from levy.

Defendant's assignments of error, as far as need be considered by us, may be said to be: (1) That the judgment is not sustained by the evidence; (2) that the court erred in finding the defendant was a farmer; (3) that the court erred in not finding the combine was exempt from levy; and (4) that the combine should not have been appraised.

The statute, section 25-1556, R. R. S. 1943, under which the defendant claimed the combine as exempt to him, so far as is pertinent to this cause, is here set out. "No property hereinafter mentioned shall be liable to attachment, execution or sale on any final process issued from any court in this state, against any person being a resident of this state and the head of a family: * * * (6) one cow, three hogs, and all pigs under six months old, and if the debtor be at the time actually engaged in the

business of agriculture, in addition to the above, one yoke of oxen, or a pair of horses, in lieu thereof; ten sheep, and the wool therefrom, either in the raw material or manufactured into yarn or cloth; the necessary food for the stock mentioned in this section, for the period of three months; one wagon, cart or dray, two plows and one drag; necessary gearing for the team herein exempted; and other farming implements not exceeding fifty dollars in value; * * * (8) the tools and instruments of any mechanic, miner or other person, used and kept for the purpose of carrying on his trade or business; the library and implements of any professional man. All of the articles hereinbefore intended to be exempt, shall be chosen by the debtor, his agent, clerk or legal representative, as the case may be."

The defendant contends that the trial court erred in holding the defendant was a farmer. It is to be noted that the statute does not use the term farmer. In subdivision (6) of section 25-1556, R. R. S. 1943, set out above, are listed certain exemptions granted to all heads of families. Thereafter are enumerated certain additional exemptions which are given debtors who are "at the time actually engaged in the business of agriculture." It is evident that the trial court used the word farmer in his findings concerning the exemptions as a synonym for one engaged in agriculture as mentioned in the statute.

Webster's Third New International Dictionary at page 44 defines "agriculture" as "the science or art of cultivating the soil, harvesting crops, and raising livestock" and also "as the science or art of the production of plants and animals useful to man and in varying degrees the preparation of these products for man's use and their disposal (as by marketing)."

Moreover, it appears that the defendant admitted he was engaged in the business of agriculture in the affidavit hitherto mentioned setting out his exemptions. This was the pleading upon which the issue was raised

and on which it was tried, and constituted a judicial admission thereof. It may be said, though not necessary in view of the admission, that the evidence if summarized clearly shows the defendant was engaged in raising and marketing livestock for himself and harvesting wheat, beets, and milo for others.

Subdivision (6) of section 25-1556, R. R. S. 1943, in enumerating the articles exempt to those engaged in agriculture, does not specifically mention either a combine or any other machine used in harvesting. After setting out certain articles by name, it refers generally to "other farming implements not exceeding fifty dollars in value." It clearly appears that this combine appraised for $800 could not be chosen as exempt under this latter provision.

The defendant objects to the appraisal of the combine claiming that no appraisal is authorized in such cases. It would appear, though it is not necessary to determine in our decision, that some method would have to be taken under subdivision (6) of the cited statute to ascertain the value of the additional machinery authorized to be so exempted up to the $50 limitation prescribed. Be that as it may in the case before us, the defendant in his affidavit asked that it be so appraised. He cannot now object to the doing of that which he requested.

The main contention of the defendant is that he is entitled to claim the combine as exempt under subdivision (8) of section 25-1556, R. R. S. 1943. This exemption covers the tools and instruments of any mechanic, miner, or other person, used and kept for the purpose of carrying on his trade or business. He argues that he is included with the words "other person" whatever his vocation and that the combine is a tool of his trade. However it appears that the rights of those engaged in agriculture are specially mentioned in subdivision (6) of the section. Some of the machinery of such a person is therein enumerated as exempted to him. Any other machinery is plainly restricted to $50

in value. The Legislature's expressed intention of restricting the other machinery to $50 in value would be a useless one if he who was engaged in agriculture could select a combine and other articles of machinery as a tool or instrument of trade under subdivision (8) of the section. Whether tools and instruments as used in subdivision (8) of this section can be said to include large articles of machinery is not necessary for us here to decide.

We have been cited to no decision of this court construing the statute before us as affecting the right of one engaged in agriculture to claim articles as exempt under section 25-1556, R. R. S. 1943. However in Poznanovic v. Maki, 209 Minn. 379, 296 N. W. 415, a farmer claimed an automobile in lieu of a wagon, cart, or dray as exempt under a statute which, though providing for more exemptions, is in many respects substantially the same as that before us, particularly as to the arrangement and the numbering of the subdivisions of the section. It would seem that the Minnesota statute provided for an exemption to farmers by name instead of those engaged in the business of agriculture. The court in the Minnesota case, in construing that statute, said: "Defendant is not a 'mechanic, miner, or other person' within the meaning of that part of 2 Mason Minn. St. 1927, sec. 9447 (8), which provides for the exemption of 'the tools and instruments of a mechanic, miner, or other person, used and kept for the purpose of carrying on his trade.'

"Being neither a mechanic nor a miner, defendant is entitled to claim such exemption only if a farmer is an 'other person.'

"This part of subd. 8 includes persons who earn their living by the use of tools and instruments in whole or part. The term 'other person' derives its meaning by association from the classes specifically enumerated and is restricted by that meaning. It does not include all persons not specifically enumerated. In Grimes v. Bryne, 2 Minn. 72 (89), we said of these words (p. 87):

" 'It is evident that a man may derive his principal support from some business in the exercise of which tools and instruments (probably meaning implements) are absolutely necessary, and still not be strictly a mechanic or miner. It was such persons that were intended to be included by the words, "or other persons," in this subdivision. It should be read, therefore, "The tools and instruments (implements) of every mechanic, minor (miner), or other person, to the exercise of whose trade or business tools or implements are necessary, used or kept for the purpose of carrying on his trade or business, &c. * * *" '

"So construed the term 'other person' does not include a farmer."

The opinion in Poznanovic v. Maki, *supra,* in discussing a Wisconsin case, further stated: "In Bevitt v. Crandall (1865) 19 Wis. 610, 615, a farmer claimed that he came under the term 'other person.' The Wisconsin exemption statute contained separate sections which were substantially the same as subds. 6 and 8 of ours. The court applied the maxim, noscitur a sociis, in construing the term and held that a farmer was not an 'other person' within the meaning of the statute. It pointed out that a farmer's exemptions are provided in the section which corresponds to our subd. 6.

"Such a construction seems to accord with the manifest legislative intent of making specific exemption for each class of debtors according to their needs and circumstances."

We think the decision in the Minnesota case is sound and we in turn hold a combine far exceeding the value of $50 is not exempt from levy or sale to one engaged in agriculture under section 25-1556, R. R. S. 1943, subdivision (6). We think also that a debtor engaged in the business of agriculture is not entitled to an exemption as a mechanic, miner, or "other person" within the statute, section 25-1556, R. R. S. 1943, subdivision (8), exempting tools and instruments of such persons.

It follows that the trial court committed no error in denying the exemption claimed and its judgment is affirmed.

AFFIRMED.

MILLARD M. MASEBERG, APPELLANT, V. LORENZO D. MERCER, APPELLEE.

127 N. W. 2d 208

Filed March 20, 1964. No. 35584.

1. **Trial.** In a case where a motion for directed verdict is made, where there is any evidence which will support a finding for a party having the burden of proof, the trial court cannot disregard it and direct a verdict against him.
2. ———. A motion for directed verdict or its equivalent must, for the purpose of the decision thereon, be treated as an admission of the truth of all competent evidence on behalf of the party against whom the motion is directed.
3. ———. A party against whom a motion for directed verdict 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 deduced from the evidence.
4. **Frauds, Statute of.** Loan agreements wholly performed on one side within a year are not void under the statute of frauds.
5. ———. Where the money involved in a loan is furnished to a third person, at the request and on the credit of the promisor, the undertaking is original and the promisor will be liable although the promise is not in writing.
6. ———. Where a loan is made and there has been delivery by the lender and receipt by the borrower or in his behalf upon an oral agreement to repay, express or implied, the promise may not be regarded as collateral.

Appeal from the district court for Thomas County: WILLIAM F. MANASIL, Judge. Reversed and remanded with directions.

James E. Schneider, for appellant.

Miles N. Lee and C. L. Robinson, for appellee.

Heard before WHITE, C. J., CARTER, MESSMORE, YEAGER, SPENCER, BOSLAUGH, and BROWER, JJ.

YEAGER, J.

This is an action at law in two causes of action by Millard M. Maseberg, plaintiff and appellant, against Lorenzo D. Mercer, defendant and appellee, for the recovery of judgment on the first cause of action in the amount of $3,000 and interest, and on the second for $150 and interest. The action was tried to a jury and at the conclusion of the evidence of the plaintiff, on motion of the defendant, a verdict was directed in favor of the defendant and a judgment of dismissal was rendered in his favor. A motion for new trial was made which was overruled. From the judgment and the order overruling the motion for new trial the plaintiff has appealed.

The controlling substance of the first cause of action is pleaded in Count I of an amended petition which was filed in the action. Prefatory to the alleged facts constituting plaintiff's right of recovery on this cause of action he pleaded a background of significance in the presentation of the questions involved in the litigation as follows: That in January 1957, the plaintiff obtained a lease from the United States of America to lands in Alaska for the purpose of grazing livestock thereon; that Berle E. Mercer, a son of the defendant, had a similar lease on the same lands; that on and after January 1, 1957, and September 16, 1958, the defendant was engaged in aiding and assisting his son in his operations on the leased lands; that in 1957 the defendant shipped to his son a load of cattle to be grazed on these lands and another load in 1958; and that the defendant was without sufficient funds to buy feed for the cattle shipped to his son.

With this as the background for the cause of action the plaintiff alleged that on September 5, 6, or 7, 1958, the plaintiff and defendant entered into an oral agreement that the plaintiff would lend to defendant $3,000 for use by the defendant and his son in purchasing feed and equipment for raising feed, and that it was further

agreed by plaintiff and the defendant that the defendant and his son would enter into a written agreement in consideration of the loan which would include terms of repayment with which there was never a compliance by the defendant.

It is further pleaded that pursuant to the oral agreement, in effectuating it, at the direction of the defendant, as was his right, the plaintiff executed and delivered to the son a check for $3,000 which was made payable to him and not directly to the defendant.

It is further pleaded that the money was never used for the purposes so loaned and has not been paid, although demand has been made for payment with interest from September 16, 1958.

As to the second cause of action it is pleaded that the plaintiff purchased for the defendant a welder at his oral request for $150 which he delivered on September 2, 1958, for which the defendant has failed and refused to pay. On account of this the plaintiff seeks to recover $150 with interest.

In the action the defendant filed an amended answer which contains the pleaded defense to the action of the plaintiff. To the extent necessary to state here, in the answer the defendant denies that the plaintiff ever loaned to him the $3,000 alleged in the first cause of action, and he denies generally the allegations contained in the second cause of action. There is no formal reply.

So that there may be no confusion as to the effect of the pleadings and the limits of processes engaged in which led up to and were included in the disposition made of the case by the district court, the first pleaded cause of action was of a loan by plaintiff to the defendant alone and no other. As to the second, this was an obligation of this defendant alone to repay money paid out on his behalf by the plaintiff for a specific purpose which the defendant agreed to repay.

There were other defenses pleaded, but the only question for consideration here and at this time is that of

whether or not the evidence adduced by the plaintiff was sufficient in and of itself as proof of the causes of action or either of them. No evidence was adduced by the defendant which was in conflict with the evidence of the plaintiff. In point of fact, no evidence at all was adduced by the defendant.

The record of the evidence of the plaintiff discloses of course without evidentiary dispute, that in August of 1958 the defendant asked plaintiff to make a loan to him of $3,000. This request was repeated later in the month. At that time the defendant agreed to repay and guarantee repayment of the $3,000 within a year or so, if the loan was made. Also at that time the plaintiff told the defendant however that if there was a feed agreement the three parties, that is the defendant, Berle E. Mercer, and the plaintiff would have to be parties in signing. Also at that time the plaintiff promised to advance the sum of $3,000. The loan according to the evidence was made.

The motion for directed verdict was made, according to the transcript, on the ground that the two causes of action had not been established by competent evidence. This motion was sustained and the action was dismissed. It was from this judgment and an order overruling a motion for new trial which has been duly filed that the appeal herein was taken.

The brief of plaintiff contains numerous assignments of error as grounds for reversal, but on the record made the question is that of whether or not the plaintiff's evidence was sufficient as prima facie proof of the causes of action pleaded.

A rule which has application in the determination of this question is that in a case where a motion for directed verdict is made, where there is any evidence which will support a finding for a party having the burden of proof, the trial court cannot disregard it and direct a verdict against him. Morse v. Gray, 166 Neb. 557, 89 N. W. 2d 842.

Another applicable rule is that a motion for directed verdict or its equivalent must, for the purpose of the decision thereon, be treated as an admission of the truth of all competent evidence on behalf of the party against whom the motion is directed. Morse v. Gray, *supra;* King v. Schmall, 156 Neb. 635, 57 N. W. 2d 287.

Still another rule is that a party against whom a motion for directed verdict 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 deduced from the evidence. Morse v. Gray, *supra.*

As to the first cause of action, as pointed out, the plaintiff pleaded an oral promise of the defendant to repay a loan to the plaintiff, which was supported by evidence of the loan and of the promise to repay. By the answer the defendant denies the allegations of the petition in this respect and on that basis contends that the transaction under the terms of section 36-202, R. R. S. 1943, is void and may not be enforced for the reason that performance was not required within 1 year. This pleaded defense however requires no consideration here since it finds no support in the evidence.

The defendant argues additionally that the pleaded cause of action was of a collateral promise of payment and was barred under the statute. The contention is without merit. The pleaded cause of action was of a loan of money under the legal declaration that a loan of money is a delivery by a lender and the receipt by a borrower of a given sum, upon an agreement, expressed or implied, to repay the sum loaned, with or without interest. Cartney v. Olson, 154 Neb. 546, 48 N. W. 2d 653.

Under this rule it is not necessary that the delivery shall have been made to and actually received by the promisor. Where the money involved in a loan is furnished to a third person, at the request and on the credit of the promisor, the undertaking is original and

the promisor will be liable although the promise is not in writing. Peyson v. Conniff & Shellabarger, 32 Neb. 269, 49 N. W. 340; King v. Schmall, *supra;* 58 C. J. S., Money Lent, § 2, p. 875.

On the record here the undisputed evidence indicates that the loan agreement was wholly performed by the plaintiff. It was therefore not void under the statute of frauds. The controlling rule is that agreements wholly performed on one side within a year are not void under the statute of frauds. In re Estate of Black, 125 Neb. 75, 249 N. W. 84. The order of the court sustaining the motion for directed verdict and the rendition of judgment for the defendant on the first cause of action was erroneous.

As to the second cause of action, the pleadings and evidence disclosed a declaration of a purchase of personal property made at the request of the defendant by the plaintiff for which the defendant became at the time obligated to pay plaintiff. On the record made it does not appear that a right of recovery from the defendant was barred by any statute of frauds or rule of law. The order of the court sustaining the motion for directed verdict and the rendition of this judgment was erroneous.

The judgment of the district court is reversed and the cause remanded for a new trial on the issues presented by the pleadings.

REVERSED AND REMANDED WITH DIRECTIONS.

WILLIAM A. EHLERS, APPELLANT, V. JAY A. POUND, SR., ET AL., APPELLEES.

126 N. W. 2d 893

Filed March 20, 1964. No. 35601.

1. **Trial: Judgments. A motion for summary judgment may be used to pierce the allegations of the pleadings and show conclusively that the controlling facts are otherwise than as alleged.**
2. **——: ——. Where there is no genuine issue of fact and**

the movant is entitled to judgment as a matter of law, a motion for summary judgment should be sustained.

3. **Appeal and Error.** In the absence of a bill of exceptions it is presumed that issues of fact presented to the trial court were correctly decided and the only issue that is considered on appeal is the sufficiency of the pleadings to support the judgment.
4. **Abstracts of Title.** An abstracter is liable for damages which are proximately caused by his negligence.

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

William A. Ehlers, pro se.

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

Heard before WHITE, C. J., CARTER, MESSMORE, YEAGER, SPENCER, BOSLAUGH, and BROWER, JJ.

BOSLAUGH, J.

This is an action for damages brought by William A. Ehlers as plaintiff against Jay A. Pound, Sr., Jay A. Pound, Jr., and Massachusetts Bonding and Insurance Company. The defendants Jay A. Pound, Sr., and Jay A. Pound, Jr., are bonded abstracters. The Massachusetts Bonding and Insurance Company is the surety on their bond.

The trial court sustained the defendants' motion for summary judgment. The plaintiff's motion for new trial was overruled and he has appealed.

The amended and substituted petition alleged that the plaintiff entered into a contract to purchase from James Fruits and Mary Fruits the west 40 feet of Lots 13 and 14, Block 17, in Bedford Place, an addition to the city of Omaha, Nebraska; that as a part of the transaction James Fruits and Mary Fruits delivered to the plaintiff an abstract of title to the property certified to by the defendants Pound; that at entry No. 50 of the abstract of title, a mortgage in the amount of $2,000 to the Four C's Credit Union of Omaha, Nebraska, was shown as a valid lien on the premises; that the mortgage actually

described property in Block 7 in Bedford Place but that the abstract of title erroneously showed the mortgage to be a lien on the property in Block 17; that in reliance upon the abstract of title the plaintiff paid the sum of $2,675.42 to James Fruits and Mary Fruits; that in a subsequent action the mortgagee obtained a judgment of reformation against the plaintiff and the mortgage was adjudged to be a lien upon the property in Block 17; and that the plaintiff was damaged in the sum of $2,675.42 by reason of the negligence of the defendant abstracters.

The answer alleged that the plaintiff had actual knowledge of the mortgage on the property which he was purchasing; that the plaintiff paid $2,000 to James Fruits and Mary Fruits and directed them to pay the mortgage but that they failed to do so; and that the plaintiff was not damaged as the result of any error in the abstract of title.

A motion for summary judgment may be used to pierce the allegations of the pleadings and show conclusively that the controlling facts are otherwise than as alleged. Knoll v. Knoll, 173 Neb. 602, 114 N. W. 2d 40. Where there is no genuine issue of fact and the movant is entitled to judgment as a matter of law, a motion for summary judgment should be sustained. Arla Cattle Co. v. Knight, 174 Neb. 360, 118 N. W. 2d 1.

The judgment recites that the motion for summary judgment was heard upon the amended and substituted petition, the answer, and "Exhibits A, B and C offered and received in evidence without objection."

The evidence which was presented to the trial court at the hearing upon the motion for summary judgment was not preserved in a bill of exceptions. In the absence of a bill of exceptions it is presumed that issues of fact presented to the trial court were correctly decided and the only issue that is considered on appeal is the sufficiency of the pleadings to support the judg-

ment. Ehlers v. Church of God in Christ, Inc., 173 Neb. 670, 114 N. W. 2d 716.

An abstracter is liable for damages which are proximately caused by his negligence. Marley v. McCarthy, 129 Neb. 880, 263 N. W. 385. The pleadings in this case are sufficient to sustain the judgment upon the basis that the negligence of the defendant abstracters, if any, was not the proximate cause of any damages the plaintiff may have sustained.

The judgment of the district court is affirmed.

AFFIRMED.

NED A. RUNYAN, APPELLANT, V. LOCKWOOD GRADERS, INC., A CORPORATION, ET AL., APPELLEES.

127 N. W. 2d 186

Filed March 20, 1964. No. 35656.

1. **Workmen's Compensation.** Under section 48-121, R. R. S. 1943, of the workmen's compensation law, where an injury is to the finger or fingers only, and the effect of such injury is the usual and natural one, the compensation must be fixed upon the basis of the loss of use of such finger or fingers, and not upon the basis of the loss of use of the hand.
2. ———. Where the workmen's compensation law fixes the amount of compensation, such compensation can be measured only in the manner directed by the statute.
3. ———. It was the intent of the Legislature in establishing a schedule of benefits for the specific injuries listed in subdivision (3) of section 48-121, R. R. S. 1943, to fix the amount of such benefits without regard to the extent of the subsequent disability with respect to the particular work or industry in which the employee was engaged at the time of his injury.
4. ———. Where an employee has suffered a schedule injury to some particular member or members and some unusual and extraordinary condition develops therefrom as a result thereof, which condition adversely affects some other member or the body itself, an increased award is proper and should be made to cover such additional disability.
5. ———. An injury to a finger or fingers only is not an injury to a member within the meaning of subdivision (3) of section

48-121, R. R. S. 1943, providing for an award of total and permanent disability for the loss of two members as listed therein.

6. ———. The workmen's compensation law creates a statutory liability and, although the law will be construed liberally to accomplish its beneficent purposes, the courts will not construe its plain and unequivocal meaning, or apply equitable principles thereto to alleviate any apparent harshness in the result provided by the controlling provisions of the statute.

Appeal from the district court for Scotts Bluff County: TED R. FEIDLER, Judge. Affirmed.

Holtorf, Hansen & Fitzke and Alfred J. Kortum, for appellant.

Wright, Simmons & Hancock, for appellees.

Heard before WHITE, C. J., CARTER, MESSMORE, YEAGER, SPENCER, BOSLAUGH, and BROWER, JJ.

CARTER, J.

This is an action to recover benefits under the workmen's compensation law for injuries sustained by Ned A. Runyan, which arose out of and in the course of his employment by Lockwood Graders, Inc. The district court held that the injuries constituted a schedule loss under the provisions of subdivision (3) of section 48-121, R. R. S. 1943, and awarded benefits as provided in such section. The plaintiff contends that his injuries were totally and permanently disabling and that he is entitled to benefits under the provisions of subdivision (1) of section 48-121, R. R. S. 1943, relating to injuries resulting in two-member losses. From the adverse ruling on his contention the plaintiff has appealed.

On May 14, 1962, the date of the accident, plaintiff was in the employ of Lockwood Graders, Inc. He was engaged in operating a hydraulic press used in crimping the edges of sheet metal in forming shields for a harvester. The press was equipped with a large blade which descended with great pressure and made the desired form. While plaintiff was centering the sheet metal, preparatory to the operation of the hydraulic press, he inad-

vertently stepped on the foot treadle, which started the blade downward. The blade crushed the middle phalanges of the four fingers of the left hand and the middle phalanges and one or more of the proximal interphalangeal joints of the four fingers of the right hand. As a result of the accident the middle finger of the right hand and the middle and ring fingers of the left hand were amputated. The remaining fingers of both hands suffered compound fractures, and a crushing of tendons and blood vessels, causing permanent stiffness, deformity, and poor circulation. The medical evidence sustains a finding that plaintiff suffered a total loss of the use of all eight fingers. There is evidence that the injuries to the fingers were such as to totally incapacitate the plaintiff from performing any work similar to that which he was able to perform previous to the accident. For the purposes of this opinion we will assume that plaintiff has suffered a total and permanent disability insofar as his earning capacity is concerned.

Plaintiff does not contend that the award of the district court is erroneous if the schedule loss provision of subdivision (3) of section 48-121, R. R. S. 1943, is the controlling statutory provision. Plaintiff's appeal is based solely on his contention that the two-member injury provision should apply with a resulting award for total and permanent disability.

Subdivision (3) of section 48-121, R. R. S. 1943, as it relates to two-member injuries provides: "The loss of both hands, or both arms, or both feet, or both legs, or both eyes, or of any two thereof, shall constitute total and permanent disability and be compensated for according to the provisions of subdivision (1) of this section." It will be noted that the loss of a finger, or any number of them, is not treated as a loss of a member in the section of the statute providing for total and permanent disability for the loss of two members.

It is the contention of the plaintiff that the loss of eight fingers is in fact the loss of two members on the prin-

ciple announced by the New York court in Dowling v. Church E. Gates & Co., 253 N. Y. 108, 170 N. E. 511, which we approved in Ottens v. Western Contracting Co., 139 Neb. 78, 296 N. W. 431, and Haler v. Gering Bean Co., 163 Neb. 748, 81 N. W. 2d 152. The rule stated in these cases is: Where an employee has suffered a schedule injury to some particular member or members and some unusual and extraordinary condition develops therefrom as a result thereof, which condition affects some other member or the body itself, an increased award is proper and should be made to cover such additional disability. We adhere to this rule and we are now confronted with the factual question as to whether or not other members, or the body as a whole, were affected by some unusual and extraordinary condition that would require application of the rule.

The general tenor of the medical testimony is that the loss of a finger is injurious to the functional use of the hand, the arm, and even the body as a whole. This view is based on the theory that an injury to a component part is injurious to the whole of which it is a part. That this is true as a general proposition cannot be questioned, whether or not there is an unusual or extraordinary condition present. But the workmen's compensation law disregards this theory in favor of an arbitrary distinction between injuries to fingers, the hand, or the arm. Subdivision (3) of section 48-121, R. R. S. 1943, specifically provides that amputation between the elbow and the wrist shall be considered as the equivalent of the loss of a hand and amputation at or above the elbow shall be considered as the loss of an arm. Permanent total loss of the use of a finger shall be considered as the equivalent of the loss of such finger. But the permanent total loss of a finger is not a member within the two-member injury provision and, consequently, the benefits for the loss of a finger are limited to the schedule loss, unless the rule cited as to unusual and extraordinary injury to some other

member, or the body as a whole, has application.

There is no evidence in this record that plaintiff suffered any unusual or extraordinary injury to some other member, or to the body. In fact, the evidence in the record is to the effect that there was no unusual or extraordinary injury to the hand, arm, or body. There was no evidence, other than the generalization of the medical theory that an injury to a component part is an injury to the whole, that physical injury was sustained to both hands, a condition necessary to bring the case within the two-member injury rule.

The evidence in this case shows that the injury is to the fingers, it actually occurring to the middle phalanx of each finger. There was no injury to the hands, with the possible exception of one finger, which was amputated at the knuckle. The theory that the loss of use of a finger to some extent constituted the loss of use of the hand has been dealt with by this court. In Greseck v. Farmers Union Elevator Co., 123 Neb. 755, 243 N. W. 898, this court said: "It is a matter of common knowledge that, when one's finger is severely lacerated and fractured, a consequential impairment of the usefulness of the hand follows, at least during the healing period. The same finger injury exerts a similar influence upon the arm, but in a lesser degree. In such cases, barring unexpected complications, the disability to the injured finger is greater than to the hand, and greater to the hand than to the arm, and in those states where workmen's compensation laws have been adopted, with classification of injuries and schedule of compensations similar to those in Nebraska, it is generally held that it is the disability to the injured finger, and not the consequential disability to the hand, which governs the compensation to be paid, and such in effect has been the holding of the court." See, also, Hull v. United States Fidelity & Guaranty Co., 102 Neb. 246, 166 N. W. 628; Schroeder v. Holt County, 113 Neb. 736, 204 N. W. 815; Johnson v. David Cole Creamery Co., 109 Neb.

707, 192 N. W. 127. In the last case cited this court said: "Where the employers' liability law (Comp. St. 1922, secs. 3024-3084) fixes the amount of compensation, such compensation can be measured only in the manner directed by the statute."

Plaintiff relies upon Updike Grain Co. v. Swanson, 103 Neb. 872, 174 N. W. 862; Fallis v. Vogel, 137 Neb. 598, 290 N. W. 461; and Haler v. Gering Bean Co., *supra.* These cases are clearly distinguishable. In the Updike Grain Company case the facts are not stated with any particularity. The court did find: "The hand was shown to have been severely injured, and it seems clear to us that the injury was not confined alone to the fingers." In the Fallis case the court found: "Therefore, under the provisions of said section 48-121, a claimant for compensation, who has sustained an injury, for the loss of the use of the left hand and for the loss of the use of the left leg, is entitled to recover such proportion of the compensation allowed for total disability, * * *." In the Haler case the court found that the claimant not only suffered injury to his legs, but he also suffered injuries to his back which resulted from a malunion or abnormal alignment of the bones at the site of the leg fracture. The court found that these conditions of the back were not the usual and ordinary results to be expected from the injury to his legs, and permitted a recovery for permanent total disability. These cases correctly apply the law to the facts recited therein, but they have no application to the case we have before us.

It was clearly the intent of the Legislature in establishing a schedule of benefits for the specific injuries listed in subdivision (3) of section 48-121, R. R. S. 1943, to fix the amount of such benefits without regard to the extent of the subsequent disability with respect to the particular work or industry in which the employee was engaged at the time of his injury. Carlson v. Condon-Kiewit Co., 135 Neb. 587, 283 N. W. 220;

Haler v. Gering Bean Co., *supra.* In the absence of unusual and extraordinary other physical injury, the compensation cannot exceed the amount specified in subdivision (3) of section 48-121, R. R. S. 1943. Since an injury to a finger or fingers is not listed in the statute as a member within the purview of a two-member injury, it can have no application to the provision allowing permanent disability benefits for two-member injuries. The district court, and the compensation court as well, were therefore correct in fixing the compensation benefits in accordance with the schedule injuries set out in subdivision (3) of section 48-121, R. R. S. 1943.

The result in the instant case appears to be a harsh one. But this court is bound by the statute as enacted. It has no authority to alleviate the apparent harshness of the result by the application of equitable principles. The plain language of the workmen's compensation law must be followed by this court. The right to and amount of recovery are purely statutory. If the Legislature intended that the loss of a finger or fingers should be equivalent to the loss or partial loss of a hand, it could have done one of two things: It could have failed to place the loss of a finger or fingers in the list of schedule losses, or it could have fixed the point at which a loss of fingers would be equivalent to the loss or partial loss of a hand. It did neither. We are therefore obliged to hold that the plaintiff is entitled to the schedule loss of each of his eight fingers as provided in subdivision (3) of section 48-121, R. R. S. 1943. Since this is the amount of the benefits awarded by the judgment of the district court, its judgment must be affirmed.

AFFIRMED.

JOHN R. ARNOLD ET AL., APPELLEES AND CROSS-APPELLANTS, v. CARL H. HUENEFELD ET AL., APPELLANTS AND CROSS-APPELLEES.

127 N. W. 2d 196

Filed March 27, 1964. No. 35571.

1. **Trial: Appeal and Error.** The trial court is required to consider any competent and relevant facts revealed by a view of the premises as evidence in the case, and a duty is imposed on this court on review of findings made by the trial court to give consideration to the fact that the trial court did view the premises; provided, that the record contains competent evidence to support the findings.
2. **Waters.** It is the duty of those who build structures across natural drainways to provide for the natural passage through such obstruction of all waters which may be reasonably anticipated to drain there. This is a continuing duty.
3. ———. Where surface water resulting from rain and snow flows in a well-defined course, whether it be a ditch, swale, or draw in its primitive condition, its flow cannot be arrested or interfered with by a landowner to the injury of neighboring proprietors.
4. **Appeal and Error.** When the evidence on material questions of fact is in irreconcilable conflict, this court will, in determining the weight of 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. **Crops: Damages.** Damages for the loss of crops, to be recoverable, must be direct and certain. Contingent, remote, or speculative damages will not be allowed.

Appeal from the district court for Hamilton County: JOHN D. ZEILINGER, Judge. Affirmed.

Vogeltanz & Grimminger, for appellants.

E. Harold Powell, for appellees.

Heard before WHITE, C. J., CARTER, MESSMORE, YEAGER, SPENCER, BOSLAUGH, and BROWER, JJ.

MESSMORE, J.

This is an action brought by John R. Arnold, Kermit L. Arnold, and Lenora A. Arnold, his wife, plaintiffs,

against Carl H. Huenefeld and Louise Huenefeld, his wife, defendants. The purpose of the action was to obtain a mandatory injunction to restrain the defendants from maintaining an obstruction across a drainageway which interfered with the drainage from the plaintiffs' land over and across the land of the defendants. The trial court enjoined the plaintiffs from maintaining the drainage level in the fence line at the east side of the west half of the northeast quarter of Section 26, Township 10 North, Range 7 West of the 6th P. M., in Hamilton County, from the southeast corner thereof along said fence line a distance of 100 feet north, at a level which is higher than 44.0 feet as determined from the datum used in the preparation of an exhibit; and enjoined the defendants from maintaining the drainage level in the fence line at the north side of the west half of the southeast quarter of Section 26, from the northeast corner thereof along the fence line a distance of 100 feet west, at a level which is higher than 44.0 feet, to be determined from the datum used in the preparation of an exhibit, and from maintaining the surface drainage south therefrom at a level which would prevent complete drainage of all surface waters which come onto their land from the north at said drainage level. The court denied the plaintiffs any damages for loss of crops. The defendants filed a motion for new trial which was overruled. Defendants appeal.

The plaintiffs' petition alleged that the plaintiffs owned the west half of the northeast quarter, the northwest quarter, and the north half of the southwest quarter of Section 26, Township 10 North, Range 7 West of the 6th P. M., in Hamilton County; and that the defendants owned the west half of the southeast quarter of said Section 26. The plaintiffs' land is north of the defendants' land. The petition further alleged that in 1951 and prior thereto rainwater would drain from the land of the plaintiffs onto and across the land of the defendants; that there was a definite drainageway from

the land of the plaintiffs onto the land of the defendants at a point approximately 400 feet west of the northeast corner of the defendants' land; that there was a definite watercourse from that point in a general southerly direction across the land of defendants, which drainageway did in 1951 and prior thereto drain the waters from the land of the plaintiffs and their predecessors in title over the land of the defendants; that in 1952, the defendants did certain land leveling which raised the level of the land in the drainageways before mentioned, which prevented drainage of waters from the plaintiffs' land; and that defendants threatened to continue such course of action causing loss of crops to the plaintiffs in each succeeding wet year.

The plaintiffs in their second cause of action alleged damages to their crops in the years 1958, 1959, and 1960.

The defendants' amended answer admitted the ownership of the lands as alleged in the plaintiffs' petition, and denied every other allegation contained therein. The defendants alleged that for more than 50 years the contour of the land where the lands of the plaintiffs and the defendants adjoin had remained as it was, and it was not possible for water to drain from the land of the plaintiffs onto or over the land of the defendants; and that if the plaintiffs had any right of drainage over the land of the defendants, the same disappeared over 50 years ago. Defendants admitted that they did certain land leveling upon their land; but denied that it in any way affected the drainage from plaintiffs' land or caused any damage to crops. The defendants alleged that the plaintiffs' land had historically contained potholes and lagoons which in rainy weather would fill up, but that such waters never drained onto the land of the defendants; that no waterway or drainageway ever existed from the plaintiffs' land to the defendants' land; that sometime in the 1950's the plaintiffs did certain land leveling, and in performing such leveling the plaintiffs failed to take into account the small lagoons and pot-

holes, except that plaintiffs dug out a substantial area adjacent to the division fence of the parties which served as a man-made lagoon in a place where such lagoon did not previously exist; that such lagoon catches waters from rains and irrigation operations which flow over and upon adjacent land owned by James M. Woodard and Mabel Woodard, described as follows: The east half of the northeast quarter of Section 26, Township 10 North, Range 7 West of the 6th P. M., in Hamilton County; that such man-made lagoon has no drainage course over defendants' land and defendants are under no obligation to alter their premises to provide drainage; and that plaintiffs have a drainageway upon their own land. The defendants denied that the plaintiffs lost any crops, and denied that any loss was caused by defendants at any time.

The plaintiffs' reply to the defendants' amended answer was a general denial of the allegations contained therein, except as admitted.

There is no dispute in the record that the plaintiffs own the land as heretofore described in their amended petition, and that the defendants own the land as is also described therein. The plaintiffs' land is north of the defendants' land.

In the companion case, James M. Woodard and Mabel Woodard, his wife, plaintiffs, v. Charles A. Huenefeld and Monetha N. Huenefeld, his wife, defendants, the plaintiffs Woodard own the east half of the northeast quarter of Section 26, Township 10 North, Range 7 West of the 6th P. M., in Hamilton County. Charles A. Huenefeld and Monetha N. Huenefeld, his wife, own the east half of the southeast quarter of said Section 26. The Woodards' land is north of the land of Charles Huenefeld, and east of the Arnold land. The Charles Huenefeld land is east of the Carl Huenefeld land. There is a line fence running from east to west dividing the lands of the Arnolds and Woodards from the lands of the Huenefelds. There is a fence running from the

south to the north between the Arnold land and the Woodard land. We are primarily concerned in this appeal with the Arnold land and the Carl Huenefeld land. Also involved herein is the Charles A. Huenefeld land and the Woodard land.

While the cases are companion cases, they are not consolidated, and consequently we will treat them as separate appeals. Both cases involve an alleged drainage right at a corner common to the four parcels of land. This corner post is between the Woodard property on the northeast, the Arnold property on the northwest, the Carl H. Huenefeld property on the southwest, and the Charles A. Huenefeld property on the southeast.

A consulting engineer who surveys land and ascertains the levels thereof, testified that the levels of land are the difference in elevation at various points on the land which are based on aid datum, either assumed or known from previous surveys from different organizations. He makes a record of such levels, from which a contour map is made with figures and lines indicating the contour and various changes in elevations. Several exhibits were introduced and received in evidence, examined, and marked by this witness. This witness made a map of elevations on April 28, 1961. The evidence of this engineer shows that the drainage from the plaintiffs' land was to the south across the land of the defendants.

The testimony of another witness who had done some surveying for land leveling in effect corroborated the testimony of the foregoing witness to the effect that the drainage from the plaintiffs' land was to the south over the land of the defendants, and that the drainage is prevented from where it would flow naturally because of a dike built up by the defendants.

Another witness testified with reference to some land leveling he did for the defendants in 1953 or 1954. The effect of his testimony is to corroborate the testimony of the two foregoing witnesses.

Wesley F. Smith, who had been acquainted with the land here involved for many years and had lived on the Arnold land and farmed it for a number of years, testified that he had lost crops because of the failure of the water to completely drain out to the south in a wet year, but the loss would not exceed half an acre; and that there was a low area in the southeast corner of the east 80 acres of the Arnold land. On cross-examination he testified that one year at harvest time there was a storm when 6 or 7 inches of rain fell, and that a little bit of water went out of the low place on the Arnold farm. He further testified that if there was a quick rain the water might cover 2 acres, but in a day or two it would be practically gone; that there was a little water that ran out across to the south before the 1930's; that in 1934 there was a lot of wind, and due to dry weather a lot of dirt filled in the fence row to a considerable extent and built it up high; and that there was a plum thicket along the east-west line between the properties of Arnold and Woodard and the properties of Carl and Charles Huenefeld, which was filled in quite a bit. On redirect examination this witness testified that the water drained from the Arnold farm and had to go south, and could not go east.

Claude Smith testified that the drainage was from the same position as testified to by his brother Wesley F. Smith, the preceding witness; that the water went south across the defendants' land; that the loss of crops was not more than half an acre after the dust storms in the 1930's and before 1950; and that the plaintiffs lost 7 or 8 acres of corn in one year because of drowning, in 1956 or 1957, after the construction of the dike by the defendants along the north side of their farm. On cross-examination this witness testified that he had never seen too much water accumulate in the southeast corner of the east 80 acres of the Arnold farm.

John Arnold testified that he and his brother purchased their farm in 1952; that in the latter part of

August or the first part of September 1954, his brother had plowed the wheat ground and he was working the ground in that area; that the plowing done by his brother had plowed dirt away from the fence and left a furrow, and in the meantime dirt had been thrown up and clods bigger than his fist had rolled over into the furrow from the defendants' dike; and that it looked to him as if the dike was 3 to 3½ feet high and wide enough so one could drive a car or tractor on it. In 1957, wheat was planted in this area by this witness. Water accumulated in the area which has been previously mentioned, but was drained out by digging through the fill on the Charles Huenefeld land. The digging was done by Charles Huenefeld, Raymond Obermeier, and this witness. After the place was dug out, Charles Huenefeld said he would keep that place open, and suggested that Obermeier and this witness do some leveling because of the low places on the Arnold and Woodard land and because they desired to irrigate, then the water would run through and a place would be kept open for it to drain. This digging was done approximately 20 feet east of the fence line between the Carl and Charles Huenefeld lands.

Raymond Obermeier testified that Charles Huenefeld came to him and wanted him to help dig a ditch to drain water off of some wheat. This witness was a tenant on the Woodard farm and had 12 acres of wheat planted. He believed that a place was dug out approximately 30 feet east of the corner post. He further testified that the water was almost at the top of the fill and they dug an opening about a foot deep; that the water drained out except in a small area back in the field; that he contributed to the water draining from the Arnold farm over onto the Woodard farm by pushing a shovel under the fence to let the water drain out; and that this was perhaps 20 feet or so north of the corner post. On cross-examination this witness testified that it was necessary to dig right up to the fence line and under it to get the water over to the irrigation fill. He

further testified that he dug out the ditch once after this time.

Carl H. Huenefeld testified that there was a 26-inch woven-wire fence with a barbed wire above the woven wire between his land and the Arnold land; that the woven wire was not visible to the naked eye except at one spot where the water had washed under and carried away the dirt a year or two before the time of trial; that the soil drifted in and buried the greater part of this woven-wire fence causing it to disappear about 25 years previously; that prior to that time the soil built up near that fence; that the wind from the north blew dust and dirt off the Arnold land onto that wire fence and there had been drifts in that area for a long time; that the ground was graded away from the north fence when the fill was made, and the fill was where the irrigation went and this was not against the fence line; that he helped his son Charles put in the irrigation lateral upon the fill; that the irrigation lateral was about 8 feet from the north division fence; that it was further out through the plum thicket; that the irrigation lateral was about 2 feet across the top and carried water effectively for irrigation purposes a distance of about 40 rods; and that the irrigation lateral would be about 1 foot above the original level of the ground at the east side of Carl Huenefeld's 80 acres. This witness further testified that the quantity of water that gathered in the southeast corner of the Arnold land since it has been leveled is a good deal more than it was previous to the time of the leveling; and that during the irrigation season the quantity of water in the southeast corner of the Arnold farm increased considerably from day to day and ran from the north against the fence line of his property and then east into a lagoon area.

Wesley Huenefeld testified that prior to 1957, he had seen mud holes and crops drowned out in the southeast corner of the Arnold farm, but not as must as at the present time. On cross-examination he testified

that there was no fill made and no water came across onto the Huenefeld land. He was referring to a leveling operation where it is claimed a fill was made on the north side of the Carl Huenefeld 80 acres.

Charles A. Huenefeld testified that he observed the Arnold and Woodard lands and observed the depression areas; that the contour of the Arnold land prior to the time it was leveled consisted of a depression area, mud holes, low areas which did not drain, other places that were pockmarked, lagoon areas, and low places scattered across the entire area of the Arnold land; that occasionally it would flood and the water would leave only by evaporation or percolation except in the event of a heavy rain which would fill up such places and the top level of the water would run off; and that the size of such area in the southeast corner of the Arnold farm would be 6 or 7 acres. This witness further testified that the water got over onto his farm through the ditch that was dug out in the fence line; that during the leveling operation or preparation of his irrigation ditch, no soil or dirt was placed in the fence line on his father's property or on his property; that he observed that Beech, who was working for him doing the leveling work, did not place any dirt in the fence line; that dirt was moved away from the fence line; that the irrigation lateral which this witness put in was quite close to the fence line, and in subsequent years it was moved so that a Jeep could be driven between the fence and the irrigation ditch; that there was no drainage from the Arnold land over to his land; that he never saw any evidence of water going across the fence line from the east 80 acres of the Arnold farm onto his father's land; that after a heavy rain he would see water accumulate on the north side of the fence but none of it came to the south side of such line; that the only time he ever saw water go across the fence line south was when someone made a man-made cut through the fence line; and that the dirt in the fence line was 15 inches above the water level at the

lowest place in the fence line that could be found.

There is much other evidence dealing with this drainage disclosed by exhibits and pictures which were testified to and which have been examined.

The defendants denied that there was any leveling done which caused any dirt to be placed near the east-west boundary line between the lands of the defendants and the plaintiffs. All of the Huenefelds testified that no water ever drained from the land of the plaintiffs through the fence line and onto the lands of the defendants.

The defendants set forth many assignments of error which may be summarized as follows: That the decision of the trial court is not sustained by sufficient evidence and is contrary to law; that the trial court erred in finding that the defendants built an obstruction which blocked a natural drainageway; that the order to remove the fence-line ridge down to a level of 44.0 feet constituted error; and that the trial court erred in finding there was a natural drainageway from the Arnold land over to the Huenefeld lands.

This case is for trial de novo in this court.

The parties agreed that the trial court view the premises of the parties here involved. In view thereof the following has application: The trial court is required to consider any competent and relevant facts revealed by a view of the premises as evidence in the case, and a duty is imposed on this court on review of findings made by the trial court to give consideration to the fact that the trial court did view the premises; provided, that the record contains competent evidence to support the findings. See, Town of Everett v. Teigeler, 162 Neb. 769, 77 N. W. 2d 467; Mader v. Mettenbrink, 159 Neb. 118, 65 N. W. 2d 334; Walla v. Oak Creek Township, 167 Neb. 225, 92 N. W. 2d 542.

The following are applicable. In McGill v. Card-Adams Co., 154 Neb. 332, 47 N. W. 2d 912, this court held: "It is the duty of those who build structures

across natural drainways to provide for the natural passage through such obstruction of all waters which may be reasonably anticipated to drain there. This is a continuing duty. * * * Where surface water resulting from rain and snow flows in a well-defined course, whether it be a ditch, swale, or draw in its primitive condition, its flow cannot be arrested or interfered with by a landowner to the injury of neighboring proprietors."

"For such an injury injunction is the proper remedy, and equity looks to the nature of the injury inflicted, together with the fact of its constant repetition, or continuation, rather than to the magnitude of the damage inflicted, as the ground of affording relief." Schomberg v. Kuther, 153 Neb. 413, 45 N. W. 2d 129. See, also, McGill v. Card-Adams Co., *supra.*

There are many cases in this jurisdiction holding the same as the above-cited cases.

It will be noted that the evidence in the instant case is in conflict. This being true, the following rule is applicable. "When the evidence on material questions of fact is in irreconcilable conflict, this court will, in determining the weight of 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." Stohlmann v. Stohlmann, 168 Neb. 401, 96 N. W. 2d 40. See, also, Ross v. Ross, 174 Neb. 795, 119 N. W. 2d 495.

The plaintiffs cross-appealed, contending that the trial court erred in denying them any damages for loss of crops which they were entitled to recover due to the obstruction of the natural drainageway by the defendants. We have reviewed the evidence relating to this subject. There is no evidence to show the market value of the crops or the expenses with relation thereto. Neither is there evidence differentiating between the totally damaged crops and the partially damaged crops. A recovery for any alleged damages the plaintiffs may

have suffered would force the trial court to indulge in speculation and conjecture as to such damages. The general rule is that damages, to be recoverable, must be direct and certain. Contingent, remote, or speculative damages will not be allowed. See Gledhill v. State, 123 Neb. 726, 243 N. W. 909. This rule relates to the loss of crops. See Turnell v. Mahlin, 171 Neb. 513, 106 N. W. 2d 693. The cross-appeal of the plaintiffs is denied.

From a review of the record we come to the conclusion that the judgment of the trial court should be, and is hereby, affirmed.

AFFIRMED.

JAMES M. WOODARD ET AL., APPELLEES AND CROSS-APPELLANTS, V. CHARLES A. HUENEFELD ET AL., APPELLANTS AND CROSS-APPELLEES.

127 N. W. 2d 191

Filed March 27, 1964. No. 35572.

1. **Trial: Appeal and Error.** The trial court is required to consider any competent and relevant facts revealed by a view of the premises as evidence in the case, and a duty is imposed on this court on review of findings made by the trial court to give consideration to the fact that the trial court did view the premises; provided, that the record contains competent evidence to support the findings.
2. **Waters.** It is the duty of those who build structures across natural drainways to provide for the natural passage through such obstruction of all waters which may be reasonably anticipated to drain there. This is a continuing duty.
3. ———. Where surface water resulting from rain and snow flows in a well-defined course, whether it be a ditch, swale, or draw in its primitive condition, its flow cannot be arrested or interfered with by a landowner to the injury of neighboring proprietors.
4. **Appeal and Error.** When the evidence on material questions of fact is in irreconcilable conflict, this court will, in determining the weight of 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.

Appeal from the district court for Hamilton County: JOHN D. ZEILINGER, Judge. Affirmed.

Vogeltanz & Grimminger, for appellants.

E. Harold Powell, for appellees.

Heard before WHITE, C. J., CARTER, MESSMORE, YEAGER, SPENCER, BOSLAUGH, and BROWER, JJ.

MESSMORE, J.

James M. Woodard and Mabel Woodard, his wife, plaintiffs, brought this action against Charles A. Huenefeld and Monetha N. Huenefeld, his wife, defendants. The purpose of the action was to enjoin the defendants in constructing and maintaining a dike or fill across a natural drainageway from the plaintiffs' land to the defendants' land. The trial court found that the general drainage of surface waters from the lands of plaintiffs, described as the east half of the northeast quarter of Section 26, Township 10 North, Range 7 West of the 6th P. M., in Hamilton County, is from the approximate east-west center thereof to the southwest, and that the natural drainage thereof leaves said land near the southwest corner thereof, and surface waters flow thence southerly across the land owned by the defendants and described as the east half of the southeast quarter of Section 26; that the defendants have erected a barrier to said drainage which barrier must be removed, provided the plaintiffs remove a barrier to drainage existing in their west fence line on their land; and that adequate drainage can be established by requiring plaintiffs to construct and maintain the drainage level in the fence line at the west side of their land, from the southwest corner thereof and north therefrom a distance of 100 feet, at the level of 44.0 feet, to be determined from

the datum used by the surveying engineer in taking readings and preparing an exhibit which shows the levels, and requiring the defendants to construct and maintain the drainage level in their fence line along the north side of their lands and east therefrom along their fence line a distance of 100 feet, and defendants to maintain the surface waters which come onto their lands from the north at said drainage level. Judgment was rendered in accordance with the findings. The defendants filed a motion for new trial which was overruled. Defendants appeal.

The plaintiffs alleged in their petition the ownership of the lands hereinbefore described, then followed allegations of blocked drainage quite similar to those alleged in the case of Arnold v. Huenefeld, *ante* p. 683, 127 N. W. 2d 196, hereinafter referred to as the companion case, with a similar prayer for relief.

For the second cause of action the plaintiffs asked that the fence line be established on the line of the United States government survey.

Defendants' answer is similar to the answer in the companion case.

The reply is in effect a general denial of the allegations of the defendants' answer not admitted.

The description of the locations of the lands is set forth in the companion case. The exhibits received in both cases have been examined and considered.

It was stipulated that the testimony of the consulting engineer and a surveyor might be considered as evidence in both cases.

Dr. James M. Woodard testified that he bought the land described in the petition in 1943; that the drainage in the south half of this land is to the southwest corner; that in times of high water the drainage was of such excess that the water would leave this land at a point approximately 200 feet east of the southwest corner; that there is a definite watercourse across that point; that leveling of the land has been done on the defend-

ants' land and there is a fill which affected the drainage of water from the plaintiffs' land; that he has been in that area after heavy rains; that there was a difference in the drainage so that instead of the water draining off "it was kind of choked up"; that the water pretty much drained off of his land before the fill was made; that after the fill was made some of the water formed in ponds on his land; that this was at times of heavy precipitation; that the water would run from his land onto the land of Charles Huenefeld prior to the leveling done on that land, at a point approximately 200 feet east of the corner post of the southwest corner of the plaintiffs' land; that the fill made in the drainageway by the defendants was close to 12 inches above the original level of the land; and that this observation was made after the irrigation lateral was placed at this point.

On cross-examination this witness testified that when there was a dry period the dirt would blow and practically every fence line was blown shut; that the fence line between his land and the Arnold land was blown shut and the fence line between his land and the Huenefeld land was blown shut; that the fence lines were "pretty open" at the time of trial, as they had been dug out and leveling had been done in some places; that he thought Charles Huenefeld said he would put in a drain or culvert to assist the drainage but he did not believe that Charles had done so; and that what he wanted was that the water should run to the south, and he believed that the defendants had built a fill so that it could not drain to the south.

Raymond Obermeier testified that he became a tenant on the Woodard land in March 1955; that when he first went on this land he noticed the dike built up on the south side of the division fence which is at the north side of the defendants' land; that in times of heavy precipitation, or in the irrigating of crops, the water would drain to the southwest corner; that the first time

he had any water problem was in 1957, before the wheat harvest; that there was a considerable rain, resulting in filling a great amount of water in the low area; that Charles Huenefeld came over and asked if this witness would help him to get the water to drain out of the low area; that there was water on the south side of the fence line 4 or 5 inches deep in the irrigation ditch; that the water was over the dirt in the fence line; that the water extended west approximately to the brace post against the corner post; that the dirt was higher in the fence line west of the corner post and he could not remember water ever being south of the fence line from there as far as he could see; that he and Charles Huenefeld started to dig from the south side to avoid the water while doing the digging, and dug through on the north side of the irrigation lateral; that the water started to flow through there quite fast because it was a low place; and that the water then went through the Charles Huenefeld fence line in that low area. He further testified that Arnold came down and assisted in the digging; that they dug as far north as the fence line itself, and dug under the fence and more water drained out; and that the digging that was done substantially let the water drain from the plaintiffs' land. He further testified that he remembered some conversation wherein Charles Huenefeld said that if the plaintiffs would level, and pull dirt down to fill up the hole on their land, Huenefeld would leave the drain open so that there would be no more waterholes on the plaintiffs' land; that Charles Huenefeld put a pipe in the ditch, and in making a ditch across it punched a hole in the pipe and dirt rolled into it; and that the water at that time was above the pipe, and when this witness dug it out the water could not go through the pipe. This was after 1957.

On cross-examination he testified that the southwest portion of the farm was recognized as a wet area. He did not know whether this area could be classed as a

lagoon, but it was a low area where at times he could not walk along the fence line on the plaintiffs' side of the fence with a pair of irrigation boots which measure 17½ inches tall when the water had been that high, that is, right at the north side of the fence line. He further testified that there was no water running across the fence line at that time; and that at the time of trial there was no irrigation ditch south of the fence, but there was still a raise there which is lower than it was, but it is still a raise. On redirect examination he testified that he saw the fill on the south side of the fence line before the irrigation ditch was put in; and that he estimated the fill to be approximately 12 to 14 inches higher than on the north side of the fence line and would hold a good foot of water that previously went through there before the fill was made.

Marion Bayne testified that he operated the farm owned by the plaintiffs, moved on it around 1940 and moved off in 1950; that he knew how the surface waters drained on the south 40 acres of the 80 acres, and that the natural flow of water was to the south; that he observed where the water would leave the plaintiffs' land to the south during times of heavy precipitation which would be close to 20 rods east of the southwest corner of the south 40 acres; that he had seen the water from that approximate position flow to the south; and that he had a conversation with Carl Huenefeld one year when there was considerable rain, and Carl Huenefeld told him that if he wanted to drain the water out he could. Carl at that time operated the 80 acres south of the plaintiffs' land. In compliance with that conversation he took an old single-row lister with a team of horses, waded out, and plowed a furrow as deep as the team could pull as close to the fence as he could get, then took a spade and dug under the fence which let considerable water drain off the plaintiffs' land. In times of heavy precipitation, water would drain out to a certain extent. On cross-examination he testified that

in the southwest part of the plaintiffs' land there was no irrigation or anything, so he just called that a waterhole; and that it was an area of poor drainage.

Carl H. Huenefeld testified that at one time he owned the land immediately south of the plaintiffs' 80 acres; that he accompanied Dr. Woodard, the owner of the land north of that of his son Charles, to the site of Dr. Woodard's land in 1959 or 1960 because he wanted the doctor to see how much water there was on his land; and that he saw the water approximately 28 feet north from the Charles Huenefeld fence. He did not recall that there was any dike on the Charles Huenefeld land which was holding any water back on the plaintiffs' land. He sold the land south of the plaintiffs' land to his son Charles Huenefeld. In the years that he farmed this land, he did not recall seeing any water come across from the plaintiffs' land onto this land. He testified that there are many places in that part of Hamilton County where water either soaks away or evaporates; that there are low places on the plaintiffs' land, and in recent years the water ran over the Charles Huenefeld land and down a waterway which Charles had constructed; that prior to about 4 years before time of trial the water mostly stayed on the plaintiffs' property; and that when the water on the plaintiffs' land gets too high it does run over onto the Charles Huenefeld land.

The testimony of this witness is to the effect that there was nothing done on the land of his son Charles which interfered in any way with the drainage of the plaintiffs' land, or which in any way blocked the drainage of the plaintiffs' land to his son's land.

Charles A. Huenefeld testified that he owned the 80 acres of land south of the plaintiffs' land; that he purchased it in 1946; that he has been familiar with this land since 1920, and was also familiar with the plaintiffs' land; that he had observed both properties many times; that he believed he testified in the companion

case that dirt which had built up through the years was removed from the Huenefeld land and pushed together for their irrigation lateral; that for 3 years he had been using pipe irrigation in this area and it was much lower on the south side than it had been in many years; and that over a period of years he had not observed any water coming from the plaintiffs' property onto his property prior to the time the dirt was taken away from the fence line in 1957. The testimony of this witness is to the effect that there never was any interference on his part, or on the part of any other person, with the drainage from the plaintiffs' land onto the Huenefeld lands.

Wesley Huenefeld testified that he was familiar with the plaintiffs' land; that after a relatively heavy rain storm he observed water in the southwest corner of the plaintiffs' land; and that there was no fill whatsoever that stopped or prevented water coming from the plaintiffs' land across the fence line onto the Charles Huenefeld land.

While we did not set out the testimony of the surveying engineer to any extent in the companion case, it is to the effect that there is a drainageway from the south side of the plaintiffs' land across the Charles Huenefeld land and in a southwesterly direction onto the Carl Huenefeld land; and that the elevation of the Huenefeld land on the north side thereof was generally lower than the land of the plaintiffs on the south side thereof just across the east and west fence line dividing the properties of the parties. This witness' testimony substantially confirms the trial court's judgment in this case and in the companion case, as does the testimony of the surveyor Discoe.

The testimony of Wayne Beech in the companion case, as stated therein, corroborates the testimony of the surveying engineer and another surveyor. Beech testified to a conversation had between the United States soil conservationist, Dwight Pumphrey, and Charles

Huenefeld in which Pumphrey and Beech were concerned with drainage from the north and what would happen to it if a fill were put in where planned to permit an irrigation lateral to run along the north side of the defendants' land. Beech was assured by Huenefeld that that drainage would be protected. Beech further testified that he would not have done this work if this promise had not been made.

The pertinent assignment of error is that the judgment of the trial court is contrary to the evidence and to the law.

This case is for trial de novo in this court.

The parties agreed that the trial court view the premises of the parties here involved. In view thereof the following has application: The trial court is required to consider any competent and relevant facts revealed by a view of the premises as evidence in the case, and a duty is imposed on this court on review of findings made by the trial court to give consideration to the fact that the trial court did view the premises; provided, that the record contains competent evidence to support the findings. See, Town of Everett v. Teigeler, 162 Neb. 769, 77 N. W. 2d 467; Mader v. Mettenbrink, 159 Neb. 118, 65 N. W. 2d 334; Walla v. Oak Creek Township, 167 Neb. 225, 92 N. W. 2d 542.

The following are applicable. In McGill v. Card-Adams Co., 154 Neb. 332, 47 N. W. 2d 912, this court held: "It is the duty of those who build structures across natural drainways to provide for the natural passage through such obstruction of all waters which may be reasonably anticipated to drain there. This is a continuing duty. * * * Where surface water resulting from rain and snow flows in a well-defined course, whether it be a ditch, swale, or draw in its primitive condition, its flow cannot be arrested or interfered with by a landowner to the injury of neighboring proprietors."

"For such an injury injunction is the proper remedy, and equity looks to the nature of the injury inflicted,

together with the fact of its constant repetition, or continuation, rather than to the magnitude of the damage inflicted, as the ground of affording relief." Schomberg v. Kuther, 153 Neb. 413, 45 N. W. 2d 129. See, also, McGill v. Card-Adams Co., *supra*.

There are many cases in this jurisdiction holding the same as the above-cited cases.

It will be noted that the evidence in the instant case is in conflict. This being true, the following rule is applicable. "When the evidence on material questions of fact is in irreconcilable conflict, this court will, in determining the weight of 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." Stohlmann v. Stohlmann, 168 Neb. 401, 96 N. W. 2d 40. See, also, Ross v. Ross, 174 Neb. 795, 119 N. W. 2d 495.

The plaintiffs cross-appealed, contending that they are entitled to have the fence line determined in accordance with the United States government survey, and that all parties be required to have the fence placed on the true division line.

The issue raised by the plaintiffs in their cross-appeal as above stated is not pertinent to the cause of action pleaded by the plaintiffs in this case. This is an injunction action relating to drainage from the respective lands of the parties and not a case wherein boundary lines are involved. Therefore, the plaintiffs' cross-appeal is denied.

The judgment of the trial court should be, and is hereby, affirmed.

AFFIRMED.

HERMAN CALDWELL, APPELLANT, V. HAROLD HECKATHORN, APPELLEE.

127 N. W. 2d 182

Filed March 27, 1964. No. 35581.

1. **Automobiles: Highways.** A pedestrian has equal rights with the operator of a vehicle in the use of public highways and each must use reasonable care for his own safety and the safety of others.
2. **Trial.** A litigant without request has a right to have his theory of a case presented to the jury by proper instructions only if it is pleaded and there is evidence to sustain it.
3. **Trial: Appeal and Error.** Instructions must be considered and construed together, and if they are not sufficiently specific in some respects, it is the duty of counsel to offer requests for instructions that will supply the omission, and, unless this is done, the judgment will not ordinarily be reversed for such defects.
4. **Automobiles: Negligence.** The mere fact that a person was standing momentarily in the street or highway does not of itself necessarily show contributory negligence as a matter of law, as he may assume that the motorist will not without warning run him down; and the fact that a person in the street is not in motion does not relieve motorists of all duty to use due care under the circumstances.
5. **Automobiles: Highways.** A party has a legal right to walk longitudinally along the highway or to stand alongside his car, but in doing so he is required to use reasonable care for his own safety.
6. **Negligence: Trial.** In determining the question of whether the evidence is sufficient to submit the issues of negligence and contributory negligence to the jury, a party is entitled to have all conflicts in the evidence resolved in his favor and the benefit of every reasonable inference that may be deduced from the evidence, and if reasonable minds might draw different conclusions from a set of facts thus resolved in favor of a party, the issues of negligence and contributory negligence are for a jury.
7. **Trial.** Instructions herein examined and found adequate in the absence of a request for more specific instructions.

Appeal from the district court for Gage County: ERNEST A. HUBKA, Judge. Affirmed.

Frederick W. Carstens, for appellant.

Chambers, Holland, Dudgeon & Hastings, for appellee.

Heard before WHITE, C. J., CARTER, MESSMORE, YEAGER, SPENCER, BOSLAUGH, and BROWER, JJ.

SPENCER, J.

This is an action for damages for injuries sustained when the plaintiff, Herman Caldwell, hereinafter referred to as plaintiff, was struck by an automobile owned and operated by Harold Heckathorn, hereinafter referred to as defendant. The jury returned a verdict for the defendant. Plaintiff has perfected an appeal from the judgment entered thereon.

The accident occurred about 10:30 p. m., on November 30, 1961, at a point at least 40 feet from any crosswalk, on Sixth Street north of Sixth and Jackson Streets, near the north edge of the city limits in Beatrice, Nebraska. Sixth Street at this point is the same as Highway No. 77, and is wide enough for four lanes of traffic.

The plaintiff, an Arapahoe Indian, and his sister, had driven to the Homestead Bar which is located on the east side of Sixth Street and north of Jackson Street. He parked his car off the street, facing the building. He spent approximately 1 hour and 20 minutes in the bar begging for money or drinks, and consumed three or four glasses of beer which were given to him. It was the bartender's testimony that plaintiff had been drinking hard liquor before he entered the bar. About 10:30 the bartender asked the plaintiff and his sister to leave the premises.

Plaintiff testified that his battery was dead and he could not get the car started, so he pushed it into Sixth Street. He faced it south because another parked car prevented him pushing it so that he could face it north. The undisputed testimony is that the car was parked in the street without lights at a slight angle, with the front end not quite up to the curb, and the back end from

2½ to 4 feet away from the curb. After the plaintiff had pushed the car into the street, he crossed over to a Champlin filling station located on the west side of Sixth Street across from the Homestead Bar. The attendant there agreed to give him a push and proceeded to warm up the truck used for that purpose. The plaintiff returned across the street to wait for the attendant to bring the truck.

A witness who observed the plaintiff at this time testified that he staggered badly crossing the street, and that two different cars came almost to a halt to avoid hitting him. The last time he saw him the plaintiff was at the rear of his parked car. This witness and the bartender both expressed the opinion that the plaintiff was drunk.

When the attendant brought his truck around to the front of the station, he observed some people around the plaintiff's car and he started to go across. He then noticed that the police were there and did not cross the street. He did not observe too closely, but it appeared to him that someone was lying 5 to 10 feet back from the parked car.

Plaintiff's testimony is that he returned to his car, got in on the right-hand side, and turned the steering wheel to straighten the car. He got out on the right-hand side and headed back to the rear of the car, and was hit. He did not see the car that hit him and does not know exactly where he was with relation to his car or whether he was walking north or facing east at the time he was hit. He was struck on the right side of his body, so he reasoned he was either facing east or was in the process of turning east when hit.

The defendant's testimony is that he first saw the parked car when he was ⅓ of a block away. He estimates it was ¼ of a block north of the intersection of Sixth and Jackson Streets. He could see the area east of the parked car and no one was standing alongside it. He pulled to the west to clear the car, and estimates

that his car was about 2 feet east of the centerline as he approached it. As he neared the car, an object suddenly loomed up in front of him. He pulled to the left and applied his brakes. His car started to slide, and then he felt an impact. The object he had seen came over the right front fender, then was thrown off to the side of the car. His car stopped one-half the length of the car beyond the rear of the plaintiff's car. The plaintiff was lying some 3 to 5 feet to the rear of his own car.

The undisputed evidence is that the defendant's car made a heavy solid skid mark of 15 feet. The east line of this skid mark, or the one closest to the plaintiff's car, was 5 to 7 feet west of the plaintiff's car. One of the investigating officers, in response to the plaintiff's question, testified that the skidding took place before plaintiff was hit, and that the point of the impact was at the north end of the skid mark.

Plaintiff lists 10 assignments of error, some of which are obviously not applicable. We discuss herein only those argued by the plaintiff in his brief. Plaintiff contends that the trial court failed to instruct the jury on his theory of the case and sets out a portion of his petition to give his theory. The trial court, in its first instruction, set out verbatim the quotation used by the plaintiff. The substance of the allegation is that plaintiff was struck while he was lawfully in the street. The plaintiff merely states that while he was lawfully in the street he was hit. There is nothing in his petition to suggest what he was actually doing, whether he was walking longitudinally along the highway or standing alongside the car. Plaintiff, himself, is not sure whether he was walking north or was standing facing east when hit. The defendant's evidence is that the plaintiff suddenly loomed up in front of him and he did everything possible to avoid an impact.

The trial court correctly instructed the jury that a pedestrian has equal rights with the operator of a vehicle in the use of public highways and each must use rea-

sonable care for his own safety and the safety of others. See McCarty v. Morrow, 173 Neb. 643, 114 N. W. 2d 512. The jury was also properly instructed on the duty of the driver of a motor vehicle on lookout, on reasonable control, and on the duty to see what is in plain sight.

It seems to be the plaintiff's contention that the trial court should have instructed the jury on every single activity of the plaintiff that did not constitute negligence. He complains because the jury was not specifically told that the plaintiff had a right to walk longitudinally on the highway or to stand to the right of his car, and could not be guilty of contributory negligence if he was standing in the roadway or moving longitudinally to the rear of his car. The instructions given by the court were in general terms, but were adequate and fully covered all points embraced in the plaintiff's assignment.

While the instructions given by the court were general in nature, they do cover the theory of the plaintiff as presented by the pleadings. A litigant without request has a right to have his theory of a case presented to the jury by proper instructions only if it is pleaded and there is evidence to sustain it. See Kennedy v. Chicago R. I. & P. R. R. Co., 156 Neb. 345, 56 N. W. 2d 446. The plaintiff tendered no instructions. If he desired more specific instructions it was his duty to tender them. As we said in Stahlhut v. County of Saline, *ante* p. 189, 125 N. W. 2d 520: "Instructions must be considered and construed together, and if they are not sufficiently specific in some respects, it is the duty of counsel to offer requests for instructions that will supply the omission, and, unless this is done, the judgment will not ordinarily be reversed for such defects."

It also seems to be the plaintiff's theory that because he testified he was walking longitudinally on the highway, or was standing beside his car at the time he was struck, it was error for the court to submit the issue of contributory negligence. It seems to be his position that as a matter of law he was not guilty of contributory

negligence. He contends that in Brenning v. Remington, 136 Neb. 883, 287 N. W. 776, we held this could not constitute negligence. This is an erroneous assumption. What we held was that it was not sufficient as a matter of law to defeat plaintiff's action. In that case we said: " 'The mere fact that a person was standing momentarily in the street or highway does not of itself necessarily show contributory negligence as a matter of law, as he may assume that the motorist will not without warning run him down; and the fact that a person in the street is not in motion does not relieve motorists of all duty to use due care under the circumstances.' " We did not say that the pedestrian, as a matter of law, was not guilty of contributory negligence, but rather that the pedestrian was not, as a matter of law, guilty of negligence.

Plaintiff in his brief states: "The evidence in this case is without dispute that plaintiff was struck in the right side of his body by a north bound vehicle. There can be no sound conclusion reached other than that at the time of the accident plaintiff was facing east. This indicates, with reasonable certainty, that plaintiff was standing beside his vehicle facing east at the time he was struck or that he had moved to the rear and was in the act of turning and exposing the right side of his body to the car approaching from the south." We do not feel the conclusion is as irrefutable as plaintiff may believe. The defendant, who was the successful party in the trial court, could argue just as logically that the plaintiff staggered suddenly into his car. The plaintiff also ignores the point that there is ample evidence, including physical facts, which could raise considerable doubt in the minds of the jurors as to the credibility of plaintiff's testimony. The undisputed evidence is that the skid mark made by the defendant's car was 5 to 7 feet west of the plaintiff's car. No contention is made of excessive speed on the part of the defendant. Defendant's overall skid mark is only 15 feet and his car came to a

complete stop a half car length behind plaintiff's parked car.

The plaintiff had a legal right to walk longitudinally along the highway or to stand alongside his car, but in doing so he is required to use reasonable care for his own safety. McCarty v. Morrow, 173 Neb. 643, 114 N. W. 2d 512. The question is whether the plaintiff was in the exercise of ordinary care under the circumstances then existing. As we view it, this is a question to be determined by the jury. See Grantham v. Watson Bros. Transp. Co., 142 Neb. 362, 6 N. W. 2d 372.

In Costanzo v. Trustin Manuf. Corp., *ante* p. 136, 125 N. W. 2d 556, we said: "In determining the question of whether the evidence is sufficient to submit the issues of negligence and contributory negligence to the jury, a party is entitled to have all conflicts in the evidence resolved in his favor and the benefit of every reasonable inference that may be deduced from the evidence, and if reasonable minds might draw different conclusions from a set of facts thus resolved in favor of a party, the issues of negligence and contributory negligence are for a jury." There is no merit to plaintiff's assignment that the issue of contributory negligence should not have been submitted to the jury.

The plaintiff argues in his brief as to the extent of his intoxication. There is ample evidence to suggest the extent to which the plaintiff's faculties were impaired. In any event, the court properly instructed the jury that whether the plaintiff was intoxicated or not in no way defeated his right of recovery, and that if the jury found he was intoxicated, it was only a circumstance to be considered by it in determining whether the plaintiff exercised the degree of care that a reasonably prudent man would exercise under the circumstances. The court further specifically instructed the jury that intoxication did not of itself constitute contributory negligence. The instruction in all particulars conformed to

the rule announced in Remmenga v. Selk, 150 Neb. 401, 34 N. W. 2d 757.

Plaintiff also complains of the instruction given on contributory negligence, with the general statement that the instruction does not clearly state the law as it should be applied in this case. We do not follow plaintiff's reasoning. The instruction given is the one first approved by this court in Morrison v. Scotts Bluff County, 104 Neb. 254, 177 N. W. 158. It correctly and adequately states the law where contributory negligence is involved. As suggested heretofore, contributory negligence was an issue in this case.

There is no merit to any of the plaintiff's assignments of error. The judgment should be and it is affirmed.

AFFIRMED.

IN RE APPLICATION OF YELLOW CAB COMPANY ET AL. YELLOW CAB COMPANY ET AL., APPELLANTS, V. NEBRASKA STATE RAILWAY COMMISSION, APPELLEE.

127 N. W. 2d 211

Filed March 27, 1964. No. 35593.

1. **Public Service Commissions.** Under the statute, section 84-915, R. S. Supp., 1961, the Nebraska State Railway Commission is required in its final order to make findings of fact and conclusions of law.
2. ———. The findings of fact shall consist of a concise statement of the conclusions upon each contested issue of fact.
3. ———. In the absence of findings of fact, there is no proper basis upon which to review the order of the Nebraska State Railway Commission and to determine whether it is reasonable or arbitrary.
4. ———. A finding, in a final order of the Nebraska State Railway Commission, that a proposed rate is or will be unjust, unreasonable, unjustly discriminatory, unduly preferential, or unduly prejudicial does not comply with the requirement of the statute that findings of fact shall consist of a concise statement of the conclusions upon each contested issue of fact.
5. **Public Utilities.** A public utility is entitled to demand, in the

fixing of its rates, a fair return upon the reasonable value of its property at the time it is being used for the public.

6. **Public Service Commissions.** The rate-making power of the Nebraska State Railway Commission is purely legislative in character and a validly promulgated rate has the force of a statute.

7. **Public Service Commissions: Appeal and Error.** The only judicial power of this court, upon review of an order of the Nebraska State Railway Commission, is to determine whether the commission acted within the scope of its power and if the action taken was arbitrary or unreasonable.

Appeal from the Nebraska State Railway Commission. Reversed and remanded.

Carl E. Sanden and Clarence A. Davis, for appellants.

Clarence A. H. Meyer, Attorney General, and Homer G. Hamilton, for appellee.

Heard before WHITE, C. J., CARTER, MESSMORE, YEAGER, SPENCER, BOSLAUGH, and BROWER, JJ.

WHITE, C. J.

This is the second appeal to this court from an order of the Nebraska State Railway Commission denying a rate increase to the Yellow Cab Company and Lincoln Cabs, Inc., doing business as Capital Cab Company. In the first appeal, Yellow Cab Co. v. Nebraska State Railway Commission, 175 Neb. 150, 120 N. W. 2d 922, we reversed the original order because no findings on contested issues of fact under section 84-915, R. S. Supp., 1961, had been made and therefore there was "no basis upon which to review the order of the commission * * *."

Under the authority of Petroleum Transp. Co. v. All Class I Rail Carriers, 173 Neb. 564, 114 N. W. 2d 34, the Nebraska State Railway Commission, on remand from this court, entered a new order without further hearing and based on the same record. This, under the authority cited, the commission may do, but the new order is challenged on appeal as not complying with the provisions of section 84-915, R. S. Supp., 1961, and the man-

date of this court. The order reads in pertinent part:

"1. The rates, fares and charges demanded and applied for * * * will be unjust, unreasonable, unjustly discriminatory, unduly preferential and unduly prejudicial to the public.

"2. The rates presently in effect are just and reasonable for the services being rendered. * * *

"4. Since the burden of proof has not been met * * * therefore the application should be denied."

Section 84-915, R. S. Supp., 1961, requires the commission to make "findings of fact and conclusions of law," and then further defining the findings of fact requires the "findings of fact shall consist of a concise statement of the conclusions upon each contested issue of fact." It is now asserted that the findings of "unjustly discriminatory, unduly preferential or unduly prejudicial to the public" meets the requirements of conclusions upon each contested issue of fact. By the express terms of section 75-248, R. R. S. 1943, the "opinion" of the commission must be exercised to determine the ultimate legal conclusion of whether the proposed rate "is or will be unjust, unreasonable, unjustly discriminatory, unduly preferential or unduly prejudicial." These legal conclusions, obviously, must be based on the evidence and the facts as developed in the record of the hearing. It seems clear that to make findings of unjustness, prejudice, preference, or discrimination are in truth the process of drawing a legal judgment or conclusion based on previously determined facts and therefore could not, in themselves, be construed to be the "conclusions upon each contested issue of fact." If these findings constitute findings of "fact," we then must inquire as to what room is left, under the statute being considered, for the making of "conclusions of law." The words here used in this order are generic concepts, commonly used in legislation covering widely varying fields, expressing an ultimate legal conclusion within the area of legal right and wrong, and their use throws no

light on what the contested fact issues were or how they were resolved. No findings of fact were required before the enactment in 1959 of section 84-915, R. S. Supp., 1961. The new statute must have a purpose and, we think, an obvious one. As stated in the previous opinion in this case and in Basin Truck Co. v. All Class I Rail Carriers, 172 Neb. 28, 108 N. W. 2d 388, unless the statute is complied with and fact findings made, there is no basis upon which to review the order of the commission and to determine whether it is reasonable or arbitrary. Before this court can decide these questions, we must know why the commission reached its final decision on the conclusions of law involved. See, Skeedee Independent Tel. Co. v. Farm Bureau, 166 Neb. 49, 87 N. W. 2d 715; Oakdale Tel. Co. v. Wilgocki, 171 Neb. 425, 106 N. W. 2d 486.

Counsel nevertheless argues that these findings are sufficient under our holding in Young v. Morgan Drive Away, Inc., 171 Neb. 784, 107 N. W. 2d 752; and Petroleum Transp. Co. v. All Class I Rail Carriers, *supra,* wherein we held that findings of fact in the language of the statute relating to the granting of certificates of public convenience and necessity, section 75-230, R. S. Supp., 1961, were sufficient compliance with the requirements of section 84-915, R. S. Supp., 1961. The effect of our holding was that the language of the statute itself contained sufficient basic fact-finding standards so that a commission order using such language formed a fact basis on which to determine unreasonableness and arbitrariness and, therefore, could be reviewed intelligently. These holdings properly interpret the requirements for the necessary fact findings under the particular statute involved. We adhere to those holdings. Any language therein purporting to hold that, irrespective of the particular statute involved, a finding by an agency using only the words of the statute necessarily constitutes a compliance with the requirement that there be concise findings on contested

issues of fact is dicta and is hereby overruled. We therefore hold that the new order does not comply with the mandatory provisions of the statute nor the mandate previously issued in this case and that the order must be reversed for this reason.

The necessity for this holding appears when we review the record, to the extent necessary, in this case. Not by way of limitation we point out some of the seriously contested fact issues and conclusions in this case. The evidence in this case consists of financial statements of assets and their valuation, and various reports as to operating expenses prepared by certified public accountants to June 30, 1961, for both the Yellow Cab Company and Capital Cab Company. The evidence also consists of the oral testimony of the owners and some employees of the two cab companies. This evidence is all undisputed. It includes, in exhibits 5 and 6, a projection of the effects of the new proposed rates and their relation to a reasonable return on the invested capital in both companies. The evidence to the contrary consists of a commission accountant's report, exhibits 7 and 8, and his oral evidence. It is based on an examination of the financial reports of the cab companies in evidence. He recommends a disallowance of some of the items charged therein, or a reduction of some of them, for rate-making purposes. Then, on the basis of these deductions, he recomputes the earnings of the companies recommending no rate increase for the Capital Cab Company but stating that there should be some minor adjustment of the existing rates for the Yellow Cab Company. It is a fair statement to say that his report suggests changes in accounting procedures and changes in the policy of management that will eliminate certain expenditures, and his recommendation to deny the increased rates is largely based thereon; as for example, a requirement that Capital Cab Company install a bulk gas and oil storage plant to save 5 to 7 cents per gallon over Yellow Cab Company's expenditure in this re-

spect. At no point is there a consideration in his estimate of a rate base of the cost of installation of such a plant.

More specifically, a review of the evidence in this case shows the following contested fact issues upon which findings are necessary to determine their reasonableness:

1. Rent of $9,000 was paid by Yellow Cab Company for its headquarters garage. This, the company charged as an expense item in full, and the commission accountant deducted it in full making an allowance only for property taxes, insurance, and other expenses that were incident to the garage rent expense account. The power of the commission to make a determination in this respect is not denied, but we are at a loss from the record to determine what its finding was or that it took it into consideration in its ultimate order denying increased rates. If this figure is allowed, or some reasonable rental for the garage building, the commission's own accountant's figures would show Yellow Cab Company operating at a loss for the last period of the report at issue, namely, July 1, 1960, to June 30, 1961.

2. There was no finding of the total value of the companies' properties on which they are entitled to a fair return, that is, a finding of the rate base. We have said that what a company is entitled to demand in the fixing of rates "is a fair return upon the reasonable value of the property at the time it is being used for the public." Marquis v. Polk County Telephone Co., 109 Neb. 140, 158 N. W. 927.

3. There is a dispute as to the allowable amount of depreciation of automobiles, not cabs, owned by the company. The commission's accountant disallowed 50 percent of the depreciation charged based upon the "personal use" of said automobiles. We have no way of determining whether this finding was made by the commission or, if it was, that it was material to the ultimate order denying the rate increase.

4. There are disputes in this record as to an allowance or deduction for income from a company-owned

house and whether the Yellow Cab Company sold its used cabs for a fair price.

There seems to be no dispute as to what income the proposed rates would produce, and we will not discuss that. The disputes as to the above factual issues alone would account for the difference between a substantial loss as shown by the undisputed company records and the recommendation of the commission accountant, apparently accepted by the commission in denying the rate increase, showing that the companies are operating at a profit under the present rates.

These factual issues appear from the record and the evidence. We do not know whether the commission based its order on a resolution of them or not. We must have the requisite findings before we can examine the evidentiary base to determine if they were arbitrary or unreasonable. By what we have said, we do not in any manner limit the fact findings in this case nor intimate that there may not be many other factors in fixing a rate for a public utility that may be considered. That depends on the particular case and all of the circumstances and evidence relevant to the fixing of a rate base and rate in each separate case.

Appellants ask in effect that we determine the order unreasonable and arbitrary, and then exercise a "judicial power" to remand the cause with directions to fix new rates. This we cannot do. The rate-making power of the commission is purely legislative in character and a validly promulgated rate has the force of a statute. The only power of the court, on review, is to determine whether the commission acted within the scope of its power and if the action taken was arbitrary or unreasonable. Furstenburg v. Omaha & C. B. St. Ry. Co., 132 Neb. 562, 272 N. W. 756; City of Scottsbluff v. United Tel. Co. of the West, 171 Neb. 229, 106 N. W. 2d 12.

For the reasons given, the order is reversed and the cause remanded for further consideration.

REVERSED AND REMANDED.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, APPELLANT, V. LARRY MCCARTY ET AL., APPELLEES.

127 N. W. 2d 284

Filed March 27, 1964. No. 35620.

Insurance: Subrogation. An insurer is not subrogated to the rights of a conditional vendor upon the payment of a loss under a loss-payable clause to the assignee of the conditional vendor where the policy has expired as to the conditional vendee unless the insurance policy specifically provides that the insurer shall be entitled to a subrogation in such circumstances. In the absence of such a subrogation clause the insurer acquires no rights by an assignment of the conditional sale contract upon payment of the loss to the assignee of the conditional vendor.

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

Sarah Jane Cunningham, for appellant.

Russell & Colfer, for appellees.

Heard before WHITE, C. J., CARTER, MESSMORE, YEAGER, SPENCER, BOSLAUGH, and BROWER, JJ.

BOSLAUGH, J.

This is a suit upon a conditional sale contract brought by State Farm Mutual Automobile Insurance Company as plaintiff against Larry McCarty and Marilyn McCarty. A jury was waived and the action tried to the court. The trial court found generally for the defendants and dismissed the action. The plaintiff's motion for new trial was overruled and it has appealed.

There is no dispute concerning the facts. In 1959 the defendants purchased a 1957 Chevrolet automobile upon a contract of conditional sale. The contract was then sold and assigned to the First National Bank of McCook, Nebraska. At the defendants' request, a policy of automobile insurance issued by the plaintiff was transferred from their former automobile to the 1957 Chevrolet.

The insurance policy contained a provision that any loss payable under the collision coverage of the policy

was payable to the First National Bank as its interest might appear. The policy further provided that as to the bank the insurance "shall not be invalidated by any act or negligence of the mortgagor or owner * * * until after notice of termination of the policy shall be given to such * * * conditional vendor * * * or assignee stating when not less than ten days thereafter such termination shall be effective; * * *."

The policy expired by its own terms on August 6, 1959, when the defendants failed to pay the required semiannual premium before that date. The plaintiff failed to notify the bank that the policy had terminated. On August 20, 1959, the defendants' automobile was damaged when it collided with a power pole. The automobile was sold for salvage and the proceeds applied to the conditional sale contract. This left a balance due the bank of $415.24 which the plaintiff paid to the bank on September 19, 1959. The bank then assigned the conditional sale contract to the plaintiff.

The plaintiff's theory of the case is that upon payment to the bank of the balance due on the conditional sale contract, the plaintiff became subrogated to the rights of the bank against the defendants under the contract. In support of its contention the plaintiff cites First Nat. Bank of Elk City v. Springfield Fire & Marine Ins. Co., 104 Kan. 278, 178 P. 413.

The defendants contend that the payment by the plaintiff to the bank was made pursuant to the terms of the insurance policy; that although the policy had expired so far as the rights of the defendants were concerned, the policy was still in effect as to the bank; and that the plaintiff could gain no rights against the defendants by merely doing that which it had agreed to do at the time the policy was issued. In support of their contention the defendants cite Fields v. Western Millers Mutual Fire Ins. Co., 290 N. Y. 209, 48 N. E. 2d 489, 146 A. L. R. 434.

In the majority opinion in the Fields case the New

York Court of Appeals observed that an insurer may contract for subrogation and that such a contract will be enforced. But in the absence of a provision in the policy that upon payment of the loss the insurer shall become subrogated to the debt, the payment of the loss merely satisfies the obligation of the insurer under the policy. The court said: "This rule of law that a policy taken out by an owner to protect his mortgagee as well as himself continues to protect the owner in the event of a payment to the mortgagee, unless otherwise provided, is based on the essential nature of the transaction. Such a policy, furnished to the mortgagee, is not a separate insurance of the debt, but is a separate security for the debt. * * *

"Of course, the insurer may contract for subrogation and such a contract will be enforced. And the insurer may go further and cover by appropriate language the exact situation which here arose, that is, a default by the owner-insured leaving the mortgagee's rights unimpaired. The 'standard fire insurance policy' above alluded to contains a paragraph dealing with that contingency and providing in terms that in such a case the insurer, on paying the loss, becomes entitled to subrogation and to an assignment of the mortgage debt. Such clauses have been in use for many years in this State. They 'make the policy operate as an insurance of the mortgagors and the mortgagees separately, and * * * give the mortgagees the same benefit as if they had taken out a separate policy, free from the conditions imposed upon the owners, making the mortgagees responsible only for their own acts.' (Hastings v. Westchester Fire Ins. Co., 73 N. Y. 141, 154.) The provision for subrogation, found as a part of such a mortgage clause, is a benefit from mortgagee to insurer, in consideration of the added protection afforded to the former by the clause (Hastings case, same page). Whatever be the law in other jurisdictions, it will be found that in every case in this State where subrogation has

been allowed to an insurer who pays the mortgagee despite the insurer's non-liability to the mortgagor, such subrogation is based on specific language in the policy to that effect. (See Barile v. Wright, 256 N. Y. 1, 5.) There was, we repeat, no such language here. The policy was a simple one insuring the owner and the mortgagee as their interests might appear. It had no language calculated or sufficient to turn it into some other kind of contract with the mortgagee, if the mortgagor should fail to pay the premium. 'The contract of insurance has its full effect between the parties by payment of the damage, and cannot survive to assume a new face against a third person.' (Shotwell v. Jefferson Ins. Co., 5 Bosworth, 247, 264.) If the insurer wanted a subrogation clause, it knew how to require one. 'The insurer makes it part of his contract that he shall have these privileges, and in that view undertakes the risk and graduates his premium. There was no such stipulation here.' (Shotwell case supra, p. 264.) There being no right to subrogation, the insurer, 'upon payment of the indemnity promised, simply performs his contract' (Clinton v. Hope Ins. Co., 45 N. Y. 454, 467), and that is the end of the whole thing.

"We are told, however, that this is the kind of case where subrogation may be based not upon express agreement but upon principles of natural justice which, frowning upon unjust enrichments, require that one who furnishes money to pay a debt (such as a surety) should be substituted for the creditor and should acquire the latter's rights. But the insurer here paid out its money because it was an insurer and because there had been loss and damage from a peril insured against. The insurer was not paying off the Autocar Company's mortgage as surety for Fields and Lake. The obligation it satisfied was its own obligation under a contract issued to, and insuring, Fields."

We think that the better rule is the one adopted by the New York court. We hold that the plaintiff was

not entitled to be subrogated to the debt of the defendants in the absence of a specific provision to that effect in the policy, and upon payment of the loss to the bank, the plaintiff acquired no rights by the assignment of the contract to it.

The policy issued by the plaintiff in this case contained a provision that upon payment under the collision coverage of the policy "the company shall be subrogated to all the insured's rights of recovery therefor and the insured shall do whatever is necessary to secure such rights and do nothing to prejudice them." This provision relates to the right of recovery which the defendants might have against third parties and has no reference to the rights which the bank had against the defendants. Fields v. Western Millers Mutual Fire Ins. Co., *supra.*

The judgment of the district court is correct and it is affirmed.

AFFIRMED.

SCHOOL DISTRICT NO. 8 OF SHERMAN COUNTY, NEBRASKA, APPELLEE, V. STATE BOARD OF EDUCATION, A BODY CORPORATE, ET AL., APPELLANTS.

127 N. W. 2d 458

Filed April 3, 1964. No. 35592.

1. **Constitutional Law: Administrative Law. It is the general rule that the Legislature may not lawfully delegate its legislative powers to an administrative agency. An exception to the rule obtains when a delegation of legislative power is authorized by the Constitution.**
2. **———: ———. Article VII, section 14, of the Nebraska Constitution authorizes the grant of administrative and legislative powers to the State Department of Education, subject to implementation and limitation by the Legislature in accordance with Article VII, section 15, of the Constitution.**
3. **———: ———. Subdivision (5) (c) of section 79-328, R. S. Supp., 1961, is not invalid in that it confers legislative power**

upon the State Department of Education in violation of Article II, section 1, of the Constitution.

4. ———: ———. The powers granted by subdivision (5) (c) of section 79-328, R. S. Supp., 1961, are adequately described in accordance with Article VII, section 15, of the Constitution.

5. ———: ———. Subdivision (5) (c) of section 79-328, R. S. Supp., 1961, is not so vague, ambiguous, and indefinite as to be unconstitutional.

6. ———: ———. Due process of law requires notice and an opportunity to be heard, as a matter of right and not by the let or leave of administrative officers or agencies, when the rights, duties, or privileges of interested parties are involved by an exercise of quasi-judicial power pursuant to the terms of a statute.

7. ———: ———. Section 79-328, R. S. Supp., 1961, and section 84-913, R. S. Supp., 1961, may properly be considered in pari materia in determining whether or not due process of law has been afforded under the former section.

8. ———: ———. Compliance with the mandatory provision in section 84-913, R. S. Supp., 1961, requiring an administrative agency to adopt appropriate rules of procedure for notice and hearing, is necessary to give validity to its action when notice and hearing are essential to due process.

9. ———: ———. The conditions and limitations fixed by the Legislature in a delegation of power must be strictly complied with before such power may be lawfully exercised.

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

Clarence A. H. Meyer, Attorney General, and Gerald S. Vitamvas, for appellants.

Wilson & Barlow and Benjamin C. Neff, Jr., for appellee.

Heard before WHITE, C. J., CARTER, MESSMORE, YEAGER, SPENCER, BOSLAUGH, and BROWER, JJ.

CARTER, J.

This is a suit to enjoin the State Board of Education and the Commissioner of Education from enforcing an order disapproving the high school of School District No. 8 of Sherman County for the collection of free high

school tuition money as provided in section 79-328, R. S. Supp., 1961. The trial court held the statute to be unconstitutional and entered judgment in favor of School District No. 8. The State Board of Education and the Commissioner of Education have appealed.

For convenience we shall hereafter refer to the State Board of Education as the state board, the Commissioner of Education as commissioner, and School District No. 8 of Sherman County as school district.

Pursuant to the authority granted by section 79-328, R. S. Supp., 1961, rules and regulations were adopted and issued by the commissioner on January 5, 1960, prior to the happening of the events herein detailed. On February 2, 1962, the school district was informed that the state board would, on February 13, 1962, consider the recommended disapproval of Rockville High School, the high school here involved, for free high school tuition money, and invited the attendance of the members of the board of the school district at the hearing. The hearing was held with the representatives of the school district in attendance. On February 14, 1962, the school district was informed that Rockville High School had been disapproved by the state board for the 1962-1963 school year for the collection of free high school tuition money for failure to maintain the high school in accordance with the rules and regulations issued by the commissioner. On April 16, 1962, this suit was commenced.

The school district contends that section 79-328 (5) (c), R. S. Supp., 1961, is unconstitutional in that it is an invalid delegation of legislative authority and power to an administrative agency. This section provides that the state board shall have the power and it shall be its duty to "(c) establish rules and regulations based upon the program of studies, guidance services, the number and preparation of teachers in relation to the curriculum and enrollment, instructional materials and equipment, science facilities and equipment, library facilities and materials, health and safety factors in buildings and

grounds, and procedures for classifying, approving, and accrediting schools, for approving the opening of new schools, for the continued legal operation of all schools, and for the approval of high schools for the collection of free high school tuition money in accordance with the rules and regulations provided for in this subdivision; Provided, that the State Board of Education shall approve a school for the collection of free high school tuition money where a hardship would result to the students and a substantial effort is being made to comply with the rules and regulations established, * * *."

The law appears to be well settled that the Legislature may properly delegate authority to an executive or administrative agency to formulate rules and regulations to carry out the expressed legislative purpose, or to implement such expressed purpose in order to provide for the complete operation and enforcement of the statute. The purpose of the delegation of authority ordinarily must be limited by express standards which have the effect of restricting the actions of the agency to the expressed legislative intent. In State ex rel. Martin v. Howard, 96 Neb. 278, 147 N. W. 689, this court approved the following: "In order to justify the courts in declaring invalid as a delegation of legislative power a statute conferring particular duties or authority upon administrative officers, it must clearly appear beyond a reasonable doubt that the duty or authority so conferred is a power that appertains exclusively to the legislative department, and the conferring of it is not warranted by the provisions of the constitution. * * * Authority to make rules and regulations to carry out an expressed legislative purpose, or for the complete operation and enforcement of a law within designated limitations, is not an exclusively legislative power. Such authority is administrative in its nature, and its use by administrative officers is essential to the complete exercise of the powers of all the departments." See, also, State v. At-

lantic Coast Line R. R. Co., 56 Fla. 617, 47 So. 969, 32 L. R. A. N. S. 639.

The difference between a delegation of legislative power and the delegation of authority to an administrative agency to carry out the expressed intent of the Legislature and the details involved has long been a difficult and important question. Increased complexity of our social order, and the multitude of details that necessarily follow, has led to a relaxation of the specific standards in the delegating statute in favor of more general ones where a specialized state agency is concerned. It is almost impossible for a legislature to prescribe all the rules and regulations necessary for a specialized agency to accomplish the legislative purpose. The delegation of authority to a specialized department under more generalized standards has been the natural trend as the need for regulation has become more evident and complex. Bloemer v. Turner, 281 Ky. 832, 137 S. W. 2d 387. See, also, 73 C. J. S., Public Administrative Bodies and Procedure, § 29, p. 322.

The Constitution provides: "There is hereby established a State Department of Education which shall be comprised of a State Board of Education and a Commissioner of Education. The State Department of Education shall have general supervision and administration of the school system of the state and of such other activities as the Legislature may direct." Art. VII, § 14, Constitution of Nebraska. It is provided by Article VII, section 15, Constitution of Nebraska, however, that the powers and duties of the state board shall be prescribed by the Legislature. The Legislature has done this and fixed the area in which the state board shall operate by section 79-328, R. S. Supp., 1961. The general supervision and administration of the school system of the state by the State Department of Education is thereby a constitutional grant of power dependent only upon implementing legislative action. In dealing with the powers of the state superintendent of public instruction

under a similiar constitutional provision in the Kansas Constitution, the Kansas court said: "Realizing that many questions pertaining to educational matters naturally would arise, and which would need the attention of a competent official who could investigate and determine what is best to be done, our constitution gave to the superintendent of public instruction 'the general supervision of the * * * educational interests of the state,' and specifically authorized him to 'perform such other duties as may be prescribed by law,' without limiting those duties to such as might be classified as executive or administrative only. He is authorized to perform any duties pertaining to the educational interests of the state which the legislature deems wise and prudent to impose upon him. Under these provisions it cannot be said that the legislature is without authority to authorize the state superintendent of public instruction to perform duties, or determine questions, with respect to the educational interests of the state which, in the general classification of powers of government, would be regarded as legislative in character. * * * However, his action was within the purview of the statutes, above cited, and as we have seen, our constitution authorizes the legislature to impose upon him such duties as it deemed best pertaining to the educational interests of the state." State ex rel. Rosenstahl v. Storey, 144 Kan. 311, 58 P. 2d 1051.

In School District v. Callahan, 237 Wis. 560, 297 N. W. 407, 135 A. L. R. 1081, the court said: "It follows under the principles thus established ever since the decision in State ex rel. Moreland v. Whitford, supra, that the provision in sec. 40.30 (1), Stats., authorizing the state superintendent by his order to attach districts to contiguous districts was not an unconstitutional delegation of legislative power to that officer; and, furthermore, that the exercise of this power is a matter involving public instruction and therefore the delegation thereof to the state superintendent cannot be held to be in violation of the provision in sec. 1, art. X, Wis. Const., that 'the

supervision of public instruction shall be vested in a state superintendent.' On the contrary the delegation of the power and the exercise thereof are consistent with that provision. Likewise, as under the principles stated above, no standard whatever need be prescribed in delegating the power in question, the absence of any other standard excepting in so far as the provision as to valuation limits the exercise of the power to districts having valuations of less than $100,000, cannot be deemed to render the statute invalid. Neither are appellants' contentions that the provision does not provide a standard which is germane to the purposes of the act, and, therefore, does not afford a proper basis for classification, material in these cases."

In dealing with the same subject the Missouri court said: "Article II of the present Constitution divides the power of government into the legislative, executive and judicial departments and provides that no person or collection of persons charged with the exercise of power properly belonging to one of those departments shall exercise any power properly belonging to either of the others, '*except in the instances in this Constitution expressly directed or permitted.*' (Italics ours.) The legislative power is vested in a senate and house of representatives by Art. III, Sec. 1. Since the State Board of Education is a constitutional board with duties defined by the Constitution and 'shall have other powers and duties as may be prescribed by law,' it follows that the state legislature can confer on that board duties that are legislative in character as distinguished from those classified as executive or administrative only. Such duties would come within the exception of Art. II of the Constitution." State ex rel. Reorganized School Dist. v. Holmes, 360 Mo. 904, 231 S. W. 2d 185. We are in accord with the reasoning of the foregoing opinions and, in our judgment, whether or not the power granted is legislative or administrative is of no importance if it is within the scope of the Legislature's implementing

legislation. The intent of Article VII, section 14, of the Constitution, was to confer powers upon the state board, which it did not and could not previously have. If this is not so there would have been no purpose in adopting it as an amendment to the Constitution in 1952. The Legislature was already authorized to delegate administrative authority to the state board and the constitutional grant of the general supervision and administration of the school system of the state, and such other activities as the Legislature may direct, necessarily included authority by the Legislature to grant purely legislative power if it was to have any added meaning at all. The constitutional amendment was a grant of legislative power within the exception contained in Article II, section 1, of the Constitution, providing: "* * * and no person or collection of persons being one of these departments, shall exercise any power properly belonging to either of the others, except as hereinafter expressly directed or permitted."

Contrary to the contentions of the school district, we think the delegation of authority by the Legislature contains adequate descriptive terms. Complaint is made that there are no restricting words such as "all in accordance with sound educational practices." But we point out that subdivision (5) (c) of section 79-328, R. S. Supp., 1961, specifies the matters to be considered in promulgating rules and regulations which are limiting in effect and confine them within the grant of power contained in Article VII, section 14, of the Constitution. Standards are not required in the constitutional grant of legislative power.

We conclude that subdivision (5) (c) of section 79-328, R. S. Supp., 1961, is not violative of Article II, section 1, Constitution of Nebraska. We hold also that the delegation of power by the Legislature to the State Department of Education pursuant to Article VII, section 14, of the Constitution, is adequately described, and that said section 79-328, R. S. Supp., 1961, is not so vague,

ambiguous, and indefinite as to be unconstitutional.

The school district contends that subdivision (5) (c) of section 79-328, R. S. Supp., 1961, is unconstitutional and void in that it contains no provision for notice and hearing. It is not disputed that no provision for notice and hearing is contained in section 79-328, R. S. Supp., 1961. Nor is it disputed that such section provides for action by the state board which would deprive the school board of free high school tuition money. It is a familiar rule that a statute which does not provide for notice and hearing to those whose interests would necessarily be affected by the exercise of a granted power is violative of the due process clauses of the state and federal Constitutions. Schutte v. Schmitt, 162 Neb. 162, 75 N. W. 2d 656; Watkins v. Dodson, 159 Neb. 745, 68 N. W. 2d 508; Ruwe v. School District, 120 Neb. 668, 234 N. W. 789. It is the general rule that, in proceedings where notice and hearing are essential, the law authorizing such proceedings must require notice and hearing; otherwise it will be unconstitutional. It is not enough that a person may have actually had notice and hearing; the statute must provide for it as a matter of right if a failure of due process is to be avoided. 42 Am. Jur., Public Administrative Law, § 135, p. 470; 12 Am. Jur., Constitutional Law, § 573, p. 269. These propositions are so well grounded in the law of this state that further discussion is not necessary.

The state board and the commissioner contend that notice and hearing is provided by general law and that it need not be reiterated in the statute before us. We are referred to section 84-913, R. S. Supp., 1961, which states in part: "In any contested case all parties shall be afforded an opportunity for hearing after reasonable notice. The notice shall state the time, place, and issues involved, but if, by reason of the nature of the proceeding, the issues cannot be fully stated in advance of the hearing or if subsequent amendment of the issues is necessary, they shall be fully stated as soon as prac-

ticable. Opportunity shall be afforded all parties to present evidence and argument with respect thereto. * * * Each agency shall adopt appropriate rules of procedure for notice and hearing in contested cases." The words "contested cases" are defined by section 84-901, R. S. Supp., 1961, as follows: "(3) Contested case means 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."

Sections 84-901 and 84-909 to 84-916, R. S. Supp., 1961, constitute an independent act dealing with administrative agencies providing, among other things, for notice and hearing when the legal rights, duties, and privileges of interested persons are affected. Such act and section 79-328, R. S. Supp., 1961, may be considered in pari materia in determining if due process is afforded, as required by the due process clauses of the state and federal Constitutions.

It is contended that section 84-913, R. S. Supp., 1961, is unconstitutional in that it requires the agency to determine if legal rights, duties, or privileges of specific parties are required by law or constitutional right to be exercised, and that, therefore, the right to notice and hearing is not absolute as required by the constitutional right of due process. We do not concur in this contention. The statute requires the agency to afford notice and hearing where such is required by law or constitutional right. If notice and hearing are afforded as required by law or constitutional right, the power to act exists; if notice and hearing in such a case are not afforded, the power to act does not exist and the courts are available to redress against the unlawful exercise of power as in the case of any void administrative order. Many statutes on our books are in the alternative and depend on the judgment of some person or agency to whom is confided the duty of determining whether or not the proper occasion or situation exists for executing

them. The exercise of such judgment is not the making of law; it is a determination of the procedure to be followed which requires a determination of fact. We think the statute provides for notice and hearing in all cases where due process is required by the due process clauses of the state and federal Constitutions.

Where, however, an agency must rely upon the provisions of the general act to afford due process of law under another statute such as section 79-328, R. S. Supp., 1961, it must comply with the provisions of the general statute. It is the province of the Legislature to determine the manner in which delegated powers shall be exercised and a failure to comply with the conditions and limitations imposed is an unlawful exercise of the powers purportedly granted.

Section 84-913, R. S. Supp., 1961, is an independent act providing for notice and hearing by administrative agencies in specified instances. The same section of the statute provides: "Each agency shall adopt appropriate rules of procedure for notice and hearing in contested cases." The State Department of Education failed to provide rules for the procedure for notice and hearing. The provision for requiring such rules is mandatory and within the competence of the Legislature to require. Until the State Department of Education adopts appropriate rules of procedure for notice and hearing, and thereby initiates its authority to provide notice and hearing, its authority to give notice and hearing is dormant and its attempt to provide it is without validity. If the State Department of Education could with impunity disregard a mandatory provision of the statute in the delegation of authority to it, it could disregard others on the authority of the first, with the result that the control of the Legislature would be lost. Compliance with the mandate of the Legislature in the delegation of power and authority to an agency of government is in effect a condition precedent to the exercise of such power and authority.

The delegation of authority and power does not ordinarily imply a parting with the powers of the Legislature, but points rather to the conferring of authority or power to do the things which otherwise the Legislature would have to do itself. The Legislature may therefore provide the conditions and limitations with which the agency must comply before the authority or power may be exercised.

In Holgate Bros. Co. v. Bashore, 331 Pa. 255, 200 A. 672, 117 A. L. R. 639, the principle was stated in the following language: "It is absolutely essential that limits be set on the power conferred on such tribunals and that the scope of their authorized action clearly appear. 'In creating such an administrative agency the legislature, to prevent its being a pure delegation of legislative power, must enjoin upon it a certain course of procedure and certain rules of decision in the performance of its function. It is a wholesome and necessary principle that such an agency must pursue the procedure and rules enjoined and show a substantial compliance therewith to give validity to its action.' "

In Wichita Railroad & Light Co. v. Public Utilities Commission, 260 U. S. 48, 43 S. Ct. 51, 67 L. Ed. 124, the court stated the rule as follows: "In creating such an administrative agency the legislature, to prevent its being a pure delegation of legislative power, must enjoin upon it a certain course of procedure and certain rules of decision in the performance of its function. It is a wholesome and necessary principle that such an agency must pursue the procedure and rules enjoined and show a substantial compliance therewith to give validity to its action."

In Union Light, Heat & Power Co. v. Public Service Commission (Ky. App.), 271 S. W. 2d 361, the court said: "We conclude that Rule 23(2) is invalid for the reason that it undertakes to materially alter KRS 278.180. If a statute lays down general standards, the administrative agency may implement the statute by

filling in the necessary details. But where, as in the case here, the statute in itself prescribes the exact procedure the administrative agency may not add to or subtract from such a provision." See, also, Robertson v. Schein, 305 Ky. 528, 204 S. W. 2d 954; State v. Miles, 5 Wash. 2d 322, 105 P. 2d 51.

We conclude that the authority of the State Department of Education to afford notice and hearing under the provisions of section 84-913, R. S. Supp., 1961, is conditional upon compliance with the mandatory provision that the agency shall adopt appropriate rules of procedure for notice and hearing in contested cases. The authority of the state board and the commissioner to afford notice and hearing is not valid when it fails to comply with the conditions and limitations of the statute. The authority and power delegated by the Legislature is therefore ineffective and dormant until such time as appropriate rules are adopted in accordance with the statute. It is the failure of the state board and the commissioner to comply with the statute, and not any deficiency in the statute itself, that results in the invalidation of the state board's finding that the school district was not entitled to its free high school tuition money.

For the reasons stated, the order of the state board and the commissioner, under date of February 14, 1962, is void and of no force and effect. The judgment of the district court, therefore, is correct in permanently enjoining the enforcement of the order of the state board denying free high school tuition money to the school district.

AFFIRMED.

WHITE, C. J., not participating.

SPENCER and BOSLAUGH, JJ., concur in the result.

FOREST HENRY BRUNSON ET AL., APPELLEES, V. WILLIAM D. KAHLER, APPELLANT.

127 N. W. 2d 281

Filed April 3, 1964. No. 35597.

1. **Deeds.** In order that it may be said that there has been passage of title to real estate proof of delivery is necessary.
2. ———. Anything done by a grantor of title to real estate from which it is apparent that the delivery of a deed was intended, either by words or acts or both combined, is sufficient.
3. ———. As a general rule a delivered deed passes title even if there is no consideration.
4. ———. By the delivery of a deed to a third person by the grantor without reserving control or dominion over it and with directions to the third person to hold it during the grantor's lifetime and upon the grantor's death to deliver it to the grantee, title to the real estate passes to the grantee.
5. **Deeds: Escrows.** A deed deposited in escrow with instructions to hold it during the life of the grantor and upon his death to deliver it to the grantee, which contains a condition that the deed can be withdrawn on written request of the grantor and grantee during the life of the grantor, where a request is never made, remains in full force and effect at the death of the grantor.
6. ———: ———. Where a grantor has deposited a deed to real estate in escrow he cannot subsequently by withdrawing the deed or by other acts indicating a change of mind affect the completed transaction.

Appeal from the district court for Cass County: JOHN M. DIERKS, Judge. Affirmed.

Francis M. Casey and Thomas Conis, for appellant.

Lane, Baird, Pedersen & Haggart, for appellees.

Heard before WHITE, C. J., CARTER, MESSMORE, YEAGER, SPENCER, BOSLAUGH, and BROWER, JJ.

YEAGER, J.

This is an action by Forest Henry Brunson and Patience P. Redon, plaintiffs, appellees here, against William D. Kahler, defendant, appellant here, to quiet title in them to an undivided one-half interest in four lots of real estate in the Village of Louisville, Cass County,

Nebraska, in which action the defendant filed an answer denying any right in the plaintiffs and a cross-petition in which he claimed full right and title thereto.

The case was tried to the court and at the conclusion of the trial a judgment was rendered sustaining the right of the plaintiffs to the relief they sought, and denying the claimed right sought by the defendant and dismissing his cross-action. From this judgment and an order overruling a motion for a new trial filed by the defendant he has appealed.

A summary of important events back of the commencement of this action is as follows: In 1942, Philip H. Kahler and Nora Kahler, who were husband and wife, were each the owner as tenants in common of an undivided one-half interest in the property here involved. Nora Kahler had two sons, Forest Henry Brunson and John Harold Brunson. Nora Kahler died December 17, 1942. Before her death she devised her interest to her two sons subject to a life estate in her husband. Title passed according to the terms of her will and concerning this there is no dispute. The litigation herein involves the disposition alone of the undivided one-half interest of Philip H. Kahler.

By a purported warranty deed dated December 23, 1942, signed and acknowledged by Philip H. Kahler, he transferred to the two sons of Nora Kahler his undivided one-half interest in the property, for a consideration of one dollar and love and affection, reserving to himself a life estate and use and control thereof during his natural life.

The deed was placed in an unsealed envelope and with the envelope was delivered to one H. B. Koop about December 23, 1942, where it remained until after the death of Philip H. Kahler which occurred October 9, 1961. On the envelope is typed the following: "Warranty Deed from Philip H. Kahler, widower, to John Harold Brunson and Forest Henry Brunson, dated December 23, 1942, delivered to the undersigned in escrow,

to be delivered to the grantees on the death of the grantor, or to either of said parties on the written request of all." This was signed "Philip H. Kahler." Beneath the signature is the signature of H. B. Koop in whose hands the deed remained until after the death of Philip H. Kahler. Philip H. Kahler requested of Koop that he deliver the deed to him on or about February 19, 1954. The request was refused, this for the reason that Koop had the right to deliver it only on the signatures of Philip H. Kahler and the two grantees.

On February 6, 1960, Philip H. Kahler executed a warranty deed in favor of William D. Kahler to the undivided one-half interest involved in the action here and on the basis of this deed William D. Kahler claims title to this property.

The claimed interest of the plaintiff Forest Henry Brunson is based directly on the rights granted to him by the deed to him and his brother. The rights of Patience P. Redon flow from a deed to her by John Harold Brunson, who was her father, of his rights under the deed to her father and Forest Henry Brunson. This deed was dated October 3, 1956, and her father died December 2, 1956.

The pleaded theory of the cause of action of the plaintiffs is that the deed from Philip H. Kahler to Forest Henry Brunson and John Harold Brunson, dated December 23, 1942, and placed in escrow in the hands of H. B. Koop caused the title to pass from him to the grantees, subject to a retained life estate, and subject to a right of revocation by joint action of the grantor and the grantees; and that hence after his death absolute title passed to the grantees or their successors.

It is pleaded that the plaintiff Forest Henry Brunson is a party as an original grantee, and Patience P. Redon as successor to the interest of John Harold Brunson. The right of Patience P. Redon to assert the interest, if any, which passed to her father by the deed is not questioned.

To the extent necessary to state herein the defendant by answer generally denied the allegations of the petition. Affirmatively it was pleaded that there was a lack of consideration for the deed; that the deed was fraudulently obtained; that there was no delivery of the deed; and that the authority of Harvey Koop, as agent of Philip H. Kahler, was terminated as of February 19, 1954.

These allegations of the answer are repeated in a cross-petition and further the defendant claims title by deed from Philip H. Kahler dated February 6, 1960.

In order to avoid confusion it is stated here that William D. Kahler, the defendant, was not related by blood or marriage to Philip H. Kahler. From about the age of 4 years he was reared in the home of Philip H. Kahler, and on his application to the court his name was changed to Kahler.

For the purpose of passage of title by deed it is necessary that there shall be evidence of delivery. Anything done however by the grantor from which it is apparent that a delivery was intended, either by words or acts or both combined, is sufficient. Milligan v. Milligan, 161 Neb. 499, 74 N. W. 2d 74; Short v. Kleppinger, 163 Neb. 729, 81 N. W. 2d 182; Johns v. Carr, 167 Neb. 545, 93 N. W. 2d 831.

There was evidence of delivery adduced on behalf of the plaintiffs. The testimony of H. B. Koop, the escrow agent, related the details of the delivery, and documentary evidence was adduced supporting his testimony. There is nothing in the record substantially to the contrary of this.

There was no evidence of the passage of any consideration, however a consideration is recited in the deed. There is nothing in this area from which any benefit can flow to the defendant. Consideration is not necessary to the validity of the deed involved here.

As a general rule a delivered deed passes title even if there is no consideration and there is nothing in the

present record to take this case out from under the general rule. Sampson v. Sissel, 151 Neb. 521, 38 N. W. 2d 341; Pierce v. Fontenelle, 156 Neb. 235, 55 N. W. 2d 658.

The evidence discloses that the deed here was deposited with a third person by the grantor without reserving dominion or control over it and with directions to the third person to hold it during the grantor's lifetime and upon grantor's death to deliver it to the grantees. In legal effect by this title passed to the grantees. Milligan v. Milligan, *supra;* Blochowitz v. Blochowitz, 122 Neb. 385, 240 N. W. 586, 82 A. L. R. 949.

The evidence of plaintiffs disclosed that the deed was deposited in escrow with instructions to hold it during the grantor's lifetime and upon his death to deliver it to the grantees. There was further evidence that the deposit arrangement contained a provision that the escrow agreement could be withdrawn on the written request of the grantor and the grantees. This condition was never exercised and according to the evidence of the plaintiffs the agreement remained in full force and effect at the time of the death of the grantor.

Such an agreement of withdrawal, unless acted upon by the parties, does not prevent a delivery in escrow from passing title to the grantees. Milligan v. Milligan, *supra;* Dunlap v. Marnell, 95 Neb. 535, 145 N. W. 1017.

There is evidence that on one occasion the grantor sought directly to withdraw the escrow agreement but this was not joined in by the grantees or representatives, and on one occasion to avoid it by deed, which was not joined in by the grantees or representatives. These acts had no effect upon the validity of the escrow agreement. The applicable rule is that where a grantor has deposited a deed in escrow he cannot subsequently by withdrawing the deed or by other acts indicating a change of mind affect the completed transaction. Milligan v. Milligan, *supra;* Newell v. Pierce, 131 Neb. 844, 270 N. W. 469.

It therefore becomes clear that on the evidence adduced by the plaintiffs and the authorities to which attention

has been directed that their burden of proof to sustain their pleaded cause of action has been met.

On behalf of the defendant no competent and material evidence has been adduced or offered which has the effect of destroying or counteracting the evidence in support of plaintiffs' cause of action, or of supporting the pleaded cross-action of the defendant, and no legal authorities are cited in the briefs the effect of which would be to impair or take away the rights claimed in plaintiffs' pleaded cause of action and declared by the judgment of the district court.

The judgment of the district court is therefore affirmed.

AFFIRMED.

IN RE APPLICATION OF CLARENCE E. COLE.
CLARENCE E. COLE, APPELLANT, V. LEROY L. WADE & SONS, INC., ET AL., APPELLEES.
127 N. W. 2d 287

Filed April 3, 1964. No. 35613.

1. **Public Service Commissions: Motor Carriers.** By statute, the Nebraska State Railway Commission shall issue a license plate or plates to any motor carrier who is in compliance with the provisions of sections 75-222 to 75-250, R. R. S. 1943, and the rules and regulations of the commission.
2. ———: ———. The Nebraska State Railway Commission, in order to revoke, change, or suspend a certificate of public convenience and necessity, must proceed in accordance with the provisions of section 75-238, R. S. Supp., 1961.
3. ———: ———. An order of revocation of a certificate of public convenience and necessity by the Nebraska State Railway Commission without compliance with the provisions of section 75-238, R. S. Supp., 1961, as to notice and hearing is not effective as a revocation.

Appeal from the Nebraska State Railway Commission. Reversed.

Hal W. Bauer, for appellant.

No appearance, for appellees.

Heard before WHITE, C. J., CARTER, MESSMORE, YEAGER, SPENCER, BOSLAUGH, and BROWER, JJ.

MESSMORE, J.

The appellant, holder of certificate of public convenience and necessity No. 2296, filed an application before the Nebraska State Railway Commission, hereinafter referred to as the commission, requesting license plates to operate as a motor carrier pursuant to his certificate of public convenience and necessity. The commission dismissed the application. Appeal was taken from the order of dismissal by the appellant to this court.

On March 3, 1938, appellant was granted certificate of public convenience and necessity No. 2296 on application No. M-5238 by the commission. This certificate authorized appellant to operate as a common carrier of property by motor vehicle in intrastate commerce. It authorized service of "Commodities specially, road construction materials and equipment." The territory authorized was "Irregular routes to and from all sections of the State of Nebraska at large." Appellant held this authority and operated thereunder from March 3, 1938, to the time of the proceedings involved herein.

On February 23, 1962, application No. M-11332 of Heavy Haulers, Inc., a corporation, was filed. The purpose of this application was to transfer certificate of public convenience and necessity No. 2296 from the appellant to Heavy Haulers, Inc., a corporation. Appellant owned all of the stock of Heavy Haulers, Inc., a corporation.

On April 11, 1962, a formal protest was filed with the commission. The protestants were LeRoy L. Wade & Sons, Inc., Omaha, Nebraska, Watson Bros. Van Lines & Heavy Hauling Co., Omaha, Nebraska, and Sullivan Transfer & Storage Co., Lincoln, Nebraska.

On April 17, 1962, hearing was held by an examiner

of the commission on application No. M-11332 for the purpose of transferring certificate of public convenience and necessity No. 2296 from the appellant to Heavy Haulers, Inc. The examiner's report and recommendations were filed. The examiner's report states as follows: "This proceeding comes under the provisions of section 75-240.02, R. R. S. 1943, which provides that the Commission may approve transfer of a certificate or permit, in whole or in part, * * *."

On August 7, 1962, the commission entered an order based upon the evidence at the hearing and the examiner's report and recommendation. Based upon the findings, the order granted application No. M-11332 in part and revoked certificate No. 2296 held by appellant. By this order the authority transferred authorized only "Sand, gravel and road and dam construction materials requiring the use of dump trucks, between all points in Nebraska, over irregular routes." This order also contained the following: "IT IS FURTHER ORDERED that unless full compliance is made by Applicant herein by September 7, 1962, this order shall be of no further force and effect."

The appellant did not comply with the order of August 7, 1962, by September 7, 1962, and permitted the order to become of no further force and effect as stated in said order.

After the entry of the order of August 7, 1962, by the commission, the return of the 1962 license plates issued to appellant under certificate of public convenience and necessity No. 2296 was never requested by the commission and he continued to hold said license plates and operate thereunder until time for issuance of new plates as required by the law in the year 1963.

On February 5, 1963, appellant filed an application with the commission requesting license plates to operate as a motor carrier. This application was apparently misplaced in the commission's files. On July 23, 1963, appellant filed a second application with the commis-

sion making the same request for license plates as was made in the application filed on February 5, 1963, with the commission.

On July 24, 1963, the commission entered an order dismissing the application for license plates.

The appellant assigns as error that the order of the commission revoking and changing the certificate of public convenience and necessity of appellant No. 2296, entered August 7, 1962, after the transfer hearing on application M-11332, was without legal authority and contrary to law, null, and void; and that the commission erred in dismissing the application of Clarence E. Cole (appellant) for license plates to operate as a motor carrier under certificate of public convenience and necessity No. 2296.

The appellant, being the holder of certificate of public convenience and necessity No. 2296, and having made compliance with the provisions of sections 75-222 to 75-250, R. R. S. 1943, and apparently with the rules and regulations of the commission, claims to be entitled to license plates to operate as a common carrier under certificate No. 2296.

Section 75-227, R. S. Supp., 1961, provides in part: "The commission shall issue a license plate or plates and renewal tab or tabs to any motor carrier who is in compliance with the provisions of sections 75-222 to 75-250, and the rules and regulations of the commission, * * *."

It has heretofore been stated that the appellant made no compliance with the order of the commission entered August 7, 1962. By its own terms this order became of no force and effect after September 7, 1962.

Section 75-238, R. S. Supp., 1961, provides: "Permits and certificates shall be effective from the dates specified therein, and shall remain in effect until terminated as herein provided. Any such permit or certificate may, upon application of the holder thereof, in the discretion of the State Railway Commission, be revoked or may, upon complaint or on the commission's own in-

itiative, after notice and hearing, be suspended, changed or revoked in whole or in part, for willful failure to comply with any of the provisions of sections 75-222 to 75-250, or with any lawful order, rule or regulation of the commission promulgated thereunder, or with any term, condition or limitation of such permit or certificate; * * *."

In Strasheim v. Martin, 169 Neb. 787, 101 N. W. 2d 161, this court cited Abler Transfer, Inc. v. Lyon, 161 Neb. 378, 73 N. W. 2d 667, as follows: " 'Section 75-238, R. R. S. 1943, must be considered a special statutory provision with regard to a particular subject and, as such, controls the general provisions with regard to such subject. The Nebraska State Railway Commission, in order to revoke, change, or suspend a certificate of public convenience and necessity, must proceed in accordance with the provisions thereof.' " See, also, In re Application of Neylon, 151 Neb. 587, 38 N. W. 2d 552; In re Application of Hergott, 145 Neb. 100, 15 N. W. 2d 418; Ferguson Trucking Co., Inc. v. Nebraska State Railway Commission, 169 Neb. 851, 101 N. W. 2d 444.

In the instant case there is nothing in the pleadings or record prior to the time of the hearing upon the application for transfer No. M-11332 that gave the appellant notice that such hearing would involve the issue of change of his certificate of public convenience and necessity No. 2296.

The protest to application No. M-11332 heretofore mentioned did allege that the authority of appellant sought to be transferred was dormant. Under section 75-240.02, R. R. S. 1943, dormancy is a ground for protest to transfer of a certificate of public convenience and necessity. The protest did not allege "willful failure" to comply with any provisions of the act, or order, rule, or regulation of the commission, and did not pray for revocation or change of the authority granted the appellant by the commission.

The commission did not at any time enter an order

to show cause against appellant requiring him to show cause why his certificate of public convenience and necessity No. 2296 should not be changed or revoked for willful failure to comply with any of the provisions of the act or order, rule, or regulation of the commission.

We have heretofore set forth the examiner's report to the effect that this proceeding came under the provisions of section 75-240.02, R. R. S. 1943, which provides that the commission may approve transfer of a certificate.

At the hearing on April 17, 1962, the appellant offered evidence only on the issue of transfer of his certificate to Heavy Haulers, Inc., and offered no evidence on the issue of revocation or change of his certificate No. 2296 for willful failure to comply with the provisions of the act or order, rule, or regulation of the commission. The appellant offered evidence only based upon the issues raised by the pleadings and notice prior to the hearing. The issue involved was the transfer of appellant's certificate of public convenience and necessity.

In Ferguson Trucking Co., Inc. v. Nebraska State Railway Commission, *supra,* Hargleroad Bulk Carriers, Inc. v. Ruan Transp. Corp., 173 Neb. 151, 112 N. W. 2d 743, and Strasheim v. Martin, *supra,* this court held that an order of the commission changing or revoking a certificate of public convenience and necessity is without legal authority and void when the notice requirement of section 75-238, R. S. Supp., 1961, is not complied with.

The order of August 7, 1962, made no finding that the appellant willfully failed to comply with any provision of the act or any order, rule, or regulation of the commission.

The order of the commission entered on August 7, 1962, is subject to collateral attack. It appears that the failure to give notice to appellant prior to changing or revoking his certificate, and the failure of the commission to include in its order a finding of willful failure of the appellant to comply with any of the provisions of the act or with any lawful order, rule, or regulation

of the commission are jurisdictional errors, on the face of the record, and under such circumstances subject to collateral attack. The order of the commission entered August 7, 1962, is void for the reason that it was entered without compliance with section 75-238, R. S. Supp., 1961.

The appellant holds a valid certificate of public convenience and necessity to operate as a common carrier. As such he is entitled to license plates upon the tender of the fees therefor in accordance with the mandatory provisions of section 75-227, R. S. Supp., 1961. The issuance of license plates under such circumstances is a ministerial function involving no discretion on the part of the commission. The commission acted beyond its authority when it entered an order on July 24, 1963, dismissing appellant's application for license plates. The appellant is entitled to license plates to permit operation of his vehicles as a common carrier in accordance with the valid certificate of public convenience and necessity held by him. The order of the commission denying the issuance of license plates to appellant is therefore reversed.

REVERSED.

LEONARD CHALOUPKA ET AL., APPELLEES, V. STATE OF NEBRASKA, DEPARTMENT OF ROADS, APPELLANT.

127 N. W. 2d 291

Filed April 3, 1964. No. 35615.

1. **New Trial.** The district court has the power and is required to consider and determine motions for a new trial by the exercise of its judicial discretion.
2. ———. Discretion as used in this connection means that the court in its ruling must be guided and governed by applicable law.
3. ———. Where a party has sustained the burden and expense of a trial and has succeeded in securing the judgment of a jury on the facts in issue, he has a right to keep the benefit of

that verdict unless there is prejudicial error in the proceedings by which it was secured.

4. **Trial.** In testing the sufficiency of the evidence to support a judgment, the evidence must be considered in the light most favorable to the successful party.

5. ———. Every controverted fact must be resolved in favor of the successful party and he should have the benefit of every inference that can reasonably be deduced from the evidence.

6. **Witnesses.** It is not essential that every witness qualified to express his opinion as to the value of real estate shall have all-inclusive information of every detail of the factors entering into market value.

7. **Witnesses: Trial.** The opinion of a witness as to value of land will ordinarily be received if he is familiar with the property and its uses and is informed as to the state of the market, the weight and credibility of his evidence being for the jury.

8. **Eminent Domain: Damages.** The measure of damages for land taken for public use is computable as of the time of the taking, which is deemed to occur when the petition for condemnation is filed.

9. ———: ———. The proper measure of damages 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.

10. **Eminent Domain: Trial.** The burden of proving the extent of the damages in a condemnation action is not on the condemner but on the owner.

11. ———: ———. The burden to show matters which tend to reduce or mitigate damages is on the condemner.

12. **Trial.** When evidence is in conflict and is such that reasonable minds can draw different conclusions from it a jury question is presented.

13. **Trial: Appeal and Error.** Wherever there is any evidence to support a jury's verdict, it is not the court's function to weigh the evidence to determine whether it would have returned a different verdict.

14. **Juries: Witnesses.** In jury cases jurors are the judges of the credibility of witnesses and of the weight to be given their testimony and, within their province, they have the right to credit or reject the whole or any part of the testimony of a witness in the exercise of their judgment.

15. **Eminent Domain: Evidence.** Where a jury is permitted to view the premises involved in eminent domain litigation, the result of its observations is evidence which it may consider in connection with other competent evidence.

16. **Trial: Appeal and Error.** Instructions should be considered together in order that they may be properly understood, and when, as an entire charge, they properly submit the issue to the jury, the verdict will not be set aside.
17. ———: ———. If an examination of all of the instructions given by the trial court discloses that they fairly and correctly state the law applicable under the evidence, error cannot be predicated thereon.

Appeal from the district court for Saline County: JOSEPH ACH, Judge. Reversed and remanded with directions.

Clarence A. H. Meyer, Attorney General, Harold S. Salter, Warren D. Lichty, Jr., Lyle C. Winkle, Richard L. Dunning, and W. L. Strong, for appellant.

Clarence C. Kunc, for appellees.

Heard before WHITE, C. J., CARTER, MESSMORE, YEAGER, SPENCER, BOSLAUGH, and BROWER, JJ.

SPENCER, J.

This is a condemnation action involving the taking of 1.95 acres of land in a strip 18.5 feet wide or less, for approximately 1 mile along the west side of the northeast quarter of Section 15 and the southeast quarter of Section 10, all in Township 6 North, Range 4 East of the 6th P. M., in Saline County, Nebraska. The purpose of the taking was to reconstruct State Highway No. 82 between Wilber and Crete by widening the highway and converting it from an oil mat to an 8-inch concrete pavement.

The property is owned by Leonard Chaloupka who with his wife are the plaintiffs herein. For convenience hereinafter Leonard Chaloupka will be referred to as owner. The property is being condemned by the State of Nebraska, Department of Roads, who for convenience hereinafter will be referred to as State.

The property involved is on the east side of Highway No. 82 and on the north edge of the city of Wilber,

Nebraska. The owner lives on the southwest corner of the property, in an area which in the 1930s was platted as Chaloupka Addition, and annexed to the city of Wilber. Chaloupka Addition consists of Lots 1 to 6, which are 44 feet wide, and Lot 7, which is 36 feet wide. The lots vary in depth from 122.8 feet for Lot 1 to 133.8 feet for Lot 7. Adjoining this addition on the east is a railroad right-of-way of 100 feet, which runs generally north and south across the owner's farm. The west boundary line of the railroad is the east boundary line of the addition. There is a strip 17 feet wide between Highway No. 82 and the west boundary line of Chaloupka Addition. For some reason which does not appear, at the time of the platting this was the property of the owner but was not included in the addition and was not a part of the highway right-of-way. The west boundary of Chaloupka Addition, therefore, was located 17 feet east of Highway No. 82. The State included this 17-foot strip in the condemnation and stipulated that it was the property of the owner. So actually, with this 17-foot strip, only the west 1.5 feet of Chaloupka Addition is included in the taking.

The owner's buildings are on Lots 1, 2, and 3. A shelter belt is growing on Lot 4, and Lots 5, 6, and 7 are farmed in connection with the balance of the owner's land. There is a building in the southwest corner of Lot 1, which previous to 1945 was used as a filling station and subsequently for about a year and a half as a feed store. For at least the last 15 years, this building has been vacant. The new right-of-way is approximately 2½ feet west of this building. The 17-foot strip of land, which is 4 feet west of the building, had been used as a driveway for the station, and in later years had on occasions been used as a parking area by the Chaloupkas and their visitors. Immediately east of the filling station, the Chaloupkas have a two-car garage. Access to this garage and to the owner's home, which is located on Lots 2 and 3, is provided by a drive-

way to an east-and-west street bounding Lot 1 on the south. The owner's residence, which faces to the west, is a story-and-a-half house. In front of the residence, or to the west, there was a hedge of shrubbery as well as some evergreen and elm trees. Part of this shrubbery and the evergreen and elm trees were included in the taking and were removed by the State.

Highway No. 82, for a portion of the taking, is to be a controlled-access highway. Included in this portion is the 300-foot strip along Chaloupka Addition, as well as the area to the north of it for 1,913.2 feet, which embraces approximately 6.5 acres between the highway and the railroad. The owner, except for the parking area and the driveway used by the filling station referred to heretofore, was provided, at state expense, with the same means of ingress and egress which were used previous to the condemnation. It is the contention of the owner that Lots 4, 5, 6, and 7 are residential lots and their value as such is destroyed by a controlled-access road. The owner further contends that the 6.5-acre tract to the north of Chaloupka Addition is suitable for industrial or commercial purposes. It is the contention of the State that both tracts are agricultural land, which is its present use, and no other use can be anticipated in the foreseeable future. The property in Chaloupka Addition is connected to sewer, water, and gas lines serving the city of Wilber, and an electric line of the city of Wilber runs along the west boundary of all the property to which access is controlled. The only access provided for the 6.5-acre tract is a field entrance from Highway No. 82 of some 22 to 24 feet, which is the same driveway which served this area before the condemnation.

The county court appraisers fixed the owner's damage at $1,085. The owner appealed to the district court where the jury, which was permitted to view the property, returned a verdict for $1,170. The owner filed a motion for a new trial. The trial court sustained the motion and in the alternative granted an additur of

$2,000 if the State complied within 15 days. Upon the State's failure to comply with the additur, the verdict was set aside and a new trial granted. The State has perfected its appeal to this court.

The reasons assigned by the trial court for its action were as follows: "That the verdict entered herein is contrary to the evidence;

"That the evidence of the defendant was that the value of the property taken was the sum of $1,054 and $1,104, respectively, and that neither of said sums included any amount for reduction in value to the remainder of plaintiff's property;

"That the verdict of the jury fails to reflect any compensation for loss of access to a portion of plaintiff's property in that the evidence adduced by the defendant was that defendant's witnesses took into account no amount as damage for loss of access to a portion of the plaintiff's property;

"That according to the evidence of the plaintiff a reduction in value resulting to the balance of plaintiff's property on account of taking of said land by the defendant and the taking of the right of access thereto is at least $2,000."

The state has alleged 10 assignments of error. They are directed to the right of the trial court on the record herein to sustain the motion for a new trial. We see no need to list or discuss the individual assignments.

In Greenberg v. Fireman's Fund Ins. Co., 150 Neb. 695, 35 N. W. 2d 772, we said: "The district court has the power and is required to consider and determine motions for a new trial by the exercise of its judicial discretion. The word 'discretion' is one of variable meanings depending on its use. In Tingley v. Dolby, supra, 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 of the facts of a case. * * *

"Where a party has sustained the burden and expense of a trial and has succeeded in securing the judgment of a jury on the facts in issue, he has a right to keep the benefit of that verdict unless there is prejudicial error in the proceedings by which it was secured."

In passing upon the questions raised by the sustaining of the motion for a new trial by the trial court, we must test the sufficiency of the evidence to support the verdict of the jury in the light most favorable to the State. As we said in Enterprise Co., Inc. v. Sanitary Dist. No. One, *ante* p. 271, 125 N. W. 2d 712: "In testing the sufficiency of the evidence to support a judgment, the evidence must be considered in the light most favorable to the the successful party." This means that every controverted fact must be resolved in the State's favor and it should have the benefit of every inference that can reasonably be deduced therefrom. See Smith v. Platte Valley Public Power & Irr. Dist., 151 Neb. 49, 36 N. W. 2d 478.

The State produced two valuation witnesses. Both of them were residents of Saline County and were licensed brokers dealing in Saline County real estate. Both of them testified that they gave consideration to control of access to the owner's property but considered the fact that the same means of ingress and egress existed after the condemnation as before. The owner argues that this did not correctly reflect the actual situation in that he lost the use of the 17-foot strip west of the filling station building which had been used for a driveway and for occasional parking. He also contends that even though he needed a permit for further access, it was possible to get it before the condemnation whereas it would be almost impossible to do so after access was condemned. This conflict and the owner's theory on loss of access

was fully presented to the jury. The State's witnesses rejected the probability of any residential development in the foreseeable future as well as any idea that the land had increased in value because of a commercial or an industrial potential. In support of their views, they testified that the population had remained fairly static and there had been no commercial or industrial development in Wilber for many years.

One of the State's valuation witnesses fixed the owner's damage at $1,054. This he broke down as follows: $424 for the 1.95 acres actually taken; $380 for damages to a fenced area, involving the replacement of the fence; and $250 for the damage to the residential area, including the shrubs and trees. The other State valuation witness fixed the owner's damage at $1,104, which he broke down as follows: $422 for the 1.95 acres actually taken; $382 for the damage to the fenced area, including the replacement of the fence; and $300 for the loss of the driveway and parking area and for the damage to the residential area because of the removal of shrubs and trees.

The owner, in addition to himself and his son, produced several local witnesses, including a real estate broker, a contractor, and two bankers, as well as a real estate broker from Lincoln. The valuation fixed by these witnesses for the 1.95 acres actually taken ranged from $600 to $2,083. The range of the damages fixed to the remainder of the property was from $3,287 to $9,300.

The witnesses for the owner and for the State differed widely on the question of the value of the land taken, as well as on the damages sustained by the remainder of the owner's property. It will serve no useful purpose to detail the conflict in the evidence. We have already suggested its area and extent.

The State's valuation witnesses were cross-examined extensively on the owner's theory of damages. The owner suggests that this cross-examination discloses a lack of qualification in the State's witnesses to testify

as to the fair market value of the owner's land and the purposes for which it was adaptable for use. While the witnesses had not checked certain elements the owner thought should have been considered, this went to their credibility and not to their qualifications. At best the cross-examination emphasized the difference in opinion and the factors the owner felt should be considered.

Without setting out the specific qualifications of the various witnesses, there is no question but that the State's witnesses were qualified as valuation witnesses and their testimony was relevant to the issue. In Evans v. State, *ante* p. 156, 125 N. W. 2d 541, we held: "It is not essential that every witness qualified to express his opinion as to the value of real estate shall have all-inclusive information of every detail of the factors entering into market value.

"The opinion of a witness as to the value of land will ordinarily be received if he is familiar with the property and its uses and is informed as to the state of the market, the weight and credibility of his evidence being for the jury." The owner's theory on damages was fully covered in his cross-examination of the State's witnesses as well as in the testimony of his own witnesses.

The measure of damages for land taken for public use is computable as of the time of the taking, which is deemed to occur when the petition for condemnation is filed. The proper measure of damages 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. Platte Valley Public Power & Irr. Dist. v. Armstrong, 159 Neb. 609, 68 N. W. 2d 200. The burden of proving the extent of the damages in a condemnation action is not on the condemner but on the owner. The burden to show matters which tend to reduce or mitigate damages is on the condemner. Twenty Club v. State, 167 Neb. 37, 91 N. W. 2d 64.

The question of remainder damage, which includes the

loss of access, is a jury question. Damages in a condemnation action are peculiarly of a local nature and weight and credibility of valuation testimony is for the jury. State v. Wixson, 175 Neb. 431, 122 N. W. 2d 72. The testimony of the State's witnesses was directed to minimizing remainder damage. On the other hand, the jury could have felt that the testimony of the owner's witnesses grossly exaggerated such damage. The rule is too-well established for discussion that when evidence is in conflict, and is such that reasonable minds can draw different conclusions from it, a jury question is presented. See Smith v. Platte Valley Public Power & Irr. Dist., 151 Neb. 49, 36 N. W. 2d 478.

Essentially, the problem herein is one of the credibility of the witnesses and the weight to be given to their testimony. This is solely a matter for the jury. We may not agree with the conclusion reached, but where there is any evidence to support a jury's verdict, it is not the court's function to weigh the evidence to determine whether it would have returned a different verdict. See Stohlman v. Davis, 117 Neb. 178, 220 N. W. 247, 60 A. L. R. 658.

The question of control of access was one of the contested issues on which the owner's witnesses concentrated. It was the State's position that previous to the condemnation the owner could not change or enlarge his access to Highway No. 82 without the permission of the State, and that the right to require a permit included a right to refuse it. Section 39-1332, R. R. S. 1943, which was controlling, provides as follows: "No person shall construct, use, or permit to be used on property owned or occupied by such person any private entrance or exit, approach road, facility, thing, or appurtenance upon or connected to a highway right-of-way without first obtaining a written permit from the department; Provided, the owner or occupier of property shall not be required to obtain a permit to use or permit to be used in its existing condition any such private entrance

or exit, approach road, facility, thing, or appurtenance existing on September 18, 1955, unless the department determines that the safety and general welfare of the public will be better served by such owner or occupier being required to apply for a permit and the department gives written notice to such owner or occupier that application for a permit must be filed with the department within thirty days from receipt of such notice." It was the owner's position that although a permit was required, it would in most instances be granted. This merely permitted the State to control the type of access to be granted.

Section 39-1330, R. R. S. 1943, which covers the acquisition of control of access where a highway is being reconstructed, reads as follows: "In connection with the acquisition of real property for new right-of-way or additional right-of-way for any highway to be constructed, relocated, or reconstructed in either rural or urban areas and paid for in whole or in part with federal or state highway funds, the department may prescribe and define in purchase agreements or condemnation proceedings the location, width, nature, and extent of any right of access that may be permitted between such improved highway and the properties from which such right-of-way or additional right-of-way is acquired, but such prescription and definition shall in no case leave such private properties without a reasonable means of egress and ingress to a road." It is the position of the State that in the taking it did provide the owner with exactly the same means of egress and ingress as existed previous to the condemnation. The owner, on the other hand, contends that in the future there will be no probability of the granting of additional access.

It was the position of the trial court that no damages were awarded to the plaintiff as remainder damage. We cannot draw this conclusion from the record unless we ignore the testimony of the State's witnesses as well as portions of the testimony of the owner's witnesses.

Further, we must consider that there was a sharp conflict on the nature and extent of any remainder damage. The owner had the burden of proving that he sustained severance damages and also the amount of such damages.

It is apparent that the jury did not wholly accept the testimony of the State's experts because the damages assessed by the jury exceed the highest figure fixed by any of those witnesses. The low figure adduced by the owner on the value of the land actually taken was $600. It is apparent, therefore, that the jury had a low range for the land actually taken of from $422 in the State's testimony to $600 in the testimony for the owner. Any difference between these figures and the verdict actually returned would appear to reflect some award for remainder damage, including fencing, loss of trees and shrubs, parking, and access. Although the amount allowed would be very meager when compared with the testimony of the owner's witnesses, we cannot say the jury made no allowance. On the issue of commercial or industrial potential, a definite jury issue was presented. We must assume the jury rejected the possibility in the foreseeable future.

Is the jury required to accept either the testimony of the State's witnesses or the testimony of the owner's witnesses, or is it permitted to draw its conclusions from whatever portion of the testimony of any of the witnesses it decided to accept? Where as here there was a difference of opinion on the possibility of commercial development, and the extent of the damage sustained by control of access, it was privileged to do any of the three. In jury cases jurors are the judges of the credibility of witnesses and of the weight to be given their testimony, and within their province, they have the right to credit or reject the whole or any part of the testimony of a witness in the exercise of their judgment. State v. May, 174 Neb. 717, 119 N. W. 2d 307. A verdict under such circumstances will not be set aside unless it is clearly wrong. We cannot agree with the trial

court that the verdict was clearly against the weight and reasonableness of the evidence. To do so on this record would be to usurp the jury's prerogative.

The jury was permitted to view the premises before arguments by counsel but after all the evidence had been adduced and after it had been instructed by the court. We must assume that when the jury viewed the premises it had the conflicting contentions of the parties in mind. The case was argued by counsel immediately after the jury viewed the premises. This also permitted the parties to point up their respective contentions while the view of the property was still fresh in the minds of the jurors. Where a jury is permitted to view the premises involved in eminent domain litigation, the result of its observations is evidence which it may consider in connection with other competent evidence. See Leffelman v. City of Hartington, 173 Neb. 259, 113 N. W. 2d 107.

The owner complains that instruction No. 9 given by the trial court did not embrace section 39-1329, R. R. S. 1943, which involves the question of access on existing highways and is not the section applicable herein. The instruction did embrace section 39-1330, R. R. S. 1943, which specifically covered the instant situation, which was the acquiring of additional right-of-way for the reconstruction of an existing highway. Both sections provide that the owner cannot be denied reasonable means of egress and ingress. The owner also complains because certain provisions of section 39-1333, R. R. S. 1943, were not included in instruction No. 9. The provisions of this section are included verbatim in instruction No. 10. The owner tendered instructions embracing his theory on access. These were embodied verbatim in instruction No. 10 given by the trial court, and adequately covered the pleadings and evidence herein.

In Beavers v. Christensen, *ante* p. 162, 125 N. W. 2d 551, we held: "Instructions should be considered together in order that they may be properly understood,

and when, as an entire charge, they properly submit the issue to the jury, the verdict will not be set aside."

In Stahlhut v. County of Saline, *ante* p. 189, 125 N. W. 2d 520, we held: "If an examination of all the instructions given by the trial court discloses that they fairly and correctly state the law applicable under the evidence, error cannot be predicated thereon." There is no merit to the owner's complaint on the instructions.

For the reasons given, the order of the trial court sustaining the motion for a new trial should be and hereby is reversed and the cause is remanded to the trial court with directions to reinstate the verdict of the jury and to enter judgment thereon.

REVERSED AND REMANDED WITH DIRECTIONS.

OWEN A. FRANK ET AL., APPELLANTS, V. STATE OF NEBRASKA, DEPARTMENT OF ROADS, APPELLEE.
127 N. W. 2d 300

Filed April 3, 1964. No. 35619.

1. **Eminent Domain: Damages.** The measure of damages for property taken for public use is the fair and reasonable value of the property actually appropriated and the difference in the fair and reasonable market value of the remainder of the property before and after the taking.
2. ———: ———. In the determination of remainder damage, it is the effect of the severance of the property taken on the value of the total unit of property that produces remainder damage.
3. **Eminent Domain: Evidence.** If a party limits his proof of remainder damage to a portion of the property remaining after the taking, he may not thereby limit the proof offered by the condemner as to the value of the whole of the remainder before and after the taking.
4. **Eminent Domain: Damages.** Land taken by right of eminent domain should be valued as a portion of the tract of which it is a part and not as if it stood alone.
5. ———: ———. Damages in a condemnation action are peculiarly of a local nature, and weight and credibility of valuation testimony are for the jury.
6. **Eminent Domain: Trial.** In a condemnation action, the burden

of proof is on the condemnee landowner to prove that the severance of the property taken caused damage to the value of the total unit of the remainder and to prove the amount of that damage.

7. ———: ———. Access to property is one of many factors bearing upon a determination of its value and where access has been affected, generally this court, as a matter of law, cannot determine that it thereby diminishes the value of the property. This determination is for the jury to make in conformity with the proper measure of damages.

8. **Eminent Domain: Appeal and Error.** In a condemnation action where the evidence is in conflict, the verdict of the jury will not be set aside unless it is affirmatively shown that the verdict is clearly wrong.

9. **Eminent Domain: Evidence.** A party may not require, in a condemnation action, that a particular witness as to valuation follow or subscribe to any given formula or method of appraisal or require that certain factors affecting valuation be considered.

Appeal from the district court for Scotts Bluff County: TED R. FEIDLER, Judge. Affirmed.

Wright, Simmons & Hancock, for appellants.

Clarence A. H. Meyer, Attorney General, Harold S. Salter, and Warren D. Lichty, Jr., for appellee.

Heard before WHITE, C. J., CARTER, MESSMORE, YEAGER, SPENCER, BOSLAUGH, and BROWER, JJ.

WHITE, C. J.

This a State highway condemnation case. From a jury verdict and judgment for the plaintiffs in the sum of $12,280, the plaintiffs appeal. The jury made special findings in this case; first, that the value of the property taken by the State was $12,280; and, second, that there was no damage to the remainder of the plaintiff's property. The plaintiffs assign error in the inadequacy of the verdict in that there was no allowance for damage to the remainder of their property, error in the admission of the testimony of the witness Zich for the State, error in an instruction, and error in permitting the State

to introduce evidence as to the value of the whole of plaintiffs' property when the plaintiffs themselves limited their claim for remainder damage to only a portion of it.

The land condemned was for the purpose of constructing a portion of a by-pass of State Highway No. 26 on the north side of Scottsbluff, Nebraska. The date of the taking was September 12, 1962. Plaintiffs own approximately 124 acres of land in an area which is gradually being developed for residential purposes. It is one continuous piece of property being bordered by Twenty-seventh Street, a paved arterial, on the north, Twentieth Street on the south, Fifth Avenue on the west, and a drainage ditch on the east which runs directly north in a straight line on the east border for a short distance and then extends diagonally in a southeast-northwest direction to a point where it intersects Twenty-seventh Street, the north boundary of the property. The actual taking by the State is 6.14 acres in a strip approximately 150 feet wide which runs parallel with and immediately next to the diagonal portion of the drainage ditch bordering plaintiffs' property on the east. The evidence shows that the plaintiffs had sold tracts from the west side of this property bordering Fifth Avenue for a Safeway store, for a school and church, and for small residential tracts. The balance of the property was devoted to farm purposes at the time of the taking, was unplatted, and was zoned by the City of Scottsbluff for residential, single-family dwelling purposes. The evidence shows that the whole surrounding area was gradually being developed for urban residential and incidental commercial purposes with comparatively new subdivisions and sales of property therein to the north, west, and east of the plaintiffs' property.

What was the testimony as to valuation of the tract taken and the remainder? All of the plaintiffs' witnesses testified that there was no damage to the remainder of the 124 acres, except to two strips of land both running paral-

lel and adjacent to the highway right-of-way. The first strip consists of 2.12 acres, running directly south from the triangular sliver of land, taken by the State to furnish the turning area onto the new highway from Twenty-seventh Street. This sliver extended west on Twenty-seventh Street approximately 54 feet to the west of the point where the new highway will intersect Twenty-seventh Street. The second strip consists of an area of 5.95 acres and a 150-foot strip parallel and adjacent to the west of the highway right-of-way throughout the Frank property. These "strips" or "areas" are not platted, marked, or naturally divided in any way on the property. They were selected and marked off on the maps arbitrarily by the plaintiffs' witnesses as to the area of remainder damage.

The plaintiffs' witnesses fixed a valuation of the land taken varying from $16,135 to $21,810. On the two strips selected for remainder damage, the plaintiffs' witnesses estimated the difference in value before and after the taking of September 12, 1962, as varying between $9,570 (owner Frank) to something over $12,000 (witness Scriven). The total damage they testified to ranged between about $27,500 to $31,380. The State's witnesses fixed a valuation on the tract taken varying between $9,824 to $12,280 based on the difference in value of the total tract immediately before and after the taking of September 12, 1962. This valuation in turn was based on a total valuation of the tract from $225,000 to $246,000 before the taking of the 6.14 acres for the right-of-way. The State's witnesses found no damage to the remainder of plaintiffs' property from the effect of the taking. The jury returned a verdict of $12,280 and, in response to the verdict form furnished it by the court, found that there was no damage to the remainder.

The evidence shows that this property, while now having only nonplatted use as farm property, has a high potential value for residential subdivision purposes. While the testimony of the experts differed widely as

to the significance of the different sales and the factors that each one of them took into consideration in fixing the value of the acreage, it is significant that they fixed a fairly uniform value per acre throughout the whole acreage and that it varied from about $2,000 to about $2,750 per acre. The plaintiffs' witnesses fixed a higher valuation on the lots that had access to Twenty-seventh Street because, although zoned at present for residence purposes only, they gave this area extra value because of a possible change in zoning, the fact that Twenty-seventh Street was a main artery of traffic, and because commercial properties of comparatively high value had been sold a short distance to the west on Twenty-seventh Street. The defendant's testimony, on the other hand, was to the effect that the difference in access before and after the taking would cause no difference in the valuation of the property for the available or prospective uses and that the effect of the taking on value, if any, would be to increase it. It also appeared that the property before the taking bordered on the drainage ditch to the east with no access to a road or other property in that direction.

The plaintiffs assign error in the court permitting the defendant's witnesses to testify as to the value of all of the plaintiffs' land before and after the taking and also error in permitting testimony as to the value of the remainder before and after the taking of September 12, 1962. In substance, they claim this was error because they limited their claim to remainder damage to two small strips next to the highway right-of-way. We see no merit in this contention. The measure of damages for property taken for public use is the fair and reasonable value of the property actually appropriated and the difference in the fair and reasonable market value of the remainder of the property before and after the taking. State v. Dillon, 175 Neb. 444, 122 N. W. 2d 223; McGinley v. Platte Valley Public Power & Irr. Dist., 133 Neb. 420, 275 N. W. 593. The testimony of the value of the whole

tract, and the remainder, before and after the taking, is squarely in conformity with the precise measure of damages announced above and to which this court has long adhered. And, as we have stated, the diminution in value by the taking to the whole of plaintiffs' property as a unit is the ultimate test of the damage caused. But, plaintiffs further argue that since they limited their claim for remainder damage to two strips paralleling the taking, the State is limited to rebuttal evidence as to remainder damage to these same two strips and, therefore, it was error to permit the State to show the value of the whole of the remainder. This contention, in effect, would permit a condemnee landowner to set up his own measure of damages. The condemner is entitled, as is the condemnee, to show the value of the whole of the remainder before and after the taking. Ordinarily, the landowner seeks to show the maximum reach of the effect of the taking on remainder damage. Here the plaintiffs voluntarily sought to limit their showing to the two small parallel strips bordering the right-of-way. This, of course, they may voluntarily do, but they cannot preclude the condemner from relying on and showing the damage or lack of damage to the whole of the remainder. It is the effect of the severance on the value of the total unit that produces remainder damage. A condemnee may not split or gerrymander the different portions of his property in order to prevent the application of this rule. If the effect of the taking is to increase the value of the remainder, or some of it, or not diminish the value at all, the condemner is entitled to introduce valuation testimony from which these inferences may be drawn. The parties may not change the legal measure of damages, and the rule applies equally to both parties. Plaintiffs argue McGinley v. Platte Valley Public Power & Irr. Dist., *supra;* and Rath v. Sanitary District No. One, 156 Neb. 444, 56 N. W. 2d 741, quoting language which appears to support their contention. These cases deal with the question of what

constitutes the remainder where there are several tracts of land and generally state the burden of proof. Here, there is no question as to what constitutes the whole tract of land or the remainder as it is one continuous tract of the same character and quality, about 124 acres bordered on the east by the drainage ditch, and having a unity of use and title.

Plaintiffs assign error in the admission of the testimony of the State's expert witness Zich. They contend that since this witness testified "that he was not qualified to place a value on the 6.14 acres taken without considering it as a part of the whole of plaintiffs' 124 acres," that the testimony was incompetent. This assignment amounts to a repetition of the assignment of error already discussed. They argue that since this witness testified there was no damage to the remainder, it was error to receive his evidence as to the value of the whole of the remainder before and after the taking. But, land taken by right of eminent domain must be valued as a portion of the tract of which it is a part and not as if it stood alone. State v. Dillon, *supra;* 4 Nichols on Eminent Domain (3rd Ed.), § 14.231, p. 544. This witness valued the whole of the property before and after the taking. From this, the value of the part taken and the value of the remainder before the taking can be ascertained. Then the testimony as to the valuation of the remainder after the taking for comparison furnishes the proper tests against the applicable measure of damages. Plaintiffs themselves fix the value of the land actually taken based on its value as a portion of the whole unit. They may not now complain because the State shows valuations of the whole units both before and after the taking. Plaintiffs argue the failure of the State's witnesses to give proper significance to some previous sales, including a church property, that were made off of plaintiffs' property prior to the taking, and that the witness Zich testified he considered the difficulty of financing a purchase of the whole tract as a factor in fixing value. Plaintiffs

at no time challenged this witness or the State's other witnesses as to qualifications, familiarity with the property, or with the real estate market in the area. The above objections go to the weight and credibility of the witnesses' testimony and not to its competency. A party may not require that a particular witness follow or subscribe to a given formula or method of appraisal or that certain factors not be considered. Damages in a condemnation action are peculiarly of a local nature, and weight and credibility of valuation testimony is for the jury. State v. Wixon, 175 Neb. 431, 122 N. W. 2d 72; Medelman v. Stanton-Pilger Drainage Dist., 155 Neb. 518, 52 N. W. 2d 328; State v. Dillon, *supra*. There is no merit to these objections.

Plaintiffs assign error in the use of the words, "if any," in instruction No. 8 given by the court in setting out the measure of damages as to the remainder of plaintiffs' property. They argue that the use of such language by the court implies that there was none. We do not agree. The burden was on the plaintiffs to prove that the severance caused damage to the total unit of the remainder and to prove the amount of that damage. Platte Valley Public Power & Irr. Dist. v. Armstrong, 159 Neb. 609, 68 N. W. 2d 200; Twenty Club v. State, 167 Neb 37, at p. 44, 91 N. W. 2d 64. An instruction containing and using this language, "if any," was approved in Dunlap v. Loup River Public Power Dist., 136 Neb. 11, 284 N. W. 742, 124 A. L. R. 400. There were issues here both as to whether there was severance or remainder damage and as to the amount thereof. The instruction was correct and without error.

Lastly, plaintiffs argue the insufficiency of the verdict. They do not contend that the verdict is not within the range of valuations introduced in the testimony. They assert, in substance, that the jury found that there was no remainder damage and that, as a matter of law, there must have been remainder damage because of the taking of access on the property bordering the new highway

and the destruction of access to Twenty-seventh Street from the portion of the property immediately to the south of the sliver of land taken for turning purposes which runs about 54 feet west from the highway right-of-way as it intersects Twenty-seventh Street.

We point out that the east border of this property was on a drainage ditch prior to the taking and had no access. The plaintiffs acquired no new access rights with the construction of the new highway, and the court, in instruction No. 15 to which there is no objection, so informed the jury. See § 39-1329, R. R. S. 1943. It is true that some access to Twenty-seventh Street was taken from remainder land lying south, but there would be access to the west both as to the rest of the property and to Twenty-seventh Street. The effect of this taking of access on the available and prospective uses of the property, and its relation to total valuation of the unitary whole of the remainder property, was for the jury. This court cannot, as a matter of law, determine that the value of the whole of the remainder was diminished thereby. It was for the jury to determine what the effect of the severance was on the value of the remainder, and access was only one of many factors for its consideration. It may have determined, which it had a right to do, that the restrictions on access had no effect on the market value of the property, or that it was counterbalanced by an increase in value of the remainder as a result of the taking. Testimony was in conflict as to noise, dust, the effect of traffic, the manner in which the property would have to be faced for residential purposes, available accesses after the taking, possibility of changes in zoning, and use for commercial purposes.

In a condemnation action, where the evidence is conflicting, the verdict of a jury will not be set aside unless it is affirmatively shown that the verdict is clearly wrong. O'Neill v. State, 174 Neb. 540, 118 N. W. 2d 616; State v. Dillon, *supra*. The finding by the jury of no remainder damage in this case has not been shown to

meet this test. The most that can be said is that it has been shown that some of the available uses of a small portion of the whole property have been affected. But, it has not been shown that the value of the remainder, as a matter of law, has been diminished or changed. We have reviewed the evidence, and the case was properly submitted upon competent testimony as to valuation based upon widely varying and different opinions as to the factors to be considered and the weight given the various factors. There is competent evidence to sustain the finding of no valuation damage to the remainder, and this court has no power to disturb it on review. The judgment of the district court is correct and is affirmed.

AFFIRMED.

NINA HUBBARD, APPELLEE, V. JACK F. HUBBARD, JR., APPELLANT.

127 N. W. 2d 503

Filed April 10, 1964. No. 35541.

1. **Divorce.** By section 42-340, R. R. S. 1943, either party to a divorce action may within 6 months of the date of entry of decree make application to have the decree set aside or modified.
2. ———. If a motion to set aside or modify a decree of divorce is made pursuant to statute, the court may in the exercise of a sound discretion grant it and vacate or modify the decree.
3. ———. The right to exercise jurisdiction to vacate or modify, within 6 months, a decree approving a property settlement agreement upon application of a party is conditioned upon the grounds alleged and proved being sufficient for that purpose. Before it can be said that the trial court abused its discretion in refusing such an application it must be alleged and shown that an unconscionable advantage was taken in the execution of the agreement through fraud, intimidation, ignorance, passion, or improvidence and that setting it aside or modifying it would not produce an unconscionable result.

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

Fitzgerald, Brown, Leahy, McGill & Strom and James F. Brogan, for appellant.

Tesar & Tesar, for appellee.

Heard before WHITE, C. J., CARTER, MESSMORE, BOSLAUGH, and BROWER, JJ., and ZEILINGER, District Judge.

ZEILINGER, District Judge.

The matter before this court is a review of the refusal of the district court to vacate or modify the permanent alimony provision of a decree of divorce within 6 months of the rendition thereof.

In the action for divorce Nina Hubbard was plaintiff and Jack F. Hubbard, Jr., was defendant. On April 27, 1962, plaintiff filed her petition for absolute divorce, child custody, child support, property settlement, permanent alimony, attorney's fees, and costs. Defendant defaulted and on July 13, 1962, the court entered its decree generally for plaintiff and against defendant specifically approving the property settlement agreement and incorporating its provisions into the decree. The property settlement agreement was dated and acknowledged July 7, 1962, before a notary public. No motion for new trial was filed within 10 days and no appeal was taken from the decree. On September 12, 1962, defendant filed an application for vacation or modification of the decree with regard only to the provision for permanent alimony. This application was denied on September 14, 1962, after a hearing and submission on briefs and argument, and during the term of court in which the divorce decree was entered. The defendant then filed a motion for rehearing or, in the alternative, for a new trial which was overruled and this appeal followed.

Defendant assigns as error the refusal of the court on September 14, 1962, to vacate or modify the permanent alimony provision of the divorce decree. It is defendant's contention that the refusal was erroneous because the court, without giving the defendant an opportunity

to introduce evidence in support of his motion, entered its order finding that "the application should be denied for the reason that the Court is without jurisdiction under the pleading on file at this time." Defendant has cited no case in which only the permanent alimony provision of a decree has been vacated or modified on the grounds set out in his application, and none has been found. Defendant is content with all provisions of the decree except with those regarding permanent alimony.

Defendant relies on the following four cases: Firebaugh v. Firebaugh, 163 Neb. 79, 77 N. W. 2d 891. But in that case the court concluded: "The appellant by fraud and deception overreached and fraudulently persuaded appellee to accept an unfair and unjust settlement." Defendant here specifically negatives fraud and deception. In Moran v. Moran, 161 Neb. 372, 73 N. W. 2d 709, the application to set aside the decree alleged that at the time of the signing of the property settlement agreement and the entry of the decree applicant was mentally and physically incapable of realizing the import of the property settlement and that the decree and property settlement was secured through fraud, deceit, and duress. Defendant here specifically negatives these allegations. In Pittman v. Pittman, 148 Neb. 864, 29 N. W. 2d 790, the husband filed an application to vacate and set aside the decree of divorce and to allow him to file an answer in the divorce action and his application was granted by this court. Grounds for vacation of the decree were in substance that the agreement which was approved by the court was unconscionable and oppressive in that plaintiff was given a grossly excessive portion of the property of the parties; that the property division was inequitable; and that unfair advantage was taken of the defendant in the making of the agreement and that although he signed it, it did not represent his intention or understanding and that in the making of the agreement he was imposed upon by the attorney for the plaintiff. Defendant here specifically negatives

these allegations. In Roberts v. Roberts, 157 Neb. 163, 59 N. W. 2d 175, the provision for alimony was modified upon an application alleging that plaintiff had not asked for alimony in her petition and had repeatedly assured defendant that she would not seek alimony; and that defendant made no appearance in reliance upon such assurance by plaintiff and her attorney, which fact was called to the attention of the court by plaintiff's attorney before decree was entered but that the court granted alimony regardless. Defendant here neither alleges nor shows such an unconscionable situation. In Pittman v. Pittman, *supra,* the court said: "The motion to vacate was filed within six months from date of entry of the decree thus conferring jurisdiction on the district court to vacate or modify the decree. The right to exercise jurisdiction was of course conditioned on the grounds alleged and proved being sufficient for that purpose." and, "the right granted under the statute to vacate or modify a decree within six months is not absolute but must be exercised within a sound judicial discretion. * * * in order that it may be said that the court has exercised a sound judicial discretion good reason must be shown for setting aside or modifying the decree and it must be further shown that setting it aside or modifying it would not produce an unconscionable result."

The following from Pittman v. Pittman, *supra,* clearly states the duty of a trial court regarding property settlement agreements: "On a severance of a marriage by divorce the court is required to take into consideration the estate of each party at the time of the marriage, their respective contributions since the marriage, the duration of the marriage, the wife's loss of interest in the husband's property by virtue of the divorce, the social standing, the comforts, and luxuries which the wife would probably have enjoyed except for the divorce, the conduct of the parties leading to the divorce, the party to which the divorce is granted, the ages and condition of health of the parties, and all other pertinent facts and

circumstances, and in this light award an amount which appears to be fair and equitable.

"A contract between husband and wife, made after and in consequence of severance of the marital relation and permanent separation, and providing for a division of property, and containing mutual releases of rights and obligations relative thereto, will be respected by the courts as presumably fair and valid, and a just and equitable adjustment of the matters of which it treats. But the courts will scrutinize such transactions closely, without too much regard for formal rules of pleading and procedure, and see to it that no unconscionable advantage is taken through fraud or intimidation, or by reason of ignorance, passion, or improvidence." Defendant has not presented to this court the evidence presented to the district court at the divorce hearing and there is nothing before this court to support defendant's conclusion that the trial court did not perform its duty in this regard.

Defendant's application to vacate or modify the permanent alimony provision of the decree contains this statement: "That the Plaintiff entered into the property settlement agreement voluntarily and of her own free will, and the defendant likewise entered into the property settlement agreement voluntarily and of his own free will; That no misrepresentations were made to the defendant by anyone, and the Defendant read and understood the property settlement agreement at the time the same was executed by him." It then states that defendant did not obtain the advice and counsel of an attorney before he executed the agreement; that upon further study and consideration and after consulting with an attorney he now believes that the permanent alimony provision is excessive considering his income and earning capacity, the station in life of the parties, and the property accumulated by the parties, and that the award of alimony should be tempered and reduced; that no change is suggested in the division of property or the

allowance for child support; and that the decree should have reserved to the defendant the right to future modifications in the event of a change in circumstances.

Defendant's application asks for a modification or vacation of one provision of the decree only, leaving all others intact. The allegations are insufficient to support a finding that an unconscionable advantage was taken of him through fraud or intimidation, or even by reason of ignorance, passion, or improvidence. The testimony presented to the trial court in the divorce hearing is not in the bill of exceptions. No affidavits were filed in support of defendant's application and the application was not offered in evidence. The bill of exceptions consists of a statement by defendant's counsel as to what defendant's testimony would be if he were permitted to testify. From this it appears that defendant's testimony would support the allegations of his application. The defendant's application and proof tendered in support thereof is insufficient to require this court to hold that the trial court abused its discretion in denying the application.

The trial court had authority to vacate the decree on its own motion during the term. The court had jurisdiction to act on a proper application. If denial of the motion was not erroneous the reason given therefor is immaterial.

The judgment of the district court should be and it is affirmed. Plaintiff should be and is allowed as compensation of her counsel in this case the sum of $250, to be taxed as costs, and all costs of appeal should be and they are taxed to defendant.

AFFIRMED.

SPENCER, J., participating on briefs.

MILLARD I. HESS, APPELLEE, V. FRANK HOLDSWORTH, APPELLANT.

127 N. W. 2d 487

Filed April 10, 1964. No. 35560.

1. **Negligence.** The question of the existence of gross negligence must be determined from the facts and circumstances in each case.
2. **Automobiles: Highways.** A violation of statutes regulating the use and operation of motor vehicles upon the highways is not negligence per se, but evidence of negligence which may be taken into consideration with all the other facts and circumstances in determining whether or not negligence is established thereby.
3. **Automobiles: Negligence.** When an action under the guest statute is based on gross negligence, the comparative negligence statute is applicable.
4. **Negligence.** If one, knowing and comprehending the danger, voluntarily exposes himself to it, though not negligent in so doing, he is deemed to have assumed the risk and is precluded from a recovery for an injury resulting therefrom.
5. **Negligence: Trial.** An issue of gross negligence is for the jury if the evidence relating thereto is conflicting and from which reasonable minds might arrive at different conclusions.
6. ———: ———. When the evidence is resolved most favorably to the existence of gross negligence and thus the facts are determined, the inquiry of whether they support a finding of gross negligence is one of law.
7. **Automobiles: Negligence.** A guest, to recover damages from a host for injury received by the guest while riding in an automobile operated by the host, must prove by the greater weight of the evidence in the case the gross negligence of the host relied upon and that it was the proximate cause of the accident and injury.
8. ———: ———. Gross negligence within the meaning of the motor vehicle guest statute means great and excessive negligence or negligence in a very high degree. It indicates the absence of slight care in the performance of duty.
9. ———: ———. Gross negligence within the meaning of the motor vehicle guest statute has also been defined as 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.
10. ———: ———. More than one act of negligence may in combination amount to gross negligence within the motor vehicle guest statute.

11. ———: ———. **A finding of gross negligence is justified if there is evidence of imminence of danger which was apparent to or known by the operator of an automobile, and he was timely cautioned by the guest concerning the manner of his operation of the automobile but he persisted in his negligent operation thereof, and if there is evidence that the operator was heedless of the consequences which might ensue by his negligent operation of the automobile consisting not only of rate of speed but of other conditions, known to the operator, which enhanced the peril.**

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

Ivan A. Blevens, for appellant.

Kier, Cobb & Ludtke and Beynon, Hecht & Fahrnbruch, for appellee.

Heard before WHITE, C. J., CARTER, MESSMORE, YEAGER, SPENCER, BOSLAUGH, and BROWER, JJ.

BROWER, J.

The plaintiff and appellee, Millard I. Hess, brought this action against the defendant and appellant, Frank Holdsworth, in the district court for Lancaster County, Nebraska, to recover for personal injuries received in a one-car accident while riding as a guest in an automobile owned and operated by the defendant.

The plaintiff will be referred to as such or as Hess, and the defendant will be either so designated or by his last name, Holdsworth, throughout this opinion.

Plaintiff's petition alleged he suffered injuries while riding as a guest in an automobile owned and operated by the defendant occasioned by the grossly negligent and careless acts of the defendant: In failing to maintain proper observation; in driving at a grossly excessive rate of speed under the existing conditions; in wholly ignoring plaintiff's protest and continuing to so drive; in failing to heed warning signs and stop signs; and in utter disregard of the character of a "T" intersection of which he knew.

Defendant's answer, insofar as becomes significant

herein, consisted of a general denial; an allegation that plaintiff while a guest in defendant's automobile was injured in the accident; and allegations that at the time defendant properly operated his motor vehicle at a lawful rate of speed but was unable to stop it at the stop sign by applying his brakes because of a blowout of the right front tire. It further alleged the assumption of risk by the plaintiff and contributory negligence on his part: In riding with defendant with whose driving habits, including that of driving at the maximum lawful rate, he was familiar; in participating in purchasing alcoholic liquors for and consuming them with defendant which impaired his driving reactions and responses though defendant was not intoxicated; in not leaving defendant's automobile when he had an opportunity to do so knowing the defendant was tired and had consumed such liquors; and in failing to maintain a proper lookout knowing the defendant's said condition, or to warn defendant of his approach to the intersection, or to object to the speed of the automobile under the circumstances.

Plaintiff's reply was in substance a general denial.

At the trial in district court, the defendant made a motion for a directed verdict or a dismissal at the conclusion of plaintiff's evidence, and again at the close of all the evidence. The jury returned a verdict for the plaintiff and judgment was entered thereon. Defendant's motion for judgment notwithstanding the verdict or for a new trial being overruled, he has brought the matter to this court by appeal.

We will now review the evidence as disclosed by the record.

State Highway No. 2 runs east and west where the accident occurred and it is joined there by State Highway No. 43 which enters it from the south forming a "T" intersection. Traffic on Highway No. 2 is favored at that point and a stop sign is present at the southeast corner of the intersection requiring vehicles on Highway

No. 43 to stop before entering Highway No. 2. The accident happened October 14, 1961, some time after 11 o'clock at night. Immediately before the accident, the defendant had been operating his 1955 Ford sedan northward on Highway No. 43. The plaintiff was riding on the front seat beside him. Shortly before, they had left a tavern about ½ mile south of Bennet, Nebraska, which village lies 2 miles to the south of the scene of the accident. The road runs straight north from the tavern through Bennet and on to the intersection.

A state trooper, Del Whitefoot, who was called to the scene of the accident, testified on behalf of the plaintiff. His investigation took place between 11 and 11:30 p.m. He gave a description of the area and measurements made by him. Both highways have paving 24 feet wide. Highway No. 43 to the south was level as was Highway No. 2 to the west, but the latter slopes down to the east. The weather was good at the time and the highways were dry. Besides the stop sign at the southeast of the intersection, there was a warning sign approximately 1 block south. There was also a reflectorized sign north of the intersection on the extention of the centerline of Highway No. 43 with arrows pointing to the east and west. There is a sodded shoulder about 10 feet wide on Highway No. 2 immediately north of the intersection. North of the shoulder the ground slopes down for 3 or 4 feet into a little hollow or gully from which it slopes upward to the north ending in a bank. From the edge of the pavement to the bank it is 22 feet in all. There is no obstruction to the view from the south to the warning sign, stop sign, or reflectorized sign.

The officer arrived 20 or 25 minutes after the accident. He found the 1955 Ford four-door in the dead end to the north of the intersection facing slightly to the northwest with its right corner or front pressed 1 to 1½ feet into the bank. The right-hand side of the car was open. Defendant Holdsworth was down on the

floorboards of the car. Plaintiff Hess was lying on the front seat with his feet hanging out the door. Hess was semiconscious and he mumbled slightly but could not be understood. Holdsworth was unable to speak. Both were later removed by ambulance. In helping to move them, Whitefoot detected the odor of alcoholic liquor on the breath of each. There were several 7-Up bottles in the car, perhaps three or four empty and three or four full. At least two were not opened. The bottles as well as the interior of the car smelled of alcohol. There was an empty pint whisky bottle with the cap on, and a full fifth bottle of whisky, cracked but the contents as yet not spilled and with the seal unbroken. Holdsworth was taken to St. Elizabeth Hospital at Lincoln, and there, at the officer's request, a body fluid specimen was taken from him. The result of the test was 0.12.

Four distinct skid marks led to the defendant's vehicle. They were measured by the officer with a tape and were 121 feet long. They were four solid marks with no evidence of a tire becoming flat before leaving the highway. The right front tire was flat where the car had stopped. It was pressed into the bank. There were wheel marks in the grass on the shoulder where the skid marks ended. For 5 feet thereafter there were no such marks which indicated to the officer the car was apparently in the air a short distance. On this type of Ford, braces go to the bumper. They are heavy pieces of steel 2 inches in width and 3/8 of an inch thick, and the two trusses extend to the front of the bumper. One brace was buckled and the other partially so.

A week later the officer interviewed the defendant at the Veterans Hospital to which he had been transferred. Defendant said that the night of the accident he was going for something to eat and that he and Hess had been to Bennet where they had a few drinks. When asked how much they had to drink, defendant said two beers. During questioning he said he did not know whether beer had anything to do with the accident, that

he thought he had gone to sleep and on crossing the highway had awakened and tried to apply the brakes but it was too late. He said the speed of the car was about 50 miles per hour. There was no defect in the vehicle and he made no claim as to there having been a blowout. When the trooper asked if he did not think he was going 75 miles per hour, defendant answered he did not think that fast. When the skid marks were mentioned and the officer again suggested the circumstances indicated greater speed, he just hung his head. Pictures of the car in evidence indicated damage to the front end. The officer pointed out from them other damage under the carriage and to the right side. There was none behind the front door post.

Orren L. Graves, assistant to the chief of police of the City of Lincoln, testified. He gave his qualifications as one who had studied and received special training in determining minimum speed from skid marks. He had made tests in many types of cars. Neither the tread on the tires nor the weight of the car made any appreciable difference. At the request of plaintiff's counsel, he had tested a 1958 Ford Fairlane on this particular intersection. If the pavement were clean and had no gravel on it, he found at this intersection that the minimum speed of a vehicle to lay down 121 feet of skid marks was 48 or 49 miles per hour.

The only witnesses to the accident or the happenings of the day leading up to it are the parties themselves. The plaintiff and defendant had known each other for many years. They lived only 2 miles apart and had been friends. Plaintiff had ridden with defendant 20 or 30 times. They had gone out evenings together. On other occasions they had had drinks together. Their evidence in the cause before us is conflicting in several material respects.

The plaintiff was a married man, 44 years old at the time of the trial on April 29, 1963. When the accident occurred he was living near Bennet, Nebraska, on a farm

operated by his father and brother. He was in World War II and was allowed a total disability pension which arose by reason of a nervous and not a physical condition. He did farm chores and took care of the garden and livestock, but was not employed otherwise. His version of what happened before the accident was related on the witness stand. About 6:30 or 7 o'clock he went to the defendant's home in his Model A Ford for the purpose of dealing for a butcher hog. The defendant told him he wanted to go to Palmyra, which is 7 miles northeast of Bennet, to buy a fifth of whisky for bowling on Sunday, and asked plaintiff to go with him. After defendant was cleaned up, they drove to Palmyra arriving there about 8 p.m. They both went to a tavern that serves tap beer and each had one glassful. Then they went to the liquor store and plaintiff bought a pint of Sunnybrooke whisky and paid $3 for it. The defendant bought and paid for a fifth of whisky but no 7-Up. They opened plaintiff's pint in the car and plaintiff took a swallow and defendant took a drink. They had no mix or chaser. The lid was then put back on the bottle. He did not drink any more of the whisky nor did he see the defendant drink any more of it. Holdsworth then drove the car to a tavern ¼ mile south of Bennet. He did not drive dangerously nor carelessly. At Bennet plaintiff played pitch for a couple of hours. Before playing he got a bottle of beer. Defendant went with him to the bar but they did not drink together. Defendant did not play with him at any time and plaintiff did not go where Holdsworth was though he saw him there with a number of others. Plaintiff had but one bottle of beer while playing. When the card game broke up about 10:30, he went over where the defendant and others were. He asked one, Bill Thomas, to take him home. The defendant became angry and said he had brought plaintiff and he wanted to take him home. About 10:30 p.m. defendant said he would take the plaintiff to Eagle to get steaks. Holdsworth did not ap-

pear drunk or boisterous. The plaintiff got in the car. They had no more to drink. Defendant "started out alright" and drove north through Bennet at 35 to 40 miles per hour. There were no cars ahead or behind. Holdsworth began thereafter to drive faster and faster. At the cemetery, plaintiff said, "Better slow down, Frank." He was then driving 75 to 80 miles per hour and plaintiff told him he was going too fast. Later he again said, "Slow down, Frank," when they were going 80 miles per hour. Then they came to the corner where they went straight on and ran in the ditch. Defendant made no exclamation of any kind about a tire blowing out and the car did not weave as if one had blown out. The car did appear to go over on the left side of the road a little bit. Plaintiff looked ahead and saw the bank and that is the last thing he remembered. Holdsworth did not apply the brakes or attempt to slow down when told he was going too fast.

On cross-examination, plaintiff's story remained substantially the same with respect to the actions of himself and the defendant concerning the obtaining of liquor, what and how much each party drank, and their actions throughout the evening. With respect to the defendant's driving before the accident, the substance of his evidence on cross-examination is here given. Holdsworth did not appear under the influence of liquor and plaintiff did not feel any such effect. Plaintiff noticed that Holdsworth was driving too fast before they got to the cemetery north of Bennet. Plaintiff could not see the speedometer because it was dark at the time. The car was driven faster and faster. Plaintiff had never ridden with Holdsworth when he had driven that fast. The car was not weaving and his fears and complaints arose from speed. Defendant was driving up to 80 miles per hour. He could tell about how fast Holdsworth was going. Plaintiff believes he felt the brakes go on when they were close to the stop sign.

The defendant, Frank Holdsworth, was a single man

30 years old at the time of the trial. He lived with his father and mother. His parents operate a 320-acre farm near Bennet. He had worked during the day repairing the corn crib and picking corn. About 2:30 in the afternoon he drove the tractor into Bennet to have the tire fixed. He had one beer at the tavern there and saw Hess playing cards but they did not converse together. He went home about 4 o'clock and worked until 7 o'clock. Hess came about 7 o'clock and stayed while he ate, shaved, and cleaned up. Hess suggested going to his place to do the chores and then going to Palmyra to get a pint of whisky to drink. Defendant drove to Palmyra. They went to the liquor store and Hess bought the pint and defendant bought a fifth and a 6-pack of 7-Up. They were there about 10 minutes. They went to the car and put the fifth under the front seat. Hess opened the pint and both took a pretty big drink. They did not open any 7-Up bottles. Then they went to the tavern which was a block south and each bought two glasses of beer and each drank two. It took them about half an hour to drink the two. When they left the tavern, they got in the car and opened two 7-Up bottles before starting the car. They drank about half of the mix and each filled up his own bottle with whisky. This they both drank after they started driving, and then they stopped and had another refill. It took them half an hour to drive the 9 miles from Palmyra to Bennet. When they got to Bennet there was about one-fourth of the bottle left. They both went to the tavern at Bennet, getting there about 9 o'clock. Hess bought two bottles of beer. Holdsworth sat at the bar and drank his and Hess started playing cards. Defendant saw Hess with a bottle of beer at the card table and was sure he drank two because Holdsworth had bought him another. Holdsworth was drinking beer while there. They both stayed until 11:15. Defendant went to the outside toilet at 11:15 and Hess came out and said, "Let's go to Eagle and get something to eat." Defendant said it was too

late because they close at 12 o'clock. They both stopped at the car and drank the whisky and killed the pint. Hess was going to buy a T-bone and said he did not care, the next day was Sunday. They did not open defendant's fifth of whisky. He bought this for bowling as the bowlers took turns buying whisky and it was his turn. When Hess got in the car it was 11:20. Defendant drove through Bennet and on north on the new asphalt road. They had nothing further to drink. Defendant drove about 55 miles per hour. Defendant's condition with reference to the effects of beer and alcohol was fair. He was not completely intoxicated but it had an effect on him. As they drove along they talked as friends about farm matters. Defendant saw the stop sign. He knew where it was anyway, having lived in the community all his life. He could see it for ¼ mile. He slowed up a bit as he approached it but did not apply his brakes too hard. About 150 feet from the stop sign he heard something like a tire blowout and it seemed as though the wheel pulled the car to the west, or left side. Then they hit the dead end. Thereafter he came to in St. Elizabeth Hospital and was later transferred to Veterans Hospital.

On cross-examination the defendant was questioned in respect to his testimony given in a deposition taken September 20, 1962. In the course of this interrogation, the defendant admitted stating in the deposition: That a couple of other "guys" had helped drink up the pint of liquor and that plaintiff and defendant had only a couple of "shots," or about half of it; that what they drank was before they arrived at Bennet and neither drank whisky thereafter; and that the most he had at Bennet was two or three beers. He further stated in the deposition that, "When that guy killed that pint then we just threw that pint outside." He said this other person was a neighbor whose name he did not know. He testified that his answers to questions in the deposition,

which constituted the substance of the testimony here related, were true.

The various errors assigned will now be discussed. The defendant assigns as error to the trial court the overruling of the defendant's motions for a directed verdict or dismissal at the conclusion of plaintiff's case and at the close of all the evidence, and in overruling the defendant's motion for judgment notwithstanding the verdict. He contends the verdict is not supported by the evidence and is contrary to law. These several assignments all relate to the sufficiency of the evidence to submit the plaintiff's case to the jury and will be discussed together. The question was raised before the trial court by the motions to direct a verdict or dismiss the cause. The basis of the motions were that the evidence as a matter of law failed to show gross negligence on the part of the defendant; that it did show as a matter of law that the plaintiff was guilty of contributory negligence more than slight in buying liquor for and drinking with the plaintiff; and that plaintiff assumed the risk of riding with the defendant as a matter of law under the circumstances.

This court has laid down certain rules in decisions concerning gross negligence attributable to the parties in such cases. In Landrum v. Roddy, 143 Neb. 934, 12 N. W. 2d 82, 149 A. L. R. 1041, this court held: "The question of the existence of gross negligence must be determined from the facts and circumstances in each case. * * *

"A violation of statutes regulating the use and operation of motor vehicles upon the highways is not negligence per se, but evidence of negligence which may be taken into consideration with all the other facts and circumstances in determining whether or not negligence is established thereby.

"When an action under the guest statute is based on gross negligence, the comparative negligence statute is applicable. * * *

"If one, knowing and comprehending the danger, voluntarily exposes himself to it, though not negligent in so doing, he is deemed to have assumed the risk and is precluded from a recovery for an injury resulting therefrom."

In considering another case involving the sufficiency of the evidence to submit to the jury the question of liability in a case involving injuries to a guest, the court in Olson v. Shellington, 167 Neb. 564, 94 N. W. 2d 20, held: "An issue of gross negligence is for the jury if the evidence relating thereto is conflicting and from which reasonable minds might arrive at different conclusions.

"When the evidence is resolved most favorably to the existence of gross negligence and thus the facts are determined, the inquiry of whether they support a finding of gross negligence is one of law.

"A guest, to recover damages from a host for injury received by the guest while riding in an automobile operated by the host, must prove by the greater weight of the evidence in the case the gross negligence of the host relied upon and that it was the proximate cause of the accident and injury.

"Gross negligence within the meaning of the motor vehicle guest statute means great and excessive negligence or negligence in a very high degree. In indicates the absence of slight care in the performance of duty.

"Gross negligence within the meaning of the motor vehicle guest statute has also been defined as 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. * * *

"More than one act of negligence may in combination amount to gross negligence within the motor vehicle guest statute."

In Werner v. Grabenstein, 165 Neb. 231, 85 N. W. 2d 297, this court said: "A finding of gross negligence is justified if there is evidence of imminence of danger

which was apparent to or known by the operator of an automobile and he was timely cautioned by the guest concerning the manner of his operation of the automobile but he persisted in his negligent operation thereof and if there is evidence that the operator was heedless of the consequences which might ensue by his negligent operation of the automobile consisting not only of rate of speed but of other conditions, known to the operator, which enhanced the peril."

Considering the evidence previously outlined in the light of the rules of law hitherto set forth, it appears there was evidence and inferences from evidence from which, if believed by it, the jury might conclude that the defendant operated his automobile at an unlawful and dangerous rate of speed in the nighttime while approaching a "T" intersection which was a short distance away. Further, that he was twice warned by his guest to slow down but thereafter persisted in so driving that he proceeded through a warning sign and a stop sign while approachng a reflectorized sign at a dead end, when he was thoroughly familiar with the conditions at the intersection, and that while not intoxicated, he was to some extent under the influence of intoxicating liquor which affected his driving. We think from this evidence, if believed, the jury could attribute gross negligence to the defendant.

There is also evidence that the plaintiff had purchased liquor for the defendant and had participated in its consumption under circumstances which, if believed, might charge the plaintiff with contributory negligence or assumption of risk involved in riding with the defendant. On the other hand, there is evidence from which the jury might infer that the plaintiff and defendant had taken one drink of whisky each some 3 hours or more before the accident and only two or three drinks of beer, thereafter, and that if the defendant indulged in further drinking, he did so either alone or with others. There was evidence if given credence by

the jury that defendant's subsequent drinking, if it occurred, was not known by the plaintiff when he accepted the invitation to ride with the defendant before the accident and that he had no opportunity to leave the car thereafter.

The trial court submitted to the jury the issues of the defendant's gross negligence and the plaintiff's assumption of risk and contributory negligence under the comparative negligence statute. As the trier of the facts, the jury determined the issues submitted in favor of the plaintiff. We think the trial court committed no error in submitting the issues.

The defendant assigns error to the trial court in the giving of instruction No. 5. That instruction sets forth the definitions of negligence, gross negligence, and slight negligence to which the defendant first directs his complaints. They were set out as follows: "The term 'negligence,' as used in these instructions, means that failure to exercise such care, prudence and foresight as under the circumatances (sic) duty requires should be given or exercised.

" 'Gross negligence' is defined as want of slight care and diligence and it includes a failure to exercise any care to avoid injury to person or property.

" 'Slight negligence' means the want of great care and diligence, or in other words, the absence of that degree of care and diligence which persons of extraordinary prudence and foresight are accustomed to use."

With respect to the definition of "negligence" defendant cites Edmunds v. Ripley, 172 Neb. 797, 112 N. W. 2d 385, and Burhoop v. Brackhan, 164 Neb. 382, 82 N. W. 2d 557, where the definition which was approved is set out as: "Negligence is the doing of something which an ordinarily prudent person would not have done under the same or similar circumstances, or the failure to do something which an ordinarily prudent person would have done under the same or similar circumstances." The definition in the cited cases has been approved many

times by this court but it does not follow that it cannot be defined otherwise. The definition as used by the trial court in the cause before us appears to be taken from the decision of this court in Brotherton v. Manhattan Beach Improvement Co., 48 Neb. 563, 67 N. W. 479, 58 Am. S. R. 709, 33 L. R. A. 598, where it was approved. The cited case and the definition used were referred to with approval although other definitions were set out also in Geist v. Missouri P. Ry. Co., 62 Neb. 309, 87 N. W. 43. We think the definition of negligence used was not erroneous.

The exact definitions of "slight negligence" and "gross negligence" used by the trial court in this instruction were both considered in Johnson v. Batteen, 144 Neb. 384, 13 N. W. 2d 625, and were held not to be prejudicially erroneous. We think the contentions of error of the defendant with respect to the definitions in instruction No. 5 are without merit.

The defendant contends the trial court committed error in not defining contributory negligence, that the issue of contributory negligence should have been submitted as a separate issue, and that it was not properly submitted. A review of all the instructions, however, shows that in instruction No. 1 the allegations of the plaintiff's petition with respect to the defendant's gross negligence were set out, and also the allegations of the defendant with respect both to assumption of risk and to the contributory negligence of the plaintiff were given. The definitions of negligence, slight negligence, and gross negligence which were given have been previously discussed. Instruction No. 2 placed the burden upon the plaintiff to prove by a preponderance of evidence his allegations of gross negligence. Instruction No. 3 placed the burden upon the defendant to similarly prove his allegations with respect to assumption of risk and contributory negligence. Both instructions No. 2 and No. 3, when taken together, clearly show that if the jury should find the defendant grossly negligent as

alleged, it should find for plaintiff unless it found he had assumed the risk set out in the instructions or that his injury was proximately caused by his own negligence. In the latter event, instructions No. 2 and No. 3 were made subject to instruction No. 14 on comparative negligence to which both No. 2 and No. 3 referred by number. Instruction No. 14 need not be and should not be discussed by us. It was not objected to in the motion for new trial and obviously could not be objected to as erroneous because it was specifically agreed upon and stipulated to by the parties before it was given. Various statutory and other duties of each party were stated in the trial court's other instructions and defendant makes no objection to them in his argument. The defendant's objections to the instructions are without merit.

From what has been said we find the cause was properly submitted, and the judgment of the trial court was right and is affirmed.

AFFIRMED.

THEODORE J. GABLE ET AL., APPELLANTS, V. STATE OF NEBRASKA, DEPARTMENT OF ROADS, APPELLEE.
127 N. W. 2d 475

Filed April 10, 1964. No. 35574.

1. **Eminent Domain.** In a condemnation proceeding it is conclusively presumed that the owner damaged by the taking received, or was afforded opportunity to receive, full compensation for damages sustained.
2. ———. A condemner must take the rights he appropriates unconditionally by his petition of taking and he must pay full compensation to the condemnee for what he takes or is entitled to take by his petition of taking.
3. ———. When property is taken by eminent domain the compensation of the owner is measured on the basis of the actual legal rights acquired by the condemner and not by the use he actually makes of them.
4. **Eminent Domain: Evidence.** Evidence of the general use to be

made of the property right condemned is admissible as evidence of the nature of the injury to the property damaged.

5. ———: ———. Promissory stipulations or intrinsic evidence in conflict with the petition of taking are not admissible to limit the extent of the taking nor to mitigate the damages.
6. **Evidence: Trial.** Where evidence has been properly received, it is not error for the court to not instruct on the specific purpose for which the evidence was received in the absence of a request to do so.
7. **Eminent Domain: Evidence.** Opinions of witnesses based upon supposed elements of damage which are not recognized by law as proper to be considered in condemnation proceedings should be excluded from the consideration of the jury when proper objection is made thereto.

Appeal from the district court for Scotts Bluff County: TED R. FEIDLER, Judge. Reversed and remanded.

Wright, Simmons & Hancock, for appellants.

Clarence A. H. Meyer, Attorney General, Harold S. Salter, and Lyle C. Winkle, for appellee.

Heard before WHITE, C. J., CARTER, MESSMORE, YEAGER, SPENCER, BOSLAUGH, and BROWER, JJ.

CARTER, J.

This is an action by the State of Nebraska to condemn from the lands of the plaintiffs a temporary easement on 8.36 acres of land, and the temporary use of such land for securing fill dirt for the construction of a state highway. The jury found for the plaintiffs in the amount of $2,500. The plaintiffs have appealed.

Plaintiffs are the owners of a quarter section of land, the west line of which lies 1 mile east of the city limits of the city of Scottsbluff, Nebraska. At the time of the taking on August 23, 1962, it contained approximately 159 acres. The land was crossed from west to east by the Enterprise Irrigation District canal. Approximately 58 acres are north of the canal and the remaining 101 acres to the south of it. The 8.36-acre tract was a tract approximately 700 feet east and west and 450 feet north and south which was accurately described by metes and

bounds in the petition of taking. The south line of the tract adjoined the north bank of the Enterprise Irrigation District canal. The taking included a temporary haul road 30 feet in width and 754 feet long which entered the land from the west just above the Enterprise Irrigation District canal and followed the north bank of the canal to the 8.36-acre tract. The right to remove fill dirt from plaintiffs' lands was to terminate upon acceptance by the Department of Roads of the completed Project F-236 (13).

Plaintiffs' evidence is to the effect that the tract of 58 acres above the canal has a value for subdivision and building purposes due to its closeness to Scottsbluff and its characterization as high ground. Plaintiffs' evidence shows that after the removal of the fill dirt by the State, the 8.36 acres would be practically worthless and the remainder of the 58 acres would be seriously damaged. Plaintiff Theodore J. Gable testified that the 8.36 acres had a market value of $1,000 an acre and that the 10 adjoining acres would be damaged $800 per acre. Two other witnesses called by the plaintiffs testified that the 58 acres had a market value of $1,200 and $1,000 per acre, respectively, and that the easement taken would reduce the value of the remainder by $12,000.

The State submitted evidence to the effect that plaintiffs' land was about 1 mile east of the city limits of Scottsbluff and that it might have added value for subdivision purposes after a period of 10 years or more. Defendant's witness, William S. Bitner, a local real estate broker, testified that plaintiffs' land was farm land most of which was subject to irrigation. He described the land immediately north of the Enterprise Irrigation District canal as an outcropping of small rocks and gravel and not very productive for farming. The land north of the gravel brakes is the best on the farm and lies well for irrigation purposes. The 8.36 acres are rough and contain pits, indicating that dirt or gravel has pre-

viously been removed. The witness testified that the farm would have much less value except for its closeness to the city of Scottsbluff. The witness Bitner testified to recent sales of farms in the vicinity of plaintiffs' farm. He testified to the following sales: The Welsch farm, on April 5, 1962, containing 183 acres, for $355 per acre; the Achziger farm on April 17, 1962, containing about 100 acres, for $230 per acre; and the Anderson farm on February 28, 1959, containing 160 acres, for $400 per acre. The witness Bitner testified that the fair market value of the farm for the best use for which it was available and adaptable before the taking was $59,300 and that such value after the taking was $57,000.

The project engineer in charge of the road construction testified that the 8.36 acres was taken to obtain borrow or fill dirt for road construction. He testified that the department's plans called for the taking of 66,000 cubic yards of dirt but that additional dirt would be taken if needed. His evidence was to the effect that the excavating of the dirt would commence approximately 25 feet inside the perimeter of the easement and be dug out on a 4-to-1 slope to the bottom of the pit. The bottom of the pit was to be sloped two-tenths foot per 100 feet from the toe of the north slope to the top of the north bank of the Enterprise Irrigation District canal. The maximum depth of the excavation at the north end was to be 18 feet. Objection was made to this evidence as an attempt by the State to reduce the extent of the taking and a consequent mitigation of the damages.

We think the evidence was admissible to show the nature of the use of the easement and the damage that would result to the land taken by the easement and that not taken, as well. It was not admissible, of course, for the purpose of reducing the extent of the taking or for obtaining a mitigation of damages. It is the general rule that if evidence is admissible for any purpose, error may not be predicated on its admission for a limited pur-

pose only in the absence of a request for an instruction to so limit it. Carleton v. State, 43 Neb. 373, 61 N. W. 699; Chicago, R. I. & P. Ry. Co. v. Holmes, 68 Neb. 826, 94 N. W. 1007; Stroud v. Payne, 124 Neb. 612, 247 N. W. 595. No request for an instruction limiting the purpose of the evidence having been made, it was not error on the part of the trial court in not giving a limiting instruction.

Plaintiffs next assign as error the admission into evidence of the testimony of the witness Bitner as to the value of plaintiffs' land before and after the taking. The objection is based on the fact that the witness was permitted to assume that less than the maximum use was to be made of the easement taken and to thereby permit him to consider an unlawful mitigation of plaintiffs' damages in arriving at his opinion as to value.

The petition and condemnation plat filed by the State in the condemnation proceeding show only the area to be used in obtaining fill dirt. The method or manner of taking the dirt, or the amount to be taken, is not shown. Since the plaintiffs must recover all of their damages in the condemnation proceeding, they are entitled, under such circumstances, to be paid for the maximum use to which the acquired easement could reasonably be put. We have heretofore recited the evidence of the project engineer as to the method and manner of the taking of the fill dirt, and the probable amount of fill dirt to be taken. As we have heretofore stated, this evidence was admissible to show the nature of the damages to the farm resulting from the taking, but it could not be shown, over objection, in mitigation of plaintiffs' damages. It is the law of this state that all damages sustained by the condemnation of property must be recovered in the condemnation proceeding. Snyder v. Platte Valley Public Power & Irr. Dist., 140 Neb. 897, 2 N. W. 2d 327. Promissory stipulations not contained in the petition of taking cannot affect the extent of the taking nor the amount of damages to be

awarded. Little v. Loup River Public Power Dist., 150 Neb. 864, 36 N. W. 2d 261, 7 A. L. R. 2d 355.

The sole evidence in the record which sustains the judgment for $2,500 is the testimony of the witness Bitner who gave as his opinion that the value before and after the taking was $59,300 and $57,000, respectively. In qualifying to give his opinion as to the value of the farm after the taking, he testified that he knew of and took into consideration the fact that excavation would commence some distance in from the perimeter of the easement, that three sides would be excavated at a 4-to-1 slope, and that no part of the excavation would be lower than the Enterprise Irrigation District canal. These were not qualifications or limitations contained in the petition of taking. The witness was then asked: "Now, based upon your investigation and your knowledge of the market, your experience in and about Scottsbluff and your knowledge of the uses to be made of this temporary easement, do you have an opinion of the fair market value of the Gable farm and property as of August 23, 1962, but subsequent to the taking of this temporary easement and removal of borrow dirt?" Objection was thereupon made, among others, that the answer was based upon facts which are contrary to the State's petition for the taking of materials. The objection should have been sustained for the reason that the opinion of the witness was based upon an element of damage not proper to be considered. The evidence of the project engineer could not have the effect of reducing the extent of the taking set forth in the petition of taking and the condemnation plat, or mitigating the damages to which plaintiffs were entitled. If the State desired to take less than the maximum use of the easement, it should have amended its petition; it cannot do so by the unaccepted promissory stipulations of the project engineer who can neither bind the State nor limit the extent of the taking as shown by the State's petition and con-

demnation plat. Plaintiffs were entitled to recover in the instant case all damages they would sustain by a maximum reasonable use of the easement taken. Since the only evidence which sustains the judgment is the incompetent testimony of Bitner, the judgment cannot stand for want of evidentiary support.

In discussing a somewhat similar situation the Illinois court said: "After the witnesses had testified and been cross-examined as to the basis of their opinions, the appellant moved to exclude their testimony in regard to the depreciation of land not taken outside of the three-rod strip for the reason that such opinions were based upon elements of alleged damage which were too remote and not sufficiently reasonably certain to be the basis for opinions touching the value or depreciation of the land, and the basis of the opinions was of such a character that the alleged elements of damage included in the opinions could not be separated so as to tell how much of the damage included was predicated upon improper elements. The court denied the motion. This was error. Opinions of witnesses based upon supposed elements of damage which were not recognized by law as proper to be considered in condemnation proceedings should have been excluded. Only such opinions as are based on evidence of lawful elements of damage can be of benefit to a jury in the assessment of the amount of damage. (citing cases)." Illinois Power & Light Corp. v. Talbott, 321 Ill. 538, 152 N. E. 486. See, also, Atlantic Coast Line R. R. Co. v. United States, 132 F. 2d 959; 1 Orgel on Valuation under Eminent Domain (2d Ed.), § 133, p. 573.

In the instant case the petition of taking was by metes and bounds. No restrictions were contained in the petition of taking other than that the purpose of the taking was to obtain fill dirt. Since the landowner must obtain judgment for all of his damages in a single action he may properly assume a taking for the maximum reasonable use to which the condemner could put the

easement. The extent of the taking or the damages to be recovered cannot be reduced by promissory stipulations or intrinsic evidence in conflict with the petition of taking. Since the opinion testimony was based in part on an improper element of damage, to wit, the limited use the State expected to make of it as testified to by the project engineer, the objections to its admission should have been sustained. As the objectionable testimony is the only evidence which supports the verdict, the judgment must be reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

K. B. MCDONALD ET AL., APPELLANTS AND CROSS-APPELLEES, v. RHEA RENTFROW, COUNTY SUPERINTENDENT OF SHERMAN COUNTY, NEBRASKA, ET AL., APPELLEES AND CROSS-APPELLEES, SCHOOL DISTRICT NO. 8, SHERMAN COUNTY, NEBRASKA, INTERVENER-APPELLEE AND CROSS-APPELLANT.

127 N. W. 2d 480

Filed April 10, 1964. No. 35607.

1. **Schools and School Districts.** The fixing of boundaries of school districts is exclusively a legislative function, and it may be properly delegated to a subordinate agency, providing the Legislature prescribes the manner and the standards under which the power of the designated board may be exercised.
2. **Constitutional Law: Statutes.** In setting up the fact standards upon which a subordinate agency may operate, the Legislature may make reasonable classifications of the objects of legislation for the purpose of legislating with reference thereto.
3. ———: ———. The power of classification rests with the Legislature and it will not be interfered with by the courts if real and substantial differences exist which afford a rational basis for classification.
4. ———: ———. In determining whether a classification of persons or property is a reasonable classification, the court will determine if the class selected is a proper and natural selection of those who, upon a reasonable view of the objectives of the

act or the mischiefs to be remedied, should be subject to the regulations prescribed.

5. ———: ———. If the classification is determined to be reasonable, the Constitution is not violated if the law is made to operate generally and uniformly upon all of the class so constituted.

6. **Constitutional Law: Schools and School Districts.** A provision in a statute allowing an owner of land in two adjoining school districts to have his property in one district transferred to another district so that his whole unit of property is taxed in the district where his children are to be educated is not an unreasonable classification and is based upon a real and substantial difference in situation.

7. **Constitutional Law.** As a general rule, the Legislature may not delegate or impose legislative functions upon the judicial department of the government under Article II, section 1, of the Constitution of Nebraska.

8. **Constitutional Law: Schools and School Districts.** The Legislature may confer upon public boards or courts judicial power to determine the facts and equities under which legislation authorizes changes in school district boundaries.

9. ———: ———. In delegating such power, the Legislature must condition the determination by the court or the board upon reasonable and ascertainable fact standards.

10. **Statutes: Schools and School Districts.** The provisions of section 79-403, R. S. Supp., 1961, requiring the board and the court on appeal to determine whether the transfer is just and proper and for the best interest of petitioner or petitioners mean that the board and the court on appeal must determine factually whether the best educative interests of the petitioner or petitioners will be served.

11. ———: ———. The language of section 79-403, R. S. Supp., 1961, referring to the best interests of the petitioner or petitioners must be construed in pari materia with related statutes and the other provisions in the statute itself in order to determine the legislative intent.

12. ———: ———. The best interest of the petitioner or petitioners means the best educative interest and not the best secular or noneducational interests of petitioner or petitioners.

13. **Schools and School Districts: Appeal and Error.** Under the provisions of section 79-403, R. S. Supp., 1961, the board therein constituted sits as a quasi-judicial tribunal exercising in part judicial powers, and the district court and this court on appeal will try the issues de novo as in equity.

Appeal from the district court for Sherman County:

S. S. SIDNER, Judge. Reversed and remanded with directions.

Dier & Ross, for appellants.

Mingus & Mingus, for intervener-appellee.

Heard before WHITE, C. J., CARTER, MESSMORE, YEAGER, SPENCER, BOSLAUGH, and BROWER, JJ.

WHITE, C. J.

The sole question involved in this case is the constitutionality of section 79-403, R. S. Supp., 1961, relating to the transfer of land between adjoining school districts and the requirements for the fixing of new school district boundaries.

This statute is too long for full quotation herein, but it is necessary to set out the pertinent portions that are under attack here. The four subdivisions of this statute, section 79-403, R. S. Supp., 1961, set out and define the class of persons and the requirements for the filing of a petition for transfer of land from one school district to another. The petition must show: (1) Ownership of the land by the petitioner or petitioners; (2) location of the land in a district adjoining the one to which attachment is sought; (3) that there are school children residing on the land with their parents or guardians; and (4) that petitioner or petitioners reside certain distances with relation to the respective schoolhouses or school bus lines (not pertinent in this case), or *that they reside in a Class I or Class II district and own not less than eighty acres of land in an adjoining equal or higher class district to which they wish to transfer their land.*

Upon the filing of the petition setting out compliance with these requirements, the board (here, since the districts are in different counties, composed of six members, three elected officials of each county), is authorized to act as follows: "The board may, after a public hearing on the petition, thereupon change the boundaries of the districts so as to set off the land described in the peti-

tion and attach it to such adjoining district as is called for in the petition *whenever they deem it just and proper and for the best interest of the petitioner or petitioners so to do.*" (Emphasis supplied.)

Appeals from the board's action are provided for in the following language: "Appeals may be taken from the action of such board, or when such board fails to agree, to the district court of the county in which the real estate is located * * *, in the same manner as appeals are now taken from the action of the county board in the allowance or disallowance of claims against the county."

Plaintiffs are the owners of land now in District No. 8, Sherman County, Nebraska (Rockville), and District No. 30, Howard County, Nebraska (Boelus). The object of the action is to transfer their land in the Rockville district to the Boelus district, based on their joint ownership of land in the two districts. The district court found, and the evidence shows, compliance by the plaintiffs with the four requisite requirements for the filing of the petition. The plaintiffs bought and own 80 acres of land in the Boelus school district which their son operates in connection with a farming and ranching operation. The evidence also shows that the children residing on the land in the Rockville district have been attending the Boelus school for some time, that the Boelus school is a higher class district (Class II), and that there are distinct educational advantages involving facilities, accreditation status of teachers, quality of teaching, number of students, and extra-curricular activities which would accrue to the educational benefits of the children involved as a result of the transfer. The district court, after finding that the jurisdictional requirements had been met, specifically found also "that there are Education advantages to the plaintiffs to be attached, as required by the Bladen School District case."

The district court, nevertheless, denied relief and dismissed the case holding that the authorization of transfer

based on joint ownership of land in both districts was an unconstitutional classification and constituted a local or special law for the benefit of individuals and, therefore, was special legislation in contravention of Article III, section 18, of the Constitution of Nebraska. The plaintiffs appeal.

The fixing of boundaries of school districts is exclusively a legislative function, and it may be properly delegated to a subordinate agency, providing the Legislature prescribes the manner and the standards under which the power of the designated board may be exercised. Nickel v. School Board of Axtell, 157 Neb. 813, 61 N. W. 2d 566; Schutte v. Schmitt, 162 Neb. 162, 75 N. W. 2d 656; Roy v. Bladen School Dist. No. R-31, 165 Neb. 170, 84 N. W. 2d 119. Stated more precisely this court said in Schutte v. Schmitt, *supra:* "The Legislature may delegate this authority provided it states the purpose for doing so and sets up reasonable standards to guide the agency which is to administer it." See, also, School Dist. No. 39 v. Decker, 159 Neb. 693, 68 N. W. 2d 354; Nickel v. School Board of Axtell, *supra;* § 79-420, R. S. Supp., 1961.

The real question at this point is whether the requirement for transfer on the basis of joint ownership in each district is a reasonable standard; that is, whether the classification of persons or property on this basis is a reasonable one. The applicable rule is precisely stated in the recent case of Fougeron v. County of Seward, 174 Neb. 753, 119 N. W. 2d 298, wherein this court stated: "The Legislature may make reasonable classifications of the objects of legislation for the purpose of legislating with reference thereto. The power of classification rests with the Legislature and it will not be interfered with by the courts if *real and substantial differences exist which afford a rational basis for classification.*" (Emphasis supplied.) And, as stated by Commissioner Roscoe Pound in Cleland v. Anderson, 66 Neb. 252, 92 N. W. 306, 5 L. R. A. N. S. 136: "On the other hand, if the

legislature has made a reasonable classification, -not a mere cloak or cover for an arbitrary exemption of certain persons or a certain class of persons, but a natural and proper selection of those who, upon a reasonable view of the mischiefs to be met, should be subject to the regulations prescribed, -and the law is made to operate generally and uniformly upon all of the class so constituted, the constitutional provision in question is not violated."

It seems to us that there is a real and substantial difference in situation as to the classes granted this privilege. The Legislature has here seen fit to allow an owner to have his entire unit of property, in adjoining districts, taxed in the district where his children are to be educated. And, significantly, in making the transfer under this section, the transferee school district must be at least Class II or higher. In this manner, the farmer or owner may give full financial tax benefit from all of his property to the school district that his children attend and contemplates that it will be devoted to the school having the better educational design and opportunity. It is true that this addition to the statute by the Legislature in 1955 was a further departure from the concept of land adjacency as a standard of transfer generally present in the history of our school districting statutes. And, we test this statute by what it actually authorizes. It is true that it authorizes or permits land some distance from the boundaries of the transferee school district to be joined and taxes paid thereon. But, there is no expressed constitutional requirement that the land be adjacent to or adjoin the proposed transferee district and the wisdom of this policy is not for this court to determine. The evaluation of the effects of an authorized transfer and the educational benefits flowing therefrom is exclusively within the discretion of the lawmaking body. The classification selected is within the scope of constitutional legislative power to fix the boundaries of school districts, and the classification of the objects

of the legislation bears a reasonable relation to the purpose of the legislation. This is so because there is a real and substantial difference in situation as to owners who have land with school children thereon and pay taxes on different portions of their property in two adjoining school districts. For these reasons, we find that the district court's holding of unconstitutionality in this respect is in error.

However, the intervener on appeal devotes almost its entire argument to another attack on the constitutionality of this statute. This argument is that the statute is in violation of Article II, section 1, of the Constitution of Nebraska, because it is an attempt to delegate and impose legislative functions upon the judicial department of the government. This argument is based on the holdings in Winkler v. City of Hastings, 85 Neb. 212, 122 N. W. 858, and Searle v. Yensen, 118 Neb. 835, 226 N. W. 464, 69 A. L. R. 257. The argument is that the discretionary power of the board may be exercised under the statute, "whenever they deem it just and proper and for the best interest of the petitioner or petitioners so to do." It is argued that such a standard is not a reasonable one and that it is so vague and indefinite as to not constitute any ascertainable fact standard at all. It is, therefore, argued that unrestrained legislative power is vested in the board, that the appeal section referred to previously in this opinion provides for trial de novo in the district court, that an appeal may be taken even when there is no decision by the board, and that therefore the design and scheme of the statute, and what the statute authorizes, are a complete delegation of legislative power to the courts. In the Searle case, *supra,* the court struck down as unconstitutional a provision in a statute on power district boundaries which provided for the district court to determine, "whether or not the district should be incorporated"; "whether the suggested boundaries are reasonable and proper for the public convenience and welfare"; and to "change,

alter and fix the boundary lines * * * with the end in view of promoting the interest thereof * * *." This court held in that case that: "These questions are all political and legislative in their nature." This case contains an exhaustive discussion of the principles lying behind the constitutional mandate forbidding any department of our government to exercise any power properly belonging to the others. In the Searle case, *supra,* in the application of these principles, the court pointed out that the Legislature may condition the operation of the law upon the existence of certain facts, and may submit to the courts the judicial power for the determination of those facts. But, it cannot delegate to the courts the power to make a law; that is, delegate the power for the court itself to determine the facts or fact standards which invoke the operation of the power granted in the law itself. In the Winkler case, *supra,* the statute provided that a city council could detach the property of an owner from the city limits by ordinance and that if the council failed to detach upon proper application under the terms of the statute, the aggrieved property owner could appeal to the district court under the same provisions for appeal as provided for in the present case. In other words, in the Winkler case, *supra,* the district court in trying the case de novo on appeal had full power to determine any boundaries and detach property from the city. The court struck down this statute because it held that the original grant of power to the council by the statute was purely legislative in nature and the provision for direct appeal in the event of failure to act was a vesting of the same legislative power in the court *without any limiting guidelines or fact standards.* It also held, in effect, that the appeal process could not be used as a guise to cover what was, in essence, a complete delegation of legislative power to the judiciary.

We have no doubt that those cases correctly construed the particular statutes in question and properly applied the proper distinction between legislative and

judicial power. The intervener compared the language of the statute in those cases with the language of the provisions of the statute that is here under attack. This comparison by isolation from context seems to make a plausible and persuasive argument by analogy that the statute in the present case is unconstitutional. But, in Roy v. Bladen School Dist. No. R-31, *supra,* this court construed these identical provisions present in the predecessor statute (1955). This court directly construed the language under attack here as it related to the nature and character of the power granted, and the jurisdiction of the courts on appeal, and whether a suitable fact standard was set up in the statute which could invoke a judicial power of the courts to review. In that case, the court said: "In that connection, we are required to determine only three propositions, to wit: (1) The nature of proceedings before the board and the capacity in which it is required to act; (2) the manner and character of the hearing upon appeal to the district court and this court; and (3) the primary factors to be considered in determining whether or not it is 'just and proper and for the best interest of the petitioner or petitioners,' to set off the land described in plaintiff's petition from the Bladen district and attach it to the Campbell district."

In the above case, the court construed the statute in pari materia with other school districting statutes and in light of the legislative intent as demonstrated by a contextual examination of all of the provisions of the whole act. It held, in substance, three important things for our consideration here. First, the Legislature had delegated to the board and it was required *"to exercise a quasi-judicial power, equitable in character."* Second, the court held as to the power of the district court on appeal as follows: "Thus, on appeal to the district court, the cause was triable de novo there as in any other original equitable action." And, third, it held that the identical requirement concerning "whether or not it

is just and proper and for the best interest of the petitioner or petitioners," constituted a suitable fact standard for judicial review. Said the court: "We turn then to proposition (3). In that connection, we conclude that in the enactment of section 79-403, R. S. Supp., 1955, authorizing the board to set off lands from one school district and attach it to an adjoining district, whenever after a public hearing it deems it just and proper and for the best interests of the petitioner so to do, the intention of the Legislature was that the board in making such determination should predicate it upon the convenience of transportation of children of school age to schools, and *the educational welfare and needs of petitioners' children,* and not the mere personal preferences of petitioners based upon noneducational reasons. That section and others in pari materia deal with schools in order to promote their proficiency in the education of petitioners' children of school age, and not the secular business affairs of petitioners. *In other words, the best interests of the petitioner or petitioners means the best educative interest of petitioner or petitioners and not the best noneducational interest of petitioner or petitioners."* (Emphasis supplied.)

In the above case, after construing the statute as above set out, this court, exercising its powers to try the case de novo, made an independent fact determination of what the best educative interests were of the children involved and rendered judgment accordingly, reversing the judgment of the trial court.

We have not overlooked the argument of intervener to the effect that the design and scheme of this statute providing for direct appeal when the board fails to agree (the board here being composed of equal-numbered representatives from counties in which the adverse school districts are located), create a situation designed to place the controlling power in the courts to determine school district boundaries, which is admittedly a purely legislative function in point of origin. But, the holding in the

Bladen School District case, *supra,* is that the original board sits as a quasi-judicial tribunal exercising in part judicial powers, and that therefore the appeal power lies to the courts. And, we said, in Schutte v. Schmitt, *supra:* " 'While the establishing of boundaries of public school districts for school purposes is a legislative function, the legislature may confer on public boards or courts judicial power to determine the facts and equities under which legislation authorizes changes in such boundaries. City of Wahoo v. Dickinson, 23 Neb. 426; Winkler v. City of Hastings, 85 Neb. 212, Searle v. Yensen, 118 Neb. 835.' See, also, Watkins v. Dodson, *supra.*" Furthermore, in the recent case of Frankforter v. Turner, 175 Neb. 252, 121 N. W. 2d 377, we held that the failure to reach a decision by a similarly constituted board (consisting of officials of two different counties) was a final appealable order.

We therefore hold that the statute created a reasonable classification and did not unconstitutionally delegate legislative power to the courts. And, further, the quasi-judicial power originally vested in the board, to change school district boundaries, is reviewable de novo in the district court and in this court, the same as in equity.

Intervener has filed a cross-appeal herein, but in the light of our holdings, it is unnecessary to decide any issues raised therein.

The evidence conclusively shows that petitioners complied with the four jurisdictional requirements for transfer, and that it is for the best educative interests of the children involved that they be transferred. The trial court so found on the facts, and we agree. The judgment of the district court is reversed and the cause remanded with directions to grant the transfer of petitioners' land to the Boelus school district as prayed for.

REVERSED AND REMANDED WITH DIRECTIONS.

WESTINGHOUSE ELECTRIC SUPPLY CO., A DIVISION OF WESTINGHOUSE ELECTRIC CORPORATION, A CORPORATION, APPELLEE, V. JACK BROOKLEY, DOING BUSINESS AS BROOKLEY ELECTRIC, APPELLEE, IMPLEADED WITH AMERICAN CASUALTY COMPANY, A CORPORATAON, APPELLANT.

127 N. W. 2d 465

Filed April 10, 1964. No. 35612.

1. **Mechanics' Liens: Contracts.** Section 52-118, R. R. S. 1943, imposes the duty upon the state and public boards to take a bond for the benefit of materialmen before entering into a construction contract to which the general provisions of the mechanics' lien law do not apply.
2. ———: ———. Materialmen have the statutory right to sue under the contractor's bond.
3. ———: ———. Such a bond is a contract made for the benefit of parties furnishing labor and materials in performance of the principal contract.
4. **Mechanics' Liens: Limitation of Actions.** Section 52-118.02, R. R. S. 1943, provides that every suit instituted under the provisions of sections 52-118 to 52-118.02, R. R. S. 1943, shall be brought by any person entitled to the benefit of this action, but no such suit shall be commenced after the expiration of 1 year after the date of final settlement of the principal contract; and that the action shall be in the name of the party claiming the benefits of this action.
5. **Limitation of Actions: Pleading.** A plaintiff need not affirmatively allege in his petition that the cause of action is not barred by the statute of limitations.
6. **Limitation of Actions.** The accrual of a cause of action means the right to maintain and institute a suit, and whenever one person may sue another, a cause of action has accrued and the statute begins to run.
7. **Contracts: Limitation of Actions.** Under statute providing that suit may be brought on public contractor's bond within 1 year after final settlement, final settlement is not synonymous with final payment, but precedes payment and denotes the proper administrative determination with respect to the amount due.
8. ———: ———. The decisive date is not the date of payment, but the time when the administrative officer having the contract in charge made and recorded the determination of the amount due.
9. **Limitation of Actions.** Where a statute grants a new remedy, and at the same time places a limitation of time within which

the person complaining must act, the limitation is a limitation of the right as well as of the remedy, and, in the absence of qualifying provisions or saving clauses, the party seeking to avail himself of the remedy must bring himself strictly within the limitations.

Appeal from the district court for Douglas County: PATRICK W. LYNCH, Judge. Reversed and dismissed.

Herbert E. Story, Robert C. Oberbillig, and Wear, Boland, Mullin & Walsh, for appellant.

Crawford, Garvey, Comstock & Nye and James R. McGreevy, for appellee Westinghouse Electric Supply Co.

Heard before WHITE, C. J., CARTER, MESSMORE, YEAGER, SPENCER, BOSLAUGH, and BROWER, JJ.

MESSMORE, J.

This action was brought by Westinghouse Electric Supply Company, a corporation, plaintiff, against Jack Brookley doing business as Brookley Electric, and the American Casualty Company, a corporation, defendants, to recover the cost of material furnished by Westinghouse Electric Supply Company to Brookley Electric on a public works contract bonded by the American Casualty Company for the benefit of all persons, firms, or corporations who or which might furnish any materials or perform any labor for or on account of the construction to be performed under the construction contract and any amendments thereto, and they, and each of them, were made obligees thereunder with the same force and effect as if their names were written therein as such, and they and each of them might sue thereon, dated March 18, 1957, signed for Brookley Electric by Jack Brookley, and American Casualty Company by Willard W. Weed, attorney in fact. Such a bond is provided for under section 52-118, R. R. S. 1943.

A jury was waived and trial was had to the court. The court found that on June 18, 1958, certain additional

work remained to be performed by Jack Brookley for Norris Rural Public Power District on a Rural Electrification Administration project designated Nebraska 77 AL Norris, Section 4; that the amount ascertained to be due Jack Brookley was conditioned on the performance of the additional work by him; that on June 18, 1958, the balance due Jack Brookley under the terms of his contract in the sum of $9,684.50, was not in line for payment; that although there was no stated reservation concerning the amount due Jack Brookley under the terms of his contract, Raymond H. Reed & Co., Inc., consulting engineers and agents for Norris Rural Public Power District, on June 24, 1958, issued written directions to Jack Brookley setting out the additional work to be performed by him, and that there was an actual withholding of the entire amount due Jack Brookley under the terms of his contract in the sum of $9,684.50 until after such additional work was actually completed by Jack Brookley; that such additional work as Jack Brookley was directed to complete by terms of a letter addressed to him on June 24, 1958, by Raymond H. Reed & Co., Inc., consulting engineers and agents for the Norris Rural Public Power District, was completed sometime after July 22, 1958, and sometime after that date the balance due Jack Brookley under the terms of the contract in the amount of $9,684.50, became liquidated and due in final payment of the contract; that the plaintiff's action was commenced prior to the expiration of 1 year from final settlement of the contract between the Norris Rural Public Power District and Jack Brookley; that plaintiff's failure to expressly plead such fact was not a fatal defect under the law and circumstances of this case; and that the plaintiff was entitled to have and recover from both defendants the principal sum of $18,806.01, with interest thereon at the rate of 6 percent per annum from the due date of July 2, 1958, and a reasonable fee for plaintiff's attorneys fixed in the

amount of $2,500, and costs of suit. Judgment was rendered in the amounts aforesaid for the plaintiff.

The American Casualty Company's motions for new trial were overruled. The defendant American Casualty Company appealed.

The plaintiff is a corporation duly organized and existing under the laws of Pennsylvania, and qualified to do business in Nebraska. The defendant Jack Brookley, doing business as Brookley Electric, is a resident of Waterloo, Nebraska, and the defendant American Casualty Company is a corporation engaged in the business of writing bonds for a consideration. On March 18, 1957, Brookley Electric as principal and defendant American Casualty Company, as surety, executed a contractor's bond to Norris Rural Public Power District, wherein the defendants jointly and severally agreed to pay all persons working on or supplying labor or materials for use in the construction of project Nebraska 77 AL Norris, Section 4.

The plaintiff's amended petition alleged that on November 30, 1956, plaintiff was requested to furnish quotations to Jack Brookley relating to materials for use in construction of a substation for Norris Rural Public Power District at Beatrice, Nebraska; that on or about March 20, 1957, Jack Brookley verbally instructed the plaintiff to order the materials for his use on the project known as Nebraska 77 AL Norris, Section 4; that between the dates of May 17, 1957, and August 6, 1958, plaintiff furnished materials which were used on such project of the agreed fair and reasonable value of $37,024.44; that on June 11, 1958, Jack Brookley paid $10,000 on the account, and on August 18, 1958, made a second payment of $8,000; that on August 6, 1958, plaintiff issued three credits on the account in the sums of $15, $25.92, and $177.51, leaving a balance due and owing plaintiff in the amount of $18,806.01, no part of which had been paid; and that on July 31, 1958, Norris Rural Public Power District finally accepted the substation located

at Beatrice, and approved the construction of the same so that the aforesaid balance of $18,806.01 became due and owing the plaintiff. The prayer was for such amount with interest at 6 percent per annum from the overage due date of January 1, 1958, a reasonable attorneys' fee, and costs of suit.

The answer of the American Casualty Company admitted the identity of the parties here involved and the contractor's bond as pleaded by the plaintiff; alleged that the final settlement of the contract between Jack Brookley, doing business as Brookley Electric, and the Norris Rural Public Power District was made more than 1 year prior to the filing of this action; and denied each and every other allegation of the plaintiff's amended petition.

The plaintiff, for reply to the answers of Jack Brookley, doing business as Brookley Electric, and the American Casualty Company, denied each and every allegation contained in each of such answers except those which constituted admissions made by the plaintiff in its amended petition.

For convenience we will refer to the Westinghouse Electric Supply Company as plaintiff; to the defendant American Casualty Company as defendant; to Jack Brookley, doing business as Brookley Electric, as Brookley or Brookley Electric; to the Norris Rural Public Power District as the district; and to other persons by their names.

The district entered into contracts for the engineering of, the financing of, and the construction of electric transmission lines in the vicinity of Beatrice. The engineering contract between the district and Raymond H. Reed & Co., Inc., engineers, of Columbus, Nebraska, was executed November 19, 1956. The financing or loan contract was between the district and the United States government, acting through the Administrator of the Rural Electrification Administration. The construction contract between the district and Brookley Electric in the original sum of $93,000 was executed by the contrac-

tor Brookley and the district on March 18, 1957.

We have heretofore set forth in substance a part of the contractor's bond executed by the plaintiff in the sum of $93,000 in favor of the district, the United States of America, and all persons, firms, and corporations furnishing materials for or performing labor on the construction contract between Brookley Electric and the district, which contract was designated by the Rural Electrification Administration as project Nebraska 77 AL Norris, Section 4.

After introducing the itemized statement of account concerning materials sold by the plaintiff to Brookley Electric on the dates shown in an exhibit and which were used on the district's project known as Nebraska 77 AL Norris, Section 4, and the balance shown on this exhibit of $18,806.01, which remained unpaid to the plaintiff; and after introducing another exhibit which is the contractor's bond, the plaintiff rested. The defendant moved for dismissal for the reason that the plaintiff failed to sustain the burden of proof upon the material allegations of its petition and to show that the action was brought within 1 year from the final settlement of the contract. This motion was overruled.

An exhibit was introduced by the defendant which was a request for additional construction costs and requested the Rural Electrification Administration for $3,845 increase in the construction loan contract. This request was made on May 31, 1958, accepted by the district and Jack Brookley on June 20, 1958, and approved by Raymond H. Reed on June 11, 1958.

On June 11, 1958, Raymond H. Reed, the president of Raymond H. Reed & Co., Inc., the engineering firm for the district, certified to the district's financing agency, the Rural Electrification Administration, Washington, D. C., as to the completion of the construction contract between Brookley and the district. The certification, on a printed Rural Electrification Administration form, contained this language:

"I, the undersigned Engineer of the above-designated Rural Electrification Administration Project do hereby certify that:

"1. The construction provided for pursuant to Construction Contract No. 58 dated March 12 1957, including all approved amendments, (hereinafter called the 'Project') between Norris Rural Public Power District ('Owner'), and Brookley Electric ('Contractor') has been completed as of May 13 1958, and is in all respects in strict compliance with the provisions of the Loan Contract and the Construction Contract, including all plans, specifications, maps, and drawings and all modifications thereof. * * *

"7. The total cost of the Project as completed is Ninety Six Thousand, Eight Hundred Forty-Five and no/100 Dollars ($96,845.00). The Project consists of facilities shown on the Statement of Construction which is true and correct and which is attached hereto and made a part hereof."

On June 11, 1958, Raymond H. Reed, president of Raymond H. Reed & Co., Inc., the consulting engineering firm for the district, certified to the United States Department of Agriculture, Rural Electrification Administration, as follows: "I certify that to the best of my knowledge and belief the attached final inventory correctly shows the total number and character of assembly units installed and removed by the Contractor and that the net amount of $96,845.00 due the Contractor, as shown above, is true and correct."

On June 20, 1958, the district and Brookley Electric accepted the certification by the engineering firm. Immediately above the certification of the engineer and on the same Rural Electrification Administration printed form this language appears: "F NET AMOUNT DUE CONTRACTOR (in making final payment to Contractor, the net amount due the Contractor as shown by this Certification, will be reduced by the sums, if any, due the Owner for liquidated damages, payment made to

date, or other sums which the Owner has the right to retain under the terms of the Contract, and signature by all parties does not preclude the retention by the Owner of such amounts.)"

As of June 18, 1958, the date of the district's board meeting, Brookley Electric had not completed all of the work under the construction contract between it and the district. The minutes of the June 18, 1958, board meeting show as follows: "The manager presented final close out documents of the District's AL Section 4 construction contract and advised that the delay for completion of the contract was due to bad weather, and the District's inability to obtain delivery of oil circuit breakers, that it was necessary for the contractor to have to complete the construction. Upon motion duly made by Herman Damkroger, seconded by David G. Warner, and unanimously carried, the final close out documents of the District's AL Section 4 construction contract were approved and extension of time granted to Brookley Electric Company to complete the contract without a penalty, and the officers of the District were authorized to execute the final close out documents in the form submitted to this meeting."

On June 24, 1958, Raymond H. Reed & Co., Inc., the engineering firm for the district, addressed a letter to Jack Brookley of Brookley Electric, and listed work items to be performed by the contractor at five different substations. These work items were referred to as "cleanup" items, and were a result of the final inspection of the construction project which was held on June 20, 1958. This letter was over the signature of Owen R. Gibbs, the chief engineer in charge of construction for Raymond H. Reed & Co., Inc., and who was also the supervising resident engineer for such company on the Brookley construction contract with the district. Certain items were also listed in this letter which were to be performed by the district. The work items to be performed by Brookley were at five different substa-

tions. Brookley testified that the clean-up work covered a period of 30 days to 6 weeks; that there was work to be done by the district before the clean-up work could be done by Brookley Electric; that he received the final payment for his work on August 12, 1958; that the clean-up work was done in the latter part of July; that the places involved covered quite a radius, being Kramer, Raymond, Davey, Adams, and Panama; and that he requested payment sometime after the 25th and before the 30th, or the last week in July.

On August 12, 1958, the district mailed a letter to Brookley Electric and enclosed its check No. 968 in the amount of $9,684.50, payable to Brookley, representative of final payment to Brookley Electric.

Brookley testified that he gave a check in the amount of $16,975.44 to Mr. Hay, the credit manager of the plaintiff, to hold, at the time he asked Mr. Hay to sign the lien waiver. An exhibit, being a waiver and release of lien, shows the following: That Westinghouse Electric Supply Company, the materialman, furnished Brookley Electric electrical material for use in the construction of a project belonging to the district and designated by the Rural Electrification Administration as Nebraska 77 AL Norris, Section 4; that the undersigned, Westinghouse Electric Supply Company, for and in consideration of $1, and other good and valuable consideration, the receipt whereof was acknowledged, did thereby waive and release any and all liens, or right to or claim of lien, on the above-described project and premises, under any law, common or statutory, on account of labor or materials, or both, theretofore or thereafter furnished by the undersigned to or for the account of Brookley Electric for the said project. This waiver and release of lien was signed on June 18, 1958, by R. T. Hay, credit manager for the plaintiff.

The receipt for $9,684.50 was satisfaction in full of all claims of Brookley under the construction contract between Brookley and the district dated March 18, 1957,

as amended, and as complete performance by the district of all obligations to be performed by it pursuant thereto. The total amount received, including the final payment, was $96,845. The receipt was signed by Brookley.

On July 22, 1959, the unpaid balance of the Brookley Electric account with the plaintiff, a subcontractor, for materials sold to Brookley on the construction project for the district was in the sum of $18,806.01.

The plaintiff commenced this action against Brookley Electric and its surety company on July 22, 1959.

The engineering service contract dated November 19, 1956, between the district and Raymond H. Reed & Co., Inc., provided, in Article V, section 1, as follows: "The Engineer shall prepare and, within twenty(20) days after the completion of construction of the Project by the Contractor, submit to the Owner and the Administrator for approval complete and detailed final documents, including without limitation, final inventory, final maps, final circuit phase diagram, certificates of completion of the Project, statement of construction, Contractor's Affidavit, Waivers and Releases of Lien, Engineer's final report, and statement of all amounts payable by the Owner under all Construction Contracts, Engineering Contracts, Clearing Contracts and Materials Contracts."

In the minutes of the meeting of the judiciary committee of the Nebraska Legislature which was held on March 21, 1955, to consider Legislative Bill 446 which was finally enacted as sections 52-118, 52-118.01, and 52-118.02, R. R. S. 1943, it was stated during the course of the discussion that Legislative Bill 446 was an amendment that would simply adopt or change the Nebraska statutes to conform to the federal statutes.

James L. Rich, Jr., testified by deposition that he was engaged in the engineering business with Raymond H. Reed - Wurdeman and Associates; that his duties included handling all of the closing out of the various projects, also plans and specifications on projects;

that he was so engaged in 1956 and up to the time his deposition was taken; that he made the final documents on the contract between Brookley and the district; that he was familiar with the contract; that he started to work on closing out the contract during May 1958; and that his first procedure was to make the wash-out amendment to add the necessary items that were not in the original contract. He identified the final wash-out amendment that was prepared for the contract to add the necessary items that were not in the original contract. He further testified that Mr. Reed's signature appeared thereon; and that after that, the Rural Electrification Administration form 254 was prepared. This is a construction inventory, and Mr. Reed's signature also appears on this document. Thereafter he prepared Rural Electrification Administration form 187 which is a certificate of completion on which Mr. Reed's signature also appears. These documents were mailed to Brookley for his signature, along with blank waiver and release forms and affidavit of contractor forms to be filled out by him and signed. He further testified that before the contract could be closed out, the Rural Electrification Administration required waivers and releases of liens and affidavit of the contractor. On redirect examination this witness testified that he entered into the procedure as outlined for the purpose of ascertaining what was due the contractor under the terms of the contract.

The defendant assigns as error that the court erred in finding that the cause of action was not barred by the limitation of 1 year from the date of the final settlement of the contract; that the court erred in finding that the burden of pleading and proving that this action was brought within the statutory time was not on the plaintiff; that the findings of fact were not supported by the evidence and were contrary thereto; and that the court erred in overruling the motion of the defendant to dismiss the action at the close of the testimony.

The defendant contends that the burden of pleading and proving that the cause of action was brought within the statutory period was on the plaintiff, and the plaintiff has failed to either plead or prove this material and essential allegation.

The following are applicable.

Section 52-118, R. R. S. 1943, imposes the duty upon the state and public boards to take a bond for the benefit of materialmen before entering into a construction contract to which the general provisions of the mechanics' lien law do not apply.

Materialmen have the statutory right to sue on the contractor's bond. A bond such as the one in suit is a contract made for the benefit of parties furnishing labor and materials in performance of the principal contract, and such persons have a right to sue thereunder in their own names.

Section 52-118.02, R. R. S. 1943, provides: "Every suit instituted under the provisions of sections 52-118 to 52-118.02 shall be brought by any person entitled to the benefit of this action, but no such suit shall be commenced after the expiration of one year after the date of final settlement of the principal contract. The action shall be in the name of the party claiming the benefits of this action."

In 34 Am. Jur., Limitation of Actions, § 424, p. 335, it is said: "It is an established principle of pleading that the plaintiff need not in his pleading anticipate or negative possible defenses, and accordingly, as a general rule, a plaintiff, in order to recover, need not affirmatively show in his complaint, declaration, petition, or statement of claim, that the cause of action set forth therein is not barred by the applicable statute of limitations, at least, where the bar of the statute does not appear on the face of the plaintiff's pleading, but may leave it to the defendant to assert the bar of the statute at the appropriate stage of the proceeding." See, also, United States

of America, for the Benefit and Use of Berkowitz v. Frankini Constr. Co., 139 F. Supp. 153.

The defendant's contention that the plaintiff was required to plead that the action was brought within the statutory time cannot be sustained.

The accrual of a cause of action means the right to maintain and institute a suit, and whenever one person may sue another, a cause of action has accrued and the statute begins to run, but not until that time. So whether at law or in equity, the cause of action arises when, and only when, the aggrieved party has a right to apply to the proper tribunal for relief. See, Bend v. Marsh, 145 Neb. 780, 18 N. W. 2d 106; Dewey v. Dewey, 163 Neb. 296, 79 N. W. 2d 578; Fraser v. Temple, 173 Neb. 367, 113 N. W. 2d 319.

It is the contention of the defendant that the time of final payment under the contract is not pertinent; and that the final settlement of a contract for a public improvement as used in section 52-118.02, R. R. S. 1943, means an administrative determination by a proper authority of the amount due on the contract, and is conclusive.

The defendant cites 91 C. J. S., United States, § 113, p. 280, as follows: "A final settlement within the meaning of the statute is an administrative determination by proper authority of the amount due, regardless of the consent or agreement of the contractor or others. In order to constitute a final settlement there must be an unconditional and final ascertainment of the amount due. Its finality is not affected, however, by subsequent consideration by the administrative officer or department in charge of minor items, * * * or by stipulations by the contractor to keep the work in repair, or by the fact that full payment has not been made and the balance may be subject to change, or that the accounts of the officer making the settlement are subject to audit, or approval of the government's general accounting office."

The statute requiring that the contractor on public

improvement work give a bond was patterned after the federal law known as the Miller Act (40 U. S. C. A., §§ 270a-270e). Therefore, the defendant relies on decisions of the federal courts, citing United States of America for the Use of Bangor Roofing & Sheet Metal Co. v. T. W. Cunningham, Inc., 141 F. Supp. 205. This was an action brought under the Miller Act, 40 U. S. C. A., §§ 270a-270e. The case arose out of a contract between the plaintiff and defendants. It was in the nature of a subcontract, stemming from a contract between T. W. Cunningham, Inc., referred to as the prime contractor, and the United States of America, relating to the construction of buildings and utilities. The defendants, Peerless Casualty Company and General Reinsurance Corporation, were sureties on the payment bond issued pursuant to the terms of the Miller Act. The question for determination was whether or not the action was instituted within 1 year after the date of final settlement of the contract, as required by section 270b (b) of the Miller Act. The court said that a decision by the government officials was final and conclusive unless such decision was fraudulent, capricious, arbitrary, or so grossly erroneous as necessarily to imply bad faith, or was not supported by substantial evidence. The court went on to say: "The Miller Act provides that suit must be brought within one year after the date of final settlement of the contract. * * * It is generally considered to be the date on which the administrative officer in charge of the contract determines and records the final amount due under the contract. * * * (Cases are cited.) It does not denote payment but a final determination of every prerequisite to payment, such as satisfactory completion of the contract, a statement of the account, and approval of the account by an authorized officer. * * * Usually, the officer with authority to approve the account is the contracting officer or his representative. * * * An analysis of the facts of this case, in the light of the definition of 'final settlement', as previously

stated, persuades this Court that the date on which the final pay estimate was prepared and approved is the date of final settlement * * *. It is the only document in this case which contains all of the information necessary to fulfill the requirements of a 'final settlement'. It specifies the date on which the contract was completed, states the account and indicates approval by an authorized officer, thereby placing the account in line for payment."

In United States Casualty Co. v. District of Columbia, to Use of North American Cement Corp., 107 F. 2d 652, the court said: "Under the Heard Act 'final settlement', not completion of performance, is the crucial event for starting the statutory periods. This does not mean 'payment' or 'agreement'. Nor, as will appear, does it involve absolute administrative finality, if that can occur short of or even with payment. Instead, the Supreme Court has held that it means 'A determination, made and recorded in accordance with established administrative practice by the administrative officer or department having the contract in charge, that the contract has been completed and that the final payment is due * * *.' * * * The determination, therefore, which is intended and controlling has the following characteristics in the usual case: it is one made by the administrative officer or department having charge of the work, not generally by the purely financial division of the Government; it is made in accordance with established administrative routine, if such exists in relation to the particular matter; usually it is recorded in like accordance with routine; it is a determination both that the work has been completed and that a liquidated sum is due in final payment of all claims under the contract; * * *."

In United States, for Use and Benefit of F. B. Spear & Sons v. Arthur Storm Co., 101 F. 2d 524, the appeal consolidated three suits upon contractors' bonds. The appellee surety company, in compliance with 40 U. S. C. A., § 270, bonded the Storm Company as principal for

the completion of contracts for the construction of public buildings at certain conservation camps. The three contracts related to certain Michigan camps. Jury was waived and trial was had to the court. The court dismissed the suits upon the ground that action had not been started within 1 year after performance and final settlement of the contract as required by statute. The court said: "Final settlement is not synonymous with final payment. It precedes payment and denotes the proper administrative determination with respect to the amount due." The court further said, quoting with approval from Illinois Surety Co. v. United States, 240 U. S. 214, 36 S. Ct. 321, 60 L. Ed. 609: " 'The pivotal words are not "final payment," but "final settlement," and in view of the significance of the latter term in administrative practice, it is hardly likely that it would have been used had it been intended to denote payment. * * * We think that the words "final settlement" in the act of 1905 had reference to the time of this determination when, so far as the government was concerned, the amount which it was finally bound to pay or entitled to receive was fixed administratively by the proper authority.' " The court also quoted with approval from Globe Indemnity Co. v. United States, 291 U. S. 476, 54 S. Ct. 499, 78 L. Ed. 924, as follows: " 'A determination, made and recorded in accordance with established administrative practice by the administrative officer or department having the contract in charge, that the contract has been completed and that the final payment is due, fulfills these requirements.' " The court went on to say: "The decisive date, therefore, is not the date of payment, but the time when the administrative officer having the contract in charge made and recorded the determination of the amount due." See, also, National Surety Corp. v. Reynolds, 87 F. 2d 865.

The plaintiff cites the case of R. P. Farnsworth & Co. v. Electrical Supply Co., 112 F. 2d 150, 130 A. L. R. 192, on rehearing, 113 F. 2d 111. It would serve no

useful purpose to set forth the facts in the original case nor the holding of the court therein for the reason that the facts in the instant case are so dissimilar that the above case is not controlling. The court announced the rule as follows: "By 'final settlement' is not meant final payment by or to the United States of what is owing, but the administrative determination by the officer having the execution of the work in charge that it has been performed and his finally fixing the amount due to be paid by or collected for the United States; that payment may be held up or refused in the General Accounting Office does not alter the date of the 'final settlement' of the contract." It will be noted that the above rule is not unlike the principal rule announced in the cases cited by the defendant.

In the same case on rehearing, 113 F. 2d 111, the plaintiff sets forth the following language from the opinion: "So long as the United States contends that contractor must do something more and is holding back an amount, large or small, to secure full performance, there is no 'final settlement' of the contract within statute limiting time for subcontractor's suit on contractor's bond given United States to one year after final settlement." In addition to the above language it was said in the opinion: "It is urged that our language: 'Not until the wall was rebuilt and the order passed to pay the $82.80 was there a final settlement of the contract,' means that payment or an order to pay is requisite to a final settlement. We do not so hold, but we say that there must be an unconditional and final ascertainment of the amount due." The above cases cited by the plaintiff are not in point considering the facts and circumstances of the instant case.

Other cases cited by the plaintiff primarily have to do with the discussion of completion, acceptance, and payment relating to contracts, but not with the final settlement in regard thereto, and therefore are not in point in the instant case.

In the instant case there was no statement that the determination made June 11, 1958, was not a final settlement, and there is no evidence that any other determination was made subsequent to that time.

Where a statute grants a new remedy, and at the same time places a limitation of time within which the person complaining must act, the limitation is a limitation of the right as well as of the remedy, and, in the absence of qualifying provisions or saving clauses, the party seeking to avail himself of the remedy must bring himself strictly within the limitations. See, City of South Omaha v. McGavock, 72 Neb. 382, 100 N. W. 805; Ray v. Sanitary Garbage Co., 134 Neb. 178, 278 N. W. 139.

The plaintiff had a cause of action against the defendant on June 11, 1958, and a limitation of 1 year commenced to run from that date, so this action, brought on July 22, 1959, was barred by the statute of limitations. The record discloses that the engineer in charge of the work determined that the work under the contract was completed on May 13, 1958. He also determined the amount due on the contract on June 11, 1958. Such determination was accepted and approved in writing by the contractor and the district on June 20, 1958. The board of directors of the district authorized the closing out of the contract on June 18, 1958, and settled all matters relating to the extension of time, the waiver of liquidated damages, etc. The plaintiff filed a lien waiver and accepted a check from the contractor on June 18, 1958. There was no reservation of any kind in the settlement agreement as to additional work or additional compensation.

In the light of the record and the authorities cited by the defendant, we conclude that the judgment of the trial court should be, and is hereby, reversed, and the cause dismissed.

REVERSED AND DISMISSED.

WARREN R. WIBORG ET AL., APPELLANTS, V. CITY OF NORFOLK, NEBRASKA, A MUNICIPAL CORPORATION, ET AL., APPELLEES.

127 N. W. 2d 499

Filed April 10, 1964. No. 35627.

1. **Pleading.** A general demurrer admits all allegations of fact in the pleading to which it is addressed which are issuable, relevant, material, and well pleaded, but does not admit the pleader's conclusions of law or fact.
2. ———. In passing on a demurrer to a pleading, the court will consider an exhibit attached thereto and made a part thereof.
3. **Municipal Corporations.** The only foundation for a local assessment lies in the special benefits conferred upon the property assessed by the improvement to pay for which the assessment is made, and an assessment beyond the benefit so conferred is a taking of property for public use without compensation, and therefore illegal.
4. **Municipal Corporations: Appeal and Error.** Where an assessment is illegal, a petitioner is not limited to an appeal from the assessment but has a right to enjoin its collection as to his property.
5. **Municipal Corporations: Trial.** When a party attacks a special assessment for illegality because his property was not or could not be benefited thereby, he has the burden to prove the illegality alleged.

Appeal from the district court for Madison County: FAY H. POLLOCK, Judge. Reversed and remanded.

Bernard A. Ptak, for appellants.

Jewell & Otte, for appellees.

Heard before WHITE, C. J., CARTER, MESSMORE, YEAGER, SPENCER, BOSLAUGH, and BROWER, JJ.

SPENCER, J.

This is an action to enjoin the collection of a special assessment levied by the City of Norfolk upon real estate owned by Warren R. Wiborg and Alice E. Wiborg, plaintiffs and appellants, hereinafter referred to as plaintiffs. The defendants and appellees are the City of Norfolk, Nebraska, and Alvin S. Ahlman, the clerk and

treasurer of the City of Norfolk. The defendants and appellees will hereinafter be referred to where necessary as city and treasurer respectively.

The city and treasurer filed general demurrers to the petition of the plaintiffs. The demurrers were sustained. Plaintiffs elected to stand on their petition, which was thereupon dismissed. Plaintiffs have perfected an appeal to this court.

Plaintiffs' petition, insofar as need be considered in this appeal, alleged their ownership of Lots 44 and 45 of Town and Country Addition to Norfolk, Madison County, Nebraska, on which they built a home into which they moved in February 1957. At that time Town and Country Addition was not a part of the City of Norfolk. Plaintiffs faced their home on a county road bordering their lots on the south, and connected it to a city water main which ran east and west under said road. They have been served with water from that source continuously since that time. On or about January 11, 1960, Town and Country Addition was annexed to the City of Norfolk. In that year, the city created water district No. 13 in Town and Country Addition. This district runs along the street to the back and north of Lots 44 and 45. The city assessed benefits on this improvement against plaintiffs' lots in the amount of $723.14. Plaintiffs alleged that Lots 44 and 45 were not benefited in any way by virtue of this new water district; that said lots are adequately and fully served by their present water line; and that the lots could never derive any benefit from water district No. 13. Plaintiffs further alleged there was not and would never be a need for additional water service to Lots 44 and 45; that the assessment was arbitrarily assessed; and that it is constructively fraudulent as to them.

Attached to and made a part of their petition is a plat which shows Lots 44 and 45 to be on the south boundary of Town and Country Addition. From this plat it is evident that the street under which the new

water main was installed bounds plaintiffs' property on the north. Plaintiffs' home fronts on the street to the south. The water main to which they are connected is under the street to the south.

Plaintiffs prayed that the special assessment be declared void as to Lots 44 and 45; that the city and the treasurer be enjoined from collecting it; and that title to their property be quieted as against any lien by virtue of the special assessment for water district No. 13.

Norfolk is a city of the first class and has statutory authority to create water districts and to levy assessments for the payment of the cost thereof. §§ 16-667, 16-668, and 16-707, R. R. S. 1943.

Review by petition in error was available to the plaintiffs if they felt they were aggrieved by any decision of the Norfolk city council sitting as a board of equalization. See Elliott v. City of Auburn, 172 Neb. 1, 108 N. W. 2d 328.

The question to be answered herein, and the only one we will discuss, is whether plaintiffs also have the right to collaterally attack the special assessment. Inasmuch as there is nothing in the petition to indicate otherwise, we assume that proper notice of hearing on the equalization of assessments for water district No. 13 was given to the plaintiffs and that they made no appearance before the board of equalization when the special assessments for the district were made and equalized. Plaintiffs in no way challenge the power and the authority of the city to create the water district in question or to levy the assessments. Their attack is directed to the point that their lots are not benefited and they should not have been included in the assessment for the improvement.

A general demurrer admits all allegations of fact in the pleading to which it is addressed which are issuable, relevant, material, and well pleaded, but does not admit the pleader's conclusions of law or fact. Jones v. Village of Farnam, 174 Neb. 704, 119 N. W. 2d 157.

In passing on a demurrer to a pleading, the court will consider an exhibit attached thereto and made a part thereof. See Valentine Oil Co. v. Powers, 157 Neb. 71, 59 N. W. 2d 150.

For the purpose of testing the ruling of the trial court on the demurrers, we assume that the plaintiffs' lots were not benefited by water district No. 13 for which the special assessment was levied. We also assume, for the purpose of testing the ruling thereon, that plaintiffs do not and will not in the future have need for additional water service to these lots.

On the point at issue, the right to collaterally attack the assessment, this case appears to be controlled by our holding in Chicago & N. W. Ry. Co. v. City of Omaha, 156 Neb. 705, 57 N. W. 2d 753. That case involved the collection of a special assessment for a paving district which included a portion of a street bordering the railroad right-of-way. The physical facts were such that the railroad property could not have been specially benefited by the improvement. That action, like this one, was to enjoin the collection of the special assessment and to quiet the title of the plaintiff to the property as against the special assessment. The City of Omaha raised the defense that the plaintiff could not collaterally attack the assessment but was limited to an appeal from the findings of the assessing body.

We quote the following from Chicago & N. W. Ry. Co. v. City of Omaha, *supra:* "In the case of Wead v. City of Omaha, 124 Neb. 474, 247 N. W. 24, the complaint was that the taxpayers were not benefited by the widening of certain streets in the city. No charge was made that taxes were assessed for an illegal or unauthorized purpose, or were invalid for any other reason. The court recognized the exceptions to the general rule that defects and irregularities in the making of special assessments cannot be questioned in a collateral proceeding, and that an assessment grossly in excess of benefits can be attacked. The court said: 'To the rule thus an-

nounced there are some apparent exceptions. For instance, where the record discloses that the physical facts are such that the property was not and could not have been specially benefited, or could not have been benefited to any extent approaching the assessment, such facts have been in some cases held to show that the levy of assessment was arbitrary and constructively fraudulent, and therefore void, and might be attacked collaterally. * * * The rule in such cases is stated in Hamilton, Law of Special Assessments, sec. 760, wherein it is said: "Where an assessment for street improvements is arbitrary and fraudulent, and therefore void, the appeal provided by the charter is not the only remedy. The person aggrieved may have his remedy in equity, or a common-law action for damages. *Equity will enjoin the collection of a void local assessment, and taxpayers are not relegated to an appeal from an assessment.*" ' (Emphasis supplied.)"

This court, in holding that the Chicago and Northwestern Railway Company could attack the assessment collaterally, further said: "We make reference to the language in Wead v. City of Omaha, supra, and to that part thereof to the effect that where an assessment for street improvements is arbitrary and fraudulent, a person so aggrieved may have a remedy in equity to enjoin the collection of a void local assessment, * * *."

Assuming, as we must do for the purposes of the demurrers, that plaintiffs' lots are not benefited by the special improvement, under the authority of Chicago & N. W. Ry. Co. v. City of Omaha, *supra,* the assessment as to the plaintiffs herein would be arbitrary and constructively fraudulent and therefore void as to them.

The city relies on Elliott v. City of Auburn, 172 Neb. 1, 108 N. W. 2d 328, which also involved a collateral attack on a special assessment. The attack in that case centered on the allegation that the petition creating the paving district was insufficient to confer jurisdiction on the mayor and counsel to create the district. The mayor

and counsel specifically found the petition for the creation of the district to be sufficient. The collateral attack, as here and in Chicago & N. W. Ry. Co. v. City of Omaha, *supra,* was to enjoin the assessment after the improvement had been made and the assessment levied. In the Elliott case, however, there was no contention that petitioner's property was not benefited by the special improvement. The attack was directed to the finding made by the mayor and council on the sufficiency of the petition. Petitioner was attacking the authority to create the district and not the fact he could not be benefited by it. From that case and the dissenting opinion on rehearing, 172 Neb. 515, 110 N. W. 2d 218, it is obvious that the court intended to narrow the field of collateral attack.

Does the Elliott decision conflict with Chicago & N. W. Ry. Co. v. City of Omaha, 156 Neb. 705, 57 N. W. 2d 753? We find that it does not. There is a clear distinction between the two. In the Elliott case the plaintiff, who was being benefited by the improvement, saw fit to wait until he had received the benefit of the paving before trying to avoid it by a collateral attack. In Chicago & N. W. Ry. Co. v. City of Omaha, *supra,* no benefit was conferred on the plaintiff by the paving. If no benefit is conferred, it constitutes a taking of property for public purposes without compensation. In the latter case, we said: "'"The only foundation for a local assessment lies in the special benefits conferred upon the property assessed, by the improvement to pay which the assessment is made, and an assessment beyond the benefit so conferred is a taking of property for public use without compensation, and therefore illegal."'"

Section 77-1727, R. R. S. 1943, provides: "No injunction shall be granted by any court or judge in this state to restrain the collection of any tax, or any part thereof, nor to restrain the sale of any property for the nonpayment of any such tax, nor shall any person be permitted to recover by replevin, or other process, any

property taken or restrained by the county treasurer for the nonpayment of any tax, except such tax or the part thereof enjoined in case of injunction, *be levied or assessed for illegal or unauthorized purpose.*" (Emphasis supplied.)

Plaintiffs' petition specifically alleged that their lots were not benefited in any way by water district No. 13, and that the lots could not derive any benefit from the new water main. They further alleged that there will never be a need for additional water service to their lots. These allegations bring them clearly within the rule announced in Chicago & N. W. Ry. Co. v. City of Omaha, *supra.* If their allegations can be proved, the assessment may constitute a taking of property for public use without compensation and therefore illegal as to them and subject to collateral attack.

For the purpose of this opinion, the demurrers admit the illegality of the assessment as to the plaintiffs. On a trial on the merits, the plaintiffs will have the burden of proving that their property has not been benefited by the improvement. When a party attacks a special assessment for illegality because his property was not and could not have been benefited thereby, he has the burden to prove the illegality alleged. See, Whitla v. Connor, 114 Neb. 526, 208 N. W. 670; Munsell v. City of Hebron, 117 Neb. 251, 220 N. W. 289; Chicago & N. W. Ry. Co. v. City of Omaha, 154 Neb. 442, 48 N. W. 2d 409.

For the reasons given, the general demurrers filed by the city and treasurer should have been overruled. The order sustaining the demurrers and dismissing the petition of the plaintiffs is hereby vacated and set aside and the cause is remanded to the trial court for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

EDWARD J. BABUREK, ADMINISTRATOR WITH WILL ANNEXED OF THE ESTATE OF JOSEPH FRANCIS PELLANT, APPELLEE AND CROSS-APPELLANT, V. JAMES J. SKOMAL, APPELLANT AND CROSS-APPELLEE.

127 N. W. 2d 731

Filed April 17, 1964. No. 35590.

1. **Trover and Conversion: Damages.** The measure of damages for a conversion of personal property is the reasonable market value of the property at the time of the conversion.
2. **Evidence.** Where the value of a postage stamp collection is in issue, and no more accurate evidence is available under the circumstances, a witness acquainted with the value of the stamps composing the collection, and who has examined the same for the purpose of estimating its value, may give his opinion of such value.
3. **Witnesses: Evidence.** Where a witness who has qualified as an expert has made a personal inspection of personal property and formed his judgment as to its value at the time of making the inspection, although at the trial he has no remembrance of the particular items examined, he may be permitted to state his opinion of its value, the effect of the evidence being one of weight and credibility and not of competency.
4. ———: ———. Evidence of a witness who has qualified as an expert as to the market value of property is not admissible where his opinion is based upon elements and considerations that do not tend to produce market value.
5. **Damages.** The measure of damages for the wrongful withholding of possession of premises from one having a legal right thereto is the reasonable rental value of the property for the period of time the party entitled to possession is deprived of its use.

Appeal from the district court for Douglas County: PAUL J. GARROTTO, Judge. Affirmed in part, and in part reversed and remanded.

McGowan & Troia, for appellant.

George H. Thompson and Robert P. Miller, for appellee.

Heard before WHITE, C. J., CARTER, MESSMORE, YEAGER, SPENCER, BOSLAUGH, and BROWER, JJ.

CARTER, J.

This is an action by Edward J. Baburek as administrator with will annexed of the estate of Joseph F. Pellant, deceased, against James J. Skomal for (1) false imprisonment, (2) conversion of personal property, and (3) the unlawful eviction of deceased from a leasehold estate. The jury returned a verdict for $4,500 on the second cause of action and a verdict for $500 on the third cause of action. Defendant Skomal filed a motion for a new trial. The trial court, after the hearing on the motion for a new trial, ordered a remittitur of $1,500 on the second cause of action as a condition to the overruling of the motion for a new trial directed to the second and third causes of action, and ordered, if the remittitur be not filed, that the motion for a new trial be sustained as to the second and third causes of action. The remittitur was filed. The defendant Skomal appealed.

Prior to March 31, 1953, the deceased was the owner of a lot and a two-story building located at 1249½ South Thirteenth Street in Omaha, Nebraska. On or about the above date the deceased sold and conveyed the property to the defendant Skomal, who has since operated the first floor of the building as a hardware store. As a part of the same transaction Skomal leased the second-floor living quarters without rent as long as deceased occupied it as his home, or until the death of deceased, or in the event of the destruction of the property. On March 31, 1959, the deceased was taken to a hospital, where he was treated for a decompensated heart and a mental condition. He was released from the hospital on April 23, 1959, and thereafter lived with his cousin, Mathilda Polan, until the middle of June 1959. He was thereafter removed to the St. Vincent's Home in Omaha where he remained until his death on May 6, 1960, at the age of 74 years. From the time he first entered the hospital on March 31, 1959, until his death, he never returned to his living quarters in the Skomal

property. On May 14, 1959, Edward J. Baburek was appointed conservator of the property of the deceased and, after the death of the deceased, was appointed administrator with will annexed of his estate.

At the close of plaintiff's evidence the plaintiff dismissed without prejudice his first cause of action for false imprisonment. The second cause of action was narrowed to the question of the value of a stamp collection belonging to the deceased, and whether or not defendant converted it to his own use. The third cause of action involved the issue of whether or not defendant unlawfully evicted the deceased from his living quarters and, if so, the rental value of the leasehold during the period of the unlawful eviction.

As to the second cause of action, the evidence shows that the deceased had lived all his life at 1249½ South Thirteenth Street, his parents having resided there before he was born. Deceased never married and in his later years was living there as a recluse, occupying his time caring for a number of cats and working with a stamp collection he had accumulated over a period of 40 or more years. His furniture was old and of little or no value. His quarters were dirty and unkept, and, according to the evidence, were those of a recluse as the term is generally understood. After the removal of deceased to the hospital, defendant found a key in the apartment and locked the door. On May 14, 1959, Baburek as conservator called on the defendant and gave him a copy of his appointment as conservator. It is the testimony of Baburek that he demanded possession of deceased's property and that defendant refused, stating that he felt he should retain its possession until everything was settled. Baburek and defendant did inspect deceased's quarters. The furniture was still there, together with the stamp collection. A close inspection of the stamp collection was not made on that day. In the latter part of July or the forepart of August 1959, Baburek, accompanied by Anton F. Ort, and one Lamm,

went to the quarters of the deceased to inventory the stamp collection. They listed 147 books of stamps and 4 or 5 large cartons of loose stamps. There was no inventory taken of the individual stamps, the evidence being that it would take days and possibly weeks to so inventory them. Baburek testified that he again demanded the stamps, the defendant refusing for the reason that deceased owed him money. At the time this inventory was made the stamp collection had been removed from the quarters of the deceased and was in a back room of defendant's store. As the stamp collection was inventoried, the stamp books were arranged in neat order on shelves in the back room. The action for the conversion of the stamps was brought on August 28, 1959. In early February 1961, Baburek and one George Thompson went to defendant's store and discovered that many volumes of the stamps were missing and the remainder was in complete disarray. On February 11, 1961, Baburek and Ort checked the stamps against the previous inventory and found approximately 50 volumes of postage stamps, described mostly as plate block mint condition stamps, to be missing. It was the testimony of Ort, who was himself an experienced stamp collector, that whoever took the missing stamps was an experienced stamp dealer or collector for the reason that the more valuable mint plate block stamps had been removed from the collection.

We point out in this case that no person had any knowledge of the number of stamps contained in deceased's collection, although one witness estimated that the number was probably between 10,000 and 20,000. No witness was able to value the individual stamps or to determine the accumulated value of individual stamp appraisals. Except for the loss of the stamps while in the custody of the defendant, this could have been done.

The plaintiff called one W. J. Mashek as a witness who testified that he had been engaged in the business of buying stamps for sale to stamp collectors for more

than 20 years. He was familiar with United States commemorative and mint plate block stamps, and many foreign stamps as well. He was familiar with those stamps that had value, of which the deceased's collection contained many. Mashek testified that defendant asked him, on a date beyond his recollection, to come to defendant's place and estimate the value of deceased's collection, which he did. He had no opportunity to count the stamps nor to appraise the stamps in accordance with the number and the individual value. After a cursory examination of 45 minutes to 2 hours, he offered defendant the amount of $1,800 for them. He testified further that in his opinion they could have been sold at wholesale to a stamp dealer for $2,500 and, in his opinion, they could have been sold at retail for $3,000. We think this evidence, under the circumstances, was sufficient to sustain a value of $3,000.

The witness Mashek testified concerning Scotts Specialized Stamp Catalog which is published annually and generally sold to stamp collectors and dealers. The catalog was not offered in evidence. The witness testified that it is not primarily a pricing or valuing catalog, but is merely a guide to those interested in the buying and selling of stamps. He testified that the value of a stamp depends upon its condition, its scarcity, and collectors' demand. The age of the stamp has a bearing upon its value but it is not an essential element of value. He testified that he had made use of Scott's catalog for more than 40 years. The 1959 issue of the catalog listed 1,122 regular standard issues of postage stamps. He indicated that he could determine estimated values from Scott's catalog. He testified that the number of stamps in the collection was a controlling factor, a fact about which he had no information. The witness testified further that the value of stamps varies in different localities depending upon the collectors' demand, and that new information might increase or reduce the indicated catalog value. He testified further that plate

block stamps are not carried in the catalog. On this foundation the court permitted the witness to answer that the catalog value of the stamp collection exceeded $6,000. There is no evidence that this was the market value of the stamp collection.

We think the trial court was in error in permitting the witness to give the catalog value as $6,000. In the first place, the witness had already testified to the market value at retail as being $3,000. In the second place, the witness had no knowledge of the number of each class of stamps, and the catalog gave him no aid in valuing mint plate block stamps. Without this information the estimate based on catalog information was pure speculation, a mere guess. The trial court recognized the speculative character of this evidence in considering the motion for a new trial when it required the plaintiff to remit $1,500, the amount of the judgment in excess of $3,000. We think the trial court was correct when it, on hearing the motion for a new trial, concluded that the opinion testimony of Mashek as to the catalog value of the stamps was pure speculation and improperly admitted.

The defendant testified that he never refused to place the stamp collection in the possession of Baburek; and that no demand was ever made upon him to do so. He testified further that he had no knowledge of anyone taking any of the stamps. Whether or not the defendant converted the stamp collection was a question for the jury.

The defendant contends that the evidence of value was not properly admitted under the general rule announced in Watkins v. Brunswick Restaurant Co., 123 Neb. 212, 242 N. W. 439, wherein it is said: "An opinion of an expert must be based upon facts, proved or assumed, sufficient to form a basis for an opinion, and cannot be invoked to supply the substantial facts necessary to support that conclusion."

The plaintiff relies on the rule announced in Jensen

v. Palatine Ins. Co., 81 Neb. 523, 116 N. W. 286, which holds: "* * * where the value of a stock of goods is a relevant fact, and no more accurate evidence is under the circumstances obtainable, the owner of such stock and witnesses acquainted with the value of the different articles of which such stock is composed, and who have observed the same for the purpose of estimating the value thereof, may give their opinion of such value." See, also, Borden v. General Ins. Co. of America, 157 Neb. 98, 59 N. W. 2d 141. The value of property that has become lost, destroyed, or for any reason is not available without fault on the part of the plaintiff is not ordinarily defeated because an itemized statement of the amount and value of the goods is not available. The law does not require mathematical certainty, but merely the best attainable evidence under such circumstances. When a witness is familiar with the value of the individual items being valued, has made some examination of them for the purpose of estimating their gross value, and has some knowledge of the quality and quantity of the items involved, he may give his opinion of their market value.

The evidence of Mashek that the retail market value of the stamp collection was $3,000 comes within the foregoing rule. He was familiar with the value of individual stamps, he had examined them for the purpose of estimating their value, and he had arrived at their value, even though at the time of trial he had little recollection of their quality and quantity. In a similar situation the court in Hazelwood v. Woodward, 277 Ky. 447, 126 S. W. 2d 857, said: "Appellant also complains because Samuel E. Simonson, a witness for appellee, was permitted to testify as to the size and value of the estate. We do not think there is much merit in this contention, as this witness states that he made an examination of the securities owned by Dr. John and made a list of them and formed his judgment as to the value of the estate at the time of making this list, although at the

time of the trial he did not remember the particular items of the estate."

On the other hand, the additional evidence of Mashek that the catalog value of the collection was in excess of $6,000 is incompetent under the foregoing rule. Mashek made no examination of the stamp collection for the purpose of appraising its catalog value and, of course, had not arrived at such value when he inspected it. Admittedly the catalog value was not the market value, even though it is an aid in arriving at market value. Admittedly the catalog gave no values of mint plate block stamps which constituted the most valuable stamps in the collection. Admittedly the witness was as familiar with Scott's catalog when he inspected and appraised the stamp collection at a market value of $3,000 as when he fixed a catalog value of $6,000. We submit that the catalog price testified to by Mashek was pure speculation and was based on conjectures that did not tend to produce the reasonable market value of the stamp collection. The admission in evidence of the catalog value of the stamp collection was error.

The plaintiff contends that the defendant unlawfully evicted the deceased. The evidence shows that when deceased went to the hospital the defendant obtained a key and locked the outer door of deceased's apartment. This constitutes no evidence of an eviction. The evidence further shows that deceased was afraid to return to the apartment. There is no evidence that the defendant participated in the creation of any such fear. It is a mere conclusion and does not support the contention that defendant evicted the deceased. There is evidence that defendant did move the property of deceased from his leasehold and take full possession of the rooms occupied by the deceased. The date on which the property was moved out of decedent's rooms is not accurately shown by the record. It was in decedent's quarters when Baburek was there on May 14, 1959. The property, or a part of it, had been moved out when

Baburek and Ort were there in July or August of 1959. Pellant, the deceased, died on May 6, 1960. The proof sustains a finding that deceased was dispossessed from July 1959, to May 6, 1960. The evidence of Baburek is that the rental value of the rooms was $50 per month. A tenant of defendant testified that he paid $16.25 per week as rent. We think the evidence sustains the verdict for $500 on the third cause of action.

The defendant assigns as error the giving of certain enumerated instructions. The instructions questioned are consistent with what we have heretofore said. We find no error in them.

We conclude that the judgment for $4,500 on the second cause of action is not supported by any competent evidence in the record. Such judgment is reversed and the cause remanded for a new trial. The judgment on the third cause of action is sustained by the evidence. The third cause of action was fairly submitted to the jury under proper instructions, and the plaintiff is entitled to the fruits of his verdict on that cause of action. The order granting a new trial on the third cause of action is therefore reversed and the cause remanded with instructions to reinstate the verdict and enter judgment for the plaintiff for $500 on the third cause of action. Each party is charged with his own costs on this appeal.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED.

IN RE APPLICATION OF LEECH, INC., A NEBRASKA CORPORATION.

LEECH, INC., A NEBRASKA CORPORATION, APPELLEE AND CROSS-APPELLANT, V. BOARD OF EQUALIZATION OF CHASE COUNTY, NEBRASKA, ET AL., APPELLANTS AND CROSS-APPELLEES.

IN RE APPLICATION OF PEARL LEECH.

PEARL LEECH ET AL., APPELLEES AND CROSS-APPELLANTS, V. BOARD OF EQUALIZATION OF CHASE COUNTY, NEBRASKA, ET AL., APPELLANTS AND CROSS-APPELLEES.

127 N. W. 2d 917

Filed April 17, 1964. Nos. 35628, 35629.

1. **Taxation.** A taxpayer has the right to test the actual value of his property as fixed by the taxing authorities under the provisions of section 77-112, R. R. S. 1943.
2. ———. As defined by section 77-112, R. R. S. 1943, the 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.
3. ———. It is presumed that a board of equalization has properly performed its official duties in determining the actual value of property for tax purposes and that in making an assessment it acted upon sufficient legal evidence to justify its action.
4. ———. This presumption of legality disappears when there is competent evidence on appeal to the contrary and when such evidence appears thereafter, the reasonableness of the valuation made by the board becomes one of fact to be determined upon the evidence unaided by presumption.
5. ———. In such a case, the burden of proof is upon the taxpayer to establish that an unreasonable and improper valuation has been placed on the property involving litigation.
6. **Taxation: Appeal and Error.** On appeal from the finding and determination on valuation by the county board of equalization, the trial in the district court and this court is de novo as an equitable proceeding.
7. **Taxation.** Where the county assessor has not acted on his own information and where valuation is arbitrarily determined with-

out explanation of the methods used or the elements considered, there is no presumption that the valuation is correct.

8. **———. Market value is not a sole test of actual value but should be given consideration along with the other relevant factors as to actual valuation.**

Appeals from the district court for Chase County: VICTOR WESTERMARK, Judge. Affirmed as modified.

Daniel E. Owens, for appellants.

Herbert L. Jackman, for appellees.

Heard before WHITE, C. J., CARTER, MESSMORE, YEAGER, SPENCER, BOSLAUGH, and BROWER, JJ.

WHITE, C. J.

This litigation involves a controversy as to actual valuation for tax purposes, under section 77-112, R. R. S. 1943, of two tracts of land in the city of Imperial, Nebraska. The cases involve technically four separate appeals from orders of the county board of equalization, the valuation of each tract being appealed for the years of 1962 and 1963. The cases were consolidated for trial on appeal in the district court, they were consolidated for briefs and argument in this court, and all of the evidence appears in one bill of exceptions. This opinion, therefore, will be dispositive of all of the appeals and the valuations complained of. The record also shows that the parties are in agreement that the valuation for 1962 should be the same as for 1963, so we approach the problem simply as a valuation of the two tracts as shown by the record before us.

Tract A (Lots 7 to 12, Block 23, Railroad Addition to Imperial) is the Leech Chevrolet garage building on the southern portion of Main Street in Imperial, Nebraska. The building is on the east side of Main Street, has a 150 by 150 foot frontage on both Main Street and a side street, and has about 19,000 square feet of floor space.

Tract B (Lots 1 to 7, Block 22, Railroad Addition to Imperial) is the Leech garage parking lot with a carport

building on it which is a canopy-type structure mainly of sheet metal and approximately 25 by 175 feet in size. It is located across Main Street to the west from the Leech garage. These lots and the building are and have been continuously used in connection with the operation of the garage.

The county assessor and the board of equalization placed a value of $69,600 on the garage (Tract A), the district court reduced this valuation to $50,000, the defendants appeal, and the plaintiffs cross-appeal claiming that the valuation should be placed at $35,000. On Tract B, the county assessor and the board of equalization placed the valuation at $11,555, the district court reduced this valuation to $7,500, and the defendants appeal. The trial of this appeal, both in the district court and this court, is de novo as an equitable proceeding. Matzke v. Board of Equalization, 167 Neb. 875, 95 N. W. 2d 61; Adams v. Board of Equalization, 168 Neb. 286, 95 N. W. 2d 627.

The pleadings and the evidence in this case frame only one basic issue and that is the actual value of the plaintiffs' two tracts of land. It is not contended by the plaintiffs that their value has not been fairly or properly equalized with other property in the county. This must be pointed out in this case because the defendants insist in their brief on the application of the rules of presumption and admissibility of evidence applicable to an equalization type of case. A taxpayer has the right to test the actual value of his property or show that it has not been properly equalized. H/K Company v. Board of Equalization, 175 Neb. 268, 121 N. W. 2d 382; Adams v. Board of Equalization, *supra.*

A like appeal on actual valuation was before this court in Adams v. Board of Equalization, *supra,* and this court laid down the following rules directly applicable to the case now before us. It said: "It is presumed that a board of equalization has properly performed its official duties and in making an assessment it acted upon

sufficient legal evidence to justify its action. However, the presumption disappears when there is competent evidence on appeal to the contrary and thereafter the reasonableness of the valuation made by the board of equalization becomes one of fact to be determined upon the evidence, unaided by presumption, with the burden upon the party contesting to establish that an improper and unreasonable valuation has been placed on the property involved in the litigation. Ahern v. Board of Equalization, 160 Neb. 709, 71 N. W. 2d 307; K-K Appliance Co. v. Board of Equalization, 165 Neb. 547, 86 N. W. 2d 381; Omaha Paxton Hotel Co. v. Board of Equalization, 167 Neb. 231, 92 N. W. 2d 537; Matzke v. Board of Equalization, *supra.*"

Before we review the evidence, we set out the provisions of section 77-112, R. R. S. 1943, which furnish the applicable yardstick for measuring the evidence: "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."

A summary of the valuation is shown by the following:

	Tract A Land	Tract A Total	Tract B Land	Tract B Building	Tract B Total
Garber-Plaintiffs' witness #1	$4,585	$35,000	$5,250	$2,000	$ 7,250
Burke-Plaintiffs' witness #2		30,000			5,000
Lessee, Powell-Plaintiffs' witness #3		24,300			5,200
Powell Contract Sale Price		24,300			5,200
Adams-Plaintiffs' witness #4		30,000			5,000

Weir-Plaintiffs' witness #5		32,500		2,500	7,500
Chase County-"Actual value" per appraisal cards	$4,585	$69,600	$7,395	$4,160	$11,555
Contractor Burham-Defendants' witness #1	$4,500	$65,513.80	$5,250	$2,800	$ 8,050
County Assessor-Browning-Defendants' witness #2		65,000			10,000
Co. Board Chairman Terry-Defendants' witness #3	Acceptance of valuation that was already on it. He did not set any value himself.				

We first discuss Tract A, the Leech garage property. The land value here of approximately $4,500 is not in substantial dispute. Factually, the real issue in the case centers around the value of the garage. It was built in three sections. The original building was built in about 1944 and had approximately a 100-foot frontage on Main Street and extended 150 feet to the east. A body shop was added to the rear of the building in 1948. An addition of approximately 50 by 90 feet was added in 1951 with a frontage on Main Street which completed a Main Street north and south frontage of 150 feet. This addition is known as the "Allison Addition," and was added on by Leech, the original owner who died in August 1960, for the contemplated expansion in the business because Allison, his son-in-law, planned to join the business but never did. The building is generally a horseshoe shape consisting of between 18,000 and 19,000 square feet. The building is cement block with some parts hollow tile, is not fireproof, is cement floored, is heated by seven overhead gas furnaces, and has a minimum of utilities. The evidence shows that the body shop is of inferior construction to the other two sections which are of "fair" construction.

Generally, the evidence shows that there is no avail-

able market in Imperial for a garage building of this type, that the garage is located at the south end of the business section, that the business section of the town is moving to the north, that the building is only adaptable for the one use for which it is now being used, that it was constructed for the special purposes that the long-time owner Leech desired, that it is much too large when compared to the reasonably necessary space usable for this purpose in a city the size of Imperial, that there has been a decline in population in Imperial in the last 10 years, and that there are unsalable vacant buildings in the vicinity.

The county assessor held office from 1947 to 1951 and from 1955 to the present date. The valuation of $69,600 (including the land) has not been changed since 1954. It was originally prepared and furnished the county by an appraisal firm. The figures on his official appraisal cards represent reproduction costs on a front footage basis on the buildings and only allow a 10 percent "physical" depreciation, arbitrarily allowed all buildings in Imperial and Wauneta. The only additions to this property were the reproduction costs added on this basis when the two additions referred to were built in 1948 and 1951. This witness' evidence shows that at no time, over a period of some 16 or 17 years, was depreciation figured or allowed on this building except what may be termed the original 10 percent "equalization" figure given to all buildings in both towns. The record shows that this appraisal card figure of $69,600 was automatically carried down as the "actual valuation" from 1954, that no reappraisal was made, and that there was no appraisal made to conform to the different requirements of section 77-112, R. R. S. 1943, set out above. The conclusion is inescapable from the record in this case that there was a mechanical acceptance of a valuation fixed by another, based on the sole factor of reproduction costs, and giving no consideration then or now to any of the other pertinent statutory factors. On

direct examination of this witness there was an attempt to take the $69,600 figure and have this witness relate it to the applicable sections of the statute based on what may be termed a brief visit to the premises in 1962 and 1963. But the evidence shows that no consideration was given to any of the other applicable factors other than reproduction costs as shown on the appraisal card. This witness did not know what square foot figure was used at any time in figuring the original reproduction costs, and despite the clear evidence available and brought home to him, gave no consideration to the earning capacity, relative location, or sale prices on the property as they related to the situation present in 1962 and 1963. All of the witnesses in this case testified, in effect, that there were no other comparable properties in Imperial by which to determine its valuation.

The above analysis is borne out by the arbitrary action of the county board of equalization in disposing of the protest and appeals, without hearing, in both 1962 and 1963. The printed form which constitutes the final determination by the county board of equalization simply recites, "No change until reappraisal." It leaves blank the other spaces in the report that are required to be filled in. In 1963, the same procedure was followed with this sole notation, "After inspection of the properties and comparison of valuations on all other complaints, no changes were made on the present valuations." These actions require no comment except to show that the board decided to follow the appraisal card valuation of the county assessor since 1954 with no hearing and no determination under the applicable factors required in section 77-112, R. R. S. 1943.

Where a county assessor has not acted on his own information, and where it is arbitrarily determined without explanation of the methods used or the elements considered, there is no presumption that the valuation is correct, and such a valuation is not supported by competent evidence and is legally erroneous. Baum Realty

Co. v. Board of Equalization, 169 Neb. 682, 100 N. W. 2d 730; Matzke v. Board of Equalization, *supra;* Adams v. Board of Equalization, *supra.*

We think applicable here is the following from a closely similar case, Adams v. Board of Equalization, *supra,* wherein it is stated as follows: "* * * applied to the replacement cost the depreciation listed in the manual which was 6 percent, a purely arbitrary percentage, and this resulted in a figure of $30,360 which was described as the physical value. The result was necessarily an arbitrary one. There is no evidence to justify the deduction or depreciation of 6 percent of the alleged replacement cost. That deduction supports an inference that the replacement cost was neither the actual nor fair market value. The last amount stated was the one turned over by the representative to the county assessor. * * * He testified that he gave no attention to market value; he just figured the replacement cost less 6 percent of the building on the lots. This was the computation the county assessor accepted as the value of the building. The value of the lots, concerning which there is no dispute, was added to $30,360, making a total of $31,524 which was the valuation placed on the real estate of appellant in this case. * * * The record is clear that appellee (the county board of equalization) merely accepted the valuation adopted by the assessor."

The defendants called a building contractor as a witness. The substance of his testimony is that he used a $92,420 reconstruction cost based on $5 per square foot, took 17 years of depreciation at 2 percent, and reached a valuation of $65,513.80 for the building. We will not analyze his evidence further except to say that his valuation took into account no other factor other than present reconstruction costs less depreciation.

The chairman of the board of equalization testified that he and the other members of the board and the assessor visited the property, that they didn't discuss sale price or earning capacity of the property, and that no

investigation was made with reference to the reproduction cost of the property. It appears they consulted the contractor witness referred to above after the determination of the appeals. Perhaps the best way to characterize the action of the county board is this testimony of the county equalization board chairman. Upon cross-examination, the plaintiffs' counsel asked Mr. Terry:

"By Mr. Jackman

"Q. Sir, what factors did you apply in trying to arrive at the actual value of the Leech properties?

"A. That valuation was already on it. * * *

"A. The value was set; it was already set on it. We never set no value."

Length forbids even a brief recital of the plaintiffs' witnesses separately. The testimony of the plaintiffs was produced by the lessee operator of the garage and included all of the licensed real estate dealers in Imperial. Their valuation ranged between $24,300 to a top of $35,000. Their valuation took into consideration all of the relevant factors recited in the statute, section 77-112, R. R. S. 1943, except the one of comparative properties in the community because there were none. They took into consideration reproduction costs, year by year depreciation, and also took into consideration that some of the building was constructed poorly and other portions only in a fair manner which, based on what appears from the record, is almost undisputed. We feel that the witness Garber's testimony in this respect is entitled to great weight—giving the property a present depreciated reproduction cost of $51,000. But, the evidence shows that the building is much too large for its reasonable available or productive use in Imperial as a garage, that it is not suitable for any other purpose, and that the size of the building exists because of the special motives of the longtime owner Leech who died in August 1960. The evidence also shows that there are vacant buildings in the vicinity, that there has been a decline in population in Imperial during the last 10

years, and that there is a movement of the business section of the town to the north and away from this large garage.

The evidence shows that the lessee, Powell, took over the garage and Chevrolet agency in May 1961 shortly after the death of Leech and that he entered into a lease with the nonresident owners for $300 per month for 5 years with options to renew. It shows an offer of $35,000 by another party for this property which fell through because the lessee, Powell, would not agree to a raise in his rent of $50 per month and to the free use of a large portion of the building by the prospective purchaser. It shows that Powell bought this garage property under contract for the sum of $24,300 and there is no evidence in the record to support the asserted suspicion that this is not a bona fide sale. The evidence tends to also show that the market value of business properties is lower in the south part of Imperial compared with market values 10 to 15 years ago. We are aware that market value is not the sole test but it is entitled to weight and must be given consideration along with many other matters relevant to the actual value as defined by statute. Novak v. Board of Equalization of Douglas County, 145 Neb. 664, 17 N. W. 2d 882.

But a fair consideration of the evidence as to market value, fair capitalization of the income on this property, its declining value in light of its location, its restricted and overbuilt condition for functional use, and a fair depreciation on reconstruction considering the original quality of construction of the three sections of the building could only lead us to one conclusion and that is that the plaintiffs have met the requisite burden of proof showing that this property was grossly overvalued for tax purposes. We feel that the value of the building should be fixed at $30,000. This, together with a valuation on the land of $4,500 to $5,000, leads us to the fixing of the valuation of Tract A, the garage property, at $35,000.

We turn now to Tract B, the carport. This tract consists of seven lots. From the chart previously set out in this opinion it seems that there is not much dispute that the value of the land is around $5,000. This is borne out in the record by previous purchases of adjacent property and offers of purchase for portions of these lots. We note that this land is not available for any other use but for parking unless the present rather temporary carport structure is removed. The canopy carport was constructed in 1953 at a cost of $4,860. The depreciation allowed by the various witnesses varied between $2,000 and $2,800. The district court fixed a valuation of $7,500 on Tract B, and we see no reason to disturb it. It is significant to note that the county's official actual valuation as taken from the appraisal card on this tract was $11,555, prepared in the same manner and carried through the years like on Tract A, the garage property. But, the assessor and Burham, the contractor witness for the defendants, placed a valuation of $10,000 and $8,050, respectively, on this property, neither one of them testifying as to the "actual value" but premising their valuation on replacement value only less depreciation.

In deciding this case, we are aware of our recent holding in H/K Company v. Board of Equalization, *supra,* in which the contention was made that the assessor's valuation did not comply with the statutory requirements because it was taken automatically from previously prepared appraisal cards. We held in that case that the county assessor did comply with the statute and did render an independent opinion as to valuation, "based on his own analysis." As we have pointed out, that is not the situation here. Here, the situation is comparable with the finding and the holding in Adams v. Board of Equalization, *supra.* The evidence here shows factually that the original appraisal card by an independent party was made on the basis of reproduction costs only with no actual allowance for continuing

depreciation and that this valuation was automatically accepted through the years by the taxing authorities without any consideration of the relevant and applicable statutory factors.

We therefore hold that in case No. 35629 involving the 1962 and 1963 valuations of Tract A, the garage property, that the actual valuation should be fixed at $35,000. We hold that in case No. 35628, involving Tract B, the carport property, that the valuation of the district court in the sum of $7,500 should be affirmed.

In light of our de novo finding on valuations of the properties involved, it is unnecessary to consider the issue presented on the cross-appeal.

The judgment of the district court is affirmed as modified.

AFFIRMED AS MODIFIED.

LINDA KAY THOMPSON, APPELLANT, V. JOHN E. THOMPSON, APPELLEE.

127 N. W. 2d 729

Filed April 17, 1964. No. 35640.

1. **Divorce.** A divorce case is tried de novo on the record in the Supreme Court, and this court is required to reach independent conclusions of fact without reference to findings made by the trial court.
2. ———. No decree of divorce or the nullity of a marriage shall be made solely on the declarations, confessions, or admissions of the parties, but the court shall, in all cases, require other satisfactory evidence of the facts alleged in the petition for that purpose.
3. ———. There may be extreme cruelty justifying a decree of divorce without physical injury or violence, if the conduct is of such a character as to utterly destroy the legitimate ends and objects of matrimony.
4. ———. Testimony of witnesses in order to be regarded as corroborative of a charge of cruelty in a divorce case must be as to asserted facts and not merely of conclusions and inferences.

Appeal from the district court for Hall County: DONALD H. WEAVER, Judge. Affirmed.

Gerald B. Buechler, for appellant.

No appearance for appellee.

Heard before WHITE, C. J., CARTER, MESSMORE, YEAGER, SPENCER, BOSLAUGH, and BROWER, JJ.

YEAGER, J.

This is an action by Linda Kay Thompson, plaintiff and appellant, wherein she seeks a decree of divorce from John E. Thompson, defendant and appellee, on the ground of alleged cruelty. Issues were joined and the case tried, and a divorce was denied. A motion for new trial was filed by the plaintiff which was overruled. From the judgment and the order overruling the motion for new trial the plaintiff has appealed. The only question presented for consideration is that of whether or not the evidence adduced was sufficient to sustain an adjudication granting a divorce to the plaintiff.

The cruelty alleged by the plaintiff is that: "The Defendant for a long period of time, without just cause or provocation has been guilty of gross and extreme cruelty toward the Plaintiff in that he has cursed and physically and mentally abused her making the Plaintiff extremely nervous and has destroyed the legitimate ends of matrimony."

An answer was filed in which the defendant denied generally the allegations contained in the plaintiff's petition. On the trial the only evidence adduced was on behalf of the plaintiff. There was no examination of plaintiff's witnesses on behalf of the defendant.

A rule applicable in the consideration and determination of this case is that a divorce case is tried de novo on the record in this court, and this court is required to reach independent conclusions of fact without reference to findings made by the trial court. Upah v. Upah, 175 Neb. 606, 122 N. W. 2d 507. Another rule to which

adherence is required is the following: "No decree of divorce and of the nullity of a marriage shall be made solely on the declaration, confessions or admissions of the parties, but the court shall, in all cases, require other satisfactory evidence of the facts alleged in the petition for that purpose." § 42-335, R. R. S. 1943.

Still another rule is applicable. It is the following: "There may be extreme cruelty justifying a decree of divorce without physical injury or violence. Unjustifiable conduct on the part of a husband or wife, which utterly destroys the legitimate ends and objects of matrimony, may constitute extreme cruelty." Brown v. Brown, 146 Neb. 908, 22 N. W. 2d 148. See, also, Green v. Green, 148 Neb. 19, 26 N. W. 2d 299.

The plaintiff in support of her charge of cruelty charged the defendant with practically daily lying and arguing with her mostly about money and that on one occasion the defendant lost control of his temper and pushed her around. The time was not stated. She said he did this more than once. Neither the time nor specific circumstances of any such incidents were described. She said that in October the defendant took another girl out, and that he would, once in a while, go out in the evening and come home drunk. She said that at the time of the trial he was dating. This she said that she knew because he told her so.

She testified in general terms that he was unkind and maintained an attitude toward a child of the parties which was disturbing to the peace and the welfare of the parties. She also testified that the separation came about at her request.

This is a summary of the total testimony of the plaintiff on the trial of the case to support her charge of cruelty.

As a witness in her behalf she called Janice Arlene Poore, a sister. She gave no testimony which was related to any described incident but only as to a general condition. In response she described the attitude of the

parties as like "A couple of cats most of the time." She said that the defendant was moody and sullen most of the time and that they never did get along.

One Dixie Whitt, a friend of the plaintiff, testified in her behalf. She testified to no particular incident of difficulty between the parties. Substantially her testimony was that she frequently heard arguments between the parties; that these arguments would be about nothing in particular and would be started by the defendant; and that the plaintiff is nervous.

It is on the basis of the evidence thus summarized that the plaintiff contends that the court erred in denying her a decree of divorce. The finding on which a decree of divorce was denied was: "The Court being fully advised in the premises finds that there is insufficient evidence presented on behalf of Plaintiff to justify the granting of a divorce herein, and thus finds that the prayer of Plaintiff's Petition should be denied."

It may be said that no specific act of cruelty charged to the defendant which has been testified to finds corroboration in the record made in the case. In the light therefore of the statute to which attention has been called herein it must be said the district court came to the correct conclusion because of absence of corroboration, unless it may be said the general statement of the plaintiff amounted to satisfactory evidence of the facts alleged in the petition, and the testimony of one or both of the two witnesses called amounted to corroboration of these facts.

It does not appear from the observations made in the cases examined that the evidence which came from the witnesses of the plaintiff in this case could be regarded as corroborative of the charge of cruelty made by plaintiff within the meaning of section 42-335, R. R. S. 1943, and the interpretations thereof. These interpretations require that testimony to be effective as corroboration must be as to asserted facts, and not, as here, only of conclusions and inferences. See, Kuta v. Kuta, 154 Neb.

263, 47 N. W. 2d 558; Lees v. Lees, 156 Neb. 664, 57 N. W. 2d 279; Hines v. Hines, 157 Neb. 20, 58 N. W. 2d 505; Pestel v. Pestel, 158 Neb. 611, 64 N. W. 2d 299; Goodman v. Goodman, 168 Neb. 841, 97 N. W. 2d 336.

The conclusion reached is that the judgment of the district court should be, and it is, affirmed.

AFFIRMED.

THEA JUNE BERNING ET AL., APPELLEES, V. NATIONAL BANK OF COMMERCE TRUST & SAVINGS, A CORPORATION, ET AL., APPELLEES, IMPLEADED WITH MAX MARSHALL SHEILS ET AL., APPELLANTS.

127 N. W. 2d 723

Filed April 27, 1964. No. 35654.

1. **Wills.** The court in construing a will must ascertain the intent and purpose of the testator as disclosed by the language of the will.
2. ———. When the intention of the testator is ascertained, it must be given effect over other considerations if not contrary to law or public policy.
3. ———. The object and purpose of the court is to carry out and enforce the true intention of the testator as shown by the will itself in the light of attendant circumstances under which it was made.
4. **Wills: Estates.** The law favors the early vesting of estates, and a remainder will be declared a vested one unless a contrary intent is apparent from the will.
5. **Wills.** There is a presumption that a testator intended to dispose of his entire estate and not to die intestate either as to the whole or as to any part thereof. Where a provision of a will is fairly open to more than one construction, a construction resulting in an intestacy as to any part of the estate will not be adopted if by a reasonable construction it can be avoided.
6. ———. It is possible that the names of the prospective beneficiaries may be given and yet the gift may be to a class.
7. ———. A substitutional gift in case any legatee shall die is not sufficient reason for holding that the gift is to individuals rather than to a class.
8. ———. An unequal distribution within a group is a strong indication of individual gifts.

9. ———. Ordinarily the determination of a class or individual gift depends upon the generally accepted, literal, natural, and grammatical language used in the will, but it is not wholly limited thereby. It is the substance and intent, rather than the words, which control.

10. ———. To determine intent, the general scope of the will, the general purpose of the testator, the language used, the relationship of the beneficiaries and the testator, as well as the surrounding circumstances, within proper limits, may be considered.

11. ———. Will herein construed to divide the remainder equally between two groups of grandchildren.

Appeal from the district court for Scotts Bluff County: TED R. FEIDLER, Judge. Affirmed as modified.

Neighbors, Danielson & Van Steenberg, for appellants.

Wright, Simmons & Hancock, for appellees Berning et al.

Heard before WHITE, C. J., CARTER, MESSMORE, YEAGER, SPENCER, BOSLAUGH, and BROWER, JJ.

SPENCER, J.

This is an action to construe the will of Thomas Sheils, deceased, which established a testamentary trust.

The will in question was drawn January 3, 1925. Thomas Sheils, hereinafter referred to as testator, died June 8, 1933. His will was admitted to probate in Scotts Bluff County. The scrivener spelled the testator's family name "Shiels" in many places throughout the will. The signature wherever it appears spells the name "Sheils."

In the first instance, the will gives all of the property to Sarah Elizabeth Sheils, testator's widow, in trust with power to sell, mortgage, lease, and to convey. At her death, which occurred August 4, 1946, the remainder is given to The First Trust Company of Lincoln, Nebraska, in trust, with directions to pay all of the income to testator's son, Gay Marshall Sheils, during his life, which terminated October 29, 1962. The will then provides:

"6. (a) Upon the death of my son, Gay Marshall Shiels, the trustee shall divide the said trust estate into two equal parts and shall set aside one part in trust for the children of my son, Gay Marshall Shiels, namely: Max Marshall Shiels, Evelyn Shiels, Katherine Shiels and Dorothy Shiels. The trustee shall set aside three-fifths (3/5) of the said half share; and accumulate the income and hold said three-fifths and income in trust for said Max Marshall Shiels until he is thirty-five (35) years of age. Then, upon a proper showing to the trustee that he has accumulated by his own efforts, the sum of Three Thousand Dollars ($3,000.00), the trustee shall pay to him one-half (½) of the sum so set aside for him, together with one-half (½) of the accumulated income. But in case he fails to make the proper showing that he has accumulated Three Thousand Dollars ($3,000.00) through his own efforts, then in that case, no part of such sum shall be paid to him until he is forty (40) years of age; then, if he can make proper showing that he has accumulated Three Thousand Dollars ($3000) the full amount set aside for him shall be paid to him. Then in case he does not make the proper showing when he is forty (40) years of age, the whole sum shall be held in trust for him during his life and the income from said Trust Fund shall be paid to him semi-annually. Provided, Further, in the event of the death of my son, Gay Marshall Shiels, before his son Max Marshall Shiels, has completed his education, then in that event, the trustee is authorized to advance any reasonable amount to help him complete his education.

"The trustee shall hold in trust the balance of said one-half share, for Katherine, Dorothy and Evelyn Shiels, and shall pay to them semi-annually, the income therefrom during their respective lives, and said payments not to commence until they are twenty-five (25) years of age, and upon the death of either, shall pay to her children, her share of the principal, free from trust.

"(b). Upon the death of my son, Gay Marshall Shiels,

the trustee shall hold the other part in trust for my grandchildren, Thomas J. Shiels, Thea June Shiels and Vanice Shiels. The trustee shall set aside three-fifths (3/5) of the said half share and accumulate the income and hold said three-fifths (3/5) and income in trust for my grand-son, Thomas J. Shiels, until he is thirty-five (35) years of age. Then, upon a proper showing to the trustee that he has accumulated by his own efforts, the sum of Three Thousand Dollars ($3000) the trustee shall pay to him one-half of the sum so set aside for him, together with one-half of the accumulated income. But in case he fails to make the proper showing that he has accumulated Three Thousand Dollars ($3000.00) through his own efforts, then, in that case, no part of such sum shall be paid to him until he is forty (40) years of age; then, if he can make proper showing that he has accumulated Three Thousand Dollars ($3000.00), the full amount set aside for him shall be paid to him. And in case he does not make the proper showing, when he is forty (40) years of age, the whole sum shall be held in trust for him during his life, and the income from said Trust Fund shall be paid to him semi-annually. Provided, Further, in the event of the death of my son, Gay Marshall Shiels, before Thomas J. Shiels has completed his education, then, in that event, the trustee is authorized to advance any reasonable amount to help him complete his education.

"The trustee shall hold in trust the balance of said share for Vanice Shiels and Thea June Shiels and shall pay to them semi-annually, the income therefrom, during their respective lives, said payments not to commence until they are twenty-five (25) years of age; and upon the death of either, shall pay to her children, her share of the principal free from trust.

"7. Neither of the beneficiaries herein shall acquire any vested interest in said trust estate until the same becomes payable under the terms hereof, and neither the principal nor the income of the trust estate shall be

liable for debts of any beneficiary hereof, nor shall the same be subject to seizure by any creditor of any beneficiary under any writ or proceeding at law or in equity, and no beneficiary hereunder shall have any power to sell, assign, transfer, incumber or in any other manner to anticipate or dispose of his or her interest in the trust estate or the income produced thereby.

"If Max Marshall Shiels or Thomas J. Shiels shall die before his share shall be paid to him, then the same shall be paid to his children, free from trust."

The problem arises herein because of the death of Thomas J. Sheils on November 20, 1944, at the age of 24. This was during the lifetime of deceased's widow, and before the provision for Gay Marshall Sheils became operative. Thomas J. Sheils was the son of Iloa J. Sheils, a deceased son of testator. Iloa J. Sheils died December 21, 1921, which was 3 years prior to the making of the will herein. Thomas J. Sheils, who died without issue and intestate, was survived by his widow, Shirley Louise Sheils, whose name now is Shirley Louise Sheils Moore; his mother; and his two sisters, Thea June Berning, and Dorothy Vanice Sheils Banta Droze, who for convenience will hereinafter be referred to as the sisters.

The sisters bring this action, claiming that the disputed share should be paid to them on the theory that the provision in which it is included is a gift to a class of which they are the survivors. The widow of Thomas J. Sheils answered, claiming an undivided one-half interest in the share, on the theory that it was vested in her husband at the time of his death. His mother was made a party herein, but filed no pleadings. Max Marshall Sheils, Evelyn Sheils Tucker, Kathryn Sheils Bullock, and Dorothy Sheils Laursen, the children of Gay Marshall Sheils, who for convenience will hereinafter be designated as the Sheils, filed an answer, claiming a four-sixths interest in the disputed share on the theory that it lapsed with the death of Thomas J. Sheils

and should be distributed as a resulting trust to the heirs of deceased as of the time of the death of Gay Marshall Sheils, or to the six surviving grandchildren of the deceased. The trial court held that the disputed share should be paid to the sisters. The Sheils perfected an appeal to this court.

There are certain fundamental rules for the construction of wills which are so well established that they are no longer debatable in this state. One is that the court, in construing a will, must ascertain the intent and purpose of the testator as disclosed by the language of the will. Another is that when the intention of the testator is ascertained, it must be given effect over other considerations if not contrary to law or public policy. See In re Estate of Mooney, 131 Neb. 52, 267 N. W. 196.

We said in Katt v. Claussen, 174 Neb. 603, 118 N. W. 2d 1002: "The object and purpose of the court is to carry out and enforce the true intention of the testator as shown by the will itself in the light of attendant circumstances under which it was made."

The law favors the early vesting of estates, and a remainder will be declared a vested one unless a contrary intent is apparent from the will. Brandeis v. Brandeis, 150 Neb. 222, 34 N. W. 2d 159.

The will herein contains the following language: "Neither of the beneficiaries herein shall acquire any vested interest in said trust estate until the same becomes payable under the terms hereof, * * *." The use of the word "Neither" raises a question as to whom reference is made. Is it the widow and son of the testator? The property vested in the widow in trust at the testator's death, so obviously she is not included in the reference. The intention apparent from the will is that the word "Neither" refers to the surviving son and the two groups of grandchildren. This becomes evident when we consider the position in the will of the paragraph containing the word. It follows the paragraph providing for the son and the paragraph providing for the

grandchildren. It becomes even more apparent when we consider the language, "Upon the death of my son, Gay Marshall Shiels, the trustee shall divide the said trust estate into two equal parts * * *." We hold, therefore, that it was the intention of testator that no interest in the trust remainder should vest in the grandchildren until the death of testator's son, Gay Marshall Sheils, which occurred on October 29, 1962.

Thomas J. Sheils died November 20, 1944, without issue. This was before the interest of Gay Marshall Sheils vested. Shirley Louise Sheils Moore, the widow of Thomas J. Sheils, filed an answer, asserting an interest in the provision made for her former husband. The effect of the judgment of the trial court is to deny her any interest. She has made no appearance in this court. Under our determination that no interest vested in the grandchildren until October 29, 1962, the prospective interest of Thomas J. Sheils terminated with his death. His widow, therefore, would have no interest herein.

There is a presumption that a testator intended to dispose of his entire estate and not to die intestate either as to the whole or as to any part thereof. Where a provision of a will is fairly open to more than one construction, a construction resulting in an intestacy as to any part of the estate will not be adopted if by a reasonable construction it can be avoided. Attebery v. Prentice, 158 Neb. 795, 65 N. W. 2d 138.

The Sheils argue that the provisions made for the grandchildren are individual gifts and that the lapsation of the provision for Thomas J. Sheils creates a resulting trust. They contend that this is so because the grandchildren are individually named; that substitutional representation is provided; and that unequal amounts are given within the class. These provisions are certainly indicative of individual gifts unless there is a clear intent otherwise obvious in the will.

We said in Katt v. Claussen, 174 Neb. 603, 118 N. W. 2d 1002: "It is possible, however, that the names of

the prospective beneficiaries may be given and yet the gift may be to a class." There is also considerable authority that a substitutional gift in case any of the legatees shall die is not sufficient reason for holding that the gift is to individuals rather than to a class. See, In re Boyer's Estate, 115 Pa. Super. 501, 175 A. 728; Strauss v. Strauss, 363 Ill. 442, 2 N. E. 2d 699, 105 A. L. R. 1386; Dove v. Johnson, 141 Mass. 287, 5 N. E. 520; Tate v. Tate, 126 Tenn. 169, 148 S. W. 1042; Saunders v. Saunders, 109 Va. 191, 63 S. E. 410.

An unequal distribution within a group is a strong indication of individual gifts. In this will we have a preference shown the grandsons. The provisions for each are identical. They do not become operative, however, unless the grandson or his issue survive Gay Marshall Sheils, which did not happen in the instance of Thomas J. Sheils.

Did the testator intend to treat his grandchildren as two separate classes, as contended by the sisters, or as individuals, as contended by the Sheils? Ordinarily, the determination depends upon the generally accepted, literal, natural, and grammatical meaning of the language used in the will, but it is not wholly limited thereby. It is the substance and intent, rather than the words, which control. To determine this intent, the general scope of the will, the general purpose of the testator, the language used, the relationship of the beneficiaries and the testator, as well as the surrounding circumstances, within proper limits, may be considered.

What is the general scheme of this will? A close scrutiny indicates that relationship of the parties was a motivating factor. The general intent manifested in the will was to provide for the wife for life, then the surviving son for life, then to divide the estate equally between two groups of grandchildren. The testator had two sons, one of whom predeceased the making of the will. The surviving son was given all of the income from the estate after the death of his mother. Looking

at the disposition of the remainder, we think it appears that the testator intended to make a complete disposition of all of his property. He directed that it be divided into two equal parts, and assigned each of those parts to the children of his own children or their issue. In this way, testator divided his grandchildren into two classes, a natural classification for him to make, particularly if he wanted to treat the issue of his two sons equally. The will clearly indicates an equal division between the two sets of grandchildren. It is true that within their respective groups, he did show a preference for the grandsons, but even here he made the same provisions within the respective groups.

As suggested above, there was no vesting of any interest in the grandchildren until the death of Gay Marshall Sheils. At the time of the death of Gay Marshall Sheils, Thomas J. Sheils was dead. The will provides that the trust estate should be divided into two equal parts. The part assigned to the children of Iloa J. Sheils is in the following language: "* * * the trustee shall hold the other part in trust for my grandchildren, Thomas J. Shiels, Thea June Shiels and Vanice Shiels." Thomas J. Shiels having died, the property is held in trust for Thea June Sheils and Vanice Sheils. The provisions made for Thomas J. Sheils are not operative because he did not survive to become vested with an interest in the trust estate. The situation present herein is in intent analogous to In re Estate of Zimmermann, 122 Neb. 812, 241 N. W. 553. To hold that the portion of the trust provided for Thomas J. Sheils should be treated as a resulting trust and four-sixths thereof given to the children of Gay Marshall Sheils would defeat the intention of the testator as manifested within the four corners of his will and interpreted in the light of the family situation. This intention should prevail over other considerations.

The judgment of the trial court directed the trustee to pay the three-fifths of the one-half share created

under the trust for Thomas J. Sheils to the sisters. This is in error. The trustee should be directed to hold the one-half share in trust for Thea June Sheils and Vanice Sheils and pay to them the income therefrom as provided in the will, and upon the death of either to pay to her children her share of the principal, free from trust. We direct that the judgment of the trial court be so modified, and affirm the judgment as so modified.

AFFIRMED AS MODIFIED.

JAMES A. DAVIS ET AL., APPELLANTS, V. GENERAL MOTORS ACCEPTANCE CORPORATION, A CORPORATION, ET AL., APPELLEES.

127 N. W. 2d 907

Filed April 24, 1964. No. 35706.

1. **Constitutional Law.** Chapter 8, Laws 1963, Special Session, page 98 (L. B. 16), relating to agreements for the sale of personal property upon an installment basis which are judicially determined to constitute loans, is special legislation in violation of Article III, section 18, Constitution of Nebraska, and, therefore, unconstitutional.
2. ———. Chapter 6, Laws 1963, Special Session, page 85 (L. B. 19), which provides that the judicial determination that certain statutes are unconstitutional shall have prospective effect only and that agreements entered into in accordance with such statutes prior to such determination shall be valid and enforceable is an invasion of the powers and authority of the judiciary in violation of Article II, section 1, Constitution of Nebraska, and, therefore, unconstitutional.
3. ———. Chapter 9, Laws 1963, Special Session, page 103 (L. B. 17), is valid and constitutional legislation and is applicable to all loans which are subject to the Installment Loan Act except where an action on such a loan has been reduced to final judgment.
4. ———. The prohibition in the Constitution of Nebraska against retroactive legislation affecting civil rights or regulating civil remedies is in the Bill of Rights which provides that no person shall be deprived of his property without due process of law, and that no law impairing the obligation of contracts

shall be passed. Art. I, secs. 3 and 16, Constitution of Nebraska.

5. **Statutes.** The repeal of a statute without any provision for saving the rights founded on the statute determines an action founded upon the statute.
6. ———. The purpose of the general saving clause, section 49-301, R. R. S. 1943, which provides that the repeal of a statute shall not affect pending actions founded thereon, nor causes of action not in suit that occurred prior to the repeal "except as may be provided in such repealing statute" is to avoid the effect of the rule stated above unless the Legislature expressly provides that the repealing act shall apply retroactively.
7. ———. The general saving clause, section 49-301, R. R. S. 1943, does not apply to Chapter 9, Laws 1963, Special Session, page 103 (L. B. 17), because the Legislature expressly provided in that act that it should have retroactive effect.
8. **Usury: Forfeitures.** An action against a lender under the Installment Loan Act is an action to enforce a forfeiture which, in practical effect, is punitive as to him.
9. **Usury.** Usury statutes are generally held to be penal in nature and subject to amendment or repeal by retroactive legislation.
10. ———. There is no vested right in a usury law and it may be repealed or changed so as to affect causes of action and defenses in pending suits.
11. ———. Parties to usurious contracts hold any right they may have to penalties given by law, subject to a modification or repeal by the Legislature, and the repeal of a statutory prohibition against usury releases any penalties imposed, and thus validates the contract.
12. ———. The right of a party to avoid his contract which is given to him by a usury statute, is given to him for purposes of its own, and not because it affects the merits of his obligation. It is a privilege that belongs to the remedy, and forms no element in the rights that inhere in the contract. It is a naked legal right which is not protected by any constitutional provision.
13. **Constitutional Law: Usury.** The repeal of a usury statute by a retroactive act does not impair the obligation of a previous contract but confirms the obligation which the parties assumed and permits its enforcement in accordance with the agreement of the parties.
14. **Contracts.** A party who has made an illegal contract has no right to insist that it remain permanently illegal. Public policy cannot be made static for those who, for reasons of their own, make contracts beyond their legal powers. No person has a vested right to be permitted to evade contracts which he has illegally made.

15. **Constitutional Law: Contracts.** The Legislature may validate contracts which were illegal when made by the retroactive repeal of a previous law. Where the Legislature provides that a repeal shall be retroactive, contracts which were illegal when made, because of the law which has been repealed, are validated.
16. **Usury.** The violation of the Installment Loan Act is a defense, and only a defense, which is available to the borrower and his privies, and a contract made in violation of the act is enforceable as against all others.

Appeal from the district court for Hall County: DONALD H. WEAVER, Judge. Affirmed.

Richard L. Debacker, for appellants.

Charles S. Reed, Clarence A. Davis, Luebs, Elson, Tracy & Huebner, and Cunningham & Cunningham, for appellees.

Kerrigan, Line & Martin, Nelson, Harding & Acklie, Charles F. Noren, and E. D. Warnsholz, for amici curiae.

Heard before WHITE, C. J., CARTER, MESSMORE, YEAGER, SPENCER, BOSLAUGH, and BROWER, JJ.

BOSLAUGH, J.

On January 31, 1963, James A. Davis and Joan B. Davis, the plaintiffs, entered into a contract of conditional sale for the purchase of a truck from the defendant, Kinman Chevrolet-Cadillac, Inc. Later the contract was assigned to the defendant, General Motors Acceptance Corporation. This action was brought to declare the contract void and to recover the payments which the plaintiffs have made under the contract.

The petition alleged that the contract for the purchase of the truck conformed to the 1959 Nebraska Installment Sales Act; that it was in fact a loan made in violation of the Nebraska Installment Loan Act; and that it was, therefore, void and unenforceable. A motion to strike certain allegations of the petition relating to the plaintiffs' right to relief filed by General Motors Accept-

ance Corporation was sustained. Thereafter, general demurrers filed by both defendants were sustained and the action dismissed.

The plaintiffs' motion for new trial was overruled and they have appealed. The assignments of error relate to the sustaining of the motion to strike and the general demurrers. Because the action was determined upon the motion to strike and the demurrers of the defendants, there is no issue of fact presented. The allegations of the petition must be accepted as true and the question which is to be determined is whether the plaintiffs have any right to the relief requested.

In Elder v. Doerr, 175 Neb. 483, 122 N. W. 2d 528, this court held that the 1959 Nebraska Installment Sales Act was unconstitutional and that a contract made in conformity with it violated the Nebraska Installment Loan Act and was subject to the penalties prescribed in that act. A subsequent decision reached the same result concerning the 1963 Nebraska Installment Sales Act. Stanton v. Mattson, 175 Neb. 767, 123 N. W. 2d 844.

The Seventy-fourth (Extraordinary) Session of the Legislature, which convened on October 21, 1963, enacted legislation relating to installment sale contracts and installment loans. The defendants contend that three of the statutes passed at that session of the Legislature are applicable to this action and defeat the plaintiffs' right to relief. The defendants rely upon Legislative Bills 16, 17, and 19 enacted by the Special Session of the 1963 Legislature. For convenience, these acts, which appear respectively as Chapters 8, 9, and 6 of the Session Laws, Seventy-fourth (Extraordinary) Session of the Legislature of Nebraska, will be referred to as L. B. 16, L. B. 17, and L. B. 19.

The plaintiffs contend that the statutes referred to are unconstitutional and, therefore, are of no effect so far as this action is concerned. Thus, the issue presented is the

validity and effect of L. B. 16, L. B. 17, and L. B. 19 with respect to this action.

The Installment Loan Act originally provided that a loan made in violation of the act was void and that the licensee had no right to collect or receive any principal, interest, or charges whatsoever. §§ 45-137, 45-138, 45-154, 45-155, R. R. S. 1943. L. B. 17 amends sections 45-137, 45-138, 45-154, and 45-155 of the Installment Loan Act to provide that a loan made in violation of the act shall not on that account be void, but the licensee shall have no right to collect or receive any interest or charges, and any interest or other charges which have been collected shall be forfeited and refunded to the borrower. L. B. 17 further provides that the penalty provisions as amended shall apply to all transactions made prior to the effective date of the act except where an action on such a transaction has been reduced to final judgment. L. B. 17 contained an emergency clause, was approved on November 15, 1963, and became effective on that date.

L. B. 17 is general in nature and applies to all loans which are subject to the Installment Loan Act. The plaintiffs do not contend that the Legislature has no power to change the penalty provisions of the Installment Loan Act, or that the power was defectively exercised, except insofar as L. B. 17 was intended to apply to transactions which occurred before its effective date. The contention that the Legislature cannot make such legislation retroactive is made with respect to all three acts and will be considered later.

L. B. 16 relates to contracts for the sale of property upon an installment basis. The act defines an "agreement" as an agreement for the sale of personal property upon an installment basis including contracts entered into pursuant to the 1959 and 1963 Installment Sales Acts. It further provides that in the event such an agreement is judicially determined to constitute, in whole or in part, a loan with interest, the applicable limit on such interest

shall be that set forth in section 45-101, R. S. Supp., 1961, as amended, and the sole remedy or defense available to such a buyer by reason thereof shall be that prescribed in section 45-105, R. R. S. 1943.

Section 45-101, R. S. Supp., 1961, is a part of the general usury or interest statute and generally prohibits interest in excess of 9 percent per annun on loans to which it is applicable. Section 45-105, R. R. S. 1943, is also a part of the general interest statute and provides generally that the penalty for violation of the act shall be forfeiture of interest.

L. B. 16 also provides that it shall apply exclusively to all agreements made prior to the effective date of the act except where an action on such an agreement has been reduced to final judgment. L. B. 16 contained an emergency clause, was approved on November 15, 1963, and became effective on that date.

L. B. 16 is an attempt to legislate specially in regard to contracts for the sale of personal property upon an installment basis. Reduced to its simplest form, it is an effort to classify installment loans made incident to the sale of personal property separately from all other installment loans. This was held to be an unreasonable and unconstitutional classification in Stanton v. Mattson, *supra*. For the reasons stated in Stanton v. Mattson, *supra*, we conclude that L. B. 16 is special legislation which violates Article III, section 18, of the Constitution of Nebraska, and is therefore invalid.

L. B. 19 provides, in part, as follows: "Notwithstanding the provisions of any other statute, any statute containing mandatory provisions requiring compliance therewith and subjecting those acting within the operative scope thereof to civil or criminal sanctions, penalties, or forfeitures for failure to so comply is judicially determined to be unconstitutional, such judicial determination shall be given prospective effect only and agreements entered into in accordance with such statutes pri-

or to the date of the particular decision holding the applicable statute unconstitutional shall be fully valid and enforceable according to their terms, subject to common law defenses applicable to all contracts."

L. B. 19 also provides that it shall apply to statutes enacted and agreements entered into in accordance therewith prior to its effective date. L. B. 19 contained an emergency clause, was approved on November 22, 1963, and became effective on that date.

It is a settled principle of constitutional law that the construction and interpretation of the Constitution is a judicial function and it is the duty of the judicial branch of our government to determine whether an act of the Legislature contravenes the provisions of the Constitution. Searle v. Yensen, 118 Neb. 835, 226 N. W. 464, 69 A. L. R. 257. This power and duty necessarily include the authority to determine what effect if any an unconstitutional statute shall have upon the rights of parties which may have been affected by it.

L. B. 19 is an attempt by the Legislature to give limited validity to certain of its acts which are later determined to be unconstitutional by providing that the determination of invalidity shall have prospective effect only. L. B. 19 is, therefore, an invasion of the powers and authority of the judiciary and violates the doctrine of separation of powers found in Article II, section 1, of our Constitution. We conclude that L. B. 19 is unconstitutional.

We now consider the power and authority of the Legislature to give retroactive effect to L. B. 17. It is important to a correct understanding of this question to recognize that all of the rights which the plaintiffs claim arise out of the penalty provisions of the Installment Loan Act. The contract which the plaintiffs entered into would have been valid at common law. See, 55 Am. Jur., Usury, § 3, p. 324; 91 C. J. S., Usury, § 5, p. 569. The entire claim to invalidity is based upon the

former provision in the Installment Loan Act that loans made in violation of the act were void and that the licensee had no right to collect or receive any principal, interest, or charges whatsoever. This provision was repealed by L. B. 17 and a provision for forfeiture of interest and charges substituted.

The prohibition in the Constitution of Nebraska against retroactive legislation affecting civil rights or regulating civil remedies is in the Bill of Rights which provides that no person shall be deprived of his property without due process of law, and that no law impairing the obligation of contracts shall be passed. Art. I, secs. 3 and 16, Constitution of Nebraska. Thus, the question is whether the plaintiffs had a vested right in the penalty provisions of the Installment Loan Act as they existed at the time the contract was entered into and whether the repeal of the penalty provisions impaired the obligation of the contract.

The repeal of a statute without any provision for saving the rights founded on the statute determines an action founded upon the statute. In Bennet v. Hargus, 1 Neb. 419, this court said: "By a long course of judicial decisions it has become a settled principle that a right of action, or a remedy founded solely on a statute, or a pending suit to enforce such remedy, not prosecuted to judgment, is terminated by the repeal of such statute, without a provision for saving rights accrued under it, or suits already commenced to enforce them. The reason is apparent. If there be no such remedy at common law, then, after the unconditional repeal of the statute which created it, there is neither common law nor statute to uphold it." See, also, City of Beatrice v. Gage County, 130 Neb. 850, 266 N. W. 777.

In 1873 the Legislature enacted the general saving clause statute. G. S. p. 1056. Section 2 of the act now appears as section 49-301, R. R. S. 1943, and provides that the repeal of a statute shall not affect pending actions

founded thereon, nor causes of action not in suit that occurred prior to the repeal "except as may be provided in such repealing statute." The purpose of the statute is to avoid the effect of the rule stated in Bennet v. Hargus, *supra,* except where the Legislature expressly provides that the repealing act shall apply retroactively. State ex rel. City of Grand Island v. Union Pacific R. R. Co., 152 Neb. 772, 42 N. W. 2d 867.

The general saving clause, section 49-301, R. R. S. 1943, has no application in this case because of the express language in L. B. 17, section 5, that the penalty provisions of the Installment Loan Act as amended by L. B. 17 shall apply to all transactions made prior to its effective date except where an action on such a transaction has been reduced to final judgment. Thus, the Legislature has provided in the repealing statute that the repeal of the penalty provisions of the Installment Loan Act, as they existed prior to L. B. 17, shall affect all transactions except those on which an action has been reduced to final judgment. City of Fremont v. Dodge County, 130 Neb. 856, 266 N. W. 771.

Forfeiture is one of the means provided in the Installment Loan Act to insure compliance with its terms. It is a liability of the lender which results from the violation of the statute. Thus, an action against a lender under the Installment Loan Act is an action to enforce a forfeiture which, in practical effect, is punitive as to him. Abel v. Conover, 170 Neb. 926, 104 N. W. 2d 684. In the Abel case this court discussed the general interest statute, which provides a forfeiture of interest as a penalty for its violation, and noted that the forfeiture prescribed in the Installment Loan Act differs only in degree.

A forfeiture such as is prescribed in the Installment Loan Act is generally considered to be penal in nature. Because usury statutes are generally held to be penal in nature, they are subject to amendment or repeal by ret-

roactive legislation. The rule is stated in 16 C. J. S., Constitutional Law, § 254, p. 1246, as follows: "There is no vested right in the usury laws, which, therefore, may be repealed or changed so as to affect causes of action and defenses even in pending suits."

In 55 Am. Jur., Usury, § 4, p. 326, the rule is stated as follows: "Upon the theory that the privilege of pleading usury as a defense pertains only to the remedy and is not an element in the rights inhering in the contract, many courts have held that the legislature by the amendment or repeal of the usury statutes abridge or take away the right to assert usury as a defense as to contracts previously entered into. It is generally considered that parties to usurious contracts hold any right they may have to penalties given by law, subject to a modification or repeal by the legislature, and that the repeal of a statutory prohibition against usury releases any penalties imposed, and thus validates the contract."

This conforms to the general rule that no one has a vested interest in a statute which is penal in nature. As stated in 23 Am. Jur., Forfeiture and Penalties, § 40, p. 632: "A mere penalty never vests, but remains executory; the repeal of a statute before a penalty is enforced is not a deprivation of vested rights. The unqualified repeal of a statute imposing a penalty operates the same way as the repeal of a strictly criminal statute. It abrogates all rights of action which have not been reduced to judgments. All pending actions and proceedings to recover a penalty which have not been prosecuted to a final judgment are defeated by the repeal. Therefore, the repeal of a statute which imposes a penalty will prevent any prosecution, trial, or judgment for penalties accruing while such statute was in force, unless the contrary is provided in the repealing statute or some other existing statute." See, also, Kleckner v. Turk, 45 Neb. 176, 63 N. W. 469; Globe Publishing Co. v. State

Bank of Nebraska, 41 Neb. 175, 59 N. W. 683, 27 L. R. A. 854.

Perhaps the leading case in the United States on this question is Ewell v. Daggs, 108 U. S. 143, 2 S. Ct. 408, 27 L. Ed. 682. That case involved a Texas statute which provided that contracts in violation of the statute "shall be void and of no effect for the whole premium or rate of interest only." After the contract had been made, the statute was repealed by a constitutional amendment. In holding the repeal of the statute to be retroactive the court said: "The effect of the usury statute of Texas was to enable the party sued to resist a recovery against him of the interest which he had contracted to pay, and it was, in its nature, a penal statute inflicting upon the lender a loss and forfeiture to that extent. Such has been the general, if not uniform, construction placed upon such statutes. And it has been quite as generally decided that the repeal of such laws, without a saving clause, operated retrospectively, so as to cut off the defence for the future, even in actions upon contracts previously made. And such laws, operating with that effect, have been upheld, as against all objections on the ground that they deprived parties of vested rights, or impaired the obligation of contracts. The very point was so decided in the following cases: Curtis v. Leavitt, 15 N. Y. 9; Savings Bank v. Allen, 28 Conn. 97; Welch v. Wadsworth, 30 Conn. 149; Andrews v. Russell, 7 Blackf. 474; Wood v. Kennedy, 19 Ind. 68; Town of Danville v. Pace, 25 Grat. 1; Parmelee v. Lawrence, 48 Ill. 331; Woodruff v. Scruggs, 27 Ark. 26. * * * And these decisions rest upon solid ground. Independent of the nature of the forfeiture as a penalty, which is taken away by a repeal of the act, the more general and deeper principle on which they are to be supported is, that the right of a defendant to avoid his contract is given to him by statute, for purposes of its own, and not because it affects the merits of his obligation; and that whatever the statute

gives, under such circumstances, as long as it remains in fieri, and not realized by having passed into a completed transaction, may, by a subsequent statute, be taken away. It is a privilege that belongs to the remedy, and forms no element in the rights that inhere in the contract. The benefit which he has received as the consideration of the contract, which, contrary to law, he actually made, is just ground for imposing upon him, by subsequent legislation, the liability which he intended to incur. That principle has been repeatedly announced and acted upon by this court. Read v. Plattsmouth, 107 U. S. 568; and see Lewis v. McElvain, 16 Ohio, 347; Johnson v. Bentley, Ib. 97; Trustees v. McCaughy, 2 Ohio State, 152; Satterlee v. Mathewson, 16 S. & R. 169; S. C. in error; 2 Pet. 380; Watson v. Mercer, 8 Pet. 88. * * * The right which the curative or repealing act takes away in such case is the right in the party to avoid his contract, a naked legal right which it is usually unjust to insist upon, and which no constitutional provision was ever designed to protect. Cooley Constitutional Limitations, 378, and cases cited."

In Gibson v. Sherman County, 97 Neb. 79, 149 N. W. 107, this court cited and quoted from Ewell v. Daggs, *supra,* with approval.

In Matthews v. Guenther, 120 Neb. 742, 235 N. W. 98, this court said: "In Gibson v. Sherman County, 97 Neb. 79, this court, speaking through Sedgwick, J., has approved the doctrine as to usury announced by the supreme court of the United States in Ewell v. Daggs, 108 U. S. 143, in effect holding, 'the right of a defendant to avoid his contract is given to him by statute, for purposes of its own, and not because it affects the merits of his obligation,' and its penalties will be limited, supported and continued only when, and to the extent, the express terms thereof provide."

The foregoing authorities establish that there is no vested right in a usury statute. Lincoln Building & Saving Assn. v. Graham, 7 Neb. 173, which holds to the con-

trary and upon which the plaintiffs rely, must be considered as having been overruled in view of the subsequent decisions of this court which have been discussed.

These same authorities establish that the repeal of a usury statute by a retroactive act does not impair the obligation of a previous contract. In fact, to contend otherwise involves a contradiction in terms. By removing the statutory ban to the enforcement of the contract, the repealing act confirms the obligation which the parties assumed and permits its enforcement in accordance with the agreement of the parties. The rule is stated in 16A C. J. S., Constitutional Law, § 361, p. 31, as follows: "A statute may not be declared unconstitutional on the ground that it gives binding force to a voluntary agreement void or unenforceable when made. Acts validating usurious loans and those perfecting defective conveyances may be mentioned as examples of this class of legislation."

The following which appears in McNair v. Knott, 302 U. S. 369, 58 S. Ct. 245, 82 L. Ed. 307, is applicable here: "There is nothing novel or extraordinary in the passage of laws by the Federal Government and the States ratifying, confirming, validating, or curing defective contracts. Such statutes, usually designated as 'remedial,' 'curative,' or 'enabling,' merely remove legal obstacles and permit parties to carry out their contracts according to their own desires and intentions. Such statutes have validated transactions that were previously illegal relating to mortgages, deeds, bonds, and other contracts. Placing the stamp of legality on a contract voluntarily and fairly entered into by parties for their mutual advantage takes nothing away from either of them. No party who has made an illegal contract has a right to insist that it remain permanently illegal. Public policy cannot be made static by those who, for reasons of their own, make contracts beyond their legal powers. No person has a vested right to be permitted to evade contracts which he

has illegally made." See, also, Gross v. United States Mortgage Co., 108 U. S. 477, 2 S. Ct. 940, 27 L. Ed. 795; Petterson v. Berry, 125 F. 902.

The Legislature has the power, by the retroactive repeal of a previous law, to validate contracts which were illegal when made. This rule is stated in Restatement, Contracts, § 609, p. 1128, as follows: "A bargain that is illegal when formed does not become legal * * * by reason of a change of law, except where the Legislature manifests an intention to validate the bargain." Illustration 2 which appears under section 609 is as follows: "A borrows money from B, promising to pay a rate of interest forbidden by law. Later, but before the time for performing the bargain, a statute is passed allowing such interest. Unless a purpose is manifested in the statute to validate existing bargains, the bargain remains illegal * * *." See, also, 6 Williston on Contracts (Rev. Ed.), § 1758, p. 4992.

The intention of the Legislature to validate existing contracts is expressed in section 5 of L. B. 17 which provides that the act shall apply to all transactions made prior to the effective date of the act except where an action on such a transaction has been reduced to final judgment.

The plaintiffs argue that a contract made in violation of the Installment Loan Act prior to its amendment by L. B. 17 was absolutely void and the Legislature cannot create a contractual liability where none existed before. This argument assumes that a contract made in violation of the statute prior to its amendment by L. B. 17 was void in the sense that no one could acquire any rights or liabilities under it and that it was completely unenforceable.

This question was considered and determined in Commonwealth Trailer Sales, Inc. v. Bradt, 166 Neb. 1, 87 N. W. 2d 705, 70 A. L. R. 2d 1397. In that case the plaintiff claimed the right to possession of a house trailer

under a chattel mortgage given to secure a loan made in violation of the Installment Loan Act. The defendant claimed possession of the trailer under an order of attachment obtained by a judgment creditor of the mortgagor. The defendant contended that the loan was absolutely void and that the mortgage could not be enforced. This court held that the defense arising under the Installment Loan Act was personal to the borrower and his privies and that the mortgage was valid as against the defendant. This court said: "The general rule is that the defense of usury is for the benefit of the borrower and is personal to him. See, 91 C. J. S., Usury, § 71, p. 648; 55 Am. Jur., Usury, § 121, p. 409. * * * As stated in 91 C. J. S., Usury, § 71, p. 648: 'Since usury laws are enacted for the protection of needy borrowers, and not to punish extortion in money lenders, the defense of usury is purely personal to the borrower, or those in privity with him, as discussed infra § 126, such as the debtor's sureties, guarantors, heirs, devisees, and personal representatives. This is true whether the statutes declare the contract void in whole or only to the extent of the usury, or whether a penalty is given for the taking. In order to question the validity of a usurious contract, the right must be based on the original debtor's right.' * * * We held in Cheney v. Dunlap, 27 Neb. 401, 43 N. W. 178, 5 L. R. A. 465, that: 'The plea of usury as a defense is personal to the borrower and his sureties and privies.' * * * That is, persons in privity with a borrower have the right to attack a transaction as usurious. 91 C. J. S., Usury, § 126, p. 714; 55 Am. Jur., Usury, § 122, p. 410. But strangers thereto may not take advantage thereof. 91 C. J. S., Usury, § 125, p. 713. As stated in 91 C. J. S., Usury, § 124, p. 712: '* * * even though the taking of usury is prohibited and is made punishable as a misdemeanor, the usurious contract will not be void as to third persons.' * * * It is true that the Legislature has broadened the scope of the effect of usury, as it relates to installment loans, in com-

parison to what it was and now is in the case of ordinary loans. See § 45-105, R. R. S. 1943. But it does not appear that the Legislature, by the enactments relating to installment loans, has extended the scope thereof as to those to whom it is available as has been previously fixed and determined by this court. If the Legislature intended to do so it could have easily done so by proper language. It is neither the privilege nor the desire of this court to do so in the absence thereof for what is usury, and the effect thereof, is a subject for the Legislature."

A dissenting opinion was filed which took the position that the effect of the statute was to declare the loan absolutely void and that it was unenforceable as against anyone. A concurring opinion was filed which stated as follows: "We agree with the majority opinion. However, in view of the dissent we desire to point out the fallacy of its reasoning. The general usury law of this state since 1879 has provided that if interest is contracted for, received, or reserved, in excess of the maximum fixed by law, no interest is collectible. Under the holdings of this court, only the debtor and those in privity with him could avail themselves of the benefits of this statute. Under the Installment Loan Act, if usurious interest is contracted for, received, or reserved, neither interest nor the principal is collectible. The penalty for the violation of the usury provisions has been increased, but the rule that the defense of usury is available only to the debtor and his privies has not been changed. Such a change is a proper subject of legislation and not one that properly can be made effective by judicial pronouncement."

The decision in the Bradt case was reaffirmed in a recent opinion of this court. In Rader v. Burnett, 175 Neb. 663, 122 N. W. 2d 747, this court held that a contract of conditional sale, illegal because in violation of the Installment Loan Act, was enforceable as against an assignee of the purchaser. The Bradt case was cited

with approval and this court held that the defense of usury under the Installment Loan Act is personal to the borrower and those in privity with him.

In both the Bradt case and the Rader case this court relied upon decisions in which the general interest statute (§ 45-105, R. R. S. 1943) was applicable, and arrived at the same result that is reached in those cases in which the general interest statute is applicable. The Bradt case and the Rader case establish that violation of the Installment Loan Act is a defense, and only a defense, which is available to the borrower and his privies, and that a contract made in violation of the Installment Loan Act is enforceable as against all others except the original purchaser and his privies. Consequently, such contracts are not void in the sense that no one can acquire any rights or obligations under them.

We conclude that L. B. 17 is a valid and constitutional act of the Legislature and that it is applicable to this action.

The judgment of the district court is affirmed.

AFFIRMED.

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for such purpose, and in absence of other controlling facts is without authority to accept for its principal anything but that which the law declares to be legal tender or which is by common consent considered as money and passes as such at par. Willan v. Farrar ---------- 1

Bills and Notes.

1. The delivery to, or acceptance by, the creditor of a debtor's check, as distinguished from the actual payment of the check, is not absolute payment of the obligation for which the check is given in the absence of any agreement or consent to receive it as payment. Willan v. Farrar ---------- 1
2. A creditor who has accepted paper, such as a check, bill, or note, in conditional payment of a debt may ordinarily, if such paper has not been paid, rescind the conditional payment and sue on the original indebtedness. Willan v. Farrar ---------- 1

Children Born Out of Wedlock.

The determination of the trial court in fixing the amount of a judgment against the father of a child born out of wedlock, and the manner and method of its payment, is largely a matter of discretion which will not be disturbed in the absence of a showing of an abuse of such discretion. State ex rel. Stobel v. Stanek ---------- 100

Constitutional Law.

1. A prohibition of activities on Sunday is for the promotion of health, peace, and good order of society by requiring a periodical day of rest and is generally sustained on the ground that it is within the domain of police power. Skag-Way Department Stores, Inc. v. City of Grand Island ---------- 169
2. A city ordinance to meet constitutional requirements must respond to the tests required of statutory enactments. Skag-Way Department Stores, Inc. v. City of Grand Island ---------- 169
3. Rule as to reasonable classification of persons and property for purposes of legislation stated. Skag-Way Department Stores, Inc. v. City of Grand Island ---------- 169
4. With respect to whether a classification made by a legislative body is unconstitutional, discrimination is the very essence of classification and is not ob-

jectionable unless founded upon distinctions which the court is compelled to find unreasonable. Skag-Way Department Stores, Inc. v. City of Grand Island ---------- 169

5. A city ordinance providing for Sunday closing cannot prohibit that which is harmless in itself, or require that to be done which does not tend to promote the health, comfort, safety, or welfare of society. Skag-Way Department Stores, Inc. v. City of Grand Island ---------- 169

6. A business or occupation which has no tendency to affect or endanger the public in connection with health, safety, morals, or general welfare is not within the police power. Skag-Way Department Stores, Inc. v. City of Grand Island ---------- 169

7. Exceptions to a general Sunday closing ordinance must, if the ordinance is to be valid, bear some relation to the public health, safety, morals, or general welfare. Skag-Way Department Stores, Inc. v. City of Grand Island ---------- 169

8. Sunday closing ordinance of city was in violation of the Constitutions of the United States and the State of Nebraska. Skag-Way Department Stores, Inc. v. City of Grand Island ---------- 169

9. Statute providing for the incorporation of villages by the county board upon the petition of a majority of taxable inhabitants is not an unlawful delegation of legislative power or a taking of property without due process of law. Kriz v. Klingensmith ---------- 205

10. Section 5 of the Uniform Reciprocal Enforcement of Support Act is constitutional. State ex rel. Brito v. Warrick ---------- 211

11. Rule for construction of legislative act invalid in part stated. State v. Lookabill ---------- 254

12. It is within the power of the Legislature to provide that the trial of petty offenses in violation of a city or village ordinance shall be triable without a jury, even if the ordinance is a reiteration of a statute covering the same offense under which the defendant would be entitled to a jury trial. State v. Lookabill ---------- 254

13. The words, "or damaged," in Article I, section 21, of the Constitution, include all actual damages resulting from the exercise of the right of eminent domain which diminish the market value of private property. Pieper v. City of Scottsbluff ---------- 561

14. The Legislature may not lawfully delegate its

legislative powers to an administrative agency. An exception to the rule obtains when a delegation of legislative power is authorized by the Constitution. School Dist. No. 8 v. State Board of Education -- 722

15. The Nebraska Constitution authorizes the grant of administrative and legislative powers to the State Department of Education, subject to implementation and limitation by the Legislature. School Dist. No. 8 v. State Board of Education ---------- 722

16. Subdivision (5)(c) of section 79-328, R. S. Supp., 1961, is not invalid in that it confers legislative power upon the State Department of Education in violation of Article II, section 1, of the Constitution. School Dist. No. 8 v. State Board of Education ---------- 722

17. The powers granted by subdivision (5)(c) of section 79-328, R. S. Supp., 1961, are adequately described in accordance with Article VII, section 15, of the Constitution. School Dist. No. 8 v. State Board of Education ---------- 722

18. Subdivision (5)(c) of section 79-328, R. S. Supp., 1961, is not so vague, ambiguous, and indefinite as to be unconstitutional. School Dist. No. 8 v. State Board of Education ---------- 722

19. Due process of law requires notice and an opportunity to be heard, as a matter of right and not by the let or leave of administrative officers or agencies. School Dist. No. 8 v. State Board of Education -- 722

20. Section 79-328, R. S. Supp., 1961, and section 84-913, R. S. Supp., 1961, may properly be considered in pari materia in determining whether or not due process of law has been afforded under the former section. School Dist. No. 8 v. State Board of Education ---------- 722

21. Compliance with the mandatory provision in section 84-913, R. S. Supp., 1961, requiring an administrative agency to adopt appropriate rules of procedure for notice and hearing, is necessary to give validity to its action when notice and hearing are essential to due process. School Dist. No. 8 v. State Board of Education ---------- 722

22. The conditions and limitations fixed by the Legislature in a delegation of power must be strictly complied with before such power may be lawfully exercised. School Dist. No. 8 v. State Board of Education ---------- 722

23. In setting up the fact standards upon which a sub-

ordinate agency may operate, the Legislature may make reasonable classifications of the objects of legislation for the purpose of legislating with reference thereto. McDonald v. Rentfrow ---------- 796

24. The power of classification rests with the Legislature and it will not be interfered with by the courts if real and substantial differences exist which afford a rational basis for classification. McDonald v. Rentfrow ---------- 796

25. In determining whether a classification of persons or property is a reasonable classification, the court will determine if the class selected is a proper and natural selection of those who, upon a reasonable view of the objectives of the act or the mischiefs to be remedied, should be subject to the regulations prescribed. McDonald v. Rentfrow ---------- 796

26. If the classification is determined to be reasonable, the Constitution is not violated if the law is made to operate generally and uniformly upon all of the class so constituted. McDonald v. Rentfrow ------ 796

27. Statute authorizing transfer of property in one school district to another held not an unreasonable classification and based upon a real and substantial difference in situation. McDonald v. Rentfrow ---------- 796

28. As a general rule, the Legislature may not delegate or impose legislative functions upon the judicial department of the government. McDonald v. Rentfrow 796

29. The Legislature may confer upon public boards or courts judicial power to determine the facts and equities under which legislation authorizes changes in school district boundaries. McDonald v. Rentfrow 796

30. In delegating such power, the Legislature must condition the determination by the court or the board upon reasonable and ascertainable fact standards. McDonald v. Rentfrow ---------- 796

31. Chapter 8, Laws 1963, Special Session, page 98, relating to agreements for the sale of personal property upon an installment basis which are judicially determined to constitute loans, is special legislation in violation of Article III, section 18, Constitution of Nebraska, and, therefore, unconstitutional. Davis v. General Motors Acceptance Corp. 865

32. Chapter 6, Laws 1963, Special Session, page 85, which provides that the judicial determination that certain statutes are unconstitutional shall have prospective effect only and that agreements entered

into in accordance with such statutes prior to such determination shall be valid and enforceable is an invasion of the powers and authority of the judiciary in violation of Article II, section 1, Constitution of Nebraska, and, therefore, unconstitutional. Davis v. General Motors Acceptance Corp. ---------- 865

33. Chapter 9, Laws 1963, Special Session, page 103, is valid and constitutional legislation and is applicable to all loans which are subject to the Installment Loan Act except where an action on such a loan has been reduced to final judgment. Davis v. General Motors Acceptance Corp. ---------- 865

34. The prohibition in the Constitution against retroactive legislation affecting civil rights or regulating civil remedies is in the Bill of Rights which provides that no person shall be deprived of his property without due process of law, and that no law impairing the obligation of contracts shall be passed. Davis v. General Motors Acceptance Corp. ------ 865

35. The repeal of a usury statute by a retroactive act does not impair the obligation of a previous contract. Davis v. General Motors Acceptance Corp. --------- 865

36. The Legislature may validate contracts which were illegal when made by the retroactive repeal of a previous law. Where the Legislature provides that a repeal shall be retroactive, contracts which were illegal when made, because of the law which has been repealed, are validated. Davis v. General Motors Acceptance Corp. ---------- 865

Contempt.

It is erroneous to quash a citation for contempt for failure to comply with the child-custody award of a nonsuperseded divorce decree for want of jurisdiction even though an appeal from the divorce decree has been lodged in the Supreme Court. Hall v. Hall ---------- 555

Contracts.

1. An express contract is proved by evidence of a definite offer and an unconditional acceptance. Where the offer requires a promise on the part of the offeree, a communicated acceptance is essential. Fairchild v. Fairchild ---------- 95

2. Delivery is not an element of a simple or informal contract. Fairchild v. Fairchild ---------- 95

3. Parties may contract subject to a condition pre-

cedent by agreeing that their contract shall not become effective until the happening of a specified event or condition. Fairchild v. Fairchild ---------- 95

4. It is the expressed intention of the parties which they manifest by the words and acts which is controlling. Fairchild v. Fairchild ---------- 95

5. Where a contract is executed but its effectiveness or fulfillment is dependent upon the doing of an agreed-upon condition before it shall become a binding contract, such contract cannot be enforced unless the condition is performed. Metschke v. Marxsen ---------- 240

6. The general principles governing the performance of contracts apply to subscriptions. If a material change in the plan or purpose for which a subscription is made is effected without the consent of the subscriber, he is excused from performing his promise unless estopped to deny his consent to the change. Barker v. Wardens & Vestrymen of St. Barnabas Church ---------- 327

7. It is assumed that parties to a contract know best what was meant by its terms and that whatever is done by the parties during the period of performance is done as they intended it should be. McLeod v. Crawford ---------- 513

8. The interpretation given contracts by the parties themselves, while engaged in their performance of it, is one of the best indications of their true intent and should be given great, if not controlling, influence. The courts ordinarily should enforce such construction. McLeod v. Crawford ---------- 513

9. Generally, the assertion of the invalidity of a contract is nullified by the subsequent acceptance of benefits growing out of the contract claimed to have been breached. McLeod v. Crawford ---------- 513

10. A provision in a contract giving a party the right to terminate for failure of the other party to make required payments under the contract is not an exclusive remedy. McLeod v. Crawford ---------- 513

11. The public building bond statute imposes the duty upon the state and public boards to take a bond for the benefit of materialmen before entering into a construction contract to which the general provisions of the mechanics' lien law do not apply. Westinghouse Electric Supply Co. v. Brookley ---------- 807

12. Materialmen have the statutory right to sue under

the contractor's bond. Westinghouse Electric Supply Co. v. Brookley ---------- 807

13. Such a bond is a contract made for the benefit of parties furnishing labor and materials in performance of the principal contract. Westinghouse Electric Supply Co. v. Brookley ---------- 807

14. Under statute providing that suit may be brought on public contractor's bond within 1 year after final settlement, final settlement is not synonymous with final payment, but precedes payment and denotes the proper administrative determination with respect to the amount due. Westinghouse Electric Supply Co. v. Brookley ---------- 807

15. The decisive date is not the date of payment, but the time when the administrative officer having the contract in charge made and recorded the determination of the amount due. Westinghouse Electric Supply Co. v. Brookley ---------- 807

16. A party who has made an illegal contract has no right to insist that it remain permanently illegal. Public policy cannot be made static for those who, for reasons of their own, make contracts beyond their legal powers. Davis v. General Motors Acceptance Corp. ---------- 865

17. The Legislature may validate contracts which were illegal when made by the retroactive repeal of a previous law. Where the Legislature provides that a repeal shall be retroactive, contracts which were illegal when made, because of the law which has been repealed, are validated. Davis v. General Motors Acceptance Corp. ---------- 865

Costs.

1. In a criminal action no costs can be assessed against a defendant except where authorized by statute. State v. Jungclaus ---------- 641

2. The pay, expenses, and mileage of jurors are not authorized by statute to be taxed as costs, and an order of the trial court to that effect is erroneous. State v. Jungclaus ---------- 641

Counties.

1. Special assessments cannot be enforced solely upon the ground that the property involved received special benefits. The right to levy and enforce special assessments for the construction of public improvements depends upon strict compliance with

the procedures prescribed by statute. McClary v. County of Dodge ---------- 627

2. A special assessment levied under drainage statute which has been paid and is later adjudged to be void may be recovered from the county. McClary v. County of Dodge ---------- 627

3. A county is not liable for interest on claims filed under tax statute prior to judgment. McClary v. County of Dodge ---------- 627

Courts.

1. A district court has the inherent power in either a civil or criminal case to correct the record of its judgments, or other orders, so that they may properly reflect the truth of the order or judgment that was actually entered. State v. Kortum ---- 108

2. A nunc pro tunc order, otherwise proper, may be entered either at the term in which the judgment or order was entered or at a subsequent term. State v. Kortum ---------- 108

3. While a court has the inherent power to correct its records to reflect the truth, such a power should not be exercised unless notice is given to all parties who may be affected by the entry of such order, if reasonably possible. State v. Kortum ---------- 108

4. It is the duty of a court to administer the law as it exists. State v. Tatreau ---------- 381

5. Courts do not have jurisdiction of election contests except insofar as it has been conferred by statute. Sutton v. Anderson ---------- 543

6. In the exercise of judicial discretion, there is an abuse of that power where the reasons and rulings of the court are clearly untenable and deprive a party of a substantial right clearly and fairly established and amount to a denial of justice. Wagner v. State ---------- 589

Criminal Law.

1. A variance in names alleged in an information and proved by the evidence will not be regarded as material unless it appears to the court that the jury was misled by it or that the defendant was otherwise prejudiced. State v. Paulson ---------- 126

2. A defect in the manner of charging an offense is waived if, upon being arraigned, the defendant pleads to the general issue, provided the information con-

tains no jurisdictional defect and is sufficient to charge an offense under the law. State v. Paulson -- 126
3. Effect of variation between verdict and the information stated. State v. Paulson ---------- 126
4. The venue of a prosecution for abandonment by a father of his child is the county in which the child is domiciled. State ex rel. Brito v. Warrick ---- 211
5. A motion for a separate trial is addressed to the sound discretion of the trial court, and its ruling on such a motion will not be disturbed in the absence of an abuse of discretion. State v. Hall -- 295
6. A defendant may not predicate error on an instruction that is more favorable to him than is required by the law applicable to the charge made. State v. Hall ---------- 295
7. Penal statutes are inelastic and must be strictly construed. They are never extended by implication. State v. Tatreau ---------- 381
8. Sufficient identification made and proper foundation laid for admission in evidence of hair samples. State v. Tatreau ---------- 381
9. The range of the penalty for any offense is a matter for legislative determination. State v. Tatreau ---------- 381
10. The district court exercises its discretion as to the penalty to be applied under any particular state of facts within the range provided by the law. State v. Tatreau ---------- 381
11. Error cannot be predicated on the failure to charge a defendant with a crime more favorable to the defendant as to penalty than the one with which he is charged. State v. Salanitro ---------- 393
12. To render the failure to give an instruction prejudicially erroneous, it is not sufficient that correct abstract propositions of law are therein embodied, but in addition it is requisite that such propositions be pertinent to the case being tried. State v. Salanitro ---------- 393
13. The intent with which an act is done is purely a mental process and difficult to establish by direct proof. It is generally a conclusion that must be drawn after a consideration of the actions of the defendant viewed in the light of the surrounding circumstances. State v. Jungclaus ------ 641
14. Where a county attorney is called as a witness by the defense, he may properly interpose objections

to questions propounded to him by defense counsel. State v. Jungclaus ---------- 641

15. In a criminal action no costs can be assessed against a defendant except where authorized by statute. State v. Jungclaus ---------- 641

16. The pay, expenses, and mileage of jurors are not authorized by statute to be taxed as costs, and an order of the trial court to that effect is erroneous. State v. Jungclaus ---------- 641

Crops.

Damages for the loss of crops, to be recoverable, must be direct and certain. Contingent, remote, or speculative damages will not be allowed. Arnold v. Huenefeld ---------- 683

Damages.

1. Damage which is uncertain, conjectural, or speculative as to the existence, nature, or proximate cause thereof is not the basis of a recovery. Caster v. Moeller ---------- 30

2. Damage for permanent injury may not be based upon speculation, probability, or uncertainty but it must be shown by competent evidence that such damage is reasonably certain as a proximate result of the pleaded injury. Caster v. Moeller ---------- 30

3. A person to whom another has tortiously caused harm is entitled to compensatory damages therefor if he establishes by proof the extent of such harm and the amount of his damage with reasonable certainty. Caster v. Moeller ---------- 30

4. Nominal damages to vindicate a technical right cannot be recovered in a negligence action where no actual loss has occurred. Beavers v. Christensen 162

5. The trial court should instruct the jury as to the proper basis upon which damages are to be assessed. It should fully and fairly inform the jury as to the various items of damage which should be taken into consideration in arriving at the verdict. Enterprise Co., Inc. v. Sanitary Dist. No. One ---------- 271

6. The verdict and judgment of $10,000 were not excessive under the evidence. Dawson v. City of Lincoln ---------- 311

7. A plaintiff relying on circumstantial evidence is not required to exclude the possibility that damages flowed from some cause other than the one

on which he relied. Petracek v. Haas O.K. Rubber Welders, Inc. ---------- 438

8. The plaintiff's duty of reasonable care to seek a cure does not require him to submit to treatment which involves substantial hazard of death or injury, nor even unduly painful treatments. He need not pursue methods which offer only a possibility of cure. Colton v. Benes ---------- 483

9. In an action in tort for personal injuries the question of whether or not the injured party should have mitigated his damages by submitting to an operation should not be submitted to the jury in the absence of evidence showing the extent of the hazards of death or injury and of the pain or suffering involved. Colton v. Benes ---------- 483

10. Since the mitigation of damages is defensive in nature, the burden of proving the plaintiff should submit to an operation to lessen his damage is upon the defendant. Colton v. Benes ---------- 483

11. The amount of damages sustained by the taking and damaging of land in eminent domain proceedings is peculiarly of a local nature to be determined by a jury, and its verdict will not ordinarily be interfered with if it is based on the testimony. Pieper v. City of Scottsbluff ---------- 561

12. Damages for the loss of crops, to be recoverable, must be direct and certain. Contingent, remote, or speculative damages will not be allowed. Arnold v. Huenefeld ---------- 683

13. The measure of damages for land taken for public use by eminent domain is computable as of the time of the taking, which is deemed to occur when the petition for condemnation is filed. Chaloupka v. State ---------- 746

14. The proper measure of damages in eminent domain proceedings 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.
Chaloupka v. State ---------- 746
Frank v. State ---------- 759

15. In the determination of remainder damage, it is the effect of the severance of the property taken on the value of the total unit of property that produces remainder damage. Frank v. State ---- 759

16. Land taken by right of eminent domain should be

valued as a portion of the tract of which it is a part and not as if it stood alone. Frank v. State 759
17. Damages in a condemnation action are peculiarly of a local nature, and weight and credibility of valuation testimony are for the jury. Frank v. State 759
18. The measure of damages for a conversion of personal property is the reasonable market value of the property at the time of the conversion. Baburek v. Skomal 832
19. The measure of damages for the wrongful withholding of possession of premises from one having a legal right thereto is the reasonable rental value of the property for the period of time the party entitled to possession is deprived of its use. Baburek v. Skomal 832

Deeds.

1. In a case where the only question presented for determination is the sufficiency of parol evidence to set aside a deed, such evidence, to be sufficient to overcome the presumption arising from the express terms of the deed, must be clear, unequivocal, and convincing. Goldsberry v. Hile 651
2. In order that it may be said that there has been passage of title to real estate proof of delivery of a deed is necessary. Brunson v. Kahler 735
3. Anything done by a grantor of title to real estate from which it is apparent that the delivery of a deed was intended, either by words or acts or both combined, is sufficient. Brunson v. Kahler 735
4. A delivered deed passes title even if there is no consideration. Brunson v. Kahler 735
5. By the delivery of a deed to a third person by the grantor without reserving control or dominion over it and with directions to the third person to hold it during the grantor's lifetime and upon the grantor's death to deliver it to the grantee, title to the real estate passes to the grantee. Brunson v. Kahler 735
6. Effect of deposit of deed in escrow as constituting delivery stated. Brunson v. Kahler 735
7. Where a grantor has deposited a deed to real estate in escrow, he cannot subsequently by withdrawing the deed or by other acts indicating a change of mind affect the completed transaction. Brunson v. Kahler 735

Divorce.

1. Where a divorced mother who has custody of children establishes a new domicile in Nebraska, that domicile becomes the domicile of the children. State ex rel. Brito v. Warrick ---------- 211
2. Proceedings to modify a divorce decree with regard to the care, custody, and maintenance of minor children are special statutory proceedings and in such cases jurisdiction must be proved or affirmatively shown on the record. Erpelding v. Erpelding 266
3. While the court in a divorce decree may on its own motion modify its provisions regarding the care, custody, and maintenance of children, it has no authority to do so without notice to the parties and an opportunity given them to be heard. Erpelding v. Erpelding ---------- 266
4. The district court may at any time within 6 months of the trial and decision of a divorce case, if no appeal is taken therefrom, vacate or modify the decree therein. Isom v. Isom ---------- 344
5. The right to vacate or modify a decree of divorce within 6 months of the trial and decision of the cause is not absolute but must be exercised within a sound discretion. Isom v. Isom ---------- 344
6. A decree of divorce may not be granted on the uncorroborated declarations, confessions, or admissions of the parties. In all cases corroborative evidence of the facts alleged to constitute a ground for divorce is required. Isom v. Isom ---------- 344
   Conry v. Conry ---------- 396
   Thompson v. Thompson ---------- 852
7. An appeal to modify a decree of divorce is triable de novo. The Supreme Court must reach a conclusion uninfluenced by what was done by the trial court, except if there is irreconcilable conflict in the evidence the Supreme Court may consider that the trial court saw the witnesses and accepted one version of the facts. Hossack v. Hossack ---------- 368
8. Ordinarily the interests and welfare of a child of tender years will be best served by placing the child in the custody of the natural mother, provided she is a fit and proper person. Hossack v. Hossack ---------- 368
9. Custody of minor children awarded to their mother in a divorce action will not be disturbed in a subsequent proceeding to modify the original decree, unless by changed circumstances it is affirmatively

shown that the mother is an unfit person to have their custody, or that the best interests of the children require such action. Hossack v. Hossack 368

10. Application for modification of divorce decree with respect to care, custody, and maintenance of minor children must be founded upon new facts and circumstances which have arisen since the entry of the decree. Hossack v. Hossack ---------- 368

11. In awarding or changing custody, the welfare of the minor children is the question of primary importance. Hossack v. Hossack ---------- 368

12. Conduct of one parent tending to poison child's mind against other parent is ground for order denying custody to party guilty of such conduct. Hossack v. Hossack ---------- 368

13. In a divorce action it is generally the best policy to keep minor children within the jurisdiction of the court. However, the welfare of the child should receive the paramount consideration in the determination of its custody. Hossack v. Hossack ---- 368

14. Corroborative evidence is required of the acts or conduct asserted as grounds for a divorce. Conry v. Conry ---------- 396

15. Corroboration of the acts of extreme cruelty testified to by a plaintiff in a divorce action is a basic essential for the right to a decree of divorce. The degree of corroboration required must be determined on the facts and circumstances of each particular case. Conry v. Conry ---------- 396

16. The trial court in a divorce action may in its discretion grant supersedeas. An absolute right to supersedeas does not exist except when it is allowable under the express provisions of supersedeas statute. Hall v. Hall ---------- 555

17. A trial court may in its discretion allow supersedeas of its order contained in a divorce decree awarding the custody of a minor child to one of its parents or to a third person. Hall v. Hall ---- 555

18. Where the divorce decree awarding custody of a minor child has not been superseded, such award may be enforced by the trial court, as in the case of any other nonsuperseded judgment. Hall v. Hall 555

19. Temporary orders in the district court allowing alimony, child support, or the custody of minor children terminate with the rendition of a final decree of divorce. Hall v. Hall ---------- 555

20. The trial court is invested with authority to en-

force its nonsuperseded judgment awarding the custody of a minor child by contempt proceedings notwithstanding an appeal to the Supreme Court. Hall v. Hall ---------- 555

21. It is erroneous to quash a citation for contempt for failure to comply with the child-custody award of a nonsuperseded divorce decree for want of jurisdiction even though an appeal from the divorce decree has been lodged in the Supreme Court. Hall v. Hall ---------- 555

22. A motion by the wife for an order for temporary child support from the husband, pending appeal, will be denied where it appears that the wife is not entitled to the care and custody of the child. Hall v. Hall ---------- 555

23. A child support judgment is a lien upon the real estate of the judgment debtor, both as to accrued and future installments, and can only be released by compliance with statute. Detter v. Erpelding 600

24. Statute with reference to collection of child support quoted. Detter v. Erpelding ---------- 600

25. Statute with reference to giving security for child support quoted. Detter v. Erpelding ---------- 600

26. Where a parent of a child has not released the child support lien nor asked the court for permission to do so as set forth in statute, the lien of such parent remains in full force and effect. Detter v. Erpelding ---------- 600

27. Divorce and its incidents are matters of public concern over which the Legislature has authority. What policies to adopt concerning its regulation are for it to decide and are not for the courts. Detter v. Erpelding ---------- 600

28. Jurisdiction of the court in matters relating to divorce and alimony is given by the statute. Every power exercised by the court with reference thereto must look for its source in the statute or it does not exist. Detter v. Erpelding ---------- 600

29. Either party to a divorce action may within 6 months of the date of entry of decree make application to have the decree set aside or modified. Hubbard v. Hubbard ---------- 768

30. If a motion to set aside or modify a decree of divorce is made pursuant to statute, the court may in the exercise of a sound discretion grant it and vacate or modify the decree. Hubbard v. Hubbard ---------- 768

31. Showing required to authorize vacation of divorce decree within 6 months stated. Hubbard v. Hubbard 768
32. A divorce case is tried de novo on the record in the Supreme Court. The Supreme Court is required to reach independent conclusions of fact without reference to findings made by the trial court. Thompson v. Thompson 852
33. There may be extreme cruelty justifying a decree of divorce without physical injury or violence, if the conduct is of such a character as to utterly destroy the legitimate ends and objects of matrimony. Thompson v. Thompson 852
34. Testimony of witnesses in order to be regarded as corroborative of a charge of cruelty in a divorce case must be as to asserted facts and not merely of conclusions and inferences. Thompson v. Thompson 852

Drains.

1. In proceedings under drainage statute, the apportionment of the cost of the ditch to each landowner is an exercise of the power to tax, but the taking of his property and the ascertainment of the damages he may suffer thereby is an exercise of the power of eminent domain. McClary v. County of Dodge 627
2. Special assessments cannot be enforced solely upon the ground that the property involved received special benefits. The right to levy and enforce special assessments for the construction of public improvements depends upon strict compliance with the procedures prescribed by statute. McClary v. County of Dodge 627
3. A special assessment levied under drainage statute which has been paid and is later adjudged to be void may be recovered from the county. McClary v. County of Dodge 627

Elections.

1. The right conferred by statute on a candidate for public office to contest the apparent election of his rival is a special statutory proceeding and all conditions prescribed for its exercise must be followed. Sutton v. Anderson 543
2. Courts do not have jurisdiction of election contests except insofar as it has been conferred by statute. Sutton v. Anderson 543

3. Strict compliance with the conditions contained in a statutory proceeding for the contest of an election is essential since such compliance is an integral part of the existence of the right. Sutton v. Anderson ---------- 543
4. Effect of premature filing of election contest stated. Sutton v. Anderson ---------- 543
5. The filing of a cost bond within 10 days after the filing of the notice of contest is essential to invest the district court with authority to hear an election contest. Sutton v. Anderson ---------- 543

Eminent Domain.

1. General and special benefits are defined. Enterprise Co., Inc. v. Sanitary Dist. No. One ---------- 271
2. In a condemnation case, a lessee is entitled to recover on the same character and quality of proof as would entitle the condemnee owner to recover. Dawson v. City of Lincoln ---------- 311
Pieper v. City of Scottsbluff ---------- 561
3. The owner of property, either real or personal, is qualified by reason of the ownership relation to give his estimate of the value of such property. Dawson v. City of Lincoln ---------- 311
4. The volume of business done on any given leasehold has a direct relation to the value of the leasehold. Dawson v. City of Lincoln ---------- 311
5. In a condemnation action, the weight and credibility of conflicting testimony is for the jury. Dawson v. City of Lincoln ---------- 311
6. Testimony as to value, from either expert or lay witnesses, is ordinarily received if the witnesses show an acquaintance with the property and are informed as to the state of the market. The weight and credibility of their testimony is for the jury. Dawson v. City of Lincoln ---------- 311
7. The admissibility of testimony as to value of a lay witness rests in the sound discretion of the trial court. Where persons are shown to be familiar with the particular land or leasehold in question, they may be permitted to testify as to value before and after the taking. Dawson v. City of Lincoln ---------- 311
8. The verdict and judgment of $10,000 were not excessive under the evidence. Dawson v. City of Lincoln ---------- 311
9. The proper measure of damages in eminent domain

proceedings 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. Pieper v. City of Scottsbluff ---------- 561
Chaloupka v. State ---------- 746
Frank v. State ---------- 759
10. The words, "or damaged," in Article I, section 21, of the Constitution, include all actual damages resulting from the exercise of the right of eminent domain which diminish the market value of private property. Pieper v. City of Scottsbluff ---------- 561
11. In condemnation proceedings, where persons are shown to be familiar with the particular land in question, they may be permitted as witnesses to testify as to the value of the tract immediately before and immediately after the appropriation. Pieper v. City of Scottsbluff ---------- 561
12. The general rule is that the burden of showing the damages which the landowner will suffer rests upon him while the burden is on condemner to show matters which tend to reduce or mitigate the damages. Pieper v. City of Scottsbluff ---------- 561
13. Conditions necessary to be taken into consideration in eminent domain proceedings stated. Pieper v. City of Scottsbluff ---------- 561
14. Evidence as to the adaptability of property for certain uses must be limited to uses reasonably anticipated in the immediate future. Pieper v. City of Scottsbluff ---------- 561
15. The amount of damages sustained by the taking and damaging of land in eminent domain proceedings is peculiarly of a local nature to be determined by a jury, and its verdict will not ordinarily be interfered with if it is based on the testimony. Pieper v. City of Scottsbluff ---------- 561
16. The owner of real estate taken in condemnation proceedings who is familiar with its value can testify as to its value. Pieper v. City of Scottsbluff -- 561
17. In an eminent domain proceeding, the weight and credibility of either lay or expert witnesses as to the value of land is for the jury. Pieper v. City of Scottsbluff ---------- 561
Schmailzl v. State ---------- 617
18. Where a lessee has established a right of recovery in eminent domain proceedings for damages for deprivation of right to produce crops, the measure

of his right of recovery is the difference between the value of his share of the crops at maturity and what would have been the cost of production of the entire crop. Pieper v. City of Scottsbluff ------ 561
19. Where a lessee has established a right of recovery for damage for deprivation of the right to graze and sell cattle on the market, such fact may be taken into consideration in assessing the damages suffered by the lessee. Pieper v. City of Scottsbluff 561
20. Judgment in eminent domain proceedings was not excessive under the evidence adduced. Pieper v. City of Scottsbluff ---------- 561
21. Where a jury is permitted to view the premises involved in eminent domain litigation, the result of its observations is evidence which it may consider in connection with other competent evidence.
Wagner v. State ---------- 589
Chaloupka v. State ---------- 746
22. The market value of land taken by eminent domain proceedings is computable as of the time of the condemnation, which is deemed to be the date the petition for condemnation is filed. Schmailzl v. State ---------- 617
Chaloupka v. State ---------- 746
23. The actual appraisal of the property must be made near enough in point of time to furnish a test of the market value as of the date in question and is a matter within the sound discretion of the trial court. Schmailzl v. State ---------- 617
24. Whether or not evidence of a comparable sale is near enough in point of time to furnish a test of the present value is a matter within the sound discretion of the trial court. Schmailzl v. State ---- 617
25. An owner who has resided on and improved land, and testifies he knows its worth, is a competent witness on the question of value. Schmailzl v. State 617
26. An owner, by virtue of the ownership relation, is qualified to give his estimate of the value of property taken in eminent domain proceedings. Schmailzl v. State ---------- 617
27. The matter of land values is not generally considered as a subject exclusively for experts, and one who has a reasonable familiarity with the property in question is usually competent to testify. Schmailzl v. State ---------- 617
28. In proceedings under drainage statute, the apportionment of the cost of the ditch to each landowner

is an exercise of the power to tax, but the taking of his property and the ascertainment of the damages he may suffer thereby is an exercise of the power of eminent domain. McClary v. County of Dodge ---------- 627

29. The burden of proving the extent of the damages in a condemnation action is not on the condemner but on the owner. Chaloupka v. State ---------- 746

30. The burden to show matters which tend to reduce or mitigate damages is on the condemner. Chaloupka v. State ---------- 746

31. In the determination of remainder damage, it is the effect of the severance of the property taken on the value of the total unit of property that produces remainder damage. Frank v. State ---------- 759

32. If a party limits his proof of remainder damage to a portion of the property remaining after the taking, he may not thereby limit the proof offered by the condemner as to the value of the whole of the remainder before and after the taking. Frank v. State ---------- 759

33. Land taken by right of eminent domain should be valued as a portion of the tract of which it is a part and not as if it stood alone. Frank v. State 759

34. Damages in a condemnation action are peculiarly of a local nature, and weight and credibility of valuation testimony are for the jury. Frank v. State ---------- 759

35. In a condemnation action, the burden of proof is on the condemnee landowner to prove that the severance of the property taken caused damage to the value of the total unit of the remainder and to prove the amount of that damage. Frank v. State ---------- 759

36. Access to property is one of many factors bearing upon a determination of its value. The Supreme Court, as a matter of law, cannot determine that it thereby diminishes the value of the property. This determination is for the jury to make in conformity with the proper measure of damages. Frank v. State ---------- 759

37. In a condemnation action where the evidence is in conflict, the verdict of the jury will not be set aside unless the verdict is clearly wrong. Frank v. State ---------- 759

38. A particular witness as to valuation may not be required to follow or subscribe to any given formula or method of appraisal. Frank v. State ---------- 759

39. In a condemnation proceeding it is conclusively presumed that the owner damaged by the taking received, or was afforded opportunity to receive, full compensation for damages sustained. Gable v. State ---------- 789
40. A condemner must take the rights he appropriates unconditionally by his petition of taking and he must pay full compensation to the condemnee for what he takes or is entitled to take by his petition of taking. Gable v. State ---------- 789
41. When property is taken by eminent domain the compensation of the owner is measured on the basis of the actual legal rights acquired by the condemner and not by the use he actually makes of them. Gable v. State ---------- 789
42. Evidence of the general use to be made of the property right condemned is admissible as evidence of the nature of the injury to the property damaged. Gable v. State ---------- 789
43. Promissory stipulations or intrinsic evidence in conflict with the petition of taking in condemnation proceedings are not admissible to limit the extent of the taking nor to mitigate the damages. Gable v. State ---------- 789
44. Opinions of witnesses based upon supposed elements of damage which are not recognized by law as proper to be considered in condemnation proceedings should be excluded from the consideration of the jury when proper objection is made thereto. Gable v. State ---------- 789

Escrows.

1. Effect of deposit of deed in escrow as constituting delivery stated. Brunson v. Kahler ---------- 735
2. Where a grantor has deposited a deed to real estate in escrow, he cannot subsequently by withdrawing the deed or by other acts indicating a change of mind affect the completed transaction. Brunson v. Kahler ---------- 735

Estates.

1. Under the Uniform Property Act, the devise of an interest in real estate to a trustee for the use of a child of the testator during his life, and upon the death of the child to his lineal descendants, creates a life estate in trust for the child and a remainder in his lineal descendants. Hauschild v. Hauschild 319

2. The law favors the early vesting of estates. A remainder will be declared a vested one unless a contrary intent is apparent from the will. Berning v. National Bank of Com. Tr. & Sav. ---------- 856

Estoppel.

1. The essential element of estoppel is a representation relied upon by the party claiming the benefit of the estoppel, which induced him to act, or refrain from acting, to his prejudice. Willan v. Farrar -------- 1
2. Where one of two innocent persons must suffer by the acts of a third, he whose conduct, act, or omission enabled such third person to occasion the loss must sustain it if the other party acted in good faith, without knowledge of the facts, and altered his position to his detriment. First Nat. Bank v. Provident Finance Co. ---------- 45

Evidence.

1. The offense of unlawful possession of alcoholic liquor may be proved by circumstantial evidence. State v. Eberhardt ---------- 18
2. In a case where circumstantial evidence is relied upon to prove the offense of unlawful possession of alcoholic liquor, the circumstances proved must relate directly to the guilt of the accused beyond all reasonable doubt in such a way as to exclude any other reasonable conclusion. State v. Eberhardt 18
3. The weight and credibility to be given opinion evidence of expert witnesses is the sole province of the jury. Grimminger v. Cummings ---------- 142
4. Triers of fact are not generally bound by opinion evidence as to value even when it is not met by opposing proof. Grimminger v. Cummings ------ 142
5. Triers of fact are 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. Beavers v. Christensen 162
   Ripp v. Riesland ---------- 233
6. Testimony as to value, from either expert or lay witnesses, is ordinarily received if the witnesses show an acquaintance with the property and are informed as to the state of the market. The weight and credibility of their testimony is for the jury. Dawson v. City of Lincoln ---------- 311
7. The admissibility of testimony as to value of a lay

witness rests in the sound discretion of the trial court. Where persons are shown to be familiar with the particular land or leasehold in question, they may be permitted to testify as to value before and after the taking. Dawson v. City of Lincoln ---------- 311

8. The burden resting on plaintiff requires proof by physical facts, or direct or circumstantial evidence together with inferences that might be drawn therefrom, indicating with reasonable certainty the acts charged in the pleaded cause of action. Barry v. Dvorak ---------- 375

9. Sufficient identification made and proper foundation laid for admission in evidence of hair samples. State v. Tatreau ---------- 381

10. The burden of establishing a cause of action by circumstantial evidence requires that such evidence, to be sufficient to sustain a verdict or require submission of a case to a jury, shall be of such character and the circumstances so related to each other that a conclusion fairly and reasonably arises that the cause of action has been proved. Petracek v. O.K. Rubber Welders, Inc. ---------- 438

11. It is not a valid objection to the evidence of an expert that the answer covers the whole ground the jury is to decide, if the case is one to be wholly resolved by such evidence. Petracek v. Haas O.K. Rubber Welders, Inc. ---------- 438

12. In the absence of the elements of estoppel, extrajudicial statements of fact are, ordinarily, not conclusive and may be explained, rebutted, or contradicted and thereafter are to be given such weight as the trier of facts deems them entitled. Crusinberry v. Merryman ---------- 479

13. Evidence that a statement is in the handwriting of a deceased person in a ledger in which the deceased kept his accounts, and that the ledger was found in the home of the deceased after his death, is sufficient foundation for the introduction of the statement into evidence as an admission of the deceased. Crusinberry v. Merryman ---------- 479

14. Where a proper foundation has been laid, a qualified expert may give his opinion as to the minimum speed that an automobile must have been traveling to lay down skid mark shown in the evidence. Flory v. Holtz ---------- 531

15. Various factors, such as skid marks, distance trav-

eled after impact, and force of impact, constitute pertinent evidence in arriving at an estimate of the rate of speed of an automobile. Flory v. Holtz 531
16. Rule as to sufficiency of hypothetical question on speed of an automobile stated. Flory v. Holtz -- 531
17. 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, indicate with reasonable certainty the negligent act charged. Flory v. Holtz ---------- 531
18. Conditions necessary to be taken into consideration in eminent domain proceedings stated. Pieper v. City of Scottsbluff ---------- 561
19. Evidence as to the adaptability of property for certain uses must be limited to uses reasonably anticipated in the immediate future. Pieper v. City of Scottsbluff ---------- 561
20. The owner of real estate taken in condemnation proceedings who is familiar with its value can testify as to its value. Pieper v. City of Scottsbluff 561
21. Rule as to view of premises by jury in eminent domain proceedings stated. Wagner v. State ---- 589
22. Whether or not evidence of a comparable sale is near enough in point of time to furnish a test of the present value is a matter within the sound discretion of the trial court. Schmailzl v. State -- 617
23. An owner who has resided on and improved land, and testifies he knows its worth, is a competent witness on the question of value. Schmailzl v. State ---------- 617
24. An owner, by virtue of the ownership relation, is qualified to give his estimate of the value of property taken in eminent domain proceedings. Schmailzl v. State ---------- 617
25. In condemnation actions, the weight and credibility of testimony of either lay or expert witnesses regarding the value of land taken is for the jury. Schmailzl v. State ---------- 617
26. The matter of land values is not generally considered as a subject exclusively for experts, and one who has a reasonable familiarity with the property in question is usually competent to testify. Schmailzl v. State ---------- 617
27. Where on a trial an inspection of the premises in question is proper, but impracticable or impossible,

a photographic view thereof is admissible. Schmailzl v. State ---------- 617
28. The possibility that photographs might have a tendency to create sympathy in favor of one party should not render them inadmissible as proof of an issue on trial. Schmailzl v. State ---------- 617
29. The intent with which an act is done is purely a mental process and difficult to establish by direct proof. It is generally a conclusion that must be drawn after a consideration of the actions of the defendant viewed in the light of the surrounding circumstances. State v. Jungclaus ---------- 641
30. An offer in evidence of other materials in the possession of defendant for the purpose of sale, whether obscene or not, is not properly admissible in a prosecution for possessing obscene materials for the purpose of sale. State v. Jungclaus ---------- 641
31. In a case where the only question presented for determination is the sufficiency of parol evidence to set aside a deed, such evidence, to be sufficient to overcome the presumption arising from the express terms of the deed, must be clear, unequivocal, and convincing. Goldsberry v. Hile ---------- 651
32. Where a jury is permitted to view the premises involved in eminent domain litigation, the result of its observations is evidence which it may consider in connection with other competent evidence. Chaloupka v. State ---------- 746
33. If a party limits his proof of remainder damage to a portion of the property remaining after the taking, he may not thereby limit the proof offered by the condemner as to the value of the whole of the remainder before and after the taking. Frank v. State ---------- 759
34. A particular witness as to valuation may not be required to follow or subscribe to any given formula or method of appraisal. Frank v. State ---------- 759
35. Evidence of the general use to be made of the property right condemned is admissible as evidence of the nature of the injury to the property damaged. Gable v. State ---------- 789
36. Promissory stipulations or intrinsic evidence in conflict with the petition of taking in condemnation proceedings are not admissible to limit the extent of the taking nor to mitigate the damages. Gable v. State ---------- 789
37. Where evidence has been properly received, it is

not error for the court to not instruct on the specific purpose for which the evidence was received in the absence of a request to do so. Gable v. State 789

38. Opinions of witnesses based upon supposed elements of damage which are not recognized by law as proper to be considered in condemnation proceedings should be excluded from the consideration of the jury when proper objection is made thereto. Gable v. State 789

39. Where the value of a postage stamp collection is in issue, and no more accurate evidence is available under the circumstances, a witness acquainted with the value of the stamps composing the collection, and who has examined the same for the purpose of estimating its value, may give his opinion of such value. Baburek v. Skomal 832

40. An expert witness who has made a personal inspection of personal property and formed his judgment as to its value at the time of making the inspection, although at the trial he has no remembrance of the particular items examined, may be permitted to state his opinion of its value. Baburek v. Skomal 832

41. Evidence of a witness who has qualified as an expert as to the market value of property is not admissible where his opinion is based upon elements and considerations that do not tend to produce market value. Baburek v. Skomal 832

Executors and Administrators.

1. Where letters testamentary have been issued to an executor named in the will and after his accounting and discharge personal property is subsequently found belonging to the estate, the proper practice is for the county court to reappoint the executor unless he is incompetent to act. Barker v. Wardens & Vestrymen of St. Barnabas Church 327

2. The citation of notice of hearing of application for letters of administration cannot be successfully attacked collaterally by one not interested in the estate or in a suit by the administrator against him. Barker v. Wardens & Vestrymen of St. Barnabas Church 327

3. Letters testamentary, issued by a court which has jurisdiction to grant such letters, are valid unless and until revoked, notwithstanding there may

be irregularities in the proceeding for which, in a direct attack, they might be revoked. Barker v. Wardens & Vestrymen of St. Barnabas Church -- 327

4. The right to recover damages against a decedent's estate as a result of an automobile accident must originate as a claim against the decedent's estate in county court and may not be brought as an original cause of action in district court. Bruno v. Kramer ---------- 597

5. In a claim against the estate of a deceased person for wrongful death, the jurisdiction of the district court is appellate only and the trial of such a claim on appeal is not joinable with an original action brought in district court against another joint tort-feasor. Bruno v. Kramer ---------- 597

Exemptions.

1. A combine far exceeding the value of $50 is not exempt from levy or sale to one engaged in agriculture under statute on exemptions. Miller v. Dixon ---------- 659

2. A debtor engaged in the business of agriculture is not entitled to an exemption as a mechanic, miner, or "other person" within statute exempting tools and instruments of such persons. Miller v. Dixon -- 659

Forfeitures.

An action against a lender under the Installment Loan Act is an action to enforce a forfeiture which, in practical effect, is punitive as to him. Davis v. General Motors Acceptance Corp. ---------- 865

Frauds, Statute of.

1. Loan agreements wholly performed on one side within a year are not void under the statute of frauds. Maseberg v. Mercer ---------- 668

2. Where the money involved in a loan is furnished to a third person, at the request and on the credit of the promisor, the undertaking is original and the promisor will be liable although the promise is not in writing. Maseberg v. Mercer ---------- 668

3. Where a loan is made and there has been delivery by the lender and receipt by the borrower or in his behalf upon an oral agreement to repay, express or implied, the promise may not be regarded as collateral. Maseberg v. Mercer ---------- 668

Highways.

1. One who places an obstruction upon a highway in such a manner that it is dangerous to others using the highway has a duty to remove the obstruction or to use due care to warn others upon the highway of the danger incident to the obstruction. Johnson v. Metropolitan Utilities Dist. ---------- 276
2. By statute, it was required that drivers proceeding in opposite directions should pass each other to the right, each giving to the other at least one-half of the main-traveled portion of the roadway as nearly as possible. Barry v. Dvorak ---------- 375
3. It is the continuing duty of a contractor engaged in construction work on a public highway to erect barricades or signs, or otherwise adequately warn the traveling public, if the highway is dangerous to travel on or if obstructions are placed thereon. Bruno v. Gunnison Contractors, Inc. ---------- 462
4. Duty to adequately warn the traveling public of obstructions placed on the highway stated. Bruno v. Gunnison Contractors, Inc. ---------- 462
5. Duty of motorist approaching a highway protected by stop signs stated. Colton v. Benes ---------- 483
6. A motorist traveling on a favored highway protected by a stop sign of which he has knowledge may properly assume that oncoming traffic will obey it. Colton v. Benes ---------- 483
7. A user of highways may assume that other users thereof will use them in a lawful manner and govern his acts in accordance with such assumption unless or until he has warning, notice, or knowledge to the contrary. Colton v. Benes ------ 483
8. Statute quoted upon duty of drivers of motor vehicles approaching an intersecting highway. Flory v. Holtz ---------- 531
9. Statute was intended to avoid collision between vehicles at intersections. The right-of-way is not to be determined by the single test of which vehicle actually entered the intersection first, if the vehicles approached or entered the intersection at approximately the same time. Flory v. Holtz ---- 531
10. The drivers of motor vehicles approach an intersection at approximately the same time whenever the two vehicles are in such relative position that upon appraisal of all factors it should appear to a man of ordinary prudence approaching from the

left that there is danger of collision if he fails to yield the right-of-way. Flory v. Holtz 531
11. A pedestrian has equal rights with the operator of a motor vehicle in the use of public highways. Each must use reasonable care for his own safety and the safety of others. Caldwell v. Heckathorn .. 704
12. A party has a legal right to walk longitudinally along the highway or to stand alongside his car, but in doing so he is required to use reasonable care for his own safety. Caldwell v. Heckathorn 704
13. A violation of statutes regulating the use and operation of motor vehicles upon the highways is not negligence per se, but evidence of negligence which may be taken into consideration with all the other facts and circumstances in determining whether or not negligence is established thereby. Hess v. Holdsworth 774

Homicide.

1. A homicide committed in the perpetration of a robbery is murder in the first degree. State v. Hall 295
2. In a homicide committed in the perpetration of a robbery, the turpitude of the act supplies the element of deliberate and premeditated malice. State v. Hall 295
3. The verdict of guilty of first degree murder was sustained by the evidence, but the sentence of death was reduced to imprisonment for life. State v. Hall 295

Indictments and Informations.

1. A defect in the manner of charging an offense is waived if, upon being arraigned, the defendant pleads to the general issue, provided the information contains no jurisdictional defect and is sufficient to charge an offense under the law. State v. Paulson 126
2. Effect of variation between verdict and the information stated. State v. Paulson 126

Infants.

1. A minor, in order to be guilty of the offense of possession of alcoholic liquor, must have known or been conscious of actual or constructive possession thereof with his consent. State v. Eberhardt 18
2. Ordinarily the interests and welfare of a child of tender years will be best served by placing the

child in the custody of the natural mother, provided she is a fit and proper person. Hossack v. Hossack 368

3. Custody of minor children awarded to their mother in a divorce action will not be disturbed in a subsequent proceeding to modify the original decree, unless by changed circumstances it is affirmatively shown that the mother is an unfit person to have their custody, or that the best interests of the children require such action. Hossack v. Hossack 368

4. Application for modification of divorce decree with respect to care, custody, and maintenance of minor children must be founded upon new facts and circumstances which have arisen since the entry of the decree. Hossack v. Hossack ---------- 368

5. In awarding or changing custody, the welfare of the minor children is the question of primary importance. Hossack v. Hossack ---------- 368

6. Conduct of one parent tending to poison child's mind against other parent is ground for order denying custody to party guilty of such conduct. Hossack v. Hossack ---------- 368

7. In a divorce action it is generally the best policy to keep minor children within the jurisdiction of the court. However, the welfare of the child should receive the paramount consideration in the determination of its custody. Hossack v. Hossack -- 368

Insurance.

1. Where a statutory omnibus provision requires coverage of additional insureds in automobile liability insurance policies, it will be treated as if expressly referred to and incorporated in the provisions of the policy. Protective Fire & Cas. Co. v. Cornelius 75

2. Where a statutory provision is in conflict with the provisions of an insurance policy, the statute and not the policy provision is controlling. Protective Fire & Cas. Co. v. Cornelius ---------- 75

3. Statutory provision referred to in opinion is an omnibus provision providing that a person using an automobile with the express or implied permission of the owner is an added insured. Protective Fire & Cas. Co. v. Cornelius ---------- 75

4. The omnibus statute making a person using an automobile with the express or implied consent of the owner an added insured excludes from the protection of the policy any person who takes the

automobile and uses it without permission in the first instance. Protective Fire & Cas. Co. v. Cornelius 75
5. Where the automobile covered by the policy is used by a person other than the owner with the permission of such owner, his subsequent use of it is with the permission of the owner within the meaning of the omnibus statute, regardless of whether the automobile is driven to a place or for a purpose not within the contemplation of the owner when the permission was granted. Protective Fire & Cas. Co. v. Cornelius ---------- 75
6. Where a person uses an automobile of another with the permission of its owner, such person's use of the automobile makes the owner's insurer primarily liable for the negligence of the user under statutory omnibus clause. Protective Fire & Cas. Co. v. Cornelius ---------- 75
7. A policy of insurance will be given effect according to the ordinary sense of the terms used and under its plain and ordinary meaning. Garrelts v. Department of Motor Vehicles ---------- 220
8. A policy of insurance should be considered as any other contract to give effect to the intention of the parties at the time it was made. Garrelts v. Department of Motor Vehicles ---------- 220
9. 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. Garrelts v. Department of Motor Vehicles ---------- 220
10. In giving effect to rules of construction, it is equally important that the contract made by the parties shall be enforced, and that a new contract will not be interpolated by construction. Garrelts v. Department of Motor Vehicles ---------- 220
11. In the absence of statutory provisions to the contrary, the parties to an insurance contract may make the contract in any legal form they desire. Garrelts v. Department of Motor Vehicles -------- 220
12. The words "use" and "actual use" when used in the omnibus clause of an insurance policy will ordinarily be treated as synonymous terms. Metcalf v. Hartford Acc. & Ind. Co. ---------- 468
13. Under omnibus clause of an insurance policy, a person who assists the user of the automobile in a permitted use by taking over the manual operation

of the car is an additional insured within the meaning of the omnibus clause. Metcalf v. Hartford Acc. & Ind. Co. ---------- 468

14. Under statute, when a beneficiary or person entitled thereto brings an action on an insurance policy, the district court, upon rendering judgment against the insurer, shall allow the plaintiff a reasonable attorney's fee to be taxed as costs and, if the cause is appealed, an additional attorney's fee shall be allowed by the appellate court for the appellate proceedings. Metcalf v. Hartford Acc. & Ind. Co. ---------- 468

15. Elements to be considered in allowance of an attorney's fee in an action on automobile insurance policy stated. Metcalf v. Hartford Acc. & Ind. Co. 468

16. The allowance of a reasonable attorney's fee under statute is unaffected by the fact that plaintiff contracted to pay his attorney on a contingent fee basis. Metcalf v. Hartford Acc. & Ind. Co. ---------- 468

17. An attorney's fee allowed under insurance statute is taxable as costs and constitutes no part of the judgment. Interest may not be assessed on an attorney's fee. Metcalf v. Hartford Acc. & Ind. Co. 468

18. Subrogation rights of insurance company under conditional sale contract are limited. State Farm Mut. Auto. Ins. Co. v. McCarty ---------- 718

Interest.

A county is not liable for interest on claims filed under tax statute prior to judgment. McClary v. County of Dodge ---------- 627

Intoxicating Liquors.

1. A minor, in order to be guilty of the offense of possession of alcoholic liquor, must have known or been conscious of actual or constructive possession thereof with his consent. State v. Eberhardt 18

2. The offense of unlawful possession of alcoholic liquor may be proved by circumstantial evidence. State v. Eberhardt ---------- 18

3. In a case where circumstantial evidence is relied upon to prove the offense of unlawful possession of alcoholic liquor, the circumstances proved must relate directly to the guilt of the accused beyond all reasonable doubt in such a way as to exclude any other reasonable conclusion. State v. Eberhardt 18

Judgments.

1. A statute specifically grants the power to district courts to vacate or modify their own judgments after term time for the reasons stated therein, and this right is not affected in any way by the taking of an appeal. Simmons v. Lincoln ---------- 71
2. Within 3 days after the rendition of any judgment, the clerk of the district court is required by statute to send a post card by United States mail to each party who has made an appearance in the action, or to his attorney or attorneys of record, advising that the judgment has been rendered and the date of rendition thereof. Simmons v. Lincoln ---------- 71
3. Language in statute "after the rendition of any judgment" includes a ruling on a motion for a new trial where such ruling is a prerequisite to an appeal, as well as to any other order finally disposing of an action. Simmons v. Lincoln ---- 71
4. A district court has the inherent power in either a civil or criminal case to correct the record of its judgments, or other orders, so that they may properly reflect the truth of the order or judgment that was actually entered. State v. Kortum ---- 108
5. A nunc pro tunc order, otherwise proper, may be entered either at the term in which the judgment or order was entered or at a subsequent term. State v. Kortum ---------- 108
6. While a court has the inherent power to correct its records to reflect the truth, such a power should not be exercised unless notice is given to all parties who may be affected by the entry of such order, if reasonably possible. State v. Kortum ---------- 108
7. Upon a motion for summary judgment the court examines the evidence, not to decide any issue of fact, but to discover if any real issue of fact exists. Johnson v. Metropolitan Utilities Dist. ---------- 276
8. The burden is upon the party moving for summary judgment to show that no issue of fact exists, and unless he can conclusively do so the motion must be overruled. Johnson v. Metropolitan Utilities Dist. 276
9. In considering a motion for summary judgment the court views the evidence in the light most favorable to the party against whom it is directed, giving to that party the benefit of all favorable inferences that reasonably may be drawn therefrom. Johnson v. Metropolitan Utilities Dist. ---------- 276
10. The citation of notice of hearing of application for

letters of administration cannot be successfully attacked collaterally by one not interested in the estate or in a suit by the administrator against him. Barker v. Wardens & Vestrymen of St. Barnabas Church ---------- 327

11. Rule for consideration of motion for summary judgment stated. Berg v. Rasmuss ---------- 340

12. It is not the purpose of summary judgment procedure to require a plaintiff to reveal in detail the evidence he expects to produce to prove the allegations of his petition. Berg v. Rasmuss ---------- 340

13. The summary judgment procedure was never intended as a substitute for a trial on the merits. Berg v. Rasmuss ---------- 340

14. A motion for summary judgment is not a substitute for a demurrer, a motion to dismiss, or a motion for judgment on the pleadings. Berg v. Rasmuss ---------- 340

15. Summary judgment is effective and serves a separate useful purpose only when it can be used to pierce the allegations of the pleadings and show conclusively that the controlling facts are otherwise than as alleged. Berg v. Rasmuss ---------- 340

16. The evidence offered on a motion for summary judgment is for the purpose of showing that no issue of fact exists, not to try issues on pleadings, depositions, and affidavits which constitute only a part of the evidence available on a trial on the merits. Berg v. Rasmuss ---------- 340

17. In order for the movant to obtain a summary judgment it must be shown first, that there is no genuine issue as to any material fact and, second, that movant is entitled to judgment as a matter of law. Berg v. Rasmuss ---------- 340

18. The judgment of a court having jurisdiction of the parties and the subject matter is conclusive upon the parties thereto, even though erroneous, unless reversed in appellate proceedings. Morimoto v. Nebraska Children's Home Society ---------- 403

19. Where a person is responsible over to another, either by operation of law or express contract, and he is duly notified of the pendency of the suit against the person to whom he is liable over, and full opportunity is afforded him to defend the action, the judgment, if obtained without fraud, collusion, or bad faith, will be conclusive against him, whether

he appeared or not. Metcalf v. Hartford Acc. & Ind. Co. ---------- 468

20. Judgment in eminent domain proceedings was not excessive under the evidence adduced. Pieper v. City of Scottsbluff ---------- 561

21. A consent decree is usually treated as an agreement between the parties. It is accorded greater force than ordinary judgments and ordinarily will not be modified over objection of one of the parties. Detter v. Erpelding ---------- 600

22. A motion for summary judgment may be used to pierce the allegations of the pleadings and show conclusively that the controlling facts are otherwise than as alleged. Ehlers v. Pound ---------- 673

23. Where there is no genuine issue of fact and the movant is entitled to judgment as a matter of law, a motion for summary judgment should be sustained. Ehlers v. Pound ---------- 673

Juries.

In jury cases jurors are the judges of the credibility of witnesses and of the weight to be given their testimony and, within their province, they have the right to credit or reject the whole or any part of the testimony of a witness in the exercise of their judgment. Chaloupka v. State ---------- 746

Kidnapping.

1. "Imprison" as used in statute on kidnapping, means the unlawful confinement of another person against his will within boundaries fixed by the actor for the purpose of extorting money, property, or a promise of the performance of an act. State v. Tatreau ---------- 381

2. The dominating element of the offense of kidnapping is the intent with which the acts enumerated in the statute are committed. State v. Tatreau -- 381

3. The Legislature has fixed the public policy of this state for determining what shall be done in kidnapping cases. It is a policy of long standing. It is a trite statement, but it is our duty to enforce the law. State v. Tatreau ---------- 381

Landlord and Tenant.

1. In a condemnation case, a lessee is entitled to recover on the same character and quality of proof as

would entitle the condemnee owner to recover. Dawson v. City of Lincoln ---------- 311
Pieper v. City of Scottsbluff ---------- 561
2. The volume of business done on any given leasehold has a direct relation to the value of the leasehold. Dawson v. City of Lincoln ---------- 311
3. Where a lessee has established a right of recovery in eminent domain proceedings for damages for deprivation of right to produce crops, the measure of his right of recovery is the difference between the value of his share of the crops at maturity and what would have been the cost of production of the entire crop. Pieper v. City of Scottsbluff ---------- 561
4. Where a lessee has established a right of recovery for damage for deprivation of the right to graze and sell cattle on the market, such fact may be taken into consideration in assessing the damages suffered by the lessee. Pieper v. City of Scottsbluff ---------- 561
5. The word "repair" means to restore to a sound or good state after decay, injury, dilapidation, or partial destruction. Zuroski v. Estate of Strickland 633
6. A lessor is liable for personal injuries to the tenant, or a member of his family, caused by a dangerous condition on the premises resulting from a failure to use reasonable care to make repairs in accordance with a covenant to repair where the lessor has been notified of the needed repairs. Zuroski v. Estate of Strickland ---------- 633

Limitation of Actions.
1. Where an amended petition states a cause of action separate and independent from that stated in the original petition, the statute of limitations runs until the filing of such amended petition. Blair v. Klein ---------- 245
2. Public building bond statute provides that every suit instituted under its provisions shall be brought by any person entitled to the benefit thereof, but no such suit shall be commenced after the expiration of 1 year after the date of final settlement of the principal contract; and that the action shall be in the name of the party claiming the benefits of the action. Westinghouse Electric Supply Co. v. Brookley ---------- 807
3. A plaintiff need not affirmatively allege in his petition that the cause of action is not barred by the

statute of limitations. Westinghouse Electric Supply Co. v. Brookley ---------- 807
4. The accrual of a cause of action means the right to maintain and institute a suit, and whenever one person may sue another, a cause of action has accrued and the statute begins to run. Westinghouse Electric Supply Co. v. Brookley ---------- 807
5. Under statute providing that suit may be brought on public contractor's bond within 1 year after final settlement, final settlement is not synonymous with final payment, but precedes payment and denotes the proper administrative determination with respect to the amount due. Westinghouse Electric Supply Co. v. Brookley ---------- 807
6. The decisive date is not the date of payment, but the time when the administrative officer having the contract in charge made and recorded the determination of the amount due. Westinghouse Electric Supply Co. v. Brookley ---------- 807
7. Where a statute grants a new remedy, and at the same time places a limitation of time within which the person complaining must act, the party seeking to avail himself of the remedy must bring himself strictly within the limitations. Westinghouse Electric Supply Co. v. Brookley ---------- 807

Mechanics' Liens.
1. By statute, any person who shall furnish material for the construction of a house by virtue of a contract or agreement, expressed or implied, with the owner thereof or his agents, shall have a lien to secure the payment of the same upon such house. Joyce Lumber Co. v. Djureen ---------- 86
2. By statute, any person who shall furnish any material to the contractor and who shall desire to secure a lien upon a house may file a sworn statement of the amount due him from such contractor for such material, together with a description of the land upon which the same was used, within 3 months from the furnishing of such material. Joyce Lumber Co. v. Djureen ---------- 86
3. Failure to file a mechanic's lien within the time provided for by statute nullifies such a lien. Joyce Lumber Co. v. Djureen ---------- 86
4. The public building bond statute imposes the duty upon the state and public boards to take a bond for the benefit of materialmen before entering into

a construction contract to which the general provisions of the mechanics' lien law do not apply. Westinghouse Electric Supply Co. v. Brookley ---- 807

5. Materialmen have the statutory right to sue under the contractor's bond. Westinghouse Electric Supply Co. v. Brookley ---------- 807

6. Such a bond is a contract made for the benefit of parties furnishing labor and materials in performance of the principal contract. Westinghouse Electric Supply Co. v. Brookley ---------- 807

7. Public building bond statute provides that every suit instituted under its provisions shall be brought by any person entitled to the benefit thereof, but no such suit shall be commenced after the expiration of 1 year after the date of final settlement of the principal contract; and that the action shall be in the name of the party claiming the benefits of the action. Westinghouse Electric Supply Co. v. Brookley ---------- 807

Mines and Minerals.

1. An oil and gas lease, providing that, unless work is commenced by a certain time, or unless the lessee pay a rental stated to renew the lease, it shall terminate, confers an optional right upon the lessee and should be strictly construed in favor of the lessor and against the lessee. Willan v. Farrar -- 1

2. A delay rental clause in an oil and gas lease is a special limitation, time is of the essence of the contract, and failure of the lessee or his assigns to tender or pay rentals within the specified time automatically terminates the lease without any affirmative action by the lessor, or any one else, for that purpose. Willan v. Farrar ---------- 1

3. The acceptance of delay rentals by the lessor in an oil and gas lease containing an "unless" provision after the date they were due or an extension of payment thereof by such lessor do not continue the lease in force as against subsequent lessees and purchasers. Willan v. Farrar ---------- 1

4. When an "unless" oil and gas lease terminates by its own terms the equitable rules as to relieving against forfeitures do not apply. Willan v. Farrar 1

Motor Carriers.

1. By statute, the railway commission shall issue a license plate or plates to any motor carrier who

is in compliance with the provisions of the Motor Carrier Act and the rules and regulations of the commission. Cole v. LeRoy L. Wade & Sons, Inc. 740

2. The railway commission, in order to revoke, change, or suspend a certificate of public convenience and necessity, must proceed in accordance with the provisions of the Motor Carrier Act. Cole v. LeRoy L. Wade & Sons, Inc. 740

3. An order of revocation of a certificate of public convenience and necessity by the railway commission without compliance with the provisions of the Motor Carrier Act as to notice and hearing is not effective as a revocation. Cole v. LeRoy L. Wade & Sons, Inc. 740

Municipal Corporations.

1. A resolution of annexation by a city or village must be adopted by a two-thirds vote of all of the members of its council or board, and the resolution and the vote thereon must be spread upon the records of the council or board. City of Valentine v. Valentine Motel, Inc. 63

2. The requirement of the statute providing that the resolution of annexation and the vote thereon should be spread upon the records of the council or board is a condition precedent to the filing of the petition for annexation in the district court. City of Valentine v. Valentine Motel, Inc. 63

3. The provisions of the statute on annexation relating to the calling and recording of the vote on the passage of an annexation resolution must be strictly complied with. City of Valentine v. Valentine Motel, Inc. 63

4. The provisions of a statute requiring the spreading upon the record of the council of the vote thereon were intended to require an indisputable record of the action actually taken, so that the public might have an opportunity to know how the elected officials voted thereon. City of Valentine v. Valentine Motel, Inc. 63

5. A requirement that the record be kept and that it be spread upon the records of the council at the time of its voting on the resolution thereon is mandatory and jurisdictional, and constitutes a condition precedent to the validity of proceedings for annexation. City of Valentine v. Valentine Motel, Inc. 63

6. A city council may correct its own record nunc pro

tunc, but it may not by such action show compliance with separate requirement that actions be spread upon the minutes prior to the time that the spreading upon the minutes actually took place. City of Valentine v. Valentine Motel, Inc. -------- 63

7. A municipal corporation may legislate reasonably with respect to Sunday observance within its corporate area. Skag-Way Department Stores, Inc. v. City of Grand Island ---------- 169

8. A city ordinance to meet constitutional requirements must respond to the tests required of statutory enactments. Skag-Way Department Stores, Inc. v. City of Grand Island ---------- 169

9. Rule as to reasonable classification of persons and property for purposes of legislation stated. Skag-Way Department Stores, Inc. v. City of Grand Island ---------- 169

10. With respect to whether a classification made by a legislative body is unconstitutional, discrimination is the very essence of classification and is not objectionable unless founded upon distinctions which the court is compelled to find unreasonable. Skag-Way Department Stores, Inc. v. City of Grand Island ---------- 169

11. A city ordinance providing for Sunday closing cannot prohibit that which is harmless in itself, or require that to be done which does not tend to promote the health, comfort, safety, or welfare of society. Skag-Way Department Stores, Inc. v. City of Grand Island ---------- 169

12. A business or occupation which has no tendency to affect or endanger the public in connection with health, safety, morals, or general welfare is not within the police power. Skag-Way Department Stores, Inc. v. City of Grand Island ---------- 169

13. Statute providing for the incorporation of villages by the county board upon the petition of a majority of the taxable inhabitants is not an unlawful delegation of legislative power or a taking of property without due process of law. Kriz v. Klingensmith -- 205

14. The incorporation of a village by the county board under specific statute is a ministerial act and is subject to review in a direct action brought for that purpose. Kriz v. Klingensmith ---------- 205

15. An ordinance of a city may by reference adopt the provisions of statutes or prior ordinances. State v. Lookabill ---------- 254

16. A legislative body such as a city council may not delegate its power to enact or amend ordinances. State v. Lookabill ---------- 254
17. A city council may not by ordinance make future amendments of a state statute incorporated by reference into a city ordinance a part of such ordinance. Such action constitutes an unlawful delegation of legislative power. State v. Lookabill 254
18. A conviction of an offense under a city or village ordinance will not authorize the suspension or revocation of a motor vehicle driver's license by a police or municipal court. Reversed on rehearing. State v. Lookabill ---------- 254
19. Under the provisions of state statute, a municipal court is authorized to suspend a driver's license upon conviction of an offense under a city or village ordinance for operating a motor vehicle while under the influence of intoxicating liquor. State v. Lookabill ---------- 415
20. The foundation for a special assessment lies in the special benefits conferred. An assessment beyond the benefit so conferred is a taking of property for public use without compensation, and therefore illegal. Wiborg v. City of Norfolk ---------- 825
21. Where an assessment is illegal, a petitioner is not limited to an appeal from the assessment but has a right to enjoin its collection as to his property. Wiborg v. City of Norfolk ---------- 825
22. When a party attacks a special assessment for illegality because his property was not or could not be benefited thereby, he has the burden to prove the illegality alleged. Wiborg v. City of Norfolk ---------- 825

Names.

1. The doctrine of idem sonans applies to both civil and criminal proceedings. State v. Paulson ------ 126
2. A variance in names alleged in an information and proved by the evidence will not be regarded as material unless it appears to the court that the jury was misled by it or that the defendant was otherwise prejudiced. State v. Paulson ---------- 126

Negligence.

1. Where the evidence adduced by the plaintiff shows that the negligence of the plaintiff is more than slight as a matter of law, it is the duty of the

trial court to direct a verdict for the defendant. Caster v. Moeller ---- 30
2. Rule for consideration of the issues of negligence and contributory negligence stated. Costanzo v. Trustin Manuf. Corp. ---- 136
Caldwell v. Heckathorn ---- 704
3. The speed of an automobile is unlawful if it is unreasonable or imprudent under the existing circumstances, even though it may not exceed the applicable statutory or ordinance limits. Costanzo v. Trustin Manuf. Corp. ---- 136
4. Before a verdict can be directed against a motorist for failing to see an approaching automobile at a nonprotected intersection, the position of the approaching automobile must be undisputedly located in a favored position. Costanzo v. Trustin Manuf. Corp. ---- 136
5. When a motorist enters an intersection of two streets, he is obligated to look for approaching automobiles and to see those within that radius which denotes the limit of danger. Costanzo v. Trustin Manuf. Corp. ---- 136
Wolstenholm v. Kaliff ---- 358
6. If a driver fails to see an automobile not shown to be in a favorable position, the presumption is that its driver will respect his right-of-way and the question of his contributory negligence in proceeding to cross the intersection is for the jury. Costanzo v. Trustin Manuf. Corp. ---- 136
7. Negligence as a cause of action or as a defense must be proved by the party alleging it, and the burden does not shift during the trial. Cawthra v. Shackelford ---- 147
8. A party claiming contributory negligence as a defense has the burden of proving it. Cawthra v. Shackelford ---- 147
Petracek v. Haas O.K. Rubber Welders, Inc. ---- 438
Giebelman v. Vap ---- 452
9. Where the evidence is in conflict and is such that reasonable minds may draw different conclusions therefrom the questions of negligence, of contributory negligence, and of comparative negligence are for determination by a jury. Cawthra v. Shackelford ---- 147
10. A negligent act is not actionable unless it results in injury to another. Beavers v. Christensen ---- 162
11. Nominal damages to vindicate a technical right

cannot be recovered in a negligence action where no actual loss has occurred. Beavers v. Christensen -- 162
12. The driver of a motor vehicle should have his car under such reasonable control as will enable him to avoid collision with other vehicles, assuming that the drivers thereof are exercising due care. Ripp v. Riesland ---------- 233
13. Reasonable control is such control as will enable drivers to avoid collision with other vehicles operated without negligence in streets and intersections, and with pedestrians in the exercise of due care. Ripp v. Riesland ---------- 233
14. Where specific acts of negligence are charged and supported by the evidence, the trial court should instruct as to the specific acts so alleged and supported. The failure to do so, whether or not requested to do so, is error. Ripp v. Riesland ---- 233
15. The enumeration in an instruction of specific acts of negligence should state the ultimate acts of negligence and not a conclusion of the pleader. Ripp v. Riesland ---------- 233
16. The burden of proving contributory negligence is always on the defendant alleging it and does not shift during the trial. Ripp v. Riesland --------- 233
17. A defendant is entitled to receive the benefit of plaintiff's evidence tending to prove contributory negligence. Ripp v. Riesland ---------- 233
18. Contributory negligence is defined. Ripp v. Riesland ---------- 233
19. One who places an obstruction upon a highway in such a manner that it is dangerous to others using the highway has a duty to remove the obstruction or to use due care to warn others upon the highway of the danger incident to the obstruction. Johnson v. Metropolitan Utilities Dist. ---------- 276
20. Two acts of independent source are not concurrent in causing an injury if one of them merely furnishes a condition by which such injury is made possible, and later such injury occurs through the efficient, self-acting, and independent operation of the other. Johnson v. Metropolitan Utilities Dist. 276
21. The doer of an original wrongful act is not relieved from liability for an injury immediately brought about by an intervening cause, wrongful or otherwise, that is set into operation by such original wrongful act, and that alone would not have caused the injury, but which with the aid of the original

wrong does cause such injury. Johnson v. Metropolitan Utilities Dist. ---------- 276

22. If the original negligence is of a character which, according to the usual experience of mankind, is liable to invite or induce the intervention of some subsequent cause, the intervening cause will not excuse it, and the subsequent mischief will be held to be the result of the original negligence. Johnson v. Metropolitan Utilities Dist. ---------- 276

23. An invitee is a person who goes on premises of another in answer to express or implied invitation of the owner or occupant on the business of the owner or occupant or for their mutual advantage. Schild v. Schild ---------- 282

24. A licensee on premises of another is a person who is privileged to enter or remain by virtue of the possessor's consent by invitation or permission. Schild v. Schild ---------- 282

25. Duty of owner or occupant of property to a licensee stated. Schild v. Schild ---------- 282

26. Duty of owner or occupant of property to an invitee stated. Schild v. Schild ---------- 282

27. Under the facts disclosed and the stated legal principles, the plaintiff was not a licensee, but was at the time an invitee. Schild v. Schild ---------- 282

28. In an action grounded on negligence in the ascertainment of whether or not there is evidence of negligence in the area charged against or attributable to the defendant, it is necessary to examine the acts or failure to act and the knowledge on the part of the plaintiff himself. Schild v. Schild ---- 282

29. Actionable negligence does not exist even if no care is exercised to avert a risk to another person subject to such risk if such risk should have been reasonably apprehended by such other person himself. Schild v. Schild ---------- 282

30. A person who enters a store for the purpose of making a purchase is an invitee. The owner of the store must use reasonable care to keep the premises reasonably safe for the use of the invitee. Jeffries v. Safeway Stores, Inc. ---------- 347

31. A storekeeper is not an insurer of the safety of customers who patronize his place of business. Jeffries v. Safeway Stores, Inc. ---------- 347

32. Where a customer slipped on substances tracked into the store by customers after a snowfall, no liability attaches to the storekeeper unless he knew

of the dangerous condition or that the condition had existed for such a length of time that he should have known of it and rectified it. Jeffries v. Safeway Stores, Inc. ---------- 347

33. Water, slush, and other substances tracked in on the floor of a store by customers because of weather conditions do not ordinarily constitute actionable negligence, even though they render the floor wet, dirty, and slippery, and result in injury to an invitee. Jeffries v. Safeway Stores, Inc. ---------- 347

34. Liability attaches for substances tracked in upon the floor when the storekeeper or his employees knew of the danger or that the condition had existed for such a period of time that he or they should have known of it and remedied the condition or warned invitees of the danger. Jeffries v. Safeway Stores, Inc. ---------- 347

35. Where there is no evidence of knowledge on the part of the storekeeper or his employees of a dangerous condition, or of the period of time such dangerous condition had existed before the injury occurred, a directed verdict for the defendant is required. Jeffries v. Safeway Stores, Inc. ---------- 347

36. In the absence of evidence to the contrary, there is a presumption that the deceased who had the directional right-of-way was exercising due regard for her own safety and the safety of others. Wolstenholm v. Kaliff ---------- 358

37. Negligence is never presumed, and it cannot be inferred from the mere fact that an accident happened. Wolstenholm v. Kaliff ---------- 358
Flory v. Holtz ---------- 531

38. Negligence must be proved by direct evidence, or by facts from which negligence can reasonably be inferred. Wolstenholm v. Kaliff ---------- 358

39. 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. Wolstenholm v. Kaliff ---------- 358
Flory v. Holtz ---------- 531

40. Circumstantial evidence sufficient to submit an issue of negligence to a jury must be such that a reasonable inference arises showing that the person charged was negligent and that such inference is the

only one that reasonably can be drawn therefrom. Wolstenholm v. Kaliff ---------- 358

41. When one looks and does not see what is in plain sight he is in the same situation as one who does not look. Wolstenholm v. Kaliff ---------- 358

42. If the driver of an automobile entering an intersection looks for approaching vehicles but fails to see one which is favored over him under the rules of the road, he is guilty of negligence as a matter of law. Wolstenholm v. Kaliff ---------- 358

43. 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. Wolstenholm v. Kaliff ---------- 358

44. In determining whether or not the evidence of plaintiff is sufficient to require submission to a jury, a plaintiff in an action for damages is entitled to the benefit of his evidence together with all reasonable inferences which may flow from evidence adduced by the defendant. Barry v. Dvorak ---------- 375

45. 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. Zoucha v. Northwestern Bell Tel. Co. ---------- 408

46. Rules with respect to pedestrian crossing a street between intersections stated and applied. Zoucha v. Northwestern Bell Tel. Co. ---------- 408

47. A driver of an automobile is not bound absolutely to avoid collision with other vehicles or pedestrians on streets or highways, but must maintain such lookout and control as will avoid collision with others exercising due care. Zoucha v. Northwestern Bell Tel. Co. ---------- 408

48. When contributory negligence is pleaded as a defense, and there is no evidence to support such defense, it is prejudicial error to submit that issue to the jury. Giebelman v. Vap ---------- 452

49. It is the continuing duty of a contractor engaged in construction work on a public highway to erect barricades or signs, or otherwise adequately warn the traveling public, if the highway is dangerous

to travel on or if obstructions are placed thereon. Bruno v. Gunnison Contractors, Inc. ---------- 462
50. Duty to adequately warn the traveling public of obstructions placed on the highway stated. Bruno v. Gunnison Contractors, Inc. ---------- 462
51. Two acts of independent source are not concurrent in causing an injury if one of them merely furnishes a condition by which such injury is made possible, and later such injury occurs through the efficient, self-acting, and independent operation of the other. Bruno v. Gunnison Contractors, Inc. -- 462
52. Liability of the doer of the original act is limited to reasonably anticipated injuries immediately brought about by the later independent intervening cause, wrongful or otherwise. Bruno v. Gunnison Contractors, Inc. ---------- 462
53. Negligence, which is the moving or effective cause of a happening, is the proximate cause thereof. Colton v. Benes ---------- 483
54. In a jury case involving issues of negligence, 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 ---------- 483
55. 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. Colton v. Benes ---------- 483
56. It is essential to the existence of negligence that there be some fault on the part of the person sought to be held liable. Colton v. Benes ---------- 483
57. The burden of proving negligence is on the party alleging it. Flory v. Holtz ---------- 531
58. Actionable negligence on the part of the defendant cannot be inferred from a presumption of due care on the part of the deceased. Flory v. Holtz ------- 531
59. The presumption of due care raised by the instinct of self-preservation benefits the defendant as well as the deceased. Flory v. Holtz ---------- 531
60. Facts and circumstances were not sufficient to indicate actionable negligence on the part of the defendant. Flory v. Holtz ---------- 531

61. Under statute, a guest passenger in an automobile may recover damages on account of negligence of the operator only if the evidence is sufficient to support a finding that the negligence was gross. Boismier v. Maragues ---------- 547
62. Gross negligence within the meaning of the motor vehicle guest statute means great and excessive negligence or negligence in a very high degree. It indicates the absence of slight care in the performance of duty. Boismier v. Maragues -------- 547
Hess v. Holdsworth ---------- 774
63. What amounts to gross negligence must be ascertained from the facts and circumstances of each particular case, and not from any fixed definition or rule. Boismier v. Maragues ---------- 547
64. Where the court is required as a matter of law to determine whether or not there is evidence of gross negligence any doubt in relation thereto must be resolved in favor of its existence, and in the event of such resolution the question becomes one for a jury. Boismier v. Maragues ---------- 547
65. In determining whether or not the evidence is sufficient for the submission of the question of gross negligence to the jury, the meaning of gross is to be arrived at by means of reference to decisions where the term has been defined. Boismier v. Maragues ---------- 547
66. Relative duties of pedestrian and operator of motor vehicle on the highway stated. Caldwell v. Heckathorn ---------- 704
67. The question of the existence of gross negligence must be determined from the facts and circumstances in each case. Hess v. Holdsworth ------- 774
68. When an action under the guest statute is based on gross negligence, the comparative negligence statute may be applicable. Hess v. Holdsworth 774
69. If one, knowing and comprehending the danger, voluntarily exposes himself to it, though not negligent in so doing, he is deemed to have assumed the risk and is precluded from a recovery for an injury resulting therefrom. Hess v. Holdsworth -- 774
70. An issue of gross negligence is for the jury if the evidence relating thereto is conflicting and from which reasonable minds might arrive at different conclusions. Hess v. Holdsworth ---------- 774
71. When the evidence is resolved most favorably to the existence of gross negligence and thus the

facts are determined, the inquiry of whether they support a finding of gross negligence is one of law. Hess v. Holdsworth ---------- 774

72. A guest, to recover damages from a host for injury received by the guest while riding in an automobile operated by the host, must prove by the greater weight of the evidence the gross negligence of the host relied upon and that it was the proximate cause of the accident and injury. Hess v. Holdsworth ---------- 774

73. Gross negligence within the meaning of the motor vehicle guest statute has also been defined as 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. Hess v. Holdsworth ---------- 774

74. More than one act of negligence may in combination amount to gross negligence within the motor vehicle guest statute. Hess v. Holdsworth ------ 774

75. Rule stated as to when a finding of gross negligence in the operation of a motor vehicle is justified. Hess v. Holdsworth ---------- 774

New Trial.

1. An order overruling a motion for new trial should be vacated when no attempt was made to notify party of the ruling until time to take an appeal had passed. Simmons v. Lincoln ---------- 71

2. Language in statute "after the rendition of any judgment" includes a ruling on a motion for a new trial where such ruling is a prerequisite to an appeal, as well as to any other order finally disposing of an action. Simmons v. Lincoln ---------- 71

3. During the pendency of a motion for a new trial timely filed, no appealable order is considered as having been rendered until the motion for new trial is disposed of. This rule applies in an equity case as well as in an action at law. Skag-Way Department Stores, Inc. v. City of Grand Island 169

4. A motion for a new trial must be filed within 10 days after the judgment or decree is rendered. Isom v. Isom ---------- 344

5. When the trial court gives no reason for sustaining a motion for a new trial, the appellant meets the duty placed upon him when he brings the record to the Supreme Court for examination with his

assignments of no prejudicial error. Wolstenholm v. Kaliff ---------- 358
6. The duty then rests on the appellee to point out the prejudicial error that he contends exists to justify the action of the trial court. Wolstenholm v. Kaliff ---------- 358
7. In review in the Supreme Court of an order granting a motion for a new trial, there is no burden in the sense of a burden of proof upon either party. The burden is upon both parties to assist the court to a correct determination of the question or questions presented. Wolstenholm v. Kaliff ---------- 358
8. Rule when a new trial restricted as to damages alone is proper stated. Caster v. Moeller ---------- 446
9. Where a judgment in favor of the plaintiff in a tort action is reversed, and the requisite conditions for the limitation of a new trial to the issue of damages are satisfied, it is proper to direct the new trial to be so limited. Caster v. Moeller ---------- 446
10. The district court has the power and is required to consider and determine motions for a new trial by the exercise of its judicial discretion. Wagner v. State ---------- 589
11. An order of the trial court granting a new trial will not ordinarily be disturbed by the Supreme Court, and not at all unless it clearly appears that no tenable ground existed therefor. Wagner v. State ---------- 589
12. The fact that the jury has had a view of land condemned presents no insuperable obstacle to the granting of a new trial on the ground that the verdict is against the evidence, or the damages inadequate or excessive. Wagner v. State ---------- 589
13. Where special findings which constitute the foundation of a general verdict appear to be unjustified, a new trial may be ordered. Wagner v. State ---------- 589
14. The district court has the power and is required to consider and determine motions for a new trial by the exercise of its judicial discretion. Chaloupka v. State ---------- 746
15. Discretion, as used in statute authorizing granting of new trial, means that the court in its ruling must be guided and governed by applicable law. Chaloupka v. State ---------- 746
16. Where a party has sustained the burden and expense of a trial and has succeeded in securing the judgment of a jury on the facts in issue, he has a

right to keep the benefit of that verdict unless there is prejudicial error in the proceedings by which it was secured. Chaloupka v. State ---------- 746

Notice.

Under later statute, publication in one regular issue of legal newspaper was sufficient, and abrogated rule under prior statute and decisions. Skag-Way Department Stores, Inc. v. City of Grand Island ---------- 169

Obscenity.

1. Obscene material within the meaning of obscenity statute is material which deals with nudity, sex, or excretion in a manner appealing to prurient interest. State v. Jungclaus ---------- 641
2. The proper standard for judging obscenity is whether to the average person, applying contemporary community standards, the dominant theme of the material, taken as a whole, appeals to prurient interest. State v. Jungclaus ---------- 641
3. Prurient interest as defined by statute is such as to excite lustful thoughts or a shameful or morbid interest in nudity, sex, or excretion which goes substantially beyond the customary limits of candor. State v. Jungclaus ---------- 641
4. Possession of obscene material for the purpose of sale may properly be inferred by the jury from the conduct of the defendant and all the facts and circumstances in evidence. State v. Jungclaus ---- 641
5. An offer in evidence of other materials in the possession of defendant for the purpose of sale, whether obscene or not, is not properly admissible in a prosecution for possessing obscene materials for the purpose of sale. State v. Jungclaus ------ 641
6. Where obscene materials are offered for sale in a store owned by a corporation, it is not error in a prosecution against the operator of the store to instruct that an aider and abettor may be punished as if he were a principal offender. State v. Jungclaus ---------- 641
7. An instruction that at least one of the materials charged as obscene must be proven to have been obscene and possessed for the purpose of sale in order to sustain a conviction is a correct statement of the law. State v. Jungclaus ---------- 641
8. The words "average person," contained in obscenity

statute, are words of common meaning which need not be further defined in the court's instructions. State v. Jungclaus ---------- 641

Parent and Child.

1. Where a divorced mother who has custody of children establishes a new domicile in Nebraska, that domicile becomes the domicile of the children. State ex rel. Brito v. Warrick ---------- 211
2. The venue of a prosecution for abandonment by a father of his child is the county in which the child is domiciled. State ex rel. Brito v. Warrick ---------- 211
3. Section 5 of the Uniform Reciprocal Enforcement of Support Act is constitutional. State ex rel. Brito v. Warrick ---------- 211

Patents.

1. Generally, parties to a patent licensing agreement may contract for the payment of royalties beyond the expiration of the patent, unless such contract, under the circumstances, constitutes a device to evade the patent laws or a violation of the principle of combinations in restraint of trade. McLeod v. Crawford ---------- 513
2. Generally, contract disclosure of a patent expiration date, which is of public record, is not required. McLeod v. Crawford ---------- 513

Payment.

1. The delivery to, or acceptance by, the creditor of a debtor's check, as distinguished from the actual payment of the check, is not absolute payment of the obligation for which the check is given in the absence of any agreement or consent to receive it as payment. Willan v. Farrar ---------- 1
2. A creditor who has accepted paper, such as a check, bill, or note, in conditional payment of a debt may ordinarily, if such paper has not been paid, rescind the conditional payment and sue on the original indebtedness. Willan v. Farrar ---------- 1

Penalties.

1. A penalty statute must be strictly construed. It will not be applied to situations or parties not fairly or clearly within its provisions. Misle v. Miller ---------- 113
2. In construing a penalty statute nothing will be

recognized, presumed, or inferred that is not expressed, unless necessarily or unmistakably implied in order to give effect to the statute. Misle v. Miller 113

3. It is only when the taxpayer is at fault or to blame for failure to comply with the requirements of the statute that a penalty may be exacted. Misle v. Miller 113

4. When a penalty may be imposed for failure to timely file a tax report, where no time is fixed by statute to file such report, a taxpayer is not liable for a penalty. Misle v. Miller 113

5. A remedy is provided by statute for the recovery of penalties as well as taxes which have been illegally imposed on property. Misle v. Miller 113

6. Statutory provisions, when construed together, were not in conflict and were available as a procedure to recover the penalties illegally imposed in the year 1959. Misle v. Miller 113

Perpetuities.

The rule against perpetuities prohibits only the creation of future interests or estates which, by possibility, may not become vested within a life or lives in being and twenty-one years, together with the period of gestation when the inclusion of the latter is necessary to cover cases of posthumous birth. Hauschild v. Hauschild 319

Pleading.

1. In the case of an appeal to the district court from the county court, the rules of pleading are the same as in an action in a justice of the peace court. Taylor v. Rhodes 130

2. The allegations of a pleading are always in evidence for all purposes of the trial. They are before the court and jury and may be used for any legitimate purpose. Stahlhut v. County of Saline 189

3. A party may at any and all times invoke the language of the pleading of his adversary on which the case is tried, on a particular issue, as rendering certain facts indisputable; and in doing this he is neither required nor permitted to offer the pleading in evidence. Stahlhut v. County of Saline 189

4. If the defendant pleads that the plaintiff was guilty of contributory negligence the burden is upon him to prove that defense. Giebelman v. Vap 452

5. A plaintiff need not affirmatively allege in his peti-

tion that the cause of action is not barred by the statute of limitations. Westinghouse Electric Supply Co. v. Brookley ---------- 807
6. Admission made by a general demurrer stated. Wiborg v. City of Norfolk ---------- 825
7. In passing on a demurrer to a pleading, the court will consider an exhibit attached thereto and made a part thereof. Wiborg v. City of Norfolk ---- 825

Public Service Commissions.

1. The prime object and real purpose of railway commission control is to secure adequate sustained service for the public at minimum cost and to protect and conserve investments already made for that purpose. In doing so primary consideration must be given to the public rather than to individuals. Missouri Pacific R.R. Co. v. Zimmerman Feed Yards ---------- 501
2. The matter of time necessary to be devoted to the performance of duties by an agent of a railroad is a matter of importance in determining whether agency should be discontinued. Missouri Pacific R.R. Co. v. Zimmerman Feed Yards ---------- 501
3. The ruling of the railway commission or of the Supreme Court on the question of discontinuance of an agency at any given time does not amount to an adjudication for the future. It is only a judgment on the condition presented by the application and relates only to the time and conditions presented. Missouri Pacific R.R. Co. v. Zimmerman Feed Yards ---------- 501
4. It is the duty of a carrier to seek, and of regulatory agencies to permit, the elimination of those services and facilities that are no longer needed or used by the public to any substantial extent. Missouri Pacific R.R. Co. v. Zimmerman Feed Yards 501
5. On appeal to the Supreme Court from an order of the railway commission, while acting within its jurisdiction, the question for determination is the sufficiency of the evidence to prove that the order is not unreasonable or arbitrary. Missouri Pacific R.R. Co. v. Zimmerman Feed Yards ---------- 501
6. It is not reasonable to require the maintenance of a full-time agency station when the cost of such service is out of proportion to the revenue derived from that portion of the public benefited thereby, especially where a substitute service may be pro-

vided which will afford the same essential service but is less convenient. Missouri Pacific R.R. Co. v. Zimmerman Feed Yards ---------- 501

7. Under statute, the railway commission is required in its final order to make findings of fact and conclusions of law. Yellow Cab Co. v. Nebraska State Railway Commission ---------- 711

8. The findings of fact of the railway commission should consist of a concise statement of the conclusions upon each contested issue of fact. Yellow Cab Co. v. Nebraska State Railway Commission 711

9. In the absence of findings of fact, there is no proper basis upon which to review an order of the railway commission and to determine whether it is reasonable or arbitrary. Yellow Cab Co. v. Nebraska State Railway Commission ---------- 711

10. A finding, in a final order of the railway commission, that a proposed rate is or will be unjust, unreasonable, unjustly discriminatory, unduly preferential, or unduly prejudicial does not comply with the requirement of the statute that findings of fact shall consist of a concise statement of the conclusions upon each contested issue of fact. Yellow Cab Co. v. Nebraska State Railway Commission ---------- 711

11. The rate-making power of the railway commission is purely legislative in character and a validly promulgated rate has the force of a statute. Yellow Cab Co. v. Nebraska State Railway Commission 711

12. The only judicial power of the Supreme Court, upon review of an order of the railway commission, is to determine whether the commission acted within the scope of its power and if the action taken was arbitrary or unreasonable. Yellow Cab Co. v. Nebraska State Railway Commission -- 711

13. By statute, the railway commission shall issue a license plate or plates to any motor carrier who is in compliance with the provisions of the Motor Carrier Act and the rules and regulations of the commission. Cole v. LeRoy L. Wade & Sons, Inc. -- 740

14. The railway commission, in order to revoke, change, or suspend a certificate of public convenience and necessity, must proceed in accordance with the provisions of the Motor Carrier Act. Cole v. LeRoy L. Wade & Sons, Inc. ---------- 740

15. An order of revocation of a certificate of public convenience and necessity by the railway commission

without compliance with the provisions of the Motor Carrier Act as to notice and hearing is not effective as a revocation. Cole v. LeRoy L. Wade & Sons, Inc. ---------- 740

Public Utilities.

A public utility is entitled to demand, in the fixing of its rates, a fair return upon the reasonable value of its property at the time it is being used for the public. Yellow Cab Co. v. Nebraska State Railway Commission ---------- 711

Railroads.

1. Requirements of services and facilities at railroad stations stated. Missouri Pacific R.R. Co. v. Zimmerman Feed Yards ---------- 501
2. The matter of time necessary to be devoted to the performance of duties by an agent of a railroad is a matter of importance in determining whether agency should be discontinued. Missouri Pacific R.R. Co. v. Zimmerman Feed Yards ---------- 501
3. The ruling of the railway commission or of the Supreme Court on the question of discontinuance of an agency at any given time does not amount to an adjudication for the future. It is only a judgment on the condition presented by the application and relates only to the time and conditions presented. Missouri Pacific R.R. Co. v. Zimmerman Feed Yards ---------- 501
4. It is the duty of a carrier to seek, and of regulatory agencies to permit, the elimination of those services and facilities that are no longer needed or used by the public to any substantial extent. Missouri Pacific R.R. Co. v. Zimmerman Feed Yards 501
5. It is not reasonable to require the maintenance of a full-time agency station when the cost of such service is out of proportion to the revenue derived from that portion of the public benefited thereby, especially where a substitute service may be provided which will afford the same essential service but is less convenient. Missouri Pacific R.R. Co. v. Zimmerman Feed Yards ---------- 501

Religious Societies.

Where a religious society raises a fund by subscription for a particular purpose, it cannot divert the fund to another purpose. If it abandons such purpose, the

donors may reclaim their contributions. Barker v. Wardens & Vestrymen of St. Barnabas Church -- 327

Replevin.

The plaintiff in a replevin action has the burden of proof and must recover on the strength of his right in or title to the property and not upon any weakness of the interest of the defendant therein. First Nat. Bank v. Provident Finance Co. -------- 45

Sales.

An innocent purchaser is one who buys property for a present valuable consideration without knowledge sufficient to charge him in law with notice of any infirmity in the title of the seller. First Nat. Bank v. Provident Finance Co. ---------- 45

Schools and School Districts.

1. One who seeks to avail himself of the statutory right to recover from a county or school district a tax voluntarily paid must show a substantial compliance with the statute. Misle v. Miller -------- 113
2. The fixing of boundaries of school districts is exclusively a legislative function, and it may be properly delegated to a subordinate agency, providing the Legislature prescribes the manner and the standards under which the power of the designated board may be exercised. McDonald v. Rentfrow ---------- 796
3. Statute authorizing transfer of property in one school district to another held not an unreasonable classification, and based upon a real and substantial difference in situation. McDonald v. Rentfrow ---------- 796
4. The Legislature may confer upon public boards or courts judicial power to determine the facts and equities under which legislation authorizes changes in school district boundaries. McDonald v. Rentfrow ---------- 796
5. In delegating such power, the Legislature must condition the determination by the court or the board upon reasonable and ascertainable fact standards. McDonald v. Rentfrow ---------- 796
6. The provisions of school district statute requiring the board and the court on appeal to determine whether the transfer is just and proper and for the best interest of petitioner or petitioners mean

that the board and the court on appeal must determine factually whether the best educative interests of the petitioner or petitioners will be served. McDonald v. Rentfrow ---------- 796

7. The language of school district statute, referring to the best interests of the petitioner or petitioners, must be construed in pari materia with related statutes and the other provisions in the statute itself in order to determine the legislative intent. McDonald v. Rentfrow ---------- 796

8. The best interest of the petitioner or petitioners means the best educative interest and not the best secular or noneducational interests of petitioner or petitioners. McDonald v. Rentfrow ---------- 796

9. Under school district statute, the board therein constituted sits as a quasi-judicial tribunal exercising in part judicial powers, and the district court and the Supreme Court on appeal will try the issues de novo as in equity. McDonald v. Rentfrow 796

Set-Off and Counterclaim.

Where a motion for a directed verdict or dismissal is sustained, the counterclaim or cross-petition should be continued as a separate cause and trial thereon had to a subsequent jury the same as if it had been filed as a separate action. Flory v. Holtz -- 531

Statutes.

1. Ordinarily words used in the original act will be presumed to be used in the same sense in an amendment thereof. Misle v. Miller ---------- 113

2. When a statute, or a clause or provision thereof, has been construed by a court of last resort, and the same is substantially reenacted, the Legislature may be regarded as adopting such construction. Misle v. Miller ---------- 113

3. When a statute is required to be strictly construed such statute should have a sensible construction. State v. Tatreau ---------- 381

4. A guide to the meaning of a statute is found in the evil which it is designed to remedy. State v. Tatreau ---------- 381

5. In setting up the fact standards upon which a subordinate agency may operate, the Legislature may make reasonable classifications of the objects of legislation for the purpose of legislating with reference thereto. McDonald v. Rentfrow -------- 796

6. The power of classification rests with the Legislature and it will not be interfered with by the courts if real and substantial differences exist which afford a rational basis for classification. McDonald v. Rentfrow ---------- 796
7. In determining whether a classification of persons or property is a reasonable classification, the court will determine if the class selected is a proper and natural selection of those who, upon a reasonable view of the objectives of the act or the mischiefs to be remedied, should be subject to the regulations prescribed. McDonald v. Rentfrow ---------- 796
8. If the classification is determined to be reasonable, the Constitution is not violated if the law is made to operate generally and uniformly upon all of the class so constituted. McDonald v. Rentfrow ---------- 796
9. The provisions of school district statute requiring the board and the court on appeal to determine whether the transfer is just and proper and for the best interest of petitioner or petitioners mean that the board and the court on appeal must determine factually whether the best educative interests of the petitioner or petitioners will be served. McDonald v. Rentfrow ---------- 796
10. The language of school district statute, referring to the best interests of the petitioner or petitioners, must be construed in pari materia with related statutes and the other provisions in the statute itself in order to determine the legislative intent. McDonald v. Rentfrow ---------- 796
11. The best interest of the petitioner or petitioners means the best educative interest and not the best secular or noneducational interests of petitioner or petitioners. McDonald v. Rentfrow ---------- 796
12. The repeal of a statute without any provision for saving the rights founded on the statute determines an action founded upon the statute. Davis v. General Motors Acceptance Corp. ---------- 865
13. The purpose of the general saving clause statute is to avoid the effect of the rule that the repeal of a statute shall not affect pending actions unless the Legislature expressly provides that the repealing act shall apply retroactively. Davis v. General Motors Acceptance Corp. ---------- 865
14. The general saving clause statute does not apply to Chapter 9, Laws 1963, Special Session, page 103, because the Legislature expressly provided in that

act that it should have retroactive effect. Davis v. General Motors Acceptance Corp. ---------- 865

Subrogation.

Subrogation rights of insurance company under conditional sale contract are limited. State Farm Mut. Auto. Ins. Co. v. McCarty ---------- 718

Subscriptions.

1. The general principles governing the performance of contracts apply to subscriptions. If a material change in the plan or purpose for which a subscription is made is effected without the consent of the subscriber, he is excused from performing his promise unless estopped to deny his consent to the change. Barker v. Wardens & Vestrymen of St. Barnabas Church ---------- 327
2. A paid subscription may be recovered back on abandonment of the enterprise, or where the agreement expressly provides for recovery, or if the condition on which it was paid has not been fulfilled. Barker v. Wardens & Vestrymen of St. Barnabas Church ---------- 327
3. Where a religious society raises a fund by subscription for a particular purpose, it cannot divert the fund to another purpose. If it abandons such purpose, the donors may reclaim their contributions. Barker v. Wardens & Vestrymen of St. Barnabas Church ---------- 327

Sunday.

1. A municipal corporation may legislate reasonably with respect to Sunday observance within its corporate area. Skag-Way Department Stores, Inc. v. City of Grand Island ---------- 169
2. A prohibition of activities on Sunday is for the promotion of health, peace, and good order of society by requiring a periodical day of rest and is generally sustained on the ground that it is within the domain of police power. Skag-Way Department Stores, Inc. v. City of Grand Island -- 169
3. Exceptions to a general Sunday closing ordinance must, if the ordinance is to be valid, bear some relation to the public health, safety, morals, or general welfare. Skag-Way Department Stores, Inc. v. City of Grand Island ---------- 169
4. Sunday closing ordinance of city was in violation of

the Constitutions of the United States and the State of Nebraska. Skag-Way Department Stores, Inc. v. City of Grand Island ---------- 169

Taxation.

1. A penalty statute must be strictly construed. It will not be applied to situations or parties not fairly or clearly within its provisions. Misle v. Miller ---------- 113
2. In contruing a penalty statute nothing will be recognized, presumed, or inferred that is not expressed, unless necessarily or unmistakably implied in order to give effect to the statute. Misle v. Miller ---------- 113
3. It is only when the taxpayer is at fault or to blame for failure to comply with the requirements of the statute that a penalty may be exacted. Misle v. Miller ---------- 113
4. When a penalty may be imposed for failure to timely file a tax report, where no time is fixed by statute to file such report, a taxpayer is not liable for a penalty. Misle v. Miller ---------- 113
5. In the absence of statute, taxes voluntarily paid cannot be recovered back. When a tax imposed is illegal and unauthorized for any purpose, an original action may be brought to recover the tax by virtue of statutory or constitutional authority. Misle v. Miller ---------- 113
6. One who seeks to avail himself of the statutory right to recover from a county or school district a tax voluntarily paid must show a substantial compliance with the statute. Misle v. Miller ---- 113
7. A remedy is provided by statute for the recovery of penalties as well as taxes which have been illegally imposed on property. Misle v. Miller ---- 113
8. Statutory provisions, when construed together, were not in conflict and were available as a procedure to recover the penalties illegally imposed in the year 1959. Misle v. Miller ---------- 113
9. A taxpayer has the right to test the actual value of his property as fixed by the taxing authorities under tax statute. Leech, Inc. v. Board of Equalization 841
10. Statutory elements of actual value of property for taxation stated. Leech, Inc. v. Board of Equalization ---------- 841
11. It is presumed that a board of equalization has properly performed its official duties in determin-

ing the actual value of property for tax purposes and that in making an assessment it acted upon sufficient legal evidence to justify its action. Leech, Inc. v. Board of Equalization ---------- 841

12. This presumption of legality disappears when there is competent evidence on appeal to the contrary and when such evidence appears thereafter, the reasonableness of the valuation made by the board becomes one of fact to be determined upon the evidence unaided by presumption. Leech, Inc. v. Board of Equalization ---------- 841

13. The burden of proof is upon the taxpayer to establish that an unreasonable and improper valuation has been placed on the property involved in litigation. Leech, Inc. v. Board of Equalization ----------841

14. On appeal from the finding and determination of valuation by the county board of equalization, the trial in the district court and the Supreme Court is de novo as an equitable proceeding. Leech, Inc. v. Board of Equalization ---------- 841

15. Where the county assessor has not acted on his own information and where valuation is arbitrarily determined without explanation of the methods used or the elements considered, there is no presumption that the valuation is correct. Leech, Inc. v. Board of Equalization ---------- 841

16. Market value is not a sole test of actual value but should be given consideration along with the other relevant factors as to actual valuation. Leech, Inc. v. Board of Equalization ---------- 841

Torts.

1. In a tort action an essential element is the existence of a duty imposed by statute or otherwise in favor of a party injured and on a party whose conduct produces an injury. Schild v. Schild ------ 282

2. The existence or nonexistence of a tort is ascertained by a determination of whether or not an ordinarily prudent person would have acted, or refrained from acting, under the same or like circumstances. Schild v. Schild ---------- 282

3. In an action in tort for personal injuries the question of whether or not the injured party should have mitigated his damages by submitting to an operation should not be submitted to the jury in the absence of evidence showing the extent of the haz-

ards of death or injury and of the pain or suffering involved. Colton v. Benes ---------- 483

4. A lessor is liable for personal injuries to the tenant, or a member of his family, caused by a dangerous condition on the premises resulting from a failure to use reasonable care to make repairs in accordance with a covenant to repair where the lessor has been notified of the needed repairs. Zuroski v. Estate of Strickland ---------- 633

Trademarks and Trade Names.

1. The right to the exclusive use of a trademark or a trade name continues in a trademark owner despite expiration of the patent required to be used in connection with the trademark or trade name. McLeod v. Crawford ---------- 513
2. A trademark licensor has not only the right, but the duty to control the circumstances under which the name is used. McLeod v. Crawford ---------- 513
3. Preservation of the unique value of a trademark and the retention of the enjoyments of it require a trademark owner to include controls over the nature, quality, type of machines, and the method of production of the finished product associated with the trade name. McLeod v. Crawford ---------- 513

Trial.

1. Where the evidence adduced by the plaintiff shows that the negligence of the plaintiff is more than slight as a matter of law, it is the duty of the trial court to direct a verdict for the defendant. Caster v. Moeller ---------- 30
2. Where there is any evidence which will support a finding for the party having the burden of proof, the trial court may not disregard such evidence and direct a verdict against him. Caster v. Moeller ---- 30
3. Rule for consideration of motion for directed verdict stated. Caster v. Moeller ---------- 30
   Flory v. Holtz ---------- 531
4. Where different minds may reasonably draw different conclusions from the evidence in a law action the question to be decided is for the jury. Caster v. Moeller ---------- 30
5. When the evidence is conflicting as to whether physical conditions existing some time after a personal injury were caused or affected by such in-

jury, the question should be submitted to the jury upon all of the evidence. Caster v. Moeller ------ 30
6. Rule for consideration of the issues of negligence and contributory negligence stated. Costanzo v. Trustin Manuf. Corp. ---------- 136
7. The question of the value of an attorney's services is ordinarily a question of fact for the jury and the verdict thereon will not be disturbed unless clearly wrong. Grimminger v. Cummings ---------- 142
8. A verdict of the jury 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. Grimminger v. Cummings -- 142
9. Triers of fact are not generally bound by opinion evidence as to value even when it is not met by opposing proof. Grimminger v. Cummings ------ 142
10. Negligence as a cause of action or as a defense must be proved by the party alleging it, and the burden does not shift during the trial. Cawthra v. Shackelford ---------- 147
11. Contributory negligence is ordinarily an affirmative defense and the burden of proving it is on the party asserting it. Cawthra v. Shackelford ---------- 147
12. Where the evidence is in conflict and is such that reasonable minds may draw different conclusions therefrom the questions of negligence, of contributory negligence, and of comparative negligence are for determination by a jury. Cawthra v. Shackelford ---------- 147
13. In a case where reasonable minds may differ on the question of whether or not the operator of an automobile exercised the care, caution, and prudence required of him under the circumstances of the particular situation, the issue of negligence on the part of the operator is one of fact to be determined by a jury. Cawthra v. Shackelford ---------- 147
14. Whether a party failed to look or looked and failed to see a motor vehicle when it was within the limit of danger is a question for the jury, except in those cases where the evidence is so conclusive that the approaching motor vehicle was within the limit of danger that reasonable minds could not differ thereon. Cawthra v. Shackelford ---------- 147
15. The opinion of a witness as to the value of land will ordinarily be received if he is familiar with

the property and its uses and is informed as to the state of the market, the weight and credibility of his evidence being for the jury. Evans v. State 156

16. Triers of fact are 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. Beavers v. Christensen ---------- 162

17. 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. Beavers v. Christensen ---------- 162

18. Instructions should be considered together in order that they may be properly understood, and when, as an entire charge, they properly submit the issues to the jury, the verdict will not be set aside.
Beavers v. Christensen ---------- 162
Stahlhut v. County of Saline ---------- 189
Chaloupka v. State ---------- 746

19. A general verdict will not be vacated on the ground of irregularity if a construction is possible which will make it effective rather than void. Stahlhut v. County of Saline ---------- 189

20. It is the province of the jury to harmonize the testimony insofar as that is possible, and in case of conflict to decide as to the weight to be given the testimony of the various witnesses. Stahlhut v. County of Saline ---------- 189

21. Triers of fact have the right to test the credibility of witnesses and to weigh their undisputed parol testimony against the facts and circumstances in evidence from which a conclusion may properly be drawn that the witness was mistaken. Stahlhut v. County of Saline ---------- 189

22. If an examination of all the instructions given by the trial court discloses that they fairly and correctly state the law applicable under the evidence, error cannot be predicated thereon. Stahlhut v. County of Saline ---------- 189
Chaloupka v. State ---------- 746

23. The allegations of a pleading are always in evidence for all purposes of the trial. They are before the court and jury and may be used for any legitimate purpose. Stahlhut v. County of Saline ---------- 189

24. A party may at any and all times invoke the language of the pleading of his adversary on which the case is tried, on a particular issue, as rendering certain facts indisputable; and in doing this he is neither required nor permitted to offer the pleading in evidence. Stahlhut v. County of Saline ---- 189

25. Instructions must be considered and construed together, and if they are not sufficiently specific in some respects, it is the duty of counsel to offer requests for instructions that will supply the omission. Unless this is done, the judgment will not ordinarily be reversed for such defects. Stahlhut v. County of Saline ---------- 189

26. Rule as to necessity of requesting an instruction where an instruction given is incomplete but not otherwise incorrect stated. Stahlhut v. County of Saline ---------- 189

27. It is the duty of the trial court, without request, to submit to and properly instruct the jury upon all the material issues presented by the pleadings and the evidence. Ripp v. Riesland ---------- 233

28. Where specific acts of negligence are charged and supported by the evidence, the trial court should instruct as to the specific acts so alleged and supported. The failure to do so, whether or not requested to do so, is error. Ripp v. Riesland ---- 233

29. The enumeration in an instruction of specific acts of negligence should state the ultimate acts of negligence and not a conclusion of the pleader. Ripp v. Riesland ---------- 233

30. The burden of proving contributory negligence is always on the defendant alleging it and does not shift during the trial. Ripp v. Riesland ---------- 233

31. A defendant is entitled to receive the benefit of plaintiff's evidence tending to prove contributory negligence. Ripp v. Riesland ---------- 233

32. It is error for a trial court to instruct a jury that it should proceed upon the theory that all witnesses have tried to testify truthfully. Ripp v. Riesland --- 233

33. Triers of fact are 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 233

34. In testing the sufficiency of the evidence to support a judgment, the evidence must be considered in the

light most favorable to the successful party. Enterprise Co., Inc. v. Sanitary Dist. No. One -- 271
Chaloupka v. State ---------- 746
35. The trial court should instruct the jury as to the proper basis upon which damages are to be assessed. It should fully and fairly inform the jury as to the various items of damage which should be taken into consideration in arriving at the verdict. Enterprise Co., Inc. v. Sanitary Dist. No. One ---------- 271
36. It is the duty of the trial court to instruct the jury upon the issues presented by the pleadings and supported by the evidence. Enterprise Co., Inc. v. Sanitary Dist. No. One ---------- 271
37. Upon a motion for summary judgment the court examines the evidence, not to decide any issue of fact, but to discover if any real issue of fact exists. Johnson v. Metropolitan Utilities Dist. ---- 276
38. The burden is upon the party moving for summary judgment to show that no issue of fact exists, and unless he can conclusively do so the motion must be overruled. Johnson v. Metropolitan Utilities Dist. ---------- 276
39. In considering a motion for summary judgment the court views the evidence in the light most favorable to the party against whom it is directed, giving to that party the benefit of all favorable inferences that reasonably may be drawn therefrom. Johnson v. Metropolitan Utilities Dist. ---------- 276
40. Where the evidence adduced to sustain an issue is such that reasonable minds can draw but one conclusion therefrom, it is the duty of the court to decide the question as a matter of law rather than to submit it to a jury for determination. Schild v. Schild ---------- 282
Giebelman v. Vap ---------- 452
41. In an action grounded on negligence in the ascertainment of whether or not there is evidence of negligence in the area charged against or attributable to the defendant, it is necessary to examine the acts or failure to act and the knowledge on the part of the plaintiff himself. Schild v. Schild 282
42. A motion for a separate trial is addressed to the sound discretion of the trial court, and its ruling on such a motion will not be disturbed in the absence of an abuse of discretion. State v. Hall ---------- 295
43. A defendant may not predicate error on an instruction that is more favorable to him than is

required by the law applicable to the charge made. State v. Hall ---------- 295

44. Where the charge to the jury, considered as a whole, correctly states the law, the verdict and judgment will not be reversed merely because a single instruction, when considered separately, is incomplete. State v. Hall ---------- 295

45. The owner of property, either real or personal, is qualified by reason of the ownership relation to give his estimate of the value of such property. Dawson v. City of Lincoln ---------- 311

46. In a condemnation action, the weight and credibility of conflicting testimony is for the jury. Dawson v. City of Lincoln ---------- 311

47. Where an action at law is tried in the district court upon an agreed statement of facts, the Supreme Court on appeal may direct the rendition of the appropriate judgment which should have been entered by the district court. Barker v. Wardens & Vestrymen of St. Barnabas Church ---------- 327

48. Rule for consideration of motion for summary judgment stated. Berg v. Rasmuss ---------- 340

49. It is not the purpose of summary judgment procedure to require a plaintiff to reveal in detail the evidence he expects to produce to prove the allegations of his petition. Berg v. Rasmuss ---------- 340

50. The summary judgment procedure was never intended as a substitute for a trial on the merits. Berg v. Rasmuss ---------- 340

51. A motion for summary judgment is not a substitute for a demurrer, a motion to dismiss, or a motion for judgment on the pleadings. Berg v. Rasmuss 340

52. Summary judgment is effective and serves a separate useful purpose only when it can be used to pierce the allegations of the pleadings and show conclusively that the controlling facts are otherwise than as alleged. Berg v. Rasmuss ---------- 340

53. The evidence offered on a motion for summary judgment is for the purpose of showing that no issue of fact exists, not to try issues on pleadings, depositions, and affidavits which constitute only a part of the evidence available on a trial on the merits. Berg v. Rasmuss ---------- 340

54. In order for the movant to obtain a summary judgment it must be shown first, that there is no genuine issue as to any material fact and, second,

that movant is entitled to judgment as a matter of law. Berg v. Rasmuss ---------- 340

55. Where there is no evidence of knowledge on the part of the storekeeper or his employees of a dangerous condition, or of the period of time such dangerous condition had existed before the injury occurred, a directed verdict for the defendant is required. Jeffries v. Safeway Stores, Inc. 347

56. In determining whether or not the evidence of plaintiff is sufficient to require submission to a jury, a plaintiff in an action for damages is entitled to the benefit of his evidence together with all reasonable inferences which may flow from evidence adduced by the defendant. Barry v. Dvorak 375

57. Rule for consideration of motion for directed verdict at close of all the evidence stated. Barry v. Dvorak ---------- 375

58. The burden resting on plaintiff requires proof by physical facts, or direct or circumstantial evidence together with inferences that might be drawn therefrom, indicating with reasonable certainty the acts charged in the pleaded cause of action. Barry v. Dvorak ---------- 375

59. Error cannot be predicated on the failure to charge a defendant with a crime more favorable to the defendant as to penalty than the one with which he is charged. State v. Salanitro ---------- 393

60. To render the failure to give an instruction prejudicially erroneous, it is not sufficient that correct abstract propositions of law are therein embodied, but in addition it is requisite that such propositions be pertinent to the case being tried. State v. Salanitro ---------- 393

61. In testing the sufficiency of the evidence to support a jury verdict the plaintiff is entitled to have all conflicts resolved in his favor, and where different reasonable inferences may be drawn from the evidence, the case is for the jury. Zoucha v. Northwestern Bell Tel. Co. ---------- 408

62. Rule as to the sufficiency of the evidence to support a jury verdict stated. Zoucha v. Northwestern Bell Tel. Co. ---------- 408

63. The burden of establishing a cause of action by circumstantial evidence requires that such evidence, to be sufficient to sustain a verdict or require submission of a case to a jury, shall be of such character and the circumstances so related to each

other that a conclusion fairly and reasonably arises that the cause of action has been proved. Petracek v. Haas O.K. Rubber Welders, Inc. ---------- 438

64. A plaintiff relying on circumstantial evidence is not required to exclude the possibility that damages flowed from some cause other than the one on which he relied. Petracek v. Haas O.K. Rubber Welders, Inc. ---------- 438

65. Ordinarily it is error to permit an expert witness to give his opinion on the ultimate fact to be determined by the jury. Petracek v. Haas O.K. Rubber Welders, Inc. ---------- 438

66. When contributory negligence is pleaded as a defense, and there is no evidence to support such defense, it is prejudicial error to submit that issue to the jury. Giebelman v. Vap ---------- 452

67. To justify the direction of a verdict, it is not necessary that there should be literally no evidence to go to the jury; it is sufficient if there is none that ought reasonably to satisfy the jury that the fact sought to be proved is established. Giebelman v. Vap ---------- 452

68. The party against whom a motion for directed verdict 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. Crusinberry v. Merryman ---------- 479
Maseberg v. Mercer ---------- 668

69. Where different minds may draw different inferences or conclusions from facts proved, or if there is a conflict in the evidence, the matter at issue must be submitted to the jury to be determined. Crusinberry v. Merryman ---------- 479

70. In the absence of the elements of estoppel, extrajudicial statements of fact are, ordinarily, not conclusive and may be explained, rebutted, or contradicted and thereafter are to be given such weight as the trier of facts deems them entitled. Crusinberry v. Merryman ---------- 479

71. The trial court is required to submit to the jury for its determination only the issues of fact presented by the pleadings and supported by evidence. It is generally prejudicial error for the trial court to present to the jury for its determination any issue of fact for which there is no proof. Colton v. Benes ---------- 483

72. In a jury case involving issues of negligence, 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 ---------- 483
73. 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. Colton v. Benes ---------- 483
74. Where a motion for a directed verdict or dismissal is sustained, the counterclaim or cross-petition should be continued as a separate cause and trial thereon had to a subsequent jury the same as if it had been filed as a separate action. Flory v. Holtz ---------- 531
75. Where the court is required as a matter of law to determine whether or not there is evidence of gross negligence any doubt in relation thereto must be resolved in favor of its existence, and in the event of such resolution the question becomes one for a jury. Boismier v. Maragues ---------- 547
76. In determining whether or not the evidence is sufficient for the submission of the question of gross negligence to the jury, the meaning of gross is to be arrived at by means of reference to decisions where the term has been defined. Boismier v. Maragues ---------- 547
77. The general rule is that the burden of showing the damages which the landowner will suffer rests upon him while the burden is on condemner to show matters which tend to reduce or mitigate the damages. Pieper v. City of Scottsbluff ---------- 561
78. In an eminent domain proceeding, the weight and credibility of either lay or expert witnesses as to the value of land is for the jury. Pieper v. City of Scottsbluff ---------- 561
79. One may not complain of the misconduct of counsel if with knowledge of such misconduct he does not ask for a mistrial. Pieper v. City of Scottsbluff -- 561
80. When the evidence is conflicting the verdict of the jury will not be set aside unless it is shown to be clearly wrong. Pieper v. City of Scottsbluff 561

81. In testing the sufficiency of evidence to support a verdict it must be considered in the light most favorable to the successful party, that is, every controverted fact must be resolved in his favor and he should have the benefit of every inference that can reasonably be deduced therefrom. Pieper v. City of Scottsbluff ---------- 561
82. One of the purposes of special findings is to furnish the means of testing the correctness of the verdict rendered and of ascertaining its extent. Wagner v. State ---------- 589
83. Special findings of a jury must be based upon the evidence in the trial, and a general verdict cannot stand where it is based upon erroneous special findings. Wagner v. State ---------- 589
84. Where special findings which constitute the foundation of a general verdict appear to be unjustified, a new trial may be ordered. Wagner v. State ---- 589
85. Where on a trial an inspection of the premises in question is proper, but impracticable or impossible, a photographic view thereof is admissible. Schmailzl v. State ---------- 617
86. The possibility that photographs might have a tendency to create sympathy in favor of one party should not render them inadmissible as proof of an issue on trial. Schmailzl v. State ---------- 617
87. Where obscene materials are offered for sale in a store owned by a corporation, it is not error in a prosecution against the operator of the store to instruct that an aider and abettor may be punished as if he were a principal offender. State v. Jungclaus ---------- 641
88. An instruction that at least one of the materials charged as obscene must be proven to have been obscene and possessed for the purpose of sale in order to sustain a conviction is a correct statement of the law. State v. Jungclaus ---------- 641
89. The words "average person," contained in obscenity statute, are words of common meaning which need not be further defined in the court's instructions. State v. Jungclaus ---------- 641
90. Where a county attorney is called as a witness by the defense, he may properly interpose objections to questions propounded to him by defense counsel. State v. Jungclaus ---------- 641
91. In a case where a motion for directed verdict is made and where there is any evidence which will

support a finding for a party having the burden of proof, the trial court cannot disregard it and direct a verdict against him. Maseberg v. Mercer 668

92. A motion for directed verdict or its equivalent must, for the purpose of the decision thereon, be treated as an admission of the truth of all competent evidence on behalf of the party against whom the motion is directed. Maseberg v. Mercer ------ 668

93. A motion for summary judgment may be used to pierce the allegations of the pleadings and show conclusively that the controlling facts are otherwise than as alleged. Ehlers v. Pound ---------- 673

94. Where there is no genuine issue of fact and the movant is entitled to judgment as a matter of law, a motion for summary judgment should be sustained. Ehlers v. Pound ---------- 673

95. The trial court is required to consider any competent and relevant facts revealed by a view of the premises as evidence in the case. A duty is imposed on the Supreme Court on appeal to give consideration to the fact that the trial court did view the premises. Arnold v. Huenefeld ---------- 683
Woodard v. Huenefeld ---------- 694

96. A litigant without request has a right to have his theory of a case presented to the jury by proper instructions only if it is pleaded and there is evidence to sustain it. Caldwell v. Heckathorn ------- 704

97. Instructions must be considered and construed together, and if they are not sufficiently specific in some respects, it is the duty of counsel to offer requests for instructions that will supply the omission. Unless this is done, the judgment will not ordinarily be reversed for such defects. Caldwell v. Heckathorn ---------- 704

98. Rule as to sufficiency of evidence to sustain submission of issues of negligence and contributory negligence to a jury stated. Caldwell v. Heckathorn 704

99. Instructions examined and found adequate in the absence of a request for more specific instructions. Caldwell v. Heckathorn ---------- 704

100. In passing on motion for new trial, every controverted fact must be resolved in favor of the successful party and he should have the benefit of every inference that can reasonably be deduced from the evidence. Chaloupka v. State ---------- 746

101. The opinion of a witness as to value of land will ordinarily be received if he is familiar with the

property and its uses and is informed as to the state of the market, the weight and credibility of his evidence being for the jury. Chaloupka v. State 746

102. The burden of proving the extent of the damages in a condemnation action is not on the condemner but on the owner. Chaloupka v. State ---------- 746

103. The burden to show matters which tend to reduce or mitigate damages is on the condemner. Chaloupka v. State ---------- 746

104. When evidence is in conflict and is such that reasonable minds can draw different conclusions from it a jury question is presented. Chaloupka v. State --- 746

105. Wherever there is any evidence to support a jury's verdict, it is not the court's function to weigh the evidence to determine whether it would have returned a different verdict. Chaloupka v. State --- 746

106. In a condemnation action, the burden of proof is on the condemnee landowner to prove that the severance of the property taken caused damage to the value of the total unit of the remainder and to prove the amount of that damage. Frank v. State -- 759

107. Access to property is one of many factors bearing upon a determination of its value. The Supreme Court, as a matter of law, cannot determine that it thereby diminishes the value of the property. This determination is for the jury to make in conformity with the proper measure of damages. Frank v. State ---------- 759

108. An issue of gross negligence is for the jury if the evidence relating thereto is conflicting and from which reasonable minds might arrive at different conclusions. Hess v. Holdsworth ---------- 774

109. When the evidence is resolved most favorably to the existence of gross negligence and thus the facts are determined, the inquiry of whether they support a finding of gross negligence is one of law. Hess v. Holdsworth ---------- 774

110. Where evidence has been properly received, it is not error for the court to not instruct on the specific purpose for which the evidence was received in the absence of a request to do so. Gable v. State -- 789

111. When a party attacks a special assessment for illegality because his property was not or could not be benefited thereby, he has the burden to prove the illegality alleged. Wiborg v. City of Norfolk -- 825

Trover and Conversion.

The measure of damages for a conversion of personal property is the reasonable market value of the property at the time of the conversion. Baburek v. Skomal ---------- 832

Usury.

1. Where a loan contract has not been entered into, there can be no usury. Metschke v. Marxsen ---- 240
2. An action against a lender under the Installment Loan Act is an action to enforce a forfeiture which, in practical effect, is punitive as to him. Davis v. General Motors Acceptance Corp. ---------- 865
3. Usury statutes are generally held to be penal in nature and subject to amendment or repeal by retroactive legislation. Davis v. General Motors Acceptance Corp. ---------- 865
4. There is no vested right in a usury law and it may be repealed or changed so as to affect causes of action and defenses in pending suits. Davis v. General Motors Acceptance Corp. ---------- 865
5. Parties to usurious contracts hold any right they may have to penalties given by law, subject to a modification or repeal by the Legislature. The repeal of a statutory prohibition against usury releases any penalties imposed, and thus validates the contract. Davis v. General Motors Acceptance Corp. 865
6. The right of a party to avoid a contract on the ground of usury is a privilege that belongs to the remedy and forms no element in the rights that inhere in the contract. Davis v. General Motors Acceptance Corp. ---------- 865
7. The repeal of a usury statute by a retroactive act does not impair the obligation of a previous contract. Davis v. General Motors Acceptance Corp. 865
8. The violation of the Installment Loan Act is a defense which is available to the borrower and his privies. A contract made in violation of the act is enforceable as against all others. Davis v. General Motors Acceptance Corp. ---------- 865

Waters.

1. Under statute, the Department of Water Resources is authorized to extend the completion date for construction, fixed by the order granting an application for an appropriation of water, when such extension is made necessary by temporary interruptions

by some unavoidable and natural cause. Hickman v. Loup River Public Power Dist. ---------- 416

2. The Department of Water Resources has authority to extend the time, if not beyond the final limit permitted by statute, although the application therefor was made after the time first fixed by it had expired. Hickman v. Loup River Public Power Dist. 416

3. An order of the Department of Water Resources in a matter over which it has jurisdiction is clothed with the presumption of regularity and validity. Hickman v. Loup River Public Power Dist. ------ 416

4. The application of appropriated water to beneficial use operates as a condition subsequent which in fact fixes the extent of the right originally acquired. Hickman v. Loup River Public Power Dist. 416

5. An appropriator will not be permitted to retain the right to water which he does not put to a beneficial use and thus deprive others of its benefits. Hickman v. Loup River Public Power Dist. ---------- 416

6. The putting of appropriated waters to a beneficial use in an irrigation appropriation, where the requirements of beneficial use are spelled out in the statute, is ordinarily different than in an appropriation for power purposes where requirments constituting beneficial use are not specified. Hickman v. Loup River Public Power Dist. ------- 416

7. In determining when an appropriation of water for the generation of hydroelectric power for sale to the public has been put to a public use, the courts will not close their eyes to the realities of business life. Hickman v. Loup River Public Power Dist. ------ 416

8. An appropriation of water for power purposes is complete where appropriator has constructed power facilities and placed them in operation, and is ready and willing to deliver hydroelectric energy to users upon demand. Hickman v. Loup River Public Power Dist. ---------- 416

9. A completed appropriation of water for power purposes remains a valid appropriation to the full extent of its granted right unless restricted by a finding of abandonment or nonuser in a proper proceeding. Hickman v. Loup River Public Power Dist. ---------- 416

10. Limitations on an appropriative right in the waters of a stream restrict the appropriator only, and do not amount to a grant to a junior appropriator or

one having no appropriation at all. Hickman v. Loup River Public Power Dist. ---------- 416
11. Effect of administrative construction of leases of water for power purposes stated. Hickman v. Loup River Public Power Dist. ---------- 416
12. An extension of time to put appropriated waters of a stream to beneficial use inheres in an extension of time to complete construction. Hickman v. Loup River Public Power Dist. ---------- 416
13. The grant of an application by the Department of Water Resources to increase the total head of water at an appropriator's generating plants, without an increase in the rate diversion from the stream, in no manner affects junior appropriators and they lack the legal capacity to raise the issue of its invalidity. Hickman v. Loup River Public Power Dist. ---------- 416
14. It is the duty of those who build structures across natural drainways to provide for the natural passage through such obstruction of all waters which may be reasonably anticipated to drain there. This is a continuing duty. Arnold v. Huenefeld ------ 683
Woodard v. Huenefeld ---------- 694
15. Where surface water resulting from rain and snow flows in a well-defined course, whether it be a ditch, swale, or draw in its primitive condition, its flow cannot be arrested or interfered with by a landowner to the injury of neighboring proprietors. Arnold v. Huenefeld ---------- 683
Woodard v. Huenefeld ---------- 694

Wills.

1. The renunciation of a will by a widow will not be allowed to break the testamentary plan further than is absolutely necessary. If, after the widow's share has been set aside, the estate of the decedent is left in such condition that the remaining provisions of the will can be carried out according to the testator's intent, the will will not be declared inoperative. Hauschild v. Hauschild ---------- 319
2. Under the Uniform Property Act, the devise of an interest in real estate to a trustee for the use of a child of the testator during his life, and upon the death of the child to his lineal descendants, creates a life estate in trust for the child and a remainder in his lineal descendants. Hauschild v. Hauschild ---------- 319

3. The rule against perpetuities prohibits only the creation of future interests or estates which, by possibility, may not become vested within a life or lives in being and twenty-one years, together with the period of gestation when the inclusion of the latter is necessary to cover cases of posthumous birth. Hauschild v. Hauschild ---------- 319
4. The court in construing a will must ascertain the intent and purpose of the testator as disclosed by the language of the will. Berning v. National Bank of Com. Tr. & Sav. ---------- 856
5. When the intention of the testator is ascertained, it must be given effect over other considerations if not contrary to law or public policy. Berning v. National Bank of Com. Tr. & Sav. ---------- 856
6. The court is required to carry out and enforce the true intention of the testator as shown by the will itself in the light of attendant circumstances under which it was made. Berning v. National Bank of Com. Tr. & Sav. ---------- 856
7. The law favors the early vesting of estates. A remainder will be declared a vested one unless a contrary intent is apparent from the will. Berning v. National Bank of Com. Tr. & Sav. ---------- 856
8. There is a presumption that a testator intended to dispose of his entire estate and not to die intestate either as to the whole or as to any part thereof. Where a provision of a will is fairly open to more than one construction, a construction resulting in an intestacy as to any part of the estate will not be adopted if by a reasonable construction it can be avoided. Berning v. National Bank of Com. Tr. & Sav. ---------- 856
9. It is possible that the names of the prospective beneficiaries may be given and yet the gift may be to a class. Berning v. National Bank of Com. Tr. & Sav. ---------- 856
10. A substitutional gift in case any legatee shall die is not sufficient reason for holding that the gift is to individuals rather than to a class. Berning v. National Bank of Com. Tr. & Sav. ---------- 856
11. An unequal distribution within a group is a strong indication of individual gifts. Berning v. National Bank of Com. Tr. & Sav. ---------- 856
12. Ordinarily the determination of a class or individual gift depends upon the generally accepted, literal, natural, and grammatical language used in the will,

but it is not wholly limited thereby. It is the substance and intent, rather than the words, which control. Berning v. National Bank of Com. Tr. & Sav. ---------- 856

13. To determine intent, the general scope of the will, the general purpose of the testator, the language used, the relationship of the beneficiaries and the testator, as well as the surrounding circumstances, within proper limits, may be considered. Berning v. National Bank of Com. Tr. & Sav. ---------- 856

14. Will construed in this case to divide the remainder equally between two groups of grandchildren. Berning v. National Bank of Com. Tr. & Sav. -- 856

Witnesses.

1. Opinion evidence of expert witnesses as to the value of an attorney's services is not conclusive, nor is it binding upon the trier of facts. Grimminger v. Cummings ---------- 142

2. The weight and credibility to be given opinion evidence of expert witnesses is the sole province of the jury. Grimminger v. Cummings ---------- 142

3. It is the general rule that a witness need not be an expert to testify to the value of land. Evans v. State ---------- 156

4. It is not essential that every witness qualified to express his opinion as to the value of real estate shall have all-inclusive information of every detail of the factors entering into market value. Evans v. State ---------- 156
Chaloupka v. State ---------- 746

5. The opinion of a witness as to the value of land will ordinarily be received if he is familiar with the property and its uses and is informed as to the state of the market, the weight and credibility of his evidence being for the jury. Evans v. State ------- 156
Chaloupka v. State ---------- 746

6. Whether or not a witness is qualified to give an opinion as to the value of real estate is ordinarily within the discretion of the trial court. Whether or not such discretion has been abused is reviewable on appeal. Evans v. State ---------- 156

7. It is not necessary that a qualifying witness be familiar with every possible element that goes into the determination of market value. Dawson v. City of Lincoln ---------- 311

8. Ordinarily it is error to permit an expert witness

to give his opinion on the ultimate fact to be determined by the jury. Petracek v. Haas O.K. Rubber Welders, Inc. ---------- 438

9. It is not a valid objection to the evidence of an expert that the answer covers the whole ground the jury is to decide, if the case is one to be wholly resolved by such evidence. Petracek v. Haas O.K. Rubber Welders, Inc. ---------- 438

10. Whether a witness' qualification to state his opinion is sufficiently established rests largely in the discretion of the trial court, and its ruling thereon will not ordinarily be disturbed on appeal unless there is a clear showing of abuse of discretion. Flory v. Holtz ---------- 531

11. In condemnation proceedings, where persons are shown to be familiar with the particular land in question, they may be permitted as witnesses to testify as to the value of the tract immediately before and immediately after the appropriation. Pieper v. City of Scottsbluff ---------- 561

12. An automobile accident is a "transaction" within the meaning of the dead man's statute. Bruno v. Kramer ---------- 597

13. In an action against the estate of a decedent driver of a vehicle involved in an automobile accident, a plaintiff's testimony is barred insofar as it relates to the actions or movements of decedent driver's vehicle immediately before or at the time of the accident. Bruno v. Kramer ---------- 597

14. In jury cases jurors are the judges of the credibility of witnesses and of the weight to be given their testimony and, within their province, they have the right to credit or reject the whole or any part of the testimony of a witness in the exercise of their judgment. Chaloupka v. State ---------- 746

15. An expert witness who has made a personal inspection of personal property and formed his judgment as to its value at the time of making the inspection, although at the trial he has no remembrance of the particular items examined, may be permitted to state his opinion of its value. Baburek v. Skomal ---------- 832

16. Evidence of a witness who has qualified as an expert as to the market value of property is not admissible where his opinion is based upon elements and considerations that do not tend to produce market value. Baburek v. Skomal ---------- 832

Workmen's Compensation.

1. In order to recover under the Workmen's Compensation Act, the plaintiff must prove that the death or disability of the workman was the result of an accident arising out of and in the course of the employment. Appleby v. Great Western Sugar Co., Inc. ---------- 102
2. The words "arising out of" and "in the course of" the employment are used conjunctively in the statute and both conditions must be established to satisfy the requirements of the Workmen's Compensation Act. The accident must occur not only in the course of the employment but the causative danger must also arise out of it. Appleby v. Great Western Sugar Co., Inc. ---------- 102
3. The words "arising out of" refer to the origin or cause of the accident and are descriptive of its character, while the words "in the course of" refer to the time, place, and circumstances of the accident. Appleby v. Great Western Sugar Co., Inc. ---------- 102
4. The term "arising out of the employment" is defined. Appleby v. Great Western Sugar Co., Inc. 102
5. Acts of ministration by a servant to himself, such as quenching his thirst, relieving his hunger, protecting himself from excessive cold, performance of which while at work are reasonably necessary to his health and comfort, are incidents to his employment and within the Workmen's Compensation Act. Appleby v. Great Western Sugar Co., Inc. -- 102
6. To warrant a recovery under the Workmen's Compensation Act, the accident which caused the injury complained of must be one arising out of and in the course of the employment. Crow v. The Americana Crop Hail Pool, Inc. ---------- 260
7. The Workmen's Compensation Act does not authorize an award in case of injury or death from a peril which is common to all mankind to which the public in general is exposed. Crow v. The Americana Crop Hail Pool, Inc. ---------- 260
8. Injuries resulting from exposure to the elements are generally classed as risks to which the general public is exposed and as not coming within the purview of workmen's compensation acts, unless a hazard is imposed upon the employee by reason of the employment greater than that to which the public generally is subject. Crow v. The Americana Crop Hail Pool, Inc. ---------- 260

9. Under the provisions of the workmen's compensation law, where an injury is to the finger or fingers only, and the effect of such injury is the usual and natural one, the compensation must be fixed upon the basis of the loss of use of such finger or fingers, and not upon the basis of the loss of use of the hand. Runyan v. Lockwood Graders, Inc. ------ 676
10. Where the workmen's compensation law fixes the amount of compensation, such compensation can be measured only in the manner directed by the statute. Runyan v. Lockwood Graders, Inc. ---------- 676
11. It was the intent of the Legislature in establishing a schedule of benefits for the specific injuries listed in Workmen's Compensation Act to fix the amount of such benefits without regard to the extent of the subsequent disability with respect to the particular work or industry in which the employee was engaged at the time of his injury. Runyan v. Lockwood Graders, Inc. ---------- 676
12. Where an employee has suffered a schedule injury to some particular member or members and some unusual and extraordinary condition develops therefrom as a result thereof, which condition adversely affects some other member or the body itself, an increased award is proper and should be made to cover such additional disability. Runyan v. Lockwood Graders, Inc. ---------- 676
13. An injury to a finger or fingers only is not an injury to a member within the meaning of Workmen's Compensation Act providing for an award of total and permanent disability for the loss of two members as listed therein. Runyan v. Lockwood Graders, Inc. ---------- 676
14. The workmen's compensation law creates a statutory liability. Although the law will be construed liberally to accomplish its beneficent purposes, the courts will not construe its plain and unequivocal meaning, or apply equitable principles thereto, to alleviate any apparent harshness in the result provided by the controlling provisions of the statute. Runyan v. Lockwood Graders, Inc. ---------- 676