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REPORTS OF CASES

DECIDED BETWEEN

DECEMBER 9, 1961 and JUNE 8, 1962

IN THE

Supreme Court of Nebraska

SEPTEMBER TERM 1961 and JANUARY TERM 1962

VOLUME CLXXIII

WALTER D. JAMES

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By WALTER D. JAMES, REPORTER OF THE SUPREME COURT

For the benefit of the State of Nebraska

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CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

SEPTEMBER TERM, 1961

GENEVIEVE HAMMON, APPELLANT AND CROSS-APPELLEE, V. JAMES BRAZDA, APPELLEE AND CROSS-APPELLANT.

112 N. W. 2d 272

Filed December 15, 1961. No. 34965.

1. **Automobiles: Highways.** A motorist proceeding in the exercise of ordinary care cannot be held negligent in failing to stop at an intersection with an arterial highway with which he is not familiar, where the stop sign protecting the arterial has been broken off and he could not be expected to be aware of its presence.
2. **Automobiles.** Ordinarily a guest passenger in an automobile has the right to assume the driver thereof is a reasonably safe and careful driver, and a duty to warn the driver does not arise until some fact or situation out of the usual or ordinary is presented.
3. **Automobiles: Negligence.** It is the rule that, where the negligence of the driver of an automobile in which a person is riding as a guest is the sole proximate cause of a collision in which the guest is injured, the guest cannot recover for such injury from a third person.
4. ———: ———. Where such injuries are the result of the negligent acts of the driver of the plaintiff's automobile and the driver of the other automobile involved in the collision, either or both tort-feasors may be held for the entire damages because the negligent acts of each are regarded in law as a cause of injury.

APPEAL from the district court for Saline County: STANLEY BARTOS, JUDGE. *Reversed and remanded.*

Stern, Harris & Feldman and *Thomas J. Dredla, Jr.*, for appellant.

John E. Dougherty, for appellee.

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

SPENCER, J.

This is an appeal in an action for damages arising out of a collision between two automobiles in a county road intersection. The jury returned a verdict for the defendant. Plaintiff, a passenger in a car operated by her husband, appeals.

The collision occurred about 4 p. m., on the 31st day of August 1958, at the intersection of two graveled highways 1 mile south and 1 mile east of Crete, Nebraska. Plaintiff, Genevieve Hammon, hereinafter referred to as plaintiff, was riding in the front seat of a Ford station wagon being operated by her husband in a northerly direction. Defendant and appellee, James Brazda, hereinafter referred to as defendant, was operating an Oldsmobile owned by one of the other occupants of the car, in a westerly direction. The weather was clear, visibility was good, and the roads were dry. Sometime between 11:30 a. m. of August 31, 1958, and the time of the collision, a stop sign on the east corner of the intersection protecting the road on which the defendant was driving, had been twisted off and was lying in a ditch nearby on the top of some weeds. The defendant was familiar with the road, knew it was protected by a stop sign, and had no reason to know that the sign was down. Plaintiff's husband had never driven on the road before and had no knowledge of the stop sign. The evidence is conclusive it was down and could not be seen as he approached the intersection. The intersection itself could best be described as a blind intersection. The evidence justifies the conclusion that because of trees and weeds it was not possible to see traffic approaching from either of the directions traveled by the two cars until the intersection itself was reached.

Plaintiff's husband testified he had observed a slow sign as he crested a hill approximately 200 or 300 yards south of the intersection. His vehicle was then traveling about 45 miles per hour. He applied his brakes and started gradually slowing down so that when he arrived at the south entrance of the intersection he was traveling 15 miles per hour and was slowing down "pretty fast." He further testified that he first saw defendant's car when the front of his own car was 6 feet into the intersection. Defendant's car was then approximately 100 feet east of the intersection and was traveling at a speed he estimated in excess of 50 miles per hour. This testimony on the part of the plaintiff's husband is the only evidence in the record which would permit a jury to find negligence on the part of the defendant.

The defendant's testimony and that of the occupants of the car he was operating was to the effect that they did not see the car in which the plaintiff was riding until after they were in the intersection; that their attention was attracted to it by the sliding of the gravel; and that the crash occurred immediately thereafter. The testimony of the sheriff of Saline county, who made an investigation within 20 or 30 minutes after the collision, tends to corroborate the story told by the defendant's witnesses. The sheriff testified he found 90 feet of skid marks behind the car driven by the plaintiff's husband, and 15 feet of skid marks behind the car operated by the defendant. The jury undoubtedly accepted this version in returning a verdict for the defendant.

The plaintiff alleges seven assignments of error. The first one is that the verdict and judgment are contrary to law. This objection obviously has no merit. The other six assignments of error involve instructions given by the trial court. We find no prejudicial error in assignments Nos. 6 and 7. The others we will discuss,

starting with the fifth assignment which covers instruction No. 20.

Instruction No. 20 given by the trial court is as follows: "If you find that a stop sign was erected on the south side of the highway running west and east, it then became the duty of those traveling towards said highway from the south to come to a full stop before entering or crossing such highway. The fact, if it be proven, that the stop sign was down or hidden from view and was not visible to those approaching said favored highway does not excuse the person so approaching the said favored highway from coming to a full stop at the intersection of the highways before entering said intersection and, if the operator of a motor vehicle fails to do so, he is guilty of negligence."

The evidence is undisputed that the driver of the plaintiff's car, who was approaching the favored highway, was not familiar with the road he was on and had no idea he was approaching a road ordinarily protected by a stop sign. This case differs from Bell v. Crook, 168 Neb. 685, 97 N. W. 2d 352, 74 A. L. R. 2d 223, where we held: "An arterial highway is not deprived of its character or status because stop signs on an intersecting road are temporarily displaced or otherwise made invisible." There the driver on the nonfavored road knew that a stop sign ordinarily protected the arterial highway and that the sign was down, and we held: "If a motorist knows of the through character of a highway, the presence or absence of warning signs is immaterial as respects his negligence in failing to yield the right-of-way."

There are some cases in other jurisdictions which hold the nonfavored driver guilty of negligence as a matter of law regardless of lack of knowledge. Titus v. Braidfoot, 226 Ala. 21, 145 So. 423, and Jones v. McCullough, 148 Kan. 561, 83 P. 2d 669, are two of them.

We believe, however, the better rule is the one represented by cases such as Schmit v. Jansen, 247 Wis.

648, 20 N. W. 2d 542, 162 A. L. R. 925; Chambers v. Donaldson, 122 Cal. App. 2d 452, 264 P. 2d 950; Mason v. Yellow Cab & Baggage Co., 153 Tex. 344, 269 S. W. 2d 329; and Lyle v. Fiorito, 187 Wash. 537, 60 P. 2d 709.

Without attempting to analyze the conflicting views, we hold that a motorist proceeding in the exercise of ordinary care cannot be held negligent in failing to stop at an intersection with an arterial highway with which he is not familiar, where the stop sign protecting the arterial has been broken off and he could not be expected to be aware of its presence. Instruction No. 20 was improper and prejudicially erroneous herein.

Reading the instructions as a whole, it is true, as plaintiff contends, they can be said to imply to the jury that the right of recovery of a guest in an automobile to whom no negligence can be imputed, is conditioned upon the right of recovery of the driver of her vehicle.

Instruction No. 16 is as follows: "The failure of the driver of an automobile upon approaching an intersection to look in the direction from which another automobile is approaching, where, by looking, he could see and avoid the collision that resulted, is more than slight negligence as a matter of law and defeats the right of recovery. The law not only requires such a driver to look for approaching vehicles but it is also required that he see any vehicle within that radius which denotes the limit of danger.

"*Applying the foregoing rule of law to the instant case* under your consideration, if you find from the evidence that either of the drivers of the automobiles failed to look in the direction from which traffic might approach as they neared the intersection of the two highways, or if they did look but failed to see any vehicle within that radius which denoted the limit of danger, *you are instructed that such driver would be guilty of negligence as a matter of law and cannot recover.*" (Italics supplied.) By this instruction, the jury was advised under what circumstances the driver of her

automobile could not recover, yet in this case neither driver was seeking to recover. The action was solely one on behalf of the plaintiff, a guest in her husband's automobile.

This instruction is not the only one where this type of reference is involved. Both instruction No. 10 and instruction No. 11 contain misleading inferences from which the instructions as a whole lend credence to plaintiff's position. Instruction No. 11 states in part: "If you find from the evidence that either of the operators of the two vehicles violated any of the laws of the State of Nebraska set forth in this instruction, the violation thereof is not in and of itself negligence as a matter of law, but the violation thereof is evidence which you should consider, together, with all the other evidence in the case, to determine *whether or not the parties or any of them* were guilty of negligence." (Italics supplied.)

Instruction No. 10 sets out in detail the reciprocal rights, duties, and obligations of the drivers of the two cars, and says in part: "* * * each had the right to the use of the road and intersection in the ordinary manner and in doing so it was the duty of each to take into consideration not alone his own rights, but the *rights of the other as well* and so each, in the exercise of ordinary care, conduct his vehicle, by complying with the lawful use of the road, so as to prevent injuring himself and *guard against injury to the other.*" (Italics supplied.) The instruction standing alone is a proper instruction, yet read in conjunction with the other instructions and its failure to include anything to cover the duty of the defendant to avoid injuring the plaintiff, a passenger in the other driver's vehicle, does suggest the dependence of plaintiff's right to recover upon the absence of negligence on the part of her driver.

The defendant devotes much of his brief to the negligence of the driver of the plaintiff's car. As we view the evidence, there can be little question but that plain-

tiff's driver was negligent. Further, there is ample evidence from which a jury could find that his negligence was the sole proximate cause of the collision. Also, as we have suggested, the question of negligence on the part of the defendant is entirely dependent upon the sufficiency of the evidence of the plaintiff's driver. On this record, this evidence is sufficient to require its submission to a jury. It is for the jury to determine the credibility of the witnesses. We find that the defendant's motions for dismissal were properly overruled.

We do not agree with the defendant that the negligence of plaintiff's driver should be imputed to the plaintiff. It is true, as plaintiff contends, that she was, at the time of the collision, a guest in her husband's automobile, and consequently the negligence of her husband is not imputable to her. See Remmenga v. Selk, 150 Neb. 401, 34 N. W. 2d 757. There is nothing in the factual situation as developed in this record that would sustain the defendant's argument to the contrary.

Defendant in his cross-appeal suggests that the plaintiff knew of the dangerous condition of the blind intersection because her husband had made some observations on the subject of such intersections several miles from the one involved. He further suggests that plaintiff knew the rules of the road, that she could have observed the situation at this particular intersection, and that she permitted the car to be driven into the intersection without protest. We do not find anything in the evidence adduced in this record that is sufficient to impose an affirmative duty on the plaintiff to observe the road and to warn the driver of approaching dangers.

As we said in Burhoop v. Brackhan, 164 Neb. 382, 82 N. W. 2d 557: "Ordinarily a guest passenger in an automobile has the right to assume the driver thereof is a reasonably safe and careful driver and a duty to warn the driver does not arise until some fact or situation out of the usual and ordinary is presented."

For the purpose of this case as we view the evidence,

plaintiff was a guest passenger and nothing out of the usual and ordinary was presented to impose that duty on her. She is not chargeable with negligence in any particular.

It is the rule that where the negligence of the driver of an automobile in which a person is riding as a guest is the sole proximate cause of a collision in which the guest is injured, the guest cannot recover for such injury from a third person. Burhoop v. Brackhan, *supra.*

Where such injuries are the result of the negligent acts of the driver of the plaintiff's automobile and the driver of the other automobile involved in the collision, either or both tort-feasors may be held for the entire damages because the negligent acts of each are regarded in law as a cause of injury. Eden v. Klaas, 166 Neb. 354, 89 N. W. 2d 74.

As we have said before, the question of defendant's negligence was for the jury. Defendant's motions for dismissal were properly overruled, and the cross-appeal cannot be sustained.

For the reasons given, the judgment of the district court is reversed and the cause remanded for further proceedings in harmony with this opinion.

REVERSED AND REMANDED.

DOANE COLLEGE, A CORPORATION, APPELLANT AND CROSS-APPELLEE, V. COUNTY OF SALINE, APPELLEE AND CROSS-APPELLANT.

112 N. W. 2d 248

Filed December 15, 1961. No. 35000.

1. **Taxation.** Provisions for the exemption of property from taxation should be given a fair and reasonable interpretation in order to ascertain the true intent as to their scope, and then should be strictly applied and enforced so that the limits thus defined shall not be unduly enlarged or extended.
2. ———. It is the exclusive use of property which determines its exempt character from taxation.

3. ———. In determining whether or not property falls within a tax exemption provision, the primary or dominant use, and not an incidental use, will control.
4. ———. It is the use of the property as distinguished from the use of the income from the property that determines whether it is exempt from taxation.
5. ———. The use of the income from rental property for an exempt purpose does not create an exemption from taxation for the property.

APPEAL from the district court for Saline County: STANLEY BARTOS, JUDGE. *Affirmed.*

Marti, O'Gara, Dalton & Sheldon and *Gerald J. Hallstead*, for appellant.

Steinacher & Vosoba, for appellee.

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

BOSLAUGH, J.

This is an appeal from the district court for Saline County, Nebraska, in a proceeding which originated before the county board of equalization of that county. The appeal involves a determination as to whether certain property owned by Doane College at Crete, Nebraska, is exempt from general taxation.

In 1957 the county assessor notified the college that the president's house and the faculty housing units owned by the college were being added to the tax rolls. The college filed a protest with the county board of equalization requesting that the property be stricken from the tax rolls. After a hearing the board found that the property was not exempt. The college then appealed to the district court. The district court held that the president's house was exempt but that the faculty housing units were not exempt. The college has appealed from the judgment of the district court and the county has cross-appealed.

There is no dispute in this case concerning the facts. The questions involved here are questions of law and in-

volve the application of the constitutional and statutory provisions relating to the exemption of property from general taxation. The Constitution and the statute enacted pursuant thereto provide that property owned and used exclusively for educational purposes, when such property is not owned or used for financial gain or profit to either the owner or user, shall be exempt from taxes. Art. VIII, § 2, Constitution of Nebraska; § 77-202, R. R. S. 1943.

In a number of cases this court has held that the provisions exempting property from taxation are to be strictly construed, that their operation should not be extended by construction, and that the power and right of the state to tax are presumed and the exemption must be clearly granted. This does not mean that there should not be a liberal construction of the language used in order to carry out the expressed intention of the fundamental lawmakers and the Legislature but, rather, that the property which is claimed to be exempt must come clearly within the provisions granting such exemption. Iota Benefit Assn. v. County of Douglas, 165 Neb. 330, 85 N. W. 2d 726, 66 A. L. R. 2d 898.

"The theory that the rule requiring strict construction of a tax-exemption statute demands that the narrowest possible meaning should be given to words descriptive of the objects of it would establish too severe a standard. Rather ought it to be the rule that such words as 'charitable' should be given a fair and reasonable interpretation, neither too broad nor too narrow, in ascertaining the true intent as to the objects of exemption, and then that the statute should be strictly applied and enforced in order not unduly to extend its scope. The rule does not call for a strained construction, adverse to the real intention, but the judicial interpretation of such a statute should always be reasonable." Young Men's Christian Assn. v. Lancaster County, 106 Neb. 105, 182 N. W. 593, 34 A. L. R. 1060.

Doane College is a nonprofit, religious, and educational

institution which has been located at Crete, Nebraska, since 1872. It is a liberal arts college which grants a Bachelor of Arts degree. Currently Doane College is the church-related school for the Congregational Christian Conferences of Nebraska, Kansas, and Colorado. In 1958-1959 the enrollment was 331.

The central campus of the college consists of 90 acres on which 14 permanent buildings and 6 temporary structures are located. The usual facilities of the college including the library, dormitories, classrooms, gymnasium, auditorium, conservatory, science building, Little Theatre, observatory, and the faculty housing units in question are located on this campus.

In 1942 the college purchased a residence property for use as the official residence of the president of the college. This property is located immediately across the street from the campus and adjoins or overlooks the campus. The residence is furnished to the president of the college without charge. As a part of his contract of employment the president is required to live there. In addition to being the living quarters of the president of the college, the president's house is the center for the reception of new faculty members, foreign visitors, the trustees, and their families. It is used as housing for prospective faculty members and foreign visitors on their visits to the campus and it is used extensively for student group meetings and conferences, senior receptions, and freshmen orientation receptions. The president uses one room for a library and a study where he carries on his work outside of his regular office hours.

It is the exclusive use of property which determines its exempt character from taxation. Nebraska Conf. Assn. Seventh Day Adventists v. County of Hall, 166 Neb. 588, 90 N. W. 2d 50. The primary or dominant use, and not an incidental use, is controlling in determining whether property is exempt from taxation. Ancient and Accepted Scottish Rite of Freemasonry v. Board of County Commissioners, 122 Neb. 586, 241 N. W. 93, 81

A. L. R. 1166. If it is devoted exclusively to educational purposes, it is not liable to taxation unless such use is not direct, but remote. If property is used only partially for the purposes of education, exemption from the burdens of taxation cannot be claimed. Academy of the Sacred Heart v. Irey, 51 Neb. 755, 71 N. W. 752.

In Watson v. Cowles, 61 Neb. 216, 85 N. W. 35, the court said: "The evidence warranted the court in finding that Professor Barrett occupied the building with his family, but it did not furnish any basis for an inference that such occupancy had any proper relation to the conduct of the school. If he lived in the building as a matter of mere personal convenience or advantage, and not because it was necessary in the discharge of his duties as an educator, or to promote the success of his school, then it is evident the property was not used exclusively for school purposes, and consequently was not exempt from taxation."

The evidence in this case establishes that the president of the college lives in the official residence provided him, not as a matter of personal convenience and advantage but because it is necessary in the discharge of his duties. We think that the primary or dominant use of this property is for educational purposes and the district court was correct in holding it to be exempt.

The faculty housing units in question were built in 1956. They consist of two apartment buildings constructed on the main campus near the southwest corner. Each building contains four housing units. The units are rented to members of the faculty for $62.50 per month for a two-bedroom unit and $70 per month for a three-bedroom unit. This is considered to be the fair market rental value of comparable privately owned property in Crete.

None of the members of the faculty of the college are required to live in the housing units and their salaries are fixed without regard to whether they live in the units. The units are intended to be residence facilities

for new members of the faculty and their families during their first 2 or 3 years at the college. After that time they are expected to obtain other housing and the units will be rented again to new members of the faculty. The units are not rented to anyone except members of the faculty.

The housing units were constructed in an effort to relieve a critical housing situation in Crete and to give the college a competitive advantage with other schools in attracting and employing new members of the faculty. Endowment funds were used in constructing the units and the income from them is considered to be endowment income and is placed in the current operational fund. The housing units yield a reasonable amount of income and the college intends to keep charging rent after the amount of endowment funds originally invested in the units has been recovered.

The evidence establishes that the faculty housing units are not owned or used for financial gain or profit to either the owner or user but that alone is not sufficient to bring the property within the exemption provisions of our law. County of Douglas v. OEA Senior Citizens, Inc., 172 Neb. 696, 111 N. W. 2d 719.

There is a distinction between the use of the property and the use of the income therefrom. In a number of cases this court has held that where a building was rented, the property or that part of it which was rented was not exempt from taxation even though the rent received was used for a purpose which was exempt under the statute. First Christian Church of Beatrice v. City of Beatrice, 39 Neb. 432, 58 N. W. 166; Y. M. C. A. of Omaha v. Douglas County, 60 Neb. 642, 83 N. W. 924, 52 L. R. A. 123; Plattsmouth Lodge, A. F. & A. M. v. Cass County, 79 Neb. 463, 113 N. W. 167; Young Men's Christian Assn. v. Lancaster County, *supra*.

The college argues that the faculty housing units are exempt because they are necessary for the operation of a college such as Doane College; that the members of

the faculty counsel with the students in their homes and that student consultation, training, and organization meetings are held there; that the close relationship between the students and faculty is an important characteristic of the training available at a college such as Doane College and is an integral part of the scholastic program; and that the housing units are necessary in order for Doane College to maintain a satisfactory faculty and administration.

Consideration must also be given to the fact that the college is in the housing business. The faculty housing units in question, which are rented at their fair market rental value, are in direct competition with other similar privately owned property. This is true even though the occupancy of the units is restricted to members of the faculty.

The evidence is that in 1959 the college had approximately 30 faculty members. Thus, more than two-thirds of the faculty members reside in dwellings other than the units in question and, presumably, carry on their program of student counseling at their homes.

Without question, the college has gained many benefits as a result of the construction of the faculty housing units. The college is to be commended for this action which resulted in providing suitable housing for some of its faculty, improved facilities for student counseling and conference activity, and a reasonable yield of endowment income for the current operational funds of the college.

The college has cited cases from other jurisdictions which have held similar property to be exempt under the laws of those states. We have considered the decisions cited but they are not controlling here.

This court is of the opinion that the use of the faculty housing units for educational purposes was incidental, or remote and not direct, and that the primary or dominant use of this property was not for educational purposes.

The district court was correct in holding that this property was not exempt.

The judgment of the district court is correct and is affirmed.

AFFIRMED.

DONALD BIGGS, APPELLEE, V. WILLIAM H. GOTTSCH, APPELLANT, IMPLEADED WITH SAFEWAY CAB COMPANY, APPELLEE.

112 N. W. 2d 396

Filed December 15, 1961. No. 35009.

1. **New Trial: Appeal and Error.** If the trial court gave no reasons for its decision in sustaining the motion for new trial, then the appellant meets the duty placed upon him when he brings the record here with his assignments of error and submits the record to critical examination with the contention that there was no prejudicial error. The duty then rests upon the appellee to point out the prejudicial error that he contends exists in the record and which he contends justifies the decision of the trial court. The appellant then in reply has the right, if he desires, of meeting this contention.
2. ———: ———. On review in this court of an order granting 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.
3. **Trial.** Where the verdict of a jury is clearly against the weight and reasonableness of the evidence, it will be set aside and a new trial granted.
4. ———. However, when the evidence is conflicting the verdict of the jury will not be set aside, unless it is shown to be clearly wrong.
5. ———. 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.
6. **Trial: Appeal and Error.** Where, however, there is a reasonable dispute as to the pertinent physical facts, the conclusions to be drawn therefrom are for the jury, and a verdict based thereon will not be disturbed unless clearly wrong.

7. **Trial: Evidence.** It is the rule in this jurisdiction that physical facts may not be accepted as a matter of law or as ground for refusal to submit a case to a jury as against the testimony of witnesses on a controverted fact question, unless they are demonstrable to a degree that reasonable minds cannot disagree concerning their existence, and unless the results flowing therefrom are demonstrable to the same degree agreeable to the known and immutable laws of physics, mechanics, or mathematics.
8. **Automobiles: Highways.** Where a motorist on a nonfavored street stops at an intersecting arterial highway when the intersection is clear of traffic, looks to the right and left for approaching vehicles, acting as a reasonably prudent person in the exercise of due care would act in the belief that he has time and opportunity to safely cross, he is not liable for negligence merely because he attempts to do so.
9. ———: ———. Where the driver of a motor vehicle approaching a through street or highway stops and looks and sees an approaching vehicle on the favored street or highway but erroneously judges its speed or distance or for some other reason assumes he can proceed with safety and not have a collision, the question of whether or not his conduct in doing so makes him guilty of contributory negligence is usually one for the jury.

APPEAL from the district court for Douglas County: CARROLL O. STAUFFER, JUDGE. *Reversed and remanded with directions.*

Gross, Welch, Vinardi, Kauffman, Schatz & MacKenzie, for appellant.

Eisenstatt & Lay and *John J. Higgins, Jr.,* for appellee Biggs.

Cassem, Tierney, Adams & Henatsch, for appellee Safeway Cab Co.

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

BROWER, J.

This action involves a suit for damages for personal injuries sustained in the collision of an automobile driven by the appellant William H. Gottsch, defendant in the district court, and a taxicab operated by the appellee and plaintiff Donald Biggs. The Safeway Cab Company

was made a party defendant because of rights of subrogation only.

In this opinion Biggs will be referred to as plaintiff and Gottsch as defendant as they were designated in the district court.

Trial was had to a jury which resulted in a verdict and judgment for the defendant dismissing the plaintiff's action. A motion was thereupon made by the plaintiff for a new trial which was sustained by the trial court. The defendant appealed from this order granting the new trial.

The collision which is the basis of the action occurred January 28, 1959. It took place at the intersection of Forty-first and Leavenworth Streets in the city of Omaha at about 6:45 p.m. It was a dark and cloudy day and the street lights were on. There was however no precipitation, fog, or mist, and the visibility was good. The area was well lighted at the time. Both streets were paved. The paved portion of Leavenworth Street was 54 feet wide and that of Forty-first Street was 24 feet in width. Leavenworth Street was a through street protected by stop signs. It slopes down from the east to the west on a 1.4 percent grade. From exhibit No. 1, a plat introduced in evidence and drawn to scale, the stop sign on the west side of Forty-first Street is approximately 19 feet north of the north curb line of Leavenworth Street and the other stop sign is on the east side of Forty-first Street between 43 and 44 feet south of the south curb of Leavenworth Street. Leavenworth Street has six lanes, three going to the west and three to the east. The outside lane on either side is 7 feet wide and is generally referred to in the evidence as the parking lane. Forty-first Street is a two-lane street. The city ordinance provided for a speed limit of 30 miles an hour on Leavenworth Street.

Plaintiff Biggs was driving the taxicab north on Forty-first Street. In the back seat was a passenger, Laura Wagner. The defendant Gottsch was driving west on

Leavenworth Street. The two drivers and Laura Wagner were the only eyewitnesses present at the time of the accident who testified.

The other matters of evidence being conflicting, we will take them up in conjunction with the discussion of the legal questions involved.

In sustaining the motion for new trial the district court gave no reasons for so doing. In such a case this court has held: " 'If the trial court gave no reasons for its decision in sustaining the motion for new trial, then the appellant meets the duty placed upon him when he brings the record here with his assignments of error and submits the record to critical examination with the contention that there was no prejudicial error. The duty then rests upon the appellee to point out the prejudicial error that he contends exists in the record and which he contends justifies the decision of the trial court. The appellant then in reply has the right, if he desires, of meeting those contentions.' Maska v. Stoll, 163 Neb. 857, 81 N. W. 2d 571. See, also, Hert v. City Beverage Co., Inc., 167 Neb. 557, 94 N. W. 2d 27; Gain v. Drennen, 160 Neb. 263, 69 N. W. 2d 916; Sautter v. Poss, 155 Neb. 62, 50 N. W. 2d 547. As stated in Sautter v. Poss, *supra*: 'There is no burden in the sense of a burden of proof upon either party. The burden is upon both parties to assist the court to a correct determination of the question or questions presented.' " Sleezer v. Lang, 170 Neb. 239, 102 N. W. 2d 435.

Complying with this rule the defendant filed his brief in which he assigns as error the sustaining of plaintiff's motion for new trial and that the trial court erred in holding the admission of certain evidence of police officer Pekula hereinafter discussed was prejudicial error.

The plaintiff in his brief states the questions involved are, did the trial court abuse its discretion in granting a new trial when the weight of the evidence was clearly contrary to the verdict received; when it erroneously instructed the jury as to the issues in the case; when it

failed to properly instruct the jury on the issues; in finding the erroneous admission of a conclusion as to a point of impact of vehicles by a police officer prejudicial to the plaintiff appellee; in granting a new trial on the improper redirect examination of the witness Wagner over counsel's objections; and when it erroneously instructed the jury on comparative negligence and contributory negligence.

On examination of plaintiff's brief it appears that he does not point out any error in the form of the instructions either in the assignment of the questions involved or the argument. He does not point out in what respect they do not state the law. The contention is that they are not applicable because the evidence shows the defendant is charged with negligence as a matter of law and that there was no contributory negligence attributable to the plaintiff as a matter of law; and that under the evidence the defendant had forfeited his right-of-way on Leavenworth Street because of excess speed as a matter of law. Thus, all the questions except those concerning the admission of certain evidence must be determined by a review of the conflicting evidence.

They must be considered in view of the following rules of law pertinent to these questions.

" 'Where the verdict of a jury is clearly against the weight and reasonableness of the evidence, it will be set aside and a new trial granted.' " Langdon v. Loup River Public Power Dist., 144 Neb. 325, 13 N. W. 2d 168.

"However, 'when the evidence is conflicting the verdict of the jury will not be set aside, unless it is shown to be clearly wrong.' " Langdon v. Loup River Public Power Dist., *supra.*

"It is the province of the jury to harmonize the testimony in so far as that is possible, and in case of conflict to decide as to the weight to be given the testimony of the various witnesses." Langdon v. Loup River Public Power Dist., *supra.*

"Where, however, there is a reasonable dispute as

to the pertinent physical facts, the conclusions to be drawn therefrom are for the jury, and a verdict based thereon will not be disturbed unless clearly wrong." Rueger v. Hawks, 150 Neb. 834, 36 N. W. 2d 236.

"It is the rule in this jurisdiction that physical facts may not be accepted as a matter of law or as ground for refusal to submit a case to a jury as against the testimony of witnesses on a controverted fact question, unless they are demonstrable to a degree that reasonable minds cannot disagree concerning their existence, and unless the results flowing therefrom are demonstrable to the same degree agreeable to the known and immutable laws of physics, mechanics, or mathematics. See, Jones v. Union P. R. R. Co., 141 Neb. 112, 2 N. W. 2d 624; Riekes v. Schantz, 144 Neb. 150, 12 N. W. 2d 766; Pruitt v. Lincoln City Lines, 147 Neb. 204, 22 N. W. 2d 651." Rueger v. Hawks, *supra.*

"Where a motorist on a nonfavored street stops at an intersecting arterial highway when the intersection is clear of traffic, looks to the right and left for approaching vehicles, acting as a reasonably prudent person in the exercise of due care would act in the belief that he has time and opportunity to safely cross, he is not liable for negligence merely because he attempts to do so. * * *

"Where the driver of a motor vehicle approaching a through street or highway stops and looks and sees an approaching vehicle on the favored street or highway but erroneously judges its speed or distance or for some other reason assumes he can proceed with safety and not have a collision, the question of whether or not his conduct in doing so makes him guilty of contributory negligence is usually one for the jury." Paddack v. Patrick, 163 Neb. 355, 79 N. W. 2d 701.

With these rules in mind we will now discuss the conflicting testimony of the witnesses as shown by the evidence.

Dennis Edward Pekula, who had been an officer of the

Omaha police department since 1956 and had been engaged in investigating automobile accidents, testified for the plaintiff. He was present at the scene shortly after the accident and investigated it. When he arrived, the Nash automobile of the defendant was on the northwest corner of the intersection facing northwest. The front wheel was past the west curb line of Forty-first Street. The Studebaker checker cab of the plaintiff faced to the southeast with its rear end against the traffic stop sign on Forty-first Street, 15 to 20 feet north of the north curb of Leavenworth Street. The defendant was standing to the rear of his car and the plaintiff was still in the taxicab. The skid marks of the Nash vehicle measured 22 feet in length and extended from a point 20 feet east of the east curb line of Forty-first Street to a point 2 feet within the intersection, veering to the north in the last foot. Plaintiff's taxicab left no skid marks. The skid marks of defendant's automobile were in the middle of the first driving lane to the north. The debris was 18 feet from defendant's automobile in the northeast quadrant of the intersection and was spread all over the quadrant. The skid marks led to it. The officer talked with defendant who was unable to give him the distance he was from the cab when he first realized danger, or his speed at that time, but at the time of the accident estimated his speed to be 20 to 25 miles an hour. He noted Gottsch wore glasses. The plaintiff said he did not notice any danger.

On cross-examination the officer stated defendant told him he noticed there was going to be a collision but couldn't tell exactly where he was at the time. He was then asked whether he determined where the impact took place and he stated he determined it from debris and skid marks and gave as his opinion that it was 16 feet south of the north curb line of Leavenworth Street. Objection was made by plaintiff's counsel, which will be discussed later.

On redirect examination he stated that the point of

impact was the center of the debris and that was what should be understood by that term.

Donald Biggs, the plaintiff and driver of the taxicab, testified he was 55 years of age and had driven Safeway cabs for 6½ years. A passenger Laura Wagner rode in the back seat. Plaintiff stopped near the curb line on Leavenworth Street as he always did where the view there was unobscured. He looked first to the west and saw cars approaching in the center lane and one next to it. When he first saw the automobiles they appeared to be about three or four hundred feet away which he considered a block. No other cars were coming then from the west or east. He started in low gear. The taxicab moving in the middle of the intersection got up to 8 or 10 miles an hour in low. When its bumper was in the center of the street he looked to the east again. He was apparently in the clear, and shifted into second gear and proceeded north. When in the center of the street he estimated the cars he saw approaching from the east were a third of a block away in the middle lane and the one next to it. The automobile in the middle lane was the closest and slowed down a bit to let him pass. When the front end of his car was north beyond Leavenworth Street he felt the shock of the collision. The taxicab spun around clockwise to the west side of Forty-first Street against the steel pole where it was headed in the opposite direction, the front end being 2 or 3 feet out of the intersection. At the time of the impact he was going 10 or 15 miles an hour. Photographs of the taxicab after the collision and bills for the repair of the taxicab in the amount of $1,122.66, and the defendant's automobile for $1,009.15, were introduced in evidence.

On cross-examination Biggs testified he was familiar with the intersection and that he stopped at the curb for the stop sign and not at the sign itself, which he thought was back 10 or 15 feet. He recalled stating in a deposition that he stopped at the stop sign itself with

the front of the taxicab about even with it but now knows he stopped south of the curb. There is no view to the west unless you are at the curb line and that he was mistaken in his former testimony. When the eastbound traffic was in front of him he saw two cars, or perhaps three cars in a group in motion coming west. When the westbound traffic cleared the intersection he started forward and there was no delay. He definitely remembered looking to the east only twice. He could have stopped before he got in the north driving lane. The automobile in the inside lane and the one next to it were fairly close together. He never saw what kind of a car struck him and was not sure its lights were on or which car of the group hit him. Plaintiff did not remember going in front of the automobile when it was close to him on the inside lane. It slowed down a bit about a third of a block away, and seemed to be going about normal speed. The car on the right of his cab was possibly a car length behind. The automobile on the outside lane might have been 75 feet away when he was in, or a little past, the middle of the intersection.

William Gottsch, the defendant, was called by the plaintiff. He stated when he put his foot on the brakes his car moved up about a car length. When asked whether he kept his brakes jammed on until coming to rest, he answered, "A- That's a difficult question. I imagine at the time of the impact I was thrown sideways. My foot probably slipped off of the brakes."

Gottsch's evidence in a deposition was introduced for admissions and in it he stated that at the time he was approaching Forty-first Street the car ahead in his lane was 6 or 8 car lengths, and it went through the intersection ahead of him. Near the intersection the car in the middle lane to his left was about a car length ahead of his car. He didn't notice whether it came to a stop or kept on going. He didn't see the plaintiff's cab until it was approximately in the middle of Leavenworth Street; and between the time he put on his

brakes and hit the taxicab his speed was reduced about 50 percent. He looked right and left on approaching Forty-first Street. The so-called car at his left was a panel truck, and because of it he couldn't see the traffic in the intersection.

At the trial of the case of State v. Biggs he had stated the right side of his car was 8 or 10 feet from the curb on Leavenworth Street and he saw the plaintiff's taxicab only momentarily when it was past the center of the street. Though he looked to the right and left, he didn't see the taxicab because the car alongside obstructed his vision. When he was about a car length from Forty-first Street the automobile alongside was there.

O. H. Witt testified he was a captain of the Nebraska State Safety Patrol. He was on the patrol since 1937 and was trained and qualified as an expert in traffic investigation. He had studied speed and skid marks from known physical facts. He explained the speed of automobiles could be determined from skid marks and other known physical facts such as pavement, grade, and directional force of the cars concerned. Subsequent to the accident the witness examined the paving at the intersection involved. The kind of car, its weight, the condition of the tires made no difference, but the grade and condition of the pavement and the direction of the impact make a difference. The witness studied the photographs of the car that were in evidence. His experiments with the mathematical formula to figure speed had been verified from his experience. He was then asked a hypothetical question as to the speed of the defendant's car based on the type of cars, their wheel base, their course, the grade, the condition of the intersection as to the paving when dry, the position of the cars after the accident, the damage shown in the photographs in evidence, and the 22 feet of skid marks. Witt testified it was his opinion, based on his formula which he had previously worked out, that the defend-

ant's Nash at the point of impact was going 25 miles an hour and that it would have been going 35 miles an hour at the time the brakes took effect and the skid marks appeared; that there was a lag distance when the car was momentarily slowing before the brakes became effective; and that considering this lag distance the car was going 39 miles an hour before the driver started to apply them. He stated there is a simple formula by which one determines the distance a car will go per second. This formula was to multiply the miles per hour by one and one-half and the result will be feet per second. He further stated that by another method of ascertaining the speed involved from the length of skid marks and the car damage shown by the bills for repairs showed a speed in excess of 35 miles an hour before applying the brakes, and 25 miles an hour at the point of impact, but on recross-examination he stated this method was based more or less on personal experience.

William Gottsch called in his own behalf testified that he was 64 years old; that he went to the Fireside Restaurant between Thirty-seventh and Thirty-eighth and Leavenworth Streets to eat, leaving there about 6:30 p.m. He then proceeded west on Leavenworth Street traveling in the north traffic lane. There was an automobile immediately ahead of him in his lane and another one in the center lane going west. As he approached Fortieth and Forty-first Streets his speed was 20 to 25 miles an hour and it so continued until he came to the intersection. The car ahead in his own lane was 8 or 10 car lengths ahead at Forty-first Street. The automobile on the inside lane was approximately a car length ahead. It was going about the same speed as his own. He saw the headlights on his left at about the center of Leavenworth Street coming out in front of the other car, and slammed on his brakes. He saw the lights when he was 20 or 30 feet back from the crosswalk. The front of his car collided with the side of

this car. The taxicab appeared to be picking up speed. When defendant applied his brakes it reduced his speed 50 percent. He didn't know how fast he was going when the cars came together. He did all he could to avoid the accident. He was sure he wasn't going 30 miles an hour. He didn't see the taxicab as he came down the street, nor when it came out from the stop, nor until he put on his brakes. His Nash automobile gained slightly on the automobile in the inside lane in the first block. After that they drove all together. The car to his left partially, or wholly, blocked his vision.

Laura Wagner testified she was a passenger in the Safeway cab. It stopped on the south side of Leavenworth Street for the stop sign, though she didn't remember whether at the curb or the stop sign itself. She didn't pay much attention to traffic on Leavenworth Street but it was fairly busy, nor did she notice the traffic from the west at all. Before the taxicab started into the intersection there was a truck facing west in the inside traffic lane. This was a panel truck either stopped or slowing, and the taxicab went in front of it. She thought it was 3 or 4 feet to the taxicab's right, but didn't know exactly. She didn't see the Gottsch automobile.

On cross-examination the witness testified that she did not protest to the driver of her cab or complain of his driving. She observed the traffic as one observes it as a passenger. She had filed suit against Gottsch, the Safeway Cab Company, and Biggs, and in her petition she stated that Gottsch was going 40 miles an hour. She gave the facts to her attorney who prepared it from her information and his private investigation, and she verified the petition.

On redirect examination she testified substantially as on direct to the presence of the panel truck and that it was apparently waiting for the cab to pass. Over the objection that it was "improper and an attempt to impeach his own witness," she said she had made alle-

gations against Biggs in the petition filed in her own suit, including that he failed to keep a proper lookout and that the taxicab went across Leavenworth Street at a time when the view of the cab driver was obstructed by westbound turning traffic. On recross-examination she stated she had sued Gottsch for $25,000.

The evidence is in many respects conflicting. All of the witnesses had testified previously either in depositions or at other trials involving the same factual situation. On cross-examination there were variances in their testimony brought out as to the details of their testimony which we have not generally set out. In at least some instances they had given evidence or statements on four different occasions. However, the substance appears substantially as outlined.

This evidence is in many respects conflicting and presents at least two factual theories. The plaintiff contends he entered the intersection at a time when the only approaching traffic was almost a block to the east. He started from the curb with ample time to cross the intersection and that any approaching vehicle should have under the circumstances slowed and allowed his cab to proceed. The defendant was bound to give him the right-of-way but failed to observe the condition of the traffic or to look when and where he was required to look. Defendant approached the intersection at an unlawful and dangerous rate of speed, as testified to by the expert Witt, and ran into the plaintiff's taxicab as the result of his negligence.

The defendant's theory is that the plaintiff left a position of safety and drove into the intersection perhaps from a position near the stop sign in accordance with his previous testimony. The plaintiff's vision as well as that of the defendant was at least partially obscured by the presence of a panel truck on the inside lane of westbound traffic. It was necessary for this truck to stop or slow down to allow the plaintiff's taxicab to pass. The plaintiff proceeded into the intersection im-

mediately after the eastbound traffic had cleared, when the panel truck was at or close to the intersection, and without correctly appraising the speed of approaching traffic or its distance from the intersection. Defendant's speed was 20 to 25 miles an hour as he testified and not the speed which the officer had computed.

The conflict of theories and the various discrepancies in the testimony were questions for the jury and were submitted to it. It appears there was ample evidence, if believed by the jury, to find the defendant or the plaintiff, or both of them, guilty of negligence. If the plaintiff was negligent his negligence might have been considered more than slight as compared with the defendant's negligence. We, therefore, conclude that the issues were properly submitted to the jury.

The jury was the sole judge of the facts presented by the evidence. It found for the defendant on the issues submitted. Its findings cannot be disturbed when based on conflicting evidence as to which reasonable minds would differ. We find no error in the submission of the cause to the jury.

There remain certain matters with respect to the evidence to consider. First, in the cross-examination of the witness Pekula, he was allowed, over proper objections, to testify where he determined the point of impact to be. In the case of Danner v. Walters, 154 Neb. 506, 48 N. W. 2d 635, this court held that an expert cannot give his opinion as to the point of impact because it would be his opinion upon the precise or ultimate fact in issue before the jury, which must be determined by it. The case held the testimony of the witnesses should be restricted to concrete facts perceived by the use of their senses as distinguished from such opinions. In the present case, however, the plaintiff's counsel brought out on redirect-examination that the witness referred only to the center of a lot of debris in the center of the street. It appears this was all he could be understood to refer to. The explanation was

sufficient to explain to the jury the fact to which he testified and we find no prejudice resulted. Travis v. Omaha & C. B. St. Ry. Co., 98 Neb. 200, 152 N. W. 395; 5A C. J. S., Appeal and Error, § 1735 (a) (2), p. 1031.

The plaintiff in his brief objects to rulings in regard to the admission of evidence in the redirect-examination of the witness Wagner over the objection of counsel for the plaintiff. The questions were concerning her suit which had been filed against the defendant, the plaintiff, and the taxicab company. The objections are pointed out to some extent in the plaintiff's brief. However, the motion for new trial did not assign any objection to this particular testimony or any general assignment as to errors in regard to the admission of evidence. The only objection to the ruling of the court below on the reception in evidence was that of the admission of the testimony of officer Pekula with respect to the point of impact previously discussed, which was specifically assigned. In Kline v. Metcalfe Constr. Co., 148 Neb. 357, 27 N. W. 2d 383, this court held: "The rulings on the admission of testimony can be reviewed by this court when, either by general or specific assignment on the motion for new trial, they are called to the attention of the trial court."

The issues were properly submitted to the jury. The rulings of the court on the evidence subject to review by this court were not prejudicial. This court has held: "Where a party has sustained the burden and expense of a trial and has succeeded in securing the verdict of a jury on 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." Hert v. City Beverage Co., 167 Neb. 557, 94 N. W. 2d 27.

The judgment of the court below in sustaining the motion for new trial and setting aside the verdict of the jury is reversed and the cause remanded with directions to reinstate the verdict and judgment rendered thereon.

REVERSED AND REMANDED WITH DIRECTIONS.

I. GLEN DAUGHERTY ET AL., APPELLEES, V. NEBRASKA NATURAL GAS COMPANY, A CORPORATION, APPELLANT.

112 N. W. 2d 790

Filed December 22, 1961. No. 35001.

1. **Gas: Negligence.** A natural gas company transmitting gas to its customers owes a duty to the public to exercise a degree of care commensurate with the danger involved in the transaction of its business.
2. **Negligence.** One under a duty to use care for which knowledge is necessary cannot avoid liability because of voluntary ignorance.
3. **Gas: Negligence.** The duty to exercise proper care to maintain a gas distributing system is a continuing one.
4. ———: ———. Constructive notice under these circumstances is just as effective as actual notice.

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

Stewart & Stewart, for appellant.

Smith Brothers and *Lawrence F. Weber,* for appellees.

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

SIMMONS, C. J.

This is an action based on negligence for damages for injury to and destruction of personal property by fire. Plaintiffs are husband and wife and sue as joint owners of the cause. Defendant is a distributor of natural gas in Lexington.

Issues were made and trial had to a jury resulting in a verdict for the plaintiffs. Defendant appeals.

We affirm the judgment of the trial court.

Plaintiffs resided in a rented house. Chronologically, the events needing consideration which the jury could have found as true generally are as follows.

Defendant's main is in the street in front of the property involved. In 1947 the then owner of the property had a service line attached to defendant's main. Plaintiffs were not tenants of the property at that time. The

service line went across the street and entered the property. The property owner paid for this line. The meter, however, was located outside of and generally against the house.

In May 1957, vegetation turned yellow along the service line. It was excavated by the defendant for about 20 feet. Corosion leaks were found in the pipe so that natural gas was leaking into the soil for a length of several feet. The defendant tested the remaining pipe, was satisfied that it did not then require replacement, and replaced a distance of some 10 feet of pipe where the leaks were discovered.

On March 31, 1959, following a rain, the wife saw bubbles coming out of the ground near the meter. She reported it to her husband who gave it no particular thought. An expert witness testified that the bubbles suggested either air being forced out by rain filling the cracks in the soil, or by gas from decomposing vegetable matter, or by natural gas leaking from the main. No report was made to the defendant.

On the evening of April 2, 1959, plaintiffs, members of their family, and guests were about the home. No cne detected the odor of natural gas.

About 2 a.m., on the morning of April 3, 1959, there was a severe explosion followed by fire.

On April 9, 1959, the supply line to the house was opened and a large hole found in the line about a foot from the riser that led to the meter. Natural gas escaped from that hole. The leak was in that portion of the original 1947 installation which had been left in the ground and in use when the defective pipe was found and removed in 1957.

The defendant has about 40 miles of mains in the city of Lexington. Once each year, usually during July, it employed a private firm to examine its lines for leaks. These examinations appear to have been superficial. A crew of men either walked or drove along the streets and alleys. If they saw discolored vegetation or other

indications of escaping gas, it was reported to the defendant. Whether they went by the property here involved does not specifically appear. No report of leakage was made. At best, the examination was some 8 or 9 months before the explosion here involved.

The defendant also employed a crew of men whose sole job was to make a detailed instrument examination of all of its lines for leakage each year. They were working in the vicinity of plaintiffs' home when the explosion occurred. It does not appear when the last detailed examination of this particular main was made by defendant.

Tests made after the explosion showed a wide diffusion of gas in the soil in the area of the leak involved.

Plaintiffs alleged defendant's negligence as the proximate cause of the explosion in that the defendant failed to properly maintain, inspect, and repair the line; failed to keep the line in good repair; failed to locate and determine the source of escaping gas after notice of the defect was had; failed to install suitable piping after it had knowledge of the defect; failed to completely and thoroughly inspect the supply line after notice of the defect; and failed to exercise reasonable care in the handling and distribution of a substance known to be highly dangerous.

Defendant answered that it did not own the line where the defect was found, did not install it, and that it belonged to the owner of the property. Defendant denied generally. It specifically denied negligence; alleged that any explosion was the result of negligence of the plaintiffs; and alleged contributory negligence.

Defendant's first argued assignments of error are that the trial court should have sustained its motion to dismiss, made at the close of plaintiffs' case-in-chief and at the close of all evidence. These seem to be predicated on the proposition that negligence was not shown by sufficient evidence to create a jury question which in

turn rests on the premise that it had no notice of a defective leak in the pipe.

The evidence does show that this pipe was placed in the ground in 1947. It further shows that by 1957 the pipe was, to a large extent, deteriorated, corroded, and in a leaking condition. It would seem that fact alone should have alerted the defendant to an investment in the installation of a service line of new pipe. Common sense, it seems, would dictate that it took only the running of time for the balance of the pipe to become a dangerous instrumentality. But the defendant elected to take that chance. The inevitable leakage and explosion occurred.

The parties hereto refer to some one or more of our decisions and quote excerpts from them which they confidently assert sustain their positions.

In Mattson v. Central Electric & Gas Co., 174 F. 2d 215, the United States Court of Appeals of the Eighth Circuit had occasion to examine into, review, and state the rules of this state in a quite similar situation. Rather than here laboring an examination of our decisions, we accept the conclusions of that court as our own. With reference to the facts of that case, the court said: "The Company, as has been observed, furnished the material and laid these pipes and used them for the transmission of its gas to its meter in the school building. The natural gas which the Company was transmitting through this pipe was of highly dangerous character and it owed a duty to the public to exercise a degree of care commensurate with the danger involved in the transaction of its business. It knew when this gas line was laid and it was its duty to know what the probable life of the gas pipe would be in the soil where it was laid. While the defendant did not have actual notice that gas was escaping from this perforated pipe, it did know that gas would escape from a perforated pipe and it was charged with knowledge, at least the jury might have so found, that this pipe had probably become per-

forated. It knew that the pipe had been in the ground for more than twenty-five years and it, rather than the plaintiff's decedent, should have known what the condition of the pipe was and the danger arising from its deteriorated condition. Under the circumstances disclosed by the record the jury might properly have charged the Company with constructive notice and if so that notice is just as effective as actual notice. While the foundation of liability for negligence is knowledge, in law an opportunity by the exercise of reasonable diligence to acquire knowledge is equivalent to knowledge, and one under a duty to use care for which knowledge is necessary cannot avoid liability because of voluntary ignorance. * * * Under the Nebraska decisions the Gas Company could not delegate the duty it owed to the public to exercise proper care to maintain its gas system in a safe condition, but it had the continuing duty to exercise proper care to prevent injury from escaping gas. Hence, the mere fact that the service pipe was paid for and possibly was the property of the consumer, did not shift the duty of exercising proper care. The gas in the service pipe, as before noted, was that of the defendant, and as long as it remained its property it was under the duty of using proper care to protect the public from injury caused by the dangerous propensities of that property. A proper regard for the safety of the public would seem to forbid the owner of such a dangerous agency to avoid liability for damage by simply housing such property in a container belonging to some one else, particularly when the owner of such dangerous agency knows, or is charged with knowledge, that the housing or container facilities are in a decayed, dilapidated and deteriorated condition. The agents and employees of the Company are presumably skilled in the business of their employer. They knew, or were presumed to know, the probable life or durability of the materials used, and where the pipes have been in use as long as the pipes in the instant

case, the jury might reasonably find that the Company was charged with notice of their condition. * * * we conclude that it can not be said, under the applicable law, that there was no negligence on behalf of the defendant, but the facts were such as to require that question to be submitted to the jury."

We find no merit in the assignments.

Defendant next argues that the wife was guilty of contributory negligence sufficient to bar recovery as a matter of law. This is predicated on the fact, as testified to by her, that she saw bubbles coming from the ground near the meter. Two experts in the gas field said that it would have suggested a gas leak to them and that they would have notified the gas company or taken some action. Plaintiff Vivian Daugherty was a housewife. From the fact that she saw bubbles, defendant assumes as established that she had "notice of gas escaping from near the meter" and on that unsupported premise bases its argument of contributory negligence. Defendant cites no authority, and we know of none, that supports this contention. It is not sustained.

Plaintiffs alleged damage and prayed for judgment in the sum of $10,148. The only testimony as to damages was that of the husband who itemized their loss at $8,374. The jury reutrned a verdict for $7,957. The trial court instructed the jury of the amount alleged in plaintiffs' petition. Defendant asserts it was a prejudicial error. Prejudice does not appear.

Also, the trial court referred, in its instructions, to "defendant's service line." There is evidence that, in part at least, it belonged to the property owner. That it was used by the defendant was not disputed. The court also did not instruct on an alleged issue of "notice of defect." Without doubt, the defendant had notice of the defective condition of the pipe, although not of the leak itself. These last two matters are disposed of in the quote from Mattson v. Central Electric & Gas Co., *supra.*

We find no prejudicial error in the matters argued by defendant.

The judgment of the trial court is affirmed.

AFFIRMED.

JOHN E. OLIVER ET AL., APPELLEES, V. NED THOMAS, SR., ET AL., APPELLANTS.

112 N. W. 2d 525

Filed December 22, 1961. No. 35027.

1. **Adverse Possession.** A person claiming title by adverse possession must, to establish it, prove open, notorious, exclusive, continuous, and adverse possession of the real estate for the full period of 10 years.
2. ———. In order to create title by adverse possession, the possession, in addition to other elements, must be exclusive for the period of limitations.
3. ———. One claiming ownership of real estate by adverse possession must recover upon the strength of his title and not because of a possible weakness in the title of his adversary.
4. ———. The possession is sufficient if the land is used continuously for the purpose to which it may in its nature be adapted.
5. ———. Title may not be granted or quieted on the theory of adverse possession in the absence of proof of exclusive possession for a purpose to which the land is adapted for the statutory period of 10 years.
6. **Waters.** Grants of land upon rivers in this state carry with them the exclusive right and title of the grantees to the center of the stream, unless the terms of the grant clearly denote an intention to stop at the bank or margin of the river.
7. ———. The thread or center of the channel of a river, within the meaning of the law, is the line which gives the owners of the land on either side access to the water, whatever its stage, and particularly at its lowest flow.

APPEAL from the district court for Morrill County: RICHARD M. VAN STEENBERG, JUDGE. *Affirmed in part, and in part reversed and remanded with directions.*

Atkins & Ferguson and *Clark G. Nichols,* for appellants.

Robert J. Bulger, for appellees.

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

YEAGER, J.

This is an action instituted by John E. Oliver, Robert L. Schmidt and Iris M. Schmidt, husband and wife, and L. Grace Oliver, plaintiffs, against Ned Thomas, Sr., Hazel M. Thomas, Ray Burden, Virgil Plummer, Leo Little, Jacob C. Zitterkopf, Claude Thomas, The Federal Land Bank of Omaha, a corporation, Pan American Petroleum Corporation, George A. Morris, and David J. Pickard, defendants, to quiet title in plaintiffs to certain real estate in Morrill County, Nebraska. The area involved is not particularly described in the pleadings or elsewhere in the record. It is however between land to the north owned by Ned Thomas, Sr., and land to the south owned by John E. Oliver. All of it except a very narrow strip along the north side is between the present north and south banks of the North Platte River. These plaintiffs claimed the right to have title quieted on the basis of adverse possession.

John E. Oliver claims to be the owner of the area in controversy. Robert L. Schmidt and Iris M. Schmidt assert an interest by reason of a contract of purchase. Presumably L. Grace Oliver is the wife of John E. Oliver. The rights of all other parties plaintiff depend upon what the adjudication shall be as to the plaintiff John E. Oliver, hence when the term plaintiff is used the reference will apply to all parties plaintiff unless separate reference is indicated.

The defendant Ned Thomas, Sr., who was the owner of the immediately adjacent land to the north, denied that the plaintiff was entitled to have title quieted in him, and by cross-petition asserted that he was entitled to have title quieted in him for the reason that the area was accretion to his adjacent land.

Of the other named parties, defendant Pan American

Petroleum Corporation was dismissed as a party defendant and is not a party to the proceeding. The rights of the others depend upon the adjudication as to the defendant Ned Thomas, Sr., hence when the term defendant is used the reference will apply to all parties defendant unless separate reference is indicated.

The questions for determination in the case are contained in the following pretrial order: "That the issues in this case be limited to whether or not the plaintiff owns the land and river lying south of the fence described in plaintiff's petition by adverse possession or the defendant Ned Thomas owns some portion of the area lying south of the fence either by adverse possession or on the basis of a shift of the river boundary line by accretion."

A trial was had and judgment was rendered in favor of plaintiff quieting title to the area described in the decree. Title was quieted in the defendant to a described area, but this is of no consequence since no party in this action has made a claim against it adverse to the title of the defendant. This was not an issuable matter on the trial.

A motion for new trial was duly made by the defendant. This motion was overruled. From the judgment and the order overruling the motion for new trial the defendant has appealed.

As grounds for reversal the defendant has set forth numerous assignments of error. The first of these is in substance that the evidence of the plaintiff was insufficient to sustain a judgment in his favor on his pleaded cause of action. This one will be considered first.

In order to arrive at any conclusion it becomes necessary to indicate as clearly as the record will permit the location of the area involved. This may be done only by reference to other property owned by the plaintiff and by the defendant. This cannot be done with any degree of accuracy on the evidence in the record. It is not described by metes and bounds or any kind of

survey; it is not described by monuments within the area or adjacent to it; and it is not described by distances from established monuments farther away. The defendant has described the land in question in his pleadings as the area south of the present fence bounded on the west by extending south at right angles with the centerline of the North Platte River as it existed in 1877 a line 1,392 feet west of the east line of Lot 5 a distance of 500 feet and on the east by extending the east line of Lot 5 south at right angles with the centerline of the North Platte River a distance of 650 feet and on the south by a line connecting the two extended lines. The exact geographical location of none of the named points or lines can be identified. This represented the total area claimed by the defendant in his pleadings and on the trial.

The court by its judgment quieted title in the plaintiff to an area described therein as "all real estate lying south of the fence line A-B-C-D as shown on the plat attached hereto and hereby made a part hereof." This plat is a copy of the exhibit elsewhere referred to in this opinion. The area to which title was quieted includes the area which the defendant says he is entitled to in his pleadings as well as the area south to the south bank of the river.

The parties have placed in the record an exhibit which discloses authentic information with reference to land a considerable distance to the north of this area and also to the south, but none as to this area going back of the year 1958. It is true that lines appear on the exhibit but the testimony does not, within the legal sense, establish true location. By lines placed upon the exhibit by the witness who made and identified it, it appears that the north bank of the North Platte River was near the north line of the area involved and a short distance north was a fence which had been maintained at this location since 1932. There is evidence that a fence was maintained at this location prior to 1932, but since plaintiff's

cause of action depends upon possession from that date forward it does not appear to require discussion as to earlier dates. The exhibit on its face indicates that by a survey made in 1877 this area was a part of the riverbed at that time, which riverbed extended a great distance north, and south generally to the present south bank of the river. The lines do not exactly coincide but they are at no point far apart.

It is obvious that the location of the north bank of the riverbed had moved south by 1932 since the north bank was near the north line of the area involved in 1932. The present south bank, according to the exhibit, is well to the south of this area. The only inference which the record contains is that the area between these two banks is within the present bed of the North Platte River, that the north bank of the river is in about the same location as it was in 1932, and that the area involved in this litigation is in the northern portion of the riverbed.

There is no complete description of the topography of this or any other portion of the riverbed at this time or since 1932. There is evidence that during the months after the close of the irrigation season it is for the most part covered with water, and that during the other months water for the most part disappears from the surface leaving channels, not clearly defined or described, for the flow of water. There is an island, not clearly described as to area, the size of which has not remained the same over the years. There are channels to the north and south of this island. There is evidence of other islands and sandbars but they are not located or identified.

Outside of and south of the fence which is to the north there is a narrow strip of land. The outer extremity is the north boundary of the river. There is no evidence the effect of which is to say that this was not also the north boundary of the river in 1932.

The claim asserted by the plaintiff in this action is

that he was entitled to have title quieted in him to the land extending from the fence line which is to the north of the river to his lands to the south, which included the area claimed by the defendant, on the basis of adverse possession.

Principles which are essential to the establishment of title to land by adverse possesssion to real estate are stated in Ohm v. Clear Creek Drainage Dist., 153 Neb. 428, 45 N. W. 2d 117, as follows:

"A person claiming title by adverse possession must, to establish it, prove open, notorious, exclusive, continuous, and adverse possession of the real estate for the full period of ten years.

"In order to create title by adverse possession, the possession, in addition to other elements, must be exclusive for the period of limitations.

"One claiming ownership of real estate by adverse possession must recover upon the strength of his title and not because of a possible weakness in the title of his adversary." See, also, other cases cited in the opinion.

Evidence of the plaintiff indicated that the area which he was claiming by adverse possession, which included the portion of the disputed area in the riverbed and the strip of land south of the fence, produced grass fit for pasture during the dry season and that from 1932 thenceforth he used all of this area as pasture for cattle, horses, and mules, to the exclusion of all others for that purpose. There was also evidence that it was to some extent used for hunting, trapping, and fishing.

There is no substantial contradiction of the evidence of plaintiff that his use for pasture was open, notorious, and continuous, and that no others used it for that purpose. The dispute in actuality revolves around the question of whether or not use for the purposes of hunting, trapping, and fishing by the defendant defeats the claim of plaintiff to title by adverse possession.

The evidence of the defendant was to the effect that the area in question was adaptable and suitable for

hunting and that it had been used by him over the years for that purpose. There is however no evidence on his part to support a claim of right to title by adverse possession on account of this use. It is however his theory that his use for this purpose defeats a right of the plaintiff to claim title by adverse possession.

The evidence on behalf of the plaintiff discloses that the area was adaptable and suitable for hunting, trapping, and fishing and had been leased for such purposes. The testimony disclosed that land of plaintiff in the area had been leased on one occasion for $600 a year and on others for lesser amounts.

The parties are therefore in agreement that this area in its nature was adapted to and used for hunting. In Worm v. Crowell, 165 Neb. 713, 87 N. W. 2d 384, it was said: "The possession is sufficient if the land is used continuously for the purpose to which it may be in its nature adapted." See, also, Walker v. Bell, 154 Neb. 221, 47 N. W. 2d 504; James v. McNair, 164 Neb. 1, 81 N. W. 2d 813.

In Burket v. Krimlofski, 167 Neb. 45, 91 N. W. 2d 57, it was said: "The claim of title to land by adverse possession must be proved by actual, open, exclusive, and continuous possession under a claim of ownership for the statutory period of 10 years. The possession is sufficient if the land is used continuously for the purpose to which it may be in its nature adapted."

An inescapable corollary to this rule is that title may not be granted or quieted on the theory of adverse possession in the absence of proof of exclusive possession for a purpose to which the land is adapted for the statutory period of 10 years.

In the light of these rules, while on the record it may well be said that the plaintiff did establish actual, open, exclusive, and continuous possession for use over the area as pasturage for much more than 10 years, he did not however establish exclusive possession against the other purpose for which it was adapted, that is

hunting. The testimony of the plaintiff Oliver given at the trial with reference to the area in dispute, as follows, is to the contrary: "Q Do you know whether—are you familiar with that island, the island marked 'E' on Plaintiff's Exhibit No. 1? Are you thoroughly familiar with that island? A I am pretty familiar with most all of those islands. Q And do you know that there is a blind on the south side of it and on the west side of it? A Oh, there might be—I think I saw some blinds in there. Q And do you know that, as a fact, people have hunted off of that island from the north side for years? A A number of people—some from the south side and some from the north. Q And you think they weren't claiming any interest contrary to your interest? A I don't think they were, no. Q It was all right with you for them to hunt there? A Yes, when— Q All right. A There was as much right for one as it was for the other, yes. Q You weren't claiming the right to hunt there—the exclusive right to hunt there, were you? A We claimed the same right that the others had, see. Q You weren't claiming the exclusive right to hunt there, were you? A No. No, I didn't claim any exclusive right to hunt there. * * * Q And you testified this morning that you leased the land for hunting for as much as $600.00 a year. A That was my side of the river. Q That's what I'm getting at, that was just your side of the river. A Uh-huh. Q You never proposed to lease the north side of the river for hunting? A No, I don't think I did, no, I had no—I had no right to."

In the light of this it must be said the evidence fails to sustain the cause of action pleaded in his petition and the judgment in his favor must be reversed.

By cross-petition the defendant seeks to have title quieted in him to an undescribed area south of what has been referred to herein as the present north bank of the North Platte River. His claim is made to depend upon three asserted grounds, namely, accretion,

adverse possession, and ownership to the middle of the river. By assignments of error he contends that on these grounds he was entitled to judgment in his favor.

As to his first ground he asserts substantially that some area south of the north bank of the river is accretion to his land which is bounded on the south by this bank.

The simple answer to this is that there is no competent evidence of probative value from which it could be reasonably inferred that any portion of the area came into being by accretion.

As to the second ground there is a total absence of evidence to sustain a title based on adverse possession.

As to the third ground it may be true that he has some rights, but whatever rights he has, if any, have not been sustained by the evidence adduced at the trial.

The North Platte River at this location is a nonnavigable river and on this account the defendant owns to the centerline or thread of the river. In Hardt v. Orr, 142 Neb. 460, 6 N. W. 2d 589, this court said: "Grants of land bounded upon rivers in this state carry with them the exclusive right and title of the grantees to the center or thread of the stream, unless the terms of the grant clearly denote an intention to stop at the bank or margin of the river. * * * 'The thread or center of a channel, as the term is above employed, must be the line which would give the owners on either side access to the water, whatever its stage might be, and particularly at its lowest flow.'" See, also, Higgins v. Adelson, 131 Neb. 820, 270 N. W. 502; In re Application of Central Nebraska Public Power & Irr. Dist., 138 Neb. 742, 295 N. W. 386; Ohm v. Clear Creek Drainage Dist., *supra;* Heider v. Kautz, 165 Neb. 649, 87 N. W. 2d 226. This is true of course unless title has been acquired thereto by someone else by adverse possession. As already pointed out as to this case adverse possession has not been proved.

The evidence here discloses that in 1932 the south

boundary of the defendant's land was the north bank of the river. Under the evidence and applicable law he is owner southward to the thread or center of the channel. Where that channel is, within the meaning of the law, is not made to appear by the record in this case. There is evidence that there are at least two channels through which water flows, but there is nothing disclosing the location of the legally recognizable channel and the thread or center thereof.

It follows that there is nothing in the record to justify an adjudication that the defendant is the titleholder of any particular area south of the fence except the narrow strip of land between the north bank and the fence line.

Merely as an observation and not as an adjudication, it appears that the defendant may have rights subject to protection from encroachment south of this bank but in the state of the record they may not be determined in this action.

Accordingly the judgment rendered in favor of the plaintiff is reversed. The judgment which was rendered against the defendant on his cross-petition is reversed and the cause remanded with directions to render judgment in his favor quieting title in him to the strip of land between the north bank of the river and the fence referred to herein. The cross-petition is otherwise dismissed, without prejudice however to his right to assert in an appropriate action a right to title to the area from the north bank of the river to the thread of the river. Each party shall pay his own costs.

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

TRAILMOBILE, INC., A CORPORATION, APPELLEE, V. WILBUR L. HARDESTY, APPELLANT.

112 N. W. 2d 535

Filed December 22, 1961. No. 35028.

1. **Trial.** In determining the sufficiency of evidence to sustain a verdict it must be considered most favorably to the successful party, that is, every controverted fact must be resolved in his favor and he is entitled to have the benefit of every reasonable inference which may be deduced therefrom.
2. **Sales.** Whether a transaction is a bona fide time sale or the financing of the balance of a cash purchase price is a question of fact.
3. **Usury.** A truck dealer may in good faith sell a truck on time for a price in excess of the cash price without tainting the transaction with usury, even though the difference in the two prices may exceed lawful interest for a loan.
4. **Witnesses: Appeal and Error.** Whether a witness' qualifications to state his opinion are 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.
5. **Witnesses: Evidence.** Persons engaged in performing services of the same character as those to be valued and persons who have knowledge of the business in and from which the services have been rendered, and their value, may give their opinion as to the value of the services.

APPEAL from the district court for Scotts Bluff County: TED R. FEIDLER, JUDGE. *Affirmed.*

Loren G. Olsson and *Dwight Elliott,* for appellant.

Wells, Martin, Lane, Baird & Pedersen and *Lawrence W. Rice,* for appellee.

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

BOSLAUGH, J.

This is an action to recover the deficiency remaining after the repossession and sale of two trailers purchased upon a conditional sale contract. The appellee, Trailmobile, Inc., was the plaintiff in the district court and the appellant, Wilbur L. Hardesty, was the defendant.

The petition alleged the sale by the plaintiff to the defendant of two 38-foot stock trailers upon a conditional sale contract; the execution and delivery to the plaintiff by the defendant of a promissory note payable in installments; the default of the defendant and the repossession and sale of the trailers by the plaintiff; and the balance due on the note and contract and the expense incident to the repossession and sale of the trailers. The defendant's answer and cross-petition alleged that the transaction was in violation of the Nebraska Installment Loan Law and, therefore, void and sought recovery of the amounts paid to the plaintiff by the defendant. The reply was a general denial.

A pretrial order limited the issues to the following: (1) Whether at the time of the sales transaction of the trailers in question two sales prices were quoted to the plaintiff, i. e., one cash and one time, or whether only one price, namely, a cash price, was quoted; and (2) if the contract is determined to be a valid contract whether skip tracer fees and repossession charges and expenses are valid items of damage.

The jury returned a general verdict for the plaintiff and special findings that during and as part of the sale transaction the defendant was actually informed that there was both a cash sale price and a time sale price; and that the plaintiff during and as part of the sale transaction did not agree that it would finance the unpaid balance of the purchase price.

The defendant's motion for judgment notwithstanding the verdict or for a new trial was overruled and he has appealed.

The defendant's assignments of error are in effect that the evidence does not sustain the verdict and judgment for the plaintiff; that the court erred in overruling the defendant's objections to testimony concerning the expense incident to repossession of the trailers; and that the defendant is entitled to judgment as a matter of law upon his cross-petition.

In determining the sufficiency of evidence to sustain a verdict it must be considered most favorably to the successful party, that is, every controverted fact must be resolved in his favor and he is entitled to have the benefit of every reasonable inference which may be deduced therefrom. Harris v. Pullen, 169 Neb. 298, 99 N. W. 2d 238.

The defendant is engaged in the livestock-hauling business at Henry, Nebraska. In June 1958, the defendant and his son, Robert Hardesty, called at the plaintiff's office in Denver, Colorado, and talked with George Richter, one of the defendant's salesmen. Richter did not testify in person or by deposition. The defendant testified that Richter quoted a price of $21,892 for the trailers that the defendant was buying, "financial charges" of $2,460, and a trade-in allowance of $5,492. Robert Hardesty testified that the "carrying charges" were computed by multiplying the difference between the price of the new trailers and the trade-in allowance by 5 percent and then multiplying that figure by 3. The defendant signed a written sales order which listed the "price of trailer" as $22,000; "5% - 3 yrs" as $2,460; and "grand total" as $24,460. The sales order also contained an agreement for the defendant to pay $18,860 ($24,460 less $5,600 trade-in allowance) in 35 monthly installments of $524 and a final installment of $520.

In October 1958, the defendant returned to the plaintiff's office in Denver to take delivery of the trailers which had been constructed by the plaintiff pursuant to the defendant's order. At that time the defendant talked with Lawrence W. Durance, the office manager of the plaintiff's Denver office. Durance testified that the defendant signed the conditional sales contract, the promissory note, and a certificate of purchaser in his presence. Durance testified that it is his practice to hand each document to the purchaser individually and go over the document with the purchaser. The certificate of purchaser is a printed statement which recites

that a cash sale price and time sale price were quoted to the purchaser before the execution of any instrument relating to the purchase; that the purchaser was given an opportunity to choose to pay the cash sale price but has elected to purchase at the time sale price; and that the transaction constitutes a bona fide time price sale agreement and not a loan of money to the purchaser. Durance testified that on the certificate of purchaser he points out that there is an option to pay cash which is designated under the cash sale price; that there is a time sale price figure also; and that the difference is the "finance charge."

In June 1959, the defendant was behind in his payments and the plaintiff notified the defendant that unless the payments were made the trailers would be repossessed. On June 12, 1959, the plaintiff repossessed the trailers. On July 6, 1959, the plaintiff notified the defendant that the trailers would be sold at auction and the defendant held liable for any deficiency remaining. The trailers were sold at auction on July 17, 1959, and were purchased by the plaintiff. Thereafter the plaintiff sent a statement to the defendant showing a deficiency of $2,322.92 due the plaintiff.

The defendant's theory of the case is that the transaction was not a valid time sale but was a cash sale and that the plaintiff agreed to finance the balance of the cash purchase price; and that the plaintiff's agreement to finance the balance of the cash purchase price constituted a loan to the defendant.

The question of whether a transaction is a bona fide time sale or actually the financing of the balance of a cash purchase price is a question of fact. State ex rel. Beck v. Associates Discount Corp., 168 Neb. 298, 96 N. W. 2d 55. There is no presumption that the contract is invalid and the burden of proof is on the defendant to show that the transaction is a loan. Commonwealth Co. v. Fauver, 169 Neb. 795, 101 N. W. 2d 150.

A truck dealer may in good faith sell a truck on time

for a price in excess of the cash price without tainting the transaction with usury, even though the difference in the two prices may exceed lawful interest for a loan. McNish v. General Credit Corp., 164 Neb. 526, 83 N. W. 2d 1. A time sale made in good faith at a price in excess of a cash price, which time price is arrived at by schedules furnished by a finance company which solicits contracts so entered into between a purchaser and a dealer, may not necessarily be regarded as being tainted with usury even though the difference exceeds the lawful rate of interest for a loan. McNish v. Grand Island Finance Co., 164 Neb. 543, 83 N. W. 2d 13. In order to have the foregoing principles apply it must appear that the buyer actually was informed of and had the opportunity to choose between a time sale price and a cash sale price. It is not enough to merely show that the instruments signed evidencing the indebtedness refer to a time price or time differential when, in fact, the buyer was never quoted a time sale price as such. McNish v. General Credit Corp., *supra.*

This is an action at law and the question before the court is whether the evidence is sufficient to support the verdict. The function of this court in determining whether or not a verdict has been sustained or whether or not there is sufficient evidence for submission to a jury is not to weigh the evidence, but to ascertain whether or not there is evidence to sustain the verdict of a jury in the exercise of its function as the trier of the facts. Johnston v. Robertson, 171 Neb. 324, 106 N. W. 2d 192.

In McNish v. Grand Island Finance Co., *supra,* in the first cause of action, the purchaser was quoted a price of $17,246.40 for a new truck and offered a trade-in allowance of $6,000 for a house trailer, leaving a balance of $11,246.40. The purchaser then advised the seller that he wanted time in which to pay the balance of the purchase price, and 24 months was agreed upon for that purpose. The seller then computed what the payments

would be on a 24-month basis and advised the purchaser of the amount it would take to buy the truck if he wanted 24 months in which to pay. On these facts this court concluded that the agreement involved was a bona fide time price sale agreement.

The testimony of the defendant in this case as to what took place in the June 1958 conversation between the defendant and Richter, the plaintiff's salesman, at Denver is substantially the same as the facts involved in the first cause of action in McNish v. Grand Island Finance Co., *supra*. In other words, the jury in this case could properly find that Richter quoted the defendant a cash price of $21,892 for the new trailers, a trade-in allowance of $5,492 for the old trailers, and a time sale price of $24,460 payable in 35 monthly installments of $524 and a final installment of $520.

There is other evidence that strongly tends to characterize the transaction as a loan rather than as a valid time sale. However, it was a question for the jury under all of the evidence to determine whether the contract was in fact a sale on time, with payments deferred, or one for cash with a loan being made to pay the balance of the purchase price. The jury found specifically that the transaction was a valid time sale and not a loan and the evidence is sufficient to sustain the verdict.

In Wood v. Commonwealth Trailer Sales, Inc., 172 Neb. 494, 110 N. W. 2d 87, which involved a factual situation somewhat similar to the facts in this case, this court held the transaction to be a loan made in violation of the Installment Loan Law and, therefore, void. In that case the court said with respect to a $1,924.04 "finance charge": "In addition to what was apparent from the face of the instrument itself the testimony on behalf of the defendant discloses that the finance charge was made on the basis of 7 percent interest a year on $5,354.40 for a period of 5 years, which amounted to $1,874.04, to which was added $50 making the total of $1,924.04. The $50 is not explained by the defendant.

The plaintiffs' evidence indicates that it was a charge for refinancing the balance remaining unpaid at the end of 5 years. * * * The conclusion that this was an interest charge and was so regarded by the parties and not the difference between a cash price and a time sale price is inescapable." However, the Wood case was a proceeding in equity in which the court made the findings of fact. This case is an action at law and a jury has made the findings of fact.

The assignment of error relating to the defendant's cross-petition does not require further consideration.

As an item of damage the plaintiff alleged and proved that it paid $245 to Truck Equipment Supply Co. for returning the trailers to Denver. Over objection as to foundation, the plaintiff's witness Durance was allowed to testify that it was his opinion that this amount was the fair and reasonable value of the services furnished. The assignment of error relating to the ruling on the objection to this testimony remains to be considered. The defendant's brief cites no authority in support of this assignment.

The foundation for this testimony was that the witness was the office manager of the plaintiff's Denver office; that prior to September 1958, he had been the office manager of the plaintiff's office in Dallas, Texas; that on five or six occasions he had been confronted with similar situations where vehicles had been repossessed and transferred from one point to another; and that he had observed what the charges were on those occasions. The plaintiff also produced an itemized statement which showed in detail how the charges had been computed.

Whether a witness' qualifications to state his opinion are sufficiently established rests largely in the discretion of the trail court and its ruling thereon will not ordinarily be disturbed on appeal unless there is a clear showing of abuse. School Dist. No. 162 v. Grosshans & Petersen, Inc., 169 Neb. 357, 99 N. W. 2d 601. Persons

engaged in performing services of the same character as those to be valued and persons who have knowledge of the business in and from which the services have been rendered, and of their value, may give their opinion as to the value of the services. In re Estate of Baker, 144 Neb. 797, 14 N. W. 2d 585, 155 A. L. R. 950.

The foundation for this testimony was rather meager but it was not so lacking that the ruling of the trial court can be said to be a clear abuse of discretion. Accordingly, the assignment of error relating thereto is not sustained.

The judgment of the trial court is correct and it is affirmed.

AFFIRMED.

RUDY KLENTZ, APPELLANT, V. TRANSAMERICAN FREIGHTLINES, INC., APPELLEE.

112 N. W. 2d 405

Filed December 22, 1961. No. 35054.

1. **Workmen's Compensation: Appeal and Error.** An appeal to this court in a workmen's compensation case is considered and determined de novo upon the record, and to entitle the plaintiff to a recovery he must sustain the burden of proof by a preponderance of the evidence that he suffered an accident arising out of and in the course of his employment.
2. **Workmen's Compensation.** A compensation award cannot be based on possibilities or speculation, and if an inference favorable to a claimant can only be reached on the basis thereof, then he cannot recover.
3. ——— The rule of liberal construction of the Workmen's Compensation Act applies to the law, not to the evidence offered to support a claim by virtue of the law.
4. **Trial: Evidence.** Triers of fact are not compelled to accept as absolute verity every statement of a witness not contradicted by direct evidence. The persuasiveness of evidence may be destroyed even though uncontroverted by direct testimony.
5. **Workmen's Compensation: Appeal and Error.** The rule that where evidence is irreconcilable and in direct conflict the court

will consider the trial court's observation of the witnesses and their manner of testifying, and also that the trial court must have accepted one version rather than the opposite, applies to the Nebraska Workmen's Compensation Court where the matter was tried on rehearing and from which appeal was taken to the district court.

APPEAL from the district court for Douglas County: DONALD BRODKEY, JUDGE. *Affirmed.*

John Stewart Barrett, for appellant.

Cassem, Tierney, Adams & Henatsch, for appellee.

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

SPENCER, J.

This is a proceeding under the Workmen's Compensation Act. The appellant, Rudy Klentz, hereinafter called the plaintiff, was an employee of the appellant, Transamerican Freightlines, Inc., hereinafter called the defendant.

The action was first tried before one of the judges of the Nebraska Workmen's Compensation Court. After dismissal, it was heard on rehearing before the entire court, and again dismissed. On a review by the district court in an error proceeding, the judgment of the compensation court was affirmed and the proceeding dismissed. Plaintiff perfected his appeal to this court.

Plaintiff states that "about a couple minutes to 6 before quitting time" on Friday night, August 29, 1958, while in the employ of the defendant as a freight handler, he was assisting two other employees to load a crated motor weighing about 900 pounds. He claims while he was pulling, trying to turn the crate, he "slipped and twisted, and it felt like somebody hit me behind my back." He made no complaint at the time to anyone. The men quit work after the crate was loaded, and the plaintiff went home. He did not work on Saturday or Sunday, and Monday, being Labor Day, was a

holiday. On Tuesday morning, when he was supposed to report for work, he called the employer and merely stated his back was hurting and he would not be at work. He did not say how he hurt his back or make any claim of an injury to the employer at this time. He remained away from work for 2 weeks. When he returned to work the third week, he mentioned his injury to his superior and was sent to the doctor by the employer. The doctor X-rayed him and made a diagnosis of pulled muscles pinching a nerve, and prescribed a corset. Plaintiff then returned to work. Plaintiff's testimony is then as follows: "Q. And how long did you work after you returned to work, from the first time you returned? A. Approximately seven months. Q. And that took you up to what date? A. To around the 1st of May. Q. And you laid off again the 1st of May; is that correct? A. Yes, because I had—I took two weeks vacation. I had one week coming with pay, and I asked him for another week because it was paining me so bad and I thought if I rested two weeks maybe it would go away, but it didn't. Then I was supposed to return to work, and I asked for two more weeks off on account of my back. Then I returned to work and worked a week and a couple days and I couldn't stand it and I laid off a week, and then I worked a week and a couple days and I couldn't stand it, and finally I just gave up. Q. Did you see a doctor during this period of time? A. No, I didn't. Q. When did you see a doctor, if you recall? A. Sometime in July I went back to him again. Q. When was the last date you worked for Transamerican at that particular time? A. The last time I worked for them? Q. Yes, the last day? A. 24th of June."

After leaving defendant's employ he did some part-time work for a filling station. He returned to defendant's employ on January 18, 1960. At the time of the hearing he was still in defendant's employ and his pay

was $2.65 an hour. He had received $2.47 an hour in August of 1958.

The last time the plaintiff had seen a doctor previous to July of 1959 was December 8, 1958. The plaintiff gave two signed statements concerning the origin of his sore back. In a statement given September 30, 1958, the plaintiff said in part: "* * * I noticed a pain in my back. It felt as if something gave loose on the left side near the belt line. I did not slip in any way nor did I fall or stumble * * *. I was doing my normal duties connected with my job * * *." In the statement taken on July 8, 1959, he said, among other things: "Since my accident on Aug 29 1958 I have had several times when I have re-hurt my back by doing heavy lifting or by twisting my back. These times have occurred both at home and at work but most of the time at work."

In his hearing before the Nebraska Workmen's Compensation Court en banc, plaintiff testified, in response to a request for an explanation by one of the compensation court judges as to the statement "I did not slip in any way nor did I fall or stumble," as follows: "Now, is there any explanation you can give us for that statement? THE WITNESS: Yes. Before I signed that, when I read that I was sitting on my bed when I told Mr. Cox, I says, 'I did slip.' Well, he said, 'That ain't so important, we will get the main things.' I remember mentioning that to Mr. Cox before I signed that."

Mr. Cox, the adjuster, categorically denied plaintiff's testimony and testified that the statement was not taken at the plaintiff's home but was actually taken at the Transamerican Lines docks while the plaintiff was on the job. Plaintiff's testimony would indicate he had returned to work at least a week before September 30, 1958. Plaintiff returned to the stand after Cox testified and did not deny that the statement containing the questioned language was given at the defendant's docks

as testified by Mr. Cox. Plaintiff's attempted explanation is far from satisfactory.

There is some evidence that the plaintiff had an extensive house remodeling project on during the period. Mrs. Klentz testified the work was started in November 1958, and completed in May 1959. Plaintiff, however, denies doing any of the work, claiming that it was done on contract by the contractor.

The medical testimony consists entirely of reports by letter made to the Travelers Insurance Company or plaintiff's counsel, which were received in evidence by stipulation. The history recitation in Doctor Iwersen's letter is obviously in error in some important particulars, such as seeing a doctor 2 days after the alleged injury. Doctor Iwersen made an examination on July 6, 1959, but did not treat the plaintiff. He diagnosed a chronic low back strain at the time of the injury, and said: "The physical examination is essentially negative today and there are no objective symptoms present. * * * X-rays show degenerative changes in the lumbar spine which account for some of his difficulty."

After plaintiff left defendant's employ, he visited the doctor who had originally examined him. This doctor, writing as of July 21, 1959, said the history would suggest a disc herniation and stated that plaintiff had been advised to return to limited work on July 20, 1959. He saw plaintiff again on September 14, 1959. A myelogram was performed September 14, 1959. This showed a large hourglass defect at the fourth interspace more on the left side, and the first sacral nerve root sleeve did not fill out normally on the left side. The doctor stated the findings did not warrant surgical intervention so he was treated conservatively and advised he might be doing some work, but was told to avoid heavy lifting. These findings appear to be substantiated by another doctor who examined the myelogram and, in a letter to plaintiff's counsel dated October 2, 1959, said:

"The findings of the Myelogram are those of a minimal type of herniated disc."

Plaintiff was paid $43.71, compensation for the period in September 1958, and medical expenses for that period were paid for him in the sum of $16. Plaintiff's claim is that his disability after May 1, 1959, is the result of the injury sustained August 29, 1958.

There are well-established rules of law which are controlling in the situation presented. An appeal to this court in a workmen's compensation case is considered and determined de novo upon the record, and to entitle the plaintiff to a recovery he must sustain the burden of proof by a preponderance of the evidence that he suffered an accident arising out of and in the course of his employment. Dworak v. City of Omaha, 172 Neb. 209, 109 N. W. 2d 160.

A compensation award cannot be based on possibilities or speculation, and if an inference favorable to the claimant can only be reached on the basis thereof, then he cannot recover. McCauley v. Harris, 164 Neb. 216, 82 N. W. 2d 30.

The rule of liberal construction of the Workmen's Compensation Act applies to the law, not to the evidence offered to support a claim by virtue of the law. The rule does not dispense with the necessity that the claimant shall prove his right to compensation by a preponderance of the evidence, and it does not permit a court to award compensation where the requisite proof is lacking. Feagins v. Carver, 162 Neb. 116, 75 N. W. 2d 379.

Triers of fact are not compelled to accept as absolute verity every statement of a witness not contradicted by direct evidence. The persuasiveness of evidence may be destroyed even though uncontroverted by direct testimony. Dworak v. City of Omaha, *supra*.

In Crable v. Great Western Sugar Co., 166 Neb. 795, 90 N. W. 2d 805, we said: " ' "It is obvious that the evidence in the instant case is irreconcilable and in direct conflict. This being true, this court will consider the

trial court's observation of the witnesses and their manner of testifying, and also that the trial court must have accepted one version rather than the opposite." See, also, Sbarra v. Middle States Creameries, Inc., 140 Neb. 813, 2 N. W. 2d 26; Bolen v. Buller, 143 Neb. 237, 9 N. W. 2d 204. This applies to the compensation court where the matter was tried on rehearing and from which appeal was taken to the district court.' "

It was the conclusion of the compensation court judge who first heard the plaintiff's claim, and the unanimous judgment of the compensation court en banc, that the plaintiff had failed to prove that the symptoms and disability of which he complained after May 1959, were the result of the alleged accident on August 29, 1958.

We observe that it is just a little unusual for an employee to fail to mention an injury at the time of its happening, even to fellow employees. It is even more unusual to take time off because of an injury and not give that as a reason to the employer until after returning to work 3 weeks later. The doctor diagnosed plaintiff's ailment in September of 1958 as a pulled muscle, and compensation was paid for 1 week and 2 days, even though a question may have been present as to whether compensation was allowable. Plaintiff, however, returned to work immediately after he saw the doctor, and remained on the job without complaint for 7 months. The record is devoid of any evidence that he lost even 1 hour of time after he returned to work in September of 1958, because of his condition. The medical evidence is less than helpful to support his present position.

Applying the rules set out above to the instant case, we must conclude that the Nebraska Workmen's Compensation Court was correct in its conclusion that the proof adduced is not sufficient to prove by a preponderance of the evidence that the symptoms and disability of which the plaintiff complains from and after

May 1959, are the result of the accident of August 29, 1958.

For the reasons given above, the dismissal of the appeal entered by the district court was in all respects correct and is affirmed.

AFFIRMED.

FRED B. ANSCHUTZ, ALSO KNOWN AS F. B. ANSCHULTZ, APPELLANT, V. THE CENTRAL NATIONAL BANK OF COLUMBUS, NEBRASKA, A BANKING CORPORATION, APPELLEE.

112 N. W. 2d 545

Filed December 22, 1961. No. 35057.

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. **Bills and Notes: Banks and Banking.** A check of itself does not operate as an assignment of any part of the funds to the credit of the drawer with the bank, and the bank is not liable to the holder unless and until it accepts or certifies the check.
3. **Bills and Notes.** The acceptance of a bill is the signification by the drawee of his assent to the order of the drawer. The acceptance must be in writing and signed by the drawee. It must not express that the drawee will perform his promise by any other means than the payment of money.
4. ———. Under our Uniform Negotiable Instruments Law requiring acceptances to be in writing, an unauthorized payment of a check by the drawee bank on a forged endorsement will not constitute an acceptance.
5. **Bills and Notes: Banks and Banking.** A drawee bank which unwittingly pays a check to a subsequent endorser where the endorsement of the payee was previously forged is not liable in an action by the payee either on contract or for money had and received or for conversion.

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

Richards, Yost & Schafersman, for appellant.

Walter, Albert, Leininger & Grant, for appellee.

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

BROWER, J.

This is an action brought by Fred B. Anschutz, appellant and plaintiff in the trial court, against the Central National Bank of Columbus, appellee and defendant, to recover the aggregate sum of $9,000 on two checks, each for $4,500, drawn on the defendant bank by M. H. Van Berg, owner-manager of Columbus Sales Pavilion, in favor of the plaintiff as payee under the name of F. B. Anschultz. It is alleged the plaintiff's signature as payee and endorser on the back of the check is a forgery.

The trial court sustained a general demurrer to the petition. The plaintiff elected to stand on the petition and plead no further. Thereupon, the trial court dismissed the petition and the plaintiff has perfected an appeal from the ruling of the court on the demurrer and dismissal.

Appellant assigns as error the court's action in striking certain words from the petition; in sustaining the demurrer and dismissing the action; and in holding by its ruling that the true owner of the check paid by the defendant bank to a third party on the forged endorsement of the payee was not entitled to collect from the bank even in the absence of the owner's negligence.

The petition sets out two causes of action, one on each check. Except for the dates of the checks they are the same. The substance of the first cause of action will be set out and it will be discussed. The second cause of action on which the check was dated September 9, 1959, with corresponding dates, will not again be referred to.

The substance of each paragraph of the first cause of action with the numbered portion as set out therein here follows with the exception of the fourth and sixth

paragraphs which are quoted in full because of the ruling of the court in striking certain portions thereof.

The first and second paragraphs allege the defendant's corporate existence and its business and that the drawer of the check was a depositor in defendant bank on September 5, 1959. The third paragraph states that on or about that day the drawer made a check payable to the order of the plaintiff for $4,500, and refers to the copy of the check and endorsements attached as an exhibit. The fourth paragraph reads in full as follows: "That thereafter on or about September 5, 1959, one P. COLUCCI, obtained possession of said check from said depositor for the pretended sole purpose of forwarding said check to the plaintiff herein." The fifth paragraph states that the check had not been endorsed at the time P. Colucci obtained possession of it. The sixth paragraph reads in full as follows: "That thereafter subsequent to September 5, 1959, said P. COLUCCI wrongfully cashed said check and thereafter said check was presented to defendant by one of the subsequent endorsers thereon for payment and defendant paid said check and charged the amount thereof to the account of said depositor, the drawer thereof; and that plaintiff did not then or at any time thereafter receive the proceeds of said check or any part thereof." The seventh and eighth paragraphs allege plaintiff's signature on the back of the check was not his signature, but a forgery, and that by reason of the facts set out the drawee bank received $4,500 from the drawer that belonged to the plaintiff which it has failed to deliver and is indebted to him in that amount. The prayer is for $9,000 on both causes of action.

The fourth paragraph set out in full originally stated that Colucci obtained possession of the checks "by artifice, fraud and trick," and the sixth paragraph stated the defendant "negligently" cashed the check. The defendant filed a motion to make the petition more definite and certain by requiring plaintiff to set out the

facts constituting the "artifice, fraud and trick" and the "negligence" mentioned, and in other particulars.

On a hearing the court ordered the quoted words stricken and otherwise in all respects overruled the motion.

The words stricken constituted nothing but the conclusion of the pleader. They added nothing to the petition in the absence of pleading further facts and striking them was not error.

"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." Elliott v. City of Auburn, 172 Neb. 1, 108 N. W. 2d 328. No prejudice arose from their being stricken. Combs v. Owens Motor Co., 121 Neb. 5, 235 N. W. 682.

The remaining question is whether or not the petition states a cause of action, which depends upon whether the payee of a check has a cause of action against a drawee bank which has paid a check upon the forged endorsement of the payee when presented for payment by a subsequent endorser.

This question involves the application and construction of two sections of the Uniform Negotiable Instruments Law enacted by Nebraska in 1905 which read as follows: "A check of itself does not operate as an assignment of any part of the funds to the credit of the drawer with the bank, and the bank is not liable to the holder unless and until it accepts or certifies the check." § 62-1,189, R. R. S. 1943.

"The acceptance of a bill is the signification by the drawee of his assent to the order of the drawer. The acceptance must be in writing and signed by the drawee. It must not express that the drawee will perform his promise by any other means than the payment of money." § 62-1,132, R. R. S. 1943.

Prior to the passage of the Uniform Negotiable Instruments Law, this court said that: "A check drawn on

funds in a bank is an appropriation of the amount of the check in favor of the holder thereof—in effect an assignment of the amount of the check; and the holder, upon refusal of the bank to pay the same, where such funds have not been drawn out before its presentation, may bring an action thereon in his own name." Fonner v. Smith, 31 Neb. 107, 47 N. W. 632, 28 Am. S. R. 510, 11 L. R. A. 528. This case was one decided before the enactment of the Uniform Negotiable Instruments Law, cited with approval in Columbia Nat. Bank v. German Nat. Bank, 56 Neb. 803, 77 N. W. 346, and Falls City State Bank v. Wehrli, 68 Neb. 75, 93 N. W. 994.

These particular cases which we have cited laid down the rule common to that of the courts of last resort in many states before the passage of the Uniform Negotiable Instruments Law that the giving of a check operated as an assignment pro tanto of the drawer's account and it followed that there was privity of contract between the payee or holder of the check and the drawee bank.

Before the enactment of the Uniform Negotiable Instruments Law there was great confusion as to the rights of a payee against the drawee bank which had cashed a check on a forged endorsement. The courts of most of the states which followed the rule that a check operated as an assignment of the drawer's account held that the true owner could thereafter sue the drawee bank because the payee was in privity of contract with the drawee by virtue of the assignment. There was, however, a line of cases which held to the contrary. The leading case in this line of authority was the early one of First Nat. Bank of Washington v. Whitman, 94 U. S. 343, 24 L. Ed. 229. The court there held there could not be a recovery in such a situation, stating: "The payee of a check before it is accepted by the drawee, cannot maintain an action upon it against the latter, as there is no privity of contract between them. * * * Payment to a stranger upon an unauthorized indorsement does not operate as an accept-

ance of the check, so as to authorize an action by the real owner to recover its amount as upon an accepted check." . . .

That case was followed and quoted by many cases before the passage of the Uniform Negotiable Instruments Law. Since the adoption of this act it is still so cited and followed. Many courts now hold that the particular sections of that act set out herein were adopted for the purpose, in part at least, of rendering the law in that case applicable generally and to make the commercial rules clear, unambiguous, and uniform. Because we can find few decisions of this court touching upon this question, and none passing precisely thereon, the following group of cases determined after the passage of the act from the courts of other states are here cited. Miller v. Northern Bank, 239 Wis. 12, 300 N. W. 758, 137 A. L. R. 870; Gordon Fireworks Co. v. Capital Nat. Bank, 236 Mich. 271, 210 N. W. 263; Elyria Savings & Banking Co. v. Walker Bin Co., 92 Ohio St. 406, 111 N. E. 147, L. R. A. 1916D 433, Ann. Cas. 1917D 1055; Baltimore & O. R. R. Co. v. First Nat. Bank, 102 Va. 753, 47 S. E. 837; Whorf v. Seattle Nat. Bank, 173 Wash. 629, 24 P. 2d 120; Fidelity & Deposit Co. v. Fort Worth Nat. Bank (Tex. Com. App.), 65 S. W. 2d 276; Jones v. Bank of America Nat. Trust & Savings Assn., 49 Cal. App. 2d 115, 121 P. 2d 94; 6 Zollmann, Banks and Banking (Perm. Ed.), § 4251, p. 458. They all hold that the payee of the check in suit had no cause of action against the drawee bank which had paid the check upon the forged endorsement of the payee.

Most of the cases in this group are those where the court's opinion discussed the question as one where the action was on contract or for money had and received and the question as to whether an action for conversion of the funds might be maintained is not mentioned. Neither does it appear in many of them whether or not the pleadings in the case before the particular court could have been construed as stating a cause of

action in conversion. The plaintiff here maintains that the petition states a cause of action for money had and received, but that if it does not it certainly states one for the conversion of the funds. It would appear that the payee in these cases never had any funds deposited in the bank and that therefore his funds could not have been converted. Some of the decisions cited discuss the law and hold the payee has no cause of action under either theory. Among them is Gordon Fireworks Co. v. Capital Nat. Bank, *supra,* where the court, discussing the case, said: "The case is ruled by Lonier v. Savings Bank, 149 Mich. 483, where the bank cashed a check in like circumstances: 'This court is committed to the doctrine that the holder of an unaccepted check has no right of action against the drawee, and that the check does not operate as an assignment of the amount named in it, in the drawee's hands, a doctrine supported by the federal case (First Nat. Bank of Washington v. Whitman, 94 U. S. 343, 24 L. Ed. 229) mentioned.'" The court thereafter in the cited case sets out the same sections of the Uniform Negotiable Instruments Law of its state in practically the same words as those of our own. Still later in the same cited case the court continues in regard to the cause of action set out in tort. It states that: "Appellant argues that our cases cited have been in assumpsit and that a different rule should be applied here for the reason that its declaration has a count for conversion. The bank did not convert funds of plaintiff. The check was not an assignment of the amount named in it. Again the Lonier case is the answer."

In Miller v. Northern Bank, *supra,* the same holding was had that there was no cause of action stated by the payee either in contract or in tort for conversion.

There are decisions in conflict with these holdings. Generally speaking, since the passage of the Uniform Negotiable Instruments Law those cases that have allowed recovery have stated that under that act no action remains in contract or for money had and received,

but one may be maintained in conversion. There are a few holding that an action for money had and received may be maintained.

Among the authorities holding that the payee may maintain such an action are the following: A. Paul Goodall Real Estate & Ins. Co. v. North Birmingham American Bank, 225 Ala. 507, 144 So. 7; Blacher & S. Co. v. Granite Trust Co., 284 Mass. 9, 187 N. E. 53; State v. First Nat. Bank of Albuquerque, 38 N. M. 225, 30 P. 2d 728; Hartford Accident & Indemnity Co. v. Bear Butte Valley Bank, 63 S. D. 262, 257 N. W. 642.

In State v. First Nat. Bank of Albuquerque, *supra,* where the recovery was allowed in conversion, the difference in opinion between the two lines of authority may be seen by setting out a quotation from the dissenting opinion as follows: "Conceding the logic of the theory espoused by the majority, I am still unconvinced and believe it my duty to register dissent. * * * I refuse to hurdle or build a road around the Negotiable Instruments Law. To permit recovery on the theory of conversion and deny it in assumpsit is simply providing an ingenious legal escort to conduct the true owner of a check to a judgment which I believe the Negotiable Instruments Law prohibits. * * * I believe that it is consistent with the purpose and spirit of the Negotiable Instruments Law to adopt the view of the United States Supreme Court as laid down in the Whitman Case irrespective of the theory under which the proceeding was instituted. In this there is no hardship. Each party to a check transaction has his remedy. The Negotiable Instruments Law was adopted for the purpose of uniformity, and it is important to the commercial life of this nation that a uniform rule of construction should be adopted by the different jurisdictions in determining the rights of all parties to a negotiable instrument."

The only Nebraska case which we find or to which we are cited after the passage of the Uniform Nego-

tiable Instruments Law touching the question is Gasper v. Security State Bank, 109 Neb. 495, 191 N. W. 654. That was a situation where the drawer brought action against the drawee bank which had cashed the check on a forged endorsement. It too was decided on a demurrer to the petition. The principal question before the court, however, was whether there had been a valid certification by the bank on the authority of the drawer, owner, or holder, or whether it was certified by procurement of the forger and hence not certified or accepted at all. The court held that under the allegations of the petition it appeared to be a certified check and that the drawer could not recover. It clearly appears that the holding was based on the reasoning that the check being validly certified there was an assignment of the funds under section 62-1,189, R. R. S. 1943. The bank therefore was bound by privity of contract with the true owner and holder of the check and its contract with the drawer was terminated and at an end, and the funds belonged to the payee or rightful holder whose funds were converted. In the decision the court held: "Under our negotiable instruments law * * * requiring acceptances to be in writing, an unauthorized payment of a check by the drawee bank on a forged indorsement will not constitute an acceptance." This holding also indicates that if the check had not been held to have been certified the action of the plaintiff drawer would have been proper. This is because under those circumstances he would have been in privity with the bank and it would have been his funds that were converted. Also in the discussion it cites, apparently with approval, Southern Trust Co. v. American Bank of Commerce & Trust Co., 148 Ark. 283, 229 S. W. 1026, 14 A. L. R. 761, which case holds that the payee could not recover from the drawee bank on a check on which the endorsement was forged.

It would appear from Gasper v. Security State Bank, *supra*, that this court has hitherto considered the cor-

rect rule in case of a forged endorsement to be that whoever is in privity of contract with the drawee bank and whose funds are in the bank is the proper person to maintain the action. In the absence of certification or acceptance under the Uniform Negotiable Instruments Law it is the drawer of the check. If it had been certified or accepted the funds are by reason thereof assigned and the contract is a new one with the true owner and holder of the check with whom the bank thereafter is in privity of contract.

Neither under the rule laid down in First Nat. Bank of Washington v. Whitman, *supra,* nor in the cases following it, either before or after the passage of the Uniform Negotiable Instruments Law, is responsibility of a drawee bank for cashing a check on a forged endorsement denied as to all persons. The rule simply denies the liability of the bank to the payee of the check unless it has been certified or accepted. Until it is certified or accepted the liability is to its customer with whom it deals and with whom it has privity of contract and whose funds it has on deposit. Plaintiff urges that these rules are only a legal fiction of law which are outmoded and should not now be applied. If so the Legislature of this state and many others have seen fit to adopt it as the statutory law. The rule would further appear to have some practical application. Checks are the principal means of transferring credits and it is of great importance that they be promptly cashed. In many instances the drawee bank has no means of verifying the authenticity of endorsements made by those who are not their customers and who are often living in remote localities and whose signatures are wholly unknown to it. In such case it would appear that there is a reasonable basis for restricting the bank's liability to the customer with whom it deals. This leaves the question relating to the proof of the matters with respect to the forgery and the negligence, if any, of the maker and payee to be determined in an action between them.

A great many such cases turn on the question of whether or not the forger was the agent of the drawer or payee and the circumstances under which he came into possession of the instrument concerning which the bank is in ignorance.

We hold a drawee bank which unwittingly pays a check to a subsequent endorser where the endorsement of the payee was previously forged is not liable in an action by the payee either on contract or for money had and received or for conversion.

The judgment of the trial court in sustaining the demurrer and dismissing the action is therefore affirmed.

AFFIRMED.

LEWIS C. RIGGS, APPELLANT, V. GOOCH MILLING AND ELEVATOR COMPANY, APPELLEE.

112 N. W. 2d 531

Filed December 22, 1961. No. 35075.

1. **Workmen's Compensation.** Where an employee working in a grain elevator is subjected to unusual inhalations of wheat dust for an extended period of time which results in a disabling emphysema, such disability is compensable as an occupational disease.
2. ———. Where an employee in a grain elevator is continuously exposed to quantities of wheat dust for an extended period of time, such exposure is a condition which is characteristic of and peculiar to the business of operating a grain elevator.
3. ———. The aggravation of an employee's existing physical condition by occupational hazards which are characteristic of and peculiar to the employment is compensable under the Nebraska Workmen's Compensation Act where occupational disease results.
4. ———. The fact that an employee's emphysema may be attributable in whole or in part to his own susceptibility or sensitivity to the properties of wheat dust is not ordinarily a defense to a claim for compensation benefits.

APPEAL from the district court for Lancaster County: PAUL W. WHITE, JUDGE. *Reversed and remanded.*

Crosby, Pansing, Guenzel & Binning and *Donn E. Davis,* for appellant.

Healey, Wilson & Barlow and *Claire D. Johnson,* for appellee.

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

CARTER, J.

This is an appeal from a judgment of dismissal in a workmen's compensation case. The total disability of the plaintiff is not an issue. The question is whether or not the plaintiff was disabled by an occupational disease within the meaning of section 48-151, R. R. S. 1943.

The case was first heard by a single judge of the compensation court who found for the defendant. Upon a rehearing before the compensation court sitting en banc it also found for the defendant. On a review by the district court in an error proceeding the judgment of the compensation court was affirmed and a judgment rendered in favor of the defendant. The plaintiff has appealed. Under the procedural provisions of the Workmen's Compensation Act, this court will consider the case de novo on the record. Rapp v. Hale, 170 Neb. 620, 103 N. W. 2d 851.

The plaintiff was employed by the defendant on December 30, 1942. He continued in such employment until May 16, 1958, at which time he was 60 years of age. At the time he terminated his employment he was earning a minimum wage of $76 per week. All medical, hospital, and drug expenses of plaintiff had been paid by the defendant at the time of the rehearing in the compensation court except $101, $10, and $130.70 respectively.

During the first 4 or 5 years of his employment plaintiff's duties consisted of loading and unloading wheat from railroad cars, sweeping out cars, cleaning up after unloading, and in blending wheat to obtain a fixed

grade for flour-milling purposes. Subsequent thereto his duties included the testing of wheat for dirt and other foreign elements and to determine its protein content. The work in the elevator and cars and the blending of the wheat consisted largely of the moving of wheat, which caused the air to be filled with dust in varying amounts, dependent upon location, winds, and weather conditions. Defendant furnished respirators to employees to filter the air. Plaintiff testified that he wore a respirator about half the time only because of his difficulty in getting adequate air through a respirator. The evidence sustains a finding that plaintiff during his employment was subjected to the breathing of wheat dust in varying and unusual amounts throughout his employment.

Plaintiff asserts that he was in good health when he entered the employment of the defendant. Plaintiff's foreman testified that plaintiff had a noticeable shortness of breath when he began his work with the defendant, which continued throughout the duration of his employment. Plaintiff testified that he first noticed a shortness of breath about 8 years after his initial employment by the defendant. He stated he had never previously worked where he was exposed to dust. His difficulty in breathing became so advanced that he was unable to work. Because of this condition he left the defendant's employment on May 16, 1958.

Plaintiff sought treatment by Dr. Arthur L. Smith on September 20, 1957, which was continued until November 16, 1957. Plaintiff has been under the care of Dr. Jon T. Williams since April 8, 1958. These two doctors were called as witnesses by the plaintiff. The defendant called Dr. Maurice E. Stoner of Omaha, who examined plaintiff for the defendant, Dr. J. Marshall Neely of Lincoln, a specialist in radiology, and Dr. O. A. Sander of Milwaukee, Wisconsin, a specialist in diseases of the chest.

The medical testimony is in agreement that plaintiff's

disability is his extreme shortness of breath upon the slightest exertion resulting from a lung condition known as emphysema. Emphysema is defined as an over-dilation of the lungs due to obstruction of the smaller bronchi and bronchiles. It results in an insufficient amount of air entering and leaving the lungs. There is evidence that plaintiff is afflicted with polycythemia, pneumoconiosis, and a decompensated heart. These three terms are generally defined as an excess of red blood cells usually compensatory for a decreased oxygen retention, the retention of dust in the lungs, and excessive strain on the heart in its attempt to supply more blood to body tissues to compensate for the existing oxygen shortage. These three diseases are secondary to the emphysema in that they result therefrom.

It is the contention of the plaintiff that the disease of emphysema with which he is afflicted, under the circumstances shown, is an occupational disease within the purview of section 48-151, R. R. S. 1943, which provides in part: "The term occupational disease shall mean only a disease which is due to causes and conditions which are characteristic of and peculiar to a particular trade, occupation, process or employment and shall exclude all ordinary diseases of life to which the general public are exposed."

The defendant contends the evidence does not establish that the disease was caused by the employment, that the disease was not an occupational one, and that the disability resulted from plaintiff's susceptibility and sensitivity to wheat dust and is not therefore compensable.

It is clear from the record that plaintiff worked in wheat dust in unusual amounts during the 15 years he was employed by the defendant. Wheat dust is characteristic of the operations of a grain elevator and is peculiar to it within the meaning of the act. Any disease or condition arising from working continuously in wheat dust is not an ordinary disease of life to which

the general public is exposed within the contemplation of the statute. See Eckert v. Commander Larabee Mfg. Co., 278 App. Div. 623, 101 N. Y. S. 2d 860.

It is argued by the defendant that emphysema becomes disabling only to persons who are susceptible and sensitive to the predisposing cause, in this case wheat dust, and is not therefore an incident of the employment, but rather an attribute of the employee's own sensitivity, susceptibility, or allergy to the properties of wheat dust and therefore not compensable. We do not concur in this view. The law of this state has consistently recognized that the lighting up or acceleration of preexisting conditions by accident is compensable. We see no difference in principle in the situation before us. A disability brought about by employment conditions and a preexisting weakness or disease, may be compensable if the conditions bringing it about are characteristic of and peculiar to the employment and do not result in a common disease to which the general public is exposed. The exposure of the plaintiff to wheat dust is a hazard in the operation of grain elevators and, if causal connection be shown between such exposure and the disease of emphysema, the latter is an occupational hazard within the purview of the quoted section of the statute.

The primary question therefore is whether or not there is a causal connection between the disability and wheat dust which the plaintiff inhaled over the 15 years he was employed by the defendant. In resolving this issue the evidence of medical experts is necessarily the controlling factor.

The evidence of Dr. Williams, plaintiff's attending physician, explains fully the condition of the plaintiff based on the history, physical examination, laboratory tests, and X-ray films. It is his conclusion that plaintiff is suffering from emphysema, a form of pneumoconiosis, because of exposure to dust for 8 years in a wheat-dust environment. He testified further that plaintiff, based

upon reasonable medical certainty, was totally and permanently disabled. The conclusion of Dr. Smith, plaintiff's first attending physician, who took a history, made physical examinations, took X-rays, and made laboratory tests, is that plaintiff is suffering from emphysema caused by continuous exposure to wheat dust for a long period of time. It is also the conclusion of Dr. Smith that the plaintiff is totally and permanently disabled.

The testimony of the attending physicians is to the effect that the inhaling of wheat dust in large quantities over a long period of time produces an irritation of the lungs and bronchial tree and an aggravation of an existing abnormal condition which may result in an emphysema reaching a disabling stage. The findings of the attending physicians are that such a disabling condition resulted in the manner thus described.

The medical evidence offered by the defendant reaches a contrary conclusion. The findings of Dr. Stoner and Dr. Sander are similar to those of the attending physicians but their opinions as to the cause of the existing condition of the plaintiff are to the contrary. Dr. Stoner testified that plaintiff is suffering from chronic bronchitis with chronic hypertrophic emphysema. He stated the bronchitis is ordinarily caused by infection and, in his opinion, it was so caused in plaintiff's case. He resorts to plaintiff's history of pneumonia in his youth and to influenza in 1916. He attributes the abnormalities shown on the X-ray films to scar tissue resulting from these prior respiratory infections and notes that the X-rays do not indicate the pattern of any occupational pneumoconiosis with which he is familiar. He further stated that there is no evidence that plaintiff was exposed to free silica dust which is indicative of a non-occupational pneumoconiosis or emphysema.

The record shows that Dr. Sander is a specialist of considerable renown in the field of chest diseases. He examined the X-rays of plaintiff's chest and the evidence of Dr. Williams and Dr. Smith taken at the first

trial of the case. He had never examined the plaintiff. He found no evidence of bronchitis, tuberculosis, silicosis, or byssinosis in the X-ray films. The abnormalities appearing on the X-ray films he described as scars of healed fungus infections of long standing, plus a history of heavy smoking. He bases his conclusion that plaintiff had no occupational disease largely on the absence of silicosis (inhalation of free silica) and byssinosis (inhalation of cotton fibers), and the absence of any X-ray pattern indicating pneumoconiosis or emphysema. He testified that emphysema is a disease of advanced years and often occurs in persons who have never had any dust exposure.

The evidence of Dr. Neely relates only to the findings that could be made from the X-ray films. He testified that there is no evidence of pneumoconiosis, silicosis, or bronchitis. He testified that the cause of emphysema cannot be determined by X-ray alone. He further testified that pneumoconiosis could exist and not be detectable by X-ray. He also stated that it would be impossible to say whether or not plaintiff had been disabled by inhaling dust or other impurities without a physical examination and laboratory tests.

In his testimony Dr. Stoner stated that he does not know if a chronic bronchitis could result from the inhalation of dust; that he could not imagine it without infection; but that it is certainly possible that it could occur. Dr. Sander also stated that it was possible for disabling emphysema to result from dust due to irritation of the bronchus mucous membrane if other factors were present and that there could be an aggravation by dust of an already existing condition.

From a consideration of all the medical testimony on the subject we conclude that emphysema may in its latter stages be an occupational disease. Plaintiff's attending physicians determined from the history, physical examinations, X-rays, and laboratory tests that plaintiff's exposure to wheat dust irritated the lungs and

bronchial tubes, and aggravated the existing condition to such an extent as to culminate in a disabling emphysema. Defendant's medical testimony leads to the conclusion that the existing condition was the result of previous infections and not the wheat dust. It does not rule out the possibility of disabling emphysema as the result of the aggravation of an existing condition. The language of section 48-151, R. R. S. 1943, indicates a legislative intent to include such aggravation as compensable in the following language: "The terms shall include an aggravation of a preexisting occupational disease, the employer being liable only for the degree of aggravation of the preexisting occupational disease." The history of plaintiff's condition shows clearly that he was not exposed to wheat dust in unusual quantities prior to his employment by the defendant. In our judgment, the evidence of the attending physicians provides the preponderance of the evidence, particularly in view of the equivocal character of the defendant's medical evidence as to ruling out disabling emphysema as an occupational disease caused by inhaling unusual quantities of wheat dust over a long period of time and the evidence of the inherent properties of wheat dust as an irritant and aggravation of an existing abnormal condition.

The case of Brown v. Armour & Co., 168 Neb. 835, 97 N. W. 2d 342, is cited by the defendant as controlling. The case is clearly distinguishable in that the evidence there showed that plaintiff was afflicted with a form of leptospirosis not associated with his employment. Other issues raised by this appeal are determined in the case of Hauff v. Kimball, 163 Neb. 55, 77 N. W. 2d 683, and they will not again be considered here.

We conclude that plaintiff is entitled to the benefits of the Workmen's Compensation Act as an employee who is totally disabled from an occupational disease. Plaintiff is awarded compensation in the amount of $34 per week for 300 weeks beginning May 16, 1958,

and $27 per week thereafter for the remainder of his life, as provided by section 48-121, R. S. Supp., 1957. Medical, hospital, and drug expenses are allowed in the sum of $241.70. The costs are taxed to the defendant.

REVERSED AND REMANDED.

CHARLES ASHTON, PLAINTIFF IN ERROR, V. STATE OF NEBRASKA, DEFENDANT IN ERROR.

112 N. W. 2d 540

Filed December 22, 1961. No. 35086.

1. **Automobiles.** By statute, "trailer" shall include every vehicle without motor power carrying persons or property and being pulled by a motor vehicle and so constructed that no part of its weight rests upon the towing vehicle.
2. ———. By statute, "truck-tractor" shall mean every motor vehicle designed and used primarily for drawing other vehicles, and not so constructed as to carry a load other than a part of the weight of the vehicle and load being drawn.
3. ———. By statute, where a trailer or semitrailer has been duly registered in any jurisdiction, no registration or license fee therefor shall be required in this state when such trailer or semitrailer is operated in combination with any truck or truck-tractor properly licensed or registered in accordance with the statute or agreements, arrangements, or declarations pursuant to the statute.
4. **Automobiles: Commerce.** Where a combination of a trailer duly licensed in the State of Iowa and a tractor duly licensed in the State of Michigan are involved in interstate commerce passing through the State of Nebraska, no Nebraska license plates are required to be purchased within the purview of the section of the applicable statute.

ERROR to the district court for Saunders County: JOHN D. ZEILINGER, JUDGE. *Reversed and remanded with directions.*

Clayton H. Shrout and *Arthur L. Foley,* for plaintiff in error.

Clarence A. H. Meyer, Attorney General, *Cecil S. Brubaker,* and *George W. Haessler,* for defendant in error.

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

MESSMORE, J.

The plaintiff in error, Charles Ashton, hereinafter called the defendant, was charged in substance as follows: On April 18, 1960, Charles Ashton did unlawfully and willfully operate a motor vehicle on the public highways of Saunders County in the State of Nebraska, while said motor vehicle did not have at all times displayed thereon one Nebraska license number plate on the front thereof or on the back thereof, for the current year, furnished for said motor vehicle as provided by the laws of the State of Nebraska. The action was brought in the justice court for Saunders County, Nebraska. A plea of not guilty was entered by the defendant's counsel in the defendant's behalf. The case came on for trial. The defendant was found guilty as charged in the complaint and was ordered to pay a fine of $10 and costs. An appeal was taken to the district court for Saunders County. The parties waived trial to a jury and stipulated to a trial by the court. The defendant also waived arraignment, confrontation of witnesses, and the production of testimony. After evidence was adduced, the trial court found the defendant guilty as charged in the complaint. The defendant filed a motion to enter judgment of acquittal notwithstanding the verdict, or in the alternative for a new trial. This motion was overruled. The trial court assessed a fine of $25 against the defendant and taxed the costs of prosecution to him in the amount of $35.25. The defendant prosecuted error proceedings to this court.

The record shows that a scale officer employed by the State of Nebraska at what is known as state scale No. 3, testified that he had reason to contact the defendant on April 18, 1960; and that upon weighing a truck the defendant was driving, and while checking the defendant's registration, he found that the defendant had a

Michigan licensed tractor and an Iowa licensed trailer, and he issued a summons for him to appear in court.

Alvin N. Scissors testified that he was the Director of the Department of Motor Vehicles of the State of Nebraska; that among his duties he was to administer the laws, rules, and regulations of the state governing the operation of motor vehicles, and of reciprocity agreements between the states; that there was a reciprocity agreement executed and in force between the State of Nebraska and the State of Michigan; and that such agreement was in effect on April 18, 1960, and at the time of trial. This witness further testified that in his position he was in contact with the heads of similar departments in other states relating to regulation, reciprocity agreements, and other matters pertaining to the operation of motor vehicles; and that he had had specific correspondence with an officer who had charge of reciprocity agreements in the State of Michigan. This correspondence was from the special assistant to the Secretary of State of the State of Michigan and was offered in evidence and objected to on the grounds that it was incompetent evidence, was not material, and not relevant. This objection was overruled.

On cross-examination this witness testified that there had been a reciprocity agreement with the State of Iowa which was no longer in effect; and that there was a similar agreement with the State of Iowa in effect but which did not relate to a reciprocity agreement with such state.

The parties stipulated the following: That at the time the summons was issued and served on him, the defendant was a resident of Kalamazoo, Michigan; that the tractor involved in this alleged offense was owned by the defendant; that the trailer involved in this alleged offense was owned by the Omaha Equipment Company, an Iowa partnership; that a partner in the Iowa partnership of the Omaha Equipment Company was a principal stockholder in the Michigan-Nebraska Transit Company; that both units, the tractor and the

trailer, were leased to the Michigan-Nebraska Transit Company; and that the Michigan-Nebraska Transit Company is an interstate carrier duly licensed by the Interstate Commerce Commission and does no intrastate business within the State of Nebraska.

The defendant contends that the trial court erred in finding the defendant guilty of driving with no Nebraska license plates since the defendant was within the terms of reciprocity agreements between the States of Nebraska and Michigan; that the trial court erred by allowing unofficial correspondence from a nonresident state official to be put into evidence over defendant's objection, to prove the validity of an unofficial interpretation by a state official of a reciprocity agreement between the State of Michigan and the State of Nebraska; and that the trial court erred in allowing the opinion of the Director of the Department of Motor Vehicles into evidence, since mere opinion of the Director of the Department of Motor Vehicles of the State of Nebraska and of the special assistant to the Secretary of State of the State of Michigan who is in charge of reciprocity matters, cannot control the effect of the plain language of the statutes under which their duties are administered.

Section 60-301, R. R. S. 1943, provides in part: "As used in sections 60-301 to 60-344, unless the context otherwise requires: * * * (4) Trailer shall include every vehicle without motor power carrying persons or property and being pulled by a motor vehicle and so constructed that no part of its weight rests upon the towing vehicle; * * * (7) Truck-tractor shall mean every motor vehicle designed and used primarily for drawing other vehicles, and not so constructed as to carry a load other than a part of the weight of the vehicle and load being drawn; * * *."

Section 60-305.02, R. R. S. 1943, provides: "Trucks, truck-tractors, semitrailers, trailers, or buses, from states other than Nebraska, entering Nebraska shall be re-

quired to comply with all the laws and regulations of any nature imposed on Nebraska trucks, truck-tractors, semitrailers, trailers, or buses, and to comply with all the requirements as to payment of all license fees, permit fees, and fees of whatever character which owners of trucks, truck-tractors, semitrailers, trailers, or buses, owned and operated in Nebraska, are required to pay when operating in such foreign state, unless the state or states, in which such trucks, truck-tractors, semitrailers, trailers, or buses are domiciled, grant reciprocity comparable to that extended by the laws of Nebraska."

Section 60-305.03, R. R. S. 1943, provides in part: "(1) In case a foreign state or territory is not reciprocal as to license fees on commercial trucks, truck-tractors, semitrailers, trailers, or buses, the owners of such nonresident vehicles from those states or territories will be required to pay the same license fees as are charged residents of this state in such foreign state or territory. In case no fees are charged in Nebraska on trucks, truck-tractors, semitrailers, trailers, or buses, other than license fees, and the reciprocity law of any other foreign state or territory does not act to exempt Nebraska trucks, truck-tractors, semitrailers, trailers, or buses operating in that state from payment of all fees whatsoever, the owners of such foreign trucks, truck-tractors, semitrailers, trailers, or buses shall be required to pay a fee in an amount equal to the fee of whatever character, other than license fee, is charged by such other state to foreign trucks, truck-tractors, semitrailers, trailers, or buses; * * *.

"(2) In order to effect the purposes of section 60-305.02 and subsection (1) of this section, and section 60-305.09 (which latter section had no applicability to the case at bar), the Director of Motor Vehicles shall have the power, duty and authority to enter into reciprocal agreements with the duly authorized representatives of other jurisdictions, including states, districts, territories or possessions of the United States, and

foreign countries, states or provinces granting to vehicles or owners of vehicles which are properly registered or licensed in such jurisdictions, and for which evidence of compliance is supplied, benefits, privileges and exemptions from the payment, wholly or partially, of any fees, or other charges imposed upon such vehicles or owners with respect to the operation or ownership of such vehicles under the laws of this state. Such agreements or arrangements shall provide that vehicles registered or licensed in this state when operated upon the highways of such other jurisdictions shall receive exemptions, benefits and privileges of a similar kind or to a similar degree as are extended to vehicles from such jurisdictions in this state. The director may withdraw from any agreement when he determines that it shall be for the best interest of the State of Nebraska upon thirty days notice. * * *

"(3) In the absence of an agreement or arrangement with any jurisdiction, the Director of Motor Vehicles is authorized to examine the laws and requirements of such jurisdiction and to declare the extent and nature of exemptions, benefits and privileges to be extended to vehicles registered in such jurisdiction, or to the owners or operators of such vehicles.

"Where no written agreement or arrangement has been entered into with another jurisdiction, or declaration issued pertaining thereto, any vehicle properly registered in such jurisdiction, and for which evidence of compliance is supplied, may be operated in this state and shall receive the same exemptions, benefits and privileges granted by such other jurisdiction to vehicles registered in this state.

"(4) Where a trailer or semitrailer has been duly registered in any jurisdiction, no registration or license fee therefor shall be required in this state when such trailer or semitrailer is operated in combination with any truck or truck-tractor properly licensed or registered in accordance with this act or agreements, ar-

rangements or declarations pursuant to this act.

"(5) All agreements, arrangements, declarations and amendments authorized by this act shall be in writing and shall become effective when filed in the office of the Director of Motor Vehicles.

"(6) Agreements or arrangements entered into or declarations issued under the authority of this section may contain provisions denying exemptions, benefits and privileges granted in such agreements, arrangements, or declarations to any vehicle which is in violation of conditions stated in such agreements, arrangements or declarations.

"(7) Properly registered shall mean a vehicle licensed or registered in one of the following: (a) The jurisdiction where the person registering the vehicle has his legal residence, or (b) the jurisdiction in which a commercial vehicle is registered, where the operation in which such vehicle is used has a principal place of business therein, and from or in which the vehicle is most frequently dispatched, garaged, serviced, maintained, operated or otherwise controlled, and the vehicle is assigned to such principal place of business, or (c) the jurisdiction where, because of an agreement or arrangement between two or more jurisdictions, or pursuant to a declaration, the person registering the commercial vehicle has licensed the vehicle as required by said jurisdiction.

"(8) It shall be unlawful to operate trucks, truck-tractors, semitrailers, trailers, or buses owned by nonresidents who are not in compliance with the provisions of subsections (1) and (2) of this section and with section 60-305.02, or any agreement executed under the authority granted hereunder."

The defendant has at all times maintained that the truck-tractor which he was driving at the time of his arrest was properly registered in Michigan, and the trailer attached was properly registered in Iowa. The State of Nebraska does not dispute this fact.

Subsection (4) of section 60-305.03, R. R. S. 1943, is plain and unequivocal. To repeat, it provides that where a trailer or semitrailer has been duly registered in any jurisdiction, no registration or license fee therefor shall be required in this state when such trailer or semitrailer is operated in combination with any truck or truck-tractor properly licensed or registered in accordance with this act or agreements, arrangements, or declarations pursuant to this act. The defendant had a properly registered trailer in Iowa and a properly registered tractor in Michigan. He was pulling a trailer in interstate commerce across the State of Nebraska. Under subsection (4) of section 60-305.03, R. R. S. 1943, he was not required to purchase license plates in the State of Nebraska, and the reciprocity agreement between the State of Nebraska and the State of Michigan does not prohibit this right. There is nothing ambiguous with reference to section 60-305.03, R. R. S. 1943. The language therein is plain and capable of interpretation without difficulty insofar as the factual situation in the instant case is concerned.

This brings us to the correspondence, wherein the special assistant to the Secretary of State in charge of reciprocity agreements in the State of Michigan, on May 24, 1960, by a letter to the Director of the Department of Motor Vehicles of the State of Nebraska stated: "In your telephone conversation you outlined certain facts concerning a carrier operating in Nebraska with a Michigan plated tractor and an Iowa plated trailer. Please be advised that such a combination would not be permitted to operate over Michigan highways. If it is a Michigan carrier that is involved we would require him to plate both units of the combination in Michigan. If it is a Nebraska or Iowa carrier then we would not extend reciprocity to him unless both units were plated in either Iowa or Nebraska."

Certainly this correspondence could in no manner change or invalidate the clear meaning of subsection

(4) of section 60-305.03, R. R. S. 1943. The Director of the Department of Motor Vehicles of this state acts solely by virtue of the statutes which prescribe his powers and functions, and he can only exercise such powers as are provided for by statute. The correspondence heretofore mentioned bears no relation to the law of this state as is clearly indicated by the statutes heretofore cited. The trial court erred in admitting this correspondence into evidence.

For the reasons given in this opinion, we conclude that the judgment of the trial court was prejudicially erroneous. The judgment of the trial court is reversed and the cause remanded with directions to dismiss the complaint.

REVERSED AND REMANDED WITH DIRECTIONS.

RICHARD CHISM, APPELLANT, V. CONVAIR MOBILE HOMES, INC., APPELLEE.
112 N. W. 2d 393

Filed December 29, 1961. No. 35059.

1. **Workmen's Compensation.** The burden of proof is on the plaintiff in a workmen's compensation case to establish that his injury was the result of an accident arising out of and in the course of his employment.
2. ———. Mere exertion which is no greater than that ordinarily incident to the employment cannot of itself constitute an accident within the meaning of the Workmen's Compensation Act.
3. **Appeal and Error.** Where the evidence is in irreconcilable conflict this court will, upon a trial de novo, consider the fact that the trial court observed the demeanor of the witnesses and gave credence to the testimony of some rather than to the contradictory testimony of others.
4. **Witnesses.** A witness may be impeached by extrajudicial statements made by him out of court. Such statements may be explained, rebutted, or contradicted, and will be given such weight as the trier of facts deems them entitled.

APPEAL from the district court for Buffalo County: S. S. SIDNER, JUDGE. *Affirmed.*

Munro, Parker & Munro, for appellant.

Luebs, Elson & Tracy and *Richard A. Huebner,* for appellee.

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

CARTER, J.

This is an appeal from a judgment of dismissal in a workmen's compensation case. The evidence indicates that plaintiff is suffering from an intervertebral disk protrusion at the fourth lumbar level. The question is whether or not the disability was the result of an accident arising out of and in the course of the employment.

The case was originally heard by a single judge of the compensation court, who found for the defendant. A rehearing before the compensation court en banc was waived and an appeal was lodged in the district court for Buffalo County. After hearing, the district court found for the defendant. Plaintiff has appealed to this court. The case will be considered de novo on the record.

Plaintiff was in the employ of the defendant on January 20, 1959. Defendant was engaged in the manufacture of house trailers at Kearney, Nebraska. It was using an assembly-line method of operation consisting generally of the frame, floor, sidewall, and roof stages. Plaintiff was working in the floor stage operation. A part of the operation was to bolt the frame to the trailer while it was in an inverted position, turn it over with hoists, nail it on the top side, nail on a plywood floor, and cover the floor with vinal tile. On the day in question, due to a required speedup of operation, the trailer involved was moved from the floor stage to the sidewall assembly stage for the leveling of the trailer and the application of the vinal tile. Suitable hoists were not available at the sidewall assembly, and instructions were given to level the trailer with

jacks and sawhorses. The lifting of the trailer to permit it to rest on sawhorses was to be accomplished by the use of a pry. On the morning of January 20, 1959, plaintiff sought to lift a corner of the trailer to insert a sawhorse by taking a position on his hands and knees and pushing the trailer up with his shoulders and back. He stated that he pushed the trailer up, pushed the sawhorse under, and inserted a 2 by 2 inch board between the trailer and the sawhorse to secure its proper level. As he relaxed from the lifting, the 2 by 2 inch board popped out, causing the trailer to fall, striking the plaintiff on the shoulder, the back, and the left side just above his hip. He felt some pain, rubbed his back, returned to the same position, and successfully lifted and leveled the trailer. A few minutes later he brought out a bucket of glue and a trowel to commence the laying of the vinal tile. He carried the bucket of glue, weighing about 55 pounds, in his right hand, and the trowel in his left hand. He lifted the bucket of glue onto the platform of the trailer some 3½ feet above the floor and suffered pain in so doing. Only after the lifting of the glue bucket did he inform the foreman that he had injured his back. Plaintiff admits that the handling of the glue bucket as he did was a part of his daily work. It is plaintiff's contention that his injury was caused by the falling of the trailer. Defendant contends that it occurred when he lifted the glue bucket, a part of his usual work, and therefore not compensable.

The evidence relied upon by the defendant is substantially as follows: After the foregoing incidents had occurred, and on the same day, plaintiff was sent to Dr. Harold V. Smith of Kearney for examination. He gave Dr. Smith a history of his injury. He stated that he had lifted a glue bucket weighing about 50 pounds and injured his back. No mention was made of the trailer falling. On January 22, 1959, while he was in the hospital, plaintiff gave a statement to an insurance adjuster in which he stated he lifted a glue bucket weighing about

55 pounds to the floor of the trailer approximately 3½ feet above the floor and felt a pop in his back. He stated also that he did not slip, trip, or fall in any manner when he lifted the glue bucket. He then stated that a few minutes before that he had lifted the trailer with his back and felt a pain in his left hip, but thought nothing of it and kept on working. At the conclusion of the statement the plaintiff stated in his own handwriting and over his signature that "I have read the above and it is true."

Plaintiff reported to the office of the defendant before going to the doctor. He stated that he didn't imagine he told the office girl about the trailer falling on his back "because the only one thing I had in my mind was getting to the doctor."

On the witness stand plaintiff testified that he had no recollection of what he told the insurance adjuster. Plaintiff also testified that he could have told Dr. Smith the first time he saw him that the cause of his back injury was the lifting of the glue bucket to the floor of the trailer, at which time he felt a pop in his back.

The burden of proof is on the plaintiff to establish that his injury was the result of an accident arising out of and in the course of his employment. Carranza v. Payne-Larson Furniture Co., 165 Neb. 352, 85 N. W. 2d 694. Mere exertion, which is no greater than that ordinarily incident to the employment, cannot of itself constitute an accident within the meaning of the Workmen's Compensation Act. Hladky v. Omaha Body & Equipment Co., 172 Neb. 197, 109 N. W. 2d 111. Where the evidence is in irreconcilable conflict, this court, upon a trial de novo, will consider the fact that the trial court observed the demeanor of the witnesses and gave credence to the testimony of some rather than to the contradictory testimony of others. Meester v. Schultz, 151 Neb. 614, 38 N. W. 2d 739. A witness may be impeached by extrajudicial statements made by him out of court. Lund v. Holbrook, 153 Neb. 706, 46 N. W. 2d 130. Such state-

ments are not conclusive but may be explained, rebutted, or contradicted, and will thereafter be given such weight as the trier of facts deems them entitled. Kirchner v. Gast, 169 Neb. 404, 100 N. W. 2d 65. The credibility of the plaintiff was peculiarly for the trial court to determine in the instant case.

In the present case the evidence of the plaintiff is of prime importance in the establishment of his claim. His evidence was conflicting and evasive. His claim rests largely upon the credibility of his own evidence. In determining such credibility the trial court is in a much better position to determine it than is this court. The trial court heard the witnesses testify, observed their demeanor on the witness stand, and concluded that plaintiff's uncorroborated evidence was insufficient to sustain a claim under the preponderance of the evidence rule. After a consideration of all the evidence and the findings of the trial court as to the credibility of the witnesses under the rules stated, we conclude, as did the trial court, that plaintiff failed to establish his claim to compensation benefits by a preponderance of the evidence.

AFFIRMED.

SIMMONS, C. J., participating on briefs.

CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

JANUARY TERM, 1962

THOMAS W. SINGLES, APPELLEE, V. UNION PACIFIC RAILROAD COMPANY, A CORPORATION, APPELLANT, IMPLEADED WITH RAILWAY EXPRESS AGENCY, INC., A CORPORATION, APPELLEE.

112 N. W. 2d 752

Filed January 5, 1962. No. 34983.

1. **Trial: Damages.** An instruction in a personal injury action that plaintiff should be compensated for the impairment of his capacity to earn money in the future and also for future loss of time permits a double recovery for the period of time lost, and is erroneous.
2. **Damages.** In an action for damages for personal injuries, a recovery for impairment of future earning power begins when compensation for future loss of time ends.
3. **Trial: Damages.** In an action for damages it is the duty of the court to instruct the jury as to the proper measure of recovery. The tendering of a proper instruction is not a condition precedent to the assignment of an erroneous instruction on the measure of damages.

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

Crossman, Barton & Norris, for appellant.

Wear, Boland, Mullin & Walsh, McCormack & McCormack, and *A. Lee Bloomingdale*, for appellee Singles.

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

CARTER, J.

This is an action for personal injuries sustained by the plaintiff as the result of the negligence of the Union Pacific Railroad Company, hereinafter referred to as the defendant. The Railway Express Agency, Inc., was made a party defendant solely to protect its right of subrogation for workmen's compensation payments made by it. The defendant admitted liability for the negligence of its employees. The only issue was the amount of damages to which plaintiff was entitled. The verdict of the jury was for $100,000. The defendant has appealed.

The evidence shows that on November 12, 1958, plaintiff was employed as night terminal agent by the Railway Express Agency, Inc., at the Union Pacific and Burlington depots in Omaha, Nebraska. He was then 66 year of age and in good health. He was earning a salary of $524.54 per month.

On the evening of November 12, 1958, defendant's switch crew spotted an express car at an unloading dock in the Omaha yards. A four-wheel platform truck was backed up to the door of the express car. As plaintiff was stepping from the platform truck into the express car, defendant's switch crew negligently pushed another car into the express car, knocking plaintiff down and causing plaintiff's foot to become caught between the platform truck and the express car. Plaintiff's right foot was so badly crushed that amputation was necessary.

The record shows that it took approximately 40 minutes to release plaintiff from between the platform truck and the express car. He was taken to a hospital where his right foot was amputated. During all of this time plaintiff was suffering extreme pain, although he was in a state of shock. On November 24, 1958, it was found necessary to amputate plaintiff's leg at a point one-third the distance below the knee. He was released from the hospital on December 10, 1958. In

April or May 1959, plaintiff was fitted with an artificial leg with which he had much difficulty. On November 24, 1959, plaintiff was again hospitalized for a traumatic neuroma, an enlargement of the nerve end resulting from scarring following the second amputation. Plaintiff was released from the hospital on December 1, 1959. A month or two following, plaintiff was fitted with a new artificial leg. He was able to move about with the aid of a cane until the time of trial. There is evidence that plaintiff has suffered pain to the time of trial. He testified to a phantom limb syndrome, a condition not unusual after an amputation. He has been unable to work since the accident. He was retired from the service of the Railway Express Agency, Inc., on July 1, 1959, because of a rule which became effective after his injury.

The evidence shows that plaintiff suffered much pain from the time of the accident to the time of trial and will suffer some pain thereafter. He suffered a disability that has prevented his working up to the time of trial and he has suffered an impairment of his capacity to work in the future. The fees of doctors, hospitals, and cost of artificial limbs are stipulated in the amount of $1,939.37.

The defendant assigns as error the giving of instruction No. 9 by the trial court. The part of the instruction complained about states: "You should consider what the evidence may show to be the pain and suffering, if any, so caused and the nature and extent of the same, and the impairment of the capacity, if any, of the plaintiff to earn money in the future, and the reasonable value of the time lost by the plaintiff, if any. You should also consider what the evidence may show with reference to any future pain and suffering, and if you find that the plaintiff will, with reasonable certainty, suffer pain and suffering in the future, you should evaluate such future pain and suffering and assess such an amount as will fairly and reasonably compensate him

for such pain and suffering, reduced to its present worth, and if the evidence shows with reasonable certainty that plaintiff will lose time in the future, you should also allow him reasonable compensation for the future loss of time, reduced to its present worth." It is the contention of the defendant that the cited portion of the instruction permits a recovery for the impairment of the capacity of the plaintiff to earn money in the future and for loss of time in the future, and thereby authorizes the jury to allow a double recovery.

The foregoing paragraph of instruction No. 9 permits a recovery for the following items of damage: (1) Pain and suffering sustained to time of trial, (2) impairment of capacity to earn money in the future, (3) reasonable value of time lost to time of trial, (4) future pain and suffering, and (5) lost time in the future. It seems clear to us that a litigant may not recover for the impairment of future earning capacity and time lost in the future during the same period of time. It permits the jury to allow a double recovery.

The controlling rule is stated in 15 Am. Jur., Damages, § 89, p. 500, as follows: "It has been held that a recovery cannot be had both for loss of time and for diminished earning capacity during the same period, and that an allowance for permanent impairment of earning capacity should run only from the expiration of the period covered by an allowance of damages for lost time."

In McLellan v. Threlkeld, 279 Ky. 114, 129 S. W. 2d 977, the court said: "The instruction as a whole authorized the jury to find for plaintiff both for permanent impairment of his power to earn money and for the loss of time for the same period, to the extent of the lost time, thereby authorizing a duplication for the period of lost time. This was error. The recovery for loss of power to earn money begins when the loss of time ends." See, also, Brown Cracker & Candy Co. v. Castle (Tex. Civ. App.), 26 S. W. 2d 435; Missouri,

Kansas & Texas Ry. Co. v. Beasley, 106 Tex. 160, 155 S. W. 183, 160 S. W. 471.

It is the contention of the plaintiff that the terms "impairment of future earning capacity," "loss of future earnings," and "loss of future time" are synonymous expressions. The case of Borcherding v. Eklund, 156 Neb. 196, 55 N. W. 2d 643, is cited as proof of the synonymous use of these terms. An examination of that case will show that there was a discussion which included several of the foregoing terms. The opinion does not reflect that such use permitted more than a single recovery. The issue before the court in this case was not before the court in the Borcherding case. We point out that the instruction under consideration as to future loss of time was in addition to any allowance for damages for the impairment of plaintiff's capacity to earn money in the future as indicated by the words of the instruction "you should *also* allow him reasonable compensation for the future loss of time." (Emphasis supplied.)

Plaintiff contends that the instructions as a whole when considered together properly submit the issues to the jury. We have examined the instructions, particularly instruction No. 5 to which our attention was called, and we find no merit in the contention.

Plaintiff asserts that there was a duty on the defendant to tender a more specific instruction. The cases of Coyle v. Stopak, 165 Neb. 594, 86 N. W. 2d 758, and Graves v. Bednar, 171 Neb. 499, 107 N. W. 2d 12, are cited in support of this contention. The plaintiff evidently misconstrued the rule announced in these cases. They hold that if the instructions, when construed together, fairly state the law applicable to the evidence, error cannot be predicated on their giving. But if a litigant deems such instructions not sufficiently specific, it is the duty of such litigant to tender an instruction giving more specific directions. It is the duty of the trial court without request to instruct the jury as to the

proper measure of damages in a personal injury case. If the instruction on the measure of damages is erroneous, a litigant is not precluded from asserting the error because of a failure to tender a proper instruction.

Where instructions are so framed as to mislead the jury into a duplication of an element of recovery, or into an award of damages twice for the same loss, such instruction is prejudicially erroneous. Ready v. Hafeman, 239 Wis. 1, 300 N. W. 480; Alexander v. Kansas City Public Service Co. (Mo. App.), 268 S. W. 2d 451.

In view of the conclusion reached it is not necessary to consider other assignments of error. The judgment is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

IN RE APPLICATION OF FERD W. KOPF ET AL.
FERD W. KOPF ET AL., APPELLEES, V. PUBLIC TELEPHONE COMPANY, APPELLANT, NORTHWESTERN BELL TELEPHONE COMPANY, INTERVENER-APPELLANT.
112 N. W. 2d 521

Filed January 5, 1962. No. 35048.

1. **Telecommunications: Public Service Commissions.** A group of people in a rural community having a telephone line to serve the community by connecting with a public service telephone company where they are afforded only local or long distance switcher service by the public service company for a fee is not a common carrier subject to control or supervision of the Nebraska State Railway Commission.
2. ———: ———. The Nebraska State Railway Commission is without power to grant an application made by a group of people in a rural community and not a common carrier to attach their area to that of a common carrier whose service area does not include the area occupied by the applicants.
3. ———: ———. The Nebraska State Railway Commission is without power to require a telephone company which is a common carrier to extend its service beyond its established service area and into a rural community where it has not previously extended its service.

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

O'Hanlon & O'Hanlon and *Edward Sklenicka,* for appellants.

Smith Brothers, for appellees.

Bert L. Overcash, for amicus curiae Nebraska Telephone Assn.

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

YEAGER, J.

This is an appeal from the findings and final order of the Nebraska State Railway Commission, which will be hereinafter referred to as the commission, wherein one Ferd W. Kopf and 22 other named persons living in the vicinity of Eddyville, Cozad, and Oconto, Nebraska, in need of satisfactory telephone service, by application and petition requested the commission to assign their area to the Northwestern Bell Telephone Company of Lexington, Nebraska. The petition is dated September 9, 1960, and is as follows: "We, the undersigned, in order to realize necessary and convenient telephone service in our community, request the State Railway Commission to assign our area under service area of the Northwestern Bell Telephone Company of Lexington, Nebraska."

Notice of public hearing on the application and petition was given to all parties interested in the matter.

Another group of people in the same general area, seeking the same character of relief as the original petitioners, made application to intervene. The original petitioners and these will be referred to hereinafter as petitioners.

The transcript does not disclose that in response to notice any formal objections or pleadings were filed. A hearing was had however before an examiner of the

State Railway Commission. At that hearing the petitioners were represented by Elbert H. Smith; the Public Telephone Company, Blair, Nebraska, by Clark O'Hanlon; and the Northwestern Bell Telephone Company by Edward Sklenicka. In the proceedings the Northwestern Bell Telephone Company is referred to as an intervener in opposition to the petition.

At the hearing before the examiner evidence was adduced by all parties seeking to do so. At the conclusion of the hearing the examiner expressed an opinion to the commission that the petition should be denied.

Thereafter the commission, after consideration of the evidence taken before the examiner, rendered the following order in disposition of the petition: "IT IS THEREFORE ORDERED by the Nebraska State Railway Commission that Application No. 22415 be and it is hereby denied."

A motion for rehearing and for vacation of the order denying the petition was duly filed. A hearing was had thereon after which the motion for rehearing was denied. At that time the previous order denying the petition was vacated and set aside, and the petition was granted. The pertinent part of the order is as follows:

"IT IS FURTHER ORDERED that the order entered herein on November 23, 1960 be and the same is hereby vacated, set aside and held for naught.

"IT IS FURTHER ORDERED that applicants herein be and they are hereby permitted to obtain telephone service from any operating company of their choice operating within the area."

From the order and the accompanying findings of the commission the Public Telephone Company, Blair, Nebraska, without stating its capacity filed notice of appeal. The Northwestern Bell Telephone Company, with designation as intervener in opposition to the petition, also filed notice of appeal. Thus in this court the appellants are Public Telephone Company and North-

western Bell Telephone Company. The petitioners are appellees.

The assignments of error asserted by the appellants are numerous, but the one of primary, if not controlling, significance, as we interpret, flows from the context of No. 5. This assignment of error, not in specific terms, but in effect in the light of the record, challenges the right of the commission to assume and exercise jurisdiction over the petitioners and the subject matter of the petition, and to make the findings and render the order in controversy.

This will become apparent with a factual declaration of the status of the petitioners and the relief they seek from the commission.

As has already been indicated there are two groups of petitioners who have joined in a single purpose. One group, according to the description contained in the application, is made up of about 25 families who have had little or no telephone service from share-owned companies of Eddyville, Cozad, and Oconto, Nebraska. The application is by people resident in or in the vicinity of Buffalo precinct.

The other group, consisting of 10 people, are residents of an area south and west of Oconto, in Custer County, Nebraska, and north of Lexington, Nebraska. These parties were without telephone service. They previously had telephone service, believed to have been operated by Pleasant Valley Telephone Company and owned by Public Telephone Company, Blair, Nebraska.

The relief requested by the petition of the original applicants and joined in by the interveners has already been set out herein.

By evidence and from the briefs it appears that appellant Public Telephone Company is a common carrier and operates an exchange at Oconto, and that all of the petitioners are in the service area which is claimed by this appellant except a few who are in the Cozad area. All of the petitioners, when they had been served,

were served by farm-owned switcher lines through exchanges and not directly by any organized or established telephone company.

Also by evidence and from the briefs it is made clear that no part of the areas included in the petitions is within the service area or territory of the Northwestern Bell Telephone Company.

On these facts the parties are in accord that the petitioners are in no legal sense a common carrier or common carriers and are not under the control of the Nebraska State Railway Commission. This accord is sustained by the decisions of this court. See, State v. Southern Elkhorn Telephone Co., 106 Neb. 342, 183 N. W. 562; City of Bayard v. North Central Gas Co., 164 Neb. 819, 83 N. W. 2d 861.

A necessary corollary to this proposition is that groups in the situation of the petitioners are, in the absence of appropriate statutory provision, without right to obtain recourse at the hands of the commission. Attention has not been directed to any statute which awards any such right.

It is of course true, and no one disputes this, that the parties within the territorial boundaries of the established service area of a telephone company, within the true meaning of that term, have access to the commission.

The next subject which requires examination is that of whether or not the Northwestern Bell Telephone Company may be required to respond to the petition and extend the service requested by the petitioners, which company does not furnish any service in the area; does not claim any rights therein; and does not seek, but on the contrary objects, to furnishing any such service. On the record and in actuality the sole and declared purpose of this action is to obtain from the commission an order placing the territory occupied by the petitioners within the service area of the Northwestern Bell Telephone Company.

No statute has been referred to which imposes any such requirement. Any effort of a telephone company to enter the territory of another is subject to action of the commission but the matter of compulsory entrance into occupied or unoccupied territory does not appear to have received legislative attention.

It is of course true that the commission has control of such companies within certain statutory limits co-extensive with established areas and in case of disputes as to service between companies operating within established areas, but there is no statutory provision which permits extension of areas or creation of new areas without the consent of the company. See, § 86-213, R. R. S. 1943; §§ 86-214 and 86-215, R. S. Supp., 1959; Block v. Lincoln Tel. & Tel. Co., 170 Neb. 531, 103 N. W. 2d 312.

These statutory provisions permit the extension of service by one company into the service area of another but they do not permit the commission to require such extension.

The petitioners, in their brief, appear to concede that the commission may not so require. They state: "The law appears to be that a public utility can be required to serve only the territory it holds itself out to serve, but the question is moot in this case as neither the Railway Commission nor anyone else is trying to force any telephone company to serve this territory."

This concession, whether or not it relates to a question which is moot, together with what has been said with reference to the cited statutes, the true status of the petitioners as the record discloses it to be, and the matters actually presented to the commission, makes clear the conclusion which must be reached. That conclusion must be based upon the following summary of the record:

The petitioners filed what was denominated application in which complaint was made with regard to telephone service.

They requested that the Nebraska State Railway Commission assign their area to the service area of the Northwestern Bell Telephone Company of Lexington, Nebraska.

They petitioned for nothing else.

They had no standing under law as a common carrier and the commission had no jurisdiction over them.

Due notice of hearing was given by the commission.

No formal protest or objection was filed by anyone.

A hearing was had before an examiner at which evidence was taken.

By evidence the Public Telephone Company, Blair, Nebraska, and the Northwestern Bell Telephone Company protested the petition. Neither sought affirmative relief at the hands of the commission.

After conclusion of the hearing the examiner gave it as his opinion that the petition should be denied.

Thereafter the petition was denied by the commission.

A motion for rehearing was filed by the petitioners which was later overruled, at which time the commission vacated its order denying the petition, and entered in its stead the following:

"IT IS FURTHER ORDERED that applicants herein be and they are hereby permitted to obtain telephone service from any operating company of their choice operating within the area."

Whether or not the commission meant by this to say that the petitioners or some of them were entitled to choose and to receive service from the Northwestern Bell Telephone Company, and that this company in such event would be required to render it, is not made clear. If it did it was an emptiness insofar as the petition is concerned. No one else was in this proceeding seeking relief at the hands of the commission.

Further, if it did, it was void as to the Northwestern Bell Telephone Company for the reason that the commission was without power to compel the extension of service by the company to the petitioners.

By all of this it is made clear that on one side was a group of individuals who, under the facts and circumstances disclosed by the record, were not subject to the power or jurisdiction of the commission. On the other side was a telephone company operating properly as a common carrier within a service area which was not occupied by any of the petitioners. The commission was without power or jurisdiction, as is disclosed also by the facts and circumstances, to require the company to enter the area of the petitioners which area was in its entirety outside the service area of the company.

In the light of this the commission was without legal right to grant the relief prayed for in the petition. The original order denying the petition was proper and the order vacating it was erroneous, and accordingly should be and is reversed.

REVERSED.

IN RE APPLICATION OF GERALD E. CANNING.
GERALD E. CANNING, APPELLEE, V. C. C. AND EARL MCKAY, DOING BUSINESS AS MCKAY FREIGHT LINES, APPELLANT.
112 N. W. 2d 737

Filed January 5, 1962. No. 35049.

1. **Motor Carriers.** The claim that a holder of a certificate of public convenience and necessity has held himself out as available for the hauling of regulated commodities will not of itself defeat a charge that his certificate is dormant when he has put himself in an unavailable position to transport such commodities.
2. ———. Where a holder of a certificate of public convenience and necessity has complied with applicable statutes, regulations, and the terms of his certificate, the question of dormancy becomes one of fact under all the circumstances shown.
3. **Motor Carriers: Public Service Commissions.** Where there is evidence to sustain a finding that a certificate of public convenience and necessity is not dormant, the finding of the Nebraska State Railway Commission of nondormancy will not be disturbed by this court.

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

Nelson, Harding & Acklie, for appellant.

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

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

CARTER, J.

This is an appeal from an order of the Nebraska State Railway Commission granting to Gerald E. Canning a transfer of the rights of Louis H. Weber under a certificate of public convenience and necessity issued December 17, 1937. An appeal was taken to this court by C. C. and Earl McKay, doing business as McKay Freight Lines, a protestant.

The evidence shows that Canning entered into an agreement with Weber to purchase the rights of Weber under his certificate for the sum of $500. Canning and Weber joined in an application to the commission for its approval of the transfer. It is the contention of the protestant that the certificate of Weber was dormant, and, there being no evidence showing that present and future public convenience and necessity required the transfer, the application should have been denied as a matter of law, and that the order of the commission granting the application was therefore arbitrary and unreasonable.

The applicant Canning was the holder of a certificate of public convenience and necessity authorizing operations as a common carrier of commodities generally, excepting those requiring special equipment or refrigeration, between points within a 20-mile radius of Endicott, Nebraska, and Omaha, Nebraska, over irregular routes. The seller was the holder of a certificate authorizing the transportation of commodities generally, excepting those requiring special equipment and refrigeration, over irregular routes from Fairbury, Nebraska, and within 30 miles thereof, and to and from points within a described

area. Due to the fact that Endicott is 6 miles from Fairbury, the commission approved the transfer with a modification of territorial scope which is not material to the present appeal.

The primary issue for determination is whether or not the certificate of Weber was dormant. The evidence on that question is not in dispute. It is substantially as follows: Weber obtained his certificate in 1937. He has transported regulated commodities since that time except for the year previous to the filing of the application in the present case. He transported no regulated commodities during this period for the reason that he had no calls to do so. He testified that he was at all times ready to transport such commodities and that he had never failed to respond to a call. During the year prior to the filing of the application he transported grain and livestock mostly, they being nonregulated commodities not within his certificate. He is retaining his truck and expects to continue in the hauling of nonregulated commodities even if the transfer of his rights under his certificate to Canning is approved by the commission. He has at all times had proper RC plates on his truck. He has at all times complied with insurance requirements and has not violated any orders or regulations of the commission.

It will be noted from the foregoing evidence that the claim that Weber's certificate is dormant is not based on any acts of omission or commission on his part that were willful. See In re Application of Resler, 154 Neb. 624, 48 N. W. 2d 718. His failure to transport regulated commodities during the year previous to the filing of the application was due to a paucity of such business during that period, and not due to any failure on his part. Whether or not a certificate is dormant is usually a question of fact. Where a certificate holder fails to obtain RC plates, or permits his insurance to lapse, or sells the equipment needed to perform the service, dormancy is not difficult to establish. By his acts he there

provides proof of his intention to abandon the service he is required by his certificate to perform. Schmunk v. West Nebraska Express, 159 Neb. 134, 65 N. W. 2d 386. But where, as here, the certificate holder is ready, willing, and able to perform the service authorized by his certificate, and does not perform such service through no fault of his own, the question of dormancy becomes a question of fact under all the circumstances of the case. The commission in the first instance determines the question of fact and its determination thus made will not be disturbed by this court if there is evidence to sustain it.

In Schmunk v. West Nebraska Express, *supra,* this court upheld the revocation of a certificate when the certificate holder had disposed of his equipment and permitted his insurance to lapse several months prior to the rendition of the revocation order. Such evidence conclusively demonstrates an abandonment of the certificate and sustains a finding of dormancy. His claim that he was holding himself out for the performance of service authorized by his certificate has no weight under such circumstances.

In Neuswanger v. Houk, 170 Neb. 670, 104 N. W. 2d 235, we said: "Under this situation we cannot say the commission was wrong in vacating its order to show cause for the evidence adduced fails to show that Neuswanger willfully ceased or discontinued to offer his services to those who desired them and, if they did, that he failed to perform the services requested insofar as his operating authority permitted."

We point out that section 75-238, R. S. Supp., 1959, provides in part as follows: "Any such permit or certificate may * * * be revoked or may, upon complaint or on the commission's own initiative, 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 * * *."

It is plain from the foregoing holding that dormancy exists as a matter of law where there has been a willful failure to comply with applicable statutes, orders, rules, regulations, or with any term, condition, or limitation of a permit or certificate. In re Application of Resler, *supra;* Nebraska State Railway Commission v. Service Oil Co., 157 Neb. 712, 61 N. W. 2d 381. But where there has been no willful failure of compliance with such statutes, orders, or regulations, it is a question of fact as to whether or not the certificate has become dormant. After a consideration of all the facts and circumstances the commission found that the certificate was not dormant. It was the province of the commission to make this determination. There is evidence to support the finding that there was no willful failure to comply with applicable statutes, regulations, or duties under the certificate by the certificate holder, and this court is not permitted, under such circumstances, to interfere with the commission's finding. The findings of the commission are consistent with section 75-240, R. R. S. 1943, and the order of the commission is affirmed.

AFFIRMED.

STUART SCHEPERS ET AL., APPELLEES, V. MARVIN LAUTENSCHLAGER ET AL., APPELLANTS.
112 N.W. 2d 767

Filed January 5, 1962. No. 35061.

1. **Brokers.** The duties and liabilities of a broker to his employer are essentially those which an agent owes to his principal.
2. ———. A broker owes to his employer the duty of good faith and loyalty, and is required to use such skill as is necessary to accomplish the object of his employment.
3. ———. It is a broker's duty to give his client the fullest information concerning his transactions and dealings in relation to the property with reference to which he is employed.

4. ———. A broker is a fiduciary required to exercise fidelity and good faith toward his principal in all matters within the scope of his employment.
5. ———. The requirement of a broker as a fiduciary not only forbids conduct on the part of the broker which is fraudulent or adverse to his client's interests, but also imposes upon him the positive duty of communicating all information he may possess or acquire which is, or may be, material to his employer's advantage.
6. ———. The rule requiring a broker to act with the utmost good faith toward his principal places him under a legal obligation to make a full, fair, and prompt disclosure to his employer of all facts within his knowledge which are or may be material to the matter in connection with which he is employed, which might affect his principal's rights and interests or influence his action in relation to the subject matter of the employment, or which in any way pertain to the discharge of the agency which the broker has undertaken.
7. ———. It is the duty of a broker who is employed to sell property at a specified price to inform his principal of the fact that the property has become of enhanced value since the time when it was placed in his hands for sale, or, upon hearing that a more advantageous sale can be made, the facts concerning which are unknown to the principal, to communicate the same to him before making the sale as expressly authorized. A neglect to do so renders him liable to his principal for whatever loss the latter may suffer as a consequence thereof.
8. **Principal and Agent.** A commission cannot be collected by the agent for his services if he has willfully disregarded, in a material respect, an obligation which the law devolves upon him by reason of his agency.
9. ———. An agent cannot, either directly or indirectly, have an interest in the subject matter of the agency without the consent of his principal, freely given, after full knowledge of every matter known to the agent which might affect the principal.
10. **Trusts: Conversion.** All persons who knowingly aid or participate in committing a breach of trust will be held responsible for the resulting loss, and will be held accountable by personal judgment for the value of the property so converted.

APPEAL from the district court for Hall County: WILLIAM F. MANASIL, JUDGE. *Affirmed.*

Robert H. Petersen and *John A. Wagoner,* for appellants.

Andrew J. McMullen and *Dier & Barton,* for appellees.

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

MESSMORE, J.

This is an action brought by Stuart and Adelia Schepers, plaintiffs, against Marvin Lautenschlager and William Lautenschlager, defendants, in the district court for Hall County, to recover $9,200, including $8,000 alleged profit on land sold by the defendants to Dr. Howard Yost, and $1,200 commission paid to defendant Marvin Lautenschlager. The trial court rendered judgment in the sum of $8,000 in favor of the plaintiffs and against the defendants, with interest at 6 percent per annum from February 2, 1961, and in favor of the plaintiffs in the sum of $1,200 with interest at 6 percent per annum from August 27, 1959, from the defendant Marvin Lautenschlager. The defendants filed a motion for judgment notwithstanding the verdict, or in the alternative for a new trial. The trial court overruled the defendants' motion, and defendants perfected appeal to this court.

The plaintiffs' second amended petition alleged in substance that the plaintiffs, prior to August 22, 1959, owned a quarter section of land in Merrick County; that the plaintiffs entered into a real estate listing contract with Marvin Lautenschlager, a real estate broker, for the sale of such land; and that upon the execution of the brokerage contract the plaintiffs orally instructed the defendant Marvin Lautenschlager to secure the best price he could for the property, but under no circumstances to take less than $150 an acre. The plaintiffs further alleged that the action of the defendant Marvin Lautenschlager, while acting legally as an agent of the plaintiffs, was in fraud and deceit, and in disregard of his duty to the plaintiffs as follows: (1) That he failed to inform his principals of their probability to secure the sale of their land for the price of $200 an acre to Dr. Howard Yost, if Dr. Yost could establish for himself the

presence of water in irrigable amounts underneath the land, and favorable soil check, which said presence of water was known to the defendant Marvin Lautenschlager at the time; (2) that defendant Marvin Lautenschlager, in concert with the defendant William Lautenschlager, conspired to secure title to the premises without divulging to the plaintiffs the prospective higher price from Dr. Yost, and with the intention to secure for themselves, or either of them, the increased price in violation of their duties; (3) that Marvin Lautenschlager made representations as to the best price he could possibly get for the sale of the farm, knowing them to be false, and did, by not divulging the whole truth to his principals, the plaintiffs, intend to deceive them; (4) that the plaintiffs relied upon the representations made by Marvin Lautenschlager that $150 was the best price he could get, and as a result thereof executed a purported deed conveying the premises for $8,000 less than could have been secured by the plaintiffs had they known the truth from their agent, Marvin Lautenschlager, about such opportunity with Dr. Yost; and (5) that had the plaintiffs been informed that Dr. Yost had expressed an interest in buying their land at $200 an acre, and the facts surrounding the negotiations, they would not have agreed to sell the land for $150 an acre.

The second amended petition further alleged that as a result of the reliance upon the representation, and the failure to divulge the whole truth, plaintiffs were damaged in the sum of $8,000, which was the difference between the price that could have been secured by an agent in the proper conduct of his legal and moral responsibilities, and the price that was secured for the plaintiffs, together with a commission in the amount of $1,200 which was not due and owing to the defendant Marvin Lautenschlager because of his breach of legal and moral duties to his principals, the plaintiffs

herein. The prayer of the plaintiffs' petition was for $9,200 and equitable relief.

The defendants each filed separate answers denying all allegations of the plaintiffs' second amended petition.

For convenience we will refer to Stuart Schepers as Stuart, to Marvin Lautenschlager as Marvin, to William Lautenschlager as William, at times to Stuart and Adelia Schepers as plaintiffs, to Marvin Lautenschlager and William Lautenschlager as defendants, and to Dr. Howard Yost as Yost.

The record discloses that the plaintiffs live in Hall County and owned 160 acres of land in Merrick County which Stuart purchased in his own name in March 1941. Stuart testified that on August 10, 1959, the plaintiffs entered into a farm listing contract with Marvin as their agent to sell the land in Merrick County for $150 an acre; and that by the contract Marvin had the exclusive right to sell the farm until January 1, 1959, which must have meant January 1, 1960. The agreement described the land and the terms of sale. Stuart further testified that Marvin represented to Stuart that he was a real estate broker and that he had sold land in the vicinity of Stuart's farm and would try to sell the plaintiffs' land for as much as he could get for it. Stuart further testified that the next time he saw Marvin was between 7 and 8 p.m., the evening of August 22, 1959, at his home; and that at that time Marvin told Stuart that he had the farm sold. On August 22, 1959, the plaintiffs signed the purchase agreement prepared by Marvin. This purchase agreement sets forth the price of $24,000 for the plaintiffs' farm, with a $2,400 down payment and the balance at the time of settlement with delivery of the deed and abstract. The purchaser was William, who was Marvin's uncle. Marvin said nothing about himself being the buyer, and he never mentioned Yost. Stuart further testified that the next time he saw Marvin was when he delivered the abstract to Marvin, and later he saw Marvin when he brought

the check for the sale of the farm and the plaintiffs signed the deed. This deed shows that the plaintiffs were the grantors conveying the farm in Merrick County to William and Marvin. The deed was signed on August 28, 1959, with Marvin as a witness and also as notary taking the acknowledgment of the plaintiffs. This deed was recorded August 29, 1959. Stuart further testified that he looked at the deed which showed William as the grantee, and Marvin's name was not on the deed at that time. He further testified that he never had any personal contact with Yost prior to August 31, 1959; that he first learned Yost was interested in this farm about a month later when Yost called him on the telephone; and that Marvin never told him of any attempt to sell the farm to Yost.

On cross-examination Stuart testified that he was familiar with irrigation around Shelton; that he agreed upon the figure of $150 an acre as the lowest price; that the listing agreement provided for $150 an acre; and that he did indicate to Marvin that he was pleased about the sale of the farm, and talked to Marvin about some land in Fillmore County which he might sell.

On redirect examination Stuart testified that the commission of $1,200 to Marvin was taken out of the purchase price of the farm.

Yost testified that he was contacted with reference to the plaintiffs' farm in Merrick County by Marvin on either Tuesday, Wednesday, or Thursday prior to August 22, 1959, which was Saturday; that he went out to the farm between 10 and 11 a.m., on Saturday, August 22, 1959; that Marvin came out and they drove around the farm in Marvin's car and looked at the wells; that Marvin had little information about the wells, except that they were shallow; and that Marvin told him that the plaintiffs owned the farm and they wanted $200 an acre for it and Marvin's uncle might be interested in the farm but if Yost wanted it they would let him have it. Yost further testified that he wanted to get some

more information, so he and Marvin terminated the conversation with the understanding that Yost would get some more information about the soil, and possibly the capacity of the pumps and the water potential before making a commitment. A man by the name of Moates was recommended to him as knowing about irrigation and the management of farms. This witness called Moates the next Tuesday morning and made an appointment to meet him at the farm. They went over the farm to see what would be needed. Moates suggested that a test well be put down, provided the owners' permission could be obtained. Yost further testified that he did not know the plaintiffs, and the only contact he had was with Marvin. He asked for permission to put down a test well and it was granted by Marvin, and from then on Moates took over. On Saturday, August 29, 1959, Moates called Yost and said they had a very promising test well, one of the best in the area, and Yost told Moates he thought he would buy the farm. Yost further testified that he immediately told Marvin he would buy the farm and asked Marvin to bring the necessary papers for him to sign and he would give Marvin a check for what was required to complete the sale. Marvin came between 8 and 9 a.m., the following Monday morning. A uniform purchase agreement, wherein this witness agreed to purchase the farm for $32,000, with $3,200 down and the balance on delivery of the deed and abstract with possession, was signed on August 31, 1959. This witness further testified that he thought the plaintiffs owned the farm and that he was buying it from them. Marvin said that his uncle William wanted it and bought it. Yost further testified that on August 22, 1959, Marvin did not tell this witness that he had any interest in the farm; and that when Marvin came out to the farm on that day this witness told Marvin he would like to have time to make the necessary investigation to satisfy himself as to whether or not he wanted to buy the farm.

On cross-examination Yost testified that he definitely accepted the offer to purchase the farm on August 29, 1959, and that his purchase of the farm was contingent upon the water supply under the land. On redirect examination this witness testified that he told Marvin on August 22, 1959, he intended to investigate the farm with the idea of purchasing it.

Marvin testified that he had lived in Hall County since 1951, and became a licensed real estate broker on October 12, 1955; that he became acquainted with Stuart on July 30 or 31, 1959; that he had heard Stuart had a farm that might be for sale so he contacted Stuart and talked about the farm being for sale; that he contacted Stuart on August 10, 1959, to ascertain if Stuart would be interested in listing his farm in Merrick County for sale; and that he wrote up the listing agreement which was signed by the plaintiffs. Stuart said he would like to have $150 an acre for the farm. Marvin further testified that on Monday, August 17, 1959, he called his uncle William and told him about the farm being for sale; that he took his uncle out to the farm and drove around it; and that he quoted a price of $200 an acre to his uncle. On or about August 18, 1959, Marvin called Yost and told him a farm was for sale in the general area where he had shown Yost a farm a year previous. An appointment was made with Yost for 10:30 a.m., Saturday, August 22, 1959. Marvin testified further that he drove to Palmer on Friday morning, August 21, and contacted his uncle William to try and sell him the farm. William said he would give $150 an acre for the farm as that was all it was worth to him. Marvin wrote up an agreement and returned to Palmer that afternoon. The agreement was a uniform purchase agreement dated August 21, 1959, wherein William agreed to purchase the farm for $24,000, $2,400 down and the balance at the time of settlement with delivery of the deed and abstract. The following morning, August 22, 1959, Marvin drove out to the plaintiffs' farm and met Yost there. Yost in-

spected the farm, they observed the irrigation wells, and Marvin quoted a price of $200 an acre for the farm. Yost said he would have to know more about the farm before he could show any interest in it, and that he would have to know more about the soil and the water supply. Yost at that time did mention the possibility of a test well, but no arrangement was made with this witness relating to a test well. Marvin told Yost that his uncle William was interested in the farm. On August 22, 1959, Marvin drove to the plaintiffs' place with the offer agreement he had signed with his uncle William to get the acceptance of the offer from the plaintiffs. The plaintiffs accepted the purchase agreement August 22, 1959, and at that time Marvin told the plaintiffs that his uncle William was buying the farm. There was some discussion about future business relations between Stuart and Marvin. On August 24, 1959, Marvin drove to Palmer and took the copy of the acceptance offer to his uncle. The title opinion was completed the morning of August 27, 1959. Marvin drove to Palmer to tell his uncle that the opinion with reference to the plaintiffs' farm was approved. This witness further testified that his uncle asked him to manage the farm and said that his uncle would give him an interest in it, let him put his name on the deed as co-owner with his uncle, and told him to draw the deed. On August 28, 1959, this witness typed up the closing statements and took the deed to Shelton, to the home of the plaintiffs, to complete the deal. Marvin testified that the names appearing on the deed were on it at the time he presented it to the plaintiffs. On Thursday morning, August 27, 1959, Yost called Marvin and wanted to know if Marvin had any objection to his running a test well on the plaintiffs' farm. Marvin testified that he did not recall telling Yost anything about his uncle William buying the farm under a purchase agreement. Marvin further testified that he contacted his uncle William on August 29, 1959, and William decided to sell the

farm to Yost. A purchase agreement was drawn, and on August 31, 1959, Yost signed the agreement. Marvin further testified that on August 22, 1959, he did not tell Stuart that Yost had seen the farm and had inspected it because, unless there was a prospect who had shown an interest in the farm, it would be unnecessary to relate to the seller the persons to whom the farm had been shown; and that Yost left him indicating that he, Yost, had little interest in the farm and Marvin did not consider Yost a prospect to purchase the farm.

On cross-examination Marvin testified that he did not tell Yost that he had a signed contract by his uncle William for the sale of the farm for $150 an acre; that Stuart never said anything about getting more than $150 an acre for the farm; that Stuart was happy with the deal; that he saw the test well on the farm on Saturday, August 29, 1959; and that when he left the indications were that it would be a good well.

William Lautenschlager testified that he was in the implement business and lived at Palmer, Nebraska; that on August 17, 1959, he had business relations with Marvin concerning the plaintiffs' farm in Merrick County; that Marvin quoted a price of $200 an acre for the farm; that on August 20, 1959, he drove to the plaintiffs' farm and looked it over; that on August 21, 1959, he again had business relations with Marvin concerning the sale of the farm; and that he told Marvin he would make an offer of $150 an acre for the farm. This offer was signed on August 21, 1959, at Palmer. He further testified that he told Marvin on August 24, 1959, to draw up a deed and to put his name on it, and that he would give Marvin a one-sixth interest in the farm and Marvin was to manage the farm. This witness further testified that he did not know that Yost had visited the farm. On August 29, 1959, Marvin contacted this witness and told him that Yost was interested in purchasing the farm, and he agreed to sell the farm to Yost; and that on

August 31, 1959, he signed the contract concerning the sale of the farm to Yost.

The deposition of Edward Jochim was read into evidence. He testified that he first knew Marvin in June 1958, when he bought a farm from Marvin, and he continued to have business relations with Marvin; that he inspected the plaintiffs' farm with Marvin; that he was advised that he was to be a tenant of William; that Marvin was interested in the management of the farm; that the terms of the tenancy were not discussed; and that the farm was sold and the new owner had a farm manager. On cross-examination this witness testified that he went out to look at the farm prior to August 30, 1959; and that there was an oral agreement between this witness and Marvin that this witness was going to be the tenant for the following year.

The defendants assign as error that the trial court erred in rendering judgment against the defendants Marvin and William Lautenschlager in the amount of $8,000 because there was insufficient evidence to support the judgment; that the trial court erred in rendering judgment in favor of the plaintiffs in the sum of $1,200 against the defendant Marvin because of insufficient evidence to support the judgment; and that the trial court erred in overruling the defendants' motion for judgment notwithstanding the findings and verdict, or in the alternative for a new trial due to insufficient evidence against either of the defendants.

This is an equity case for trial de novo.

There are well-established rules of law that are applicable to the instant case.

"The duties and liabilities of a broker to his employer are essentially those which an agent owes to his principal. A broker owes to his employer the duty of good faith and loyalty, and is required to use such skill as is necessary to accomplish the object of his employment. * * * It is also his duty to give his client the fullest information concerning his transactions and dealings in

relation to the property with reference to which he is employed, * * *." 8 Am. Jur., Brokers, § 85, p. 1035.

"A broker is a fiduciary required to exercise fidelity and good faith toward his principal in all matters within the scope of his employment. * * * This requirement not only forbids conduct on the part of the broker which is fraudulent or adverse to his client's interests, but also imposes upon him the positive duty of communicating all information he may possess or acquire which is, or may be, material to his employer's advantage." 8 Am. Jur., Brokers, § 86, p. 1035.

"A broker cannot, without violating his general duty of good faith, act for persons having interests adverse to those of his employer, unless he acts with the consent of his employer given with full knowledge of the facts." 8 Am. Jur., Brokers, § 87, p. 1036.

"The rule requiring a broker to act with the utmost good faith towards his principal places him under a legal obligation to make a full, fair, and prompt disclosure to his employer of all facts within his knowledge which are or may be material to the matter in connection with which he is employed, which might affect his principal's rights and interests or influence his action in relation to the subject matter of the employment, or which in any way pertain to the discharge of the agency which the broker has undertaken. Thus, it is the duty of a broker who is employed to sell property at a specified price to inform his principal of the fact that the property has become of enhanced value since the time when it was placed in his hands for sale, or, upon hearing that a more advantageous sale or exchange can be made, the facts concerning which are unknown to the principal, to communicate the same to him before making the sale as expressly authorized. A neglect to do so renders him liable to his principal for whatever loss the latter may suffer as a consequence thereof." 8 Am. Jur., Brokers, § 89, p. 1038.

In Jansen v. Williams, 36 Neb. 869, 55 N. W. 279, 20

L. R. A. 207, this court said: "An agent is required to disclose to his principal all the information he has touching the subject-matter of the agency; and his relation to his principal forbids his becoming a purchaser thereof for his own benefit in any way without the full knowledge by the principal of this fact, and the principal's acquiescence therein with such knowledge .* * * A commission cannot be collected by the agent for his services as such if he has willfully disregarded, in a material respect, an obligation which the law devolves upon him by reason of his agency." The court went on to say, quoting from Mechem, Agency, § 455: "'*Fidelity in the agent* is what is aimed at, and as a means of securing it the law will not permit the agent to place himself in a situation in which he might be tempted by his own private interest to disregard that of his principal.'"

As said in Pearlman v. Snitzer, 112 Neb. 135, 198 N. W. 879: "The law imposes upon an agent the duty of disclosing to his principal every material fact known to him which is the subject of the agency. * * * Where an agent for the sale of real estate to another withholds from his principal material facts pertaining to the sale of the property, such conduct renders the contract voidable and the agent cannot recover any commission."

The doctrine is well settled that an agent cannot, either directly or indirectly, have an interest in the subject matter of the agency without the consent of his principal, freely given, after full knowledge of every matter known to the agent which might affect the principal. See 2 Am. Jur., Agency, § 253, p. 204. See, also, Nebraska Power Co. v. Koenig, 93 Neb. 68, 139 N. W. 839; James v. McNair, 164 Neb. 1, 81 N. W. 2d 813; Jansen v. Williams, *supra;* Northup v. Bathrick, 80 Neb. 36, 113 N. W. 808.

In 2 Am. Jur., Agency, § 269, p. 217, it is said: "In the exercise of good faith and diligence, it is the duty of the agent to use reasonable efforts to keep his principal informed of all facts which may come to the agent's

knowledge concerning the matters that have been intrusted to him which affect the principal's business, his rights, or his interests, or which he would desire to know, and which can be communicated without violating a superior duty owing to a third person. For example, if, after receiving instructions to sell property on certain specified terms or at a stipulated price, the agent learns that other and more advantageous terms or a better price can be obtained, he is under every legal as well as a moral obligation, to communicate the facts to the principal."

The evidence shows that William, after purchasing the land for $150 an acre, sold it within a few days to Yost for $200 an acre; and that William gave Marvin, his nephew and the agent of the plaintiffs, a one-sixth interest in the land and authorized the insertion of Marvin's name as grantee in the deed. From this, together with the relationship of William to Marvin, the trier of facts could properly find knowledge on the part of William that Marvin was acting adversely and fraudulently as to the best interests of his principal.

In Ericson v. Nebraska-Iowa Farm Investment Co., 134 Neb. 391, 278 N. W. 841, this court said: "An agent or other fiduciary who deals with the subject-matter of the agency so as to make a profit for himself will be held to account in equity as trustee for all profits and advantages acquired by him in such dealings. * * * An agent who fails to disclose to his principal every material fact in the transaction which is the subject-matter of the agency is guilty of fraud and bad faith, and may not retain anything acquired by him either in the performance or violation of his agency. * * * All persons who knowingly aid or participate in committing a breach of trust will be held responsible for the resulting loss, and will be held accountable by personal judgment for the value of the property so converted." See, also, Gesselman v. Phillips, 110 Neb. 416, 193 N. W. 750; Pearlman v. Snitzer, *supra;* Rockford Watch Co. v. Manifold, 36

Neb. 801, 55 N. W. 236; Jansen v. Williams, *supra;* State v. State Journal Co., 77 Neb. 752, 110 N. W. 763; Missouri Valley Trust Co. v. Nelson, 104 Neb. 499, 177 N. W. 835; Masonic Building Corp. v. Carlsen, 128 Neb. 108, 258 N. W. 44; Federal Trust Co. v. Baxter, 128 Neb. 1, 257 N. W. 368; Ashby v. Peters, 128 Neb. 338, 258 N. W. 639, 99 A. L. R. 843.

From the facts adduced from the record, William should not have been permitted, in equity, to retain any benefit from his purchase and sale, as he participated in the breach of duty by the agent Marvin, or at least knew that Marvin was breaching his duty to the plaintiffs at the time he, William, purchased the farm.

The record discloses that Marvin, as a broker, had shown real estate in the area in which the plaintiffs' farm was located to Yost a year previous to showing Yost the plaintiffs' farm involved in the instant case. Obviously he was acquainted, as a real estate broker, with the water situation in that area, and knew the type of land therein and its value.

The record discloses that Marvin violated his duty as a broker, as shown by the evidence and the authorities heretofore set forth.

There is another rule that is applicable to this case, that is, where the evidence is in irreconcilable conflict this court will consider the trial court's observation of witnesses and their manner of testifying, and also that the trial court must have accepted one version rather than the opposite. See Crable v. Great Western Sugar Co., 166 Neb. 795, 90 N. W. 2d 805.

In consideration of the facts and authorities heretofore cited, the judgment of the trial court should be, and is hereby, affirmed.

AFFIRMED.

SIMMONS, C. J., participating on briefs.

SPENCER, J., dissenting.

I respectfully dissent from the majority opinion insofar as it affirms the judgment as to William Lauten-

schlager. I am unable to find any evidence in the record to justify this court in holding that William Lautenschlager knew that his nephew, Marvin Lautenschlager, was breaching his duty to the plaintiffs at the time William signed the purchase agreement.

Marvin first talked to William Lautenschlager about buying the farm on August 17, 1959, quoting a price of $200 an acre. William Lautenschlager inspected the farm on August 20, 1959, with Marvin and an insurance representative who said he would loan $16,000 on it. On August 21, 1959, Marvin came to see William at Palmer, Nebraska, urging him to purchase the farm. At that time William told Marvin that he would make an offer of $150 an acre. Marvin went back to Grand Island, typed up the offer, and brought it back to Palmer, Nebraska, where it was signed. It was accepted by the plaintiffs the next day. Doctor Yost's testimony is that he did not look at the farm until August 22, 1959, and that at that time did no more than indicate he intended to inspect it further before he would make a commitment.

The evidence is undisputed that William Lautenschlager did not know that Doctor Yost was interested in the farm or that Doctor Yost had even been contacted when he made his offer. It was a full week after his offer had actually been accepted by the plaintiffs before he learned of Doctor Yost's interest. The effect of the majority opinion is to shift the burden of proof from the plaintiffs to the defendant, William Lautenschlager, with which I cannot agree.

Judge Boslaugh authorizes me to say that he joins in this dissent.

JOHN THINNES, APPELLANT, V. KEARNEY PACKING COMPANY, A PARTNERSHIP, ET AL., APPELLEES.

112 N. W. 2d 732

Filed January 5, 1962. No. 35081.

1. **Workmen's Compensation.** For workmen's compensation purposes, total disability means disablement of an employee to earn wages in the same kind of work, or work of a similar nature, that he was trained for or accustomed to perform, or any other kind of work which a person of his mentality and attainments could do.
2. ———. A workman who, solely because of his injury, is unable to perform or to obtain any substantial amount of labor, either in his particular line of work, or in any other for which he would be fitted except for the injury, is totally disabled within the meaning of the Workmen's Compensation Act.
3. ———. Disability is not to be measured solely by the occupation in which the workman was engaged at the time of the injury. Disability is not total if the workman who was injured is still capable of obtaining and performing remunerative employment.
4. ———. Disability under subdivisions (1) and (2) of section 48-121, R. S. Supp., 1957, refers to loss of earning power rather than loss of bodily function. Losses in bodily function, so far as these subdivisions of the statute are concerned, are important only as they relate to earning capacity.
5. **Appeal and Error.** Where the evidence is in irreconcilable conflict this court will, upon trial de novo, consider the fact that the trial court observed the demeanor of the witnesses and gave credence to the testimony of some rather than to the contradictory testimony of others.

APPEAL from the district court for Buffalo County: S. S. SIDNER, JUDGE. *Affirmed as modified.*

Munro, Parker & Munro, for appellant.

Nye & Wolf, Maupin, Dent, Kay & Satterfield, Thomas O. David, and *Clinton J. Gatz,* for appellees.

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

BOSLAUGH, J.

This is a proceeding under the Nebraska Workmen's Compensation Act. John Thinnes, the plaintiff and

appellant, was injured while working as a slaughterer and butcher for the Kearney Packing Company, the defendant and appellee. The defendant's insurance carrier was also joined as a party.

After a hearing before a single judge of the compensation court the plaintiff was awarded compensation for temporary total disability for 59 weeks at the maximum rate; medical, hospital, and traveling expenses in the amount of $614.95; and compensation at the rate of $7.09 per week for 241 weeks for 15 percent permanent partial disability to the body as a whole.

The plaintiff refused to accept the award and filed an application for a rehearing before the full compensation court. The full compensation court, after trial de novo, awarded the plaintiff compensation for temporary total disability for 59 weeks at the maximum rate; medical, hospital, and traveling expenses in the sum of $977.30; and compensation at the rate of $6.26 per week for 241 weeks for 15 percent permanent partial disability to the plaintiff's body as a whole, as a result of partial disability to his back.

The plaintiff refused to accept the award of the full compensation court and appealed to the district court which affirmed the award. From that judgment the plaintiff has appealed to this court.

An appeal to this court in a workmen's compensation case is considered and determined de novo upon the record. Klentz v. Transamerican Freight Lines, Inc., *ante* p. 53, 112 N. W. 2d 405.

The accident happened on July 29, 1959. The plaintiff was attempting to maneuver a beef animal into a chute where it would be killed. While the plaintiff was standing on a rail of a fence that led to the chute, one of the animals fell against his legs, pinning his feet down straight and dragging him along the fence toward a post. In an effort to free himself, the plaintiff grabbed hold of the fence and "gave all the strength I had to clear myself." At that time the plaintiff felt a sharp pain in

his right leg extending from his heel into his back.

Several days after the accident the plaintiff consulted Dr. Harold V. Smith, a physician. Dr. Smith made a diagnosis of a ruptured intervertebral disk and treated the plaintiff at his office for a week or 10 days with diathermy, analgesics, and rest. The plaintiff was then hospitalized and placed in traction for about 10 days.

In September 1959, the plaintiff was hospitalized at Hastings and examined by Dr. John G. Yost, an orthopedic surgeon. The plaintiff testified that at this time he had pain only in his lower back. Dr. Yost found that the plaintiff had a bad sprain of his low back with minimal signs of nerve irritation in the lower right extremity. X-ray and myelogram examination of the plaintiff by Dr. Yost disclosed no demonstrable evidence of a protruding or herniated lumbar disk but did disclose osteoarthritic changes in the plaintiff's spine.

The plaintiff was placed in traction, given continuous heat and medication, and gradually ambulated. He was then placed in a plaster cast and discharged from the hospital. Approximately 1 month later the cast was removed and a brace fitted. On November 10, 1959, Dr. Yost advised the plaintiff to try light work for half days.

Commencing in November 1959, the plaintiff complained to Dr. Yost of pain in his right arm. Later the pain spread to his shoulder and neck. In February 1960, the plaintiff was hospitalized at Hastings for about 9 days because of this difficulty.

In April 1960, the plaintiff was examined by Dr. Robert M. House, an orthopedic surgeon. X-ray examination of the plaintiff's cervical and lumbosacral spine disclosed a narrowing of the intervertebral disk spaces due to osteoarthritis. Dr. House concluded that the plaintiff had evidence of cervical nerve root irritation and a lumbar nerve root syndrome due to degenerative disk changes. Dr. House felt that the conservative treatment

of the lumbarsacral spine using a brace and exercise should be continued, and he performed a closed manipulation of the plaintiff's right shoulder under anesthesia at a hospital in Grand Island.

The controversy here is over the extent of the permanent disability of the plaintiff. The plaintiff contends that he is totally and permanently disabled. The defendant contends that the plaintiff's permanent disability does not exceed 15 percent and that the judgment of the district court should be affirmed.

For workmen's compensation purposes, total disability means disablement of an employee to earn wages in the same kind of work, or work of a similar nature, that he was trained for or accustomed to perform, or any other kind of work which a person of his mentality and attainments could do. A workman who, solely because of his injury, is unable to perform or to obtain any substantial amount of labor, either in his particular line of work, or in any other for which he would be fitted except for the injury, is totally disabled within the meaning of the Workmen's Compensation Act. Rapp v. Hale, 170 Neb. 620, 103 N. W. 2d 851.

The extent of the permanent disability which the plaintiff sustained as a result of the accident and injury on July 29, 1959, is a question of fact and can be determined only upon the basis of the record in this case.

The plaintiff is 59 years of age. He has a third grade education. He commenced farming when he was 22 years old and continued until 1937. He has worked on railroad section gangs and extra gangs and has done roofing and painting. He has worked for the defendant at the packing plant for about 14 years. At the time he was injured he was slaughtering and butchering cattle. This work, as done at defendant's plant, is hard manual labor which requires heavy lifting at times. There is other work at the plant such as boning, grinding, packaging, etc., which requires less physical effort and strength, but the defendant's business operation is such

that the employees are assigned to whatever work there is to be done at the time and some of it requires heavy lifting and strength.

According to Dr. Yost, when the plaintiff was examined on November 10, 1959, he was able to bend over and reach within 2 inches of the floor with his knees straight, and his straight-leg-raising sign was negative. The plaintiff stated that his pain was diminished, that he could walk 2 miles, and that he was able to drive from Kearney to Hastings by himself. Dr. Yost advised the plaintiff to increase his activities as he could tolerate and to try light work for half a day.

The plaintiff testified that in November he worked 5 hours 1 day helping feed cattle at the defendant's plant and that after that he felt very "tough" and stayed in bed for 4 days. The defendant's pay roll records show that in December 1959, plaintiff worked 12½ hours one week and 8 hours during another week. In November and December 1960, the plaintiff worked about 3 hours per day on 6 or 8 days at the defendant's plant. This work included trimming bones, helping cut up hogs, and sacking hams. The plaintiff testified that he did not continue to work for short periods of time because he could not stand it; that his back and neck pain him; and that the pain becomes greater when he stands for a long period of time and when he stoops over. The plaintiff also testified that he walks 2 or 3 miles every day; that he washes dishes for his wife, helps her clean ducks, sweeps the floor, and scrubs the basement; and that he looks after his horse, pumps water for it, and feeds it.

Dr. Yost testified that it was his opinion that the plaintiff could not return to work immediately and work 8 or 9 hours per day; that he could start on a gradual basis, performing light activities such as cutting and wrapping meat, making hamburger, and boning, and then work into other activities as his strength increased; that it is not unusual for a person to require from 3 weeks

to 3 months before he can work fully into the activities that he was doing before his injury; and that persons with low back injuries can and should learn to squat and lift with their knees.

There is definite conflict between the testimony of the plaintiff as to what he can do and the testimony of Dr. Yost as to what he thinks the plaintiff can do. It is clear that the compensation court accepted the testimony of Dr. Yost and rejected that of the plaintiff. In a workman's compensation case where the testimony is in irreconcilable conflict, this court will consider the fact that the trial court observed the demeanor of the witnesses and gave credence to the testimony of some rather than to the contradictory testimony of others. Chism v. Convair Mobile Homes, Inc., *ante* p. 86, 112 N. W. 2d 393.

The evidence establishes that the plaintiff is unable to do hard manual labor such as he has done at times in the past and such as he was doing at the time he was injured. The evidence also establishes that he is able to do some work including part of the work that he formerly did for the defendant. Disability is not to be measured solely by the occupation in which the workman was engaged at the time of the injury. Disability is not total if the workman who was injured is still capable of obtaining and performing remunerative employment. Micek v. Omaha Steel Works, 136 Neb. 843, 287 N. W. 645.

The evidence establishes that the plaintiff has some permanent disability as a result of the accident but it fails to show that he is permanently totally disabled. The evidence does not show that the earning power of the plaintiff was totally destroyed as a result of the accident on July 29, 1959.

Disability under subdivisions (1) and (2) of section 48-121, R. S. Supp., 1957, refers to loss of earning power rather than loss of bodily function. Losses in bodily function, so far as these subdivisions of the statute are

concerned, are important only as they relate to earning capacity. Miller v. Peterson, 165 Neb. 344, 85 N. W. 2d 700.

It is difficult to determine the extent of the permanent partial disability resulting from the accident in this case upon the evidence which is available to us. The record in this case does not contain any satisfactory direct evidence as to the permanent loss in earning power which the plaintiff has sustained. There is opinion evidence as to what his permanent losses in bodily functions are.

Dr. Yost testified that it was his opinion that the plaintiff had a permanent partial disability of the body as a whole of between 10 and 15 percent. This was based upon his finding as to range of motion, activity tolerance, muscle tightness of the hamstring muscles of his legs, and the weakness of grip in his right hand.

Dr. House testified that it was his opinion that the plaintiff had approximately 5 percent permanent partial impairment of the lumbarsacral spine, a 10 percent permanent partial impairment of the cervical spine, and a 3 percent impairment of the right shoulder.

It is significant that Dr. House made a lower estimate of disability of the lower back than of the cervical spine and shoulder. Dr. Yost did not relate the arm, shoulder, and neck difficulty which the plaintiff has to the accident on July 29, 1959. Dr. Yost testified that the plaintiff made no complaint about his neck, shoulder, and arm until 2 months after Dr. Yost first saw him, more than 3 months after the accident, and that the plaintiff stated these symptoms came on spontaneously. Dr. Yost further testified that in his opinion the neck, shoulder, and arm difficulty was the result of a reflex sympathetic dystrophy; and that it was the result of the stiff posture in which the plaintiff held himself and the rigid position in which he held his arm, together with the arthritic condition of his spine.

Dr. House testified that he thought the plaintiff had

been protecting his right arm because of pain and when the arm of an older person is protected for any length of time, there is a tendency for adhesions to form about the shoulder joint and result in a limitation of motion. Dr. House further testified that in his opinion the accident was the direct cause of the lumbar nerve root syndrome, but with respect to the neck, shoulder, and arm condition he would only state that the accident could cause that condition.

Upon consideration of all of the evidence in this case, we conclude that the plaintiff sustained a 35 percent loss in earning power as a result of the accident which occurred on July 29, 1959. This finding is based upon all of the factors which enter into earning power and is not limited to the evidence relating to loss of bodily functions.

The judgment of the district court should be modified to provide that the defendant and its insurance carrier shall pay to the plaintiff as compensation for permanent partial disability the sum of $14.61 per week for 241 weeks from September 15, 1960. As so modified, the judgment of the district court is affirmed.

AFFIRMED AS MODIFIED.

STATE OF NEBRASKA ET AL., APPELLEES, V. MILTON C. KIDDER, APPELLANT.

112 N. W. 2d 759

Filed January 5, 1962. No. 35082.

1. **Constitutional Law: Public Lands.** Article VII, section 1, of the Constitution of this state provides in part that the general management of all lands and funds set apart for educational purposes, and for the investment of school funds, shall be vested, under the direction of the Legislature, in a board of five members to be known as the Board of Educational Lands and Funds.
2. **Public Lands.** The Board of Educational Lands and Funds has control and management of school lands.

3. ———. Section 72-232, R. R. S. 1943, provides in part that no individual, partnership, or corporation shall be entitled to hold under lease a total of more than 640 acres of state educational lands, whether the same be acquired by direct lease or by assignment; provided, that said limitation shall not apply where the land to be leased is bounded entirely on two sides thereof by lands owned or operated by such applicant or assignee.
4. **Trial: Judgments.** The Summary Judgments Act authorizes summary judgment only where the moving party is entitled to judgment as a matter of law, where it is quite clear what the truth is, and that no genuine issue remains for trial.

APPEAL from the district court for Cherry County: ALBERT W. CRITES, JUDGE. *Affirmed.*

Milton C. Kidder, pro se.

Clarence A. H. Meyer, Attorney General, *Bernard L. Packett, Robert V. Hoagland,* and *William C. Smith, Jr.,* for appellees.

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

MESSMORE, J.

This is a forcible entry and detention action brought in the county court of Cherry County by the State of Nebraska and Arnold Wright, its tenant, as plaintiffs, against Milton C. Kidder, defendant. This petition was filed in the county court of Cherry County May 3, 1958. The purpose of the action was to recover possession of certain school land. On May 26, 1958, judgment was rendered in favor of the plaintiffs and against the defendant. The defendant perfected appeal to the district court for Cherry County. In the district court a pretrial conference was held to simplify the issues raised by the pleadings. On January 24, 1961, the State, on behalf of the plaintiffs, filed a motion for summary judgment. On March 14, 1961, the defendant filed a motion for new trial which was overruled on May 11, 1961. The plaintiffs' motion for summary judgment was sustained March 15, 1961. The defendant perfected appeal to this court.

The defendant assigns as error that the trial court erred in sustaining the plaintiffs' motion for summary judgment, for the reason that the trial court's finding of fact is not sustained by the pleadings, the admissions, or other evidence introduced at the hearing on the motion for summary judgment; and that the trial court erred in finding that the plaintiffs were entitled to possession of the school land here involved.

The issues include the following: Is an order of the district court assigning and directing the assignment of a school land lease as a part of a property settlement in a decree of divorce a valid and legal assignment of said school land lease where there is a procedure for such assignment prescribed by statute which required, among other things, that an assignment of a school land lease be approved by the Board of Educational Lands and Funds?

It was stipulated that the former wife of the defendant Milton C. Kidder was the holder of a school land lease from the Board of Educational Lands and Funds; that said lease was included in the property settlement between the defendant and his wife which was incidental to a divorce decree issued by the district court for Cherry County in a case entitled Kidder v. Kidder; that said case was appealed to the Supreme Court of this state and affirmed; and that the decree in the divorce action purportedly assigned, or attempted to assign, said lease to the defendant Milton C. Kidder, but that no assignment or transfer of said lease was executed by the wife of the defendant pursuant to the order of the court in said case which the Board of Educational Lands and Funds approved.

It was admitted that the State was the owner of Section 36, Township 29 North, Range 34 West of the 6th P. M., in Cherry County; that said real estate is a part of the lands granted to the State of Nebraska under the Enabling Act of Congress, and under the Enabling Act and the constitutional provisions of the state is

dedicated to be used for the benefit of the common schools of the state; that under the Constitution of the State of Nebraska, the Board of Educational Lands and Funds is charged with the control and management of said public school lands; that Pearl L. Kidder is the ex-wife of Milton C. Kidder and acquired a school land lease on the above-described real estate by assignment on May 24, 1948, which was approved by the Board of Educational Lands and Funds, and the lease was stated to expire on December 31, 1961; that an order was issued by the Board of Educational Lands and Funds to Pearl L. Kidder on January 16, 1958, to show cause why her school land lease should not be forfeited for lack of using the school land for her own use and benefit as provided by section 72-235, R. R. S. 1943; and that Pearl L. Kidder did not appear to show cause why her school land lease should not be forfeited, and the secretary of the Board of Educational Lands and Funds was authorized to sell a new lease at public auction.

It was stipulated that the plaintiff, Arnold Wright, was the lessee of the school land here involved under a school land lease dated March 10, 1958, and ending December 31, 1969, executed by the Board of Educational Lands and Funds of the state, as lessor; and that the defendant was served with a 3-day notice to vacate the premises.

Article VII, section 1, of the Constitution of this state provides: "The general management of all lands and funds set apart for educational purposes, and for the investment of school funds, shall be vested, under the direction of the Legislature, in a board of five members to be known as the Board of Educational Lands and Funds. The members shall be appointed by the Governor with such qualifications and for such terms and compensation as the Legislature may provide."

The Board of Educational Lands and Funds has control of and the management of the school lands. See State v. Cooley, 156 Neb. 330, 56 N. W. 2d 129.

As early as the case of State ex rel. Crounse v. Bartley, 40 Neb. 298, 58 N. W. 966, this court, in referring to the constitutional provision dealing with the management of school lands, said: "By this provision the power to sell, lease, and manage the educational lands of the state is conferred upon a distinct board, * * *. The authority thus conferred upon the board of commissioners, or board of educational lands and funds, as it is usually called, the legislature is powerless to take away."

At the present time the Board of Educational Lands and Funds has sole power under the Constitution to manage and control school lands.

Section 72-233, R. R. S. 1943, provides in part: "No lease shall be sublet or assigned without the written approval of the board."

In the divorce decree the trial court orderd that Pearl L. Kidder, the defendant's wife, assign to the defendant Milton C. Kidder a school land lease which she had. This constituted a part of the property settlement between the parties. The State was not a party to the divorce action, and is not bound by the judgment rendered therein. The decree in the divorce action, including the property settlement, while binding on the parties to the action, was in no manner binding on the State or the Board of Educational Lands and Funds. The Board of Educational Lands and Funds was not prevented from carrying out the statutory provisions relative to school lands, leaving the parties to the divorce action such rights and remedies as they may have between themselves. Whatever rights or remedies the parties have in the divorce action, if any, cannot defeat the statutory powers of the Board of Educational Lands and Funds in the leasing of school lands.

The second issue pertains to the effect of section 72-232, R, R. S. 1943, providing in substance that no person shall be entitled to hold under lease more than 640 acres of school lands by assignment, unless the land to

be leased is bounded entirely on two sides thereof by lands owned or operated by the assignee.

It was stipulated that the defendant is the present holder of record, as lessee, of a school land lease from the Board of Educational Lands and Funds covering 97.85 acres of land in Cherry County, described as Government Lots 1 and 2 in Section 2, Township 28 North, Range 31 West of the 6th P. M., in Cherry County, which lease was for a term of 25 years, expiring on December 31, 1960; and that the defendant neither owned nor operated real estate contiguous to the entire part of two sides of Section 36, Township 29 North, Range 34 West of the 6th P. M., in Cherry County.

Section 72-232, R. R. S. 1943, provides in part: "No individual, partnership or corporation shall be entitled to hold under lease a total of more than six hundred and forty acres of state educational lands, whether the same be acquired by direct lease or by assignment; Provided, said limitation shall not apply where the land to be leased is bounded entirely on two sides thereof by lands owned or operated by such applicant or assignee."

The defendant assumed the right of possession of the school land lease here involved. He drove 25 cows and 1 bull on this land, to which the plaintiff Wright protested, but the protest was not heeded by the defendant.

The record shows that the leasehold by Pearl L. Kidder covers a full section of 640 acres; that the defendant neither owned nor operated real estate contiguous to the entire part of two sides of the section here involved; and that at the time the decree of divorce was entered, and at least until December 31, 1960, the defendant held a school land lease covering 97.85 acres in Cherry County. It is apparent that under the facts adduced and under section 72-232, R. R. S. 1943, the defendant would not be entitled to the possession of the school land here involved.

In Illian v. McManaman, 156 Neb. 12, 54 N. W. 2d

244, it was said: "The summary judgment act, * * * authorizes summary judgment only where the moving party is entitled to judgment as a matter of law, where it is quite clear what the truth is, and that no genuine issue remains for trial. * * *."

There are many cases that hold the same way as the above-cited case.

In the instant case the trial court did not err in sustaining the plaintiffs' motion for summary judgment.

The judgment of the trial court should be, and is hereby, affirmed.

AFFIRMED.

SIMMONS, C. J., participating on briefs.

A. B. RAPP ET AL., APPELLANTS, V. EMERALD F. RAPP ET AL., APPELLEES.

112 N. W. 2d 777

Filed January 12, 1962. No. 34932.

1. **Subrogation.** The doctrine of subrogation is not administered by courts of equity as a legal right, but the principle is applied to subserve the ends of justice and to do equity in the particular case under consideration. It does not rest on contract, and no general rule can be laid down which will afford a test in all cases for its application. Whether the doctine is applicable to any particular case depends upon the peculiar facts and circumstances of such case.
2. ———. The real question in all subrogation cases is whether the payment made by the stranger was a loan to the debtor through a desire to aid him or whether it was made with the expectation of being substituted in place of a creditor.
3. **Estoppel.** The general rule is that where one of two innocent persons must suffer by the acts of a third, he whose conduct, act, or omission enabled such third person to occasion the loss must sustain it if the other party acted in good faith, without knowledge of the facts, and altered his position to his detriment.

APPEAL from the district court for Cheyenne County: JOHN H. KUNS, JUDGE. On rehearing. See 172 Neb. 68,

108 N. W. 2d 412, for original opinion. Original opinion set aside. *Reversed and remanded with directions.*

Beatty, Clarke, Murphy & Morgan, Donald W. Pedersen, and *Frank E. Piccolo, Jr.,* for appellants.

Clinton & McNish and *Heaton & Heaton,* for appellees.

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

SIMMONS, C. J.

In this action plaintiffs sought subrogation, foreclosure of a chattel mortgage, and equitable relief. Relief was denied. Plaintiffs appeal.

In Rapp v. Rapp, 172 Neb. 68, 108 N. W. 2d 412, we affirmed the judgment of the trial court. We granted reargument. We now set aside our former opinion and judgment, reverse the judgment of the trial court, and remand the cause with directions.

The parties plaintiff are husband and wife. Reference hereinafter need be made only to the husband who will be called the father. The defendants Rapp are husband and wife. He is the son of the plaintiffs and will be referred to herein as the son.

The defendant Sidney National Bank will be referred to as the Sidney bank. It was dismissed from the case during the trial. However, it will be necessary to refer to it during the recital of the evidence.

The defendant, Charles N. Deaver, is a substantial stockholder in and director of the Sidney bank. He will be referred to herein as Deaver. It will be necessary to make reference also to the Potter State Bank of Potter, Nebraska, and the Denver National Bank of Denver, Colorado. They will be described respectively as Potter bank and Denver bank. Mr. Leo Krieger is president of the Sidney bank. He will be referred to herein as Krieger.

Primarily, the controversy here is between the father and Deaver. It requires a determination of the priority

of chattel mortgages given by the son to the father and to Deaver. A question of marshalling of assets is also involved.

Property involved in both mortgages is an auction house with auxiliary equipment including a lunchroom. The auction house and other equipment will be referred to herein as the sale barn. It is located on property leased from the Union Pacific Railroad. The classification of the sale barn as personal property is not questioned.

The father has a common school education. He was a farmer and an auctioneer. He succeeded financially. The son worked with the father, became an auctioneer, farmer, and businessman who appears to have engaged also as a dealer in livestock and other merchandise at his auctions.

The son succeeded in staying within the credit confidence of the Sidney bank and to a lesser degree in the Potter bank although he had a somewhat regular practice of writing insufficient fund checks on each bank.

On February 20, 1958, the son and his wife executed a note to the Sidney bank for $26,694.56, payable in 60 days. This was secured by a chattel mortgage on a large amount of cattle, machinery, grain, and lumber and other equipment. The lumber and equipment of various kinds were clearly to have been and were used in the construction of the sale barn. The Denver bank participated in this loan by arrangements with the Sidney bank. Its only connection with the transaction has to do with such participation financing.

The minutes of the meeting of the board of directors of the Sidney bank, hereinafter called the board, on February 11, 1958, show Deaver present and the "past due notes" of the son read and discussed at that meeting. The son's note and chattel mortgage to the bank, by its terms, became delinquent and unpaid in April 1958.

The minutes of the meeting of the board for May 13,

1958, show Deaver present and show the son's indebtedness to the bank as a matter of discussion.

The minutes of the board for June 10, 1958, again show Deaver present and the son's note a matter of discussion.

On June 24, 1958, the son, in consideration of additional security, was given an extension on his note to July 20, 1958. On that date, the son and his wife executed a note for $26,694.56 payable to the Sidney bank July 20, 1958. This was secured by a chattel mortgage covering largely the general items in the earlier mortgage plus the sale barn and "other buildings and chattels." The Denver bank again participated.

The board minutes for August 7, 1958, show Deaver again present and a discussion had "on all notes past due." The son's note was listed in that category. The board met again on August 12, 1958, with Deaver present. General notes past due were read including that of the son.

The son appears to have continued his inability to meet obligations. On July 28, 1958, the father loaned him $4,000 to meet pressing obligations. This indebtedness was unsecured.

As a result of discussions running over several weeks, on July 29, 1958, Deaver loaned the son $20,000, represented by a promissory note, payable on demand and secured by a chattel mortgage on the sale barn and corrals on the leased premises. This included an agreement to assign the lease to Deaver in the event of a default.

Deaver directed Krieger, by telephone, to transfer the $20,000 to the son by withdrawal from a savings account of Deaver's. Krieger, or other employees at his direction, completed this transaction. So, it appears definitely that Krieger knew that the son was mortgaging the sale barn to Deaver, upon which the Sidney bank had a first mortgage. The mortgage from the son to Deaver was not recorded but left at the Sidney

bank either in the possession of it or where it was available to Krieger and others of its officers and employees.

The board met again on September 9, 1958, with Deaver present. Again, "general loans" past due were read including that of the son.

Both Deaver and the son testify that the loan of $20,000 was to be but for a short time. Deaver gives that as his reason for not recording it. However, it is patent that during this time, efforts were being made by the son and Krieger to refinance the son through a small business loan from the United States. It is, likewise, patent that any recording of the Deaver mortgage would have complicated the effort of the bank to refinance the son's obligations.

Deaver testifies that during September he was increasingly anxious to collect the son's $20,000 loan. The son corroborates that it was a subject of discussion on several occasions.

On September 24 or 25, 1958, the son gave the Sidney bank a check in blank, drawn on the Potter bank. It was sent to and filled in by the Denver bank for the full amount of principal and interest due it and presented to the Potter bank for payment on September 27, 1958. It was an insufficient fund check. The Potter bank attempted to contact the son and failed. It contacted the father. He came to the bank with the son. As a result of a conference had there, the father agreed to loan the son an additional $26,000, the agreement being that the son would give the father a note for $30,000 and give a chattel mortgage as a first lien on the sale barn and some accessories and on a considerable acreage of wheat.

Two checks were made out, payable to the son, at the Potter bank on September 27, 1958. One was for $12,500 which was immediately delivered and together with other funds enabled the son to pay the Denver bank check. It was then paid. Krieger called Potter to

find out if the check, payable to the Denver bank, had been paid and was informed that it had been.

The second check made out at Potter on September 27, 1958, was for $13,500 but dated October 1, 1958. It was payable to the son and deposited to his credit on October 1, 1958, at the Potter bank, to pay off the Sidney bank.

There were intervening events. On September 29, 1958, the son drew a check on the Potter bank, payable to the Sidney bank for the full amount of its note and interest remaining unpaid. Assuming the payment of the check, the son's obligation to the Sidney bank was then paid.

Deaver testified that just about that time the son told him that he would not be able to pay the $20,000 obligation in the near future. Deaver then, professing complete ignorance of the fact that the Sidney bank was being paid, decided to record his mortgage. On the late afternoon of September 30, 1958, Deaver directed Krieger at the Sidney bank to have his mortgage recorded. It was too late to have it done that day. It was done, by Krieger's direction, some time on the morning of October 1, 1958. Some time during the morning of October 1, 1958, Krieger telephoned the Potter bank and was told that the check to it for the balance of the son's indebtedness had been paid. Krieger told the Potter bank he wanted to know "in order that he could release the mortgage." We have not been able to tell by direct evidence which of these two events preceded the other.

The Sidney bank released of record its February 20, 1958, mortgage on December 15, 1958, and its June 24, 1958, mortgage on January 5, 1959.

In the meantime, on September 30, 1958, the son and father went to a lawyer in Sidney and directed the drafting of a note for $30,000 and the drafting of a chattel mortgage to secure its payment.

The drafting of this chattel mortgage was completed

either on September 30 or October 1, 1958. It provided that the property being mortgaged was free and clear of all encumbrances. It covered the sale barn, auxiliary buildings and equipment, and several hundred acres of wheat and grain that had not previously been covered by the chattel mortgages mentioned herein. The son told his father there were no mortgages ahead of the one he was giving his father.

At the father's insistence, the lawyer checked the chattel mortgage records later in the afternoon of September 30, 1958. He obviously found the Sidney bank mortgages which had been paid off. He found no other mortgages. The father and son appeared at the lawyer's office on the morning of October 1, 1958. The note and mortgage were signed by the son and the $13,500 check delivered and immediately taken to Potter and deposited. The son's wife did not sign the note and mortgage until some time after the noon hour. The father then immediately took the mortgage to the courthouse and had it recorded.

It cannot be questioned on this record but that the father contracted to receive a first lien on the property mortgaged. No one denies it. Deaver claims no knowledge of it. Everyone, including Krieger (but excluding Deaver, so he says), knew that the father was advancing the $26,000 to the son for the specific purpose of paying the Sidney bank indebtedness, including that of the Denver bank. No one denies that it was so used.

Deaver testified that he did not know for several days when his mortgage had been recorded. The board's meeting of October 16, 1958 (with Deaver present), does not show the son's note among the listed delinquent notes.

Deaver's urge, which possessed him in September, to secure payment of the $20,000 disappeared. Everyone connected with the transaction maintained silence. The father did not find out about the Deaver mortgage and its recording ahead of the one to him until some time

in December 1958. When that knowledge was disclosed, the father went to the lawyer and inquiry began into the transaction and this litigation followed.

There was a conference in Sidney in December 1958, evidently initiated by Krieger, in an effort, apparently, to persuade the others that the son was not insolvent, to persuade the father to accept a second lien status, and to thereby permit the Deaver mortgage to retain priority. Deaver attended that meeting. According to his testimony, he was little more than an interested onlooker.

Although there is no direct evidence that Deaver knew of the father's mortgage or knew when the bank had been paid off, all the circumstances point to such knowledge and to the fact that he waited his time to protect the Sidney bank and to get his mortgage on record after the bank had been paid. Certainly Krieger was Deaver's agent in this matter and had full knowledge of all that transpired including the source of the money that the son paid the Sidney bank and the obligation for security that went with it.

It is to be remembered that Deaver is a businessman. It is difficult to believe that he is as naive as this record indicates. Simple caution and elementary knowledge of the recording acts and their purpose would have caused Deaver to have recorded his mortgage—but he did not until he thought he was in a position to make a man who had trusted his son bear the loss.

It is recognized that there are many decisions of many courts, some of which would sustain the denial of subrogation here, others would not.

Appellate courts, including ours, have a habit at times of going from decision to decision and failing to return at times to the refreshing reasoning of original rules and decisions.

It seems to us that courts, including our own, have placed the emphasis in subrogation cases upon facts rather than weighing facts to determine whether or not

justice and equity require subrogation.

It is said repeatedly that because certain facts exist subrogation is justified. From that it has been held that certain facts or combination of facts must exist to permit subrogation. Such is not the rule. It makes for rigidity. It erects compartments into which cases must fit fact-wise. It ignores the resiliency in the rule. Its very purpose was to permit an equity court to do justice under the facts and not to erect barriers.

The equity courts have been building up a restriction on their own powers reminiscent of the action of the common law courts which result in the development of equity as a separate jurisdiction both of adjective and substantive law.

We have repeatedly stated the rule that: " 'The doctrine of subrogation is not administered by courts of equity as a legal right, but the principle is applied to subserve the ends of justice and to do equity in the particular case under consideration. It does not rest on contract, and no general rule can be laid down which will afford a test in all cases for its application. Whether the doctrine is applicable to any particular case depends upon the peculiar facts and circumstances of such case.' " Equitable Life Assurance Society v. Person, 135 Neb. 800, 284 N. W. 260.

We early stated the rule that: " 'The real question in all such cases is whether the payment made by the stranger was a loan to the debtor through a desire to aid him or whether it was made with the expectation of being substituted in place of a creditor.' " Bohn Sash & Door Co. v. Case, 42 Neb. 281, 60 N. W. 576. This rule has been repeatedly approved down to and including Hoagland & Co. v. Decker, 118 Neb. 194, 224 N. W. 14.

Subrogation may be had where certain facts exist, or do not exist, which justify an equity court doing justice in the premises. However, presence or absence of comparable certain facts in other cases does not neces-

sarily become a criterion which requires granting or denial of subrogation. The essential element is that facts exist which require subrogation that justice be done.

We conclude that justice and equity here require that the father have a first lien on all that property covered by the mortgage to him of October 1, 1958, for the full amount secured thereby. Deaver should have a second lien on all that property included in his mortgage which is also included in the father's mortgage.

There is another rule of equity that requires this result: "The general rule is that where one of two innocent persons must suffer by the acts of a third, he whose conduct, act, or omission enabled such third person to occasion the loss must sustain it if the other party acted in good faith, without knowledge of the facts, and altered his position to his detriment." Terry Bros. & Meves v. National Auto Ins. Co., 160 Neb. 110, 69 N. W. 2d 361. Deaver's conduct successfully enabled the son to deceive his father to his loss and detriment.

We said earlier herein that there was a question of marshalling of assets involved. The father had a mortgage on wheat as a part of his security for the $30,000 note. He realized something in the neighborhood of $8,000 on the wheat. The net amount received by the father should be applied to the reduction of the $30,000 debt and interest. It is our understanding that was substantially done in the trial court. There are other items of personal property included in the father's mortgage which are not included in the Deaver mortgage. They, likewise, should be sold and the net amount applied to the reduction of the $30,000 debt and interest. All property remaining unsold included in the bank's mortgage to which the father is subrogated, and not included in Deaver's mortgage, should be sold and applied to a reduction of the indebtedness from the son to the father before resort may be had to the property covered by Deaver's mortgage. All property received by the father

from the son, whether or not it is included in any mortgage, except where received in payment of some other valid existing indebtedness should also be credited on the $30,000 note. Equity will not permit the father to receive money or property from the son in the nature of a gift to the detriment of Deaver. If there be more than enough received to pay the $30,000 note and interest after thus marshalling the assets and the sale of the sale barn, any surplus remaining shall be paid to the defendant Deaver, after payment of the costs. All costs in this court and the trial court are taxed to the defendant Deaver.

A deficiency judgment or judgments are authorized to be entered against the son, if the sales do not produce a sufficient amount to pay either the father or Deaver, or both.

A result of this decision is that we are not required to determine the father's contention with reference to the effect of the recording acts.

Our prior opinion and judgment in Rapp v. Rapp, *supra*, is set aside. The judgment of the district court is reversed and the cause remanded for further proceedings in accord with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

SPENCER, J., dissents.

NEBRASKA BOTTLED GAS & APPLIANCE COMPANY, A CORPORATION, APPELLANT, V. AETNA CASUALTY AND SURETY COMPANY, A CORPORATION, APPELLEE.

112 N. W. 2d 740

Filed January 12, 1962. No. 35018.

1. **Trial.** In a case where further and more specific instruction is desired on a point covered by the charge given, such further instruction must be prepared and presented on behalf of the party in whose interest it is claimed to be necessary.
2. ———. If an instruction is so worded as necessarily to leave

the jury to uncertain conjecture as to its meaning and is therefore liable to lead the jury astray in the consideration of the case, it presents ground for a new trial.

3. **Trial: Appeal and Error.** It is reversible error for the trial court to fail to instruct the jury respecting the law that is applicable to the material issues raised by the pleadings and supported by the evidence.
4. **Trial: Damages.** It is the duty of the court in the instructions to fully and fairly inform the jury as to the various items of damage which it should take into consideration in arriving at its verdict, and as to the proper basis upon which the separate items thereof shall be assessed.

APPEAL from the district court for Dodge County: RUSSELL A. ROBINSON, JUDGE. *Reversed and remanded.*

Spear, Lamme & Simmons, for appellant.

Crossman, Barton & Norris, for appellee.

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

YEAGER, J.

This is an action by Nebraska Bottled Gas & Appliance Company, a corporation, plaintiff and appellant, against the Aetna Casualty and Surety Company, a corporation, defendant and appellee, to recover under a policy of insurance, issued by the defendant to plaintiff, for damage to a truck belonging to the plaintiff which was brought about by reason of the fact that the truck was overturned while in use by the plaintiff. The action was for the total amount of the damage which the plaintiff claimed was $1,248.35, less $100, or $1,148.35. The case was tried to a jury and a verdict was returned in favor of plaintiff for $355.88. From this verdict and the judgment rendered thereon the plaintiff has appealed.

In substance the plaintiff contends that the judgment is insufficient. It seeks a reversal on the ground that the court failed to instruct the jury on the appropriate theory of damages and of the measure of damages.

On January 21, 1959, a truck owned by plaintiff and

used by it to transport propane gas in bottles and tanks to rural and industrial customers in an area extending out from Fremont, Nebraska, was overturned and damaged. On this account repairs were required. By the policy of insurance which has been mentioned the defendant was required to respond in damages for the necessary costs of repair, except $100, in case the truck was damaged by accident while in use. As to this there is no dispute. In truth the defendant admits this obligation.

The plaintiff, on the trial, made proof of damages to the truck which was sufficient prima facie to support the amount of the claim, less $18.60, an item of which there is no proof, or $1,229.75. The evidence was in conformity with the appropriate legal measure for proof of damages in such circumstances. As to this there is no dispute.

In defense of the action the defendant proceeded upon the same theory as the plaintiff and adduced evidence that the total damage was $455.88 and admitted liability after deduction of $100 for $355.88. On the basis of this conflicting evidence and the instructions of the court the verdict of $355.88 was returned.

There are four assignments of error, however the total substance of them is that it was the duty of the court in the instructions to fully and properly inform the jury as to the measure of recovery to which the plaintiff was entitled in case a right of recovery had been established by the evidence, whereas in these respects there was a failure.

With particularity the failure complained of was that the instructions did not permit evaluation of the damage on the basis of evidence, and the rendition of a verdict accordingly, unless the jury found that all of the repairs made were necessary and the total charges therefor were reasonable.

The defendant does not contend that the court was not under the duty to instruct in the manner suggested

by the plaintiff. Its response is twofold. The first is that the court did fully instruct. The second is that if there was a deficiency it was one of which the plaintiff could not properly complain since it fell within the rule barring complaint in the absence of request for more specific instruction. This rule is more explicitly considered later herein.

It is pointed out here that the defendant does not contend that under proper legal principles the plaintiff was not entitled, on sufficient proof, to recover whatever damage was sustained less $100 whether that be $1,148.35 or some lesser amount.

The portion of the instructions which the plaintiff contends manifests this failure is found in instruction No. 1 as follows:

"The burden of proof is upon the plaintiff to prove, by a preponderance of the evidence, the following propositions:

I.

"That the repairs made to the truck and paid for by plaintiff were necessary to place the truck back in substantially the same condition it was immediately prior to the accident.

II.

"That the charges made for such necessary repairs were fair and reasonable.

III.

"The amount thereof."

It is clear from an examination of the instruction as a whole that this language has reference to the total amount of $1,229.75, without any direction to the jury the effect of which was to say directly or by inference that if a lesser amount was proved the verdict should be rendered accordingly.

To say the least this language in the instructions is capable of the meaning which the plaintiff insists that it conveys, and it may not well be said that the jury could not and did not so interpret and apply it.

The theory of the defendant is that the situation here is controlled by the rule that where an instruction correctly states the law it is not error for the court, in the absence of request for a more specific instruction, to fail to give a more elaborate one. The rule contended for is stated in Stewart v. Smith, 50 Neb. 631, 70 N. W. 235, as follows: "If further and more specific instructions are desired on a point covered by the charge given, they must be prepared and presented on behalf of the party in whose interest it is contended they were necessary." See, also, Osborne v. State, 115 Neb. 65, 211 N. W. 179; Berggren v. Hannan, O'Dell & Van Brunt, 116 Neb. 18, 215 N. W. 556.

This rule however has no application where there has been a failure to instruct at all or to instruct properly on an issue in the case. One controlling rule is the following: "Where an instruction is so worded as necessarily to leave the jury to uncertain conjecture as to the meaning, and therefore liable to lead the jury astray in their consideration of the case, it is good ground for new trial." Hickman-Williams Agency v. Haney, 152 Neb. 219, 40 N. W. 2d 813. See, also, Patras v. Waldbaum, 170 Neb. 20, 101 N. W. 2d 465.

Another rule which is of broad and general application is the following: "It is reversible error for the trial court to fail to instruct the jury respecting the law that is applicable to the material issues that are raised by the pleadings and are supported by the evidence." Hickman-Williams Agency v. Haney, *supra*. See, also, Shiers v. Cowgill, 157 Neb. 265, 59 N. W. 2d 407; Cover v. Platte Valley Public Power & Irr. Dist., 162 Neb. 146, 75 N. W. 2d 661; Bodtke v. Bratten, 166 Neb. 36, 88 N. W. 2d 159.

This rule has application, as well as to other issues, to the measure of damages and the manner of arriving at the amount.

In Borcherding v. Eklund, 156 Neb. 196, 55 N. W. 2d 643, in discussing the rules relative to sufficiency of in-

struction as to damages and measure of damages, the court said: "A jury should be fully and fairly informed as to the various items of damages which it should take into consideration in arriving at its verdict. In this respect it is the duty of the trial court to instruct as to the proper basis upon which damages are to be assessed for each such item." See, also, Riley v. National Auto Ins. Co., 162 Neb. 658, 77 N. W. 2d 241, 57 A. L. R. 2d 1219; Wylie v. Czapla, 168 Neb. 646, 97 N. W. 2d 255.

In the light of these rules it must be said that the court failed to instruct the jury in such manner as to inform it of what was required of it in ascertaining the true measure and amount of damage, if any, in excess of $355.88, plaintiff was entitled to receive.

Accordingly the judgment of the district court is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

IN RE APPLICATION OF HARGLEROAD BULK CARRIERS, INC. HARGLEROAD BULK CARRIERS, INC., ET AL., APPELLANTS, V. RUAN TRANSPORT CORPORATION ET AL., APPELLEES.

112 N. W. 2d 743

Filed January 12, 1962. No. 35033.

1. **Public Service Commissions: Judgments.** The rules relating to nunc pro tunc orders are generally applicable to administrative and quasi-judicial commissions.
2. **Judgments.** It must be borne in mind that the proper function of a nunc pro tunc order is not for the purpose of correcting some affirmative action of the court which ought to have been taken, but its true purpose is to correct the record which has been made, so that it will truly record the action really had, but which through some inadvertence or mistake has not been truly recorded. In other words, it is an order to make the record speak the truth.
3. **Public Service Commissions: Motor Carriers.** On complaint or on the initiative of the Nebraska State Railway Commission, a permit or certificate of public convenience and necessity may

be suspended, changed, or revoked in whole or in part, after notice and hearing, for willful failure to comply with any of the provisions of sections 75-222 to 75-250, R. R. S. 1943, 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.

4. ———: ———. An order of revocation of a permit or certificate of public convenience and necessity by the Nebraska State Railway Commission without compliance with the provisions of section 75-238, R. R. S. 1943, as to notice and hearing is not effective as a revocation.
5. Statutes. Curative statutes, by reason of their remedial and retrospective nature, are applicable not only to past transactions generally, but also to cases pending in the trial court.

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

Jack Devoe, James E. Ryan, and *Conway & Irons,* for appellants.

Viren & Emmert, C. J. Burrill, K. E. Wolcott, Robert E. Powell, Robert S. Stauffer, and *Nelson, Harding & Acklie,* for appellees.

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

BROWER, J.

This is an appeal from an order of the Nebraska State Railway Commission, hereinafter referred to as the commission. The order was entered January 26, 1961, and is entitled "Order Nunc Pro Tunc Granted: Motions to Dismiss Sustained."

The appellants are Hargleroad Bulk Carriers, Inc., and E. Dorothea and Corwin J. Hargleroad, doing business as Hargleroad Van and Storage Company. The Hargleroad Bulk Carriers, Inc., will be referred to as the Hargleroad Company and the Hargleroad Van and Storage Company as the Hargleroad Partnership.

The appellees are the Nebraska Small Truckers Association; Paul Littrell; Ruan Transport Corporation; Earl Houk, doing business as Western Nebraska Truck Line;

Denver Chicago Transport Co., Inc., of Nebraska; Wheeler Transport Service, Inc.; and Melton Transport Company of Nebraska. They will be designated simply as appellees.

In order that the questions under consideration may be understood it is necessary to review chronologically the matters in controversy so far as they are pertinent to this discussion.

On October 24, 1945, the Hargleroad Partnership filed with the commission an application to acquire the operating rights of one George B. Fergus who had previously been granted a certificate of public convenience and necessity. His certificate gave him authority to operate as a common carrier of "Commodities Generally" over "irregular routes to and from all parts of the State of Nebraska." This application was thereupon docketed by the commission as application No. M-7553. On the same day the commission without giving notice and without a hearing granted the application and issued a certificate of public convenience and necessity under application No. M-7553, purporting to give the same authority to the Hargleroad Partnership as had been held by Fergus.

In July 1949, this court in the case of In re Application of Neylon, 151 Neb. 587, 38 N. W. 2d 552, held the commission had no authority to grant such transfers and issue the new certificates applied for in such cases without notice and hearing and that their action in so doing was void.

In October 1956, the partnership commenced transporting liquid petroleum in bulk tank vehicles under the Fergus certificate No. 7553. Thereafter, in November 1956, certain competitors of the Hargleroad Partnership carrying petroleum products commenced an action in the district court for Adams County seeking to enjoin the partnership from operating without a valid certificate of public convenience and necessity. The defendants demurred to the petition. The demurrer was sustained by

the trial court and the action dismissed. The plaintiffs thereupon appealed to this court.

In R. B. "Dick" Wilson, Inc. v. Hargleroad, 165 Neb. 468, 86 N. W. 2d 177, the court reversed the judgment of the trial court and remanded the cause for further proceedings. In the opinion the court stated there was a failure to give notice to interested parties and to have a hearing on the granting of the certificate to the Hargleroad Partnership. It also cited In re Application of Richling, 154 Neb. 108, 47 N. W. 2d 413, to the effect that such a certificate was invalid. It reversed the order and remanded the cause to the trial court for further proceedings. It appears from the record before us that no further proceedings were had in this action.

On November 29, 1957, the Hargleroad Partnership filed an application seeking a certificate of public convenience and necessity to transport commodities generally over irregular routes to and from all parts of the State of Nebraska, which was the same authority supposedly acquired from Fergus. This application was docketed as M-7553, supplement No. 1. It was regularly set for hearing on January 10, 1958, and proper notice was given and a hearing had.

At the conclusion of the hearing the commission granted application No. 7553, supplement No. 1, on a "temporary basis pending further hearing and final adjudication" and issued a temporary authority to the Hargleroad Partnership to conduct the transportation proposed in said application. The order granting authority ended with the following:

"IT IS FURTHER ORDERED by the Commission that the granting of this temporary authority creates no presumption that any permanent authority will be granted hereafter.

"IT IS FURTHER ORDERED that operations pursuant to this order shall be subject to such terms, conditions and limitations as have been, or may hereafter be, prescribed by the Commission."

The temporary character of the order and certificate was likewise recited in the findings of the commission.

Thereafter application No. M-7553, supplement No. 1, was referred to the examiner and the hearing, after several continuances, was finally set for June 10, 1958, at 9:30 a.m. On that day the examiner heard the same and took the evidence offered by the applicant and numerous protestants, including some of the appellees herein.

On June 26, 1958, the examiner filed his report and on November 26, 1958, filed the transcript of the evidence taken on June 10, 1958. In his report he recommended that the commission grant authority to operate to the applicant. He further recommended however that the service authorized, instead of applying to "commodities generally" as sought by the applicant and as set forth in the certificate, purportedly granted on transfer of the Fergus authority in 1945, be restricted as far as the commodities were concerned to those specified in the certificate later granted by the commission. He also recommended that certificate No. M-7553, which was issued on the transfer of the Fergus authority, be revoked and cancelled.

Exceptions to the report were made by the Hargleroad Partnership and certain protestants. A hearing was had before the commission and after being taken under advisement an order was made on December 29, 1959, in application No. M-7553, supplement No. 1, overruling the exceptions and granting the applicant a certificate of public convenience and necessity. In the findings the commission recited that the examiner's report should be approved. It set out the proposed service as follows: "3. That the proposed service is or will be required by the present or future public convenience and necessity to the following extent:

"SERVICE AND ROUTE OR TERRITORY AUTHORIZED: (A) Commodities generally, except those requiring special equipment, between all points in Ne-

braska, over irregular routes. (B) Household goods and emigrant movables, heavy machinery, contractor's equipment and articles of unusual size or weight requiring the use of special equipment, between all points in Nebraska, over irregular routes."

The order following, so far as is necessary for this discussion, is quoted here:

"IT IS THEREFORE ORDERED by the Nebraska State Railway Commission by the action of the majority thereof that *Application No. M-7553* of E. Dorothea & Corwin J. Hargleroad, dba Hargleroad Van & Storage Co., Hastings, Nebraska, be, and the same is hereby, Granted in Part; that the temporary authority granted in Application No. M-7553, Supplement No. 1, of E. Dorothea & Corwin J. Hargleroad dba Hargleroad Van & Storage Co., Hastings, Nebraska on January 10, 1958, be, and the same is hereby, revoked and cancelled and that a certificate of public convenience and necessity be, and the same is hereby, issued to E. Dorothea & Corwin J. Hargleroad, dba Hargleroad Van & Storage Co., Hastings, Nebraska in Application No. M-7553, Supplement No. 1, authorizing operations as described in paragraph No. 3 of the findings above, which findings are hereby referred to and incorporated herein. (Italics ours.)

"IT IS FURTHER ORDERED that operations pursuant to this order shall be subject to such terms, conditions and limitations as have been, or may hereafter be, prescribed by the Commission."

Motions for rehearing were filed on behalf of the Hargleroad Partnership and one of the protestants and were regularly heard and overruled on February 16, 1960. The Hargleroad Partnership appealed to this court but subsequently dismissed its appeal and it is admitted by all that this final order of December 29, 1959, is now in full force, except as it may have been changed by the order nunc pro tunc now on this appeal.

In the meantime the Legislature passed on June 17,

1959, with the emergency clause, what is now section 75-231.01, R. S. Supp., 1959, purporting to validate all certificates of public convenience and necessity issued prior to July 7, 1949, which will be hereafter set out and discussed.

The Hargleroad Corporation, on June 17, 1960, filed an application with the commission for the transfer of the authority of the Hargleroad Partnership under certificate No. M-7553, originally issued on the transfer from Fergus in 1945, which it maintains was validated by this act. This application sought to retain in the partnership the new authority granted under certifcate No. M-7553, supplement No. 1, on December 29, 1959. This application to transfer was docketed as application No. M-11195. The articles of incorporation attached to the application show that E. Dorothea and Corwin J. Hargleroad were the sole stockholders. Notice of hearing thereon was entered but no hearing was had nor evidence taken.

Thereafter there were certain appearances filed in opposition to this application on behalf of the appellees for the transfer of authority requested under application No. M-11195. Some of these were formal protests, setting out the authority of the protestants and alleging that the granting of the transfer under application No. M-11195 would interfere with their business and that adequate service existed under authorities in existence. Others stated that there was no existent authority under certificate No. M-7553 to be transferred, under the Supreme Court's opinion in R. B. "Dick" Wilson v. Hargleroad, *supra*. These protestants and appellees prayed that application No. M-11195 for the transfer should be summarily dismissed. Finally, on August 5, 1960, a motion was filed to correct the order nunc pro tunc of December 29, 1959, to show that the commission itself had revoked and cancelled all authority under certificate No. M-7553. The motion set out that the commission had so held but had neglected to show it in the

record. It prayed that the commission amend that order nunc pro tunc to show the revocation of certificate No. M-7553. A suggested order to be entered was attached to the motion. This motion also called attention to a clerical error in the order of December 29, 1959. It set out that this order should have read that, "Application No. M-7553, Supplement No. 1" was granted in part and not "Application No. M-7553." It is admitted by all parties that the authority under application No. M-7553, supplement No. 1, was the authority granted. This change made nunc pro tunc is not objected to by anyone.

On October 24, 1960, oral argument was had on the protests and motions filed by the appellees and other protestants. No notice of hearing was given in respect to these protests and motions, although copies of the protests and motions had been served on the Hargleroad Partnership and the protestants. At the hearing no evidence was taken but it was confined to oral argument on the applications and protests and motions filed.

On January 26, 1961, the commission entered an order nunc pro tunc which rewrote its order of December 29, 1959, to show that the authority granted was on application No. M-7553, supplement No. 1. This order went further, however, and revoked and cancelled nunc pro tunc as of December 29, 1959, the authority granted in application No. M-7553 in October of 1945. It dismissed application No. M-11195.

From this order revoking and canceling nunc pro tunc the authority under certificate No. M-7553, and dismissing application No. M-11195, both the Hargleroad Corporation and Hargleroad Partnership have appealed to this court. They contend this order and dismissal were arbitrary, unreasonable, and capricious.

In considering the function and propriety of a nunc pro tunc order certain rules have been laid down by this court. In Watson Bros. Transp. Co. v. Red Ball Transf. Co., 159 Neb. 448, 67 N. W. 2d 475, it was said:

"The rules relating to nunc pro tunc orders are generally applicable to administrative and quasi-judicial commissions. Frankfort Ky. Nat. Gas Co. v. City of Frankfort, 276 Ky. 199, 123 S. W. 2d 270. We have so applied them.

"In North Loup River P. P. & I. Dist. v. Loup River P. P. Dist., 149 Neb. 823, 32 N. W. 2d 869, we stated the rules as follows: ' "If a judgment in fact was rendered, if an order in fact was made, and such judgment or order not recorded, then the court, at any time afterwards, in a proper proceeding and upon a proper showing, is invested with the power to render nunc pro tunc such judgment or make such order." '

" ' "It must be borne in mind that the proper function of a nunc pro tunc order is not for the purpose of correcting some affirmative action of the court which ought to have been taken, but its true purpose is to correct the record which has been made, so that it will truly record the action really had, but which through some inadvertence or mistake has not been truly recorded. In other words, it is an order to make the record speak the truth." '

" 'We have also held that such a judgment must conform to and be no broader in its terms than the judgment actually rendered.' "

With the rules before us we have examined the transcript and bill of exceptions, not for the purpose of passing on the sufficiency of the evidence to support the order of the commission in granting the certificate of public convenience and necessity on December 29, 1959, as to which there was no appeal, but for the purpose of finding what the commission actually decided at that time with respect to revoking the authority granted in 1945 under certificate No. M-7553.

The examiner's report of the hearing had on June 10, 1958, a year before the passage of the curative act, recites that this authority was void because of the rulings of this court in R. B. "Dick" Wilson v. Hargleroad, *supra.* At the conclusion of the report the examiner recom-

mended that certificate No. M-7553, be revoked and canceled. There is, however, no finding that certificate No. M-7553 was dormant. Neither is there any finding that the Hargleroad Partnership had willfully violated the law or the rulings of the commission as required by section 75-238, R. R. S. 1943. In the case of Caudill v. Lysinger, 161 Neb. 235, 72 N. W. 2d 684, this court held: "The Nebraska State Railway Commission is without power to revoke a certificate of convenience and necessity in the absence of evidence of a willful failure of the holder thereof to observe and comply with the Motor Carrier Act or any lawful order or regulation of the commission or any term, condition, or limitation of the certificate." In the case of In re Application of Hergott, 145 Neb. 100, 15 N. W. 2d 418, it was held that before revocation or suspension there must be a finding of willful failure to comply with the provision of the law or with a lawful order, rule, or regulation of the commission promulgated thereunder or with some term, condition, or limitation of such permit or certificate.

Nowhere in the findings of the examiner in his report of the hearing on June 10, 1958, is there a finding that the certificate of the Hargleroad Partnership, No. M-7553, was dormant or that the partnership was guilty of violation of any law or rule of the commission or with the terms, conditions, or limitations of this certificate. Neither was there any such finding by the commission in its order of December 29, 1959. There is presently in the order after its amendment nunc pro tunc no such finding. Indeed, the findings set out that the partnership had acted in good faith and under color of law in each instance. Both in the findings in the examiner's report and the order of the commission dated December 29, 1959, there are extensive findings that certificate No. M-7553 was void because of the ruling of this court in R. B. "Dick" Wilson v. Hargleroad, *supra*. No other reason is given requiring the commission to revoke and annul that authority. Except for the one

sentence near the close of the examiner's report it is nowhere suggested it be revoked. This report was a report of a hearing had before the passage of the validating act of June 17, 1959. The order granting the application and issuing certificate No. M-7553, supplement No. 1, does not refer to or discuss section 75-231.01, R. S. Supp., 1959, or discuss the possibility of its having validated the authority conferred by certificate No. M-7553. It is treated by the commission in its findings on December 29, 1959, as void under the Supreme Court's decisions and because of the other matters hereinafter referred to. The commission on overruling the exceptions to its order of December 29, 1959, did not suggest that it had revoked and cancelled certificate No. M-7553. An examination of the evidence taken on January 10, 1958, and June 10, 1958, fails to show that this certificate was dormant or that the Hargleroad Corporation had willfully violated the law or the rules of the commission, or the provisions or conditions of the certificate. Not until the protests and motions filed in July and August 1960, is it anywhere suggested that the commission had revoked or cancelled this certificate in December 1959. In its order nunc pro tunc of January 26, 1961, the commission does state it had revoked this authority by its order of December 29, 1959, but it dwells at great length that it was void anyway by the Supreme Court decisions and the other matters to be discussed. In the entire proceedings there was no notice that the commission was to consider revoking the authority in certificate No. M-7553.

Prior to December 1959, the notice had always been to hear application No. M-7553, supplement No. 1, and in most notices the purpose was spelled out in the notice in the following words: "Applicant seeks a certificate of public convenience and necessity as a common carrier."

In the case of Ferguson Trucking Co., Inc. v. Nebraska State Railway Commission, 169 Neb. 851, 101 N. W. 2d 444, this court said: "On complaint or on the initiative

of the Nebraska State Railway Commission, a permit or certificate of public convenience and necessity may be suspended, changed, or revoked in whole or in part, after notice and hearing, for willful failure to comply with any of the provisions of sections 75-222 to 75-250, R. R. S. 1943, 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.

"An order of revocation of a permit or certificate of public convenience and necessity by the Nebraska State Railway Commission without compliance with the provisions of section 75-238, R. R. S. 1943, as to notice and hearing is not effective as a revocation."

In the case before us no such notice was given prior to the order of December 29, 1959, and in fact was not given prior to the order nunc pro tunc. Neither was any hearing had in connection with the nunc pro tunc order.

Because of failure of notice and hearing, the absence of findings either of dormancy or willful failure to comply with sections 75-222 to 75-250, R. R. S. 1943, or the lawful orders, rules, or regulations of the commission, or the terms and conditions of the certificate, and for the reason it appears from the record and the evidence the commission attempted to do by a nunc pro tunc order that which it felt should have been done instead of what it really did, we are constrained to hold that the order by which the commission revoked and cancelled certificate No. M-7553 by a nunc pro tunc order was arbitrary, unreasonable, and void.

It is contended by the appellees however that this certificate is void in any event for the reasons which will now be discussed. They urge that no prejudice therefor resulted from the making of the order.

They further contend that certificate No. M-7553, granted in 1945, was void because of the holding of this court in the case of R. B. "Dick" Wilson, Inc. v. Hargle-

road, *supra*, and that ended the litigation prior to the enactment of the validating statute in June 1959. In that case the petition sought injunctive relief preventing the Hargleroad Partnership from operating under the authority acquired from Fergus in 1945 in application No. M-7553. This court reversed the judgment of the trial court, stating that the certificate in suit under the law then existing was void and that in those circumstances injunctive relief was proper. It did not however purport to be a final order. It remanded the cause for further proceedings. The record before the commission shows that at the time of its order, entered December 29, 1959, no further action in the district court had taken place. Hence, it appears no final order was entered and if the Legislature intended by enacting what is now section 75-231.01, R. S. Supp., 1959, to affect pending litigation, then this litigation as far as the decision of this court was concerned was still pending and not finally decided.

The appellees suggest that the order of the commission of January 10, 1958, though temporary in nature, was a final order terminating the proceedings and adjudicating the rights of the parties prior to the passage of section 75-231.01, R. S. Supp., 1959. They cite in support of this contention the cases following: In re Application of Airline Ground Service, Inc., 151 Neb. 837, 39 N. W. 2d 809; In re Application of Richling, *supra*. On reading these cases it is clear that this court held therein that the commission's temporary orders while in force conferred the same authority which a permanent certificate would authorize, and that in such a case it was a final reviewable order for the purpose of appeal to this court. They did not purport to hold that they were permanent or final orders of the commission. The order of January 10, 1958, was clearly a temporary order. Moreover, it expressly states that it was to create no presumption that any permanent authority would thereafter be granted. The commission was retaining jurisdiction to finally decide the whole matter. Under the

circumstances the matter was pending before the commission.

The appellees further claim the passage of what is now section 75-231.01, R. S. Supp., 1959, which became effective on June 17, 1959, a year after the hearing had before the examiner, has no application to matters already pending. That section reads as follows: "All certificates of public convenience and necessity and all permits issued pursuant to sections 75-222 to 75-250, prior to July 7, 1949, without notice and hearing and without a finding of public convenience and necessity are hereby validated and shall not be subject to formal complaint or collateral attack."

In considering this statute there is no contention on the part of any parties here that it was not a valid exercise of power by the Legislature and consequently that question is not before us. We are faced only with the question of its applicability and scope as it affects the matters involved herein. It is quite clear that this statute is wholly a curative statute, retrospective in operation and remedial in its nature, and is in confirmation of rights already existing. The provisions requiring notice and hearing were provided by the Legislature. They were dispensed with by the Legislature as to the authority granted in these old certificates. This court hitherto cited with approval Corpus Juris in regard to curative statutes in City of Fremont v. Dodge County, 130 Neb. 856, 266 N. W. 771, as follows: " 'Curative statutes, by reason of their remedial and retrospective nature, are applicable not only to past transactions generally, but also to cases pending in the trial court, * * *. It is truly said that the bringing of suit vests in a party no right to a particular decision; and his case must be determined on the law as it stands, not when the suit is brought, but when judgment is rendered.' 2 Lewis' Sutherland, Statutory Construction (2d ed.) sec. 677. See, also, Cooley, Constitutional Limitations (6th ed.)

469." This rule presently appears in 82 C. J. S., Statutes, § 430 b, p. 1004.

It appears that section 75-231.01, R. S. Supp., 1959, is clearly retrospective and remedial in purpose and effect, and would apply to the litigation still pending in R. B. "Dick" Wilson, Inc. v. Hargleroad, *supra*, and the proceedings before the commission with respect to the authority of the Hargleroad Partnership, neither of which matters was finally determined before its enactment.

Appellees also contend that the status of the Hargleroad Partnership was protected by the temporary authority granted by the commission in its order of January 10, 1958, and that the Legislature did not intend to validate authority already validated and conferred by order of the commission. As discussed hitherto, that authority was only temporary by its terms and it was superseded by the final order of December 29, 1959. The order of December 29, 1959, did not continue the authority validated by the curative statute passed by the Legislature. The authority was changed from authority to carry "Commodities Generally" to that of authority to "carry commodities generally excepting those requiring special equipment" save as subsequently mentioned in the order. It is quite apparent from the record therein that most of the proceedings before the commission, as well as that of the suit in the district court in R. B. "Dick" Wilson, Inc. v. Hargleroad, *supra,* were as to whether the Hargleroad Partnership was to have authority to transport petroleum and petroleum products and oil field equipment, and that the authority in the new certificate of public convenience and necessity, granted December 29, 1959, excluded commodities requiring special equipment in order to prevent it from carrying those particular commodities.

Lastly, they contend that the result is the Hargleroad Partnership now has two authorities, one of which it is now attempting to transfer to the Hargleroad Corpora-

tion, resulting in the creation of a new competing authority in the field.

It is to be observed that the two authorities, though not formally consolidated, are united at present in the same company. As long as they are so united they present but one operating authority though its scope is enlarged by the authority validated by the Legislature. They cannot be transferred so as to be separately operated except by transfer authorized by the commission after a finding that it is justified by public convenience and necessity. However, the commission has no power to refuse the transfer and dismiss the application without proper notice and hearing on an application for its transfer.

We hold that the order nunc pro tunc, insofar as it revoked and cancelled certificate No. M-7553, granted in 1945 to the Hargleroad Partnership, and the order granting the motion to dismiss the application to transfer authority No. M-11195, without a notice and hearing were arbitrary and unreasonable. Both of said orders should be vacated but without vacating that portion of the order nunc pro tunc of January 26, 1961, which changed the number of the application on which the certificate was granted from "No. M-7553" to "No. M-7553, Supplement No. 1" which all concede was a mistake of the commission.

REVERSED AND REMANDED.

JAMES W. CARLSON, APPELLEE, V. IRVING E. CHAMBERS, APPELLANT.

112 N. W. 2d 729

Filed January 12, 1962. No. 35066.

1. **Trial: Appeal and Error.** The trial court has the duty to instruct the jury on the issues presented by the pleadings and evidence, whether requested to do so or not, and a failure to do so constitutes prejudicial error.

2. ———: ———. Conflicting instructions are erroneous and they are prejudicial unless it is apparent from the record that the jury was not misled thereby.

APPEAL from the district court for Douglas County: PAUL J. GARROTTO, JUDGE. *Reversed and remanded.*

Fraser, Wenstrand, Stryker, Marshall & Veach, and *James A. Buckley,* for appellant.

Charles E. Kirchner and *James J. Fitzgerald,* for appellee.

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

BOSLAUGH, J.

This is an appeal in an action for damages to an automobile resulting from a collision. James W. Carlson, the plaintiff and appellee, recovered a judgment for $700 against the defendant, Irving E. Chambers. The defendant's motion for new trial or for judgment notwithstanding the verdict was overruled and he then appealed.

The accident happened at about 10 o'clock on a Sunday morning, February 22, 1959, in Omaha, Nebraska. The weather was partly cloudy but visibility was good. The paving was wet.

The collision occurred at the intersection of Dodge Street and Thirty-fifth Avenue. Traffic at this intersection is controlled by signal lights.

The plaintiff was driving west on Dodge Street. Dodge Street has four traffic lanes and two parking lanes near the curbs. The speed limit on Dodge Street is 35 miles per hour.

The defendant was driving south on Thirty-fifth Avenue. Thirty-fifth Avenue is a narrower street and is barely able to accommodate two-way traffic if vehicles are parked at both curbs. The speed limit on Thirty-fifth Avenue is 25 miles per hour.

There is a retaining wall north of the sidewalk at the northeast corner of the intersection but the evi-

dence is in dispute as to how much interference there is with the vision of traffic approaching the intersection from the east and north.

The plaintiff alleged that after he had entered the intersection on a green light, the defendant, driving at an excessive speed, entered the intersection on a red light and collided with him. The plaintiff specifically alleged that the defendant violated the ordinance relating to traffic lights, failed to yield the right-of-way, failed to keep a proper lookout, drove at an excessive speed, and failed to maintain proper control over his automobile.

The defendant alleged that he entered the intersection on the green light and that the plaintiff entered the intersection on a red light and collided with him. The defendant further alleged that the sole proximate cause of the collision was the negligence of the plaintiff in failing to yield the right-of-way, failure to maintain a proper lookout, and failure to maintain reasonable control.

The plaintiff produced evidence that he was driving from 30 to 35 miles per hour in the traffic lane nearest the centerline as he approached the intersection where the accident happened; that the traffic light at the northwest corner of the intersection was green for westbound traffic; that when he was approximately 75 feet east of the intersection he saw defendant's automobile going south on Thirty-fifth Avenue at about 20 to 25 miles per hour; that the defendant was then about 40 feet north of the intersection; that the plaintiff began to slow down and applied his brakes and turned slightly to the southwest when it appeared that the defendant was not going to stop; and that the right front of the plaintiff's automobile and the left front of the defendant's automobile collided in the intersection; and that as he got out of his automobile after the accident, the traffic light was just changing from green to yellow to red.

The defendant produced evidence that when he was

150 feet north of the intersection he saw that the traffic light at the southeast corner was green for southbound traffic; that he approached and entered the intersection traveling approximately 20 miles per hour with the traffic light green; that as he entered the intersection he heard brakes being applied, looked to the east, and saw the plaintiff's automobile about 25 feet away; that he attempted to accelerate his automobile to avoid the collision, but the front of plaintiff's automobile collided with the left front wheel of his automobile; and that he could have stopped his automobile within 10 or 20 feet.

The assignments of error all relate to the trial court's instructions to the jury. We are primarily concerned with instructions Nos. 4, 5, and 6.

Instruction No. 4 was apparently based upon the Omaha ordinance relating to traffic lights. By it the jury was advised as to the duty of a motorist when a green, yellow, or red light was displayed and that violation of the ordinance was not negligence per se but was evidence of negligence.

By instruction No. 5 the trial court advised the jury that a green light was a permission to proceed only if in the exercise of ordinary care it appeared safe and proper to do so and that a motorist could not disregard other persons or vehicles already within the intersection.

Instruction No. 6 was as follows:

"You are instructed that if you find from a preponderance of the evidence that the Defendant entered the intersection of 35th Avenue and Dodge Street with the traffic signal showing green for north and southbound traffic, said Defendant had the right of way in said intersection and it was the duty of the Plaintiff to grant said right of way to said Defendant, and in that case your verdict will be for the Defendant.

"If, on the other hand, you find from a preponderance of the evidence that the traffic signal for east and westbound traffic was *red* when the Plaintiff entered said intersection then it was the duty of the Defendant to

yield the right of way to the Plaintiff, and in that event your verdict will be for the Plaintiff in the sum of $700.00 and the costs herein expended." (Emphasis supplied.)

There is no assignment of error based directly upon what appears to have been an inadvertent substitution of the word "red" for "green" in the second paragraph of instruction No. 6. However, it is a plain error which the court may, at its option, notice under Rule 8 a 2 (4) of the Revised Rules of this court.

The second paragraph of instruction No. 6 was an incorrect statement of the law and conflicted with the first paragraph of the instruction and with instructions Nos. 4 and 5. Conflicting instructions are erroneous and they are prejudicial unless it is apparent from the record that the jury was not misled thereby. Carter v. Chicago, B. & Q. R. R. Co., 170 Neb. 438, 103 N. W. 2d 152. There is no basis here upon which to say that the jury was not misled. There are, however, other errors assigned which are sufficient to require that the judgment be reversed.

Instruction No. 6, if properly worded, would have limited the issues to the question of which driver had a green light at the time he entered the intersection. The issue as to proper lookout and proper control on the part of each driver was excluded from consideration by the jury, and the jury was instructed as to the amount of the verdict to be returned if it found for the plaintiff on the issue of liability. There was no instruction given on the comparative negligence statute, section 25-1151, R. R. S. 1943.

The trial court has the duty to instruct the jury on the issues presented by the pleadings and evidence, whether requested to do so or not, and a failure to do so constitutes prejudicial error. Barry v. Moore, 172 Neb. 57, 108 N. W. 2d 401.

As we view the record, the trial court should have submitted the issues of proper lookout and proper con-

trol on the part of each driver to the jury and should have instructed the jury with reference to the comparative negligence statute. See Baty v. Wolff, 162 Neb. 1, 74 N. W. 2d 913.

Also, the trial court should have instructed the jury as to the applicable measure of damages. A failure to instruct the jury on the proper measure of damages is error. Harsche v. Czyz, 157 Neb. 699, 61 N. W. 2d 265.

The effect of instruction No. 6 was to direct a verdict as to the amount of damages if the jury found the defendant liable to the plaintiff. The defendant was denied the benefit of the provision in section 25-1151, R. R. S. 1943, the comparative negligence statute, which provides that "the contributory negligence of the plaintiff shall be considered by the jury in the mitigation of damages in proportion to the amount of contributory negligence attributable to the plaintiff." The defendant was further denied the benefit of the jury's consideration of what conflict there was in the evidence offered by the plaintiff to prove the damages.

The defendant's motion for new trial should have been sustained. The judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

LARRY LEE HENGGLER, PLAINTIFF IN ERROR, V. STATE OF NEBRASKA, DEFENDANT IN ERROR.

112 N. W. 2d 762

Filed January 12, 1962. No. 35071.

1. **Criminal Law.** Where a motion for a directed verdict is made at the close of the evidence of the State in a criminal action, the introduction of evidence thereafter by the defendant waives any error in the ruling on the motion. The defendant, however, is not prevented from questioning the sufficiency of the evidence in the entire record to sustain a conviction.
2. **Burglary.** Evidence that a burglary was committed, together with evidence that some of the property stolen in the burglary

was discovered in the possession of the defendant, is not alone sufficient to make a prima facie case of burglary.

ERROR to the district court for Fillmore County: JOSEPH ACH, JUDGE. *Reversed and dismissed.*

John S. Barrett, for plaintiff in error.

Clarence A. H. Meyer, Attorney General, and *Dwain L. Jones,* for defendant in error.

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

BOSLAUGH, J.

The plaintiff in error, Larry Lee Henggler, who will be referred to as the defendant, was convicted of burglary under section 28-532, R. R. S. 1943. His motion for new trial was overruled and he received an indeterminate sentence. He then filed his petition in error in this court.

The State proved that a store located in Fairmont, Nebraska, was broken into and entered on November 12, 1960; that a safe located in the store was broken into and approximately $600 taken from it; that merchandise having a value of approximately $900 was taken from the store; and that on January 3, 1961, part of the merchandise taken in the burglary was found in the defendant's home in Omaha, Nebraska. At the conclusion of the State's evidence the defendant moved for a directed verdict which motion was overruled.

The defendant then testified and admitted that the articles in question were in his possession on January 3, 1961, but claimed that he had bought some of them in other stores, that some of them were gifts from relatives, and that some of them had been delivered to him by Ronald Hiatt as partial payment of a preexisting indebtedness. The defendant further testified that Ronald Hiatt had pleaded guilty to the same burglary as was charged in the information in this case.

There is but one assignment of error: That the trial

court erred in overruling the defendant's motion for a directed verdict made at the close of the State's evidence. The general rule is that any error in the ruling on such a motion is waived by the introduction of evidence by the defendant. 23A C. J. S., Criminal Law, § 1148, p. 391; 53 Am. Jur., Trial, § 426, p. 337; Annotation, 17 A. L. R. 925. See, also, Lund v. Holbrook, 153 Neb. 706, 46 N. W. 2d 130; Wylie v. Czapla, 168 Neb. 646, 97 N. W. 2d 255.

The defendant, however, is not prevented from questioning the sufficiency of the evidence as contained in the entire record to sustain the conviction. The case was presented upon that basis by the parties in their briefs and in their arguments. Accordingly, we will consider it upon that basis.

The question, then, is whether evidence that a burglary was committed, together with evidence that some of the property stolen in the burglary was discovered in the possession of the defendant, is sufficient to make a prima facie case of burglary. In Bassinger v. State, 140 Neb. 63, 299 N. W. 293, this court held that it was not. The court said: "There being no other evidence and no other circumstance indicating guilt on the part of the defendant, to sustain the conviction in this case would require the adoption of a rule of law that mere possession of stolen property lately taken burglariously is sufficient evidence upon which to base a verdict of guilty against the person found in possession of the property. This is not the present rule, and the adoption of such a rule would be obviously unsound."

The State argues that there is other circumstantial evidence to be considered such as the fact that the defendant did not know the retail price of an item of the property which he claimed that he had purchased: that he claimed that an item of the property which is not distributed west of Nebraska had been sent from California as a gift; and that some of the clothing did not fit him. The evidence referred to tends to disprove the

defendant's testimony that the property in question was not stolen in the burglary but it does not otherwise tend to prove the defendant's participation in the burglary.

The evidence in this case is not sufficient to sustain a conviction of burglary. The judgment of the district court is reversed and the cause dismissed.

REVERSED AND DISMISSED.

SIMMONS, C. J., participating on briefs.

LINCOLN EQUIPMENT COMPANY, A CORPORATION, APPELLANT, V. PAUL R. EVELAND, APPELLEE.

112 N. W. 2d 755

Filed January 12, 1962. No. 35076.

1. **Principal and Agent.** In order to exempt an agent from liability upon a negotiable note, executed by him within the scope of his agency, he must not only name his principal but he must express by some form of words that the writing is the act of the principal, though done by the hand of the agent.
2. **Bills and Notes: Reformation of Instruments.** Though the language of a note executed by an authorized agent of a corporation imports a personal obligation, it may be shown by parol evidence on the issue of reformation, except as to a holder in due course, that the intention of both the maker and the payee was to execute an instrument binding the corporation only, and that, though the language was that which they intended, it did not express their true purpose.
3. ———: ———. In order to warrant the reformation of a written instrument in any material respect, the evidence must be clear, convincing, and satisfactory, and until overcome by such proof the terms of the instrument must stand as evidencing the intention of the parties.

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

Donald S. Bergquist, Jr., for appellant.

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

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

CARTER, J.

This is a suit on a promissory note for the balance due. The defendant asserted by answer that he signed the note in a representative capacity only and that he is not personally bound on the note. Defendant also prayed for a reformation of the note to show his representative capacity. The trial court found for the defendant, ordered a reformation of the note, and dismissed the action.

The evidence shows that prior to August 19, 1959, the Meadow Rock Company was indebted to the plaintiff in the amount of $22,887.10. On August 19, 1959, plaintiff accepted the note in question, which at the time of trial had been reduced to $17,887.10 by payments made thereon by the Meadow Rock Company. There is no dispute as to the amount due on the note.

Defendant was president of the Meadow Rock Company at the time of the note transaction. Plaintiff had threatened suit prior to the execution of the note. On August 19, 1959, Robert Phillips, executive vice president of the plaintiff corporation, contacted the defendant in Ashland, Nebraska, concerning the payment of the indebtedness owing by Meadow Rock Company. Defendant advised Phillips that he could not make payment but that he would be willing to give plaintiff a note for the amount due. A note was drawn up by Phillips. He printed "Meadow Rock Company" with his pen as a maker and defendant signed "Paul R. Eveland" beneath the corporate name. There was nothing on the note to indicate that defendant signed the note in a representative capacity. It is clear that Phillips understood that Meadow Rock Company was to be obligated, since he printed its name on the note as a maker. The contention of the plaintiff that defendant was personally liable carries with it the implication that

defendant had personally obligated himself and the Meadow Rock Company by attaching a single signature as he did.

We are cited to section 62-120, R. R. S. 1943, which provides: "Where the instrument contains or the person adds to his signature words indicating that he signs for or on behalf of a principal, or in a representative capacity, he is not liable on the instrument if he was duly authorized; but the mere addition of words describing him as an agent, or as filling a representative character without disclosing his principal does not exempt him from personal liability." There were no words indicating that defendant signed on behalf of a principal or in a representative capacity. It is not disputed that defendant was authorized to sign for the Meadow Rock Company. The name of defendant's alleged principal, the Meadow Rock Company, was clearly shown on the note. The question then is whether or not, as between the maker and payee, extrinsic evidence is admissible to show that it was not intended that defendant be personally bound. It is plain that section 62-120, R. R. S. 1943, is not determinative of the question.

In Restatement, Agency, § 324 (3), p. 718, it is stated: "If the name of the principal appears upon a negotiable instrument and the agent does not appear unambiguously as a party, extrinsic evidence of an understanding that the agent shall not be a party to it is admissible as against any holder of the instrument who has notice of the agreement or who is not a holder in due course."

The rule in this state is set forth in Western Wheeled Scraper Co. v. McMillen, 71 Neb. 686, 99 N. W. 512, as follows: "We think this court is now fully committed to the doctrine that in order to exempt an agent from liability upon an instrument executed by him within the scope of his agency, he must not only name his principal, but he must express by some form of words that the writing is the act of the principal, though done by the hand of the agent. If he expresses this, the principal

is bound and the agent is not; but a mere description of the general relation or office which the person signing the paper holds to another person or to a corporation, without indicating that the particular signature is made in the execution of the office and agency, is not sufficient to charge the principal, or to exempt the agent from personal liability. There was evidence which would fully support a finding that, in executing these notes, the defendants did not intend to bind themselves personally, and that the plaintiff's agent was not fully aware of that fact and understood that he was taking the notes of the corporation, but assisted and advised as to the form in which the notes should be drawn in order to make them the obligation of the corporation. This being the case, the defendants, upon a proper plea, would be entitled to have the notes reformed to express the real intention of the parties." See, also, Sutherland State Bank v. Dial, 103 Neb. 136, 170 N. W. 666; Belmont Dairy Co. v. Thrasher, 124 Md. 320, 92 A. 766; Austin, Nichols & Co., Inc. v. Gross, 98 Conn. 782, 120 A. 596.

In the instant case the defendant prayed for the reformation of the note to conform to the intent of the parties that said note is the corporate obligation of Meadow Rock Company only. The trial court reformed the note as prayed. Plaintiff contends the evidence is insufficient to sustain the action of the trial court in reforming the note. The rule is: "In order to warrant the reformation of a written instrument in any material respect, the evidence must be clear, convincing, and satisfactory, and until overcome by such proof, the terms of the instrument must stand as evidencing the intention of the parties." Lovenburg v. Justice, 155 Neb. 406, 51 N. W. 2d 895.

The evidence offered in support of defendant's claim for a reformation of the note is substantially as follows: Plaintiff's vice president, Phillips, was authorized to represent the plaintiff. He knew that defendant was

president of the Meadow Rock Company and authorized to sign notes for the company. The Meadow Rock Company was indebted to plaintiff and the defendant was not. Phillips filled out the note. He penned in the printed name of Meadow Rock Company, indicating clearly that he intended that Meadow Rock Company be bound. He must have known that the signature of an authorized person must be attached in order to bind the company. He knew that defendant had such authority. If, as plaintiff now claims, plaintiff desired only the personal liability of defendant on the note, no reason would exist for printing in the name of Meadow Rock Company as a maker of the note. Defendant stated and Phillips admitted that there was no discussion of any kind about the defendant becoming personally liable on the note. Defendant testified that he was the majority stockholder in the Meadow Rock Company and that the company was indebted to him in excess of $50,000. It seems clear that Phillips, at the time of the execution of the note, understood that he was accepting the note of the corporation. The signature of defendant was necessary to bind the company. It cannot reasonably be said that defendant intended to bind Meadow Rock Company and himself as well by a single signature. The payments on the note were made by the Meadow Rock Company and not by the defendant.

The plaintiff asserts that it already had evidences of indebtedness against Meadow Rock Company and, unless additional security was obtained, a note executed by Meadow Rock Company would add little to what it already had. Defendant admits that litigation would be embarrassing, if not harmful, to him personally because of his status as a creditor and stockholder in the Meadow Rock Company. But a fear of litigation alone cannot be advanced as establishing an intent to become bound for his principal's obligation. It seems strange to us, if plaintiff was seeking only additional security, that no mention was ever made of it by either party.

Ordinarily, a personal liability for $22,887.10 for the debt of another is not brought about in such a passive manner.

The evidence is clear, satisfactory, and convincing, as the trial court found, that Phillips understood he was obtaining the note of the Meadow Rock Company at the time it was delivered to him. The evidence supports the testimony of defendant that he signed in a representative capacity and that neither he nor Phillips intended that he was to be personally bound. The judgment of the trial court is in conformity with the holding in the Western Wheeled Scraper Co. case, to wit: Though the language of a note executed by the president of a corporation imports a personal liability, it may be shown by parol evidence, on an issue of reformation, except as to a holder in due course, that the intention of both the maker and the payee was to execute an instrument binding the corporation only, and that, though the language was that which they intended, it did not express their true purpose.

The judgment is sustained by the evidence, which is clear, convincing, and satisfactory, and it is affirmed.

AFFIRMED.

SIMMONS, C. J., participating on briefs.

EVERETT BEBEE ET AL., APPELLEES, V. JERRY KRIEWALD, APPELLANT.

112 N. W. 2d 764

Filed January 12, 1962. No. 35083.

1. **Appeal and Error.** Section 25-1912, R. R. S. 1943, governing the perfecting of appeals to this court, provides, among other things, that the appeal shall be brought by filing in the office of the clerk of the district court the notice of intention to appeal within 1 month of the rendition of the judgment or decree, or within 1 month of the overruling of a motion for new trial in the cause.
2. **Judgments.** A judgment is rendered when the court announces its decision upon the law and the facts in controversy as ascertained by the pleadings.

3. **New Trial.** The statute for filing a motion for new trial, section 25-1143, R. R. S. 1943, provides that a motion for new trial must be filed within 10 days after the verdict, report, or decision is rendered.

4. **Appeal and Error.** The time for appeal does not begin to run from the overruling of the motion for new trial unless the motion itself is filed in time.

APPEAL from the district court for Garfield County: DONALD H. WEAVER, JUDGE. *Appeal dismissed.*

Keith J. Kovanda, for appellant.

E. L. Vogeltanz, for appellees.

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

BROWER, J.

Everett Bebee, Earl Bebee, Norman Bebee, Opal Kelley, and Freda Smith, plaintiffs in the trial court, and appellees herein, brought this action as owners of certain land in Garfield County, Nebraska, against Jerry Kriewald, defendant and appellant. The parties will be referred to as they were designated in the trial court.

The plaintiffs' petition alleged the ownership of the land. It set out that the defendant Kriewald, the tenant thereof, had abandoned the lease but threatened to move back onto the land. Plaintiffs prayed for an injunction restraining the defendant from moving on the premises. It further asked for damages for various matters arising from poor husbandry and waste, misuse of the buildings and pasture, failure to pay pasture rent, and for an accounting and judgment for $3,000.

The answer denied the allegations of the petition, set out that the defendant properly farmed and cared for the premises, and contained a cross-petition asking for $160 for certain hay alleged to have been taken by the plaintiffs which belonged to defendant.

The case was tried on March 21, 1961, and at the conclusion of the trial the court on the same day en-

tered a permanent injunction against the defendant restraining him from again entering on the premises. It took the matter of damages under advisement and thereafter on April 4, 1961, determined the damages to be $150 and rendered judgment against defendant for that amount, together with the costs of the suit.

No journal of these judgments was filed or entered of record until April 20, 1961. On April 25, 1961, defendant filed a motion for new trial which was overruled on April 27, 1961. Thereupon, on May 18, 1961, the defendant filed a supersedeas bond and notice of appeal.

The plaintiffs' brief requests a dismissal of the defendant's appeal on the grounds that it was not taken in time. If this contention is true the appeal should be dismissed and the case should not be considered by this court on the merits.

Section 25-1912, R. R. S. 1943, governing the perfecting of appeals to this court, provides, among other things, that the appeal shall be brought by filing in the office of the clerk of the district court the notice of intention to appeal within 1 month of the rendition of the judgment or decree, or within 1 month of the overruling of a motion for new trial in the cause.

This statute was discussed and this court held in Sloan v. Gibson, 156 Neb. 625, 57 N. W. 2d 167, as follows: "A judgment is rendered when the court announces its decision upon the law and the facts in controversy as ascertained by the pleadings.

"The entry of a judgment upon the records is not an integral part of the judicial act of rendering a judgment, although the entry thereof may be required before it can become available for certain purposes."

In that case the court stated the statute prior to the amendment in 1941 had been construed to allow the notice of appeal and other steps therein set out to be taken within the specified time from entry of the judgment or decree of record, but by reason of that amendment these new rules applied.

The defendant cites Ash v. City of Omaha, 152 Neb. 393, 41 N. W. 2d 386, holding to the contrary, but evidently overlooked that the portion of the opinion which he relies upon was vacated and set aside on rehearing. See Ash v. City of Omaha, 152 Neb. 699, 42 N. W. 2d 648.

The notice of appeal was not filed for more than a month after the judgments granting the injunction or assessing the damages were rendered.

The statute for filing a motion for new trial, section 25-1143, R. R. S. 1943, provides that a motion for new trial must be filed within 10 days after the verdict, report, or decision is rendered. The motion for new trial was not filed for more than 20 days after the decision of the court.

In Ehlers v. Neal, 148 Neb. 697, 28 N. W. 2d 558, under the former statute providing for taking an appeal within 3 months instead of 1 month, it was held: "The Supreme Court is without jurisdiction to entertain an appeal from the district court unless notice of appeal is filed in the office of the clerk of the district court within three months after the rendition of judgment or decree or within three months from the overruling of a motion for new trial in a cause.

"A motion for a new trial that is not filed within the time specified by statute is a nullity and of no force and effect."

It was held in the cited case that the time for appeal does not begin to run from the overruling of the motion for new trial unless the motion itself is filed in time.

The judgment of the trial court having been rendered and the appeal taken before the passage of Laws 1961, c. 111, § 1, p. 350, amending section 25-1301, R. R. S. 1943, the notice of the rendition of the judgment therein provided for has no application to the case before us.

It follows that the defendant has not consummated the appeal in time and it must be dismissed.

APPEAL DISMISSED.

DELORES MEYER BLECHA ET AL., APPELLANTS, V. SCHOOL DISTRICT OF HEBRON, COUNTY OF THAYER, NEBRASKA, APPELLEE.

112 N. W. 2d 783

Filed January 19, 1962. No. 35063.

Eminent Domain. The deposit in county court in condemnation provided for in section 76-711, R. R. S. 1943, is to be paid to the condemnees on a final judgment entered on appeal in excess of the award in county court, and if the condemnees fail to use ordinary diligence to procure the same it should be deemed credited on the judgment as of the date of its becoming final and the interest on the judgment reduced accordingly.

APPEAL from the district court for Thayer County: JOSEPH ACH, JUDGE. *Affirmed.*

J. L. Richards, for appellants.

W. O. Baldwin, for appellee.

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

BROWER, J.

This is a proceeding brought by Delores Meyer Blecha and Charles A. Blecha, appellants and condemnees, to revive a dormant judgment obtained by them in a condemnation proceeding brought against them by the School District of Hebron, condemner.

There is no dispute as to the facts which are set forth in a stipulation of the parties. From this stipulation it appears that the appraisers appointed by the county court filed a report on March 10, 1953, assessing the damage to the condemnees on the taking at $4,150. The condemner school district accepted the report and on the same day paid into court for the benefit of the condemnees the full sum of $4,150, and court costs and appraisers' fees of $86.90.

The condemnees appealed to the district court and a trial was had resulting in a verdict of the jury for $4,350, and judgment was rendered therefor with 6 percent in-

terest from March 10, 1953, and costs of the action. A motion for new trial was filed by the condemnees and overruled on September 22, 1954. No appeal thereon to this court was taken thereafter.

On April 5, 1956, a journal entry of the judgment was prepared and filed by condemnees' attorney. A certified copy of the judgment was transmitted to the county judge by the clerk of the district court on July 6, 1956, and on October 27, 1956, the sum of $4,150 was received by the condemnees from the clerk of the district court.

On August 11, 1956, the condemner paid to the clerk of the district court for costs, interest, and principal the sum of $641.82, of which $53.85 was costs. No other payments have been made.

On April 5, 1961, the district court rendered judgment of revivor on condemnees' motion upon the stipulation of facts finding the condemnees entitled to judgment for $4,350, the amount of the jury's award, with interest from March 10, 1953, as provided by the original judgment. However, it credited upon this judgment $4,150, the amount on deposit with the county judge as of October 22, 1954, that being 1 month after overruling condemnees' motion for new trial, and $587.97 on August 11, 1956. It found this last payment lacked $157.28 of paying the judgment in full and rendered a judgment for that sum with 6 percent interest from August 11, 1956, in favor of the condemnees. This resulted in condemnees receiving no interest on the $4,150 deposited in court after October 22, 1954, when the original judgment became final.

From this judgment the condemnees, after their motion for new trial was overruled, have perfected an appeal to this court.

The only question before us is whether the district court erred in holding the deposit of $4,150 paid to the county judge on the award of the appraisers automatically became a payment on the district court judg-

ment when the time for appeal to the Supreme Court expired, resulting in the interest on the judgment being reduced pro tanto.

The statutes in regard to appeals from awards in the county court in condemnation proceedings, insofar as they are pertinent to the case before us, are the following: "The condemner shall not acquire any interest in or right to possession of the property condemned until he has deposited with the county judge *for the use of the condemnee* the amount of the condemnation award in effect at the time the deposit is made. * * * If an appeal is taken from the award of the appraisers and the condemnee obtains a greater amount than that allowed by the appraisers, the condemnee shall be entitled to interest from the date of the deposit with the county judge at the rate of six per cent per annum on the amount finally allowed. Upon deposit of the condemnation award with the county judge, the condemner shall be entitled to a writ of assistance to place him in possession of the property condemned." § 76-711, R. R. S. 1943. (Emphasis ours.)

"After rendition of final judgment in the district court on the appeal, a certified copy thereof shall be prepared and transmitted by the clerk of the district court to the county judge." § 76-718, R. R. S. 1943.

In the original judgment of the district court rendered on September 10, 1954, the court allowed interest on the full amount of the verdict of the jury from the original taking in county court in harmony with the holdings of this court, where the verdict is greater than the award of the appraisers. Langdon v. Loup River P. P. Dist., 142 Neb. 859, 8 N. W. 2d 201.

It becomes necessary in determining the question before us to make inquiry into the nature of the deposit in county court. Section 76-711, R. R. S. 1943, states it is "for the use of the condemnee." In discussing the same matter this court, in Langdon v. Loup River P. P. Dist., 144 Neb. 325, 13 N. W. 2d 168, said: "As stated

in Central Nebraska Public Power and Irrigation District v. Fairchild, 126 Fed. 2d 302: 'When it makes its payment into court the amount of such payment constitutes a fund which must be deemed a substitute to the owners for the land of which they have been deprived and for their damage.' "

If this deposit constituted a fund substituted for the land condemned and was for the use of the condemnees it was certainly intended by the Legislature to be available to them for payment on the judgment when the action was finally determined.

Section 76-718, R. R. S. 1943, directs the clerk of the court to prepare and transmit to the office of the county judge a certified copy of the final judgment of the district court on appeal. It provides that this be done after the "rendition of the final judgment." This court has held that a judgment is rendered when the court makes its decision upon the law and the facts in controversy. Sloan v. Gibson, 156 Neb. 625, 57 N. W. 2d 167. Though the clerk might have certified the result of the case as set out from the trial docket it may be doubtful whether this section in speaking of a certified copy contemplated that it be done in that manner. Usually a certified copy is made from the formal judgment. It is not necessary however for us to decide the question at this time.

The condemnees contend that they were entitled to interest on this fund of $4,150 on deposit for a longer period than the trial court granted. They do not point out clearly just how much longer, but imply interest should run until they actually receive the deposit or at least until the clerk actually certifies the judgment to the county court. They apparently contend it was the duty of the condemner to procure its delivery either to them or to the district court.

The judgment was in favor of the condemnees. The condemnees' attorney prepared the journal of the court's judgment and filed the same therein on April 5, 1956.

The clerk delayed certifying it to the county court until July 6, 1956. The condemnees received this money on October 27, 1956. It would seem the attorney for the condemnees could have journalized the judgment at any time and procured the money thereafter by prompting either the clerk or county judge. Apparently there were no steps taken and no efforts made to collect it, either before or after the clerk's certified copy was sent to the county judge. In such a situation we cannot think that condemnees could collect more interest by simply waiting and doing nothing on the theory that it was the condemner's turn to act.

In most proceedings in condemnation by the United States in federal courts, the condemnees may withdraw from the registry of the court at least a part of the deposits of the United States before final adjudication. In such circumstances the federal courts have ruled that no interest is recoverable on such amounts after they are subject to withdrawal. Disputes have arisen in such cases as to the responsibilities of the parties and their counsel in preparing orders which appear to be necessary for the withdrawal. In the case of Southern Amusement Co. v. United States, 265 F. 2d 34, the court said: "The other point argued by appellant is that the trial court erred in declining to allow appellant interest on the amount deposited in court from October 9, 1956, through the date of the verdict, January 10, 1958. This argument is predicated entirely on an exchange of letters which took place in September and October, 1956, in which the United States Attorney wrote appellant's attorney that it was his purpose to draw an order, within about one week of October 2nd, that the money deposited be turned over to appellant. The United States Attorney did not prepare the order and neither did the attorney for the appellant, so that the money lay in the depository of the court for more than a year because no order was presented to the court for its withdrawal.

"While it is unfortunate that the United States Attor-

ney failed to perform the courtesy offered in his letter, the money was there subject to withdrawal at any time and appellant has no one to blame but himself that this interest was lost. At all events, the United States cannot be held liable for this interest."

The foregoing case cites United States v. Certain Parcels of Land, 151 F. 2d 116, to the same effect.

In the case here under discussion it appears the money on deposit belonged to the condemnees on the judgment in the district court becoming final. It could have been obtained by them with little effort through the clerk of the court at any time on application of counsel. A month elapsed after overruling the motion for new trial before the judgment became final. During that time condemnees' attorney could have prepared journals which the clerk could have certified at once on request. There is no showing that any such request was made.

We conclude that the deposit in county court in condemnation provided for in section 76-711, R. R. S. 1943, is to be paid to the condemnees on a final judgment entered on appeal in excess of the award in county court, and if the condemnees fail to use ordinary diligence to procure the same it should be deemed credited on the judgment as of the date of its becoming final and the interest on the judgment reduced accordingly.

There is no dispute as to the correctness of the amount of the judgment on revivor finding $157.28 with interest thereon from August 11, 1956, still unpaid if the credit of the $4,150 is made thereon as of the date the judgment became final.

We find no error in the judgment of the trial court and the same is affirmed.

AFFIRMED.

IN RE ESTATE OF DAVID CARR, DECEASED.
ALLEN CARR, APPELLANT, V. CLEO F. CARR, APPELLEE.
112 N. W. 2d 786

Filed January 19, 1962. No. 35064.

1. Wills. When the language used in a will is clear and unambiguous the court will apply thereto its usual and ordinary meaning and then apply to the construction thereof the applicable rules of law.
2. Wills: Estates. The law favors the early vesting of estates, and in construing a will containing a devise of a life estate and a devise of the remainder, the inference of a vested remainder is stronger than the inference of a contingent remainder, if the meaning of the testator is obscure in this respect.
3. ———: ———. Where the language of the will postpones the vesting of an estate in remainder to the time of the death of the holder of the life estate, and no other intent can be gathered within the four corners of the will, the vesting of the remainder absolutely occurs upon the death of the holder of the life estate.
4. ———: ———. Under such circumstances the remainder interest existing upon the death of the testator is contingent and not absolute.
5. ———: ———. The creation by will of an interest in real estate defeasible upon the occurrence of an expressed contingency is not legally objectionable and is valid and enforcible.
6. ———: ———. The words "should either die without lawful issue" refer to the period of time prior to the vesting of the estate involved when the intention of the testator is not otherwise indicated within the four corners of the will.

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

James R. McGreevy and *Gross, Welch, Vinardi, Kauffman, Schatz & MacKenzie,* for appellant.

George W. Haessler, for appellee.

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

CARTER, J.

This is a suit in equity for the construction of the will of David Carr, deceased.

The evidence shows that David Carr died testate on September 18, 1927, leaving surviving his wife, Lulu Carr, and two sons, Darrel and Allen, ages 23 and 16 years, respectively. The pertinent part of the will provided: "I hereby give divise (sic) and bequeath unto my beloved wife Lulu Carr all my property both real and personal for and during her natural life; at her death, the remainder in said real estate shall vest in my children Darrel Carr and Allen Carr as follows: To Darrel Carr the North Half of the S. W. ¼ of Section Thirteen, Township Thirteen, Range Nine, Saunders County, Nebraska, upon this condition that said land is not to be sold until he reaches the age of thirty years; To Allen Carr the South Half of the S. W. ¼ of Section Thirteen, Township Thirteen, Range Nine, Saunders County, Nebraska, upon the condition that the land be not sold until he reaches the age of thirty years. Should either die without lawful issue, then and in that case the survivor shall have his share."

The evidence shows that Darrel Carr died testate on May 17, 1950. By the terms of his will, he devised and bequeathed his entire estate to his wife Cleo F. Carr. No children were born to Darrel and Cleo F. Carr. Lulu Carr, the widow of David Carr, deceased, died on May 2, 1960. It is the contention of Allen Carr that he is now the owner of the north half of the Southwest Quarter of Section Thirteen, as described in the will. Cleo F. Carr, the widow of Darrel Carr, contends that she is the owner of said real estate. The trial court found for Cleo F. Carr, and Allen Carr has appealed.

The primary and controlling issue is whether the words "Should either die without lawful issue, then and in that case the survivor shall have his share," mean should either die prior to the death of testator or prior to the death of the life tenant. The quoted section of the will provided for a life estate in testator's widow and "at her death, the remainder in said real estate shall vest in my children * * *." It is contended by plaintiff

that these words evidence an intent to vest the remainder interest at the death of the life tenant and not at the death of testator. In Lacy v. Murdock, 147 Neb. 242, 22 N. W. 2d 713, this court in dealing with this subject stated: "We recognize that the provisions of the will defer the right to and beneficial use of the property and that the same is not to be divided until the death of the widow who has a life use thereof. This does not necessarily mean that the two estates shall not vest at the same time or that the remainder shall not vest until the death of the wife. The policy of the law is to favor the early vesting of estates and we construe the language used to refer to the time when the possession and enjoyment of the estate in remainder shall begin rather than to the date of vesting."

The policy of the law favors the early vesting of estates. Such policy also favors the absolute vesting of an estate at the earliest possible time. Except where a testator evidences an intent to vest an interest at a different time, the vesting occurs upon the death of the testator in accordance with the foregoing rules. But where the intent of the testator to vest at a different time is ascertainable from the will, the intent of the testator will be given effect. Consequently when a will provides for a life estate, and at the death of the life tenant the remainder to vest in his children, the remainder interest vests in the children on the death of the life tenant unless there be evidence of a contrary intent within the four corners of the will.

In determining the intention of the testator, the court will examine the entire will, consider each of its provisions, give words their generally accepted literal and grammatical meaning, and assume that the testator understood the meaning of the words used. Carroll v. Hastings College, 172 Neb. 20, 108 N. W. 2d 223. It is clear, therefore, that the words "at her (life tenant's) death, the remainder in said real estate shall vest in my children," standing alone, mean that the remainder in-

terest shall vest on the death of the life tenant, and that the interest of the designated remaindermen at the death of the testator was contingent.

The intervener, Cleo F. Carr, relied primarily on Davis v. Davis, 107 Neb. 70, 185 N. W. 442; Schuyler v. Hanna, 31 Neb. 307, 47 N. W. 932, 11 L. R. A. 321; and Moore v. Lyons, 25 Wend. 119 (N. Y.), cited with approval in Schuyler v. Hanna, *supra*. We think these cases are distinguishable. In the Davis case the will provided for a life estate to testator's wife, and at her death his property was to be divided equally between his four children. Testator then provided if one or more of his children should die without heirs, his property was to descend in equal shares to his surviving children. A son died childless after the death of the testator and before the death of the life tenant. The court held that the remainder vested at the death of the testator, the court saying: "He did not say that the estate in remainder shall be divided among his children at his wife's death, but he did say that his 'property' shall then be thus divided. Such a division of the 'property' cannot be made at an earlier date or before the termination of the life estate. * * * The expression, 'die without heirs,' should be construed to refer to the death of a devisee during the life of testator. The policy of the law is to favor the early vesting of estates. The inference of a vested remainder is stronger than the inference of a contingent remainder, if the meaning of testator is obscure." The will provided for a division of the property upon the death of the life tenant, a result that would obtain if he had devised the remainder to his children without words of explanation. There were no words used in the will indicating a vesting of the remainder at any time other than the death of testator.

In the Schuyler case a wife's statutory life estate in a homestead was involved. There was no will. This court held that the remainder vested on the death of the

husband. The applicable statute was construed to mean that the life estate in the homestead and the remainder interest vested at the same time on the death of the husband. The case is not in point in the present case.

In Moore v. Lyons, *supra,* there was a devise of real estate, to A for life, and after his death to three others, or the survivors or survivor of them. The court held that under such a devise, the remainder vested at the death of the testator. In commenting on the case this court in the Schuyler case said: "Survivorship is referred to the period of the death of the testator where there is no intent manifest to the contrary so as to cut off the heirs of the remainderman * * *."

In the instant case the testator stated in plain language that the remainder was to vest on the death of the life tenant. We find nothing within the four corners of the will to indicate an intent to vest the remainder at any other time. Giving the words "at her death, the remainder in said real estate shall vest in my children" their usual and accepted meaning, the remainder interest did not vest absolutely until the death of the life tenant. In Goodrich v. Bonham, 142 Neb. 489, 6 N. W. 2d 788, this court had before it a provision of a will which stated "Upon the death of said daughter, title to said lot * * * shall vest in fee simple in my son, Leonard W. Goodrich." We held that the remainder vested on the death of the testator because of other provisions of the will indicating a contrary intent. The court said: "To accept the plaintiffs' construction of the will we must conclude that the testator contemplated and intended that, in the event of the son's death prior to the daughter, the remainder estate in the city lot should pass as an intestate property, and that he contemplated that contingency but did not provide for it. The care with which the will was drawn, the provision for all contingencies that the will contains, and the evident desire of the testator to vest title to all his estate in the son, subject

to specific bequests and devises to other beneficiaries, all negative any such construction as that for which plaintiffs contend. The contrary is clearly indicated by every provision of the will. It is clear from this analysis of the will as a whole that the testator intended to create a life estate in trust for his daughter, and a remainder in fee simple to the son in the lot in question. * * * Tested by these rules it is clear that the life estate vested in the trustee, and the remainder estate vested in Leonard W. Goodrich, as an individual at the instant of the death of the testator." This case points up the rule. The intent of the testator was gathered from the whole will which contained provisions necessitating a finding that a vesting upon the death of the daughter, the life tenant, was not the real intention of the testator. The will before us contains no such provisions indicating any intent other than that to be drawn from the plain language used.

The words "should either die without lawful issue" refer to the time of the vesting of the remainder. Consequently the death of Darrel Carr without lawful issue prior to the death of the life tenant requires a holding that the real estate in question should descend to the survivor Allen Carr. Such a disposition is not violative of any rule of law. In Ingraham v. Ingraham, 145 Neb. 330, 16 N. W. 2d 445, this court said: "The creation by will of a vested interest in real estate defeasible upon the occurrence of an expressed contingency is not legally objectionable and is valid and enforcible." See, also, Wilkins v. Rowan, 107 Neb. 180, 185 N. W. 437. The contingency occurring in the present case, resulting in a defeasance, was the death of Darrel Carr without lawful issue prior to the death of the life tenant.

For the reasons stated, the judgment of the district court is reversed and the cause remanded with directions to enter a decree quieting the title to the north half of the southwest quarter of Section Thirteen, Township

Thirteen North, Range Nine East, Saunders County, Nebraska, in the plaintiff, Allen Carr.

REVERSED AND REMANDED WITH DIRECTIONS.

SIMMONS, C. J., and MESSMORE, J., participating on briefs.

STATE OF NEBRASKA EX REL. CLARENCE A. H. MEYER, ATTORNEY GENERAL, PLAINTIFF, V. COUNTY OF LANCASTER, NEBRASKA, ET AL., DEFENDANTS.

113 N. W. 2d 63

Filed January 19, 1962. No. 35144.

1. **Constitutional Law: Statutes.** Though this court may question the wisdom of a given enactment as a matter of policy, that gives it no right to strike it down if it violates no provision of the fundamental law.
2. ———: ———. The Constitution does not require that the title of an act be a synopsis of the law.
3. ———: ———. The provisions of the Constitution relating to titles are to be so liberally construed as to admit of the insertion in a legislative act of all provisions which, though not specifically expressed in the title, are comprehended within the objects and purposes of the act as expressed in its title.
4. **Statutes.** The power to sell, contained in Laws 1961, chapter 54, page 200, is comprehended within the objects and purposes of the act as expressed in the title.
5. **Constitutional Law.** The Constitution is not a grant but rather is a restriction on legislative power, and the Legislature may legislate upon any subject not inhibited by the Constitution.
6. **Statutes.** Where a legislative act is complete in itself but is repugnant to or in conflict with a prior law which is not referred to nor in express terms repealed by the latter, the earlier statute is repealed by implication as to the latter act, but only to the extent of the repugnancy or conflict.
7. ———. The portion of Laws 1961, chapter 54, section 8, page 207, reading "on both the assessment date and the date the levy is made in any year; but such projects shall not be subject to taxation in any year if they are not leased to or held by private interests on both the assessment date and the date the levy is made in any year" is invalid and void.
8. ———. The fact that a part of a law is invalid does not always

require that the entire law be treated as void. If the part that is bad is independent of and separable from the balance of the law, and was not an inducement to the passage of the act, the balance of the act may be sustained and given effect.

9. ———. A basic rule in the interpretation of a statute is to ascertain the legislative intent and to give effect to it if it is a lawful one.

10. ———. A declaration of separability in a legislative act is a declaration of the intent of the Legislature that it would have passed the act with the invalid parts omitted.

Original action. *Demurrer sustained.*

Clarence A. H. Meyer, Attorney General, and *Melvin K. Kammerlohr*, for plaintiff.

Paul L. Douglas and *Cline, Williams, Wright, Johnson, Oldfather & Thompson*, for defendants.

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

SPENCER, J.

This is an original action brought by the State of Nebraska on the relation of the Attorney General, hereinafter referred to as plaintiff, at the direction of the Governor, pursuant to section 84-205, subsection (9), R. R. S. 1943, to enjoin the defendants from proceeding under Legislative Bill No. 159, Laws of Nebraska, 1961, chapter 54, page 200, hereinafter referred to as L. B. 159, because of its constitutional invalidity.

The defendants are the County of Lancaster and Ralph E. Harlan, William M. Grossman, and Kenneth E. Bourne, its three duly qualified and acting county commissioners. The petition alleges that L. B. 159 purports to authorize any county or incorporated city or village to issue revenue bonds for the purpose of defraying the cost of acquiring, purchasing, constructing, or maintaining lands, buildings, or improvements suitable for use for manufacturing and industrial enterprises, and to pay all expense in connection with the issuance of said bonds. It is further alleged that the act provides that such

property may be leased or sold to private individuals or corporations, and that said act is in violation of the Constitution of Nebraska for the following reasons:

"1. It constitutes an attempt to donate lands under the control of the state to a private corporation or private individual in violation of the provisions of Section 21, Article III, of the Nebraska Constitution.

"2. It is an attempt to authorize the giving or loaning of the public money or credit of the state in aid of private individuals, associations and corporations, in violation of the provisions of Section 3 of Article XIII of the Nebraska Constitution, and is beyond the purview of Section 16, Article XV of the Nebraska Constitution, commonly known as the Industrial Development Amendment.

"3. There are provisions in the act not clearly expressed in the title thereof, particularly the provision for sale and conveyance of property acquired by a municipality or county under said act and are therefore void under the provisions of Section 14, Article III, of the Nebraska Constitution.

"4. The provisions in said act for the sale and conveyance of property acquired under said act by municipalities and counties exceeds the authority granted by Section 16, Article XV of the Nebraska Constitution.

"5. Said act attempts to authorize the issuance of revenue bonds without submission to the qualified electors of the municipality or county in violation of Section 2, Article XIII of the Nebraska Constitution and beyond the express authority granted by Section 16, Article XV of the Nebraska Constitution.

"6. That the act attempts to create powers, rights, benefits, and privileges for private purposes which are out of harmony with and contrary to the constitutional provisions herein set forth."

There is also an allegation as to the invalidity of section 8 of L. B. 159, which will be set out hereinafter.

It is then alleged that the defendant county, acting

through the defendant commissioners, has adopted a resolution authorizing the issuance of three million dollars in revenue bonds for the purchase from the Wander Company, a Delaware corporation, of certain property for the construction thereon of an industrial and manufacturing plant, all to be paid for from the proceeds of the sale of the revenue bonds. When this construction is referred to hereafter, it will be designated as the project.

It is then alleged that the resolution incorporates a purported lease and agreement with Wander Company as lessee of said plant at a rental sufficient to pay the costs and expenses and to retire the bonds over a period of 30 years, with an option to purchase the plant and facilities for five thousand dollars and costs and expenses when the bonds have been retired.

This case had its antecedents in the case of State ex rel. Beck v. City of York, 164 Neb. 223, 82 N. W. 2d 269, in which this court held sections 18-1601 to 18-1613, R. R. S. 1943, violative of the Nebraska Constitution. Those sections embraced Laws of Nebraska, 1953, chapter 40, page 133, which provided for the issuance of revenue bonds by incorporated cities and villages. Subsequent thereto, the Seventieth (Extraordinary) Session of the Nebraska Legislature, convening on August 1, 1960, adopted Legislative Bill No. 1, approved August 9, 1960, to place on the ballot at the 1960 general election the question of the adoption of the following amendment to Article XV of the Constitution of Nebraska: " 'Sec. 16. Nowithstanding any other provision in the Constitution, the Legislature may authorize any county, incorporated city or village, including cities operating under home rule charters, to acquire, own, develop, and lease real and personal property to manufacturing and industrial enterprises and to issue revenue bonds for the purpose of defraying the cost of acquiring and developing such property by construction, purchase, or otherwise. Such bonds shall not become general obligation

bonds of the governmental subdivision by which such bonds are issued. Any such real or personal property so acquired, owned, developed or used by any such county, city or village, shall be subject to taxation to the same extent as private property during the time it is leased to or held by private interests, notwithstanding the provisions of Article VIII, section 2, of the Constitution. The acquiring, owning, developing, and leasing of such property shall be deemed for a public purpose, but the governmental subdivision shall not have the right to acquire such property by condemnation. The provisions of Article XIII, section 2, of the Constitution, shall not apply to the issuance of revenue bonds herein provided for. The principal of and interest on any bonds issued may be secured by a pledge of the lease and the revenues therefrom and by mortgage upon such property. No such governmental subdivision shall have the power to operate any such property as a business or in any manner except as the lessor thereof.' " Article XV, section 16, of the Constitution of Nebraska, will hereafter be referred to as the amendment.

The amendment was adopted by the electorate and proclaimed by the Governor as a part of the Constitution of Nebraska on November 28, 1960. L. B. 159 is the purported legislative implementation of the amendment. It was adopted, approved, and made effective by reason of the emergency clause, on March 14, 1961. The resolution of the defendant county was adopted on August 22, 1961, and this action was docketed on September 5, 1961. Defendants and each of them demurred to the plaintiff's petition for the reason that it fails to state facts sufficient to constitute a cause of action. This brings before us the constitutionality of L. B. 159, as raised by the plaintiff's petition.

Even though we may question the wisdom of a given enactment as a matter of policy, that gives us no right to strike it down if it violates no provision of the fundamental law. We clearly stated our position on this

type of legislation previous to the amendment in State ex rel. Beck v. City of York, 164 Neb. 223, 82 N. W. 2d 269. Now, however, L. B. 159 must be viewed in the light of the adoption of the amendment, which has changed our fundamental law in an attempt to validate that which we held to be invalid.

Before entering on a discussion of the specific allegations of invalidity raised by the plaintiff's petition, it is well to state certain elemental propositions. The judiciary may not declare an act of the Legislature unconstitutional unless it clearly contravenes some provision of the fundamental law. State ex rel. Cornell v. Poynter, 59 Neb. 417, 81 N. W. 431. It is not the province of the court to annul a legislative act unless it clearly contravenes the Constitution, and no other resort remains. Wilson v. Marsh, 162 Neb. 237, 75 N. W. 2d 723. It is the duty of courts to ascertain and to carry into effect the intent and purpose of the framers of the Constitution or of an amendment thereto. Swanson v. State, 132 Neb. 82, 271 N. W. 264.

In construing an act of the Legislature, all reasonable doubts must be resolved in favor of its constitutionality. Nebraska Mid-State Reclamation Dist. v. Hall County, 152 Neb. 410, 41 N. W. 2d 397. In construing a constitutional provision for the purpose of ascertaining the intent of the people in adopting it when its language is explicit, the courts are bound to seek for the intention in the words of the provision itself, and they are not to suppose or hold that the people intended anything different from what the meaning of the language imports. Swanson v. State, *supra.*

Where a statute is susceptible of two constructions, one of which renders it constitutional and the other unconstitutional, it is the duty of the court to adopt the construction which, without doing violence to the fair meaning of the statute, will render it valid. Jensen v. Omaha Public Power Dist., 159 Neb. 277, 66 N. W. 2d 591.

With these observations on general applicable rules of construction, we will consider together contentions Nos. 1, 2, and 5 raised by the petition as to constitutionality. The first is that L. B. 159 constitutes an attempt to donate lands under the control of a state to a private corporation in violation of the provisions of Article III, section 21, Constitution of Nebraska. That section is as follows: "Lands under control of the State shall never be donated to railroad companies, private corporations or individuals."

The second contention is that L. B. 159 is an attempt to authorize the giving or loaning of public money or credit in violation of Article XIII, section 3, Constitution of Nebraska. That section is as follows: "The credit of the state shall never be given or loaned in aid of any individual, association, or corporation." Except as the Constitution provides otherwise, these provisions applicable to the state apply also to all political subdivisions thereof. State ex rel. Beck v. City of York, *supra.*

The fifth contention is that Article XIII, section 2, Constitution of Nebraska, requires a vote of the electors before revenue bonds can be issued. That section provides as follows: "No city, county, town, precinct, municipality, or other subdivision of the state, shall ever make donations to any railroad, or other works of internal improvement, unless a proposition so to do, shall have been first submitted to the qualified electors thereof, at an election by authority of law. Provided, that such donations of a county with the donations of such subdivisions in the aggregate shall not exceed ten per cent of the assessed valuation of such county. Provided, further, that any city or county may, by a two-thirds vote increase such indebtedness five per cent in addition to such ten per cent; and no bonds or evidences of indebtedness so issued shall be valid, unless the same shall have endorsed thereon a certificate signed by the secre-

tary and auditor of state, showing that the same is issued pursuant to law."

In State ex rel. Beck v. City of York, *supra,* we held that revenue bonds, although not subject to payment through the exercise of the taxing power, were obligations of the issuing municipality; and that the money derived from the sale of the revenue bonds was public money and could not be expended for a private purpose. We also specifically held that the procedure now embraced in L. B. 159 violated Article XIII, section 3, Constitution of Nebraska.

Plaintiff argues that under Article XIII, section 2, Constitution of Nebraska, donations can be made only to aid in works of internal improvement, and that if the proposed project is not a work of internal improvement, no donation can be made. If it is a work of internal improvement, then the proposition must first be submitted to the qualified electors of the county. We suggest the amendment specifically provides: "The provisions of Article XIII, section 2, of the Constitution, shall not apply to the issuance of revenue bonds herein provided for." It is obvious that to hold the question of the issuance of the bonds must first be submitted to the qualified electors would be to strike this provision from the amendment.

Plaintiff argues that even conceding that the amendment specifically exempts the issuance of revenue bonds from submission to the voters, that does not exempt the application of Article XIII, section 2, Constitution of Nebraska, as to the donation of property acquired by the bonds without a vote of the people. This is based on the assumption that the sale of the property for a very nominal amount is in effect a donation of the property. This point will be discussed hereafter.

While it was not argued, there can be no question but that the effect of the amendment in this case is to give a private corporation substantial benefits through the offices of the county, which the county enjoys only by

virtue of being a governmental subdivision. The effect is to loan the credit of the county and its tax exempt status to a private corporation. In a sense also, there is a donation of a property, yet all this is specifically authorized by the amendment.

The third and fourth contentions have specific reference to the power of sale. The third contention states that the power of sale granted in L. B. 159 is not expressed in the title, and consequently the act is void under the provisions of Article III, section 14, Constitution of Nebraska, which provides, so far as material here: "No bill shall contain more than one subject, and the same shall be clearly expressed in the title." We have said on many occasions that this provision does not require that the title shall be a synopsis of the law. Maher v. State, 144 Neb. 463, 13 N. W. 2d 641.

We have also said the provisions of the Constitution relating to titles are to be so liberally construed as to admit of the insertion in a legislative act of all provisions which, though not specifically expressed in the title, are comprehended within the objects and purposes of the act as expressed in its title, and to admit all provisions which are germane, not foreign, to the provisions of the act as expressed in its title. See Affholder v. State ex rel. McMullen, 51 Neb. 91, 70 N. W. 544.

The title of L. B. 159 is as follows: "AN ACT relating to industrial development; to define terms; to provide for the acquisition, purchase, construction, reconstruction, improvement, betterment and extension of industrial development by cities, villages, and counties for the prescribed uses and purposes; to authorize and regulate the issuance of mortgages and revenue bonds for financing such industrial development as prescribed; to provide for payment of such mortgages and bonds; to provide for leasing of property; to provide for payment of taxes; to provide a construction clause; and to declare an emergency."

L. B. 159 contains the following: "Sec. 2. In addition

to any other powers which it may now have, each municipality and each county shall have without any other authority the following powers: * * * (4) To sell and convey any real or personal property acquired as provided by subdivision (1) of this section, * * *."

We hold that the power to sell is comprehended within the objects and the purposes of the act as expressed in the title, and that there is no merit to contention No. 3.

Contention No. 4 raises the point that the amendment did not specifically mention the power to sell, so that L. B. 159 exceeds the authority granted by the amendment. We should not lose sight of the fact that the Constitution is not a grant but rather is a restriction on legislative power, and the Legislature may legislate upon any subject not inhibited by the Constitution. Swanson v. State, 132 Neb. 82, 271 N. W. 264.

We said in State v. Sheldon, 78 Neb. 552, 111 N. W. 372: "In the construction of a governmental system upon the American plan, the broad outlines are furnished by the constitution, but all the details necessary to carry the powers of government into effect are provided by the action of the legislature. The provisions of the constitution, while in one sense creative, also limit and define the powers to be exercised by the various departments of the government; but, except so far as its authority is limited or defined by the constitution, the legislature of the state is as fully vested with governmental powers as the British parliament. See a discussion of this subject in State v. Nelson, 34 Neb. 169."

Certainly the right of the Legislature to grant the power of sale of property to a municipality has not been inhibited by the Constitution, and there is no merit to plaintiff's fourth contention.

On the power to sell, however, there is a more arguable point inferentially involved and mentioned in plaintiff's brief. This is the fact that section 23-107, R. R. S. 1943, as amended by Laws of Nebraska, 1961, chapter

84, section 1, page 294, provides that the sale of property costing more than three thousand dollars, or the lease of property for a period of more than 10 years, shall not be made by a county board until such proposition shall have been approved by the electors of the county. We hold that the provisions of section 23-107, R. R. S. 1943, as amended, are not applicable to property acquired under L. B. 159.

The applicable rule is that where a legislative act is complete in itself but is repugnant to or in conflict with a prior law which is not referred to nor in express terms repealed by the latter, the earlier statute is repealed by implication as to the latter act, but only to the extent of the repugnancy or conflict. In re Estate of Grblny, 147 Neb. 117, 22 N. W. 2d 488.

We return now to plaintiff's contention that the sale, after the revenue bonds and costs are paid, of a three million dollar facility for five thousand dollars, is nothing more than a donation of public property, and that the inadequacy of the consideration is apparent on the face of the transaction. We do not doubt that there is involved in this transaction not only a donation of public property but the loan of public credit, as may be inferred from our opinion in State ex rel. Beck v. City of York, *supra*. Our problem is to determine whether it is within the limits now permitted by the amendment. In reviewing the lease and agreement, we find that Wander Company, in addition to the payments necessary to retire the bonds and pay all the costs, is obligated to make necessary repairs and replacements; to keep the property insured; to maintain public liability insurance to protect the county; and if the construction funds should prove insufficient, the Wander Company is to pay the deficiency directly to the contractor or the supplier. Also, the Wander Company may consent to the sale of the bonds for less than par, and if the county is unable to sell the bonds, the property is to be reconveyed to Wander Company by a quitclaim deed. It

should be evident to anyone reading the lease and agreement that the feature of county ownership is a sham. By the proposed lease, Wander Company leases the project for 25 years for an annual rental, subject to discharging the bonds and other obligations, and is given the option to purchase the project for five thousand dollars by paying off the bonds and paying all expenses. This arrangement permits it to acquire a plant with very little if any investment of its own capital. In addition, because the interest on county securities is exempt from federal income tax, the bonds will be sold at a lower rate than if issued by the corporation itself. Essentially what we have is a rental purchase arrangement which gives Wander Company the tax advantage of a sale and lease plan. When Wander Company buys at the nominal price of five thousand dollars after the bond issue has been retired, it has in effect amortized the complete cost of the project, including the cost of the land itself, in rental payments, which were deductible.

While we may still feel the financing of private enterprises with public funds is foreign to the fundamental concept of our constitutional system, as we said in State ex rel. Beck v. City of York, *supra,* the constitutional prohibition has been removed by amendment and it is now a part of our fundamental law.

We note that the amendment and the act provide that revenue bonds can never become a general obligation of the municipality. We suggest, however, that it is not beyond the realm of possibility that litigation could arise on this point. If the municipality were grossly negligent in the issuance of the bonds and it was clearly impossible for the project to succeed, the municipality might be required to defend an action for breach of an implied covenant of good faith. Misrepresentation, implied covenant or warranty, and breach of trust are additional theories through which attempts might be made to reach the taxing power. We are suggesting that the purpose of the act is to finance responsible enterprises

which actually will develop industry, and not to provide a method to finance irresponsible individuals or corporations with limited finances, permitting them to shift all of the risk to the bondholders.

Plaintiff's petition also alleges that section 8 of L. B. 159 does not subject the project to taxation to the same extent as private property, as required by the amendment. With this contention we must agree. Section 8 provides in part: "Notwithstanding that title to a project may be in a municipality or county, such projects shall be subject to taxation to the same extent, in the same manner, and under the same procedures as privately-owned property in similar circumstances, if such projects are leased to or held by private interests on both the assessment date and the date the levy is made in any year; but such projects shall not be subject to taxation in any year if they are not leased to or held by private interests on both the assessment date and the date the levy is made in any year; * * *." The amendment on this point provides as follows: "Any such real or personal property so acquired, owned, developed or used by any such county, city or village, shall be subject to taxation to the same extent as private property during the time it is leased to or held by private interests, notwithstanding the provisions of Article VIII, section 2, of the Constitution." It is apparent that L. B. 159 does not conform to the amendment, but that the tax provision in section 8 is more restrictive than that applying to private interests. It is evident that if a period had followed the words "private interests" in section 8, and the balance of the portion of the section set out above stricken or made to conform to the law affecting property held by private interests, it would comply with the amendment.

With reference to the property owned on assessment date, we held as follows in Wood v. McCook Water-Works Co., 97 Neb. 215, 149 N. W. 417, L. R. A. 1915C 125: "Did the sale of the property on July 1 to the city, cancel defendant's liability upon the assessment

because of the fact that after the property passed to the ownership of the city it thereafter would not be liable to taxation? We think the answer to this question must be adverse to defendant. The case is not different from what it would be if, after defendant had filed its schedule and the assessor had made the assessment, and while still owning the property, it had changed the use of it to a purpose which would relieve it from taxation. Such a change would not relieve it from liability. People v. Commissioners, 104 U. S. 466."

The power to tax is determinable as of the date the tax is levied. Lynch v. Howell, 165 Neb. 525, 86 N. W. 2d 364. In that case, property outside the limits of the city of Omaha was annexed to the city on July 19, 1956, 3 months after the assessor was required to complete the assessment, and the city tax was levied by the city taxing districts on August 9, 1956. We said: "The purpose of an assessment is to determine the ownership, quantity, and value of property for tax purposes as of the date fixed by statute, the date being March 1st under our present law. It involves no question of the power to tax. This was made clear in State ex rel. Hinson v. Nickerson, 99 Neb. 517, 156 N. W. 1039, wherein we said: 'There was no difference in that respect, and it was held that transferring the property to the city itself, which could not be taxed, did not relieve the company from payment of the tax for that year. It was held to be a question of ownership, and not a question of power to tax. Where it is a question of ownership, it is the ownership on April 1 that controls. When it is a question of power to tax, that power must exist when it is assumed to exert the power; that is, when the property is taxed. The property is taxed by the city when the city levies the tax.' "

Section 77-1211, R. S. Supp., 1959, as amended by Laws of Nebraska, 1961, chapter 381, section 5, page 1172, provides in part as follows: "Except as provided in sections 1 to 3 of this act, when any person shall bring

personal property into the state or from one county thereof to another county after 12:01 a.m. on January 1 and prior to July 1 in any year, it shall be the duty of the owner to list and return such property for taxation that year, unless he shall show to the county assessor or county clerk, where he is ex officio county assessor, under oath and by producing a copy of the assessment duly certified to, by the proper officer of the state or county in which said property was assessed, that the property has been listed for taxation for that year in some other county in this state, or in some other state or territory of the United States, or that such property has been received by him in exchange for money or property already listed for taxation during that year." Suppose the project was not leased by the county until after January 1, which is now the assessment date, and thereafter property was brought into the county before July 1 and turned over to the lessee under the lease. Under section 8 of L. B. 159, such property would not be subject to taxation. This does not subject the property to taxation to the same extent as private property during the time it is leased or held by private interests, as required by the amendment.

There are other situations which might be enumerated, but the above will suffice. The rule prescribed by our Constitution inhibits the Legislature from discriminating between taxpayers in any manner whatever. State ex rel. Cornell v. Poynter, 59 Neb. 417, 81 N. W. 431. We therefore hold that the following language in section 8 of L. B. 159: "* * * on both the assessment date and the date the levy is made in any year; but such projects shall not be subject to taxation in any year if they are not leased to or held by private interests on both the assessment date and the date the levy is made in any year" is clearly violative of the Constitution.

Does this invalidity void the entire act? The fact that a part of a law is invalid does not always require that the entire law be treated as void. If the part that

is bad is independent of and separable from the balance of the law, or if the invalid part was not an inducement to the passage of the act, or if the remainder of the act is not so connected with the invalid portion that it cannot be upheld without doing violence to the legislative intent as a whole or result in putting into effect a law which the Legislature would not have passed had its attention been called to the invalid parts, the portion of the act that is valid may be sustained and given effect. Wilson v. Marsh, 162 Neb. 237, 75 N. W. 2d 723. We held in that case that it is not the province of this court to annul a legislative act unless it clearly contravenes the Constitution and no other resort remains.

A basic rule in the interpretation of a statute is to ascertain the legislative intent and to give effect to it if it is a lawful one. There can be no question that the legislative intent of L. B. 159 was to provide an industrial development act within the terms of the amendment. Section 11 of L. B. 159 provides: "If any section in this act or any part of any section shall be declared invalid or unconstitutional, such declaration of invalidity shall not affect the validity of the remaining portions thereof." This declaration of separability is certainly a declaration of intent. It is an assertion by the Legislature that it would have passed the act with the invalid part omitted. The rest of the act is not in any sense dependent upon the part we hold to be invalid. In fact, the elimination of the invalid part conforms section 8 to the amendment, and clearly gives expression to the legislative intent. In Howell v. Fletcher, 157 Neb. 196, 59 N. W. 2d 359, we said that the legislative intent may be gathered from the reason for the enactment of the legislation in question. Here the reason is apparent, and the fact that the electors adopted a constitutional amendment to make it possible to effectuate that intent clearly removes even a shadow of a doubt.

No question has been raised as to the validity of the procedural steps in the adoption of the amendment, and

we have set out and discussed herein every contention as to the invalidity of L. B. 159 raised by the pleadings. We have restricted ourselves to the actual points presented, and have not undertaken to examine or to analyze at length the lease and agreement or the exhibits attached to the plaintiff's petition, except insofar as they were actually involved in the objections presented. As thus restricted, we find no merit to the plaintiff's petition other than as to the portion of the act which we have found to be invalid.

For the reasons detailed above, the demurrer of the defendants is sustained.

DEMURRER SUSTAINED.

JACK B. LEWIS, APPELLEE, V. ELBERT M. GALLEMORE, SR., APPELLANT, IMPLEADED WITH ELBERT M. GALLEMORE, JR., APPELLEE.

113 N. W. 2d 54

Filed January 26, 1962. No. 35080.

1. **Appeal and Error.** In an equity action the Supreme Court will, in determining the weight of evidence which is in irreconcilable conflict on a material issue, consider the fact that the trial court observed the witnesses and their manner of testifying.
2. **Contracts.** The practical interpretation given their contracts by the parties to them while they are engaged in their performance, and before any controversy has arisen concerning them, is one of the best indications of their true intent, and the courts will ordinarily enforce such construction.
3. **Partnership.** The existence and scope of a partnership may be evidenced by written or oral agreement, or implied by the conduct of the parties and what was done by them.

APPEAL from the district court for Buffalo County: S. S. SIDNER, JUDGE. *Affirmed.*

Kenneth H. Dryden, for appellant.

Dier, Barton & Barton and *Charles H. Beatty,* for appellee Lewis.

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

BOSLAUGH, J.

This is an appeal in an action in equity in which Jack B. Lewis, the appellee, was the plaintiff and Elbert M. Gallemore, Sr., the appellant, was the defendant. Elbert M. Gallemore, Jr., was joined as a defendant in the lower court but did not participate in the trial and has made no appearance in this court. For convenience, Elbert M. Gallemore, Sr., will be referred to as the defendant and Elbert M. Gallemore, Jr., will be referred to as Bert Gallemore, Jr.

The plaintiff's second amended petition alleged in part that the plaintiff, Bert Gallemore, Jr., Don Main, and the defendant associated together on November 16, 1956, for the purpose of developing and operating a radio station at Kearney, Nebraska, to be known as KRNY, and that as a part of their agreement the parties entered into the following written memorandum:

"Kearney, Nebraska
November 16, 1956

"TO WHOM IT MAY CONCERN:

"Prior to this date, Elbert M. Gallemore Sr., of Kearney, Nebraska, applied for and received from FCC a construction permit for a 5,000 watt, daytime radio station to operate on 1460 kc., at Kearney, Nebraska. Hereafter, said radio station will be referred to as KRNY.

"We, the undersigned, being able and competent in mind and body, now agree that within reasonable time after license to broadcast for KRNY has been received, Elbert M. Gallemore Sr., will apply for authorization from FCC to amend KRNY ownership. Upon receipt of said authorization, we will file articles of incorporation pertaining to KRNY with the secretary of state, state of Nebraska.

"We, the undersigned, agree that upon grant of corporation charter, Elbert M. Gallemore Sr., will hold

30% of the corporation stock, and serve KRNY as General Manager. Elbert M. Gallemore Jr., will hold 25% of the corporation stock, and serve KRNY as Assistant-General Manager and Chief Engineer. Jack B. Lewis will hold 25% of the corporation stock, and serve KRNY as Station Manager. Don Main will hold 20% of the corporation stock, and serve KRNY as Program Director.

"Elbert M. Gallemore Sr., has already spent in excess of $8,000.00 in initial investment for KRNY. We, the undersigned, agree that within reasonable time after license to broadcast has been received, we shall make initial capital investments as follows: Elbert M. Gallemore Jr., $2,000.00 (minimum). Jack B. Lewis, $4,000.00. Don Main, $4,000.00.

"/s/ Elbert M. Gallemore
ELBERT M. GALLEMORE SR.
"/s/ Elbert M. Gallemore Jr.
ELBERT M. GALLEMORE JR.
"/s/ Jack B. Lewis
JACK B. LEWIS
"/s/ Don Main
DON MAIN"

The petition further alleged that the agreement between the parties provided for the organization of a corporation and for the plaintiff to receive 25 percent of the capital stock; that pursuant to the agreement between the parties, the plaintiff contributed $4,000 as capital; that the radio station was developed and has been operating since that date; that the defendant has purchased from Don Main his interest in the radio station; and that the defendant has refused to join in the organization of a corporation and, in effect, now claims to be the sole owner of the radio station. The plaintiff prayed that the court find that the plaintiff owned a 25 percent interest in the station property which was held by the defendant as trustee for the plaintiff; that the association between the parties be dissolved and the assets partitioned; that an accounting be had and

a receiver appointed; and that the defendant be enjoined from disposing of the property.

The defendant's answer was a general denial.

The district court, upon its own motion, directed the parties to proceed to trial upon the issue as to whether the plaintiff owned any interest in the radio station, and reserved all other issues for determination at a later date. There was no objection by either party to this procedure. After a hearing upon the issue as to the ownership of the plaintiff, the court found that the plaintiff owned a 25 percent interest in a joint venture which owned and operated the radio station, and found that a receiver should be appointed to take charge of the property pending a determination of the other matters involved in the litigation. The defendant's motion for new trial was overruled and he has appealed.

The assignments of error are, in effect, that the finding and judgment of the district court upon the only issue tried are not supported by the evidence. Thus, the question upon this appeal is whether the evidence shows that the plaintiff owned an interest in the radio station.

This being an appeal in an action in equity, it is the duty of the court to try the issues of fact complained of de novo and reach an independent conclusion without reference to the findings of the district court. Toelle v. Preuss, 172 Neb. 239, 109 N. W. 2d 293. However, in determining the weight of the evidence which is in irreconcilable conflict on a material issue, the court will consider the fact that the trial court observed the witnesses and their manner of testifying. Smith v. Wade, 169 Neb. 710, 100 N. W. 2d 770.

The evidence shows that the defendant is engaged in the construction business. The plaintiff, Bert Gallemore, Jr., and Don Main have all had experience in the radio and television industry.

Early in 1956 the plaintiff talked with the defendant, Bert Gallemore, Jr., and Don Main about starting a

new radio station in Kearney, Nebraska. On May 11, 1956, an application for the radio station was filed in the name of the defendant. On October 24, 1956, the Federal Communications Commission authorized the construction of the station. On November 16, 1956, the parties entered into the written memorandum set out above.

The technical work of assembling the transmitter and other equipment, setting it up, and doing the necessary wiring so that the station would be ready to operate was done by the plaintiff and Bert Gallemore, Jr. The station began to operate in December 1956. The plaintiff acted as station manager. Bert Gallemore, Jr., was the station engineer. Don Main was the program director. The defendant was the general manager of the station.

The plaintiff testified that early in 1956 the parties agreed that the plaintiff and Bert Gallemore, Jr., would each own 25 percent of the station, Don Main 20 percent, and the defendant 30 percent; that the plaintiff and Bert Gallemore, Jr., were each to receive a credit of $1,000 for their work in preparing the application filed with the Federal Communications Commission and their work in getting the station on the air; that the plaintiff was to contribute $3,000 in cash which would make his total investment $4,000; and that Bert Gallemore, Jr., was to contribute $2,000 in cash and Don Main $4,000. The plaintiff further testified that he paid $3,000 to the defendant as his contribution of capital; that the money was obtained through a loan from his uncle, Sam Wild; that the loan was evidenced by two notes signed by the plaintiff and the defendant; and that the defendant was required to sign the note because the title to the station was held in the name of the defendant.

The testimony of Don Main substantially corroborated that of the plaintiff. Main also testified that he paid the defendant $1,700 in cash and worked at the station for 6 months without salary as his contribution of capi-

tal. Main further testified that he later sold his interest in the station to the defendant for $5,000; that the defendant executed and delivered his promissory note in the amount of $5,000 payable to Main; that the defendant has paid $2,300 upon the note; and that he and the defendant executed the following memorandum agreement:

"AGREEMENT

"This agreement, made and entered into by and between Don Main, hereafter known as 'Seller', and E. M. Gallemore, hereafter known as 'Buyer.'

"WITNESSETH, that the Seller is the owner of an individual interest in the business known as KRNY Radio, of Kearney, Nebraska, and is desirous of selling such capital interest representing his money and services previously contributed, and the Buyer is desirous of buying such interest in full, for the accomplishment of such sale the following terms are agreed to:

"1. Seller agrees to, and does by these presents, convey to the Buyer all his right, title, and interest in and to KRNY Radio, effective November 4, 1957.

"2. Buyer agrees to execute and deliver to Seller a promissory note, of even date, in the principal sum of $5,000.00 payable at the rate of $200.00 per month, at Sutherland, Nebraska, or as directed in writing by Seller, together with interest on any unpaid principal, payable annually, according to the terms of the note of this date.

"3. Buyer further agrees to assume any and all shares of obligation due from KRNY Radio to any creditors, and to save the Seller harmless from any liability from any creditors, past, present, and future, and agrees the obligation to pay the note is personal to the Buyer.

"Dated this 4th day of November, 1957

"/s/ Don Main
"/s/ E M Gallemore"

"/s/ Rose E. Ross
WITNESS

At about the time Main sold his interest in the station to the defendant, a notice was published in a local newspaper to the effect that Main had terminated "his association and all interest" in the station and "from any and all liabilities, activities, responsibilities therefrom." On or about January 23, 1958, the plaintiff signed a letter addressed to the defendant which stated:

"For the record, this is to advise that as of this date, I have no interest in Radio Station KRNY, other than as an employee.

"I have been advised that when this station is incorporated, with Federal Communication Commission approval, I will be given the opportunity to purchase a part of the stock, if I so desire."

The plaintiff testified that the letter had been prepared by the defendant; that the defendant stated that the Federal Communications Commission had inquired about the ownership of the plaintiff in the station; that the application for the station had been made in the name of the defendant "as a service to us all"; and that the defendant wanted the plaintiff to sign the letter in order to protect the investment in the station.

The defendant testified that he was the owner of the radio station; that the plaintiff was an employee; that at the time the agreement was signed on November 16, 1956, it was understood that there was to be no partnership but that if the money was supplied he would, subject to Federal Communications Commission approval, sell the radio station to the corporation; that the $3,000 received from Sam Wild was a loan to the defendant and not a contribution of capital by the plaintiff; and that the plaintiff had requested the defendant to pay the notes to Sam Wild.

The annual financial reports filed with the Federal Communications Commission for 1957 and 1958 listed the defendant as the owner of the station.

It is a general rule that the practical interpretation given to a contract by the parties to it, while they are

engaged in its performance and before any controversy has arisen concerning it, is one of the best indications of the true intent of the contract, and such a construction will ordinarily be enforced by the courts. Podewitz v. Gering Nat. Bank, 171 Neb. 380, 106 N. W. 2d 497. We believe that this rule is applicable in this case.

When the defendant voluntarily entered into the agreement with Don Main to purchase his "interest in the business known as KRNY Radio" and assumed the seller's share of any "obligation due from KRNY Radio to any creditors," he acknowledged that the agreement dated November 16, 1956, contemplated that the other parties to it were to have an interest in the radio station property. This is the only issue that was tried in the district court. After considering the evidence de novo we make the same finding that was made by the district court.

The argument of the defendant is directed largely to the question of whether a partnership or joint adventure existed between the parties. The defendant contends that there was no partnership or joint adventure here because there was no express agreement for sharing profits and losses, for common property and accounts, and for mutual agency.

The agreement dated November 16, 1956, contemplated the organization of a corporation within a "reasonable time after license to broadcast has been received." The agreement contained express provisions as to the amount of capital to be contributed by each party and the amount of stock to be issued to each party. Thus, the parties contemplated the sharing of profits and losses, the ownership of a common property, and some control over the management of the business by each of them.

The existence and scope of a partnership may be evidenced by written or oral agreement, or implied by the conduct of the parties and what was done by them. Hauke v. Frey, 167 Neb. 398, 93 N. W. 2d 183. The

acts of the parties in this case, and what was done by them, indicated a joint adventure which was to continue until a corporation was organized to take its place.

The judgment of the district court is correct and it is affirmed.

AFFIRMED.

SIMMONS, C. J., participating on briefs.

NEAL C. SHREVE, SR., APPELLEE AND CROSS-APPELLANT, V. AGRICULTURAL PRODUCTS COMPANY, A CORPORATION, ET AL., APPELLANTS AND CROSS-APPELLEES.

113 N. W. 2d 58

Filed January 26, 1962. No. 35084.

1. **Trial: Appeal and Error.** The findings of a court in a law action in which a jury is waived have the effect of a verdict of a jury, and will not be disturbed on appeal unless clearly wrong.
2. **Trial.** In considering the sufficiency of the evidence to sustain a verdict or judgment rendered by a court in a case where a jury is waived, the evidence must be considered most favorably to the successful party, any controverted facts resolved in his favor, and he must have the benefit of every inference reasonably deducible from the evidence.

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

C. Thomas White, for appellants.

Wagner & Johnson, for appellee.

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

SPENCER, J.

This is a law action to recover commissions due on the sale of certain irrigation equipment. A jury was waived. Judgment was entered for the plaintiff. Defendants appealed. Plaintiff cross-appealed as to a deduction of $240 allowed the defendants.

The appellee, Neal C. Shreve, Sr., hereinafter designated as plaintiff, is a dealer in farm equipment at Sioux City, Iowa. The appellants, Irrigation Pump Company, a corporation, and Agricultural Products Company, a corporation, are respectively a manufacturer and a distributor of agricultural equipment. They will hereinafter be designated as defendants.

The defendants concede that the plaintiff acted as their agent in the transactions involved, and that only the amount of plaintiff's commission is in dispute. The dispute grows out of two transactions, for brevity described as the Everson deal and the Warden deal.

Plaintiff testified that he was to receive 10 percent of the gross sale of certain engine-propelled sprinkler systems on the Everson deal, and 5 percent on the Warden deal. This equipment was manufactured by the Irrigation Pump Company and distributed by the Agricultural Products Company. He testified he was also to receive 7½ percent on some pump and gear equipment on the Everson deal, 20 percent on some irrigation pipe on the Warden deal, and 25 cents a foot on test wells drilled on the Warden deal. He further testified that his contract on the main equipment was made with the president of the manufacturing company, and his contract on the other items was based on either previous dealings or specific agreements with representatives of the Agricultural Products Company.

The defendants contend that the plaintiff's commission agreement was made with the assistant sales manager of the Agricultural Products Company on the main equipment, and that there was no specific agreement on the other items.

The defendants agree that the plaintiff was to receive 5 percent on the main equipment in the Warden deal, but that it was to be based only on the amount actually collected by them. On the Everson deal, the defendants contend that plaintiff was to receive 10 percent on the main equipment, less the trade-in; and that

plaintiff also was to absorb one-half the excess credit on the trade-in allowance, and at his own expense was to furnish a man to help install the equipment.

The trial court in effect found that the plaintiff was to receive a commission on all amounts actually collected. He was to receive 10 percent of all cash received on the Everson deal; 5 percent on the cash actually received on the Warden deal; 7½ percent on the pump and gear equipment on the Everson deal; and 20 percent on the irrigation pipe in the Warden deal. The court disallowed the claim for any commission on the test wells which were drilled.

This case is controlled by well-settled legal principles. The findings of a court in a law action in which a jury is waived have the effect of a verdict of a jury, and will not be disturbed on appeal unless clearly wrong. In such case, it is not within the province of this court to resolve conflicts in or to weigh evidence. If there is a conflict in the evidence, this court in reviewing the judgment rendered will presume that the controverted facts were decided by the trial court in favor of the successful party, and the findings will not be disturbed unless clearly wrong. Plummer v. Fie, 167 Neb. 367, 93 N. W. 2d 26.

In considering the sufficiency of the evidence to sustain a verdict or judgment rendered by a court in a case where the jury is waived, the evidence must be considered most favorably to the successful party, any controverted fact resolved in his favor, and he must have the benefit of every inference reasonably deducible from the evidence. Dunbier v. Stanton, 170 Neb. 541, 103 N. W. 2d 797.

It will serve no useful purpose to detail the evidence herein. The testimony of the parties is in irreconcilable conflict on the basic disputes. There is ample evidence to justify the trial court in reaching the conclusion it did. Under the rules set out above, there is no merit to the defendants' assignments of error.

The plaintiff has cross-appealed as to a deduction from the commission allowed him of an item of $240. As stated, the trial court found that the plaintiff's commission was to be paid only on the amounts actually collected by the defendants. He therefore deducted from the sale price $2,400 paid in attorneys' fees, to effect collection on the Everson deal. Plaintiff therefore was not allowed a commission on this $2,400 collection expense. This is in conformity with the general finding of the court that the agreement of the parties was in effect that commissions were to be paid on the net amount received from sales. Plaintiff in no way questions this finding. The court then made an additional finding that the plaintiff should be charged with 10 percent of the collection expense of $2,400, or $240, which he deducted from the amount of the commission found to be due the plaintiff. It is on this item that the plaintiff prosecutes his cross-appeal.

We are unable to find any evidence in the record on which to base this deduction. Defendants' representative testified as follows: "Q. Now, this cost of $2400.00 for collection, was that attorneys' fees? A. Yes, sir. Q. Did you have any agreement in any way with Mr. Shreve that he should bear any part of this attorney fee? A. No, sir. We did not anticipate any collection problems of that kind when our first dealings with Mr. Shreve was originated. Q. When the original sale was made with Mr. Everson, did you discuss with Mr. Shreve that he would have to bear any cost of collection on this account? A. No, sir."

There is no other evidence in the record which would in any way suggest an agreement on this point or indicate any responsibility on the part of the plaintiff for the collection of the account. The record indicates that the defendants actually recovered a judgment for the full amount of their claim, with interest amounting to $2,500. They waived the $2,500 interest to effect immediate collection. The plaintiff was not informed of

the litigation or the settlement, and had no part in it.

We find the deduction of 10 percent of the collection expense, or $240, from the commission found to be due to be clearly wrong, and sustain the cross-appeal.

For the reasons given above, the judgment of the trial court is modified by increasing the amount allowed the plaintiff on his first cause of action by $240, and, as thus modified, the judgment of the trial court is affirmed.

AFFIRMED AS MODIFIED.

MARGARET A. PETERSON, A MINOR, BY HELEN PETERSON, NEXT FRIEND, APPELLANT, V. ALLEN C. SKILES ET AL., APPELLEES.

113 N. W. 2d 105

Filed January 26, 1962. No. 35108.

Appeal and Error. When a court reporter is unable to prepare and certify a bill of exceptions, a bill of exceptions shall be prepared under the direction and supervision of the trial judge and shall be certified by the judge and delivered to the clerk of the district court, all as provided by Rule 7 d, Rules of the Supreme Court.

APPEAL from the district court for Buffalo County: S. S. SIDNER, JUDGE. *Order denying a bill of exceptions reversed with directions.*

Dier, Barton & Barton and *Raun & Samuelson,* for appellant.

Luebs, Elson & Tracy, Richard A. Huebner, Munro, Parker & Munro, and *A. W. Storms,* for appellees.

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

CARTER, J.

This is an action brought by Helen Peterson, as next friend of her daughter Margaret A. Peterson, to recover damages for injuries sustained by Margaret A. Peterson

in an automobile accident. The defendants are Allen C. Skiles and Robert Schroeder, the drivers of two automobiles involved in the accident, and Floyd Skiles and Edward Schroeder, the owners of the two automobiles and the fathers, respectively, of the operators of the two automobiles. The trial court sustained a motion by Floyd Skiles for summary judgment against the plaintiff. The plaintiff has appealed.

The record shows that a hearing was had in open court at which time the affidavits of Ruth Skiles, Floyd Skiles, Allen C. Skiles, and Gary Skiles, and the deposition of Allen C. Skiles were presented to and considered by the court. After the motion for summary judgment was sustained, plaintiff gave timely notice of appeal and filed her praecipe for a bill of exceptions. The official court reporter advised that he could not provide a bill of exceptions for the reason that he was not present at the hearing. Proceedings were initiated which had for their purpose the procurement of a bill of exceptions. The trial court, after hearing, denied an amendment of the bill of exceptions to include the affidavits and deposition hereinbefore referred to. The bill of exceptions presently before the court contains no evidence taken on the hearing on the motion for summary judgment. It contains nothing except statements of court and counsel on the application to amend the bill of exceptions and other proceedings pertaining thereto. The primary question presented on this appeal is the correctness of the trial court's ruling in denying an amendment of the bill of exceptions by adding thereto the affidavits and deposition considered by the court in sustaining the motion for summary judgment.

The record shows that neither court nor counsel requested the presence of the official court reporter, although he was available.

The preparation and certification of bills of exceptions in this state are governed by rule of the Supreme Court. Rule 7, Rules of the Supreme Court of Nebraska. There

is no statute or rule of court which makes the preparation and certification of a bill of exceptions the exclusive duty of the official court reporter. See Norfolk Packing Co. v. American Ins. Co., 116 Neb. 118, 216 N. W. 309. Under Rule 7 the certificate of the court reporter is all that is required to validate a bill of exceptions, except in case of dispute the district judge, upon notice and hearing, may resolve all proposed amendments upon which the parties cannot agree. By an amendment to Rule 7 d, effective June 2, 1961, it is provided: "If the court reporter is unable to prepare and certify a bill of exceptions, a bill of exceptions shall be prepared under the direction and supervision of the trial judge and shall be certified by the judge and delivered to the clerk of the district court." Under the foregoing rule the trial court, in the event of inability of the court reporter to do so, is required to have a bill of exceptions prepared under his direction and supervision, and to certify and file the same.

The record shows that all of the evidence in support of the motion for a summary judgment was in writing in the form of affidavits and a deposition. The preparation of a bill of exceptions by the court reporter, under the direction and supervision of the trial court, under such circumstances, would be a simple matter. The court was in error in denying plaintiff a bill of exceptions, or the amendment of the existing bill of exceptions.

We point out that the amendment to Rule 7 d became effective on June 2, 1961, a time prior to the proceedings had herein relating to the obtaining of a bill of exceptions, and, consequently, it is applicable to the present situation. Many points are presented by the defendant Floyd Skiles which we do not deem applicable to the situation here presented.

The preparation and certification of a bill of exceptions is a matter over which the district court has jurisdiction after the Supreme Court has acquired jurisdiction on appeal. No reason exists for a reversal of

the judgment or a dismissal of the appeal in the present case. We reverse the order denying a bill of exceptions only, with directions to the district court to direct and supervise the preparation of a bill of exceptions, and to certify and file the same with the clerk of the district court within 30 days from the date of the release of this opinion. Upon the filing of the bill of exceptions with the clerk of the district court, and notice thereof given to the clerk of this court, the brief days of the parties will be again fixed in conformity with the rules of this court. We do not here imply that the procedure followed under the circumstances of the present case affords an exclusive remedy for obtaining the preparation and certification of a bill of exceptions.

ORDER DENYING A BILL OF EXCEPTIONS REVERSED WITH DIRECTIONS.

SIMMONS, C. J., participating on briefs.

OREN DAVID GREEN, APPELLANT, V. BENSON TRANSFER COMPANY, APPELLEE.

113 N. W. 2d 61

Filed January 26, 1962. No. 35131.

Workmen's Compensation. Mere exertion, which is no greater than that usually incident to the employment, cannot of itself constitute an accident within the meaning of the Workmen's Compensation Act.

APPEAL from the district court for Douglas County: JOHN E. MURPHY, JUDGE. *Affirmed.*

Ross & O'Connor, for appellant.

Joseph H. McGroarty and *Albert C. Walsh,* for appellee.

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

CARTER, J.

This is an appeal from a judgment of dismissal in a workmen's compensation case. The evidence indicates that plaintiff is suffering from an injury which resulted in a surgical operation for a hernial condition. The only question presented is whether or not the disability was the result of an accident arising out of and in the course of the employment.

The plaintiff was employed by the defendant as a truck driver in March or April 1958. On May 2, 1960, he and one McCoy, a fellow employee, were engaged in the transportation and delivery of a quantity of furniture. Included in the furniture was a hide-a-bed, an article of furniture similar to a davenport. It was 80 inches in length and weighed between 500 and 550 pounds. It was the practice in cases such as the instant case to place and tighten a heavy strap around the middle of the hide-a-bed to hold it together and prevent it from flopping over during handling. Plaintiff and McCoy lifted the hide-a-bed to their knees, then turned it so that the back was parallel with the floor of the truck to more conveniently handle it. As they turned the hide-a-bed it fell open, until restrained by the tightened strap. It is the testimony of plaintiff that, as the hide-a-bed thus shifted its weight, he felt a burning sensation in the groin on his lower left side. He reported the incident to McCoy after the hide-a-bed was deposited in the home, and to defendant's supervisor upon return to the warehouse. It is not disputed that plaintiff had a hernial operation resulting in loss of time and in medical and hospital expenses.

Plaintiff testified that he had handled hide-a-beds at least a dozen times during the previous 18 months of his employment. He knew that hide-a-beds were prone to flop open and it was for that reason that the strap was used. He stated that they always open up to the extent permitted by the strap, but that it was never known as to the precise time when it would occur. Because

of this uncertanty plaintiff contends that it was an unexpected and unforeseen event happening suddenly and violently, within the meaning of section 48-151, R. R. S. 1943.

Under the evidence adduced, plaintiff's injury resulted from work incident to his employment. It falls within the rule announced in Jones v. Yankee Hill Brick Manuf. Co., 161 Neb. 404, 73 N. W. 2d 394, which is to the effect that mere exertion, which is no greater than that ordinarily incident to the employment, cannot of itself constitute an accident within the meaning of the workmen's compensation law. In the instant case the incident claimed to be an accident was not only common to the employment but it was recognized as such when means were taken by the use of a strap to limit the shifting of the weight in carrying the hide-a-bed.

Plaintiff relies on Gilbert v. Metropolitan Utilities Dist., 156 Neb. 750, 57 N. W. 2d 770. While the case is somewhat similar on its facts, it is distinguishable. In that case the claimant and two other employees were lifting a stove with claimant on the light end and the other two on the heavy end. One of the two employees lifted too quickly and too high, causing the stove to wobble and shift its weight to the claimant as he commenced to lift his end of the stove. An injury to claimant's back was sustained at that time. We point out that the injury was the result of unusual handling by a fellow employee, and constituted an accident within the meaning of the workmen's compensation law. In the case presently before the court the shifting of the weight was usual and expected, and a common incident of the employment.

Upon a consideration of all the evidence de novo, we concur with the finding of the trial court that there was no compensable accident.

AFFIRMED.

SIMMONS, C. J., participating on briefs.

THE BALLANTYNE COMPANY, A CORPORATION, APPELLEE, V. CITY OF OMAHA, A MUNICIPAL CORPORATION, APPELLANT.

113 N. W. 2d 486

Filed February 2, 1962. No. 34971.

1. **Pleading: Appeal and Error.** Section 25-852, R. R. S. 1943, provides in part that the court may, either before or after judgment, in furtherance of justice, and on such terms as may be proper, amend any proceeding.
2. ———: ———. The term "proceeding" as used in the above section of the statutes includes filing of an appeal bond, and the right to amend such bond is within the purview of the statute.
3. ———: ———. Section 25-853, R. R. S. 1943, provides that the court in every stage of an action must disregard any error or defect in the proceedings which does not affect the substantial rights of the adverse party; and no judgment shall be reversed or affected by reason of such error or defect.
4. ———: ———. The right to amend an appeal bond is within the purview of the above-cited section of the statutes.
5. **Eminent Domain: Landlord and Tenant.** In the absence of a statute or agreement to the contrary, the removal expenses of a lessee, including injury to personal property, caused by said removal, from a leasehold or fee in land, where there is an entire taking of the whole of the condemnee's estate under the sovereign power of eminent domain, cannot be considered as an element of damage, since such loss is not a taking of property.
6. ———: ———. The measure of damages in the taking or injury of a leasehold is the difference between the rental value of the remainder of the term and the rent reserved in the lease.
7. ———: ———. If a leasehold interest is taken, or injured, the lessee is entitled to a sum which will restore the money loss consequent to the taking or injury.
8. ———: ———. This consists generally of the fair market value of the leasehold or unexpired term of the lease, and is said to be the difference between the rental value of the remainder of the term and the rent reserved in the lease.
9. ———: ———. Where the rent reserved equals or exceeds the rental value, the lessee has suffered no loss and cannot recover.

APPEAL from the district court for Douglas County: CARROLL O. STAUFFER, JUDGE. *Reversed and remanded with directions.*

Herbert M. Fitle, Bernard E. Vinardi, Irving B. Ep-

stein, Frederick A. Brown, Benjamin M. Wall, Edward M. Stein, and Steven J. Lustgarten, for appellant.

Seymour L. Smith, for appellee.

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

MESSMORE, J.

The plaintiff and claimant, The Ballantyne Company, a corporation, appealed to the district court for Douglas County from the award of the appraisers duly appointed by the city council of the City of Omaha in a condemnation action allowing said plaintiff no damages.

The Ballantyne Company, plaintiff, is a corporation existing under the laws of the State of Nebraska. The City of Omaha, defendant, is a city of the metropolitan class by virtue of the laws of the State of Nebraska. We will refer to The Ballantyne Company, a corporation, as the plaintiff or the company, to the City of Omaha as the defendant or, on some occasions, as the city, and to the other parties involved in this cause by their names.

The condemnation proceedings instituted by the city were for the purpose of obtaining certain private property upon which to construct a municipal auditorium.

It was stipulated by the parties that this cause be tried to the court without a jury.

The trial court found generally for the plaintiff and against the defendant, and that the plaintiff was entitled to recover from the defendant the sum of $45,871.26. Judgment was rendered in accordance with the findings, in the amount of $45,871.26, with lawful interest from the date of the judgment, and the costs of the action.

The defendant filed a motion for new trial which was overruled. The defendant perfected appeal to this court.

The plaintiff's amended petition alleged in substance that the plaintiff was the lessee of a tract of land being acquired by the defendant; that the plaintiff sustained

damages by reason of the taking of the leasehold and as a consequence suffered expenses of removal, moving, and relocating trade fixtures; and that the plaintiff required a special type of building for its business and suffered expense of making a new building suitable for its purpose, and claimed damages in the amount of $69,257.96, plus interest at 6 percent per annum from and after July 10, 1951.

The answer of the city admitted that the city had instituted condemnation proceedings. The answer alleged that the plaintiff was not entitled to damages; that the finding on the part of appraisers allowing no damages to the plaintiff was legal and just; and that the plaintiff failed to perfect its appeal to the district court by reason of the filing of a faulty bond with the city clerk of the city of Omaha.

The defendant assigns as error that the trial court was without jurisdiction; that the judgment is contrary to law and to the evidence; and that there was error of law occurring at the trial.

The defendant contends that the appeal bond in this case was jurisdictional.

The appeal bond filed with the city clerk of the city of Omaha was an undertaking in the specific amount of $200. The above bond was filed with the city clerk, and the surety approved by the city clerk July 12, 1951. On December 19, 1956, the plaintiff filed a motion asking leave to file an additional appeal bond, which was allowed. The additional appeal bond provided to pay all costs adjudged against the plaintiff.

Section 14-813, R. R. S. 1943, provides in part: "Whenever the right of appeal is conferred by this act, the procedure, unless otherwise provided shall be substantially as follows: The claimant or appellant shall, within twenty days from the date of the order complained of, execute a bond to such city with sufficient surety to be approved by the clerk, conditioned for the faithful prosecution of such appeal, and the payment of all

costs adjudged against the appellant. Such bond shall be filed in the office of the city clerk. It shall be the duty of the city clerk, on payment or tender to him of the costs of the transcript, * * * to prepare a complete transcript of the proceedings of the city relating to their decision thereon. It shall be the duty of the claimant or appellant to file a petition in the district court as in the commencement of an action within thirty days from the date of the order or award appealed from, and he shall also file such transcript before answer day. The proceedings of the district court shall thereafter be the same as on appeal from the county board. Any taxpayer may appeal from the allowance of any claim against the city by giving a bond and complying with the foregoing provisions; * * *."

In the case of Creighton University v. City of Omaha, 91 Neb. 486, 136 N. W. 829, it was said: "The inquiry arises as to what step it is that is to be taken by an appellant in order to confer jurisdiction upon the district court? We take it as not to be questioned that the jurisdiction is obtained by the filing of some pleading or process therein. As appears therein, the section under consideration provides: 'It shall be the duty of the claimant or appellant to file a petition in the district court as in the commencement of an action within thirty days from date of the order or award appealed from,' and he shall file the transcript before answer day. Thereafter the proceedings shall be the same as appeals from the county board. This provides a departure from the law of ordinary appeals. It is not the filing of the transcript that gives jurisdiction, for it may be filed at any time before answer day. The petition is the first filing to be made and that must be filed within the 30 days named. Until that is done the case is not in court nor within its jurisdiction. This seems to be the plain provision of the section. It is within the power of the legislature to make the change from the usual course of procedure. The provision is a special one, probably

enacted for the purpose of expediting the settlement of questions which may arise in the matter of grading and paving streets. We can see no way of escape from its direction."

Section 25-852, R. R. S. 1943, provides in part: "The court may, either before or after judgment, in furtherance of justice, and on such terms as may be proper, amend any pleading, process or proceeding, * * * when the amendment does not change substantially the claim or defense, by conforming the pleading or proceeding to the facts proved. Whenever any proceeding taken by a party fails to conform, in any respect, to the provisions of this code, the court may permit the same to be made conformable thereto by amendment."

The term "proceeding" as used in the statute includes filing of appeal bond, and the right to amend such bond is within the purview of the statute. See In re Estate of Kothe, 131 Neb. 780, 270 N. W. 117. In the cited case it was said: "This court has frequently held that where a bond is given, even if defective, still the court has obtained jurisdiction, and that the proper procedure is for the adverse party to move to compel the appellant to give a proper bond in an amount and condition as required by law; * * *."

Section 25-853, R. R. S. 1943, provides: "The court in every stage of an action must disregard any error or defect in the pleadings or proceedings which does not affect the substantial rights of the adverse party; and no judgment shall be reversed or affected by reason of such error or defect."

The right to amend an appeal bond is within the purview of the statute. See In re Estate of Hoagland, 128 Neb. 219, 258 N. W. 538. In the cited case the court said: "In this O'Dea case the following rule was announced by this court: 'Steps taken by filing an appeal bond to obtain a review of an award made by appraisers, of damages on account of the laying out of a public highway, is a proceeding in an action, and clearly within the

statutory meaning of that term; and if such bond be found to be defective it may be amended in the appellate court, by consent of sureties, or a new bond may be filed.' The action of the trial court in permitting and approving the amendments to the appeal bond is approved as being not only within the spirit, but as required by the express wording, of the statute quoted." See, also, State ex rel. Miller v. Cavett, 163 Neb. 584, 80 N. W. 2d 692; Rube v. Cedar County, 35 Neb. 896, 53 N. W. 1009. The defendant's contention is without merit.

The plaintiff contends that the defendant's assignments of error are insufficient, and that assignments of error in the language of the statute relating to grounds for a new trial in the district court, without more, are insufficient as assignments of error in the Supreme Court.

In Hartman v. Hartmann, 150 Neb. 565, 35 N. W. 2d 482, this court said: "Under section 25-1919, R. S. 1943 (now section 25-1919, R. R. S. 1943), and Revised Rules of the Supreme Court, Rule 8 a2(4), consideration of the cause on appeal is limited to errors assigned and discussed, except that the court may, at its option, note a plain error not assigned." See, also, Okuda v. Hampton, 154 Neb. 886, 50 N. W. 2d 108.

In examining the defendant's brief it is apparent that it has discussed in detail every assignment of error which it assigned. We conclude that the defendant's brief is sufficient in this respect to justify this court in proceeding to an adjudication of this appeal. The plaintiff's contention is without merit.

On July 29, 1947, necessity ordinance No. 15706 declaring the necessity of appropriating certain private property for the purpose of owning and constructing a municipal auditorium was passed by the city council. The mayor of the city appointed three disinterested freeholders to appraise and assess damages sustained by the various owners of the property to be taken by the city under the provisions of ordinance No. 15706 and to report to the city council what the freeholders recom-

mended be awarded. The committee of freeholders made a report. The committee viewed and inspected all of the real estate involved and made awards to the owners and persons interested therein in the following amounts: For Lots 2 and 3, and the north 115 feet of Lot 4, Block 78, and the south 14 feet of vacated Davenport Street adjoining the north 115 feet of Lot 4 on the north, to Carl W. Jensen, county treasurer, for taxes $710.84; Occidental Building and Loan Association, mortgagee, $24,357.19; Robert S. Ballantyne, fee owner, $196,361.97; and The Ballantyne Company, a corporation, tenant, no award.

On May 25, 1949, articles of incorporation of The Ballantyne Company were filed in the office of the Secretary of State. The name of the corporation was The Ballantyne Company, located in Omaha. Its resident agent was J. Robert Hoff, and his address was 1707-11 Davenport Street, Omaha, Nebraska. The names of the incorporators were Robert S. Ballantyne and Ethel C. Ballantyne.

Robert S. Ballantyne and J. Robert Hoff, as relators, filed an application for writ of mandamus in the district court for Douglas County on September 8, 1947, against the mayor and members of the city council of the city of Omaha, respondents. It was stipulated that in the mandamus case the Supreme Court returned its mandate to the clerk of the district court on July 21, 1948, the opinion being released on June 29, 1948. State ex rel. Ballantyne v. Leeman, 149 Neb. 847, 32 N. W. 2d 918. This court held that the referendum section of the Omaha home rule charter applies to legislative acts of the city council, but not to administrative or executive matters; and that to allow a referendum to be invoked to annul or delay executive conduct would destroy the efficiency necessary to successful administration of the business affairs of a municipality. The relators did not prevail in this action.

On June 1, 1949, Robert S. Ballantyne entered into an

agreement with The Ballantyne Company, a corporation, wherein Robert S. Ballantyne assigned to the corporation all the assets he owned, including accounts receivable, merchandise on hand and in transit, furniture, and automobiles. At a meeting held by the board of directors of The Ballantyne Company, a corporation, Robert S. Ballantyne became president and treasurer of the corporation, Ethel C. Ballantyne vice president, and J. Robert Hoff secretary.

The business of the plaintiff is a specialized business. It includes the manufacturing, assembling, and sale of sound and projection equipment which is completely manufactured from sheet metal to the finished product. The company manufactured only theatre equipment. The coming of the drive-in theatre in 1950 to 1952 made a great change, and increased the demand for the plaintiff's products.

Robert S. Ballantyne first conducted the business as an individual. During World War II, Hoff married Ballantyne's daughter. After his service in the Navy, in August 1945, he joined his father-in-law, Robert S. Ballantyne, in business, the latter having no son to carry on the business. Hoff was advised by Robert S. Ballantyne that they would form a partnership or a corporation.

The amounts of the award for the fee title were paid, and deed given by the owner of the fee title to the city on August 3, 1951. The Auditorium Commission of the City of Omaha leased the premises to the plaintiff for 1 year commencing August 1, 1951, at a rental of $700 a month. This lease was subject to cancellation upon 30 days notice. On May 27, 1952, notice was served on the plaintiff to vacate the premises.

Hoff testified that the plaintiff vacated the premises approximately June 1, 1952, but started to move in the last week of May 1952. Hoff further testified that the plaintiff's sales territory extended throughout the world.

The plaintiff for some years had been in the process of developing a test panel, which is an instrument neces-

sary in the manufacture of equipment which produces sound. Such equipment must be tested for its aptitude for a particular building and to the location in the building. When Hoff joined the business, the test panel had been in the process of development 3 or 4 years and was about 40 percent completed. By 1950, the test panel had reached a point of perfection. It is an instrument having over 1,000 individual wires running to and from it. This test panel was disturbed by the condemnation. A claim was made for the value of this test panel to the city's official appraisal board in the amount of $10,840. A communications engineer who examined the test panel gave an opinion that to assemble it at a new location would cost between $11,000 and $11,500.

The building the plaintiff was operating in at the time of the condemnation proceedings was equipped for the business. The foundation was especially fitted and arranged for the heavy machines used in the business.

The plaintiff moved 7 blocks from its original location to a building on Jackson Street which was purchased by Robert S. Ballantyne and leased to the plaintiff. Robert S. Ballantyne superintended the work of reassembling the plant and overseeing the work. The Jackson Street location was a smaller building and had to be arranged differently than the building which the company left. This building had three floors as against two floors in the building from which the plaintiff had to move. The Jackson Street location was not suited for the company's business. It was necessary to add toilets on the second floor. The plaintiff was required to meet certain standards provided for by law in its new location. The heating plant was built into the Davenport Street location so it could not be moved. The heating plant in the Jackson Street property needed attention. The air-conditioning equipment was moved from the Davenport Street location to the new location. A new spray booth was necessary to be built because the one in the previous location could not be moved. New electric wiring was necessary

for the plaintiff's use in the new plant. Upon moving it was discovered that an old creekbed ran through the Jackson Street property, which made it necessary, in order to provide a solid foundation for the heavy machinery, to dig holes and fill them with concrete because for the manufacture of stereophonic equipment the machinery had to be stabilized.

On July 27, 1960, Selby, chairman of the board of appraisers which awarded no damages to the tenant plaintiff, wrote to the officials of the city that in a hearing before that board Hoff claimed damages in behalf of the plaintiff which were estimated at $32,300. These items of damage claimed by the plaintiff consisted of the following: Cost of moving $21,070; electric sign $390; and test panel $10,840, a total of $32,300.

At the time of the appraisal, Robert S. Ballantyne owned 120 shares of stock in the company, Ethel C. Ballantyne, his wife, owned 120 shares, Hoff owned 80 shares, and his wife owned 80 shares.

Joseph Barker, Jr., testified in behalf of the defendant, that he had been appointed to the Auditorium Commission of the City of Omaha in January 1947, and was a member of the commission during its entire existence. He was secretary of the commission for the first 6 years and chairman for the last 4 years of its operation. He further testified that at the time the Auditorium Commission was formed in 1947, it had approximately $3,300,000 to expend; that the Auditorium Commission selected a site for the auditorium and made its recommendation to the city council in 1947; that during the time of the pendency of the Ballantyne mandamus action the Auditorium Commission could not go forward with the acquisition of the site; and that in the fall of 1950, an additional bond issue was placed on the ballot for auditorium purposes.

The bond issue to appropriate money for the city auditorium purposes was placed on the ballot on November 7, 1950. The amount to be raised was $2,794,000 in addi-

tion to $3,540,000 which had been authorized for the purpose of building a new city auditorium.

The trial court's judgment consisted of 12 separate items, each of which was based upon an exhibit. We will take up the principal amount of each item in continuity and the exhibit relating thereto.

Item No. 1 was for $5,631.81. This was an invoice from B. Grundwald, Inc., for plumbing, relating to facilities such as air conditioning and hooking up to spray booths in the paint room. This expense was on the plaintiff's new location on Jackson Street.

Item No. 2 was for $941.27. This was an invoice from B. Grundwald, Inc., for work done to improve the heating system in the Jackson Street location.

Item No. 3 was for $3,348.41. This was an invoice from H. W. Stitt Construction Company covering items of work done in the new location such as general remodeling as a result of the removal, ventilating shafts, roofing, and shelving.

Item No. 4 was for $44.68. This was an invoice from the Henry W. Miller Electric Company covering wiring for a thermostat in the heating system in the plaintiff's new location.

Item No. 5 was for $7,806.16. This was an invoice from the H. W. Stitt Construction Company for work relating to the reconditioning of the premises at the plaintiff's new location, which included the cost of placing an incinerator on the inside of the newly acquired building, also work in placing a chimney on the building in connection with the incinerator, and painting or decorating the new building acquired by the plaintiff.

Item No. 6 was for $221.91. This was an invoice of the Henry W. Miller Electric Company covering wiring of machine tools in the plaintiff's new location.

Item No. 7 was for $2,887.59. This was an invoice from the H. W. Stitt Construction Company covering work done on the balcony and the closing of a rear door to the dock and stairway.

Item No. 8 was for $310.30. This was an invoice from the Henry W. Miller Electric Company for installation of light fixtures in the stock room in the plaintiff's new location.

Item No. 9 was for $874.72. This was an invoice from the Henry W. Miller Electric Company for work done in 1954, and portions of the statement relate to work done at another address, 4402 North Twenty-second Street, Omaha, and also for work done at the new location. This related to wiring and rewiring of two machines.

Item No. 10 was for $7,108.20. This was an account by the plaintiff of its employees identified by a series of timecards. From the timecards there appears an analysis of the payroll expense which was a compilation of salaries paid from June 27 through August 22, 1952, to certain employees of the plaintiff who handled the moving from the Davenport Street location to the Jackson Street location.

Item No. 11 was for $1,564.90. This consisted of checks payable to J. I. Kelly who was hired to supervise the moving operation from the Davenport Street location to the new location of the plaintiff on Jackson Street. The first check to Kelly was dated March 21, 1952. Kelly had been put to work to sort projector parts for eventual moving of the plaintiff to its new location.

Item No. 12 was for $548.99. This was a check issued to Union Freightways for moving of materials for the plaintiff to the new location on Jackson Street.

The above items of $5,631.81, $941.27, $3,348.41, $44.68, $7,806.16, $2,887.59, $310.30, and part of item $874.72, are items relating to charges for making the new premises fit for the use of the plaintiff. Items of $7,108.20, $1,564.90, and $548.99 are with reference to dismantling, removing, and reassembling expenses incurred by the plaintiff. The item of $221.91 and a part of item $874.72 relate to the wiring of machines reassembled. This item is not broken down as to allocation of machine wiring.

The plaintiff contends that in determining the fair and reasonable market value of a leasehold taken in condemnation, consisting of an operating plant, it is proper to consider the fair and reasonable cost of removing the machinery and equipment of the lessee from the leased premises, the fair and reasonable cost of transportation for a reasonable distance to another location, and the fair and reasonable cost of installing the same in the new location. The plaintiff cites several cases that apparently support its contention which we will not discuss in this opinion but which have been examined.

It is true that the decisions in the various states are not harmonious on this issue. However, in the absence of a statute, a lessee who, because of condemnation proceedings, is compelled to move from the condemned premises is not entitled to be compensated for moving expenses, as will be shown by the following cases which support the majority rule in this country.

The only case in this state on this subject is Mohler v. Board of Regents of the University of Nebraska, 102 Neb. 12, 165 N. W. 954, wherein this court held: "The provisions of sections 7118, 7120, Rev. St. 1913, relating to condemnation proceedings for the purpose of extending the campus of the state university construed, and held that the provisions thereof are declaratory and the measure of damages heretofore applied in this state prevails and that loss of time and the cost of removal are not elements of damage." The plaintiff insisted that under the statute he was entitled to prove that he lost time from his employment as a railroad engineer, and that he had been compelled to procure another house and move his household goods, all to his damage in the amount of $250. This court said: "The measure of recovery where property has been taken for a railroad right of way is the value of the land taken, and damages to the remainder of the tract not actually appropriated. This rule must have been in the mind of the legislature

when this statute was enacted. It is merely declaratory of the former law. There is nothing in the text to indicate that it was the intention of the legislature to introduce a new element of damage."

In the case of Williams v. State Highway Commission, 252 N. C. 141, 113 S. E. 2d 263, the court quite thoroughly discussed the issue that is before this court. In that case the State Highway Commission, in condemnation proceedings, took the entire leasehold, as in the instant case. The question was, should removal expenses and damages to the petitioner's stock of merchandise caused by such removal be included in the measure of just compensation and awarded to him? The court said: "The Fifth Amendment to the United States Constitution, which is a limitation upon the federal government, and not upon the states, * * * provides that private property shall not be taken for public use without just compensation. Art. I, Section 17, of the North Carolina Constitution uses language of similar import. * * * Under the settled rule against allowance for consequential losses in federal condemnation proceedings, expenses of removal or of relocation of personal property are not to be included in valuing property taken, where there is an entire taking of a condemnee's property, whether that property represents the interest in a leasehold or a fee. U. S. v. General Motors Corp., 323 U. S. 373, 89 L. Ed. 311; U. S. v. Petty Motor Co., 327 U. S. 372, 90 L. Ed. 729; U. S. v. Westinghouse E. & Mfg. Co., 339 U. S. 261, 94 L. Ed. 816."

It is apparent from the federal cases cited that if the government takes merely temporary occupancy of premises under lease, the cost of removal may be considered in determination of just compensation.

The court went on to say in the case of Williams v. State Highway Commission, *supra*: "A majority of the State Courts hold that, in the absence of a statute or agreement to the contrary, the removal costs of a stock of merchandise, or other personal property, and

the breakages or other injury to such property caused by such removal, from a leasehold or fee in land, where there is an entire taking of the whole of the condemnee's estate under the sovereign power of eminent domain, cannot be considered as an element of damage, since such loss is not a taking of property." See, Housing Authority v. Kosydor, 17 Ill. 2d 602, 162 N. E. 2d 357; Edgcomb Steel of New England v. State, 100 N. H. 480, 131 A. 2d 70; Emery v. Boston Terminal Co., 178 Mass. 172, 59 N. E. 763, 86 Am. S. R. 473; 4 Nichols on Eminent Domain (3 ed.), §§ 14.2471(2), 14.2471(3), pp. 401-414.

In the case of Housing Authority v. Kosydor, *supra,* the court said: "For the reasons stated we cannot agree with the suggestion that a denial of damages for defendants' moving expenses amounts to a confiscation of their stock in trade. Conceivably an expected return on their investment has been frustrated by the exercise of the power of eminent domain by an agency of the State. Similar frustrations have been involved in the denial of other incidental losses, due to continuing payrolls during the time spent in moving, * * *. At times they may be substantial for the individual. * * * But in the absence of legislation, * * * they have been regarded as a part of the burdens of common citizenship." A great number of cases are cited to sustain that court's view of the issue relating to moving expenses.

In Williams v. State Highway Commission, *supra,* the court went on to say: "The rationale of the decisions for not allowing the damages are: one, the tenant eventually would have to move anyhow, and this is one of the circumstances attached to placing property on leased premises; second, it is not a taking of property within the language of the constitution, in that the expense of moving and injury to the property in moving is neither a taking or damaging of the property; three, a verdict would be based on conjecture; four, such expenses constitute no gain to the taker; and five, a taking of real estate or a leasehold does not affect the owner-

ship of personal property kept on the premises taken, but not permanently affixed thereto, and the owner is entitled to remove such property." Several other cases are cited in the Williams case. See, United States v. Meyers, 190 F. 688; Metropolitan West Side El. R. R. Co. v. Siegel, 161 Ill. 638, 44 N. E. 276; Mayor & City Council of Baltimore v. Gamse, 132 Md. 290, 104 A. 429; Fiorini v. City of Kenosha, 208 Wis. 496, 243 N. W. 761; Korengold v. City of Minneapolis, 254 Minn. 358, 95 N. W. 2d 112; 18 Am. Jur., Eminent Domain, § 255, p. 894; Annotations, 34 A. L. R. 1523, 156 A. L. R. 397, 3 A. L. R. 2d 312; 29 C. J. S., Eminent Domain, § 175, p. 1048; 4 Nichols on Eminent Domain (3d ed.), § 14.247 (1), p. 400. All of these cases support the defendant's contention in the instant case. We deem further citation of authority relating to this issue unnecessary, but the above authorities fully declare the majority rule as heretofore stated.

There is some contention made by the plaintiff that the constitutional provisions in some of the cited cases made by the defendant relating to the above issue are different than the Constitution of this state which provides in Article I, section 21: "The property of no person shall be taken or damaged for public use without just compensation therefor."

As to the case of Korengold v. City of Minneapolis, *supra,* Article I, section 13, of the Minnesota Constitution, provides: "Private property shall not be taken, destroyed or damaged for public use without just compensation therefor, first paid or secured."

As to the cases of Housing Authority v. Kosydor, *supra,* and Metropolitan West Side El. R. R. Co. v. Siegel, *supra,* cited with approval in Williams v. State Highway Commission, *supra,* the Illinois Constitution, Article II, section 13, provides in part: "Private property shall not be taken or damaged for public use without just compensation."

The words "or damaged" do not change the rule of

law stated in Platte Valley Public Power & Irr. Dist. v. Armstrong, 159 Neb. 609, 68 N. W. 2d 200, where the court held that the measure of damages in the taking or injury of a leasehold is the difference between the rental value of the remainder of the term and the rent reserved in the lease. This case cites State v. Platte Valley Public Power & Irr. Dist., 147 Neb. 289, 23 N. W. 2d 300, 166 A. L. R. 1196, as follows: "If a leasehold interest is taken, or injured, the lessee is entitled to a sum which will restore the money loss consequent to the taking or injury. This consists generally of the fair market value of the leasehold or unexpired term of the lease, and is said to be the difference between the rental value of the remainder of the term and the rent reserved in the lease. * * * Where the rent reserved equals or exceeds the rental value, the lessee has suffered no loss and cannot recover."

This brings us to the consideration of the leasehold here involved.

The plaintiff contends that with knowledge of the fact that a public improvement is proposed and preliminary steps have been taken to acquire property in condemnation, but a delay of nearly 2½ years ensues without further action by the condemner, one may acquire a leasehold interest in such property 2 years after the last step was taken, which leasehold will be the subject of damages.

The plaintiff cites many cases on this issue, such as Maher v. Commonwealth, 291 Mass. 343, 197 N. E. 78, wherein the court said: "Until divested of their title, either by a taking by the commission under eminent domain, or by delivery by them of a deed to the Commonwealth and taking the other steps above described, the landowners possessed all the attributes of ownership in fee of their land. In making changes and improvements on their land, they were simply exercising their rights as proprietors." Other cases, while not using the same type of language, sustain the rule as

announced in the above-cited case. See, Briggs v. Commissioners of Labette County, 39 Kan. 90, 17 P. 331; State v. Stabb, 226 Ind. 319, 79 N. E. 2d 392; Herron v. Pittsburgh, 281 Pa. St. 401, 127 A. 64; State Highway Commission v. Holden, 217 Ark. 466, 231 S. W. 2d 113; 18 Am. Jur., Eminent Domain, § 256, p. 896; 4 Nichols on Eminent Domain (3d ed.), § 12.1 (4), p. 22.

The plaintiff asserts that the report of the appraisers was not approved by the city council until July 10, 1951, therefore, under the authorities cited, the plaintiff could lease the property without regard to the city, and is entitled to be compensated under this state's Constitution.

The leases here involved are described as follows.

It appears that the buildings on the Davenport Street location were completed at three different times. There were three leases made at three different times which covered the subject property. These leases were made by Robert S. Ballantyne to the plaintiff. The first lease was dated June 1, 1949, for a term of 3 years, with the expiration date May 31, 1952. The rental was $750 a month, plus taxes to be paid by the lessee. This lease covered Lot 2, Block 78, original city of Omaha.

The second lease was dated July 12, 1949. The term covered was from date of completion to May 31, 1952. The rental was $210 a month, with taxes paid by lessor. The property covered was the north 69 feet of the east 22 feet of Lot 3, Block 78, original city of Omaha.

The third lease was dated July 12, 1950, the term from date of completion to May 31, 1952. The rental was $625 a month, with taxes paid by the lessor. This lease covered Lot 3, except the north 69 feet of the east 22 feet thereof, and the north 55 feet of the south 60 feet of Lot 4, Block 78, original city of Omaha.

The fourth lease, starting at the expiration of the above three leases, was dated July 12, 1950, for a term of 10 years from June 1, 1952, to May 31, 1962. The rental was $1,750 a month, with lessee paying all regu-

lar taxes. This lease was dated after 2 years delay in going forward with the condemnation.

Hoff testified that the difference between the value of the leasehold and the rent reserved was between $65,000 and $70,000. An offer of proof was not objected to that Robert S. Ballantyne would testify that such value was between $55,000 and $60,000. Hoff further testified that, as to the fourth lease, the plaintiff was not paying too much rental.

Selby made an appraisal of the leasehold, and in his opinion it had no value as of the date of taking. According to this appraisal, the economic rental of the premises was $18,473.88. The contract rental was $19,843.81 per year. The contract rental exceeded the economic rental in the amount of $1,369.93 per year. Relating to the Kennedy and Undeland appraisal made for the plaintiff as a face valuation to determine the value of the leases, this witness determined that the economic rental should have been $19,040.03, or that the economic rent was exceeded by the contract rental in the amount of $803.78.

This witness also made an appraisal of the leasehold by using the capitalization approach. By using this approach he found that the contract rent was excessive.

The plaintiff asserts that its business is highly specialized and doing a volume in excess of one million dollars a year; and that in appraising the value of the leasehold the volume of the business was not taken into account by the defendant's appraiser. The plaintiff cites Phillips Petroleum Co. v. City of Omaha, 171 Neb. 457, 106 N. W. 2d 727, wherein this court, quoting from James Poultry Co. v. City of Nebraska City, 135 Neb. 787, 284 N. W. 273, said: " 'The volume of business done on any given leasehold has a direct relation to the value of the leasehold, as volume is directly connected with the success of the business, and diminution of business means decrease in volume.' " The plaintiff asserts that without consideration of the scope, extent, volume, and profitable

results of the plaintiff's business as the basic factor, a proper appraisal of the leasehold could not be made.

In James Poultry Co. v. City of Nebraska City, *supra,* this court said: "Evidence of the volume of business transacted on a leasehold may be shown, not as an independent item of damage, but as it affects the market value of the leasehold before and after the construction of the improvement."

There is no competent evidence in the record to show that the plaintiff's volume of business had diminished or that it has been lessened in any degree because it was forced to move from the old location to the new. In the absence of such proof, there is no merit to the plaintiff's contention insofar as it relates to the volume of business.

The evidence adduced by the plaintiff relating to the value of the leasehold shows the rent reserved equals or exceeds the rental value of the leasehold, consequently the lessee has suffered no loss and cannot recover. See Platte Valley Public Power & Irr. Dist. v. Armstrong, *supra.*

It appears from the judgment of the trial court that it made no specific finding with reference to the value of the leasehold but did, as shown by the 12 items above, allow damages for the amounts shown therein, with interest.

In the light of the record and the authorities heretofore referred to, we conclude that the judgment of the trial court, which has the effect of a jury verdict, was clearly wrong, and that such judgment should be reversed and the cause remanded with directions to dismiss the plaintiff's action.

REVERSED AND REMANDED WITH DIRECTIONS.

SIMMONS, C. J., participating on briefs.

ESTHER E. RAHN, APPELLEE, V. HARRY RAHN, APPELLANT.
113 N. W. 2d 189

Filed February 2, 1962. No. 35036.

1. **Divorce.** A decree of divorce may not be granted upon the uncorroborated testimony of one of the parties.
2. ———. In determining the question of alimony or division of property as between the parties the court will consider the respective ages of the parties to the marriage; their earning ability; the duration of the marriage; the conduct of each party during the marriage; their station in life, including the social standing, comforts, and luxuries of life which the wife would probably have enjoyed; the circumstances and necessities of each; their health and physical condition; and their financial circumstances as shown by the property they owned at the time of divorce, its value at that time, its income-producing capacity, if any, whether accumulated or acquired before or after the marriage, the manner in which it was acquired, and the contributions each has made thereto. From these elements and all other relevant facts and circumstances, the court will determine the rights of the parties and make an award that is equitable and just.

APPEAL from the district court for Sarpy County: JOHN M. DIERKS, JUDGE. *Affirmed.*

Theodore L. Richling and *Shrout & Foley,* for appellant.

L. W. "Jim" Weber and *Paul E. Watts,* for appellee.

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

YEAGER, J.

This is an action for divorce which was instituted by Esther E. Rahn, plaintiff, appellee here, in the district court for Sarpy County, Nebraska, against Harry Rahn, defendant, appellant here. In the action the defendant filed a cross-petition on the basis of which he sought a decree of divorce from the plaintiff. There were two children born of the marriage of the parties. One, a son, had attained his majority. The other, a daughter, was a minor, and each party prayed for an award of custody of this child.

The case was tried to the court and a decree of divorce was granted to the plaintiff. The custody of the minor child was awarded to the plaintiff. By the decree no alimony as such was awarded, but in lieu of alimony the plaintiff was granted the title to two parcels of real estate in Sarpy County, Nebraska, all household goods and furnishings contained in a house on one of the properties awarded to her, a 1940 Chevrolet automobile, $4,790.20, being the balance in an account of the defendant in the Nebraska Savings & Loan Association, and $2,259. Also by the decree a final award was made of $900 for the attorneys for the plaintiff. In addition to this the defendant was ordered to pay $60 a month for the support of the minor child during her minority, or until the further order of the court.

From this judgment and an order overruling a motion for new trial, which was duly filed, the defendant has appealed. The brief of defendant contains numerous assignments of error as grounds for reversal. These however present basically three questions. The first is that of to which party, if either, a decree of divorce should have been granted? The second is, if a decree was proper, to whom should the custody of the minor child of the parties have been granted? The third is, in case a divorce decree was proper, what was proper in the area of alimony and division of property?

Certain facts upon which the ultimate determination must depend and about which there is no material dispute are that the parties were married March 18, 1933; that two children were born of the marriage, a son born January 1, 1934, and a daughter born March 28, 1947; that at the time of the marriage the plaintiff was about 20 years of age and the defendant about 40; that the parties have lived in Sarpy County; that the defendant during that time has engaged in farming and in the operation of a shop where he performed automobile repairing, welding, and other such types of work; that lately he is retired and disabled from personal engage-

ment in gainful employment; that the farming activities of the defendant from 1940 forward were carried on on 160 acres of land in which the defendant had an undivided one-fourth interest and on 96.29 acres of land in which he had an undivided one-fourth remainder interest; that prior to 1940 he farmed only the 160 acres; and that he rented this land on a crop or production basis whereby he received three-fifths and the owners of the 160 acres and the life tenant of the 96.29 acres received two-fifths. The shop of the defendant was on the land and there is no evidence that he paid anything for the use of the area. The parties also lived on the land.

On the question of whether or not one or the other of the parties was entitled to a divorce there is much dispute in the evidence. The alleged basis charged by each is cruelty practiced by the other. No good purpose could be served by setting forth in detail the testimony as to this. It appears that general reference will be sufficient.

The evidence of the plaintiff indicates that the defendant denied from the beginning paternity of the son, and through all of the years, in terms reflecting upon the chastity of the plaintiff, voiced to plaintiff his denial. Her evidence further indicates that the same character of denial of paternity of the daughter accompanied her birth and has continued throughout the years. The plaintiff testified that following the birth of the daughter and as a result of this attitude and the accusations conjugal relations between the parties were discontinued. This was not disputed by the defendant. Her evidence further discloses that the defendant habitually and over the years used toward her vile, profane, and abusive language which was at times in its nature threatening. On the other hand the evidence discloses that she used language of a like character, however to a lesser extent. There is no evidence that either used any violence upon or toward the other. There is no

evidence that these attitudes increased or decreased over the years.

This state of affairs, according to the evidence of the plaintiff, continued to June 18, 1960, on which date the parties went to Omaha, on which day after the return home the testimony of the plaintiff is that the defendant left the home and did not return until the following day, when he did return. He came in, drank a cup of coffee, and went away. The defendant denied that he left and remained away that night. Some time in the afternoon the plaintiff, the son, the daughter, and another young lady went swimming. On their return the defendant, his two sisters, and his mother were there. Some of them were sitting at a table. The plaintiff entered the room and according to her testimony, which testimony is supported by the testimony of other witnesses, said to the defendant: "Where have you been?" In response the defendant said: "You God damn whore, where have you been?" The son came in and said: "You can't talk to my mother like that, I have stood by too many years, you have got to cut that out." The plaintiff said that she got between the father and son, then the father made a lunge at her. The evidence as to the sequence of events thereafter is not certain but it appears that the son grabbed a chair and broke it over the table. Articles were tossed about violently and wildly, and in some manner a bone in the forearm of the defendant was fractured. Whether this was of the left or right arm is not made clear. Whether a blow from a part of the chair in the hands of the son or a fall caused the fracture is not made certain. It was testified that this incident was closed by the defendant running from the room with a statement that he would shoot those involved if it was the last thing he ever did.

The effect of the evidence of the defendant was to deny all of the improper conduct over the years and to place the blame for the incident occurring on June 19, 1960, on the son of the parties. The defendant spe-

cifically denied that he made the statements charged against him, and he charged that the fracture of the bone in his arm was produced by the acts of the son. He did not charge that he was assaulted by the plaintiff.

After hearing all of the evidence the trial court found that the plaintiff was entitled to a divorce and adjudicated accordingly.

The defendant urges that on the record this adjudication is not sustained under law by the evidence. The theory of this appears to be that the plaintiff as ground for divorce relies upon cruelty over a long period of years, proof of which is made by testimony of the plaintiff and which stands without corroboration.

It is true that a decree of divorce may not properly be granted upon the uncorroborated testimony of a party. See, § 42-335, R. R. S. 1943; Hines v. Hines, 157 Neb. 20, 58 N. W. 2d 505.

It may well be said that incidents of conduct alleged to have taken place before June 19, 1960, are without corroboration and if there was nothing else to be considered the contention might be availing. This however is not the case. The testimony in this area presents a background but the pleaded basis of the action was a complete incident taking place on June 19, 1960, which was corroborated.

The trial court heard the witnesses and observed them as they testified, and there is nothing in the record to justify a conclusion that it did not weigh and consider the evidence in this area properly and arrive at a correct decision. The award of a divorce to the plaintiff is therefore sustained.

As to the custody of the daughter there is nothing in the record on which to justify a disturbance of that part of the decree awarding custody to the plaintiff with the stated rights of visitation with the defendant. That part of the decree will be sustained.

There is no assignment of error questioning the amount of the allowance for child support.

The remaining matter for determination is that of what should be awarded to the plaintiff as alimony or in lieu thereof division of property.

In an approach to this it is pointed out that at the time of trial the plaintiff was of the age of about 49 years. The age of the defendant was about 69 years. There was no evidence that the plaintiff would in the future have any earning capacity. The defendant was retired and had no earning capacity. The evidence indicated that his health was such as to prevent him from engaging in any gainful occupation. The defendant was receiving social security at the rate of $86.40 a month. The plaintiff was receiving social security payments in the amount of $41.40 a month. Social security payments were being received by plaintiff for the daughter in the amount of $41.40 a month. The only other income that could be anticipated was from income property owned, securities, and money on hand and on deposit.

There is no evidence that the plaintiff brought any money or property to the marriage relationship. The defendant had some money and property at the time of the marriage. The amount cannot be reasonably determined, but it may well be said that it was not large.

It is reasonably inferable that the parties were frugal and hard working, and that by their joint efforts they accumulated some money and acquired some property. Two pieces of real estate or lots were purchased. One appears to have had a rental value of $85 a month and the other $75 a month. One was occupied by the plaintiff at the time of the trial. Each of these cost $5,500 and $1,685 was spent in improvement of them. The total value of the two lots was fixed by the trial court at $14,000.

On evidence from which it was not possible to arrive at an accurate value thereof the trial court arrived at a valuation of personal property, stocks, money, and deposits in the amount of approximately $21,214.85. The finding is not clear. Property of the value of $2,000 was

in possession of the plaintiff and the balance was in the possession or control of the defendant.

During the marriage of the parties, or in January 1940, the father of the defendant died and from him the defendant received an inheritance. This was in part an interest in land and in part in money. The trial court made its findings with reference to the money so received. The view taken here is that it was not proper for consideration since its identity and present existence was not established.

In real estate the defendant received an undivided one-fourth interest in fee simple in 160 acres of land the value of the total acreage of which was fixed by the trial court at $26,000, and an undivided one-fourth interest in remainder in 96.29 acres of land, the total value of which was fixed by the court at $38,516. By computation made by the trial court with reference to the life estate of the defendant's mother the interest of the defendant in this land was treated as one-fourth of $34,665, but no satisfactory legal basis has been found for this computation. The evidence of value here, as was true in the case of the personal property, was not sufficient to insure accuracy, but it is not possible on the record to reach greater accuracy. The value of the interest of the defendant in the 160 acres of land will be treated as $6,500. The value of the remainder interest of the defendant in the 96.29 acres of land will be treated as $9,629.

The evidence as to the present or prospective income from the interest in the 160 acres is so fragmentary that no estimate thereof is possible.

There is no present income to the defendant from the mentioned remainder interest. In legal contemplation there will be none until after the death of the mother of the defendant. She holds it as her homestead by election to take as a surviving spouse under statute rather than under the will of her husband who was the father of the defendant. She was a second

wife and there were children by the first wife, hence she took title to one-fourth of the area involved and a homestead interest in the entirety of this part of the land during her life.

This court has many times outlined the matters which shall be considered in arriving at a determination of an appropriate award of alimony and division of property in a case of divorce. This outline is stated as follows in Kinch v. Kinch, 168 Neb. 110, 95 N. W. 2d 319: "In determining the question of alimony or division of property as between the parties the court will consider the respective ages of the parties to the marriage; their earning ability; the duration of the marriage; the conduct of each party during the marriage; their station in life, including the social standing, comforts, and luxuries of life which the wife would probably have enjoyed; the circumstances and necessities of each; their health and physical condition; and their financial circumstances as shown by the property they owned at the time of divorce, its value at that time, its income-producing capacity, if any, whether accumulated or acquired before or after the marriage, the manner in which it was acquired, and the contributions each has made thereto. From these elements and all other relevant facts and circumstances, the court will determine the rights of the parties and make an award that is equitable and just."

Of particular significance in this case are the ages of the parties; the duration of the marriage; their station in life; the necessities, the health, and physical condition of each of the parties; their financial situation at the time of marriage and at the time of divorce; and the contributions made.

As to ages, there is a difference of about 20 years. There is little, if anything, in the record to suggest that this should require anything beyond what would be proper if they were more nearly the same age. The paramount suggestion of the record is, in the light of

prospective economic conditions, that reasonably equal division should be attempted.

This is true in view of the fact that the defendant is without personal earning capacity as is also true, it reasonably appears, of the plaintiff, and in view of the further fact that it does not appear that there is any more property and income from the existing interest than a sufficient amount to very modestly meet the needs and requirements of the parties and the minor child.

Herein the total of the estimate of value is approximately $51,343.85. The total value of real estate is $30,129. Two houses included in this are of the value of $14,000. One is occupied by the plaintiff and the other is capable of a rental income of $75 a month. The interest of the defendant in the 160 acres of land produces income, but so far as this record is concerned the amount is uncertain. The one-fourth remainder interest of $9,629 will not be capable of income production in favor of the defendant until after the death of his mother. This is all of the real estate in which the defendant has an interest.

It appears that the trial court in its conclusion as to the value of real estate of the defendant computed an interest in the value of the one-fourth interest in fee of the mother of the defendant in the homestead as a part of the property of the defendant. This computation was obviously improper.

As to personal property there is an item of equipment and household goods in the hands of the defendant of the value of $3,000. There is nothing to indicate that this is capable of producing income or that there is a market for its sale. There is an item of $2,000 as the value of the household goods and other personal property which are in the hands of the plaintiff. Of course this is not income producing. There are items of money due, bank stock, and savings and loan accounts amount-

ing to $16,214.85. These for the most part at least are capable of being converted into cash.

From the values fixed by the trial court modified as indicated herein it appears that the physical value of the defendant's interest in the real estate and the total value of the personal property, as already pointed out, amounts to approximately $51,343.85. The total value of the real estate is $30,129 and the total value of the personal property is $21,214.85.

By the division of the property made by the trial court plaintiff was awarded two lots of the value of $14,000, household goods of the value of $2,000, balance in a savings account in the amount of $4,790.20, and a judgment for $2,259. The total is $23,049.20.

On the basis of the computations made this left property to the defendant of the value of $28,294.65. The effect of this was to divide the total property more favorably to the defendant than to the plaintiff. The trial court, in all likelihood, made this division with the fact in mind that a considerable portion of the property had come to the defendant by inheritance, and made some allowance accordingly. It appears, in the light of this record, that the court exercised a sound discretion.

In view of the facts that the marriage was broken up on account of the acts of the defendant; that the plaintiff was awarded the custody of the minor child: that the award for child support is not likely to be sufficient to care for, educate, and maintain the child; and that in likelihood the only source of revenue the plaintiff will have is that which she will receive from what has been awarded by the decree together with the small amount to be received from social security, it does not appear that what was awarded to her by the decree was unreasonable or excessive.

The judgment of the district court granting a divorce to the plaintiff, and awarding custody of the minor child of the parties to the plaintiff, support for the child, the division of property, and an attorney's fee for

services on behalf of plaintiff is affirmed. An attorney's fee is allowed for services of plaintiff on appeal in the amount of $500. The motion made in this court for a temporary allowance for support is denied, however the permanent allowances for child support shall be made from and after the date fixed in the decree of the district court. The costs are taxed to the defendant.

AFFIRMED.

JOSEPH F. LEFFELMAN, APPELLEE, V. CITY OF HARTINGTON, CEDAR COUNTY, NEBRASKA, A MUNICIPAL CORPORATION, APPELLANT.

113 N. W. 2d 107

Filed February 2, 1962. No. 35091.

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: 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.
5. **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.
6. **Eminent Domain.** The adaptibility for uses which may be considered must be so reasonably probable and so reasonably ex-

pected in the immediate future as to affect the market value of the land at the time the land is taken or damaged.

7. **Trial.** Where a verdict of a jury is clearly against the weight and reasonableness of the evidence it will be set aside and a new trial granted.

APPEAL from the district court for Cedar County: JOHN E. NEWTON, JUDGE. *Reversed and remanded for new trial.*

Philip H. Robinson, for appellant.

E. J. McCarthy and *Verzani & Verzani,* for appellee.

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

MESSMORE, J.

The defendant, City of Hartington, located in Cedar County, instituted eminent domain proceedings in the county court of Cedar County wherein the city sought to acquire 2.195 acres of land owned by the plaintiff, for park purposes. The plaintiff appealed from the award made by the appraisers to the district court for Cedar County. The only question submitted to the jury was the amount of damage sustained by the plaintiff as a result of the taking of 2.195 acres of his land. The jury returned a verdict finding for the plaintiff and against the defendant in the amount of $2,664.50. The defendant filed a motion for new trial which was overruled. The defendant city perfected appeal to this court.

The defendant assigns as error that the verdict of the jury was excessive, and that the trial court erred in not sustaining defendant's motion for new trial on that ground.

The defendant city is a city of the second class.

The plaintiff's petition on appeal to the district court alleged in substance that he was the owner of a tract of land which is described in the petition, and in addition Lots 3, 4, 5, and 6, Block 21, Felber Place Addition to the city of Hartington; that the lots above mentioned

are within the city limits and are divided into lots and blocks; that the remainder of the plaintiff's land adjoins that part which is within the city limits and also adjoins the Felber Place Addition to the city, being located immediately on the west side; that said land is suitable and desirable for a subdivision addition to the city; that the total acreage owned by the plaintiff is approximately 17 acres; and that at the time of taking the plaintiff had valuable corn and alfalfa crops planted and growing thereon, and used his buildings and yards for raising livestock. It was further alleged that on or about July 8, 1960, the city appropriated, by condemnation proceedings filed in the county court, a portion of the plaintiff's land as heretofore mentioned; that the plaintiff intended to have the total acreage of land owned by him, and that portion thereof which is properly suited and adapted, platted and subdivided into blocks and building lots, and to dispose of the same to the public for the construction of dwellings thereon; that the taking of the 2.195 acres and such crops planted thereon, which the plaintiff alleged to be of the value of $1,000 an acre, will result in permanent damage to the remainder of his tract of land by reducing the acreage thereof and making the same uneconomical to operate by the plaintiff, and will materially affect the value of his remaining land contiguous thereto, for the reason that the land appropriated is the best agricultural portion of the plaintiff's land, and further for the reason that the plaintiff has a large silo, 32 feet in height and 12 feet in diameter, a large barn, 48 feet by 48 feet in size, a corncrib and granary 9 feet by 28 feet in size, and a 9-room dwelling house located thereon; that by the taking this property will be ineffective to the plaintiff for the use to which it is put; and that the taking of the plaintiff's land as heretofore stated will interfere with his ingress and egress to the remaining land and will destroy the value of the plaintiff's yards adjacent to his farm buildings by materially reducing the distance

between such buildings and his property line, which in itself will have a detrimental effect on the value of the remainder of the said tract. The plaintiff prayed judgment for $4,800.

The defendant's answer constituted a general denial of all the allegations of the plaintiff's petition not admitted.

There are certain established rules of law which are pertinent to this appeal.

"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." 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, the 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."

In Platte Valley Public Power & Irr. Dist. v. Armstrong, 159 Neb. 609, 68 N. W. 2d 200, it was 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. * * * 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 con-

demner to show matters which tend to reduce or mitigate the damages."

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 adaptabiliy 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 adaptability for uses which may be considered must be so reasonably probable and so reasonably expected in the immediate future as to affect the market value of the land at the time the land is taken or damaged. There is a clear distinction between what land may be worth in the future and what it is worth at the time it was taken or damaged in view of the future. The fundamental issue is the reasonable market value of the land immediately before and immediately after it is taken or damaged."

In the instant case there is no evidence to show that the land owned by the plaintiff outside of the city limits would, in the near future, be adapted as an addition to

the city of Hartington and divided into lots and blocks for the construction of dwellings thereon to be sold to the public.

The plaintiff and his brother purchased 16 and a fraction acres of land adjacent to the city limits from John Walz, for which they paid $10,500. The plaintiff had lived on this land for 12 years.

An exhibit in evidence shows this land, including a road, consists of 17.045 acres. The land taken by the city for park purposes and part of its golf course consisted of 2.195 acres, leaving the acreage remaining 14.85 acres.

The plaintiff also purchased four lots from James A. Walz for which he paid $2,500. These lots adjoin his premises on the east and are used in conjunction with his other property. All of his land is in one tract. His property adjoins a city street on the north, and there is a street on the south side of his property which is the main traveled street. The evidence shows there would be little interference, if any, with the right of ingress or egress to and from the plaintiff's property.

The plaintiff testified that in his opinion the land would be worth $2,500; and that by the taking, the rest of the land would be restricted and would be harder to sell.

The plaintiff and his brother improved the buildings on the premises in the amount of nearly $3,000. These buildings are apparently in the southeast part of the plaintiff's premises.

Lots 3, 4, 5, and 6, in Block 21, Felber Place Addition to the city, were acquired by the plaintiff in 1959, and are within the city limits. The plaintiff keeps some chickens, 5 sows, and a male hog on the acreage outside of the city limits, and the lots inside the city limits are used for pasture purposes.

The plaintiff made no attempt to justify his valuation of $2,500 on the land taken, nor did he testify as to any damage which would result to the rest of the tract of

land by reason of the taking of the 2.195 acres by the city.

A tenant farms the plaintiff's land on a two-fifths share of the crops basis. This tenant testified that the plaintiff's land was worth $1,000 an acre; and that the remainder of the plaintiff's land would be affected by the taking, to the extent of $700 an acre. He made some measurements which show that the silo on the plaintiff's land is 77 feet from the west side of Center Street, and the barn is 16 feet farther. The silo is the nearest building to the plaintiff's east line, and the plaintiff would have the distance of 52 feet, after the taking, from the east line to his silo.

Ivo Strattman testified that he had been engaged in the real estate business since 1918; that he lived at Wynot, Nebraska, but most of his business was done in Cedar County; that he was familiar with the values of real estate in said county; and that he had looked over and examined the plaintiff's property and was familiar with the part of the plaintiff's land that was being taken by the city. His opinion was that the plaintiff's land was worth $1,000 an acre, $16,000 for 16 acres which included the buildings; that after the taking there would be a smaller tract and the value would not be there; and that there would be a difference of at least $3,000, and maybe more. On cross-examination this witness testified that by the taking of the plaintiff's land for park or golf course purposes, the park would then come right up against the plaintiff's buildings. He further testified that if a man wanted to keep his land, he should set his own price. On redirect examination this witness testified that the fact that the plaintiff's land adjoined the city limits, and the fact that the land was in one tract, were factors that would make a difference in figuring the value of land near a city the size of Hartington as distinguished from that of a small town.

A real estate broker who resided in Coleridge, Nebraska, testified that she had been in the real estate

business since 1920, and had engaged in real estate transactions in Cedar County, however the evidence shows that this witness helped in only one such transaction in 1958. She testified that she examined the plaintiff's premises in June 1960. (It might be added that that is the date from which the fair market value of the plaintiff's land was to be considered in these condemnation proceedings.) This witness' opinion was that the premises would be worth $1,000 an acre; that the depreciation to the remainder of the land not taken by the city would amount to $200 an acre; and that the fair market value of the property to be taken would be $3,000.

David Ewing testified in behalf of the defendant city that he was born and raised in Hartington and conducted a business known as the Midwest Land Company whose business consisted of selling farm real estate and the appraisal of farm real estate; that he had done considerable appraisal work of farm real estate in the past 3 or 4 years by appraising land for individuals, governmental bodies, bank service and estates, and attorneys; that he had handled real estate transactions in Cedar County within the past year or two, and had an office in Hartington; that 80 to 90 percent of his time was spent in appraisal work and 10 to 20 percent on sales on his own time; that he was familiar with the plaintiff's property and was so on June 23, 1960; and that there was no change in the market value of the plaintiff's land up to the time of the hearing. He viewed the plaintiff's premises either on Friday or Saturday of the week preceding the hearing. He gave as his opinion that the plaintiff's land was worth $9,800 on the market; that the land to be taken by condemnation proceedings would be of the fair market value of $250 an acre; and that the severance damage to the remaining land of the plaintiff would be $50 to the entire tract. He based his opinion on his knowledge of the community and sales of comparable kind that he could find in

the area. This witness also testified that according to the Census Bureau statistics there was a decline in population in all towns in northeastern Nebraska.

Vernon Nelson, a resident of Hartington since 1948, testified that he was the manager of the Federal Land Bank Association, and in that capacity he had occasion to appraise real estate in Cedar County and was familiar with the general land values in said county. He further testified that he had viewed the plaintiff's premises and was familiar with the same on June 22, 1960; and that he viewed the premises in the fall of 1960. He gave as his opinion that the market value of the plaintiff's entire tract of land would be $250 an acre. He based his opinion on the basis of comparisons in sale price of comparable tracts in Cedar County which he had appraised. He testified that the entire tract of the plaintiff's land was used for agricultural purposes. On cross-examination he testified that he made appraisals of land in Cedar County as to agricultural value, and for that purpose only; and that the property sought to be taken from the plaintiff in the condemnation proceedings would be very limited for agricultural purposes.

The jury was permitted to view the premises.

It is apparent from the record that the qualifications of the expert witnesses and the testimony adduced in behalf of the plaintiff as to the fair and reasonable market value of the plaintiff's land and that part of which is taken by the condemnation proceedings was wholly lacking in placing values relating to the fair market value of the plaintiff's land for the purpose for which it is used.

As stated in Twenty Club v. State, *supra:* "Where a verdict of a jury is clearly against the weight and reasonableness of the evidence it will be set aside and a new trial granted." See, also, Bentley v. Hoagland, 94 Neb. 442, 143 N. W. 465; Stewart v. City of Lincoln, 114 Neb. 362, 207 N. W. 511; Heiden v. Loup River Public Power Dist., 139 Neb. 754, 298 N. W. 736; Moyer v.

Nebraska E. G. & T. Coop., 171 Neb. 879, 108 N. W. 2d 89.

From an examination of the testimony of the witnesses and an examination as to their qualifications to give testimony, the evidence adduced by the plaintiff discloses that the verdict of the jury is clearly against the weight and reasonableness of the evidence. The judgment rendered by the trial court on the verdict of the jury awarded the plaintiff an excessive amount as to damages for the land taken. The judgment of the trial court is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED FOR NEW TRIAL.

SIMMONS, C. J., participating on briefs.

PRENTICE MILLER, PLAINTIFF IN ERROR, V. STATE OF NEBRASKA, DEFENDANT IN ERROR.

113 N. W. 2d 118

Filed February 2, 1962. No. 35094.

1. **Criminal Law.** A common purpose among two or more persons to commit a crime need not be shown by positive evidence but may be inferred from the circumstances surrounding the act and from defendant's conduct subsequent thereto.
2. ———. Participation in criminal intent may be inferred from presence, companionship, and conduct before and after the offense is committed.
3. **Criminal Law: Trial.** Where the trial court has instructed generally as to the issues of a criminal prosecution, error cannot be predicated on its failure to instruct as to a particular phase of the case, where no proper instruction has been requested by the party complaining.
4. ———: ———. In the absence of a request, the trial court is not required to give a cautionary instruction.
5. ———: ———. The correctness of the ruling of a district court in giving or refusing instructions cannot be considered here unless such ruling is first challenged in the district court by motion for a new trial.

ERROR to the district court for Douglas County: PATRICK W. LYNCH, JUDGE. *Affirmed.*

Young & Denenberg, for plaintiff in error.

Clarence A. H. Meyer, Attorney General, and *Bernard L. Packett,* for defendant in error.

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

BOSLAUGH, J.

The plaintiff in error, who will be referred to as the defendant, was convicted of robbery under section 28-414, R. R. S. 1943. The defendant's motion for new trial was overruled and he was sentenced to 3 years in the penitentiary.

The assignments of error are that the evidence is not sufficient to sustain the conviction and that the court erred in failing to give certain instructions.

There is evidence from which the jury could find the following facts: On Saturday evening, February 4, 1961, the defendant attended a dance at a youth club in Omaha, Nebraska. After midnight the defendant drove to South Omaha with Leonard Barton and Henry A. Williams. The defendant was driving a 1954 Oldsmobile automobile owned by his nephew, James Walker. At about 1:15 a. m., as they drove south on Twenty-fifth Street approaching the intersection at N Street, they saw an intoxicated man leaning up against a building. Williams said to stop the car and told Barton to come with him. The defendant stopped the car about 20 feet away from where the man was, and Williams and Barton got out. The defendant then turned the car around and parked on Twenty-fifth Street facing north.

The man who was leaning against the building asked Williams and Barton to help him. Williams and Barton helped the man to a parking lot on the corner where they went through his pockets, took his money, and knocked him down. The robbery took place across the

street from where the defendant was and he could see what Williams and Barton were doing. Barton ran back to the automobile where the defendant was, holding the money in his hand, and said to the defendant, "I got the money," gave some of the money to the defendant, and asked the defendant to take him home. Williams dropped some of the money he had taken from the man on the sidewalk and while he was picking it up the police arrived. Williams ran into a dead end between two buildings and was captured.

When the police arrived at the scene of the robbery, the defendant and Barton drove away. They drove around the block several times looking for Williams and then drove north on Twenty-fourth Street. At Leavenworth Street the defendant's automobile was sighted by a police car. At St. Marys Street another police car sighted the defendant's automobile. The police cars had their red lights and spotlights turned on and one car had a siren which was turned on. As the defendant entered the intersection at St. Marys Street, a policeman opened one of the car doors and ordered the defendant and Barton to stop. When they failed to stop, the policeman started shooting at them. North of St. Marys Street, the defendant's car was curbed and it stopped when it hit a building. The defendant and Barton tried to get away but they were handcuffed and taken to the police station. At the police station the defendant gave the name of James Walker and was booked that way.

The theory of the State is that the defendant aided and abetted Barton and Williams in committing the robbery and is guilty as a principal. The evidence established that Barton and Williams committed a robbery. There was evidence that the victim of the robbery was seen trying to get away from two men, one of whom was trying to hold his arm; that one man held him while the other went through his pockets and then knocked him down in the snow; and that he was

frightened. This evidence was sufficient to prove force and violence or putting in fear, and to establish the crime as robbery and not larceny from the person.

The question remaining is whether the evidence was sufficient to show that the defendant participated in the crime. The defendant's theory of the case is that he was an innocent bystander and did not know that Barton and Williams intended to commit a robbery.

A common purpose among two or more persons to commit a crime need not be shown by positive evidence but may be inferred from the circumstances surrounding the act and from the defendant's conduct subsequent thereto. Salyers v. State, 159 Neb. 235, 66 N. W. 2d 576. Participation in criminal intent may be inferred from presence, companionship, and conduct before and after the offense is committed. Callies v. State, 157 Neb. 640, 61 N. W. 2d 370.

In Clernt v. State, 109 Neb. 628, 192 N. W. 209, the defendant was found guilty of bank robbery upon evidence that he waited in a car while his companions robbed a bank and then drove the automobile in the attempt to escape from the scene of the crime. In affirming the conviction this court said: "In the instant case, defendant was likewise watching and waiting, evidently in agreement with his companions to assist in the commission of the crime charged in the information. This brought him within the rule and made him a principal equally as responsible as if his was the hand that aimed the revolver at the employee of the bank, or snatched the money from the till." See, also, Gardiner v. State, 110 Neb. 11, 192 N. W. 946; Williams v. State, 91 Neb. 605, 136 N. W. 1011; Dixon v. State, 46 Neb. 298, 64 N. W. 961.

The evidence in this case was sufficient to permit the jury to find that the defendant aided and abetted Barton and Williams in committing the robbery.

The defendant's other assignments of error relate to the failure of the trial court to give certain instructions.

The defendant does not contend that any of the instructions which were given were erroneous. The defendant complains that the trial court should have instructed as to circumstantial evidence, the testimony of an accomplice, corroboration, and larceny from the person.

Where the trial court has instructed generally as to the issues of a criminal prosecution, error cannot be predicated on its failure to instruct as to a particular phase of the case, where no proper instruction has been requested by the party complaining. Smith v. State, 169 Neb. 199, 99 N. W. 2d 8. In the absence of a request, the trial court is not required to give a cautionary instruction. Fisher v. State, 154 Neb. 166, 47 N. W. 2d 349.

The transcript shows that the defendant requested no instructions and that the motion for new trial did not allege error in the failure of the trial court to instruct upon any of the matters now complained of by the defendant. The correctness of the ruling of a district court in giving or refusing instructions cannot be considered here unless such ruling is first challenged in the district court by motion for a new trial. Schreiner v. State, 155 Neb. 894, 54 N. W. 2d 224.

The judgment of the district court is correct and it is affirmed.

AFFIRMED.

SIMMONS, C. J., participating on briefs.

JUDITH ANN MARASCO, APPELLEE, V. ROBERT W. FITZPATRICK, DOING BUSINESS AS FITZPATRICK ELECTRIC COMPANY, APPELLANT.

113 N. W. 2d 112

Filed February 2, 1962. No. 35134.

1. **Death.** The burden of proof is on one asserting death due to other than natural causes to establish such fact by a preponderance of the evidence.
2. **Workmen's Compensation.** In order that plaintiff recover under

the workmen's compensation law for accidental death of an employee, the burden of proof is upon plaintiff to show with reasonable certainty that the death was proximately caused by the alleged injury. It cannot be left to surmise or conjecture, or based upon possibilities or probabilities, but must be established in a legal way and not by guess or speculation.

3. **Witnesses: Evidence.** Hypothetical questions propounded to an expert, if so framed as to fairly and reasonably reflect the facts proved by any of the witnesses in the case, will be sufficient, provided the subject is one proper for expert testimony.

APPEAL from the district court for Douglas County: JOHN E. MURPHY, JUDGE. *Reversed and dismissed.*

Gaines, Spittler, Neely, Otis & Moore, for appellant.

Floersch & Floersch, for appellee.

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

SPENCER, J.

This is an appeal from an award in a workmen's compensation case. The principal question presented is whether the evidence in the record supports the finding of the district court that the death of plaintiff's decedent was caused by an electric shock or current accidentally received by said decedent in the course of his employment.

The facts are not in dispute. The only witnesses were those called by the plaintiff. There is, however, substantial disagreement as to the conclusions and inferences to be drawn from the facts. On appeal to this court in a workmen's compensation case, we consider the cause de novo upon the record before us. Knaggs v. City of Lexington, 171 Neb. 135, 105 N. W. 2d 727.

The plaintiff's decedent, John A. Marasco, Jr., is hereinafter referred to as decedent. He was a licensed electrician, 20 years of age, 6 feet tall, and weighed about 165 pounds. At the time of his death he was an employee of the defendant. On the morning of July 13, 1959, decedent and a helper, one Walter Washka, here-

inafter referred to as Washka, were installing a new electrical service and rewiring the basement at 2723 South Twenty-sixth Street in Omaha, Nebraska. At that time, the electricity, which was a 110-volt, 30-ampere service, was turned on in the house. Washka was working in the attic and decedent in the basement. Washka had been using a Thor electric drill which was in good operating condition. Decedent came to the attic for the drill, and apparently used it to drill three holes in the east concrete basement wall, near the northeast corner. Washka testified that the holes were not there when he took the drill to the attic, but were there when he found the body of decedent some 20 or more minutes after the decedent had obtained the drill from him.

Washka found the body of the decedent in the northeast corner of the basement. He was flat on his back, with his head to the north, approximately under the three holes in the northeast corner, and his feet were to the south. The upper part of his body was in a 2 or 3 foot space between the east wall and a table or work bench which was against the north wall and was loaded with miscellaneous tools and litter. His nose was bleeding, and Washka believed him to be unconscious. He was pronounced dead on arrival at the hospital to which he was taken by the rescue squad. There were blood spots on decedent's arm and nose, and blood on the floor under his head. There were also blood spots on the electric drill. Otherwise, there was no evidence of any cut, bruise, burn, or other indication of physical injury or damage of any kind.

At the time the body was found, the drill was lying on the floor 3 or more feet west of the legs, and south of the table, and was connected to an extension cord which was west of the drill. The drill had a ¾ inch bit attached, and, with the bit, was 22 inches long. The cord of the drill was 7½ feet long. The length of the extension cord to which the cord of the drill was attached is not shown, but from a photograph in evidence,

would be more than three times longer than the drill cord. The cord was disconnected from the electric socket which would be used for drilling. This socket was on a short drop cord 7½ to 8 feet southwest of the three holes previously referred to, and slightly above the level of the holes. Both the cord and the extension cord when found were "laid normally, all of it normally coiled up" on the floor.

After the body was removed, Washka put the drill in the work truck. He testified the truck was kept locked and that the drill was not touched from that time until he later gave it to a police officer. The police officer testified that later the same day he went to the defendant's place of business and picked up the drill from Washka. As he recalled it, the drill was in the back end of the service truck, which was open at that time. He then had the drill tested, and it was found to be inoperative because a brush plug assembly was missing. This assembly is a small threaded plug, called a plug adapter, screwed into an aperture at the back of the drill. It holds a spring attached to a piece of carbon which presses against the armature of the drill. This plug adapter is three-eighths of an inch high, and three-eighths of an inch across at the top. The top is covered by bakelite to the thickness of one-eighth of an inch. When this brush plug assembly is removed, the drill will not operate. The police searched the basement, the yard, and the truck, but did not find any part of the brush plug assembly. It is not known when or where or how it was lost or removed, but the fact that the evidence indicated the drill had been used to drill the three holes tended to establish that the plug was in place and the drill operative after the decedent took it to the basement.

Washka testified that the decedent was subject to nosebleeds, and he had them if he got up in a hot attic. He estimated the temperature that morning to be between 80 and 85 degrees. He also testified that when

the decedent came up to the attic for the drill, he said that he felt hot.

An autopsy was performed, and the pathologist testified that there were no anatomical findings which satisfactorily accounted for the death. He testified there were no burns any place on the body, but that burns are not always found in electrocution cases, and that outside of burns where 110 volts of electricity are involved, there are no characteristic signs for electrocution. The pathologist found the blood that was present came from a nosebleed, but did not know why the decedent had a nosebleed. The decedent had a deviated nasal septum, and people who have that defect are prone to have nosebleeds. The pathologist could find no evidence that the decedent had fallen. He would expect to find some mark if decedent fell on the concrete floor. He further testified that it was impossible to say that the decedent was electrocuted from the autopsy. That as far as the autopsy was concerned, he didn't know why decedent died.

The pathologist was asked a lengthy hypothetical question, which, among other things, asked the doctor to assume: "* * * that the floor of the basement where he was working was damp, * * * that if the drill were connected and the trigger depressed in lock position so that the drill was energized with electricity, a person handling the drill could get an electric shock if he stuck a metal object such as a screwdriver into the recess where the brush and the spring were missing, or if he touched the plug adapter when the bakelite was broken from the top of the adapter when the drill was energized with electricity; that he would receive a shock if he attempted to remove the plug adapter and the brush while the drill was energized with electricity; that when Mr. Marasco was found the electric cord was not attached to the electric socket but it could come out easily; the drill and the cord were approximately three feet from him and approximately under the elec-

tric outlet which was a cord hanging from the ceiling; * * *."

The law is well settled that the burden of proof is on the one asserting death due to other than natural causes to establish such fact by a preponderance of the evidence. Aeschleman v. Haschenburger Co., 127 Neb. 207, 254 N. W. 899. This does not mean, in a workmen's compensation case, that accidental death must be established to a certainty. The requirement is that it be established to a reasonable certainty. Porter v. Brinn-Jensen Co., 131 Neb. 611, 269 N. W. 96.

We said in Omaha & C. B. St. Ry. Co. v. Johnson, 109 Neb. 526, 191 N. W. 691: "In order that plaintiff recover under the workmen's compensation law for accidental death of an employee, the burden of proof is upon her to show with reasonable certainty that the death was proximately caused by the alleged injury."

Reasonable certainty is not so fixed a criterion that facts and circumstances in other decisions will be particularly helpful in any given case. There is, it is true, a twilight zone where reasonable certainty may be indistinguishable from reasonable probability, but we can say definitely that mere probability or possibility can never bridge that gap.

In a case in some ways analogous to the present situation, Mullen v. City of Hastings, 125 Neb. 172, 249 N. W. 560, we held: "When an employee dies suddenly and mysteriously while engaged in his work, the burden of proof that his death was an accident arising out of his employment rests upon the claimant for compensation, and such proof must amount to something more than mere guess."

Referring to the portion of the hypothetical question set out above, the law is well settled that a hypothetical question may be propounded to an expert if it is so framed as to fairly and reasonably reflect the facts proved by any of the witnesses in the case, provided the subject is one proper for expert testimony. Wessel

v. City of Lincoln, 145 Neb. 357, 16 N. W. 2d 476. In the instant case, keeping in mind that the expert testified that from the autopsy he performed he could not state why decedent died, does the hypothetical question propounded meet that test?

Without attempting to show all of the gaps between the evidence and the assumptions in the hypothetical question, we will consider the following: Plaintiff attempted to prove the basement floor was damp by two witnesses. Sergeant Bruning's testimony on this point is as follows: "Q. What was the condition of the floor? A. I would say it was normal; I wouldn't say it was wet, it was a dry floor. Q. Just the normal damp basement floor? A. The normal concrete floor."

The testimony of Washka, the other witness who testified on this point, was as follows: "Q. Now would you tell us what the condition of the basement floor was on that day when you found him? A. Well, the floor was just as dry and normal as any other basement, sir. Q. It's like any other basement? A. Well, any basement is a little damp. The floor was dry. Q. It was dry, would you say? A. As far as I know, it was dry. Q. It was a little damp; is that correct? A. All basements are damp."

As to the position of the cord when Washka found the body, his testimony is as follows: "Q. Now this cord then and the drill would have been lying to the west, is that correct, of his body? A. Yes, sir. Q. And how far west would you say this cord and drill were from his body? A. Well, that is a hard question to answer, sir. I figure it was laying in between the middle of that table. That would be about three or four feet from his legs. Q. Three or four feet from his legs? A. Yes, sir. Q. And you say it would be about in the middle of the table as shown? A. Well, that is just a guess. I was excited, I couldn't tell you no real definite measurements on it, sir." As to its position from the light socket, Washka's testimony is: "Q. And then

when you come down underneath the light, you said that the drill was about three or four feet away from the point underneath the light; is that correct? A. Yes. Q. And then the cord was a couple, three or four feet beyond that? A. Yes, sir." This testimony is supported by some marks on an exhibit in evidence, which places the position of the drill 3 or 4 feet west of the light socket 7½ to 8 feet southwest of the point where the drill was used.

As to the condition of the cord on the floor, Washka's testimony is as follows: "Q. And do you recall, Mr. Washka, how the extension cord was, how high it was or what the condition of it was? A. Well, to the best of my knowledge, it was laid normally, all of it normally coiled up. Q. It was coiled up? A. Yes, sir. Q. And was the plug of the drill plugged into the extension cord? A. Yes, sir. Q. And do you recall, Mr. Washka, whether or not the plug of the extension cord was plugged into the light socket? A. Well, no, sir, it wasn't." His testimony then continued: "Q. Now this drill, this Thor drill that you were using on that day, and which is represented by the pictures on Exhibits 4 and 5, was that the one that you normally used? A. Yes, sir. Q. And that you and John Marasco used regularly and was part of your tools, was it? A. Yes, sir. Q. Assigned to you? A. Yes, sir. Q. And had you ever in the use of this drill received any shock of any kind, electrical shock? A. No, sir. Q. Had you ever in the course of the use of this drill have it come disconnected from the socket? * * * A. They will fall out of the socket, old-fashioned socket, yes, sir."

It is evident in the portion of the hypothetical question set out above that the plaintiff is suggesting possibilities to account for an electric shock. However, the plaintiff's expert testified that it would be unusual for the adapter plug to come out accidentally, or for the bakelite insulation to break off, or for an electrician to be as careless as suggested by the plaintiff's assump-

tion. The testimony of James McGrane is as follows: "Q. Now then, it is not an ordinary thing for the plug to come out accidentally, is it? This is unusual? A. In a drill it is unusual, yes. Q. In a drill it is unusual. It is also unusual for the insulation to break off, isn't it? By unusual I mean this doesn't happen very frequently? A. No, not too often. Q. Bakelite is a hard material, it is actually bonded on the metal, isn't it? A. Yes. Q. In order to remove this plug you would use a screwdriver, would you not? A. Yes. Q. Now, an electrician, a person who is acquainted with electricity, would not ordinarily or usually remove that plug while the drill was energized, would he? A. I wouldn't think so, no. Q. Not if he knew anything about electricity? A. No. Q. You certainly wouldn't ordinarily or usually plug the drill in, pull the trigger, and then either remove the plug or hold onto a piece of metal and push it down inside that hole, would you? * * * A. No, I wouldn't think so. Q. * * * As far as that is concerned, an electrician's screwdriver is ordinarily an insulated screwdriver; that is, the handle is insulated? A. The handle, yes. Q. So the handle would act as an insulator between whatever the tip of the screwdriver touched and the man's hand? A. True. Q. That is the function of the insulation? A. Right."

There is no evidence in this record that the decedent even had a screwdriver with him in the basement. The testimony of Washka is that his personal tools were outside.

The evidence in this record is conclusive that the drill, except for the plug adapter assembly, as testified, was in good order with no cracks or breaks in the casing or no current leakage. The plaintiff's theory in effect requires a finding, without a scintilla of evidence, that the drill was connected and that the decedent, an electrician, did one or more acts which no reasonably prudent electrician would do while a drill was energized. Possibly more fatal to the plaintiff's contention than

this, however, is the physical unlikelihood that the drill and cord dropped from the socket and fell in a normally coiled up position more than 3 feet west of the socket. The evidence is that there was no mark on the drill of any nature other than the blood spots. If it were possible for the drill to fall in the position in which it was found, it would be logical to suppose that some mark would show on the drill. As suggested above, the drill was actually found a minimum of 10½ to 11 feet southwest of the point where the holes were actually drilled.

If we were to speculate, it might be much more logical to assume from the blood spots on the drill and its position, that the decedent had a nosebleed while drilling, disconnected the cord from the socket, and placed it on the floor. The testimony is undisputed that he had complained to Washka that he was hot when he went to the attic. Washka's testimony is that he frequently had nosebleeds when he worked while it was too hot. The absence of any marks on his body and the position in which it was found could reasonably suggest that he stretched out on the floor in the northeast corner, either to stop the nosebleed, or because he may have felt weak or faint from the heat.

Under our workmen's compensation law, plaintiff had the burden of establishing by a preponderance of the evidence a right to compensation. It cannot be left to surmise or conjecture, or based upon possibilities or probabilities, but must be established in a legal way and not by guess or speculation. Rose v. City of Fairmont, 140 Neb. 550, 300 N. W. 574.

It is clearly evident that the instant case does not meet the test of proof by reasonable certainty, or even reasonable probability. The most favorable light in which the record can be viewed is that there is at the very best a mere possibility that the decedent was electrocuted.

For the reasons given above, we find that the record and reasonable inferences arising therefrom do not sus-

tain the position that the death of plaintiff's decedent was caused by an electric shock or current accidentally received by the decedent in the course of his employment, nor does it point thereto with any reasonable certainty. The judgment is therefore reversed and the claim dismissed.

REVERSED AND DISMISSED.

SIMMONS, C. J., participating on briefs.

HARVEY E. MARSH, INDIVIDUALLY AND AS EXECUTOR OF THE ESTATE OF ALFRED E. MARSH, DECEASED, APPELLANT, V. DORA MARSH ET AL., APPELLEES, IMPLEADED WITH CLARK LEROY MARSH ET AL., APPELLANTS.

113 N. W. 2d 323

Filed February 9, 1962. No. 35058.

1. **Declaratory Judgments.** The statute authorizing a declaratory judgment is applicable only where all interested persons are made parties to the proceeding.
2. ———. An action to secure a declaration of rights under the Uniform Declaratory Judgments Act is designed to terminate a controversy so far as it relates to the parties and facts giving rise thereto, and the courts should ordinarily dismiss such an action without prejudice when all parties whose claims gave rise to the controversy and whose rights would be adjudicated by the declaration sought, had they been parties to the action, have not been impleaded.
3. **Courts: Parties.** The courts will not entertain and render decrees which, for want of necessary parties, cannot fully adjudicate the questions presented.
4. **Courts.** The question of want of jurisdiction, in case a purported judgment is under attack, is one which the court may raise on its own motion.
5. **Parties.** In a case where new parties are made defendants for whom a guardian ad litem is required, appointment prior to service of summons is premature.
6. ———. It is the duty of a guardian ad litem of defendants in an action to deny all material allegations of the petition which are prejudicial to the defendants represented.
7. ———. It is the duty of a guardian ad litem to submit all relevant defenses or legal claims of the persons represented by him.

8. **Courts: Parties.** It is the duty of the courts to protect the neglected rights of parties represented by a guardian ad litem regardless of the conduct of the guardian.
9. **Judgments.** The courts have the right to decline to treat as res judicata a prior judgment in the case which was the consequence of consent and not the judgment of the court.

APPEAL from the district court for Cheyenne County: TED R. FEIDLER, JUDGE. *Reversed and remanded with directions.*

Beatty, Clarke, Murphy, Morgan, Pedersen & Piccolo, L. W. Balderson, and *Lowell C. Davis,* for appellants.

Clinton & McNish, for appellees.

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

YEAGER, J.

In this action, according to the transcript which has come to this court, Harvey E. Marsh, individually and as executor of the estate of Alfred E. Marsh, deceased, filed a petition for a declaratory judgment construing the last will and testament of the deceased. The deceased died February 5, 1959, and the petition was filed November 24, 1959. Harvey E. Marsh is a son of the deceased. Dora Marsh, widow, and Fern Marsh Olsen, daughter of the deceased, respectively, were made defendants. The petition declared the relationship of these parties to the deceased and declared that they were the sole legatees, devisees, and beneficiaries under the will, and the sole and only heirs at law.

Paragraph IV of the petition described the property of which the deceased died seized. Real estate consisted of one lot. The balance of the estate was personal property.

By the petition it was declared there was necessity for construction of the will, and particularly as to the meaning of paragraph I of the will and a codicil dated December 3, 1958. This is a second codicil.

Paragraph I of the will is as follows: "I direct that all my debts and funeral expenses be paid first."

Paragraph V of the will is as follows: "It is my express wish and desire that the money and securities of which I may die possessed shall be invested in real property or securities, at a reasonable rate of interest, and the income therefrom be paid semi-annually to my wife, said Dora Marsh, during her natural life time, the capital investment to be kept intact and to be a Trust Fund with the income therefrom for the benefit and use of my wife, said Dora Marsh, and such investment to be made by the executor of this, my Last Will and Testament, After my estate has been fully probated and closed, and the executor discharged, it is my express wish that then the Judge of the District Court of this (Cheyenne) county appoint a capable and trustworthy trustee to take over, manage and care for said Trust Fund under such proper rules and regulations as he, the Judge of the District Court, may designate."

The portion of the second codicil which contains the declaration of its purpose is the following: "To clarify and make specific the purpose and intent of paragraph V. of my Last Will and Testament executed by me on the 15th day of November, 1948, and the Codicil thereto executed by me on the 23rd day of February, 1949, I give and bequeath to my son, Harvey E. Marsh, all of the personal property of which I may die the owner IN TRUST for the use and benefit of my wife, Dora Marsh, during her lifetime. Said Trustee is hereby empowered to invest, sell or otherwise dispose of said Trust Estate for the purposes herein stated without the necessity of Court approval, and under such circumstances as to him shall seem best calculated. Said Trustee shall have full power and authority to use and expend said Trust Estate in his sole discretion for the purpose of providing amply for my wife, Dora Marsh. It is my intention that the powers herein granted to Harvey E. Marsh shall be exercised by him first as Executor of this, my Last Will and Testament, and then as Trustee after the probate of my estate."

The will by its terms devised to the widow a life estate in the real estate, and also the personal estate, except a few items, with remainder in both to Harvey E. Marsh in case he survived the widow and if he did not to his living children. Harvey E. Marsh had two minor children whose names and ages on March 3, 1961, were respectively Clark LeRoy Marsh, 18, and Douglas Harvey Marsh, 16. Neither these nor any contingent remaindermen were made parties to the action. The portion of the personal estate which was composed of money and securities was placed in trust for the widow's life with Harvey under conditions described in the will. The only condition which will be mentioned here is that money received from this source or this part of the trust should be invested in real property or securities.

By the first codicil, which was made on February 23, 1949, the deceased empowered the named executor, in case of illness, financial distress, or difficulty of the widow to provide for her out of the trust fund or other real or personal property. There was no change in this codicil as to classification of property for the purpose of distribution.

By the second codicil all of the personal property was made a part of the trust instead of the money and securities alone. The unexpended balance of this, on the death of the widow, was bequeathed to Harvey E. Marsh. It is therein declared that the codicil was to make specific the purpose and intent of paragraph V of the will.

What has been said here as to these instruments shall not be construed as an interpretation and adjudication upon any issue but only as a reflection to the extent stated of the petition.

Insofar as the record here is concerned process was not issued for anyone except Dora Marsh, the widow. She filed an answer. Its contents do not appear of consequence here. There are no other pleadings to or concerning the petition.

A journal entry, the apparent purpose of which was to adjudicate finally the matter which had been presented by these pleadings, was entered on March 15, 1960. This entry contains the following: "The matter then proceeds to trial, evidence is submitted, and in consideration thereof the Court does find: * * *." It is not deemed necessary for the purposes of this opinion to set forth here any of the findings.

The final paragraph of the entry is the following: "The Court does further find that in consideration of the agreement of both parties to the entry of the decree above specified it has been stipulated in open court that no appeal will be taken by either party from said decree."

There is nothing in the record except the journal entry the effect of which is to say that there was or was not a trial.

This pretended determination is however not the one which is the basis of this appeal. What its status is may not be definitely ascertained from the record. There is a suggestion that there was a motion relating to it which was set for hearing, but what the motion was or what disposition was made of it has not been disclosed. There is a questionable inference that the motion was to set aside the journal entry.

The journal entry which is the basis of this appeal is one dated March 22, 1961, based on an amended petition dated February 9, 1961, with an amendment thereto dated March 16, 1961. By the amended petition Clark LeRoy Marsh and Douglas Harvey Marsh, apparently minors, together with unknown contingent remaindermen, were made additional parties defendant. Substantially the same relief was prayed as that prayed in the petition filed on November 24, 1959. In addition the court was requested to appoint a guardian ad litem for the two newly named defendants.

The record does not disclose that any process was issued for or served upon the named new defendants.

This is also true as to the amendment which was filed March 16, 1961.

A guardian ad litem was appointed on March 3, 1961. On March 8, 1961, the guardian ad litem filed an answer on behalf of the two named new defendants and the unknown contingent remaindermen. The answer was in substance a general denial based on a declaration that he was without knowledge of the truth of the allegations of the petition. He requested that the plaintiff should be put on strict proof. No other pleadings were filed.

The next step disclosed by the record is the rendition of the adjudication which was made on March 22, 1961. The journal entry recites that the matter came on for hearing with all parties represented and "The matter then proceeds to trial, evidence is submitted, and in consideration thereof the Court does find: * * *."

The final paragraph of the journal entry is as follows: "The court does further find that in consideration of the agreement of both parties to the entry of the decree above specified it is stipulated that no appeal will be taken from either party from said decree."

The determination made on the basic issues pleaded was not materially different than the one made by the journal entry of March 15, 1960.

The record discloses that in truth there was no evidence taken and there is no record of agreement for rendition of judgment without trial or of stipulation not to appeal.

As to the matter of whether or not evidence was taken, notice of appeal was filed on April 20, 1961, on behalf of the plaintiff and of the two named new defendants, and on the same day they ordered a bill of exceptions. The bill returned by the official court reporter, to the extent of consequence here, contained the following: "The complete Bill of Exceptions is as follows: VOLUME I, Testimony and Exhibits, NONE."

From recitals made in a hearing at chambers in Kimball, Nebraska, on what appears to have been an appli-

cation of the appellee herein to amend the bill of exceptions, it becomes clear from statements which the judge who rendered the purported judgment of March 15, 1960, was allowed to make in response to questions relating to what occurred on March 15, 1960, that on that date there was no trial. The purported amendment was allowed, but there is nothing therein which had any bearing on any issue pertaining to what took place on March 22, 1961.

The appeal was taken jointly by the plaintiff in his two capacities and the two named new defendants who are designated as minor defendants.

The brief of appellants contains 16 separate assignments of error as grounds for reversal, but from a review of the record it appears that there are matters which require consideration by this court on its own motion, which have significance in the area of jurisdiction and the integrity of legal processes.

As pointed out this is a declaratory judgment action. As to such an action section 25-21,159, R. R. S. 1943, contains the following: "When declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceeding."

In Wood Realty Co. v. Wood, 132 Neb. 817, 273 N. W. 493, this court said: "It is well-settled law that the statute authorizing a declaratory judgment is applicable only where all interested persons are made parties to the proceeding." See, also, Redick v. Peony Park, 151 Neb. 442, 37 N. W. 2d 801; Haynes v. Anderson, 163 Neb. 50, 77 N. W. 2d 674.

In Stahl v. Allchin, 155 Neb. 412, 52 N. W. 2d 251, it was said: "An action to secure a declaration of rights under the Uniform Declaratory Judgments Act is designed to terminate a controversy so far as it relates to the parties and facts giving rise thereto, and courts should, under most circumstances, dismiss such an ac-

tion without prejudice, whenever all parties, whose claims gave rise to the controversy and whose rights upon such claims would be adjudicated by the declaration sought, had they been a party to the action, have not been impleaded."

In Redick v. Peony Park, *supra,* the court quoted with approval the following from Holland v. Flinn, 239 Ala. 390, 195 So. 265: "'No matter what may be the wishes of the parties in court the courts will not entertain and render decrees, which, for want of necessary parties cannot adjudicate the questions presented. This rule has been declared by many courts in cases under the Declaratory Judgment Law.'" This pronouncement was made in an instance where remaindermen were not named parties. The Supreme Court raised the question on its own motion and held that the question was one of jurisdiction.

It becomes clear therefore that the purported judgment of March 15, 1960, was subject to attack on account of want of jurisdiction, which was a question which could be properly raised by the court on its own motion. In view of the filing of the amended petition and the amendment thereto it is inferable that the parties recognized this lack of jurisdiction.

Now with reference to the amendatory pleadings naming new parties defendant it was proper to appoint for them a guardian ad litem. The appointment however could not be made until after the service of summons in the action. See § 25-309, R. R. S. 1943. By the terms of this statutory provision and by the following statement appearing in In re Estate of Bayer, 116 Neb. 670, 218 N. W. 746, compliance in the present action was necessary: "Section 8533, Comp. St. 1922 (§ 25-309, R. R. S. 1943), relied upon by appellants, would seem to have no application to this case, because its terms are limited to the requirement that the defense of an infant must be by a guardian ad litem."

Assuming the proper appointment of a guardian ad

litem it is his duty to deny by answer all material allegations of the petition prejudicial to the defendant represented. See § 25-819, R. R. S. 1943. This was done by the guardian ad litem in this case.

Another duty of importance however was not performed by the guardian ad litem. It was his duty to submit all relevant defenses or legal claims the persons represented by him might have had, and if he failed to do so it was the duty of the court to protect the rights neglected, regardless of the conduct of the guardian. In re Estate of Manning, 85 Neb. 60, 122 N. W. 711.

This was not done, but on the contrary, if the inferences of the journal entry are to be accepted, the guardian ad litem consented to the entry of judgment without trial and further agreed to take no appeal.

By her brief the appellee Dora Marsh urges that the pretended adjudication of March 15, 1960, protects the pretended adjudication of March 22, 1961, from attack on the ground that it is res judicata. The position is under the holdings of this court untenable.

In Warren v. County of Stanton, 145 Neb. 220, 15 N. W. 2d 757, this court considered the question of whether or not a judgment agreed to by parties acting in a representative capacity and which was rendered without trial must be accepted as res judicata in a subsequent action, and arrived at a definite conclusion. The representatives there were public officials whereas here they are an executor and a guardian ad litem. It becomes difficult to see that any different rule should apply. Authorities from other jurisdictions are considered in the opinion. In that opinion the following was quoted with approval from Lawrence Mfg. Co. v. Janesville Cotton Mills, 138 U. S. 552, 11 S. Ct. 402, 34 L. Ed. 1005: " 'The prior decree was the consequence of the consent and not of the judgment of the court, and this being so, the court had the right to decline to treat it as res adjudicata; * * *.' "

In the light of this it must be said that the contention

of the appellee Dora Marsh that the pretended adjudication of March 15, 1960, was res judicata may not be sustained.

It is perceptible from what has been said that the proceedings in this case from the beginning to the final judgment departed from the properly declared and defined legal processes applicable in the presentation of matters such as are presented for determination in this case. The departures are of such significance and of such possible consequence that, although they are not presented by assignment of error, they should not be ignored or overlooked on review by this court, unless there exists no legal power to review.

Under the authorities cited this court does have this power, which power it may exercise on its own motion. The fact that the appellants who have presented the case to this court apparently were parties who agreed to the judgment or judgments will not be allowed to prevent this court from exercising its power to reject the processes which have been described, and adjudicate accordingly herein.

The conclusion reached is that the proceedings herein should be rendered for naught. In this connection it is stated that while this decision does not depend upon the merits of the issues presented by the pleadings, examination of the record including the pretended judgments does not present any indication or inference that such action would deprive anyone of any substantial legal or equitable right under the will and its codicils no matter what a proper construction thereof might be.

The judgment or judgments of the district court are reversed and the cause remanded with directions to dismiss the entire action. This dismissal however shall be without prejudice to the commencement and proper prosecution of an action to construe the will and its codicils.

REVERSED AND REMANDED WITH DIRECTIONS.

EUNICE SAFAR, APPELLEE, V. ALBIN SAFAR, APPELLANT.
113 N. W. 2d 206

Filed February 9, 1962. No. 35068.

1. **Divorce.** In determining the question of alimony or division of property as between the parties the court will consider the respective ages of the parties to the marriage; their earning ability; the duration of the marriage; the conduct of each party during the marriage; their station in life, including the social standing, comforts, and luxuries of life which the wife would probably have enjoyed; the circumstances and necessities of each; their health and physical condition; and their financial circumstances as shown by the property they owned at the time of divorce, its value at that time, its income-producing capacity, if any, whether accumulated or acquired before or after the marriage, the manner in which it was acquired, and the contributions each has made thereto. From these elements and all other relevant facts and circumstances, the court will determine the rights of the parties and make an award that is equitable and just.
2. ———. In making an award of alimony or division of property in an action for divorce the court may assign both real and personal property as the ends of justice may require.
3. ———. In the computation of values of property for the purposes of making an award of alimony or division of property interests, it is not proper to include money or property not shown to be in existence.

APPEAL from the district court for Douglas County: LAWRENCE C. KRELL, JUDGE. *Affirmed in part, and in part reversed and remanded with directions.*

Frost, Meyers & Farnham and *G. Merrill Kartman,* for appellant.

Margaret Fischer and *Robert H. Petersen,* for appellee.

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

YEAGER, J.

This is an action where Eunice Safar, plaintiff and appellee, instituted in the district court for Douglas County, Nebraska, an action for divorce against Albin Safar, defendant and appellant. A decree of divorce

was duly granted. In the decree the rights of the parties with regard to division of property in lieu of alimony for the plaintiff were adjudicated, as well as the obligation of the defendant to support and maintain a minor daughter of the parties. From an order overruling a motion for new trial which was filed and the judgment the defendant has appealed.

On the appeal the defendant does not challenge that part of the decree granting the divorce or the portion relating to the minor daughter. The only challenge is to the propriety of the division of property. There was no award of alimony as such. Instead there was decreed a division of property. The single complaint is that the decreed division was unfair. The single assignment of error is: "The Trial Court erred by computing the total assets subject to division, not only on the basis of real and personal property owned by the parties at the time of the hearing, but also on the basis of past income earned and spent by the parties prior to the decree."

There is no substantial dispute as to the amount of value of the personal and real property owned by the parties or of existing unpaid obligations at the time the judgment was rendered by the district court, or of the amount of income earned or received over the period in question.

The defendant contends that the theory of the court was to make a substantially equal division of property between the parties, but that in so doing values of non-existing properties or money were used which rendered the division unequal and unfair to the defendant. He does not contend that equal division was improper but that existing property alone should be considered in making the division.

He asserts however that for the purposes of equal division the court added to the value of the existing property the earned and rental income received by plaintiff and by the defendant for the 2 years prior to

the trial, none of which was shown to be in being.

It is clear that the purpose of the trial court was to effect an equal division of property between the parties. This is declared by an opinion of the court which was delivered before the judgment was rendered, as is apparent from a recital therein. It, however, was not made a matter of record until after rendition of the judgment.

There can be no doubt that the court did add earnings of the defendant in the amount of $11,000, earnings of the plaintiff in the amount of $5,824, rental income received by plaintiff in the amount of $1,100, and rental income received by the defendant in the amount of $2,200. There is no evidence the effect of which was to say that there was an existence of these amounts separate from other property which was assigned a value for the purpose of a property division.

With these items eliminated and a division based on the valuations fixed by the court, which valuations are not contested, the plaintiff would receive, instead of equal division, property of the value of $14,100, whereas the defendant would receive property of the value of $8,775.

The question arises of course as to whether or not the items of earnings should be eliminated in arriving at a division of the property of the parties in an action for divorce.

In an action for divorce the court has power to adjust the respective property interests, and to assign both real and personal property. See Mason v. Mason, 157 Neb. 279, 59 N. W. 2d 365. It may not however assign property interests which are nonexistent.

The plaintiff substantially contends that although the trial court by its opinion declared the basis for a judgment and rendered judgment which by computation conformed to the opinion, it did not necessarily base its judgment thereon, but that the judgment must be treated as one which was right, proper, and equitable

in the light of the whole record without reference to the opinion.

In legal and equitable contemplation the theory of this approach is sustained by the decisions of this court. There is no fixed standard, but all facts and circumstances surrounding each particular case are to be considered and adjudication made accordingly. The guiding principles as they have many times been stated have been set forth as follows in Waldbaum v. Waldbaum, 171 Neb. 625, 107 N. W. 2d 407: "In determining the question of alimony or division of property as between the parties the court will consider the respective ages of the parties to the marriage; their earning ability; the duration of the marriage; the conduct of each party during the marriage; their station in life, including the social standing, comforts, and luxuries of life which the wife would probably have enjoyed; the circumstances and necessities of each; their health and physical condition; and their financial circumstances as shown by the property they owned at the time of divorce, its value at that time, its income-producing capacity, if any, whether accumulated or acquired before or after the marriage, the manner in which it was acquired, and the contributions each has made thereto. From these elements and all other relevant facts and circumstances, the court will determine the rights of the parties and make an award that is equitable and just."

It is pointed out here that in the determination of what shall be awarded as alimony or division of property the court may assign both real and personal property as the ends of justice may require. See, Metschke v. Metschke, 146 Neb. 461, 20 N. W. 2d 238; Mason v. Mason, *supra;* § 42-321, R. R. S. 1943.

The grounds for divorce pleaded by the plaintiff may well be said to have been supported by a bare sufficiency of evidence. As related to the question of division of property the record discloses that the parties were married in 1934; that three daughters were born of the

marriage and that they are of such ages and in such situations that the question of child support is not involved in this case; that the parties were divorced in 1951; that they were remarried in 1954; that in February 1959, this action for divorce was instituted; and that the decree herein was rendered in February 1961. After the separation both parties were gainfully employed and over that period, it reasonably appears, had sufficient individual incomes to be regarded as self-supporting. It further appears that each will be self-supporting in the future. Over the years certain property was accumulated including two separately described pieces of improved real estate in the city of Omaha, Nebraska. The contributions made by each do not definitely appear, but in the light of the evidence the inference is unavoidable that the accumulations flowed from the joint efforts of the parties.

In the light of the record there is nothing to indicate, under the legal and equitable principles to which reference is made herein, that there should be a division of property the effect of which would be to award to plaintiff an amount or value of property in excess of that awarded to the defendant.

This conclusion requires therefore that this court make an accounting and direct a division which will substantially accomplish an equal division.

From the computations made by the court and which are not disputed, after eliminating from consideration income from salaries and wages and rental income not shown at the time of trial to be in existence or in being, the value of property and money awarded to plaintiff was $14,100 and to the defendant $8,775. Real estate included in this, which was described as 1905 Park Avenue, of the value of $11,500 was awarded to plaintiff. Real estate of the value of $6,000, described as 1901 Park Avenue, was included in the award to the defendant. The difference in total values favorable to the plaintiff was $5,325. To equalize the division would

require a reduction of the amount of the award to plaintiff of $2,662.50 and an increase in a like amount of the award to the defendant.

This is subject however to a small mortgage indebtedness in the neighborhood of $400 against the two pieces of real estate and also some unpaid real estate taxes, the amount of which is uncertain but which amounted to $790.22 on December 19, 1960. The total of these obligations should be divided equally between the parties.

Equalization requires that a reduction from the amount awarded to the plaintiff must be made. To accomplish this it appears that it may be done most readily by adjustment in the award of real estate and its burdens.

It is observable that the plaintiff was awarded real estate of the value of $11,500 and the defendant real estate of the value of $6,000. Where title now resides has not been disclosed. Likewise the name or names of the mortgagors have not been authentically disclosed. There is parol testimony of an indefinite character relating to this matter but none upon which reliance may be placed. This indicates that the case requires ascertainment of information necessary to accomplish proper and effective division.

It appears therefore that that portion of the decree of the district court awarding to the plaintiff furniture in the amount of $1,500 and her savings in the amount of $1,100 should be sustained. It appears that the award to the defendant of his savings in the amount of $2,775 should be sustained. It appears that the award to the defendant of the named real estate of the value of $6,000 should be sustained. It appears also that the award to plaintiff of the named real estate of the value of $11,500 should be sustained subject to an obligation to pay to the defendant $2,662.50 reduced by one-half of the amount due on the mortgage and one-half of the

amount of the taxes due and delinquent on all of the real estate.

The defendant should by the decree of the court be granted a lien upon the real estate awarded to the plaintiff for the amount due him from the plaintiff, and for any amounts which he may be required to expend, if any, to protect his interests on account of unpaid taxes or on account of the mortgage on the real estate.

That part of the decree of the district court granting a divorce to the plaintiff is affirmed. Otherwise it is reversed and remanded with directions to proceed as indicated and to render judgment accordingly.

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

SIMMONS, C. J., participating on briefs.

WILLIAM A. NICHOL, SR., ET AL., APPELLANTS, V. ADA A. YOCUM ET AL., APPELLEES, ARTHUR PIEPER, INTERVENER-APPELLANT.

113 N. W. 2d 195

Filed February 9, 1962. No. 35096.

1. **Waters.** The common-law doctrine in regard to surface waters is as a general rule in force and controls in this state.
2. ———. Diffused surface waters, which ordinarily result from rainfall and melting snow and having no permanent source of supply or regular course, may be dammed, diverted, or otherwise repelled by an adjoining landowner without liability, if it is necessary and done without negligence.
3. ———. The common enemy doctrine as to surface waters is not of common-law origin and it is disapproved as a controlling rule of law in this state.
4. ———. When surface waters concentrate and gather in volume, so as to lose their character as diffused surface waters and flow into a natural depression, draw, swale, or other natural drainway, the flow may not be arrested or interfered with to the injury of neighboring proprietors.
5. ———. The owner of land is the owner of surface waters which fall, arise, or flow upon it, and he may retain them for

his own use without liability. He may also change their course on his own land by ditch or embankment, but he may not divert them upon the lands of others except in depressions, draws, swales, or other drainways through which such waters were wont to flow in a state of nature.

6. ———. While the flow of surface waters in a natural depression, draw, swale, or other natural drainway may be temporary and occasional, the course which they uniformly take is the controlling factor.

7. ———. The fact that there is no natural outlet from the servient estate does not relieve it from receiving such waters from the dominant estate.

APPEAL from the district court for Scotts Bluff County: TED R. FEIDLER, JUDGE. *Reversed and remanded with directions.*

Frank Glebe, for appellants.

Neighbors, Danielson & Van Steenberg, for appellees.

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

CARTER, J.

This is an action brought in the district court for Scotts Bluff County to obtain a mandatory injunction to compel defendants to remove an earthen embankment which is alleged to have obstructed the natural flow of surface waters and to permanently enjoin any interference with the natural flow of such waters. The trial court found for the defendants and plaintiffs and intervener have appealed.

The plaintiffs are the owners of the south half of the southeast quarter of Section 11, Township 22 North, Range 56 West of the 6th P. M., Scotts Bluff County, Nebraska. The intervener, Arthur Pieper, is the owner of the north half of the southeast quarter of said Section 11. The defendants, Ada A. Yocum, Arthur L. Yocum, and Maybelle Luxa, are the owners of the southwest quarter of said Section 11. The defendant A. C. Smith Company, Inc., is the contractor engaged in constructing the embankment at the time the suit was

brought. Defendant Reuben Herdt is an employee of A. C. Smith Company, Inc. We shall hereafter refer to the owners of the above-described lands as plaintiffs, intervener, and defendants, respectively.

The lands owned by plaintiffs and intervener join the land owned by the defendants on the east, there being a common boundary line between them. There is a railroad grade which crosses the northeast corner of plaintiffs' land and continues through intervener's land in a northwesterly direction. A concrete irrigation lateral enters the land of the intervener from that of the defendants at a point approximately 400 feet north of the southwest corner of intervener's land. This irrigation lateral follows a southeasterly course to intervener's south property line, thence east to the railroad grade. There is no flow of surface waters to the south from above this irrigation lateral.

The land of the plaintiffs slopes to the north and west. The lands to the south of those owned by plaintiffs and defendants slope to the north and generally to the west. Along the south line of defendants' land is a second irrigation lateral partly earthen and partly concrete, which conveys irrigation water to the south part of defendants' land. Because of this lateral, surface waters directly south cannot flow upon defendants' land except in times of heavy floods. Surface waters directly south of the defendants' land follow this irrigation lateral to the southeast corner of defendants' land, where they turn north onto the land of the plaintiffs.

The surface waters originating south of defendants' and plaintiffs' lands, as well as those originating on plaintiffs' land, flow to the north and thence to the west toward the northwest corner of plaintiffs' land.

The evidence shows that on the common boundary line between the lands of plaintiffs and the intervener and that of the defendants there is low ground for a distance of approximately 900 feet through which the aforesaid surface waters flowed upon the land of the defendants

prior to the construction of the embankment involved herein. The evidence also shows that defendants' land is lower than the land of the plaintiffs and the intervener. Prior to the construction of the embankment the waters flowed from plaintiffs' and intervener's land onto that of the defendants and ponded in a low area in the southwest quarter of defendants' land. This low area on defendants' land becomes covered with water to as much as 40 acres, depending upon the amount of rainfall and surface runoff. There is no outlet from this low area and water stands upon it until it evaporates or percolates into the soil. There is evidence that in most years crops have been damaged or lost because of this accumulation of water on defendants' land.

With this situation existing the defendants constructed an embankment across the 900 feet of low ground on the east boundary of their land across the area where surface waters were wont to flow in the state of nature from plaintiffs' and intervener's lands onto those of the defendants. On June 21, 1959, after a heavy rainfall, the embankment then existing caused water to be backed up and ponded on plaintiffs' land to the extent of approximately 19 acres and on that of interveners to the extent of 3½ acres. The evidence is clear that, if the embankment under construction is completed, plaintiffs' land in times of heavy rainfall will be covered to the extent of 35 acres or more to the damage of plaintiffs' land and crops growing thereon. It is not questioned that the land here involved is excellent irrigated land. Plaintiff William A. Nichol, Sr., estimated the value of his land at $500 per acre.

There is little conflict, if any, in the evidence heretofore recited. The defendant Arthur L. Yocum testified that he had two purposes in constructing the embankment. One purpose was to construct an irrigation lateral on the embankment across the low ground so that he could irrigate the south part of his land from his north lateral. This was clearly for convenience only,

since the south part of his land could all be irrigated from his south lateral. It was shown by the evidence of an engineer that proper construction could provide for the passage of the surface waters under the proposed irrigation lateral, but the defendant refused to agree to any such construction. There is evidence that plaintiff William A. Nichol, Sr., and intervener protested the construction of the embankment to the defendant Arthur L. Yocum, who replied: "I have taken this flood water for all of these years, and I'm going to let you take it now." The other purpose was admittedly to ward off these surface waters for the benefit of the land of these defendants. We think it is clear that the motivating purpose in constructing the embankment was to stem the flow of surface waters from the lands of plaintiffs and intervener to the land of the defendants for the benefit of the defendants.

The parties are in agreement on many aspects of the case. They are in agreement that the waters involved are surface waters derived from rainfall. Admittedly there is no watercourse, live stream or otherwise, as distinguished from mere surface drainage. It is agreed, also, that the waters in question flowed across the lands of plaintiffs and intervener onto defendants' land in the past and would continue to do so but for the embankment constructed by the defendants. It is further agreed that the embankment when constructed will hold these surface waters on the lands of plaintiffs and the intervener, and cause waters to pond thereon during and after floods caused by heavy rains. The dispute arises largely over the law applicable to surface waters as it relates to the conditions shown by the evidence about which there is little dispute. A review and rationalization of the authorities as they relate to surface waters and the rights and duties of landowners in respect thereto appears necessary.

It is the contention of the defendants that the waters involved are surface waters, that surface waters are a

common enemy, which implies that the owner of land may fight it as he will without liability therefor. That surface waters are a common enemy has been stated in several opinions of this court. See, Lincoln & B. H. R. R. Co. v. Sutherland, 44 Neb. 526, 62 N. W. 859; Snyder v. Platte Valley Public Power & Irr. Dist., 144 Neb. 308, 13 N. W. 2d 160, 160 A. L. R. 1154; County of Scotts Bluff v. Hartwig, 160 Neb. 823, 71 N. W. 2d 507; Turnell v. Mahlin, 171 Neb. 513, 106 N. W. 2d 693. This court has also held that the law as to surface waters is controlled by the common law, with certain modifications and exceptions. Jorgenson v. Stephens, 143 Neb. 528, 10 N. W. 2d 337; Muhleisen v. Krueger, 120 Neb. 380, 232 N. W. 735; Town v. Missouri P. Ry. Co., 50 Neb. 768, 70 N. W. 402. The implication is that the common enemy doctrine is a principle of the common law. We submit that it is not.

This court has defined surface waters as waters which appear upon the surface of the ground in a diffused state, with no permanent source of supply or regular course, which ordinarily result from rainfall or melting snow. Courter v. Maloley, 152 Neb. 476, 41 N. W. 2d 732. This appears to be the common-law definition of surface waters. At common law, and under the law of this state as well, a landowner may by embankment, or dike, or otherwise, defend himself against encroachment of such diffused surface waters and will not be liable in damages which may result from its deflection or repulsion. This statement of the law has been modified by this court to the extent that such owner, in defending against such diffused surface waters, must do so without negligently or unnecessarily injuring another.

But under the common-law rule, when diffused surface waters gather in volume in velocity and flow into a natural depression, draw, gulch, or drainway, the right to drain along natural courses was regarded as sound doctrine. They partake of the nature of rivulets and small streams to which riparian rights do not attach.

In other words, the common law recognized that lower lands are under a natural servitude to receive the surface water of higher lands flowing along accustomed and natural drainways. Such waters are not, therefore, subject to the rule that they may be dammed, repelled, or diverted without liability as in the case of diffused surface waters. More important to the present case is the invalidity of the assertion that all surface waters are a common enemy, and also the implication that they may be defended against by the landowner as he will without liability.

The history of the asserted common enemy doctrine is stated in 3 Farnham, Waters and Water Rights, § 889b, p. 2589, as follows: "As will be seen in the succeeding section, a rule has been stated as the antithesis of the civil-law rule that surface water is a common enemy which may be fought at pleasure. And, because it was the antithesis of the civil-law rule, some courts, without investigation, have announced that it was the common-law rule. And, under the influence of this doctrine, broad statements are to be found, such as that contained in Jordan v. Benwood (42 W. Va. 312, 26 S. E. 266, 36 L. R. A. 519, 57 Am. S. R. 859), as follows: Under the common-law rule as to surface water, each owner may fight surface water as he chooses, and he may use it all, divert it away from the lower land, may prevent its invasion of his land and thus dam it up on his neighbor's land, or he may, in the use of his land, cause it to flow differently upon his neighbor's land from what it did before. That statement is a very good illustration of the peril of adopting general statements as rules of decision. As has been seen from the preceding sections, there is no general right to fight surface water as a common enemy. All rightful acts with regard to it are confined within very narrow limits which have not yet been fully defined. And to state generally that such water is a common enemy, or that there is a right to fight it at common law, cannot be otherwise than misleading."

In section 889d, p. 2599, of the same text it is said: "The question of the right to obstruct a natural drainage channel has been needlessly complicated with the further question whether or not a water course existed. The rules with respect to water courses form a distinct class by themselves, and were formulated to conserve the interests of the riparian owners. On the other hand, the question of drainage involves, not only the welfare of the individual landowner, but also that of the community in so far as its healthfulness and prosperity depend upon relieving land of stagnant water and improving its productiveness. Before man owned any parcel of land nature had impressed upon it certain characteristics. So far as these can be changed without interfering with the use or enjoyment of neighboring property, they may be changed at will. But, so far as one parcel has been subjected by nature to a servitude in favor of an adjoining parcel, the enjoyment of which will be materially injured by destroying the servitude, it would seem that the rule by which a purchaser of property is bound by its condition when he acquires title would prevent the destruction of such servitude. In order to be within the operation of this rule, the servitude must be clearly and permanently impressed upon the property so as to be plainly visible to the intending purchaser. Under this rule, the great weight of authority is in favor of the proposition that a lower proprietor cannot place any obstruction in an obvious drainage channel which has been formed by nature and carries the water from a higher to a lower estate."

What is known as the common enemy doctrine originated in Massachusetts and is no part of the common-law rule. It has been adopted in some other states, generally with exceptions and modifications. While it is sometimes referred to in our cases as the common-law rule, it actually has no relation thereto. 56 Am. Jur., Waters, § 69, p. 552. This court has stated in several cases that surface waters are a common enemy, imply-

ing an approval of the common enemy doctrine, but we find no case specifically adopting the common enemy doctrine as such as the declared law of this state. It was assumed, and we now think incorrectly, that the common enemy doctrine originated in the common law dealing with surface waters. We now hold that the common enemy doctrine is not the law of this state, and that the true doctrine of the common law in regard to surface waters is as a general rule in force and controls in this state. See, Jorgenson v. Stephens, *supra;* Muhleisen v. Krueger, *supra;* Town v. Missouri P. Ry Co., *supra.*

This leads us to the conclusion that diffused surface waters may be dammed, diverted, or otherwise repelled, if necessary, and in the absence of negligence. But when diffused surface waters are concentrated in volume and velocity and flow into a natural depression, draw, swale, or other drainway, the rule as to diffused surface waters does not apply. The proper rule in such cases is generally stated in 56 Am. Jur., Waters, § 75, p. 562, as follows: "The great weight of authority, however, is to the effect that both under the civil-law rule as to surface waters and under the so-called 'common-law' or 'common enemy' rule, a natural drainway must be kept open to carry the water into the streams, and as against the rights of the upper proprietor, the lower proprietor cannot obstruct surface water when it has found its way to and is running in a natural drainage channel or depression. Thus, it has been held that it is the duty of a lower landowner who builds a structure across a natural drainway to provide for the natural passage through such obstruction of all the water which may be reasonably anticipated to drain therein, and that this is a continuing duty."

At common law the right to drain surface waters into depressions, draws, swales, and drainways which existed in the state of nature was recognized. Lower lands are, at common law, under a natural servitude to receive the

surface water of higher lands flowing along natural depressions on the surface of the ground. This is so, whether or not a live watercourse occupies the natural course. In Bellows v. Sackett, 15 Barb. 96 (N. Y.), the common-law rule is stated as follows: "The rule of the civil law was, that 'rain water or other waters which have their course regulated from one ground to another, whether it be by the nature of the place, or by some regulation, or by a title, or by an ancient possession, the proprietors of the said grounds cannot innovate any thing as to the ancient course of the waters. Thus he who has the upper grounds cannot change the course of the water either by turning it some other way or rendering it more rapid, or making any other changes in it to the prejudice of the owner of the lower grounds.' (Domat, 616, Cushing's ed.) This is substantially the rule of the common law, and it applies, I apprehend, equally to flowing streams and descending rains, though not to streams flowing beneath the surface, the courses and fountains of which do not lie open to observation and cannot be traced." See, also, Beer v. Stroud, 19 Ont. 10; Dayton v. Drainage Commissioners, 128 Ill. 271, 21 N. E. 198. The rule was extended at common law so as to permit a hastening of the flow of the waters. 3 Farnham, Waters and Water Rights, § 889b, p. 2587.

We point out that the owner of land is in the position of an owner of all surface waters which fall or arise on it, or flow upon it. He may retain them for his own use. He may change their course on his own land by ditch or embankment, but he cannot divert their flow upon the lands of others except in depressions, draws, swales, gulches, or other drainways through which such waters were wont to flow in a state of nature. Schomberg v. Kuther, 153 Neb. 413, 45 N. W. 2d 129; Seibold v. Whipple, 143 Neb. 167, 9 N. W. 2d 154; Ricenbaw v. Kraus, 157 Neb. 723, 61 N. W. 2d 350.

This court has recognized the right of an upper pro-

prietor to drain surface waters through a well-defined natural course, whether the course be ditch, swale, or drain in its primitive condition, and that such flow cannot be arrested or interfered with to the injury of neighboring proprietors. Turnell v. Mahlin, *supra;* Town of Everett v. Teigeler, 162 Neb. 769, 77 N. W. 2d 467; Bussell v. McClellan, 155 Neb. 875, 54 N. W. 2d 81; Mader v. Mettenbrink, 159 Neb. 118, 65 N. W. 2d 334; Keim v. Downing, 157 Neb. 481, 59 N. W. 2d 602. The foregoing cases, and others as well, are consistent with the common-law rule, although they appear to be treated as exceptions to the common enemy doctrine. In other words, the court has resorted to exceptions to what was thought to be the common-law rule when, in fact, resort to exceptions was not required if the true common-law rule were properly applied.

The evidence shows that surface waters flowed through a natural drainway onto defendants' land only in case of heavy rainfall and runoff. While the flow of water in such a drainway may be temporary and occasional, the course which it uniformly takes is not temporary or occasional. The latter is, of course, the controlling factor. Briscoe v. Drought, 11 Ir. C. L. 250; Beer v. Stroud, *supra.*

The evidence shows that the surface waters flow from plaintiffs' and intervener's lands onto defendants' land through a natural depression or drainway. They thereafter pond on defendants' land in a low basin having no natural outlet. The fact that there is no natural outlet from the servient estate does not relieve it from receiving such waters from the dominant estate. Beechley v. Harms, 332 Ill. 185, 163 N. E. 387; 93 C. J. S., Waters, § 114a, p. 803. See, also, Ricenbaw v. Kraus, *supra;* Rudolf v. Atkinson, 156 Neb. 804, 58 N. W. 2d 216; Skolil v. Kokes, 151 Neb. 392, 37 N. W. 2d 616.

It is established by the evidence in the instant case that the waters involved were not diffused surface waters. They were surface waters collected and con-

centrated in volume which flowed into a depression or drainway through which they flowed in a state of nature. Such waters may not be dammed, diverted, or otherwise repelled by the proprietor of lower lands upon which they flow. The judgment of the trial court denying injunctive relief to the plaintiffs and intervener was therefore contrary to the law and the evidence. The judgment of the district court is reversed and the cause remanded with directions to enter a mandatory injunction requiring defendants to remove the embankment and to permanently enjoin the defendants from building or maintaining any structure which would interfere with the flow of surface waters through the natural depression or drainway described in the pleadings and evidence, all in accordance with the prayer of plaintiffs' petition.

REVERSED AND REMANDED WITH DIRECTIONS.

SIMMONS, C. J., participating on briefs.

OLAVA M. HANSEN, APPELLANT, V. R. C. SMIKAHL ET AL., APPELLEES.

113 N. W. 2d 210

Filed February 9, 1962. No. 35098.

1. **Easements.** A way of necessity is just what it purports to be, a way arising by implication of law out of the necessities of the case.
2. ———. Where a conveyance is made of realty separated from the highway by other realty of the grantor or surrounded by his realty or by his and that of third persons, there arises, by implication, in favor of the grantee, a way of necessity across the said premises of the grantor to the highway.

APPEAL from the district court for Cheyenne County: JOHN H. KUNS, JUDGE. *Reversed and remanded with directions.*

Heaton & Heaton, for appellant.

Peetz & Balderson and *Joel E. Babcock,* for appellees.

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

MESSMORE, J.

This is an action in equity brought in the district court for Cheyenne County by Olava M. Hansen, plaintiff, against R. C. Smikahl and Margaretha Smikahl, husband and wife, and Arthur Miller and Bethal Miller, husband and wife, defendants. The purpose of the action was to enjoin the defendants from interfering with the plaintiff and her tenants as to the right of ingress and egress to and from her land, to require the defendants to remove from their land all obstructions which prevent the plaintiff from having ingress and egress to and from her land to U. S. Highway No. 30, and to grant the plaintiff an easement of necessity across the defendants' land to U. S. Highway No. 30. The trial court dismissed the plaintiff's petition. The plaintiff filed a motion for new trial which was overruled, and the plaintiff perfected appeal to this court.

The record shows that on March 5, 1958, the plaintiff entered into a contract with the Smikahls to purchase a tract of land lying within Section 33, Township 14 North, Range 49 West of the 6th P. M., in Cheyenne County. The width of the land north and south is 56 feet, and the length of the land east and west is 267 feet. The plaintiff gave a check for $200 as a down payment. On August 1, 1958, Smikahls executed a warranty deed to this property to the plaintiff. On the property the plaintiff purchased there were two houses and four trailer lots with a patio for each trailer lot. The water lines, sewer lines, electric wiring, and gas lines to serve the trailers were all to the north of the plaintiff's property. The patios were made of concrete, and there were sidewalks from each of the patios to the north. The fronts of the trailer lots faced to the north. The two houses were west of the trailer lots. The entrance

to the large house was to the south, and the entrance to the smaller house was to the east and south. There were gates leading from the trailer lots to the north, but none to the south.

When the plaintiff purchased her land, there was a drainage ditch to the south of her property, and also a fence at that location. There were no improvements or trailer lots north of her property up to U. S. Highway No. 30. When the plaintiff purchased her property, all of the trailer lots were occupied, and the occupants of the trailers and houses parked their cars to the north on Smikahls' land. The trailers that entered onto or left the plaintiff's property went to the north to U. S. Highway No. 30. That was the only method of getting the trailers into and out of the trailer lots on the plaintiff's property, and there is no other method at this time. Prior to the time the plaintiff entered into the contract to purchase the property, she had a conversation with Dr. Smikahl, and also at the time the contract to purchase the property was prepared at a lawyer's office. The plaintiff testified that in these conversations Dr. Smikahl promised the plaintiff that she could use the north part of his property to permit trailers to go north to U. S. Highway No. 30, and her tenants would be allowed to park their cars north of the plaintiff's boundary line on Smikahls' property. After the plaintiff purchased her property, the Smikahls erected a barbed-wire fence running east and west on their property and blocking off the property of the plaintiff. After the fence was erected, all of the tenants occupying the plaintiff's trailer lots moved out, except one, and in order to get out they had to take the fence down.

The land of the plaintiff, purchased by her from the defendants Smikahl, is completely surrounded by land owned by Smikahls and others.

At the time the deed was delivered by the Smikahls to the plaintiff, there was also executed a contract for

the mutual use of the water, electric, and sewer facilities.

Theodore J. Kosemund testified that he owns a trailer lot in Smikahl's Addition and has lived there since 1955 or 1956. This lot is directly south of the east trailer lot now owned by the plaintiff. While he lived there, the trailers occupying the trailer lots owned by the plaintiff came in and out of Smikahls' land lying north of the plaintiff's property. Cars for the trailer tenants were always parked on the Smikahl land. This witness testified that there is no method for trailers to get in and out of the plaintiff's property without crossing the land of the Smikahls on the north; that to do so they would have to take the fence down; that it would be impossible to move a trailer out of the east trailer lot on the plaintiff's property because his trailer is parked directly south of this east trailer lot; nor could a trailer be moved out to the east because the road in that location is only 30 feet wide.

The plaintiff's daughter owns Trailer City which is south of the plaintiff's property. The road south of Trailer City goes to the county road to the west, and has access to U. S. Highway No. 30.

The plaintiff's daughter testified that she purchased Trailer City from Lester Campbell who purchased it from Dr. Smikahl, and that the doctor acted as her agent. There are 52 trailer lots in Trailer City. The plaintiff's daughter also owns three trailer lots in the same row as Kosemund's trailer lot which she purchased after she had purchased Trailer City. There is a private road on her property which is used by her tenants, and a road to the west which is a county road. Since her mother bought the property, the mother has put in sidewalks and replaced some worn out sidewalks on the trailer lots. The trailer lots have a front and a back, and the trailers have to be put on the trailer lot from the front. The gas line is on the north, the water and sewer lines on the west, and the concrete patios on the east

side of the trailer lots which is the side on which the trailer doors open. The plaintiff's daughter further testified that there was no way to put a trailer on the trailer lots from the south; that before trailers could be put on the trailer lots from the south it would be necessary to completely change all of the fences, the water, sewer, electrical and other hookups, and to tear up the patios and put them on the other side of the trailers; and that this would cost $500 for each trailer lot. The findings of the trial court are in agreement with the testimony of this witness as to the cost of changing the trailer lots. The plaintiff's daughter further testified that at the time her mother purchased the trailer lots the tenants' clothesline was on the Smikahl property north of the west house; that there are 13 power or utility lines running east and west on the south side of her mother's property with one pole to each trailer lot; that there are six poles in all, counting two REA poles; and that there are two trees to the south and east on each trailer lot.

On redirect examination this witness corroborated the testimony of her mother with reference to the conversations had with Dr. Smikahl; and further testified that insofar as her mother's property is concerned, it would be necessary to use the Smikahl property to get a trailer onto the trailer lots; and that it would take at least 40 feet of roadway on the Smikahl property to get a trailer in and out.

Sidney J. Simmerman is the owner and operator of Sid's Mobile Home Towing Service. His business is moving trailer homes onto and out of trailer lots. He testified that he always hooks onto a trailer at the front, and backs them onto the trailer lots on the property owned by the plaintiff; that he has moved 10 or 12 trailers onto this property; that it simply is not possible to move any trailer onto her property except by going across the Smikahl property from the north; and that he

always did just that, before and after the plaintiff purchased her property.

Leland Frickey lived in a trailer home on the east trailer lot of plaintiff's property from May 1957 until late summer of 1960. He testified that the only way he could get in and out of that lot was across the land of Smikahl to the north. He moved out when Smikahls put up the barbed-wire fence at the end of the summer of 1960. He had to take the barbed-wire fence down to do it. When called in rebuttal this witness further testified that it would be impossible to get a trailer out of the trailer lot he formerly lived on to the south because of the Kosemund property, to the west because of the trees, and to the east without removing the fence on the farmer's land across the road to the east.

Dr. Smikahl testified that it was possible to get trailers in from the south onto the plaintiff's property; that the use of his land to the north of her property was permissive only; that at the time the contract was prepared in the lawyer's office the plaintiff's daughter was not present; that the only discussion had with the plaintiff was that the plaintiff wanted to buy some more land from him and he would not sell any more; and that the plaintiff wanted to know what was going to be done with the cars parking on the north and the doctor told her as long as he was not going to use that ground they could leave them sit on the ground like they were, but he would not sell her any more land. He further testified that the land could be used by the plaintiff until he wanted to use it, and when he wanted to use it those occupying it would have to vacate. He further testified that he sold property to the north of the plaintiff's property to the defendants Miller; and that he fenced the property to the north and denied the plaintiff its use. Dr. Smikahl further testified that he was familiar with the general area marked as Road No. 6 on exhibit No. 1 where it turns approximately at the east end and goes south, which road comes from the west end and is on

the county line; that the area at the east end where this road turns to the south is not built up; that the roadway in that area is wider than 30 feet; that a person could run down 200 feet and over, then straighten up and back a trailer into the plaintiff's trailer lots; that the lots are 39 or 40 feet wide; and that he had observed trailers backing in from that area, and personally had caused trailers to come onto those lots from the south. He further testified that to change the trailer lots so that trailers could come in from the south would cost from $20 to $25 for each trailer lot.

On cross-examination this witness testified that trailers could get out of the plaintiff's property onto his private road to the east; that he sold the property to the plaintiff specifically for the parking of trailers; and that if she could not get the trailers in and out, the entire value of the property would be abolished. He admitted that trailers moved in across his property to the trailer lots on the plaintiff's property.

Harry Schwank testified that he had lived in a trailer a good many years and had moved it about from place to place; that he had a 29-foot trailer and he could pull it in from the south and park it on one of the lots on the plaintiff's property; and that a 38-foot trailer could be put on these lots which are approximately 39 feet, and the lot could still be utilized. This witness was a tenant of Smikahl's in 1951, which was 7 years prior to the time the plaintiff purchased her property. When he lived there there was no ditch, no fence, no sewer, no sidewalks or patios, and no utility connections. His trailer at that time was 27 feet long, and he pulled it in from the south to what is now the west trailer lot of the plaintiff's property. He further testified that he could not pull into that lot from the south without pulling out onto Smikahls' land to the north.

Arthur Miller testified that he came to Sidney in 1960 and contracted to purchase the land lying north of the plaintiff's property from Smikahl, and the purchase

had not been completed. After he contracted to purchase this property, he observed that the plaintiff's tenants parked their cars to the north of her property and they drove to the highway over the land of Smikahl which he was buying. He helped Smikahl put up the barbed-wire fence. He has objected to the title as being unmerchantable because of this litigation.

This case is triable de novo on the record before us. The assignment of error necessary to a determination of this appeal is whether or not the judgment of the trial court is contrary to the evidence and the law.

In Badura v. Lyons, 147 Neb. 442, 23 N. W. 2d 678, this court said: "'A way of necessity is an easement arising from an implied grant or implied reservation; it is the result of the application of the principle that whenever a party conveys property, he conveys whatever is necessary for the beneficial use of that property and retains whatever is necessary for the beneficial use of land he still possesses. A way of necessity usually arises where there is a conveyance of a part of a tract of land of such nature and extent that either the part conveyed or the part retained is entirely surrounded by the land from which it is severed or by this land and the land of strangers. It is a universally established principle that where a tract of land is conveyed which is separated from the highway by other lands of the grantor or surrounded by his lands or by his and those of third persons, there arises, by implication, in favor of the grantee, a way of necessity across the premises of the grantor to the highway. In other words, if one grants a piece of land in the midst of his own, he thereby impliedly grants a way to reach it.' 17 Am. Jur., Easements, § 48, p. 959." Language of similar import appears in 17A Am. Jur., Easements, § 58, p. 668.

The case of City of Bismarck v. Casey, 77 N. D. 295, 43 N. W. 2d 372, quotes Badura v. Lyons, *supra,* as above set forth. It also cites the case of Douglas v. Jordan, 232 Mich. 283, 205 N. W. 52, 41 A. L. R. 1437, wherein

the Supreme Court of Michigan said: "'Where the owner of land conveys a parcel thereof which has no outlet to a highway except over the remaining lands of the grantor or over the land of strangers, a way of necessity exists over the remaining lands of the grantor.'"

In the case of Waubun Beach Assn. v. Wilson, 274 Mich. 598, 265 N. W. 474, 103 A. L. R. 983, the court said: "A way of necessity is just what it purports to be, a way arising by implication of law out of the necessities of the case, * * * a way of necessity is based upon an implication of an intended grant and the use of it is based entirely upon such implication or consent to its use." There are many other cases, too numerous to cite, holding as above stated.

No reasonable explanation was given by Dr. Smikahl with reference to how the trailers could be backed in from the south onto the plaintiff's trailer lots. The evidence shows that Dr. Smikahl testified that he sold the plaintiff this property for a specific purpose, and further, that in the event ingress and egress to and from the plaintiff's property would be such that trailers could not be parked thereon, the value of this property would be abolished.

The defendants Smikahl contend that the conversations heretofore mentioned between Dr. Smikahl, the plaintiff, and her daughter, relating to the promise allegedly made by Dr. Smikahl as to the use of the Smikahl land north of the plaintiff's land for the purpose of permitting mobile homes or trailers to enter to and from the Smikahl land onto the plaintiff's trailer lots are in violation of the parol evidence rule, for the reason that such conversations tend to alter the consideration contained in the contract and the deed between the Smikahls and the plaintiff.

The trial court permitted these conversations into evidence, but determined by its judgment that such

conversations were inadmissible and would violate the parol evidence rule.

Even assuming the defendants' contention to be correct, under the evidence adduced, excluding these conversations and considering the evidence other than such conversations and the authorities heretofore cited, no other conclusion can be reached than that the plaintiff is entitled to an easement of necessity north of her land to U. S. Highway No. 30 for the purpose of moving mobile homes and trailers in and out of her land to U. S. Highway No. 30, and parking cars of her tenants on such land north of her land which is owned by the Smikahls. When Smikahl sold the land to the plaintiff, trailers and mobile homes had been coming onto these trailer lots from the north, and cars were parked thereon. These trailer lots were built by Dr. Smikahl. He sold the land to the plaintiff for a specific purpose, and he knew that for the plaintiff to operate a successful business it would be necessary to use this land for the purposes heretofore indicated.

It is apparent from the testimony of Arthur Miller that he is not an innocent purchaser for value of the land north of the plaintiff's land up to U. S. Highway No. 30. The Millers refused to proceed with the purchase of this land due to this litigation.

There is evidence to the effect that the plaintiff should have an easement north of her property on the Smikahl land up to U. S. Highway No. 30, of a width of 40 feet. On this phase of the case we believe the easement of necessity should be fixed by agreement of the parties and, if the parties are unable to agree, the trial court should fix this easement. If it should be necessary to take further evidence on this phase of the case to fix the easement of necessity, then this should be done. In fixing this easement of necessity over the Smikahl land, it should be fixed with the least detriment to the defendants Smikahls' land.

We conclude that the judgment of the trial court

should be reversed and the cause remanded with directions to proceed in conformity with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

SIMMONS, C. J., participating on briefs.

RICHARD L. PIERCE, PLAINTIFF IN ERROR, V. STATE OF NEBRASKA, DEFENDANT IN ERROR.

113 N. W. 2d 333

Filed February 9, 1962. No. 35102.

1. **Intoxicating Liquors: Witnesses.** In the area of intoxication, without qualifying as an expert on the subject, a witness who has actual knowledge and sufficient observation of an occurrence should be allowed to supplement his description by his opinion.
2. **Evidence.** An answer partly responsive cannot be stricken by a motion to strike the entire answer. The motion must be limited to the portion which is not responsive.
3. **Witnesses: Evidence.** The scope of cross-examination of a witness rests largely in the discretion of the trial court, and its ruling will be upheld unless an abuse of discretion is shown.
4. **Criminal Law.** Unexplained silence in the face of an accusation may support an inference of guilt. Where, on being accused of crime, with full liberty to speak, one remains silent, his failure to reply or to deny is admissible in evidence as an admission by silence.
5. ———. An accused is not required to anticipate the nature of an accusation against him, and his silence when he fails to do so cannot be considered as an admission against him.
6. **Criminal Law: Evidence.** Statements by third persons which are not made in accused's presence, and which are not declarations of a coconspirator nor part of the res gestae, are generally not admissible.
7. **Witnesses.** Before a witness, not a party to the suit, can be impeached by proof that he made statements contradicting or differing from the testimony given him upon the stand, a foundation must be laid by interrogating the witness himself as to whether he ever made such statements.
8. **Trial: Appeal and Error.** When instructions are tendered which correctly state the law upon an issue involved, refusing them is error unless the points are fairly covered by the instructions given by the court on its own motion.

9. **Criminal Law.** It is the purpose of this court to protect and not to encourage the violation of a defendant's rights, and we do not intend to speculate on whether prejudice has resulted where those rights are violated.

ERROR to the district court for Keith County: CLARENCE S. BECK, JUDGE. *Reversed and remanded.*

McGinley, Lane, Mueller & Shanahan, for plaintiff in error.

Clarence A. H. Meyer, Attorney General, and *Cecil S. Brubaker,* for defendant in error.

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

SPENCER, J.

The defendant was convicted by a jury in the district court for Keith County of operating a motor vehicle while under the influence of alcholic liquor. He prosecutes error to this court. Defendant lists 15 assignments of error. We will discuss only those we deem of sufficient importance to merit consideration.

The first assignment of error involves the admission, over objection, of an opinion by a witness for the State that the defendant was drunk. Actual observations on the part of a witness are an essential part of his opinion on intoxication, and in the usual and regular course such facts must be proved as a foundation. In the area of intoxication, without qualifying as an expert on the subject, a witness who has actual knowledge and sufficient observation of an occurrence should be allowed to supplement his description by his opinion. In this case, the witness, although he was 75 to 100 feet away, did have an opportunity to observe the defendant for more than 5 minutes. He observed some unusual actions; he observed defendant wobbling around; and he observed the state of defendant's clothes. We find that there was, in this instance, a sufficient observation for the expression of an opinion. The question of the credibility of this witness was for the jury.

Defendant next complains that the trial court committed prejudicial error in refusing to strike an unresponsive answer of Ralph Robb, a witness for the State. The question, answer, and objection are as follows: "Q. Can you tell the jury how he walked? A. Oh, he just wobbled around there, just like a drunk would. MR. SHANAHAN: We object to that and move that it be stricken as an unresponsive answer, and the jury instructed to disregard it. THE COURT: No; overruled." Part of the answer was responsive. The objection was a general one, directed against the entire answer. If the motion to strike had been properly limited, it should have been sustained. It was not limited, so the objection was properly overruled.

We said in Missouri Pacific Ry. Co. v. Fox, 60 Neb. 531, 83 N. W. 744: "Where an answer is not responsive to the question, it should be reached by motion to strike out." In Fouse v. State, 83 Neb. 258, 119 N. W. 478, we said: "An answer responsive to a question should not be stricken from the record." We now say that an answer partly responsive cannot be stricken by a motion to strike the entire answer. The motion must be limited to the portion which is not responsive.

The third assignment of error concerns the restriction of the cross-examination of Fuller, an Ogallala police officer, regarding the availability of chemical tests in connection with the alcoholic content of body fluids. On direct examination, Fuller, after testifying to asking the defendant for a blood alcohol test and his refusal to take it after the arrival of a hospital technician, testified as follows: "Q. And did he take a test at any time? A. No. Q. Was that for the purpose of determining his sobriety or intoxication? A. Yes. * * * Q. Did you make any other tests for the purpose of ascertaining whether he was under the influence of alcoholic liquor? A. No; just observing him is all."

On cross-examination of officer Fuller, the existence of other tests, suggested by the county attorney on di-

rect examination, was the subject of inquiry in the following respects: "Q. Just what other tests do you have available to test the alcoholic content of blood? MR. FELTZ: Objected to as incompetent, irrelevant and immaterial. THE COURT: Yes, sustained."

In the eighth assignment of error, defendant complains of the restriction of the cross-examination of officer Fuller concerning defendant's removal to the local hospital. The direct examination of officer Fuller was as follows: "Q. Now then do you have knowledge of the defendant being admitted to the Ogallala hospital that day? A. Yes, I do. Q. And do you know what hour he was admitted to the Ogallala hospital? A. Around 4 o'clock P. M. Q. That was the same afternoon of the same day? A. Yes. * * * Q. Were you present when he was removed from the jail to the hospital? A. Yes. * * * Q. It was about four and one-half hours from the time you took him in your custody until he was removed to the hospital, would that be correct? A. Yes, approximately." The objections which were sustained on cross-examination are as follows: "Q. Officer, was Mr. Pierce removed from the Keith County jail under doctor's orders? MR. FELTZ: Objected to as incompetent, irrelevant and immaterial; calling for a fact not in evidence and a conclusion of this witness—improper cross examination. THE COURT: Yes; sustained. Q. All right. Did you voluntarily remove him from the jail? MR. FELTZ: I will object to that as calling for a conclusion of the witness. THE COURT: Yes, sustained."

The record indicates that on direct examination Fuller was interrogated by the county attorney as to Pierce's physical condition, as follows: "Q. And was there any complaint made to you at that time by the defendant as to any physical disability or suffering—? A. I don't believe, at that time. * * * Q. And was there any complaint made to you by the defendant about his physical condition? A. Yes, I believe there was. Q. When

was that? A. At the sheriff's office. Q. And what was the complaint? A. He complained that he was sick and he had tried to vomit a couple times." Defendant, in his thirteenth assignment of error, assigns as error the restriction on cross-examination directed at this testimony, as follows: "Q. Did you ever attempt to ascertain whether he was sick? MR. FELTZ: Object to that as not within the issues of this case. THE COURT: Yes; sustained."

In the twelfth assignment of error, defendant complains of the restriction of the cross-examination of officer Sauer as to the presence of a physician at the time the accused was requested to take a blood test. In his direct examination, officer Sauer was examined about the circumstances and occurrences at the sheriff's office relating to a request for a blood test and the bringing of a hospital technician to draw the blood. On cross-examination, we find the following: "Q. You got into some testimony about the blood test here which you were going to give to this fellow. You didn't have a doctor there, did you, at any time that he was requested to take the blood test? MR. FELTZ: Object to that as argumentative, your Honor. THE COURT: Yes; sustained."

There is no question but that the scope of cross-examination of a witness rests largely in the discretion of the trial court, and its ruling will be upheld unless an abuse of that discretion is shown. Garcia v. State, 159 Neb. 571, 68 N. W. 2d 151.

With the exception of the twelfth assignment of error, where the question was so framed as to be argumentative, it would appear that the questions asked the witnesses for the State on cross-examination, to which objections were sustained, were reasonably within the scope of the direct examination.

In Sherrick v. State, 157 Neb. 623, 61 N. W. 2d 358, we quoted the following from 58 Am. Jur., Witnesses, § 632, p. 352: " 'Generally speaking, however, when the

direct examination opens a general subject, the cross-examination may go into any phase, and may not be restricted to mere parts which constitute a unity, or to the specific facts developed by the direct examination. Cross-examination should always be allowed relative to the details of an event or transaction a portion only of which has been testified to on direct examination. As has been stated, cross-examination is not confined to the identical details testified to in chief, but extends to its entire subject matter, and to all matters that may modify, supplement, contradict, rebut, or make clearer the facts testified to in chief by the witness on cross-examination.' "

We believe the rule in Sherrick v. State, *supra,* is applicable in this case, and find that the defendant was too severely restricted in his cross-examination, and while this was error, we do not feel that in and of itself it was prejudicial error.

Defendant's fourth assignment of error is directed to the testimony of a police officer, over objection, that the defendant offered no explanation or reason for not submitting to the withdrawal of his blood when there had been no accusation of intoxication leveled against the defendant, and where there had been no inquiry by the officer concerning the defendant's reasons for not submitting to the withdrawal of his blood. In this regard, defendant also calls attention to the fact that there is no testimony in this record that the police officers had complied with the statute relating to the withdrawal of a blood sample.

Officer Fuller testified that he asked the defendant for a blood alcohol test, and the defendant agreed to give one, but that when he secured a hospital laboratory technician, defendant refused to give it. Officer Sauer testified to bringing the technician to the sheriff's office and to the defendant's refusal to take the test. Sauer, on direct examination, was then asked: "Q. Did he make any statement in your presence as to his reason for

not giving such a sample? MR. SHANAHAN: Object to the line of questioning as highly improper, irrelevant, incompetent, and immaterial. I think I will move for a mistrial. THE COURT: Objection overruled. Q. You may answer the question. * * * A. No." It is defendant's position that the mere silence of one under arrest or in custody without an accusation is not an admission of guilt, and that the failure to volunteer exculpatory statements is not admissible evidence against an accused. It is his position that the trial court's admission of the officer's testimony over objection indicated that silence without an accusation was an admission of some nature and therefore was evidence to be considered by the jury.

It is true that unexplained silence in the face of an accusation may support an inference of guilt. Where, on being accused of crime, with full liberty to speak, one remains silent, his failure to reply or to deny is admissible in evidence as an admission by silence. See the cases collected in 22A C. J. S., Criminal Law, § 734(1), p. 1068, note 30.55.

The question here, however, infers that an inquiry has been made of the defendant as to his reason, or that he had been asked for an explanation, and that he failed to give one. This is not true. No such inquiry was made of the defendant. It is therefore his failure to volunteer a reason which is involved. We also have a situation where the record does not affirmatively show any accusation. The defendant, however, was taken to the sheriff's office, and undoubtedly was aware of the reason, but nowhere in the record previous to the time of the challenged testimony, was any direct accusation made to or against him. We do not consider the absence of an accusation controlling under the circumstances. However, the effect of the ruling is to admit the officer's testimony on the theory that the silence of the defendant, or, more properly, his failure to give a reason when none was requested, was an admission of

guilt, or, at the very least, a circumstance indicating guilt. There is no question it would be so considered by the jury. This appears to be carrying the doctrine of silence a step too far. To require a defendant to anticipate the nature of an accusation and to require him to give reasons without inquiry is to make a farce of the presumption of innocence. Nebraska has gone further than many jurisdictions on the criteria of silence as an admission, but it is still the rule in Nebraska that in the absence of a duty to speak, silence is not an admission. See the discussion in O'Hearn v. State, 79 Neb. 513, 113 N. W. 130, 25 L. R. A. N. S. 542. To allow a prosecutor to explore the silence of the accused or the failure of the accused to explain why he does not offer evidence against himself, when the circumstances are such that there is no occasion to explain, is to fasten on the accused a presumption of guilt and to make a mockery of his presumption of innocence, which certainly is contrary to our fundamental law.

Defendant's fifth assignment of error concerns the comment of the county attorney in his closing argument to the jury on the refusal of the accused to submit to an alcohol blood test or chemical analysis. Proper objection was made by the defendant at the time of the statement, together with a request for an order declaring a mistrial. The objection and the request were overruled. Passing for the moment the fact that the evidence indicated that only a blood test was requested, this occurred in the presence of the jury during argument, and emphasized the claim of the prosecution that the defendant's failure to take a test was an important factor to be considered by the jury.

The defendant tendered instruction No. 13 which the trial court refused to give, and which the defendant in his tenth assignment of error contends constitutes prejudicial error. This instruction correctly states the provisions of the law as set out in section 39-727.04, R. R. S. 1943. If this instruction had been given in some

form, the defendant's theory would have been before the jury. In view of the injection of the issue of the failure to take a fluid test into the evidence, and the argument of the county attorney, defendant was entitled to the tendered instruction in some form. As it was, the defendant was prevented from showing by his cross-examination of the witnesses who testified as to the refusal to take a blood test that the law had not been complied with. On the record in this case, even if a test had been made, under our holding in Otte v. State, 172 Neb. 110, 108 N. W. 2d 737, it could not have been received in evidence over objection. The State would have been required to show compliance with section 39-727.04, R. R. S. 1943.

Referring again to the final argument of the county attorney, the record reflects that the county attorney argued not only the failure of the defendant to give an alcohol blood test, but also a chemical analysis test which would embrace the analysis of a sample of urine. The record affirmatively shows that no urine test was ever offered to or requested from the defendant. The restrictive cross-examination and the failure to give an instruction on the defendant's theory deprive the defendant of a substantial right in view of the conduct of the prosecuting attorney.

The sixth and seventh assignments of error relate to the admission of certain rebuttal testimony. Briefly it pertains to a police officer testifying as to a conversation with Donald L. Criswell, one of defendant's witnesses, which conversation took place out of the presence and hearing of the defendant. The pertinent testimony is as follows: "Q. Do you recall what Donald L. Criswell said to you about the condition of Richard Pierce? A. Yes. Q. State the conversation—state the statement. MR. SHANAHAN: We object to this as being out of the presence of the accused. It is incompetent, irrelevant and immaterial; hearsay; it violates almost every rule we have. THE COURT: It will

be received for the purposes of impeachment only. A. He said—Don Criswell—that he was in no shape to be driving."

The general rule is stated as the headnote to section 746, 22A C. J. S., Criminal Law, p. 1106: "Statements by third persons which are not made in accused's presence, and which are not declarations of a co-conspirator nor a part of the res gestae, are generally not admissible." There is no reason in this case why the general rule should not apply. The objection was clearly a proper one and should have been sustained.

It is suggested that the evidence may properly be received for impeachment purposes. The subject of defendant's driving was not covered in the county attorney's examination of Criswell, nor was there any showing of a prior inconsistent statement. The pertinent testimony relating to the point on cross-examination is as follows: "Q. Did you talk with the Chief of Police when he answered the call or came up there? A. I talked with him and Sauer there; yes, sir. Q. And you told the Chief of Police Dick was in bad shape at that time, didn't you? A. I said he was in bad shape, yes. I didn't think he was intoxicated or drunk; I meant he didn't feel good."

No attempt of any nature was made to lay a foundation for impeachment. The following principles are applicable: "Before a witness, not a party to the suit, can be impeached by proof that he has made statements contradicting or differing from the testimony given by him upon the stand, a foundation must be laid by interrogating the witness himself as to whether he has ever made such statements." Meyers v. State, 112 Neb. 149, 198 N. W. 871. See, also, Bartek v. Glasers Provisions Co., Inc., 160 Neb. 794, 71 N. W. 2d 466.

The State suggests that defendant's objection did not include an objection to any lack of foundation for impeachment. The objection as made was good when made. It was the trial court who, without any sug-

gestion that the testimony was being offered for that purpose, said it would be received for impeachment purposes. Under these circumstances, a proper objection to foundation for impeachment should then have been made.

The defendant, in his ninth assignment of error, complains of the failure of the court to give his tendered instruction No. 4 in some form. The tendered instruction is as follows: "If, upon a consideration of the evidence by you, the evidence or any material part thereof is susceptible of two constructions, one being in favor of the Defendant, Richard Pierce, the doubt must be resolved in behalf of the innocence of the Defendant and every inference under the evidence must be considered in its entirety and construed in favor of Richard Pierce, the Defendant."

We said in Bourne v. State, 116 Neb. 141, 216 N. W. 173: "* * * if the evidence or any material part thereof is fairly susceptible of two constructions, one in favor of the state, and the other in favor of the defendant, the doubt must be resolved in behalf of the innocence of the accused, as every intendment or inference under the evidence, considered in its entirety, must be construed in his favor." We also said in Jeppesen v. State, 154 Neb. 765, 49 N. W. 2d 611: "* * * any fact or circumstance reasonably susceptible of two interpretations must be resolved most favorably to the accused." The tendered instruction substantially states the present rule in this jurisdiction and when tendered should have been covered in some form. When instructions are tendered which correctly state the law upon an issue involved, refusing them is error unless the points are fairly covered by the instructions given by the court on its own motion. Simcho v. Omaha & C. B. St. Ry. Co., 150 Neb. 634, 35 N. W. 2d 501.

Defendant's eleventh assignment of error complains of the failure of the trial court to give tendered instruction No. 17 which directed the jury to disregard all in-

ferences to be drawn from the testimony relative to fluid tests. What was said on the tenth assignment of error relative to an instruction in some form on the defendant's theory is applicable here.

Many of the errors assigned by the defendant standing alone would be errors without prejudice, but in combination must be held to be prejudicial errors. It is the purpose of this court to protect and not to encourage the violation of a defendant's rights, and we do not intend to speculate on whether prejudice has resulted where those rights are violated. Quoting from Bruntz v. State, 137 Neb. 565, 290 N. W. 420: "If we treat violations indulgently, we shall soon — in the words of Pope — 'first endure, then pity, then embrace.' "

We have said that public prosecutors are charged with the duty of conducting criminal trials in such a manner that the accused may have a fair and impartial trial. Cooper v. State, 120 Neb. 598, 234 N. W. 406. Viewing the record as a whole, we cannot say that the defendant in this case has had such a trial.

For the reasons given above, the judgment is reversed and the cause remanded to the district court for a new trial.

REVERSED AND REMANDED.

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

113 N. W. 2d 202

Filed February 9, 1962. No. 35107.

1. **Divorce.** In a divorce case where the custody of minor children is involved, the custody of the children is to be determined by the best interests of the children, with due regard for the superior rights of fit, proper, and suitable parents.
2. ———. In awarding the custody of minor children the court looks to the best interests of the children, and those of tender age are usually awarded to the mother if she is a fit and proper person to have their custody.

3. **Divorce: Parent and Child.** Courts may not properly deprive a parent of the custody of a minor child unless it is shown that such parent is unfit to perform the duties imposed by the relation, or has forfeited that right.
4. **Divorce.** Child support payments which accrue after the filing of a petition to modify the judgment may be canceled.

APPEAL from the district court for Douglas County: ROBERT L. SMITH, JUDGE. *Affirmed.*

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

Stern, Harris & Feldman and *Kistle & Telpner*, for appellee.

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

BOSLAUGH, J.

This is an appeal from the district court for Douglas County, Nebraska, in a proceeding upon an application to modify the judgment in a divorce action. The appellant, Kathryn G. Goodman, was the plaintiff in the divorce action and David E. Goodman, the appellee, was the defendant.

On January 11, 1956, the plaintiff was granted an absolute divorce from the defendant. The custody of the two minor children of the parties was awarded to the plaintiff subject to a specified right of visitation by the defendant. The judgment further provided that the defendant was to pay the sum of $85 per month to the plaintiff as child support and additional amounts as alimony, attorney's fees, and costs.

On May 2, 1958, upon the stipulation of the parties, the judgment was modified to provide that the plaintiff could remove the minor children of the parties from Omaha, Nebraska, to Independence, Iowa, and made certain changes in the defendant's right of visitation.

On March 31, 1959, the defendant filed an application to modify the judgment by transferring the custody of the minor children from the plaintiff to the defendant

and eliminating the provision for child support payments effective April 1, 1959. This appeal concerns the proceedings upon this application.

The application, filed March 31, 1959, alleged that the plaintiff recently had married Frank Davis but that the marriage was invalid because Davis was previously married; that the plaintiff knew that Davis was a married man at the time she entered into the marriage ceremony with him; that the plaintiff and Davis had left Douglas County with the minor children of the parties and that her address and that of the children was unknown; that the plaintiff was unfit to have the custody of the children; and that their best interests required that their custody be awarded to the defendant.

On April 12, 1961, the plaintiff filed a voluntary appearance and answer to the application, alleging that she was a fit person to have the custody of the children and praying that no change in custody be made.

Thereafter the defendant filed a reply alleging that on October 28, 1960, in a habeas corpus proceeding in the State of Louisiana, the custody of the children was awarded to the defendant; that on April 13, 1961, in a proceeding in the State of Kentucky, the defendant was again awarded the custody of the children; and that the children were now in the custody of the defendant pursuant to the judgments in those proceedings.

The trial court found that the plaintiff was not a fit and proper person to have custody of the children and that the defendant was a fit and proper person to have custody of the children. The trial court modified the judgment in the divorce action and awarded custody of the children to the defendant subject to a right of visitation in the plaintiff. The court further ordered that all child support payments due after March 31, 1959, be canceled. Each party was ordered to pay his own costs and no allowance was made for an attorney's fee. The plaintiff's motion for new trial was overruled and she has appealed.

An application to modify a judgment in a divorce action relating to child custody is heard and determined de novo in the Supreme Court. Caporale v. Hale, 169 Neb. 751, 100 N. W. 2d 847.

The evidence shows that the minor children of the parties are Devera Jean Goodman, now 9 years of age, and Douglas James Goodman, now 7 years of age.

The evidence further shows that on February 9, 1959, the plaintiff entered into a marriage ceremony with Frank Davis at Omaha, Nebraska. The marriage between the plaintiff and Davis was void because Davis was then a married man. The plaintiff testified that early in 1959, in a conversation with the employer of Davis in Omaha, she was advised that the employer thought that Davis was a married man; and that early in 1959 she received a long-distance telephone call from a woman who claimed to be married to Davis. The plaintiff elected to disregard these incidents and without making further inquiry states that she relied upon the statement of Davis that he was unmarried.

The plaintiff further testified that she was aware of the fact that she was not to take the children out of the state without the permission of the court. However, in February 1959, without securing the permission of the court, the plaintiff left Omaha with Davis and the children and went to Bossier City, Louisiana. The plaintiff left no forwarding address and did not want the defendant to know where she was. Several weeks later the plaintiff called her mother in Omaha and told her where they were living. But, upon inquiry by the defendant and others in his behalf, the plaintiff's mother denied that she knew where the plaintiff was living.

In September 1960, the defendant learned that the plaintiff and the children were living in Bossier City, Louisiana. He employed counsel and obtained a writ of habeas corpus commanding the plaintiff and Davis to produce the children instanter. The petition filed in the Louisiana proceeding alleged that Davis had

deserted his wife and children. A copy of the petition and the writ were served upon the plaintiff and Davis, and at that time Davis admitted to the plaintiff that he was not divorced. The plaintiff and Davis appeared in the Louisiana proceeding by counsel and secured a continuance for 2 weeks but their counsel later withdrew from the case. Before the day set for hearing arrived, the plaintiff left Louisiana with the children and went to Texarkana. The plaintiff stayed in Texarkana for about 3 weeks. She was then 5 or 6 months pregnant. The plaintiff talked with Davis by telephone and at his suggestion she and the children went to Fulton, Kentucky. The plaintiff rented a three-room apartment there and entered the children in school as the children of Mr. and Mrs. Frank Davis.

Davis spent several weekends with the plaintiff at the apartment in Fulton, Kentucky. In January 1961, he moved into the apartment. The plaintiff's third child was born in January 1961. After the plaintiff returned from the hospital she continued to live in the apartment with Davis. Davis lived with the plaintiff and the children in the apartment from January 1961 until 3 days before the plaintiff returned to Omaha in April 1961. During the time that they were in Kentucky, the plaintiff and Davis held themselves out as married.

In January 1961, the defendant learned that the plaintiff and the children were living in Kentucky. The defendant employed counsel and commenced a proceeding to obtain custody of the children. This proceeding resulted in a judgment placing temporary care, custody, and control of the children in the defendant and directed that the defendant return to his home, and, on request, submit the children to the jurisdiction of the district court for Douglas County, Nebraska.

In a divorce case, where the custody of minor children is involved, the custody of the children is to be determined by the best interests of the children, with due regard for the superior rights of fit, proper, and

suitable parents. In awarding the custody of minor children the court looks to the best interests of the children, and those of tender age are usually awarded to the mother if she is a fit and proper person to have their custody. Speck v. Speck, 164 Neb. 506, 82 N. W. 2d 540. Courts may not properly deprive a parent of the custody of a minor child unless it is shown that such parent is unable to perform the duties imposed by the relation or has forfeited that right. Caporale v. Hale, *supra.*

The evidence shows that the plaintiff is not a fit and proper person to have the custody of the minor children. The plaintiff has demonstrated that she is an irresponsible person who is primarily interested in her own pleasure. What interest she has in her children is secondary to her concern for herself.

The plaintiff admits that she deliberately removed the children from the jurisdiction of the court for the express purpose of depriving the children from any association with their father. By concealing her address from the defendant and the clerk of the court, she deprived the children of the benefit of the support payments. At the same time the plaintiff carried on a relationship with a married man who had deserted his own wife and family. The plaintiff continued this relationship for more than 6 months after she knew positively that her companion was married and had deserted his family. In fact, the plaintiff testified that Davis did not move out of the apartment in Fulton, Kentucky, until after the habeas corpus proceeding had been commenced there and counsel had advised that he should move from the apartment.

The evidence further shows that the defendant is a fit and proper person to have the custody of the children. Upon a review of the evidence de novo we come to the same conclusion as the district court did with respect to custody of the children. We also conclude, as did the trial court, that the form or kind of religious instruc-

tion for the children should not be prescribed by the court at this time.

The trial court canceled all payments of child support due after March 31, 1959, the date upon which the defendant's application to modify the judgment was filed. The plaintiff contends that the court had no right to cancel payments which accrued after the application had been filed and before it had been heard and acted upon, citing Schrader v. Schrader, 148 Neb. 162, 26 N. W. 2d 617. The precise question raised by the plaintiff in this case was not considered in the Schrader case.

The general rule is that the court has the power to cancel payments of child support which accrue after the filing of a petition to modify the judgment. 17 Am. Jur., Divorce and Separation, § 762, p. 795; 17A Am. Jur., Divorce and Separation, § 863, p. 50; Annotation, 6 A. L. R. 2d 1277. This rule was given effect in Clark v. Clark, 139 Neb. 446, 297 N. W. 661, where the defendant was ordered to pay the balance due on defaulted installments of alimony and child support to the date of the filing of the petition for modification of the decree, but was excused from making further payments for support and maintenance until the further order of the district court.

The plaintiff in this case removed the children from the jurisdiction and deliberately concealed them from the defendant. It was impossible for the defendant to visit the children and there was no way for the support money to be forwarded to the plaintiff. Under the circumstances in this case, it was proper for the court to cancel the payments which accrued after the filing of the application to modify the judgment. See Hasse v. Hasse, 232 Minn. 234, 45 N. W. 2d 383.

The trial court made no allowance for attorney's fees and none is made in this court. The judgment of the district court is correct and it is affirmed.

AFFIRMED.

SIMMONS, C. J., participating on briefs.

IN RE APPLICATION OF JEFFRIES-EAVES, INC.
JEFFRIES-EAVES, INC., ET AL., APPELLANTS, V. W. F. GETTEL, INC., ET AL., APPELLEES.

113 N. W. 2d 476

Filed February 16, 1962. No. 35060.

1. **Public Service Commissions: Judgments.** When the Nebraska State Railway Commission holds a rehearing and at the rehearing vacates and sets aside a former order the findings in the prior order are of no further effect.
2. **Public Service Commissions: Motor Carriers.** Where a certificate of public convenience and necessity is not dormant it may be transferred on approval of the Nebraska State Railway Commission under reasonable rules and regulations to be prescribed by it, (1) if the transfer will be consistent with public interest, (2) if it will not unduly restrict competition, and (3) if the transferee is fit, willing, and able to perform the service proposed.
3. ———: ———. The question of dormancy, in case where an application is made for transfer of operating rights, should be the same as where an order to show cause had been issued based upon that ground.
4. ———: ———. Where an application is made for the transfer of operating rights under the provisions of section 75-240, R. R. S. 1943, the question of whether or not such operating rights are dormant, within the meaning of the foregoing statute, relates to the time the application is made, a hearing is held thereon, and for a reasonable length of time immediately prior thereto.
5. ———: ———. In determining the issue of public convenience and necessity, in cases where new or extended operating rights are sought, controlling questions are whether the operation will serve a useful purpose responsive to a public demand or need; whether this purpose can or will be served as well by existing carriers; and whether it can be served by applicant in a specified operation without endangering or impairing the operations of existing carriers contrary to the public interest.
6. ———: ———. Where on application to transfer a certificate of public convenience and necessity the dormancy of the certificate may reasonably be inferred from the evidence before the Nebraska State Railway Commission, the express provisions of section 75-240.02, R. R. S. 1943, provide that the commission may approve an application for transfer only upon the basis of proof of and a finding that the transfer of such certificate is or will be required by the present and future public conven-

ience and necessity in the same manner as provided in section 75-230, R. R. S. 1943.

7. **Public Service Commissions: Appeal and Error.** On an appeal to the Supreme Court from an order of the Nebraska State Railway Commission administrative or legislative in nature, the only questions to be determined are whether the commission acted within the scope of its authority and if the order complained of is reasonable and not arbitrarily made.

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

Nelson, Harding & Acklie and *Donald E. Leonard,* for appellants.

Torgeson, Hurlbut & Knapp and *Robert S. Stauffer,* for appellees.

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

BROWER, J.

This is an appeal from an order of the Nebraska State Railway Commission dated March 29, 1961, by which it sustained a motion by W. F. Gettel, Inc., appellee, for rehearing and reconsideration of its order of January 11, 1961, which had authorized the transfer of a certificate of public convenience and necessity of Oilfield Trucking, Inc., to Jeffries-Eaves, Inc., both of whom are appellants. The order appealed from granted the rehearing and reconsideration, and denied the application to transfer.

Hereafter, the Nebraska State Railway Commission will be designated as the commission; Oilfield Trucking, Inc., as Oilfield; Jeffries-Eaves, Inc., as Jeffries; and W. F. Gettel, Inc., as the protestant or Gettel.

The application of Oilfield and Jeffries which was to effectuate the transfer of certificate of public convenience and necessity No. M-10631, from Oilfield to Jeffries was filed with the commission on February 23, 1960, and was docketed as application No. M-11145.

Attached thereto was an agreement between the par-

ties showing the consideration of the proposed transfer and sale of the authority as $15,000, which Jeffries had placed in escrow in a bank to be delivered to Oilfield on final approval of the commission or, if appealed, by a court of last resort. Articles of incorporation of Jeffries and documents showing its equipment, financial condition, and other matters were likewise appended.

Application No. M-11145 was regularly set for hearing at Sidney, Nebraska, on April 13, 1960. Prior to the hearing Gettel and another carrier filed formal protests. One protest set out that Oilfield had conducted no operations for the past several years under its certificate and further it was in violation of the rules and regulations of the commission relative to providing reasonable and adequate service to the public.

The commission entered an order directed to Oilfield requiring it to show cause why its certificate of public convenience and necessity No. M-10631 should not be revoked for willful failure to comply with the provisions of the Nebraska Motor Carrier Act and the rules and regulations of the commission thereunder. The hearing on the order to show cause was likewise set for April 13, 1961, at Sidney, Nebraska.

A hearing was had before the examiner on that day and evidence was taken for the applicants and the protestants which will be discussed later.

During the examination of the witness Porter, president of Oilfield, the attorney for the protestant requested the production of the records of Oilfield with respect to certain financial transactions between Oilfield and Jeffries with reference to leased equipment. The witness testified they were in Winfield, Kansas, and the applicants' attorney stated, on request being renewed for their production, that Oilfield would not produce them and if protestant wanted them it would have to subpoena them.

On May 2, 1960, the protestant filed a praecipe for a subpoena duces tecum for Porter, president of Oilfield

and the proposed transferor, and Boyd, vice-president of Jeffries, the transferee, who testified at the hearing on April 13, 1960. It sought to require them to appear before the commission at a time and place to be set and to bring the financial records of the two companies with respect to lease arrangements and payments between them. It also asked for the records of payments made by them to others for services and the amounts paid or withheld for federal social security or income taxes. Likewise, it sought the records concerning the owners and drivers of equipment; whether Jeffries or Oilfield accepted, loaded, or delivered the freight; and concerning which of them collected the freight charges for transportation. It also sought the written lease between Jeffries and the owners of equipment that had been in turn leased by Jeffries to Oilfield.

Objections were filed on May 2, 1960, by both Oilfield and Jeffries to the granting of the subpoena and a motion made to quash the same. The motion to quash was overruled on May 3, 1960, and the praecipe granted. It provided that the matter should be thereafter set for further hearing.

On July 14, 1960, separate subpoenas were issued for each witness to appear with the records before the examiner on August 10, 1960, at Sidney, Nebraska. The subpoenas were served by sending them by registered mail, addressed to the witnesses without the State of Nebraska.

Jeffries, on July 18, 1960, filed a motion for rehearing and reconsideration of the order granting the subpoena but it was overruled by the commission. By a motion filed by both applicants and protestant the hearing was continued and thereafter was set for October 12, 1960, at the courthouse at Sidney, Nebraska, when further evidence was taken.

The transcript of the testimony taken at the hearing on April 13, 1960, was filed with the commission on

May 5, 1960, and that of the hearing on October 12, 1960, was filed on November 2, 1960.

On December 28, 1960, the examiner filed his report which reviewed the record and evidence, and at the conclusion recommended the application to transfer be granted.

On January 11, 1961, the commission entered an order granting the transfer from Oilfield to Jeffries on application No. M-11145, and granted Jeffries a certificate of public convenience and necessity for transporting oilfield equipment, materials, and supplies, as provided in the certificate previously held by Oilfield between points and places in Nebraska over irregular routes.

The order contained the following findings required by section 75-240.02, R. R. S. 1943:

"3. The proposed Transfer will be consistent with the public interest and will not unduly restrict competition.

"4. Applicant is fit, willing and able properly to perform the service proposed.

"5. It does not appear the certificate involved is dormant, nor that approval of the transfer will result in a new or different service or operation as to territorial scope than that which is or may be rendered or engaged in by the transferor."

Thereafter, on January 19, 1961, the protestant Gettel filed a motion for rehearing and reconsideration which was argued before the commission. Thereafter, on March 29, 1961, the commission entered an order in effect reversing its order of January 11, 1961, and sustaining the motion for rehearing and reconsideration of application No. M-11145. It vacated and set aside the order of January 11, 1961, and denied the application. Its findings in the order of March 29, 1961, insofar as necessary for this opinion, were as follows:

"3. That the proposed transfer of the certificate in Application No. M-10631 of Oilfield Trucking, Inc., Winfield, Kansas, to Jeffries-Eaves, Inc., Albuquerque, New

Mexico in Application No. M-11145 would result in a new or different service or operation as to territorial scope than that which is or may be rendered or engaged in by the transferor.

"4. That applicant, Jeffries-Eaves, Inc., Albuquerque, New Mexico, has failed to prove that the proposed transfer is or will be required by the present and future public convenience and necessity in the same manner as provided in Section 75-230, R. R. S. 1943."

From this order of March 29, 1961, sustaining the motion for rehearing and denying application No. M-11145, the applicants Oilfield and Jeffries have appealed to this court.

The applicants' assignments of error, insofar as they are discussed and argued in their briefs and which are required to be considered by this court, are as follows:

1. Error in the exercise of power by the commission without proper compliance with the law in its opinion, findings, and order entered March 29, 1961.

2. The commission erred in finding that the proposed transfer would result in a new or different service or operation as to territorial scope than that which is or may be rendered by Oilfield Trucking, Inc.

3. The commission erred in finding that the applicants were required by statute to show that the proposed transfer is or will be required by the present and future public convenience and necessity.

4. The order of the commission dated March 29, 1961, denying application No. M-11145, is unreasonable, arbitrary, and contrary to law as being contrary to the evidence and law.

The applicants Oilfield and Jeffries complain first of the findings and order of the commission of March 29, 1961, as being erroneous and arbitrary. Their argument is confined to the contention that the findings of the commission contained in its order of January 11, 1961, were still in full force and effect because not specifically revoked or cancelled by the commission. They

maintain that by virtue of sections 75-415 and 75-416, R. R. S. 1943, these findings remain in force until specifically annulled and that the vacation and revocation of the order leaves the findings still operative. They further contend that the original findings were sufficient to authorize the transfer of the authority of Oilfield, under certificate No. M-10631, to Jeffries and that the new findings were inconsistent with the old ones.

We cannot accede to this argument. Section 75-406, R. R. S. 1943, provides that a motion for rehearing may be filed within 10 days after the mailing of a copy of the commission's order which was filed in this case. Section 75-415, R. R. S. 1943, provides that no order shall go into effect during this 10-day period. It is apparent that rehearings are to be had in the proper case and this court has so held. Miller v. Consolidated Motor Freight, Inc., 168 Neb. 712, 97 N. W. 2d 265.

When the Nebraska State Railway Commission holds a rehearing and at the rehearing vacates and sets aside a former order the findings in the prior order are of no further effect.

It is also urged by the applicants that the order of March 29, 1961, was improper and invalid because the commission took no further evidence before the order was entered. The requirement that new evidence be taken hinges entirely upon whether or not it had before it sufficient evidence upon which it might on reconsideration make a new and different order. This has been done by the commission with approval of this court in Miller v. Consolidated Motor Freight, Inc., *supra.*

The next three assignments of error, in view of the determination we make of the case before us, depend upon a review of the evidence as shown by the bill of exceptions.

Before entering on a discussion of this evidence, it is appropriate to summarize the rules of law applicable to proceedings of this nature.

In the case of Neuswanger v. Houk, 170 Neb. 670, 104 N. W. 2d 235, this court laid down the following rules:

The question of dormancy, in case where an application is made for transfer of operating rights, should be the same as where an order to show cause had been issued based upon that ground.

Where a certificate of public convenience and necessity is not dormant it may be transferred on approval of the Nebraska State Railway Commission under reasonable rules and regulations to be prescribed by it, (1) if the transfer will be consistent with public interest, (2) if it will not unduly restrict competition, and (3) if the transferee is fit, willing, and able to perform the service proposed.

In determining the issue of public convenience and necessity, in cases where new or extended operating rights are sought, controlling questions are whether the operation will serve a useful purpose responsive to a public demand or need; whether this purpose can or will be served as well by existing carriers; and whether it can be served by applicant in a specified operation without endangering or impairing the operations of existing carriers contrary to the public interest.

Where an application is made for the transfer of operating rights under the provisions of section 75-240, R. R. S. 1943, the question of whether or not such operating rights are dormant, within the meaning of the foregoing statute, relates to the time the application is made, a hearing is held thereon, and for a reasonable length of time immediately prior thereto.

On an appeal to the Supreme Court from an order of the Nebraska State Railway Commission administrative or legislative in nature, the only questions to be determined are whether the commission acted within the scope of its authority and if the order complained of is reasonable and not arbitrarily made.

With these rules in mind we will now proceed to dis-

cuss the evidence as shown in the record before us. It is voluminous and there is some conflict in it but the greater portion of the controversy between the parties arises from diverse inferences and conclusions that can be drawn from it.

The transferor Oilfield had statewide authority to operate as a motor carrier in intrastate commerce in Nebraska authorizing it to carry oilfield equipment and supplies over irregular routes. Jeffries had interstate authority to carry the same type of equipment to and from Nebraska. It had no intrastate authority in Nebraska and desired to acquire it.

At the hearing on April 13, 1960, the only witnesses for the applicants were Porter, the president and general manager of Oilfield, who resided at Winfield, Kansas, where its administrative offices were located, and Olif Boyd, vice president of Jeffries, a resident of Denver, Colorado. Porter testified that Oilfield carried on business in Nebraska in a separate division. It had operated with leased equipment from facilities at Sidney, Nebraska, since January 10, 1960, on which day it leased equipment from Jeffries. The leased equipment consisted of 12 power units. The trailers were included with this leased equipment. Each tractor with trailer was of the approximate value of $27,000. The lease provided that Oilfield pay $50 a month per unit to Jeffries. The terminal facilities at Sidney were handled by a manager who was paid $500 a month by Oilfield. His name was Skeets Hardy. He was an employee of the transferee Jeffries who paid him $500 a month. He was also one of the owners of Reliable Trucking Company, a company having similar equipment. It will hereinafter be referred to as Reliable. Oilfield, Jeffries, and Reliable used the same facilities at Sidney. Hardy attended to the business of all of them. Jeffries did not own the equipment leased to Oilfield. Of the equipment three units were leased by Reliable to Jeffries. The other nine units were leased from other parties to

Jeffries. These units, 12 in all, were subleased to Oilfield. The only facilities Oilfield had at Sidney were the ones furnished by Hardy. Oilfield made no arrangements with respect to their acquisition.

The witness Porter did not know what improvements were on the facilities and whose facilities they were. He did not know whether Oilfield had advertised in Nebraska for 6 months prior to the hearing. The witness on cross-examination did not know whether the rental of $50 a month per unit had been paid because the records were at Winfield. He did not know who actually owned the equipment or how it was marked.

The testimony disclosed remittances for Nebraska transportation were sent to both Oilfield at Winfield and Jeffries at Albuquerque, which was Jeffries' home office. The leased equipment at Sidney was used interchangeably in both interstate and intrastate operations. It was leased to Jeffries by certain individuals, subleased to Oilfield, and trip leased back to Jeffries for interstate work. The trip leasing was verbal by Hardy and not embodied in the sublease to Oilfield. Jeffries operates in 14 states and Canada in interstate commerce, including Nebraska, and 5 other states in intrastate commerce.

The witness Boyd had no knowledge of the remittances going to Jeffries at Albuquerque. He knew none had been cashed by Jeffries. Jeffries had access to the accounts receivable at Sidney. When the Reliable equipment was used in interstate commerce by Jeffries, Reliable received 89½ percent of the revenue. Boyd stated Jeffries was developing the business and would receive the benefit if the application was approved. He stated no payment except the lease fee was paid by Oilfield to Jeffries. Boyd states at first that there was no procedure set up by Jeffries for accounting with Oilfield. The intrastate revenue went to Oilfield. Oilfield paid the individual owners of equipment used in intrastate commerce in addition to the $50 to Jeffries. The original

owners of equipment received 89½ percent of gross intrastate revenue. Later he stated Jeffries paid the owners and Oilfield paid Jeffries. Jeffries had three employees in addition to Hardy at Sidney. They were not paid by Oilfield.

Prior to the sublease of equipment from Jeffries, Oilfield had no terminal at Sidney. It had leased equipment from Bill Kope, hereinafter referred to as Kope, who had a small yard at Kimball, Nebraska. These operations were testified to by Porter. Oilfield received 5 percent of the gross revenue from Kope's operating this equipment. Kope had authority to receive the bills and pay them with checks drawn by him on a Kimball bank. Kope received the receipts and deposited them at that bank. Oilfield had no control over the account and put no money into the operation. Kope received no salary and Oilfield did not hire or supervise the personnel. Kope never made an accounting. When asked if the losses of Oilfield exceeded the 5 percent gross, the president answered that they made nothing out of the arrangement.

At the hearing on April 13, 1960, abstracts of shipments were prepared and introduced in evidence. The first of these, exhibit 2-A, was submitted as shipments of Oilfield from August 5 to December 15, 1959, and contained records of 211 shipments. This was the period during which Kope operated the terminal at Kimball. It ended at about the time he ceased acting for Oilfield.

The second, exhibit 3, contained the shipments from January 18 to March 29, 1960, when Hardy operated the facilities at Sidney which contained a record of about 90 shipments. No shipments were shown between the time of leasing of equipment from Kope and the lease from Jeffries. There was testimony tending to show one unit of equipment for operation in Nebraska stationed at Great Bend, Kansas, but no record was produced of any operations by it.

At the hearing the president of the protestant Gettel

testified as to its operation. It had statewide authority for carrying oilfield equipment in intrastate commerce in Nebraska. Gettel had 10 truck-tractors of which 9 were rigged for oilfield work, and 14 trailers with a terminal at Kimball, Nebraska, covering between 10 and 15 acres. It has two telephones and a radio system between the office and equipment. It maintained offices at Sidney with a telephone, also a yard covering 5 acres at Harrisburg, Nebraska. An accountant testified as to the balance sheet and operating statement for 1959. It showed an invested capital approximating $265,000 for common carrier equipment and gross revenue for the year of $317,257.57. Its net income however was only $3,790.97.

Gettel, the president, testified that Jeffries had offered to buy the authority with an agreement to transfer it back if the arrangement at any time proved to be unsatisfactory.

Ernie Neff, president of Neff Trucking Company, a protestant, testified as to its facilities at Kimball and elsewhere. The facilities at Kimball alone represented a thirty thousand dollar investment. It had $268,000 invested in motor equipment at Kimball. It hired 75 employees of whom 35 were in Nebraska.

The testimony of the protestants was of course for the purpose of showing adequate facilities existed for the oilfield business and that further authority to be granted would injure those not operating very profitably at the time.

In the October hearing following the issuance of the subpoena duces tecum further evidence of substance was offered and received both in the form of documents and testimony.

A new motion was made at the hearing to release Porter from the subpoena on the grounds that he was served while in Kansas and that Oilfield's records had been produced in any event in response to the subpoena.

He was released but the examiner ordered the records of Oilfield to be submitted to counsel.

Donovan M. Hoover, vice president and general counsel of Jeffries, and Olif Boyd, another vice president, who had testified previously, were called by the protestant and testified. Hoover testified that all of the records of Oilfield pursuant to the subpoena were produced. The lease of equipment from Jeffries to Oilfield was introduced in evidence. The lease, dated January 10, 1960, covered 9 units of equipment. It was stamped "approved conditionally," by the Motor Transportation Department of the Commission. The lease provided the rental to be paid to Jeffries was $50 a month per unit. The drivers were to be exclusively the employees of the lessee Oilfield. Jeffries owned none of this equipment. A lease of one of the owners to Jeffries was introduced and the testimony was that the remaining original nine units described in the lease given by Jeffries to Oilfield were similar to it except for the names of the lessors and description of the units. They purport to be leases to Jeffries for use in interstate commerce and provide for the exclusive control in Jeffries of the leased equipment. By their terms the equipment was to be operated only by licensed drivers in the lessee's employment. Rental in an amount equal to 89½ percent of the gross revenue earned by each unit was to be paid with the exception of three units which were rented from Reliable which was to receive 90 percent. None of the leases provided for subleasing.

Later, three units were added to the equipment. They likewise had been leased to Jeffries and were reported to the commission as added to the subleased equipment to Oilfield and the commission approved on a copy of the letter.

Records from the books of Jeffries and testimony explaining them show the receipts from both interstate and intrastate shipments at Sidney were sent to and received by Jeffries. Prior to April 13, 1960, the re-

mittances for intrastate shipments were sent to Oilfield at Winfield, Kansas, and endorsed and sent to Jeffries at Albuquerque, New Mexico. Subsequent to that date they went directly to Jeffries at Albuquerque. These later remittances were endorsed by Billy Saxon whom the witness said was an agent for Oilfield appointed for convenience. The receipts for interstate and intrastate shipments however were identified separately on Jeffries' books. Thereafter, approximately 89½ percent of the revenue less certain small charges from both operations were remitted by Jeffries' check to Reliable at Sidney. Hoover testified that Reliable was the agent both of Jeffries and Oilfield, but there was no further showing as to what happened to these payments. Hoover said it was beyond his information as to whether there were any such records. It appears that Reliable was the owner of part of the equipment and the assignee of owners for collection of the rent from the others, and that this might be in payment of the rentals.

The remaining 10 percent, or thereabouts, was kept by Jeffries. Hoover testified it was retained by Jeffries under an agreement of the parties "based upon bookkeeping services rendered by Jeffries-Eaves for Oilfield Trucking, Inc."

The records of Jeffries with respect to the employees assigned to the Sidney terminal, including wages paid for transportation in both interstate and intrastate commerce, were identical as to type of information. Twenty persons were employed during the period of the operations under the equipment lease. From each Jeffrey deducted F.I.C.A. and withholding taxes, and from the records were prepared the necessary government reports. Boyd testified that the only way to show from the records who loaded and unloaded shipments in exhibit 3, being the shipments claimed as Oilfield, was to examine the several bills of lading, and time and trip sheets which were not brought pursuant to subpoena because the witness thought they would not be asked

for. All of the office help at the Sidney terminal were employed by Jeffries except one girl, an employee of Reliable.

No records were shown concerning the payment by Oilfield of $500 a month to Hardy as salary nor the rental of the 12 units of equipment at $50 a month per unit to Jeffries. It would seem that if 89½ percent of gross income was remitted to Reliable and 10 percent retained for bookkeeping service, no operational funds would be available to pay them. If paid, Oilfield's operation would have been at a substantial loss.

Neither Hardy nor Kope, the agents of Oilfield at Sidney and Kimball, testified.

There was, of course, other evidence. The review would however appear to reflect the substance of the whole. It would appear with such evidence before it there was reasonable grounds for the commission to find on rehearing and reconsideration that the operation, instead of being that of Oilfield operated by it under its authority through leased equipment, was in fact an operation of the authority of Oilfield by the proposed transferee Jeffries to reactivate that which was to all intents dormant. The character of the operation when Kope leased equipment immediately before the Jeffries lease appears substantially the same.

Under a quite similar factual situation the United States District Court for the District of Nebraska, in United States v. Canada, 105 F. Supp. 126, a criminal case for illegal operation without authority, stated: "Upon the facts found, the court is convinced beyond a reasonable doubt that the defendant is guilty as charged upon each count of the information. The lease of July 1, 1947 appraised in the light of the practical conduct of the parties is completely unrealistic and a mask or sham not reflecting, but rather concealing the actual operations of the defendant.

"The earlier effort, neither completely abandoned nor finally rejected on July 1, 1947, to acquire Grantham's

operating rights discloses the true purpose of the parties. Grantham had abandoned the transportation business and desired wholly to part for value with its Interstate Commerce Commission permit. The defendant wanted to acquire it. Thwarted in that effort, but still litigating the question, the parties made the lease, whereunder Grantham's permit was to be utilized for the operations to Kearney and Lowell as destination points which the defendant had in view.

"Without asserting or thinking that operations conducted within the definition and ostensible plan of the written lease would have been unlawful, the court finds that such operations never occurred. The lease contemplated and provided for transportation by Grantham. What resulted was transportation, with virtually all of its identifying indicia, by the defendant. Grantham was, and remained, out of the transportation business. The defendant simply extended his carriage operations to the forbidden destinations of Kearney and Lowell. Branding the equipment with a legend declaring its leasing to Grantham and procuring insurance coverage in Grantham's name, both under the spur of the Commission's representative, are inadequate to nullify that conclusion. After, as well as before, those actions the substantial operation in complete reality was the defendant's. Nor are the bookkeeping operations already mentioned effective to convert the defendant's carriage into an operation by Grantham."

The present case under consideration is not before us de novo. It is here as far as the evidence is concerned to ascertain whether the action of the commission was arbitrary or unreasonable.

The appellant Jeffries had no certificate of public convenience and necessity to operate a motor carrier in Nebraska in intrastate commerce. In R. B. "Dick" Wilson, Inc. v. Hargleroad, 165 Neb. 468, 86 N. W. 2d 177, this court quoted section 75-228, R. R. S. 1943: " 'It shall be unlawful for any common carrier by motor

vehicle subject to the provisions of sections 75-222 to 75-250, to engage in any intrastate operations on any public highway in Nebraska unless there is in force with respect to such carrier a certificate of public convenience and necessity issued by the State Railway Commission authorizing such operations.' "

The question of whether the operating authority of Oilfield was being operated lawfully by it by means of leased equipment or whether it was dormant and was being unlawfully operated by Jeffries at the time the requested transfer was before the commission. It would appear there was evidence before it from which it might reasonably be inferred that Oilfield had discontinued its own operations.

Where on application to transfer a certificate of public convenience and necessity the dormancy of the certificate may reasonably be inferred from the evidence before the commission, the express provisions of section 75-240.02, R. R. S. 1943, provide that the commission may approve an application for transfer only upon the basis of proof of, and a finding that, the transfer of such certificate is or will be required by the present and future public convenience and necessity in the same manner as provided in section 75-230, R. R. S. 1943.

In such a case this court has held the burden is on the applicant for the certificate to show that the statutory requirements for the issuance thereof exist. In re Application of Moritz, 153 Neb. 206, 43 N. W. 2d 603.

It would follow that if the operational authority were dormant the proposed transfer would also result in new or different service or operation as to territorial scope. In the present case the protestants introduced considerable evidence from which the commission could find that adequate facilities already existed for the transportation of oilfield equipment and that public convenience and necessity did not require further service by carriers in the field requested.

We cannot find that the order of the commission was

arbitrary or unreasonable, and its action should be affirmed.

AFFIRMED.

SIMMONS, C. J., participating on briefs.

VERNON BRELAND, APPELLANT, V. CECO STEEL PRODUCTS CORP., APPELLEE.

113 N. W. 2d 528

Filed February 16, 1962. No. 35105.

1. **Workmen's Compensation.** The rule of liberal construction, as it relates to the workmen's compensation law, applies to the law and not to the evidence offered to support a claim by virtue of the law.
2. ———. Under the workmen's compensation law it is required that the plaintiff prove by a preponderance of the evidence, before compensation can be awarded, that personal injury to an employee must have been caused by an accident arising out of and in the course of his employment.
3. ———. Such facts must be proved by the plaintiff by sufficient legal evidence leading to the direct conclusion, or a legal inference therefrom, that such an accidental injury occurred and caused the disability.
4. ———. Where the evidence is conflicting and cannot be reconciled, this court, upon a trial de novo in a workmen's compensation case, will consider the fact that the trial court observed the demeanor of witnesses and gave credence to the testimony of some rather than to the contradictory testimony of others.
5. ———. If, after injury, an employee receives the same or higher wage than before injury, it is indicative, although not conclusive, of the fact that his earning power has not been impaired.

APPEAL from the district court for Douglas County: JOHN E. MURPHY, JUDGE. *Affirmed.*

Ross & O'Connor, for appellant.

Joseph P. Cashen and *Kennedy, Holland, DeLacy & Svoboda,* for appellee.

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

BROWER, J.

This is an action brought under the Nebraska Workmen's Compensation Law by Vernon Breland, appellant and plaintiff, against Ceco Steel Products Corporation, appellee and defendant.

A hearing was had before a judge of the compensation court on December 2, 1960, and on December 27, 1960, the judge found that the plaintiff was temporarily totally disabled from the date of the accident until May 8, 1960, and was entitled to compensation thereafter for an additional 296 4/7 weeks at $6.80 per week on account of 7½ percent permanent partial disability and loss of earning power to the body as a whole, and also allowed certain medical expenses.

From the award of the single judge defendant appealed to the workmen's compensation court which heard the same, sitting en banc, and on March 2, 1961, entered an award which denied compensation for the permanent partial disability to the body as a whole.

The allowance for total temporary disability has been paid. The medical and hospital expenses have been allowed and adjudged by the court below and no question is raised concerning them.

Plaintiff appealed to the district court for Douglas County which court dismissed the appeal and as a result sustained the award of the compensation court, finding no permanent partial disability. After a motion for new trial filed by the plaintiff was overruled, he appealed to this court.

The only error alleged is that the court erred in failing to find that plaintiff sustained injuries of a permanent partial nature to the body as a whole.

This being a matter which is tried de novo in this court, it becomes necessary for us to review the evidence.

On April 14, 1960, the plaintiff while employed by defendant as a carpenter at the Brandeis Building in Omaha was engaged in tying pans on the ceiling of a building. His work on this job required him to stand

on a scaffold and work by reaching above his head. He was wearing an aluminum safety hat. The scaffold broke and he fell 9 feet or more causing the injuries, the extent of which is the question in controversy. He remembers his head struck something and then he blacked out. He was taken to Immanuel Hospital where he remained 4 days and was treated by Dr. Vetter who applied heat to his right side. After he left the hospital this treatment was continued by the doctor throughout May 1960. However, he was able to return to work on May 9, 1960, being still employed by defendant. While away from work he received compensation for temporary total disability. After his return to work he received a slight raise in pay and then received $3.55 an hour. On return he states he asked for and received lighter work but it appears the work he had been doing had terminated. His new assignment consisted of building shoring. This required handling and clamping together 4 x 4 timbers from 7 to 9 feet long, weighing about 36 pounds each, classed by the field superintendent as heavy work which he says was the only work the defendant had. This available work ended in June of 1960, and shortly thereafter he entered the employment of W. Boyd Jones who was repairing a partially burned-down feed mill for Swift Packing Company, where he assisted in tearing down and rebuilding a roof and moving equipment. He continued this work at the same hourly wage until November 25, 1960.

On October 14, 1960, he consulted with Dr. Harold A. Ladwig, a neurologist at Omaha. This was the first medical treatment since his visit to Dr. Vetter in May of 1960.

Dr. Ladwig who testified for plaintiff stated he made an examination of and took a history from the plaintiff concerning his accident and condition. In the history, as related by the doctor, plaintiff said that in the fall he struck a concrete wall with his right side and that his head struck something in falling. He spoke of pain

in his back which had continued to grow worse. It was relieved somewhat on movement. He complained also of headaches consisting of dull, throbbing pain in the left frontal region occasionally becoming sharp. The pain bothered him on working with his hands above his head or at his feet. He also complained of numbness in his left hand.

The doctor's examination showed the cranial nerves as normal except a decreased hearing in the left ear. His muscle strength was normal. The cervical vertebra showed normal alignment. The thoracic vertebra disclosed a mild kyphosis or backward curvature and there was some degenerative spurring in the cervical vertebra, neither of which he associated with the accident.

There was however tenderness in the middle of the back to the right midline and a tenderness of the upper cervical area where, if he applied pressure, headache was produced. The doctor also found an area of hypesthesia or decreased feeling in the little and ring fingers of the left hand, which the doctor stated involved the distribution of the ulnar nerve in the left arm. The doctor thought plaintiff had received a muscular sprain which he associated with the headache and tenderness in the upper cervical region, and that this and the disturbance of sensation in the left ulnar nerve resulting in the numbness in the left hand were of post-traumatic nature, and thus he attributed it to the accident in view of the fact the numbness, according to the history, had not existed before. He stated the basis for the partial permanent disability was primarily on the hypesthesia or numbness in the hand. He estimated this disability at 5 or 10 percent of the body as a whole.

The doctor testified that he could not state at what point the ulnar nerve had been injured and that many times injuries to the ulnar nerve exist where no cause could be found. He stated the trauma in many cases might have been caused several years before the doctor

saw the patient. In this case it might have been produced by trauma occurring months before the accident. He stated also that the only basis for his conclusions was the history related by the patient who reported no injury to the left arm in the fall.

The last time the doctor saw plaintiff was on February 14, 1961, at which time the tenderness in the neck and back regions was present but not in so great a degree, but the hand was much the same.

Dr. Alister I. Finlayson, a neurological surgeon on the staff of several hospitals in Omaha, examined the plaintiff on behalf of the defendant on February 13, 1961. He also reviewed the report of Dr. Ladwig and received a history from plaintiff which related the pain in the neck and headaches, and the numbness or "sleep" sensation in the left hand. There was no pain associated with the numbness and no complaint with regard to strength or handgrip. He examined the cranial nerves going to the neck; checked the function of the spinal cord and nerves going to the extremities and trunk; and also checked by means of examination of his motor strength, reflex activity and sensory disturbances or their lack, and coordination tests. In the examination there were no positive findings except the disturbance in the ulnar nerve resulting in the numbness of the hand which he said extended up the arm to a slight degree only. He found spurring in the cervical vertebra but considered it unrelated to the accident. Plaintiff's history did not disclose any injury to the arm except an abrasion to the thumb which was not related to the numbness. He indicated he could not determine with any degree of certainty the cause of the numbness in the hand.

Nolan Bracey, the defendant's field superintendent, testified that he was well acquainted with the plaintiff and that their families get together about once a week. He was not present at the accident. The ceiling on which plaintiff was working was approximately 16 feet high and that a contemplated fill on the floor might not

have been finished, and that, therefore, it might have been higher. He further testified that the work the plaintiff did upon returning to work after the accident was classed as heavy work. The plaintiff was given the work and did it, and while continuing to work complained of no difficulty.

This is the substance of the evidence before the trial court. This being a workmen's compensation case, it is to be considered and determined de novo upon the record by this court. Gotfrey v. Sakurada, 169 Neb. 879, 101 N. W. 2d 470. In such a case this court has held, in Cole v. Cushman Motor Works, 159 Neb. 97, 65 N. W. 2d 330, that: "'In considering the sufficiency of the proof it should be remembered the rule of liberal construction, as it relates to the workmen's compensation law, applies to the law and not to the evidence offered to support a claim by virtue of the law. The rule does not dispense with the necessity that claimant prove his right to compensation; that is, it does not permit a court to award compensation when the required proof is lacking.'"

In the case before us it is not questioned that there was an accident and that the plaintiff was injured and received compensation of a temporary nature. He seeks however compensation for permanent partial disability. In such a case the claimed disability must be shown to have resulted from the accident. In Pixa v. Grainger Bros. Co., 143 Neb. 922, 12 N. W. 2d 74, this court said, concerning a death claim under workmen's compensation, that: "Any possible connection between the slight accident to his back, from which his attending physician says he had recovered, and his death would be a mere guess, surmise, conjecture, speculation, or possibility.

"This is not sufficient, for under our law it is required that the plaintiff prove by a preponderance of the evidence, before compensation can be awarded, that personal injury to an employee must have been caused by

an accident arising out of and in the course of his employment.

"Such facts must be proved by the plaintiff by sufficient legal evidence leading to the direct conclusion, or a legal inference therefrom, that such an accidental injury occurred and caused the disability."

Though Dr. Ladwig and Dr. Finlayson agreed in many respects as to the plaintiff's condition, they did not agree as to whether the permanent partial disability was attributable to the accident. Dr. Ladwig felt that, "from the history of its development, following the injury, one would relate it as being post-traumatic in origin." He admitted that this was based wholly on the history given to him by the plaintiff. Dr. Finlayson, after his examination and review, felt that he could not state what had brought about the condition in the left hand and could not find any other condition of permanence.

It is to be noted that plaintiff had been treated by Dr. Vetter immediately following the accident for injury to his right side, and not his left side. The plaintiff related falling upon his right side to the doctors. The field superintendent testified that the plaintiff did ordinary heavy work without complaint. Therefore, it appears that there is a conflict of evidence as to when the disability arose and what might have caused it, and as to whether or not it can with any reasonable certainty be attributed to the accident.

In such a case, "Where the evidence is conflicting and cannot be reconciled, this court, upon a trial de novo in a workmen's compensation case, will consider the fact that the trial court observed the demeanor of witnesses and gave credence to the testimony of some rather than to the contradictory testimony of others." Cole v. Cushman Motor Works, *supra.*

In the case of Frederick v. Cargill, Inc., 165 Neb. 589, 86 N. W. 2d 575, this court said: "If, after injury, an employee receives the same or higher wage than before

injury, it is indicative, although not conclusive, of the fact that his earning power has not been impaired." It is to be noted that in the work plaintiff did for the defendant and W. Boyd Jones after his injury he received slightly more wages than before the accident.

Reviewing the record in this case, we are of the opinion that the plaintiff has not sustained the burden of proof which is required by him to show, with reasonable certainty, that the permanent disability of which he suffers was caused by the accident which he sustained while in the employ of defendant.

To award him compensation for the disability claimed would be, as stated in Pixa v. Grainger Bros. Co., *supra,* a mere guess, surmise, conjecture, speculation, or possibility. This conclusion agrees with that of the court which tried the case, heard the testimony, and observed the witnesses.

The plaintiff having received total temporary disability payments while away from work and the judgment of the trial court having awarded the medical and hospital expense, the judgment should be and is affirmed.

AFFIRMED.

SIMMONS, C. J., participating on briefs.

ELLA P. COKER, APPELLEE, V. ALFRED M. COKER, APPELLANT.
113 N. W. 2d 329

Filed February 16, 1962. No. 35106.

1. **Parties.** Where a defect of parties is not raised by demurrer or answer, the defect is waived unless such parties are indispensable to the rendering of a final judgment consistent with equity and good conscience.
2. **Divorce.** After judgment has been entered in a divorce action, a property and alimony settlement made by the parties before judgment is effective only insofar as it is made a part of the judgment.
3. ———. After divorce, a wife is at liberty to establish an independent domicile.

4. ———. In the absence of evidence showing a change in circumstances, there is no basis upon which the judgment in a divorce action which has become final can or should be modified.

APPEAL from the district court for Douglas County: LAWRENCE C. KRELL, JUDGE. *Affirmed in part, and in part reversed and remanded.*

Fraser, Wenstrand, Stryker, Marshall & Veach and *Young, Holm, Miller & McEachen,* for appellant.

Wear, Boland, Mullin & Walsh, for appellee.

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

BOSLAUGH, J.

This is an appeal from the district court for Douglas County, Nebraska, in proceedings upon a motion relating to a judgment in a divorce action. Ella P. Coker, the appellee, was the plaintiff in the divorce action. Alfred M. Coker, the appellant, was the defendant.

On March 8, 1960, the plaintiff was granted an absolute divorce from the defendant and was awarded the custody of the minor daughter of the parties, Mary Jo Ann Coker, subject to the defendant's right of visitation. The parties had entered into a separation agreement which was approved by the court and incorporated in the judgment in the divorce action.

The separation agreement provided in part as follows:

"In consideration of the release by First Party of her marital rights in any property of Second Party, Second Party shall supply to First Party a home for herself and Mary Jo Ann Coker, costing approximately Fifty Thousand ($50,000) Dollars, more or less, the title to which shall be placed in the Mary Jo Ann Coker Trust #2 with a life estate to First Party, with a reversion on the death of First Party to the Mary Jo Ann Coker Trust #2.

"First Party shall select the location and the specific property, and her first choice of said property shall

be in the State of California, and the location and property shall be subject to the approval of the Second Party.

"In order to bring about the purchase of said house, Second Party shall supply the First Party with sufficient funds to seek out and approve two or more locations and properties and submit same to Second Party for the approval of the one of his choice.

"First Party shall have the right to select the necessary furnishings and fixtures from the home now occupied by her and Mary Jo Ann Coker, to furnish the new home, except the drapes, carpets, and any items regarded as fixtures shall be left within the present home.

"Second Party shall pay the necessary moving expenses of First Party, in an amount not in excess of Five Thousand ($5,000) Dollars. * * *

"If in the future it becomes necessary or desirable that the location and home be changed, the sale of the property first agreed upon and set up as the home of First Party and Mary Jo Ann Coker shall be by mutual agreement of the parties hereto, and the same provisions with reference to the title shall apply to the new location and home which shall be substituted for the one first acquired.

"In the event a second home is acquired, then the funds from the sale of the first home shall be used for the acquisition of the second home, and the same terms and conditions with reference to title and life estate shall apply to the second home.

"If the parties are unable to agree as to a second home or residence, then same shall be submitted for determination by the District Court of Douglas County, Nebraska."

After some preliminary difficulty and a further proceeding before the district court, a home was purchased in the Los Angeles, California, area and in June 1960, the plaintiff and her daughter moved into the new home.

In the fall of 1960, in a telephone conversation with

the defendant, the plaintiff said that she and Mary would like to return to Omaha. The defendant asked the plaintiff to make a written request stating her reasons. The plaintiff then employed counsel in California who wrote to the defendant. The defendant referred the matter to his attorneys in Omaha and the matter eventually resulted in this proceeding.

On March 21, 1961, the plaintiff filed a motion for an order authorizing the plaintiff and Mary to move from California to Omaha; directing the sale of the California real estate and the purchase of a new home in Omaha; and requiring the defendant to pay the moving expenses, attorney's fees, costs, and other expenses incident to the proceeding. A notice of hearing addressed to the defendant and "The Omaha National Bank of Omaha, Nebraska as Trustee of the Mary Jo Ann Coker Trust #2," and to the defendant's counsel as "their attorneys," was served upon one of the defendant's attorneys who acknowledged receipt of the notice as one of the attorneys for the defendant and "The Omaha National Bank, Trustee." The defendant filed objections to the plaintiff's motion. The bank as trustee made no appearance in the proceeding.

The district court found generally for the plaintiff and entered an order authorizing the plaintiff and Mary to move back to Omaha, directing the bank as trustee to sell the California property, and directing the plaintiff to "take such further action as may be necessary" to obtain a new residence property in Omaha. The court further ordered the defendant to pay one-half of the moving expenses and allowed the plaintiff's attorney a fee of $250. The defendant's motion for new trial was overruled and he then perfected this appeal.

The assignments of error are that the trial court erred in directing the trustee to sell the California property because the trustee was not a party to the proceedings, and that the order of the court is contrary to the law and the evidence.

The defendant's contention that the trustee was not a party to the proceeding appears to be somewhat of an afterthought. The notice of hearing of the plaintiff's motion was addressed to both the defendant and the trustee, and receipt of a copy of the motion and notice was acknowledged by defendant's counsel as attorneys for both the defendant and the trustee. The defendant's objections to the motion of the plaintiff did not assert that there was a defect of parties because the trustee had not been made a party to the proceeding and it does not clearly appear that the defendant made an objection to that effect at any time in the district court. The general rule is that a defect of parties not raised by answer or demurrer is waived. Riley v. National Auto Ins. Co., 162 Neb. 658, 77 N. W. 2d 241, 57 A. L. R. 2d 1219.

The defendant argues that the trustee is an indispensable party to the proceeding and suggests that a separate trust agreement exists which, although not in the record, should be considered by the court before determining the present controversy between the plaintiff and the defendant. This argument overlooks the fact that the rights of the parties in this proceeding are determined by the judgment entered in the divorce action. This proceeding involves only the interpretation and enforcement of the judgment.

"Courts may approve property and alimony settlements made between the parties, when a divorce is granted, if it finds the same to be fair and equitable. However, when the court in its decree determines and fixes the amount of alimony and no appeal is taken therefrom, the effect of the stipulation, so far as the decree is concerned, is that it was taken merely as advisory to the court and the terms fixed by the decree are controlling." Dunlap v. Dunlap, 145 Neb. 735, 18 N. W. 2d 51.

We are concerned here with a judgment that is binding upon both the plaintiff and the defendant. So far

as this proceeding is concerned, the trustee is merely an agent designated by the defendant to perform in his behalf certain duties and obligations imposed upon him by the judgment in the divorce action and that otherwise must be performed by the defendant. The defendant will not now be heard to complain that, perhaps, the terms of the judgment cannot be complied with because of some provision in a trust agreement which is not shown to have been before the court at the time the judgment was entered. In the present state of the record, the trustee is no more than a nominal party to this proceeding.

It is apparent from the record that the plaintiff and Mary are dissatisfied with living in California and they wish to return to Omaha. There is nothing which prevents them from doing so. After divorce, a wife is at liberty to establish an independent domicile. 17A Am. Jur., Domicil, § 64, p. 244; Restatement, Conflict of Laws, § 29, p. 54.

Their change in residence, however, is to be made at the expense of the plaintiff except to the extent that the judgment provides otherwise. To require the defendant to pay all or a part of the moving expenses of the plaintiff and Mary would be, in effect, a modification of the judgment and the allowance of additional alimony and child support. In the absence of evidence showing a change in circumstances, there is no basis upon which the judgment could or should be modified. Dunlap v. Dunlap, *supra*. The evidence in this case does not show a change of circumstances sufficient to justify a modification of the allowances previously made.

The separation agreement, which is a part of the judgment, provides that the sale of the California property should be by mutual agreement of the parties. Since the parties were unable to arrive at an agreement, it was proper for the district court to order the property sold. In the event the parties are unable to agree upon a second home, which shall be a replacement or

substitute for the California property, then the matter should again be submitted to the district court.

That part of the order of the district court directing the sale of the California property and the application of the proceeds to the purchase of a replacement property strictly in accordance with the terms of the original judgment is affirmed. The part of the order directing the defendant to pay one-half of the moving expenses is reversed and the cause remanded. No further allowance for attorney's fees is made. All costs are taxed to the appellant.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED.

SIMMONS, C. J., participating on briefs.

DONALD ROSS FRASER ET AL., APPELLANTS, V. ALICE N. TEMPLE ET AL., APPELLEES.
113 N. W. 2d 319

Filed February 16, 1962. No. 35109.

1. **Limitations of Actions: Tenancy in Common.** An action for the recovery of rents and profits from a cotenant is not barred by the statute of limitations until 4 years have elapsed from the accruing of such action.
2. **Limitations of Actions.** The accrual of a cause of action means the right to maintain and institute a suit, and whenever one person may sue another, a cause of action has accrued and the statute begins to run, but not until that time. So whether at law or in equity, the cause of action arises when, and only when, the aggrieved party has a right to apply to the proper tribunal for relief.
3. **Equity.** Independently of any limitation prescribed for the guidance of courts of law, equity may, in the exercise of its own inherent powers, refuse relief because of laches where it is sought after undue and unexplained delay, and when injustice would be done, in the particular case, by granting the relief asked.
4. **Tenancy in Common: Interest.** Under section 45-104, R. R. S. 1943, a cotenant who collects the rents and profits on real estate

is required to pay interest at the rate of 6 percent per annum for each year's rent to the other cotenants.

5. ———: ———. In the instant case the above applies for the years of 1956, 1957, 1958, and 1959.
6. **Tenancy in Common.** The cotenant who has collected the rents and profits of the real estate and paid the taxes thereon for the years above mentioned is entitled to have credit for the taxes paid on such real estate.

APPEAL from the district court for Perkins County: VICTOR WESTERMARK, JUDGE. *Affirmed in part, and in part reversed and remanded with directions.*

Bruce K. Lyon, for appellants.

George B. Hastings, Frederick E. Wanek, and *McGinley, Lane, Mueller & Shanahan,* for appellees.

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

MESSMORE, J.

The plaintiffs, Donald Ross Fraser, Kenneth Fraser, Dorothy Hyde Fraser (who has no interest in the real estate here involved except by virtue of being the wife of Kenneth Fraser), and Bruce K. Lyon, administrator of the estate of Carrie N. Fraser, deceased, brought this action in the district court for Perkins County against Alice N. Temple, William H. Long, and Wardie E. Bullock, defendants, to partition 160 acres of farm real estate located in Perkins County and, in addition, for an accounting of rents and profits received by the defendant Alice N. Temple who was a cotenant with Carrie N. Fraser, now deceased.

This case is for trial de novo on the record before us.

The issue on this appeal is confined to the accounting, and there is no issue insofar as the partition of the real estate is concerned.

Donald Ross Fraser and Kenneth Fraser, since the death of their mother, Carrie N. Fraser, are each owners, in fee simple, of an undivided one-fourth interest in said real estate.

The trial court found that the plaintiffs were entitled to an accounting of the rents and profits from the defendant Alice N. Temple for the years 1956, 1957, 1958, and 1959; that said plaintiffs were not entitled to an accounting for any rentals received by Alice N. Temple before 1956, for the reason that said claim was barred by the statute of limitations; that upon the accounting action there was due the administrator of the estate of Carrie N. Fraser, deceased, $1,806.43; that no demand was made by the administrator until the filing of the amended petition on November 8, 1960, and by reason thereof the administrator is not entitled to interest thereon until after said date; that the total interest due to date of decree was $56.59, making an aggregate amount due the administrator of $1,863.02; and that the administrator had a lien against the interest of the defendant Alice N. Temple in the land involved in this action in said amount, together with interest at 6 percent per anum until paid.

Judgment was rendered in accordance with the findings.

The plaintiffs filed a motion for new trial, which was overruled. The plaintiffs perfected appeal to this court.

On or about April 25, 1887, the Union Pacific Railroad Company conveyed the southeast quarter of Section 13, Township 11 North, Range 38 West of the 6th P. M., in Perkins County, Nebraska, to Carrie N. Fraser and Alice N. Temple as tenants in common, in equal shares. Carrie N. Fraser died December 16, 1959.

The defendants, William H. Long and Wardie E. Bullock have been tenants on this land in the years 1956, 1957, 1958, and 1959.

The amended petition, for the second cause of action, alleged in substance that ever since the real estate was conveyed to Carrie N. Fraser and Alice N. Temple as tenants in common, Alice N. Temple had assumed control and management of the land, and during all of the period of time had leased and rented the land in her

own name, collected all of the rents for the same, used them for her own benefit, and had never accounted to the other tenants in common for any of the rents that she collected, nor had she paid such other tenants any of the money she collected from the rents; and that during this period of tenancy in common, this land had been leased most of the time on a crop-sharing basis. The plaintiffs prayed for an accounting to be made of all the rents and profits collected by Alice N. Temple since she took exclusive control of the land, about April 25, 1887; that any amount found due the plaintiffs be decreed to be a lien upon that part of said real estate owned by Alice N. Temple; and, in addition, that interest be allowed such plaintiffs on all the sums found due them from the time each item was due and payable.

The defendant, Alice N. Temple, in her answer, alleged an affirmative defense to the plaintiffs' second cause of action that all accounting claims and demands of the plaintiffs, if any there be, which accrued more than 4 years prior to the commencement of this action were barred by the statute of limitations of the State of Nebraska; and that plaintiffs were guilty of laches prohibiting any recovery by them beyond 4 years prior to the commencement of this suit. This defendant prayed that as to the second cause of action, an accounting be made by the court as between the parties from July 6, 1956, through and including 1960; and that credit be given Alice N. Temple for the taxes paid by her upon this land from July 6, 1956, through and including 1960.

The plaintiffs' reply denied the allegations of the defendant Alice N. Temple's affirmative defense, admitted that plaintiffs collected one-half of the rents from the land for the year 1960, and renewed the prayer of their petition.

Carrie N. Fraser was a resident of Los Angeles, California, and Alice N. Temple is a resident of Birmingham, Alabama.

Alice N. Temple made an accounting of the rents, profits, and taxes for the years from 1956 through 1960, as follows: For 1956, rent received, $968.48, taxes paid, $118.12; for 1957, rent received, $1,391.50, taxes paid, $127.12; for 1958, rent received, $1,552.75, taxes paid, $120.82; for 1959, rent received, $45.20, taxes paid, $149.86; and for 1960, rent received, $321.16, taxes paid, $150.30. She made the following explanation. The 1959 crop was hailed out, and Mr. Long planted milo, for which the amount shown was received in 1960. Bruce K. Lyon, the administrator of the estate of Carrie N. Fraser, deceased, procured one-half of the rent wheat for 1960, and the plaintiffs should be charged with one-half of the taxes for the year 1960.

During all of the time from 1887, Alice N. Temple collected the rents and profits and paid the taxes on this property. There was no effort made by her sister, Carrie N. Fraser, to require Alice N. Temple to account for any of the rents and profits that she may have received from such land. It is true that Alice N. Temple took exclusive control of this property. It is apparent that Carrie N. Fraser had a complete understanding with her sister, Alice N. Temple, with reference to the rents from this property for a period of 73 years. It is obvious that Carrie N. Fraser knew Alice N. Temple was collecting the rents on this real estate and retaining the same for her own use, and made no objections to such actions of Alice N. Temple in this respect. There is nothing in the record to indicate otherwise. No demand was ever made by Carrie N. Fraser during her lifetime for any part of the rents and profits so collected or for an accounting by Alice N. Temple. The first demand for an accounting was made by the heirs of Carrie N. Fraser when this suit was instituted on July 6, 1960.

In Beacom v. Daley, 164 Neb. 120, 81 N. W. 2d 907, this court said: "An action for the recovery of the reasonable value for the use and occupancy of lands is not barred by the statute of limitations until 4 years have

elapsed from the accruing of such action." The court went on to say: "Ordinarily a court of equity has no jurisdiction of an action for rent and claims for unpaid rent are separate and distinct causes of action for each term or payment involved. However, rent may be recovered in equity where the remedy has become difficult or where there is an uncertainty as to the title or the extent of the defendant's responsibility." See, also, Schuster v. Schuster, 84 Neb. 98, 120 N. W. 948, 29 L. R. A. N. S. 224; Fiala v. Tomek, 164 Neb. 20, 81 N. W. 2d 691.

In Names v. Names, 48 Neb. 701, 67 N. W. 751, this court said: "A tenant in common who alone occupies the common property, and holds possession adversely as sole owner, or where he excludes his co-tenant from the enjoyment of the premises, is liable to his co-tenant for the rents and profits." The court went on to say: "Mrs. Names was, we think, entitled to recover her share of the value of the use or rental of the property for four years prior to the commencement of the action, * * *. No rents prior to said period are recoverable, since the statute of limitations had run against them."

In Schuster v. Schuster, *supra,* this court said: "An action for the recovery of rents and profits from a co-tenant is not barred by the statute of limitations until four years have elapsed from the accruing of such action."

In Dewey v. Dewey, 163 Neb. 296, 79 N. W. 2d 578, this court said: "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."

In Fitzsimmons v. Gilmore, 134 Neb. 200, 278 N. W. 262, the court said: "But, 'Equity regards stale claims with disfavor and long lapse of time, unexplained, even

when not of itself a bar to relief, operates by way of evidence against the justice of the right asserted, and not only subjects plaintiff's case to severer scrutiny than it would otherwise receive, and exacts of him a higher degree of proof than would otherwise be required, but moves the court to look with more indulgence on the evidence adduced by defendant. Long lapse of time, if unexplained, may create or justify a presumption against the existence of validity of plaintiff's right and in favor of the adverse right of defendant; or a presumption that if plaintiff was ever possessed of a right, it has been abandoned or waived, or has been in some manner satisfied, or that plaintiff has assented to or acquiesced in the adverse right of defendant; or a presumption that the evidence of the transaction in issue has been lost or become obscured, or that conditions have changed since the right accrued, and that in consequence the adverse party would be prejudiced by its enforcement.' 21 C. J. 226. '* * * the delay may be so long that under the circumstances many of the important facts have become obscured. To allow a complainant relief in such cases would frequently risk a great hardship to innocent parties. Consequently, the courts decline to interfere.' 4 Pomeroy, Equity Jurisprudence (4th ed.) p. 3425."

In Hawley v. Von Lanken, 75 Neb. 597, 106 N. W. 456, this court said: " 'Independently of any statute of limitations, courts of equity have inherent power to refuse relief after undue and unexplained delay, and where injustice would be done by granting the relief asked, and the doctrine applies to suits relating to land. * * * it is now well settled that, independently of any limitation prescribed for guidance of courts of law, equity may, in the exercise of its own inherent powers, refuse relief where it is sought after undue and unexplained delay, and when injustice would be done, in the particular case, by granting the relief asked.' "

Section 45-104, R. R. S. 1943, provides in part: "On

money due on any instrument in writing, or on settlement of the account from the day the balance shall be agreed upon, *on money received to the use of another and retained without the owner's consent, express or implied, from the receipt thereof* * * * and withheld by unreasonable delay of payment, interest shall be allowed at the rate of six per cent per annum." (Emphasis supplied.)

We conclude that under the above-cited section the plaintiffs are entitled to interest on each year's rent at the rate of 6 percent per annum for the years 1956, 1957, 1958, and 1959, that is, that Donald Ross Fraser and Kenneth Fraser would each receive the rent for a one-fourth interest which they have in the real estate, and Alice N. Temple would receive the rent for the one-half interest which she owns in the real estate.

Alice N. Temple made an accounting, as heretofore set forth, and paid the taxes on this land for each of the years for which the accounting was made as heretofore mentioned, and she is entitled to have this credited against any amount of rent that might be due the plaintiffs.

From a review of the evidence in this case and the authorities heretofore cited, we conclude that the judgment of the trial court should be reversed with reference to the interest to be allowed the plaintiffs, and in all other respects the judgment of the trial court should be affirmed. We remand the cause with directions to the trial court to proceed in accordance with this opinion to fix the amount of interest due the plaintiffs.

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

SIMMONS, C. J., participating on briefs.

QUINTIN BRUMBAUGH, APPELLEE, V. THE FRONTIER REFINING COMPANY, A CORPORATION, APPELLANT.

113 N. W. 2d 497

Filed February 23, 1962. No. 35114.

1. **Malicious Prosecution.** Probable cause is a reasonable ground of suspicion, supported by facts and circumstances of such a nature as to justify a cautious and prudent person in believing that the accused was guilty.
2. ———. To maintain an action of malicious prosecution the plaintiff must prove malice and want of probable cause.
3. ———. In an action for malicious prosecution where there is sufficient undisputed evidence to show probable cause, the trial court should direct a verdict for the defendant. This rule applies even though some of the facts supporting probable cause were disputed in the evidence on behalf of the plaintiff.
4. ———. The test as to whether or not there was probable cause is to be determined in the light of facts and circumstances as they existed and were known at the time the prosecution was commenced and not from the viewpoint of subsequently appearing facts.
5. **Trial.** If a motion for directed verdict made at the close of the evidence in a case should have been sustained for want of evidence to support a verdict in favor of the party against whom made, it is the duty of the court on motion for judgment notwithstanding the verdict timely made to sustain such motion to set aside the verdict and to render judgment pursuant to the motion for a directed verdict.

APPEAL from the district court for Hall County: WILLIAM F. MANASIL, JUDGE. *Reversed and remanded with directions.*

Heaton & Heaton, for appellant.

Harry S. Grimminger, for appellee.

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

MESSMORE, J.

This is an action at law brought by Quintin Brumbaugh, plaintiff, in the district court for Hall County, against The Frontier Refining Company, a corporation, defendant, to recover damages for malicious prosecution.

The case was tried to a jury, resulting in a verdict for the plaintiff in the amount of $5,000. The defendant filed a motion for judgment notwithstanding the verdict or in the alternative for a new trial, which was overruled. Defendant perfected appeal to this court.

We will refer to Quintin Brumbaugh as plaintiff, and to The Frontier Refining Company as defendant.

The defendant is a corporation organized under the laws of the State of Wyoming, engaged in business in the State of Nebraska, and qualified to do business in this state.

The record discloses that on April 16, 1958, the plaintiff accepted and approved a contract with the defendant to operate a filling station in Grand Island. The contract provided in part that all merchandise supplied by the defendant would be retained by it until sold by the plaintiff; that the plaintiff would be responsible for all inventories of petroleum products and other merchandise supplied to the plaintiff by the defendant; that the plaintiff would remit to the defendant at Denver, Colorado, or the bank defendant designated, all sums collected by the plaintiff for merchandise sold; and that the plaintiff would prepare and submit to the defendant operating reports as directed by the defendant. The contract set forth the commissions to be received by the plaintiff for the sale of certain specified items of merchandise. H. E. Armitage, vice president of the defendant, signed the contract in its behalf. This contract of employment was subject to be terminated at the pleasure of the defendant.

On August 6, 1958, H. R. Heaton, representative of the defendant, signed a complaint wherein the plaintiff was charged with the crime of embezzlement in the amount of $282.69, on or about July 12, 1958. At 9 p.m., on the same date, the plaintiff was brought before a justice of the peace and furnished bond in the sum of $1,000 for his appearance before the court on August 14, 1958, at 10 a.m. On August 14, 1958, preliminary

hearing was held and the case was dismissed by the county attorney.

The county attorney of Hall County testified that he dictated the complaint at the request of H. R. Heaton, legal counsel for defendant and representing the defendant; that he had a conference with Heaton, and possibly other officers of the defendant, going over the records which were left by the defendant with him; that he was present at the preliminary hearing; and that he believed Fields and Thompson, for the defendant, might have been present. Hearing was had. Fields testified, and this witness dismissed the action because in his opinion, by the contract between the plaintiff and defendant, he believed the defendant had a civil action against the plaintiff, but not a criminal action against him. The plaintiff was released.

On cross-examination this witness testified that when this matter was brought to his attention the defendant brought certain books for examination; and that at that time, upon the evidence presented by the defendant to him, he believed there was probable cause to believe the plaintiff guilty of the offense charged, and upon this belief the complaint was filed and signed by Heaton.

On redirect examination this witness testified that in all instances wherein a complaint is made to his office and no law enforcement investigation is made, he requires the person making the complaint to sign it; that he had not seen the contract between the plaintiff and the defendant before the preliminary hearing; and that he had the impression that Heaton was making a full and complete disclosure of the defendant's business with the plaintiff, otherwise he would not have filed the complaint.

On recross-examination this witness testified that the evidence taken at the preliminary hearing disclosed a shortage on the part of the plaintiff.

A deputy sheriff served a warrant on the plaintiff at his home, and took him to the county jail. The plaintiff

was kept in a room where he could use the telephone. The plaintiff called two or three people, including his attorney. This witness went home for supper. When he returned the plaintiff and others were still talking, and decided they could make bond. This witness took the plaintiff to the home of the justice of the peace. The bond was signed, and the plaintiff was released. The plaintiff was in custody 2 or 3 hours from the time he was arrested until he was released. On cross-examination this witness testified that the plaintiff was not put in a cell and locked up, but that outside doors of the jail were locked.

The plaintiff testified that he entered into the contract with the defendant and operated the filling station under such contract. Kenneth R. Fields was the supervisor of filling stations and would check the station occasionally, and was supposed to be available for the plaintiff to call if he had difficulty in making his reports. He was required to make a daily report, and had discount slips to fill out and credit cards to make out in duplicate. Up to July 1, 1958, if there was anything determined wrong or short it would show up on the reports which were sent to the office of the defendant and returned to him, and he would receive credit one way or the other, but it seemed that there was always something short. He went to Minnesota about the 28th or 29th of June, and returned July 4th. During his absence no reports were made out. He testified that he tried to figure out what happened while he was gone, to ascertain the amount of gas that was sold, and to make some kind of a report with reference to it; that he tried to call Fields to come out, but Fields was not at home; and that within a day or two Fields did come and talk to him about this matter, but did nothing about it. The plaintiff further testified that he did not recall making any bank deposits during that time; that the next time he saw Fields was when Fields came out to close the filling station and asked him for the keys;

and that he gave Fields the keys to the station. Fields told the plaintiff that he was going to take what money there was in the station and apply it on the records, because the plaintiff was short in his accounts with the defendant. Fields did not count the money, and he never accounted to the plaintiff for the money. When Fields returned, he told the plaintiff that it appeared that the plaintiff was short $152. The plaintiff told Fields that he wanted a complete audit with everything itemized by his own auditor, and Fields told the plaintiff he had better get the money, borrow it if necessary, and if the plaintiff did not get the money he would be arrested. The plaintiff had some money coming for credits and salary, and told Fields that when he was credited with such amounts he would make up the difference in the shortage. Fields contacted the plaintiff two or three times about paying the so-called shortage. The first time the plaintiff knew that he was supposed to be $282.69 short was when he was arrested and that amount appeared in the complaint filed against him.

On cross-examination the plaintiff testified that it was understood by him that all the money he received for the merchandise sold he should deposit in the Overland National Bank in Grand Island, and that he could not use the money for any purpose except to deposit it in the bank; that he sent daily reports to the defendant which showed the amount of fuel on hand and what was sold, a report of the business done each day, the amount of cash on hand, and the amount received; that when he made the deposits, the deposit slips were sent to the defendant; that the contract set forth the amount of commissions he would receive for the sale of various items; that if he knew how much merchandise he sold and what he sold it for it was possible to compute the amount due him, but he did not compute these figures; and that when he started to work under the contract he was furnished with a stock of merchandise consisting of gas and other petroleum products, and $100 in cash.

There were five of the defendant's daily station reports bearing dates of June 30, 1958, July 1, 1958, July 2, 1958, July 3, 1958, and July 7, 8, 9, 10, and 11, 1958, introduced and received in evidence. The June 30th report showed the amount of total receipts $80.23, July 1st, $50.13, July 2nd, $13.20, July 3rd, $18.50, and July 7, 8, 9, 10, and 11, $79.99.

The plaintiff further testified that he made no deposits during the period of time shown by the above reports. When he was absent on the trip to Minnesota, he made no reports to the defendant.

During the plaintiff's absence in Minnesota, a friend of his, and his father who was in charge of a restaurant in connection with the filling station, attended to the operation of the filling station. The plaintiff's friend put up $400 with the idea of going into the fish bait business on the theory that it would help the business at the filling station. This friend helped out at times when he was available from his other work. The money collected during the absence of the plaintiff from the filling station was put in a bag or pouch by the plaintiff's father and delivered to the plaintiff upon his return from Minnesota.

The supervisor of direct accounting for the defendant who was in charge of field auditors testified that the defendant accepts daily reports, checks to ascertain if they are sent in daily, and registers the sales as shown by such reports; that he keeps a register of all field auditors and the auditing he expects these auditors to make from time to time; that he was the principal person under whose direction the field auditor who had charge of the defendant's service station at Grand Island would be working; that he worked in such capacity in June, July, and August 1958; and that Fields was the auditor during that time. He further testified that daily reports would be received from the plaintiff for banking days; that the defendant should receive five reports a week from its stations, and in addition should receive

deposit slips each day. If no deposit slips were received, the matter was taken up immediately. After the records were received in his office they were under his direction and control, and that was the manner in which the filling station operated by the plaintiff was handled during the period the plaintiff was an agent of the defendant up to the time of the audit closing the plaintiff's place of business. He further testified that Fields made an audit of the plaintiff's business on July 7, 1958. At that time Fields called this witness and reported that four of the deposits which were listed on the daily reports furnished by the plaintiff and reported in the audit of July 7th, had never been made in the bank. This witness then did some checking and found that none of these daily reports had been received in his office. He then instructed Fields to make copies of those reports, which Fields did. These reports showed the following receipts of cash for which there were no deposit slips: $80.23, $50.13, $13.20, and $18.50. Another such daily report showed a deposit of $40.03 which, upon checking, was shown not to have been made. This witness then told Fields to make a reaudit of the plaintiff's station and find out what the actual situation was. Fields made a reaudit of the plaintiff's station on July 15, 1959. This reaudit showed a shortage of the petty cash fund of $100, contained a résumé of the gasoline business, and showed a shortage other than the petty cash in the amount of $182.69, a total shortage of $282.69 which was received for merchandise and never deposited in the bank in Grand Island nor accounted for by the plaintiff. This witness made a recapitulation in writing. He verified the fact that the money shown on the plaintiff's daily report had never been deposited in the Overland National Bank in Grand Island. This recapitulation is the instrument that was finally delivered to the county attorney at Grand Island. A final statement of the plaintiff's account shows a balance of $217.26, after all credits due the plaintiff had been taken into account. This wit-

ness was present at Grand Island at the time of the preliminary hearing. An exhibit was prepared by him for the defendant for delivery to the county attorney which disclosed, among other things, a credit to the plaintiff in the amount of $119.49, and constituted a full disclosure of the plaintiff's account and shortage insofar as this witness was able to ascertain.

Kenneth R. Fields testified that he was the zone manager and auditor for the defendant mainly in the area of central and eastern Nebraska; that he lived in Grand Island and was acquainted with the plaintiff only in his official capacity as auditor; that he checked the plaintiff's reports and made audits at the filling station; that he probably saw the plaintiff once a week; that he did not remember the plaintiff discussing with him his difficulties; that the plaintiff, as agent for the defendant, was responsible for any merchandise that was put into the filling station to begin with; that the plaintiff had a starting inventory and if he sold anything contained in the inventory he was required to deposit the money received in the bank; that each time the agent made a report he had to read the meters on the pumps in order to know how many gallons of gasoline or diesel oil had been sold, and the plaintiff was required to make a daily report as to the previous day's readings and deduct from that amount, which would give him the amount of gasoline he was responsible for for that period; that all these matters were transposed on the daily report; and that the daily reports were sent to the defendant at Denver, the agent retaining copies of the daily reports which were always available at the plaintiff's filling station for use in making an audit. He further testified that the inventory was taken from the merchandise at the station, and that was all that was done at the station. This witness further testified that when he took the audit back to the plaintiff the station was closed; that he and the plaintiff went over in detail the items contained in the audit; that he told the plaintiff that the

audit showed a shortage amounting to $282.69; and that as far as the plaintiff was concerned he should pay this amount. The plaintiff said he did not have the money and wanted to use the telephone in the station to make a long distance telephone call to see if he could raise the money. This witness further testified that he did not remember the plaintiff denying the audits made on July 7 and July 15, 1958.

This witness explained that in making an audit he takes the cash on hand that has not been deposited and deposits it in the bank to cover the items shown on the agent's daily report that have been sold; and that the plaintiff never offered or gave any explanation of the shortages shown by the audit. This witness stated that he never at any time told the plaintiff that if he did not pay the shortage he would be arrested and go to jail, and he never threatened the plaintiff nor discussed arrest or jail with him.

Henry R. Heaton, assistant secretary of the defendant, testified that on August 6, 1958, he was in Grand Island on business for the defendant concerning the plaintiff. At that time he had with him an exhibit which was the recapitulation of the plaintiff's account showing the shortage due defendant, and also disclosing credits due the plaintiff in the amount of $119.49. He called on the county attorney, and this exhibit was presented to the county attorney. On cross-examination this witness stated that he went to the office of the county attorney to present the facts in the case as he knew them; and that the matter of filing the complaint was solely up to the discretion of the county attorney.

The principal assignments of error to be determined on this appeal may be stated as follows: The verdict is contrary to the evidence and the law; and the trial court erred in overruling defendant's motion for a judgment notwithstanding the verdict or in the alternative for a new trial.

In 54 C. J. S., Malicious Prosecution, § 26, p. 983, it is

said: "In the majority of decisions probable cause is defined, in substance but with some verbal differences, as reasonable grounds for suspicion supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief that accused is guilty of the offense with which he is charged." See, also, Tucker v. Cannon, 28 Neb. 196, 44 N. W. 440, adhered to, 32 Neb. 444, 49 N. W. 435; Turner v. O'Brien, 5 Neb. 542.

In 34 Am. Jur., Malicious Prosecution, § 47, p. 731, it is said: "Many definitions of the term 'probable cause,' as used in actions for malicious prosecution, differing more or less in their language, are to be found in the decisions."

In Diers v. Mallon, 46 Neb. 121, 64 N. W. 722, 50 Am. S. R. 598, it is said: "Probable cause is a reasonable ground of suspicion, supported by facts and circumstances of such a nature as to justify a cautious and prudent person in believing that the accused was guilty."

In Bronnenkant v. Kucera, 141 Neb. 408, 3 N. W. 2d 913, the court said: " 'In a malicious prosecution case, the necessary elements for the plaintiff to establish are: * * * (4) the absence of probable cause for such proceeding. * * * If any one of these elements is lacking, the result is fatal to the action.' Kersenbrock v. Security State Bank, 120 Neb. 561, 234 N. W. 419. 'Want of probable cause is an indispensable element of an action for malicious prosecution.' Clausen v. Omaha Loan & Bldg. Ass'n, 131 Neb. 666, 269 N. W. 517.

"This court has held: 'While some of the facts supporting probable cause were disputed by evidence on behalf of plaintiff, yet there were others undisputed upon which the defense of probable cause might be predicated. In such circumstances we have held that the question of probable cause is one of law for the court. "In an action for malicious prosecution where there is sufficient undisputed evidence to show probable cause, the trial court should direct a verdict for the defendant." Bechel v. Pacific Express Co., 65 Neb. 826, 91 N. W. 853,

* * *; McHugh v. Ridgell, 105 Neb. 212, 180 N. W. 75; Kersenbrock v. Security State Bank, 120 Neb. 561, 234 N. W. 419.' Clausen v. Omaha Loan & Bldg. Ass'n, supra. 'It cannot matter that some or many of the facts bearing on the issue as to probable cause are in dispute, if there are still enough established and undisputed to determine the question in point of law.' Bechel v. Pacific Express Co., 65 Neb. 826, 91 N. W. 853. The test as to whether or not there was probable cause is to be determined in the light of facts and circumstances as they existed and were known at the time the prosecution was commenced and not from the viewpoint of subsequently appearing facts. 34 Am. Jur. 731, sec. 47, 784, sec. 140, 790, sec. 153; 38 C. J. 405."

In 54 C. J. S., Malicious Prosecution, § 18, p. 970, it is said: "Want of probable cause for instituting proceedings is an essential and indispensable element of an action for the malicious prosecution of either a civil or a criminal action, no matter what the result thereof; in fact, want of probable cause for the prosecution of the original proceeding by defendant has been described as the gist of the action. The very foundation of the action is that the previous legal proceeding was resorted to or was pursued causelessly.

"Where it appears that there was probable cause to institute the original proceeding, such fact constitutes a complete and absolute defense or bar to an action of malicious prosecution, irrespective of the motive in instituting the prosecution, or of a conspiracy." This is the rule throughout the United States.

To maintain an action of malicious prosecution the plaintiff must prove malice and want of probable cause, notwithstanding the prosecution may be malicious, yet, if there be sufficient probable cause for its institution, the action cannot be sustained. See Turner v. O'Brien, *supra.*

If a motion for directed verdict made at the close of the evidence in a case should have been sustained for

want of evidence to support a verdict in favor of the party against whom made, it is the duty of the court on motion for judgment notwithstanding the verdict timely made to sustain such motion to set aside the verdict and to render judgment pursuant to the motion for a directed verdict.

The defendant made a motion for directed verdict at the close of the plaintiff's evidence and at the close of all of the evidence.

The evidence of the plaintiff in the instant case fails to show malice or want of probable cause. The evidence adduced by the defendant is more than sufficient to establish a prima facie case of embezzlement on the part of the plaintiff, and therefore shows probable cause to believe him guilty of the crime charged.

The plaintiff failed to maintain his burden of proof by the establishment of malice and want of probable cause. Both are essential elements of the action, and failure of proof of either is fatal to the plaintiff's cause of action.

The defendant made a full disclosure of all information available to it bearing on the innocence or guilt of the plaintiff to the prosecuting attorney, and left the filing of the charge to the discretion of the county attorney.

We conclude that the trial court should have taken the matter from the consideration of the jury and sustained the motion for directed verdict. We reverse the judgment and remand the cause with directions to sustain the defendant's motion for judgment notwithstanding the verdict and to dismiss the plaintiff's cause of action.

REVERSED AND REMANDED WITH DIRECTIONS.

SIMMONS, C. J., participating on briefs.

CLARENCE D. LEMMON, PLAINTIFF IN ERROR, V. STATE OF NEBRASKA, DEFENDANT IN ERROR.

113 N. W. 2d 525

Filed February 23, 1962. No. 35124.

1. **Trial: Appeal and Error.** An objection made to the argument of opposing counsel after the jury has retired is not timely and will not be reviewed on appeal.
2. **Intoxicating Liquors: Witnesses.** A witness may give his opinion from observations made by him, after stating the facts upon which the conclusion is drawn, that a person was or was not under the influence of intoxicating liquor.
3. **Appeal and Error.** An assignment of error that the court erred in overruling the motion for a new trial is too indefinite where there are several grounds of error set forth in such motion.
4. ———. A party who claims error in a proceeding is required to point out the factual and legal basis that shows the error.

ERROR to the district court for Lancaster County: PAUL W. WHITE, JUDGE. *Affirmed.*

Duane W. Acklie and *Donald E. Leonard,* for plaintiff in error.

Clarence A. H. Meyer, Attorney General, and *Bernard L. Packett,* for defendant in error.

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

BROWER, J.

The plaintiff in error was tried before a jury in the district court for Lancaster County, Nebraska, for the crime of unlawfully operating a motor vehicle while under the influence of alcoholic liquor. The amended complaint and information on which he was tried alleged it to be his second offense. The trial resulted in a verdict of guilty. He was sentenced to pay a fine of $300 and costs, to be imprisoned in the county jail for 30 days, and his driver's license suspended for a period of 1 year after his discharge.

A motion for new trial being overruled, he brings error to this court.

Hereafter the plaintiff in error will be referred to as the defendant, and the defendant in error as the State.

The defendant's brief makes only three assignments of error which are here set out as follows: (1) The court erred in overruling defendant's motion for mistrial at the close of the prosecution's closing argument; (2) the court erred in permitting trooper C. P. Karthauser to give his opinion over objection as to whether or not defendant was under the influence of alcoholic liquor without laying as foundation the facts upon which the conclusion was drawn; and (3) the court erred in failing to sustain defendant's motion for a new trial.

With respect to the first assignment of error an examination of the bill of exceptions, in order to ascertain what the motion for mistrial was about, discloses that it was directed to what are alleged to be improper remarks claimed to have been made in the prosecuting attorney's argument to the jury. The record discloses that the complete argument of the State's attorney was preserved by the reporter in the bill of exceptions. At the close of the argument the court instructed the jury. Immediately after receiving the instructions the jury retired for deliberation. Up to that time no objections whatever had been made to the argument. As soon as the jury retired the defendant's counsel moved for a mistrial because of the alleged improper remarks of the State's attorney in his argument to the jury. The motion was overruled by the court.

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. The impropriety of counsel's conduct may be such as can be cured by retraction by the offending counsel or by proper instruction by the court, or both, or may be such as cannot be cured either by the court or counsel. 88 C. J. S., Trial, § 197, p. 389. In either event 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 second assignment of error complains of the court allowing an officer of the state safety patrol to give his opinion as to whether or not the defendant was under the influence of alcoholic liquor when he was driving at the time of arrest.

We will review but a small portion of the evidence of patrolman Karthauser who made the arrest and expressed the opinion as to whose testimony the objection was addressed. Shortly before making the arrest on the day set out in the complaint at 1 o'clock in the morning, and while on a patrol assignment, he observed the defendant driving on the wrong side of the road a short distance from West Lincoln in Lancaster County. The officer turned his patrol car around and followed defendant's car which was going through West Lincoln from the west to east. The defendant's car at times straddled the centerline and at times his car's right wheels went up onto the shoulder. It went back and

forth in this manner three times. The officer could not stop defendant's automobile by flashing his front lights and sounding his siren. At length the officer succeeded in bringing him to a stop. He opened defendant's car door and asked him to get out. The officer testified defendant's breath smelled strongly of alcoholic liquor. He was unsteady on his feet and didn't stand or talk normally. The front of his trousers were unzipped and moisture was about the entire front. The defendant was taken to the county jail and given tests and there engaged in conversation by questioning. He talked as if his tongue was thick and he was hard to understand. His clothing smelled of alcoholic liquor, as had his car theretofore. When asked to stand on one foot he almost fell and couldn't walk in a straight line. His eyes were red and bloodshot. He stated he was not sick, hadn't taken medicine, and had not been hurt. The officer testified he had seen and observed people who were under the influence of alcoholic liquor. After all this and other testimony he was first asked and thereupon gave the answer to the following question: "Q- Taking into consideration your personal observations of the defendant during the time you saw him on the date of the offense charged in this complaint, taking into consideration your training and your experience, do you have an opinion as to whether or not the defendant was then under the influence of alcoholic liquor so as to impair his driving ability? A- I do." On being thereafter asked his opinion, the objection was made that no sufficient foundation had been laid which was overruled and he was permited to answer. Obviously no other ruling would have been proper. In Pribyl v. State, 165 Neb. 691, 87 N. W. 2d 201, this court stated the proper rule to be that a witness may give his opinion from observations made by him, after stating the facts upon which the conclusion is drawn, that a person was or was not under the influence of intoxicating liquor.

The third assignment of error states merely that the trial court erred in failing to sustain the defendant's motion for a new trial. This court's attention is not directed to any specific reason why it should have been sustained. The motion for a new trial in general terms sets out 30 alleged reasons. An assignment of error that the court erred in overruling the motion for a new trial is too indefinite where there are several grounds of error set forth in such motion. Allsman v. Richmond, 55 Neb. 540, 75 N. W. 1094. A party who claims error in a proceeding is required to point out the factual and legal basis that shows the error. O'Hara v. Frederickson Bldg. Corp., 166 Neb. 206, 88 N. W. 2d 643.

The assignment will not be considered.

No other error is assigned and those advanced cannot be sustained.

It follows that the judgment of the trial court must be affirmed.

AFFIRMED.

SIMMONS, C. J., participating on briefs.

IN RE APPLICATION OF TRANSIT HOMES, INC.
TRANSIT HOMES, INC., ET AL., APPELLANTS AND CROSS-APPELLEES, V. NATIONAL TRAILER CONVOY, INC., ET AL., APPELLEES AND CROSS-APPELLANTS.
113 N. W. 2d 638

Filed March 2, 1962. No. 35062.

1. **Public Service Commissions: Motor Carriers.** The burden is on an applicant for a certificate of public convenience and necessity to show that he is fit, willing, and able to perform the service he proposes; that he will conform to the provisions of the statute and the requirements, rules, and regulations properly promulgated by the Nebraska State Railway Commission; and that the proposed service is or will be required by the present or future public convenience and necessity.

2. ———: ———. Where a certificate of public convenience and necessity is not dormant it may be transferred on approval of the Nebraska State Railway Commission under reasonable rules and regulations to be prescribed by it, if the transfer will be consistent with the public interest, if it will not unduly restrict competition, and if the transferee is fit, willing, and able to perform the service proposed.
3. ———: ———. The statute governing the transfer of certificates of public convenience and necessity is permissive in terms and not mandatory, and action of the Nebraska State Railway Commission in refusing to transfer will be sustained unless it appears that the refusal was unreasonable and arbitrary.
4. **Motor Carriers.** The term public interest which appears in the Motor Carrier Act means that which has a direct relation to adequacy of transportation service, to its essential conditions of economy and efficiency, and to appropriate provision for the best use of transportation facilities.
5. ———. Although the transfer of a certificate of public convenience and necessity is permissive and not mandatory, a refusal of transfer will be regarded as unreasonable and arbitrary if under the facts a valid basis for denial is not disclosed.

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

Barney, Carter & Buchholz and *Holtorf & Hansen,* for appellants.

Nelson, Harding & Acklie, Donald E. Leonard, and *Pilcher, Howard & Hickman,* for appellees.

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

YEAGER, J.

To the extent necessary to state here, this proceeding was commenced by the filing by Transit Homes, Inc., a corporation, which will be referred to as Transit, of an application on May 16, 1960, with the Nebraska State Railway Commission for authority to operate as a motor carrier of property for hire in intrastate commerce as successor in interest under a transfer of a certificate held by Duane Alden Nikont of Gering, Nebraska. The certificate was one of public convenience and necessity

for the towing or hauling by truck of trailers or trailer homes with one authorized terminal, which was Gering, Nebraska. The certificate authorized transportation of house trailers over irregular routes throughout the state.

To this application separate protests by two parties were filed. One was Morgan Drive Away, Inc., which will be referred to as Morgan, which was engaged under a certificate in the same kind of activity in the State of Nebraska as Nikont. It was also operating under interstate authority. By its protest it alleged that it had a direct interest in the application of Transit, and specifically alleged that the transfer of the certificate would not be consistent with the public interest and that approval would unduly restrict competition.

By the other protest National Trailer Convoy, Inc., which will be referred to as National, alleged that it operates over irregular routes under an intrastate certificate of public convenience and necessity issued by the Nebraska State Railway Commission which are in part in the area of the Nikont operation. It also had interstate authority. It is therein declared that the territory is already adequately served and this will be a new and competitive service for which no need exists, and if there is additional need National is entitled to provide and afford that service. Further it is declared that the granting of the application will seriously impair the ability of National to conduct operations under its certificate and to maintain the quality and quantity of service being rendered and performed in the area.

A hearing was had before an examiner for the Nebraska State Railway Commission, which will be referred to as the commission, at which evidence bearing on the questions involved was adduced. This evidence together with the findings and recommendations of the examiner were filed with the commission.

Without stating in detail the findings and recommendations of the examiner it is stated here that he recommended that the application of Transit be granted.

To the recommendations of the examiner the objectors filed exceptions. The exceptions of National are eight in number. A summary of the first four is that the report is contrary to the evidence and law. The fifth is that it is arbitrary, unreasonable, and contrary to the evidence. The sixth is that it is contrary to the public interest and fails to consider sound economic conditions in the motor carrier industry. The seventh does not differ materially from the sixth, and the eighth is that there was refusal to consider evidence of dormancy and unfitness.

The exceptions of Morgan are 11 in number, but in their entirety they do not depart materially from the exceptions of National.

Thereafter, according to recital, the commission conducted a hearing and examined the evidence and the report of the examiner. On this basis it rendered an opinion with findings and an order in disposition of the controversy.

The findings are as follows:

"1. The exceptions to the Examiner's Report should be sustained and the application should be denied.

"2. The proposed Transfer would not be consistent with the public interest.

"3. Applicant is fit, willing and able properly to perform the service proposed.

"4. The certificate involved is not dormant but approval of the transfer would result in a new or different service or operation as to the territorial scope than that which the Commission intended when it granted application No. M-11102."

The order is as follows:

"IT IS THEREFORE ORDERED By the Nebraska State Railway Commission Application No. M-11177 of Transit Homes, Inc., Anderson, South Carolina be, and the same is hereby, denied."

It is from these findings and this order that Transit and Nikont have appealed. Morgan and National cross-

appealed from the portion of the findings relating to fitness and dormancy. As grounds for reversal the appellants' brief contains three assignments of error. The substance of the first is that the order denied the application for transfer of the certificate notwithstanding the evidence disclosed that full performance of every essential of transfer had been complied with by the transferor and the transferee. The second, in true substance, points to no particular error committed by the commission, but it directs attention to findings which were altogether favorable to the appellants. The third is that the commission was in error in finding that the approval of the transfer would result in a new or different service or operation as to territorial scope than that which the commission intended when it granted application No. M-11102, or the application which was the basis of the certificate of Nikont.

The first of the findings in and of itself requires no separate consideration herein. It is merely an overall conclusion upon the other findings. The third requires no extended discussion. This one is favorable to Transit. It is a finding that Transit is fit, willing, and able to perform the service proposed. The propriety of the refusal of the commission to approve the transfer depends upon whether or not there was a factual and legal basis for the second and fourth findings.

There is no substantial dispute as to the legal principles which must be regarded as controlling in situations such as this. One of these is that the burden is on an applicant for a certificate of public convenience and necessity to show that he is fit, willing, and able to perform the service he proposes; that he will conform to the provisions of the statute and the requirements, rules, and regulations properly promulgated by the commission; and that the proposed service is or will be required by the present or future public convenience and necessity. See, §§ 75-222 to 75-250, R. R. S. 1943; Preisendorf Transp., Inc. v. Herman Bros., Inc., 169 Neb. 693, 100

N. W. 2d 865; Abler v. Wheeler Transp. Service, Inc., 169 Neb. 728, 101 N. W. 2d 476.

Another of these rules is that where a certificate of public convenience and necessity is not dormant it may be transferred on approval of the Nebraska State Railway Commission under reasonable rules and regulations to be prescribed by it, if the transfer will be consistent with the public interest, if it will not unduly restrict competition, and if the transferee is fit, willing, and able to perform the service proposed. See Caudill v. Lysinger, 161 Neb. 235, 72 N. W. 2d 684.

A further rule is that the statute governing the transfer of certificates of public convenience and necessity is permissive in terms and not mandatory, and action of the Nebraska State Railway Commission in refusing a transfer will be sustained unless it appears that the refusal was unreasonable and arbitrary. See Caudill v. Lysinger, *supra.*

The term public interest which appears in these rules and the Motor Carrier Act means that which has a direct relation to adequacy of transportation service, to its essential conditions of economy and efficiency, and to appropriate provision for the best use of transportation facilities. See, West Nebraska Express v. Pirnie, 159 Neb. 353, 67 N. W. 2d 342; Omaha Transit Co. v. Briggs, 167 Neb. 703, 94 N. W. 2d 461.

Under pronouncement of this court it has been pointed out that although the transfer of a certificate of public convenience and necessity is permissive and not mandatory, a refusal to transfer will be regarded as unreasonable and arbitrary if under the facts a valid basis for denial is not disclosed. See Caudill v. Lysinger, *supra.*

Coming now to the facts as disclosed by the record in their relation to the findings of the commission it is pointed out that the commission found that the applicant was fit, willing, and able to perform the service proposed. It was also found that the certificate was not

dormant. These findings were fully sustained. There was no evidence having weight to the contrary. Necessity for review in this area does not appear. This conclusion disposes of that phase of the appeal and the cross-appeal, both unfavorably to Morgan and National.

As to the findings of the commission this leaves only the finding that the proposed transfer would not be consistent with the public interest, and the one that the transfer would result in a new or different service or operation as to the territorial scope than that which the commission intended when it granted the application for which transfer was sought. The latter of these two will be considered first.

It is deemed proper to say that if the certificate was clear and definite in its terms the only proper inference is that it expressed the full and true intention of the commission when it was granted. No party adduced the certificate in the record either by pleading or evidence. The transcript however, by recital, contains what appears to be its substance. There can be but little doubt, if any, of the correctness of the recital.

By recital it appears that the certificate granted to the holder the following:

"SERVICE AND ROUTE OR TERRITORY AUTHORIZED:

"New and used house trailers by winch or tow trucks between points and places in the State of Nebraska, over irregular routes.

"RESTRICTION:

"Terminals shall not be established and/or motor vehicle equipment stationed in any place other than Scottsbluff, Nebraska."

The terminal and point of station for motor vehicle equipment was changed after the date of original issue to Gering, Nebraska.

By this the parties under the evidence are in accord that the holder of the certificate was entitled to move house trailers in intrastate movements over any of the

highways in Nebraska with Gering as the terminal and the motor equipment station. No one contends that the language declares or implies any intent other than that expressed.

From this it appears that the intention of the commission was clear and clearly expressed, and that the finding relative to intention was without any recognizable basis.

It is pointed out here that Transit was not seeking by its application for transfer of the certificate to extend, enlarge, or otherwise change the grant of authority conferred by the certificate. It must be said therefore that this finding was without merit.

The question of whether or not a transfer of the certificate would be inconsistent with the public interest requires an examination into the facts disclosed and reasonable inferences to be drawn therefrom as they related particularly to public interest and its needs, and the involved competitive situations.

The evidence disclosed that Nikont held and was operating individually under the certificate in question since about January 1960. He operated under the name of D & D Trailer Towing. Prior thereto, from about June 1958, he operated under it in partnership with one Dale Benda. During his operation he had one truck which he was empowered to use for the purposes contemplated in intrastate commerce. He did the driving and had an agent or representative at his terminal. He operated through his terminal in the transportation of trailer homes to and from all points in Nebraska.

In case of transfer of the certificate the actual operation will not in anywise change. Nikont will retain ownership of the truck and it will be used for hire by Transit. Nikont will become an employee of Transit in the operation of the truck. The only effect of the transfer would be that ownership of the certificate and of the rights under it would pass to Transit which is a corporation with headquarters in Anderson, South Carolina,

having also interstate rights to operate as a carrier of house trailers in many of the United States.

The certificate in question is the only one of this character having a terminal in the western part of the State of Nebraska. There is a considerable amount of service such as is permissible under this certificate required in the western part of the state. For the most part the service required is in the western part of the state, but some movements are required from points west to points east and from points east to points west. Such movements have been made under this certificate, and they are in contemplation for the future.

The only conclusion of which the record is capable is that National and Morgan have the same kind and character of certificates as does Nikont. The only difference is that their terminals are in the eastern part of the state, with National at Lincoln and Morgan at Omaha. Each of these has interstate authority in a large number of states including Nebraska.

If the transfer of this certificate is granted the method and practices in operation would be the same as those employed by these two objectors. These two establish a terminal, hire a driver or drivers, rent a truck or trucks which may properly be used in intrastate commerce, and on that basis respond to calls and perform their service. The number of employees and the amount of equipment on hand by these for service might exceed at times that of Transit but the only real difference would be that Transit would operate from and within an area of need in western Nebraska, whereas the other two would operate from points some 400 miles distant. Nothing which would flow from this certificate and its declared intent, if it is transferred, would be taken away from National or Morgan. It is also true that the public interest generally would not be in anywise affected. Competition would remain the same. The rights of persons in the western part of the state desiring or requir-

ing this character of service would be the same as now exist.

With reference to public interest the objectors suggest in effect that a policing problem would be presented to the commission which should be regarded as contrary to the public interest. The suggestion is that Nikont has only an intrastate right whereas if the transfer is allowed the certificate would pass into the hands of a carrier having also interstate rights and, this being true, a burden would be imposed upon the commission to police to see that Transit did not violate the obligations of the certificate.

A sufficient answer to this is that this amounts to an attack on purely speculative motives rather than rights over which the commission has control. It may well be pointed out here as to this that, if the transfer is allowed, Transit and these objectors will be in identical situations since they would all have interstate authority in the State of Nebraska.

In the light of the record and what this court has said the conclusion reached is that in this case the denial of transfer of the certificate in question was unreasonable and arbitrary. The concluding paragraphs of Caudill v. Lysinger, *supra,* point out incidents for the determination of what is and is not unreasonable and arbitrary. The record here, analyzed in the light of the pattern there characterized, discloses the action of the commission in denying a transfer was unreasonable and arbitrary.

Accordingly the order of the commission denying a transfer is reversed.

REVERSED.

SIMMONS, C. J., participating on briefs.

T. L. STERNER, APPELLANT, V. ROBERT LEHMANOWSKY, ALSO KNOWN AS RUSSELL ROBERT LEHMANOWSKY, ET AL., APPELLEES.

113 N. W. 2d 588

Filed March 2, 1962. No. 35078.

1. **Trial.** A motion for a directed verdict admits, for the purpose of a decision on the motion, the truth of the material and relevant evidence on behalf of the party against whom the motion is directed, and he is entitled to have every controverted fact found in his favor and to have the benefit of fair inferences deducible from the evidence.
2. **Fraud.** Fraud is never presumed but must be clearly proved by the party who pleads and relies on it.
3. ———. Fraud must relate to a present or preexisting fact and may not generally be predicated on an inference concerning any event in the future or acts to be done in the future unless such representations as to future acts are falsely and fraudulently made with an intent to deceive.
4. **Automobiles: Fraud.** The failure of a motor vehicle dealer to keep a promise to do an act in the future does not amount to fraud within the provisions of section 60-619, R. R. S. 1943, in the absence of a showing that the dealer's promise was not made in good faith.

APPEAL from the district court for Buffalo County: S. S. SIDNER, JUDGE. *Affirmed.*

Mitchell & Taylor, for appellant.

Andrew J. McMullen and *Munro, Parker & Munro,* for appellees.

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

SPENCER, J.

This is an action to enforce the provisions of a statutory bond of a licensed used car dealer brought by a holder of notes endorsed with recourse and secured by chattel mortgages and certificates of title on automobiles sold by the dealer. At the close of the plaintiff's case, motions for directed verdict by both the dealer and the surety were sustained, and plaintiff perfected this appeal.

Plaintiff, T. L. Sterner, who will hereinafter be referred to as plaintiff, is the holder of a small loan license and operates a real estate, insurance, and loan business in Franklin, Nebraska. The defendant, Robert Lehmanowsky, was a licensed used car dealer operating businesses at Kearney and Grand Island, Nebraska. He will be hereinafter referred to as Lehmanowsky. Defendant, Western Surety Company, hereinafter referred to as surety company, was the surety on a motor vehicle dealer's bond furnished by Lehmanowsky pursuant to section 60-619, R. R. S. 1943, which is set out hereinafter.

The plaintiff pleaded two causes of action against Lehmanowsky and the surety. The first cause of action alleged that the plaintiff purchased from the defendant Lehmanowsky, with recourse, a note of one Danielson, secured by a chattel mortgage on, and the certificate of title to, a 1955 Buick. Danielson defaulted on his payments and Lehmanowsky was given the note, mortgage, and certificate of title to repossess the Buick unless payment was made. When the Danielson papers were delivered to Lehmanowsky, the plaintiff took a demand note from him for $863.19, the amount due on the Danielson obligation. Plaintiff testified that he took this note as a receipt. The demand note, which is exhibit 2, contains no recitation of that fact or reference of any nature to the Danielson transaction. The only recitation on the note is as follows: "833 if paid by 3/1." Lehmanowsky subsequently collected the amount due on the mortgage but did not remit it to plaintiff.

Plaintiff's second cause of action covers three separate transactions which for convenience may be described as follows: (1) A 1952 Buick sedan sold to one Don Lizer, hereinafter referred to as Lizer Buick; (2) a 1952 Ford sold to Gusto Gonzales, hereinafter referred to as Gonzales Ford; and (3) a 1953 DeSoto sold to Leroy Journey, hereinafter referred to as Journey DeSoto. It seems that only the certificate of title, endorsed in blank, was delivered to the plaintiff on the Gonzales Ford. On

the other two transactions, the notes, chattel mortgages, and certificates of title were delivered to the plaintiff. The plaintiff alleges that Lehmanowsky either repossessed or was supposed to repossess the three cars but now falsely claims they are lost or stolen. None of the papers on these cars was delivered to Lehmanowsky, as was the situation in the first cause of action. The Lizer and Journey notes were assigned with recourse.

In evaluating the plaintiff's evidence, which is very sketchy, we apply the following rule: A motion for a directed verdict admits, for the purpose of a decision on the motion, the truth of the material and relevant evidence on behalf of the party against whom the motion is directed, and he is entitled to have every controverted fact found in his favor and to have the benefit of fair inferences deducible from the evidence. Hancock v. Parks, 172 Neb. 442, 110 N. W. 2d 69.

The Lizer Buick paper was sold to Sterner February 7, 1959, for $550. The first payment was due March 12, 1959. Nothing was paid on the note, and sometime before March 30, 1959, it was turned over to the plaintiff's attorneys. On that date, Lehmanowsky was allowed credit of either $25 or $35 against the obligation, which represented an adjustment on other notes. The car was apparently repossessed by Lehmanowsky and put on his lot in Grand Island where it was supposed to have been damaged in a hail storm. Lehmanowsky agreed with plaintiff's attorneys that any money received from the insurance company on the hail loss would be turned over to the plaintiff. On October 3, 1959, Lehmanowsky advised plaintiff's attorneys that no loss was paid on the Buick. He was then told to bring the car to Kearney and to deliver it to an auction house. Extracts from Lehmanowsky's deposition indicate that the car was to have been delivered to the auction house by one Marvin who tends bar at a tavern in Grand Island; that Lehmanowsky met him at a Kearney tavern after he supposedly delivered the Buick; and that he did not see it

thereafter. The car apparently was never delivered. Plaintiff, on the assumption that it was Lehmanowsky's responsibility to account for the car, produced no further evidence. Plaintiff, in his brief, sums up his position in the following paragraph: "In brief, if we assume that the Lizer Buick represented by Exhibit 6 ever existed, it has now vanished someplace between a bar in Grand Island and a tavern in Kearney. Lehmanowsky would have us believe that it just disappeared off a Kearney street. He owes a better explanation than that."

Exhibit 6 is plaintiff's ledger sheet on the transaction. Exhibit 7 is the certificate of title. Exhibit 7 was in the plaintiff's possession. The car could not have been sold by Lehmanowsky unless he fraudulently secured a duplicate title which would be covered by the bond. If the car never existed, exhibit 7 would be a forgery and the transaction would be covered by the bond. The plaintiff has the burden of proving his case. He certainly cannot shift that burden to the defendant by innuendo.

The Journey DeSoto was sold by Lehmanowsky in July 1958 for $588.24. Lehmanowsky discounted the paper with plaintiff and received $500. When the August payment was not paid by Journey, Lehmanowsky assigned another note and mortgage to plaintiff in the amount of $178.20, for which he was given credit on this transaction. The car was subsequently wrecked by Journey and was never repossessed by Lehmanowsky, although in a letter to plaintiff, exhibit 4, set out hereinafter, Lehmanowsky referred to it as repossessed. Plaintiff's attorneys had asked Lehmanowsky to deliver the Journey car after the wreck to the auction house. This was never done.

The Gonzales Ford certificate of title, signed in blank, and another title not involved herein, were delivered to the plaintiff's attorneys in May 1959 in exchange for a certificate of title on a Chrysler which was being sold.

On July 16, 1959, Lehmanowsky reported that the Ford had been stolen from his lot, and advised plaintiff's attorneys that when he settled with the insurance company he would turn the proceeds over to them. There is no evidence in this record as to the nature of the policy under which a claim was being made or whether any assignment of the policy had been made to the plaintiff. Lehmanowsky later settled with the insurance company but the amount of the settlement does not appear in evidence. The proceeds were never paid over to the plaintiff or to his attorneys.

It is plaintiff's contention that the losses sustained by him in financing these four transactions are the result of Lehmanowsky's "misappropriations, misrepresentations, fraud and deceit in the conduct of his business as a used car dealer, in the handling of cars repossessed by the dealer for nonpayment by the purchasers," and as such are covered by the surety bond.

The plaintiff relies heavily on Sun Ins. Co. v. Aetna Ins. Co., 169 Neb. 94, 98 N. W. 2d 692, in which we said: "As we interpret section 60-619, R. S. Supp., 1955, upon which the plaintiff's bond is based, the Legislature intended that persons other than purchasers might sustain damage or loss by reason of a motor vehicle dealer's misrepresentations, false and fraudulent acts, and misappropriations of funds or deceitful practices in representing a motor vehicle to the purchaser thereof. It is obvious that the Legislature intended that any person sustaining loss by reason of a motor vehicle dealer's conduct in engaging in acts prohibited by law would be entitled to recourse on such a bond as the plaintiff's bond in the instant case, regardless of the particular status of such person as defined in section 60-601, R. S. Supp., 1955.

"The plaintiff's bond, being a statutory bond, must be interpreted in the light of section 60-619, R. S. Supp., 1955.

"In 11 C. J. S., Bonds, § 39, p. 418, it is said: 'A statu-

tory bond will be construed in the light of the purpose for which it is required as expressed in the statute, * * *. Accordingly, in view of the fact that the public has an interest in official and other statutory bonds, such bonds should be liberally construed to effect the purpose for which they were given, and the ordinary rules of construction give way.' "

Since that opinion, the Nebraska Motor Vehicle Dealers License Board was set up to administer the Motor Vehicle Dealers Licensing Act, and sections 60-601 to 60-616, inclusive, R. S. Supp., 1955, some of which were referred to in the opinion in Sun Ins. Co. v. Aetna Ins. Co., *supra,* have been repealed. However, the provisions of those sections have been reenacted in Chapter 60, article 14, R. R. S. 1943.

In Sun Ins. Co. v. Aetna Ins. Co., *supra,* all but two of the transactions were on cars on which the dealer fraudulently secured duplicate certificates of title for the purpose of defrauding the creditor. The other two transactions involved cars on which he was given the certificates of title to take the cars to a car auction upon his representation that the proceeds of the sale would immediately be paid to the credit company. He transferred the titles to innocent purchasers and left the state. The recovery was not for misappropriation of funds belonging to the purchaser, but for fraud practiced by the dealer on other than purchasers. This is not the situation we have in the instant case, as the recitals above will clearly indicate.

Section 60-619, R. R. S. 1943, provides as follows: "Applicants for a motor vehicle dealer's license or for a used motor vehicle dealer's license shall, at the time of making application, furnish a corporate surety bond in the penal sum of ten thousand dollars on a form to be prescribed by the Attorney General of the State of Nebraska. The bond shall provide (1) that the applicant will faithfully perform all the terms and conditions of said license, (2) that the licensed dealer will fully in-

demnify any person by reason of any loss suffered because of (a) the substitution of any motor vehicle other than the one selected by the purchaser, (b) the dealer's failure to deliver to the purchaser a clear and marketable title, (c) the dealer's misappropriation of any funds belonging to the purchaser, (d) any alteration on the part of the dealer so as to deceive the purchaser as to the year, model of any vehicle, and (e) any false and fraudulent representations or deceitful practices whatever in representing any motor vehicle, and (3) that the automobile dealer shall well, truly, and faithfully comply with all the provisions of his license and the acts of the Legislature relating thereto. The aggregate liability of the surety, however, shall in no event exceed the penalty of said bond."

The essential provisions of the bond, which is in evidence, are as follows: "THE CONDITION OF THIS OBLIGATION IS SUCH, That whereas, the said Principal has made application for a motor vehicle dealer's license in accordance with Sections 60-1401 to 60-1416, and all Acts Amendatory thereto, and has paid or deposited all fees in connection therewith according to law.

"NOW, THEREFORE, upon such license being issued to the said Principal above named, if the said Principal hereinabove named: 1- Shall faithfully perform all of the terms and conditions of said license, 2- Shall fully indemnify any person by reason of any loss suffered because of: a- The substitution of any motor vehicle other than the one selected by the purchaser b- The licensee's failure to deliver to the purchaser, a clear and marketable title c- The licensee's misappropriation of any funds belonging to the purchaser d- Any alteration on the part of the licensee so as to deceive the purchaser as to the year, model of any vehicle e- Any false and fraudulent representations or deceitful practices whatever in representing any motor vehicle. 3- If the licensee shall well, truly and faithfully comply with all provisions of his license and the acts of the Legislature re-

lating thereto, then this obligation shall be null and void, otherwise to be and remain in full force and effect."

It is evident that the bond essentially embraces the provisions required by section 60-619, R. R. S. 1943.

As we interpret the act and the transactions involved herein, the plaintiff is not in any sense a purchaser as described in the act. Consequently, if he is to recover it must be under subdivision (2)(e) of section 60-619, R. R. S. 1943, which is subsection "e" under numeral "2" in the bond. This provision is: "Any false and fraudulent representations or deceitful practices whatever in representing any motor vehicle." Before discussing this point, we also note that plaintiff calls attention to the fact that under section 60-1412, R. R. S. 1943, a license may be revoked for a dealer "willfully defrauding any retail buyer, to the buyer's damage, or any other person in the conduct of the licensee's business, * * *." He suggests this is one of the conditions which is covered by the bond in the requirement that the applicant will faithfully perform all the terms and conditions of the license. Granted that the plaintiff's position is correct, and that he is included in the language, it is still necessary for him to prove that Lehmanowsky has willfully defrauded him. The general rule is that fraud is never presumed but must be clearly proved by the party who pleads and relies on it. Fritsche v. Turner, 133 Neb. 633, 276 N. W. 403. We can find no evidence of willful fraud in this record, as will be apparent in our discussion of subdivision (2)(e) of section 60-619, R. R. S. 1943.

The first cause of action did not involve the sale or exchange of a motor vehicle. The plaintiff took a demand note from Lehmanowsky and delivered to him the Danielson papers. There is nothing in the demand note to indicate that it is other than what it purports to be. Plaintiff testified that Lehmanowsky said that if Danielson "paid off in full then he would, of course, send us the money for that, or else bring it down." There is

no proof in this record that this promise, if it is material, was not made in good faith. About a month after the demand note was given, Lehmanowsky wrote the plaintiff exhibit 4, which is as follows:

"Friday

"Mr. Sterner:

"I sure have been having bad luck. Last Sunday someone broke in my office & stole all my titles & papers Also took 2 cars (59 Buick and 56 Ford station wagon). I had some deals & I was coming down to trade some & pay you some. Now I cant even do that until I get all these titles back or obtain duplicates.

"Here is a rundown on the accts:

"Gillming - up to date

"Ganser - $50.00 enclosed

"Journey - repo.

"Kearney Rug - Up to date

"Lizer - Repo - on lot

"Murphy - Repo - on lot

"Rick - Repo - on lot

"Scott - Repo - on lot

"Weston - Must repo - will pay out if sold.

"Danielson - Paid me & I will be down & pay you some & another deal in exchange. I used the money on Danielson payoff & bought 2 cars & was going to borrow the money here from Lowe & Co. & had plenty to pay you. Thats when they got all my titles. You will just have to bear with me until I get some of this stuff sold. I completely overhauled Scotts 53 Olds & cost me $150.00. All the repos are in shape except the old 53 DeSoto (Journey) This weather is another damn nuisance Looks like snow here right now.

"Respy

"R. Lehmanowsky"

An Oregon case in point on the principle involved is Butte Motor Co. v. Strand, —— Or. ——, 358 P. 2d 279. The Oregon court held that the failure of an automobile dealer, to whom automobiles were consigned, to pay for

them as they were sold as he had agreed to do, did not amount to fraud within a statute providing that if any person suffers loss by reason of fraud by a licensed automobile dealer, he has a right of action against the surety upon the dealer's bond in the absence of a showing that the dealer's promise to pay for the automobiles as sold was not made in good faith. There is no such showing in this case.

As set out heretofore, the second cause of action involved three separate transactions. The plaintiff at the very most on the Lizer Buick has raised a possibility which he later rebuts by direct evidence that Lehmanowsky may have collected some hail insurance on the car which he had agreed to give to the plaintiff's attorneys to apply on the indebtedness, and also that Lehmanowsky failed to deliver the car to an auction house when he was told to do so. We fail to see how, without more, this could constitute willful fraud or false and fraudulent representations within the meaning of the statute. Fraud must relate to a present or preexisting fact and may not generally be predicated on an inference concerning any event in the future or acts to be done in the future. Nathan v. McKernan, 170 Neb. 1, 101 N. W. 2d 756. This is true unless, of course, such representations as to future acts are falsely and fraudulently made with an intent to deceive. Severin v. Lukovsky, 149 Neb. 113, 30 N. W. 2d 568. The failure to take a car to a third person on demand does not constitute fraud nor give rise to any action on the bond. Also, even if plaintiff had a right of action for hail insurance collected by Lehmanowsky on the Lizer Buick, he should have produced some evidence not only that some insurance was collected, but also the amount collected. He did neither.

The most that can be said about the Journey DeSoto was that Lehmanowsky represented it as repossessed but did not repossess it. However, plaintiff's evidence also indicates it may have been repossessed and then

Lehmanowsky permitted Journey to take it for the purpose of having the damage appraised to see if a settlement could be made with an insurance company and that it was not returned. While there is nothing but an inference in the record, it would appear that Journey, who had run into a tree, could not collect for the damage. In any event, we do not consider there was sufficient evidence, if any, to constitute the type of false representation covered within the terms of the bond.

Was the failure to turn over the insurance proceeds collected by Lehmanowsky on the Gonzales Ford covered by the bond? Plaintiff suggests that Lehmanowsky misappropriated insurance funds within the terms of the bond. We assume he has reference to subdivision (2)(c) of section 60-619, R. R. S. 1943, which is also subsection "c" under numeral "2" of the bond, which reads as follows: "The licensee's misappropriation of any funds belonging to the purchaser." Does the plaintiff, on the facts in this case, qualify as a purchaser as that term is used in the statute? We think not. But assuming he does, has Lehmanowsky misappropriated his funds? Plaintiff held the certificate of title on the Gonzales Ford, signed in blank. It was delivered with another to secure the return of a certificate of title on a Chrysler. There being no evidence as to the insurance policy, we can only speculate that Lehmanowsky made some recovery under a general theft policy covering his lot. Would the mere delivery of a certificate of title signed in blank, ostensibly for security, constitute also an assignment of a portion of a blanket theft policy covering all cars in Lehmanowsky's possession? We do not believe Lehmanowsky's failure to keep his promise to turn over the proceeds is a misappropriation within the terms of the bond on the evidence in this record.

Plaintiff further contends that the bond protects against the dealer willfully defrauding any person, and quotes a definition of "defraud" which we approved in Benedict v. State, 166 Neb. 295, 89 N. W. 2d 82, as fol-

lows: "Defaud - '* * * to deprive a person of property or any interest, estate, or right by fraud, deceit, or artifice.'" We agree the bond does protect against willful fraud, but willful fraud is not proved by the mere failure to keep a promise or to pay a debt.

For the reasons stated, the motions for directed verdict were properly sustained and the judgment of dismissal entered by the trial court is hereby affirmed.

AFFIRMED.

SIMMONS, C. J., participating on briefs.

MARGARET PRAUNER ET AL., APPELLEES, V. THE BATTLE CREEK COOPERATIVE CREAMERY ET AL., APPELLANTS.
113 N. W. 2d 518

Filed March 2, 1962. No. 35092.

1. **Nuisances.** The storage of petroleum products is not a nuisance per se.
2. ———. Where it is sought to enjoin an anticipatory nuisance, it must be shown: (1) That the proposed construction or the use to be made of the property is a nuisance per se; or (2) that, while it may not amount to a nuisance per se, under the circumstances of the case, a nuisance must necessarily result from the contemplated act.
3. ———. Generally, an owner of property has a right to make any use of it he sees fit. It is only where his use prevents his neighbors from the enjoyment of their property to their damage that an owner's use may be restricted. The burden rests on the one complaining to establish that the use to be made of the property must necessarily create a nuisance.
4. **Injunction: Nuisances.** A court of equity will not usually enjoin the operation of a lawful business without regard to how serious may be the grievance caused thereby. In the first instance, at least, it will require the cause of the grievance to be corrected and will enjoin the conduct of the enterprise perpetually after it has been proven that no application of endeavor, science, or skill can effect a remedy or that the owners cannot be induced to conduct it properly.
5. **Nuisances.** Devoting property to uses which produce destructive vapors and noxious odors, where it results in material in-

jury to property and the comfort or existence of those in the immediate vicinity, is a nuisance which may be enjoined.

6. ———. For odors to be a nuisance, they must be such as offend the olfactories of an ordinary man, and not those of an individual with sensitive and delicate nostrils.

APPEAL from the district court for Madison County: FAY H. POLLOCK, JUDGE. *Reversed and dismissed.*

Jewell & Otte, for appellants.

James F. Brogan and *Thomas E. Brogan,* for appellees.

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

SPENCER, J.

This is an action to enjoin the construction and operation of a bulk petroleum plant. The trial court granted a permanent injunction and the defendant appealed.

The question involved is whether construction and operation of a bulk petroleum plant, in conformity with the rules and regulations of the State Fire Marshal, which plant will be located outside the corporate limits of the village of Battle Creek but across the street from the residences of the plaintiffs which are within the corporate limits of the village, necessarily creates a nuisance, where the character of the neighborhood is not strictly residential but is mixed commercial, agricultural, and residential, and where the residences of the plaintiffs are 123 feet and 168 feet from the proposed plant.

Essentially, plaintiffs' petition alleged that they would be irreparably damaged by the construction because of unsightly tanks, annoying odors, noisy commercial vehicles, and the storage of liquid petroleum. They alleged that their property would be greatly depreciated; that they would be subjected to the constant danger of fire and explosion; that their rest would be greatly disturbed; and that their health would be impaired.

Plaintiff, Mrs. Margaret Prauner, is the owner of and is living on Lots 1 to 5, Block 1, Highlawn Addition to Battle Creek, Nebraska. This property is bounded on the west by State Highway No. 121 and on the south by Park Avenue. The house on said property is 30 feet north of Park Avenue and 23 feet east of State Highway No. 121. Plaintiff purchased this property at auction in September 1959, for $7,000. At that time and for more than 10 years previously, one Victor J. Klein, hereinafter referred to as Klein, operated a petroleum bulk storage plant 254 feet northwest of the house on the property. This plant is 125.5 feet west of State Highway No. 121. Klein also maintains a storage tank on said property for a propane gas business operated by him. This tank is 212 feet northwest of the Margaret Prauner residence. There is another house north of the Margaret Prauner residence, which is 216.5 feet east of the Klein bulk plant.

The plaintiffs Herman F. Praeuner and Lenora Praeuner, husband and wife, hereinafter designated as Herman Praeuner, own lots 6 to 15 in the same block, which lots adjoin the Margaret Prauner lots on the east. This property faces on Park Avenue, and the west boundary of lot 6, which is the east line of Margaret Prauner's property, is 138 feet from State Highway No. 121. The corporate limits of the village of Battle Creek constitute the south boundary of both properties, so that Park Avenue, which is 60 feet wide, is entirely outside of the corporate limits of the village of Battle Creek. Block 2 of Highlawn Addition, which the defendants have agreed to purchase and on which they propose to operate the petroleum bulk plant, is bounded on the west by State Highway No. 121 and on the north by Park Avenue. The proposed construction will be in the northwest corner of block 2.

Herman Praeuner built his home in 1949 on lots 7 and 8 at a cost of $10,000. The Klein bulk storage plant was then in existence but it was at least 350 feet northwest

of the Herman Praeuner home. He built a garage approximately 5 years later on lot 6 to the west of his home at a cost of $425.

There is a tin shed or warehouse located at the rear of the property on which defendants propose to operate their bulk petroleum plant, which was erected about 1954, and was used by the plaintiff, Herman Praeuner, to store livestock feeds when he was in the feed business. Defendants have used the warehouse to store dry fertilizer since 1958. This shed, which is directly south of lots 6 and 7 of Herman Praeuner's property, is 88.5 feet from Park Avenue, which separates the properties, and the entrance to it is directly south of the Herman Praeuner garage. This shed is approximately 140 feet east of State Highway No. 121.

Exhibit 7 shows a natural gas substation is located in the northwest corner of the property adjoining the proposed storage construction area. This natural gas substation is approximately 40 feet south of the proposed construction. There is also a public park in the block to the east of block 2. The nearest fireplace in the park is approximately 100 feet from the southeast corner of block 2. The southeast corner, however, is over 200 feet southeast of the proposed construction. The nearest shelter area in the park is 310 feet from the southeast corner, and the park playground is 643 feet from the same point. The evidence does not indicate whether the park is or is not outside of the corporate limits of the village, although Park Avenue and block 2, which is west of the park, are outside the corporate limits.

The defendants have agreed to purchase the present bulk storage plant, which they are now operating, from Klein, and propose to move it to the proposed site. The present plant is located 119 feet southwest of the Klein home. They are not purchasing the propane tank which is 62 feet south of the Klein home. This Klein will continue to use in his business.

The defendants plan to place the bulk petroleum plant on the property so that the north tank (the one closest to the plaintiffs) will be 33 feet from the north line of the property. This will put it 123 feet directly south of the Margaret Prauner house and 168 feet southwest of the Herman Praeuner house. The west tank will be 27 feet east of the west line and the loading dock will be 25 feet from the nearest tank. The main entrance to the site will be from State Highway No. 121, at the extreme southwest corner of block 2. There are now two entrances from the site to Park Avenue. The capacity of the plant, if moved, will be 30,000 gallons. The capacity of the present plant is 29,000 gallons, but while operated by Klein its maximum annual volume was between 90,000 and 100,000 gallons. Defendants, in September of 1960, the first month of their operation of the present plant, had a volume of 20,000 gallons.

This action, being one for a permanent injunction, will be heard de novo on appeal. When an action in equity is appealed, it is the duty of this court to try the issues de novo and to reach an independent conclusion without reference to the findings of the district court. Probert v. Grint, 148 Neb. 666, 28 N. W. 2d 548.

As we view the evidence, the area involved is not strictly residential. There have been two, and if we consider the propane tank separately, three commercial enterprises there for several years. One was there before either of the plaintiffs acquired their homes and one was used by one of the plaintiffs for commercial purposes 5 years before another of the plaintiffs acquired her home. The area involved is outside the corporate limits of the village and no zoning ordinances are in any way involved.

Plaintiffs contend that the proposed construction will violate the rules and regulations of the State Fire Marshal as respects the requirements for diking. By stipulation, the parties agreed that the State Fire Marshal had given preliminary approval to the layout and design of

the bulk plant at the approved site, and that the defendants in obtaining such approval had followed the procedures set forth by regulation of his office. The evidence of the defendants is that they intend to fully comply with all requirements made by the State Fire Marshal. In any event, we can assume at this stage that the State Fire Marshal will not finally approve a construction which does not conform with all the requirements of his office.

The law has determined that some businesses are, under certain conditions, nuisances per se. In this automotive age, the courts are unanimous that the storage of petroleum products is not a nuisance per se. Nebraska recognized this rule as early as 1923 in the case of Brown v. Easterday, 110 Neb. 729, 194 N. W. 798, which involved a service station in a residential district in the city of Lincoln. In that case, we held: "* * * automobiles being of general use, and public gasoline supply stations being essential, their erection in a residence district is not a nuisance per se."

Where, as here, it is sought to enjoin an anticipated nuisance, it must be shown: (1) That the proposed construction or the use to be made of the property is a nuisance per se; or (2) that, while it may not amount to a nuisance per se, under the circumstances of the case, a nuisance must necessarily result from the contemplated act. See, Annotation, 55 A. L. R. 882; Demont v. Abbas, 149 Neb. 765, 32 N. W. 2d 737. The plaintiffs concede that a bulk petroleum plant is a lawful business and not a nuisance per se, but do contend that it may become a nuisance by reason of its location in a residential neighborhood and in close proximity to a public park.

One of the principal contentions in Brown v. Easterday, *supra,* was that the location in question was a purely residential district, which should not be invaded by a service station. We said: "A sufficient answer would seem to be that, in the absence of legislation dividing the city into zones and having a general application to all

property within the respective sections, it is not within the power of the courts to interfere with the lawful use of property by the owner."

Generally, an owner of property has a right to make any use of it he sees fit. It is only where his use prevents his neighbors from the enjoyment of their property to their damage that an owner's use may be restricted. The burden rests on the one complaining to establish that the use to be made of the property must necessarily create a nuisance. Demont v. Abbas, *supra.*

From the time of Aldred's Case, 9 Coke 57b, 77 Eng. Rep. R. 816, which involved a pigsty near the plaintiff's residence, it has been a settled rule of this country and of England that a man had no right to maintain a structure on his own land which made that of his neighbor dangerous, intolerable, or uninhabitable, or as said in Camfield v. United States, 167 U. S. 518, 17 S. Ct. 864, 42 L. Ed. 260: "No person maintaining such a nuisance can shelter himself behind the sanctity of private property." The plaintiffs sum up their position in a quotation from Euclid v. Ambler Realty Co., 272 U. S. 365, 47 S. Ct. 114, 71 L. Ed. 303, 154 A. L. R. 1016: "A nuisance may be merely a right thing in the wrong place,—like a pig in the parlor instead of the barnyard."

There is no single arbitrary rule governing cases of this class. Each case must be determined by the facts and circumstances developed therein. Beisel v. Crosby, 104 Neb. 643, 178 N. W. 272. There can be no question either but that a court of equity has jurisdiction to enjoin use of property which violates the accepted rule of decency and substantially depreciates the value of the adjoining property. Sarraillon v. Stevenson, 153 Neb. 182, 43 N. W. 2d 509, 18 A. L. R. 2d 1025.

As suggested, we are concerned here with an anticipatory nuisance. For this reason, we must remember that a court of equity will not usually enjoin the operation of a lawful business without regard to how serious may be the grievance caused thereby. In the first instance, at

least, it will require the cause of the grievance to be corrected and will enjoin conduct of the enterprise perpetually after it has been proven that no application of endeavor, science, or skill can effect a remedy or that the owners cannot be induced to conduct it properly. Mathews v. Mozer, 111 Neb. 71, 195 N. W. 943; State ex rel. Towle v. Eyen, 130 Neb. 416, 264 N. W. 901.

Analyzing the instant case in the light of the foregoing discussion, we conclude that the plaintiffs are unduly disturbed about the situation which confronts them. We will discuss in detail the principal factors of which the plaintiffs complain.

Considering first the allegation of the depreciation of the property values. To this we say that the depreciation of the values of adjoining property by the operation of a lawful business of itself furnishes no ground for injunction for the legal remedy would be adequate. Brown v. Easterday, 110 Neb. 729, 194 N. W. 798. Here the evidence of depreciation is disputed. Some of defendants' witnesses thought the area would be benefited. The present petroleum bulk plant is unsightly. Volunteer trees, shrubs, and weeds now grow on the proposed construction site. In view of the present character of the area, there is a possibility that the proposed construction may actually improve the physical appearance of the neighborhood. We are not persuaded that the value of plaintiffs' property will be substantially affected. In any event, there is insufficient evidence to justify an injunction.

The expert called by the plaintiffs referred to the constant hazard of fire and explosion. We have reviewed his testimony with interest, and note that he does not believe the State Fire Marshal's regulations go far enough, and that he specifically does not approve of the regulations in this particular case. We believe, however, that the testimony of defendants' witness, who has been familiar with and closedly identified with the operation of 650 bulk storage outlets in 8 or 10 states

for the past 15 years, is more in accord with the realities of the situation in this industrial age. While the plaintiffs' expert suggested many potential hazards, except for an act of God and faulty equipment, they all would involve carelessness. If properly stored, petroleum products can be safely stored. We might further observe that regardless of safety measures attempted, we still must consider the human equation, that of carelessness. In the absence of evidence to the contrary, however, we must assume that the plant will be operated within all of the accepted safety limits.

The evidence is undisputed that the construction will have no effect on fire insurance rates on the property of plaintiffs. Plaintiffs' own insurance agent testified that a bulk plant, with a 42,000-gallon capacity, which is 12,000 gallons more than involved herein, would not affect fire insurance rates after 50 feet. The plaintiffs are 123 feet and 168 feet away. Defendants' witness testified that there had only been 3 fires in 15 years in the 650 bulk plants served by his company in an 8 or 10 state area, and that in each instance these fires were confined to the premises involved. It is true that plaintiffs' witnesses were concerned about a fire shortly before the trial in a bulk plant in Stuart, Nebraska. A newspaper account, exhibit 15, indicates that the fire started when one of the proprietors was filling a gas tank while smoking a cigar. Exhibit 16 is a newspaper note on two other oil fires in Kansas City in August of 1960. Fires do occur, not only in oil storage plants or service stations, but also in other businesses dealing in materials which may be combustible, particularly where carelessness is involved.

The storage of petroleum products is one of the hazards of our present civilization. Recent cases would indicate that it is not the amount stored but rather the manner of its storage which determines the question of danger therefrom. If stored in approved scientifically constructed tanks, it is not considered dangerous. There

was evidence that the defendants expect to use the present tanks but only if they are approved by the State Fire Marshal. We conclude the apprehension of danger is too speculative in this case to sustain the basis of equitable interference.

The law is well settled that devoting property to uses which produce destructive vapors and noxious odors, where it results in material injury to property and the comfort or existence of those in the immediate vicinity, is a nuisance which may be enjoined. See Sarraillon v. Stevenson, 153 Neb. 182, 43 N. W. 2d 509, 18 A. L. R. 2d 1025. In that case we said: "A legitimate business conducted in a residential neighborhood that pollutes or contaminates the air through noisome and noxious odors created by it, that by noises emanating from it disturbs the peace, quiet, and comfort of the residents thereof, and injuriously affects property rights of adjoining and nearby property owners, is a nuisance in fact." That case involved the operation of a slaughterhouse, stockyards, and a cold storage or locker plant in Nebraska City. The court enjoined the operation of the slaughterhouse and stockyards, but not the cold storage or locker plant. Eight of the plaintiffs occupied residences in the same block as the defendants' business. The other plaintiffs owned and occupied homes in the immediate vicinity of the business.

For odors to be a nuisance, they must be such as offend the olfactories of an ordinary man, and not those of an individual with sensitive and delicate nostrils. The evidence on odors is very sketchy and extremely speculative. The testimony of plaintiffs' expert is that even if properly constructed, there would be an ever-present hazard of fumes from the bulk plant which could nauseate a person and make him ill. This witness was concerned about structural failures in the tanks, and testified that he had known of such occurrences but did not particularize. Assuming the situation to be as prevalent as the witness would have us believe, what

we have said with reference to the hazard of fire would still be applicable. We are convinced that if the equipment is of an approved standard and all necessary precautions are taken, the danger suggested is minimized to the point of a very remote possibility.

There is evidence, however, that on occasions there will be limited amounts of vapor escape during the loading process, and that if the wind is in the right direction there is a possibility that the odor may reach the premises of the plaintiffs. There is also evidence that modern equipment does retard the escape of odor even in this instance. We are dealing with anticipated odors. There is no evidence that the present bulk plant has been offensive. True, the new plant will be situated south of the plaintiffs, and the testimony is that the wind blows 55 percent of the time from the south and 45 percent of the time from the northwest. In the area involved, we cannot see that there will be a sufficient possibility of noxious odors to warrant the issuance of an injunction.

Plaintiffs also complain of the anticipated increase in the volume of noise because of the expansion of the business of the bulk plant by the defendants. Margaret Prauner in her cross-examination admitted that she had not heard any noise in the loading or unloading at the present site. In her rebuttal testimony, over a month later, she testified that she paid particular attention to the loading and unloading operations. She heard a grinding noise for 45 minutes on one occasion, when a large tank truck was unloaded. On occasions she heard a grinding noise for 15 minutes when the defendants' delivery tank truck was loaded, and once in a while she heard noises when wrenches were used. We do not believe that the noise is of sufficient intensity and duration to constitute a nuisance in the area involved.

Plaintiffs further complain of the possibility of the increase of traffic because of the anticipated increase in

the volume of defendants' business. State Highway No. 121 appears to be a main highway to Norfolk, and has always carried considerable automobile and truck traffic. It was doing so when the plaintiffs acquired their properties. Property such as that in question, outside of the village limits, is ideal for certain types of commercial property. We see no merit to plaintiffs' complaint.

The last contention we will consider is the location of the plant between residence properties and a public park. We suggest that the area involved is not strictly residential. A bulk petroleum plant has been operated in the area for many years. As to the reference to the public park, we find no evidence that would even indicate that the proposed construction could be detrimental to the operation of the park.

From a detailed analysis of the various factors complained of by the plaintiff, we have come to the conclusion that there is no sufficient evidence to permit this court to find that the proposed construction is a nuisance in fact.

For the reasons given above, we determine that the finding of the trial court was erroneous, and that the judgment should be reversed and the action dismissed.

REVERSED AND DISMISSED.

SIMMONS, C. J., participating on briefs.

C. H. SWINK, AN INDIVIDUAL DOING BUSINESS AS SWINK CONSTRUCTION COMPANY, APPELLEE, V. MILO SMITH, APPELLANT.

113 N. W. 2d 515

Filed March 2, 1962. No. 35103.

1. **Trial. Where on the trial of an issue of fact the proof relating to the disputed issue is so clear and conclusive that reasonable minds cannot reach different conclusions, it is the duty of the**

trial court to dismiss the jury and enter judgment in accordance with the evidence.

2. **Trial: Appeal and Error.** Where a motion to direct a verdict does not state the reasons therefor in accordance with section 25-1315.01, R. R. S. 1943, prejudicial error cannot be predicated thereon where it is not shown that prejudice resulted therefrom.

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

W. C. Conover and *Franklin D. Carroll,* for appellant.

Daniel E. Owens, for appellee.

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

CARTER, J.

Plaintiff commenced this action to recover the balance due for services rendered the defendant at his request. Defendant by answer admitted making certain payments for such services and denied generally otherwise. Defendant filed a counterclaim for damages alleged to have resulted from a breach of contract by plaintiff. At the close of all the evidence the trial court sustained a motion for judgment for plaintiff in the amount of $1,025.75 and interest, and dismissed defendant's counterclaim. Defendant has perfected his appeal to this court.

The evidence shows that the defendant is the owner of a farm in Chase County through which was a drainage ditch. The defendant desired to remove trees and debris from this ditch and have it filled and leveled. At the same time he desired to construct a new drainway to more efficiently carry drainage waters from his land into Frenchman Creek by a more direct route. He contacted the Chase County A. S. C. office and obtained an allotment of funds in the amount of $1,395.36 for the construction of the drainway to be built in accordance with plans and specifications to be prepared in accordance with the conservation practices of the A. S. C. office.

In August 1959, defendant contacted the plaintiff, a contractor engaged in the construction of such projects, with reference to the performance of the work. Plaintiff and defendant agree that plaintiff was to be paid $12 per hour for removing the trees and filling the old ditch with earth. It was further agreed that plaintiff was to be paid 13 cents per yard for removing the dirt in the construction of the new drainway. In addition to the foregoing, defendant was to pay the cost of dynamite used in the blasting of the trees. There is no dispute that plaintiff spent 10½ hours in removing trees with his bulldozer for the agreed price of $126. It is agreed also that plaintiff removed 12,480 yards of dirt from the new drainway at the agreed price of $1,622.40. It is not disputed that plaintiff used dynamite costing $30.15. It is not disputed the plaintiff performed additional work in digging a silo and filling in a ditch near the farmhouse for the agreed price of $888. The agreed price for all the work actually performed was $2,666.55. The defendant paid $1,706.31 of such amount, leaving a balance due of $960.24.

It is the contention of defendant that plaintiff agreed to perform the work within 30 days. Plaintiff testified he informed the defendant that the work could easily be done within 30 days but that he did not agree to perform it within that time. The issue before the court is whether or not an agreement to complete the work within 30 days was made and whether or not, if such an agreement was made, there was a breach thereof resulting in damage to the defendant.

The defendant did testify in the form of a conclusion that plaintiff agreed to complete the work in 30 days. No objection was made on the ground that it was a conclusion of the witness. It might be said that, standing alone, there was a question of fact for a jury. We think, however, that the evidence shows that time was not of the essence of this contract. The evidence shows that plaintiff commenced the work about the middle of Au-

gust 1959. After working a few days, plaintiff's equipment broke down and it required 2 weeks to get it repaired. Subsequently, another breakdown occurred which required 10 days to make repairs. During the course of the work covered by the agreement defendant requested plaintiff to dig a silo and to do filling work around the farmhouse. Defendant also permitted plaintiff to leave the work and perform work for others. It does appear that on December 10, 1959, the manager of the A. S. C. office advised defendant by letter that the drainway must be completed by December 21, 1959, or it would be unable to pay the authorized allotment. Defendant's wife contacted plaintiff and advised him of the contents of the letter. Plaintiff agreed to return to the work by the following Wednesday, but he failed to do so. On December 14, 1959, the manager of the A. S. C. office wrote defendant telling him it had informed plaintiff that the time for completion had been extended to December 31, 1959. On December 24, 1959, defendant employed the Wallace Construction Company to complete the work. Wallace Construction Company began the work on the afternoon of December 24, 1959. On December 28, 1959, plaintiff appeared with his equipment to finish the drainway and, finding the Wallace Construction Company doing the work, left the premises. Wallace Construction Company continued the work until December 31, 1959, when a snow storm and freezing weather caused operations to cease. No further work was done on the drainway by plaintiff or Wallace Construction Company. Defendant later purchased equipment and finished the work in September 1960.

The manager of the A. S. C. office testified that defendant was paid the full amount of his allotment when the work was completed. He testified to writing the letters to coerce the completion of the work so that it could be paid from the appropriation of funds for that year, and for no other reason. He stated that no time limit could properly be fixed as a completion date. In

any event A. S. C. was in no way involved in the contract between the plaintiff and defendant. It is made abundantly clear that defendant was in no way damaged with reference to his allotment authorized by the A. S. C. office as the full amount was paid him.

The evidence is that Wallace Construction Company was paid the same rate per yard for the removal of dirt as was the plaintiff. Defendant suffered no loss in this respect. Defendant alleges in his answer that because of the delay he was required to spend more time and fuel in his farming operations, but there is no evidence of any such damage. Although it was not pleaded, defendant testified that damage resulted to the drainway because of its uncompleted condition. In this respect it will be noted that it was the Wallace Construction Company that last left the uncompleted drainway before the alleged damage occurred, and not the plaintiff. There is no evidence of damage resulting to defendant because of the unfinished condition of the drainway.

We do not think the defendant established an agreement for a 30-day completion date by a preponderance of the evidence. In any event, if such agreement were established, the breach of the 30-day provision was waived by the subsequent actions of defendant in demanding performance as late as December 1959, and in making voluntary payments on the amount due after the 30 days had expired. We point out also that defendant failed to produce any evidence of damage to support a recovery under his counterclaim.

Defendant complains of the insufficiency of the motion for a directed verdict in that it did not specify the grounds therefor as required by section 25-1315.01, R. R. S. 1943. The motion for a directed verdict in favor of plaintiff for the amount prayed was based upon defendant's testimony as to the agreement and the construction he put on it. The motion to direct a verdict for plaintiff on defendant's counterclaim was based upon

his failure to plead or prove any damages attributable to the plaintiff. In such a situation we fail to see where defendant was prejudiced by plaintiff's failure to state the reasons why he was entitled to a directed verdict. The reasons were so apparent that their recitation could add little benefit to the court and the parties to the litigation. A judgment will not ordinarily be reversed where the complaining party would not be entitled to succeed in any event. Bohmont v. Moore, 141 Neb. 91, 2 N. W. 2d 599. In the absence of a showing of prejudice, error may not be predicated on the failure to properly set out the grounds for a directed verdict.

Where on the trial of an issue of fact the proof relating to the disputed issue is so clear and conclusive that reasonable minds cannot reach different conclusions, it is the duty of the trial court to dismiss the jury and enter judgment in accordance with the evidence. Kirshenbaum v. Massachusetts Bonding & Ins. Co., 107 Neb. 368, 186 N. W. 325; Wrona v. Schrawger, 171 Neb. 814, 108 N. W. 2d 95.

The motion by plaintiff for a directed verdict was properly sustained. The motion for a directed verdict in favor of plaintiff on defendant's counterclaim was likewise properly sustained. The record being free of prejudicial error, the judgment of the district court is affirmed.

AFFIRMED.

SIMMONS, C. J., participating on briefs.

MAX D. HICKMAN, APPELLANT, V. LOUP RIVER PUBLIC POWER DISTRICT ET AL., APPELLEES, MIDDLE LOUP PUBLIC POWER AND IRRIGATION DISTRICT ET AL., INTERVENERS-APPELLANTS.

113 N. W. 2d 617

Filed March 2, 1962. No. 35112.

1. **Waters.** The Department of Water Resources of Nebraska has

original and exclusive jurisdiction to hear and adjudicate all matters pertaining to water rights for irrigation, power, or other useful purposes, except as specifically limited by statute.

2. **Actions: Parties.** A representative suit is authorized by statute in this state when the question to be determined is one of common or general interest of many persons, or when the parties are numerous and it is impracticable to bring them all before the court.

3. ———: ———. Where a community of interest or a privity of estate exists between an intervener and other plaintiffs, a suit commenced before the expiration of the statutory period inures to the benefit of a person who intervenes therein after the time when an action would be barred.

4. **Waters.** Where the owner of a superior right seeks to acquire water being used for power purposes under an earlier priority he is limited to the statutory right of condemnation unless the just compensation can be determined by mutual agreement.

5. ———. In a proceeding by a junior appropriator and others similarly situated to cancel and annul the appropriation of a senior appropriator, the Department of Water Resources has no authority to compel the acceptance of an offer of compensation in lieu of condemnation.

6. **Waters: Actions.** In a class action to cancel and annul an appropriation of public waters, an unaccepted offer by the respondent to waive its rights as against the petitioner does not make the question of the validity of respondent's appropriation moot.

7. **Actions.** One bringing a class action cannot dismiss the action for reasons personal to him over the objection of a person having a beneficial interest in the litigation common to that of the nominal petitioner. A court is bound by the same consideration in ruling on motions to dismiss.

APPEAL from the Department of Water Resources. *Reversed and remanded.*

John H. Evans, for appellant Hickman.

Monsky, Grodinsky, Good & Cohen, George A. Munn, Leo F. Clinch, and *Hotz, Hotz & Taylor,* for interveners-appellants.

Neighbors, Danielson & Van Steenberg and *Walter, Albert, Leininger & Grant,* for appellees.

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

CARTER, J.

This is an appeal by the petitioner Max D. Hickman from a final order of the Department of Water Resources of the State of Nebraska dismissing his petition for the cancellation and annulment of the appropriation rights of the respondents Loup River Public Power District and the United States of America, arising out of appropriation No. 2287 granted to Loup River Public Power District for 3,500 cubic feet of water per second of time with a priority date of September 15, 1932. Petitions of intervention filed by North Loup River Public Power and Irrigation District and its receiver R. L. Cochran and by Middle Loup Public Power and Irrigation District were also dismissed. Each of the interveners has perfected appeal to this court.

As a matter of convenience we shall hereafter refer to the petitioner as Hickman, to the respondent Loup River Public Power District as Loup District, to the North Loup River Public Power and Irrigation District as North Loup District, to R. L. Cochran, receiver of the North Loup River Public Power and Irrigation District, as receiver, to the Middle Loup Public Power and Irrigation District as Middle Loup District, to the Department of Water Resources of the State of Nebraska and its predecessors as department, and to the United States of America as United States.

The petitioner is the owner of an appropriation of the public waters of the Middle Loup River for the purpose of irrigation for 1.28 cubic feet per second of time with a priority date of October 23, 1939. His appropriation is junior in point of time to the claimed appropriation rights of Loup District, North Loup District, and Middle Loup District.

The Loup District obtained an appropriation of public waters of the Loup River for the purpose of gen-

erating power with a priority date of September 15, 1932, and with a diversion rate of 3,500 cubic feet per second of time. The purpose of this appropriation was for the operation of a hydroelectric power plant near Columbus, Nebraska. The diversion of water was to be made at a point below the confluence of the North Loup and Middle Loup Rivers, and other streams, to form the Loup River.

It is the contention of Hickman that in granting the corrected application of the Loup District the department fixed August 24, 1937, as the final date for perfecting the application of water to the beneficial use for which the appropriation was made. No appeal was taken from the order of the department approving the corrected application, and Hickman alleges that it was accepted and assented to by Loup District. Hickman further alleges that Loup District obtained from the department an extension of time for completing the construction work until July 1, 1938. Hickman alleges that Loup District did not complete its construction work until September 1, 1938, that it applied no water to the beneficial use for which taken under its appropriation right until June 1, 1938, and that the maximum amount of water diverted under its appropriation prior to August 24, 1937, was 506 cubic feet per second of time, although there was additional water available in the Loup River subject to diversion by Loup District. Hickman alleges that the failure of Loup District to comply with the order of the department approving and allowing the corrected application of Loup District, including the failure to complete its works prior to the time limited in the order and to apply water to the beneficial use for which it was appropriated prior to August 24, 1937, resulted in a failure by Loup District to acquire a final and complete appropriation of the waters of the Loup District, or a vested right therein, or the priority date of September 15, 1932. Hickman asserts that the Loup District, irrespective of the foregoing facts,

claims the right to divert the waters of the Loup River to the extent of 3,500 cubic feet per second of time with a priority date of September 15, 1932, and that said claimed appropriation right is superior to that of Hickman.

Hickman asserts that there are a great many appropriators of water for irrigation from the Loup River and its tributaries who have priority dates junior to September 15, 1932, and whose diversion points are upstream from the diversion point of the Loup District. The junior appropriators are alleged to be similarly situated as Hickman and the action is allegedly brought on their behalf.

Hickman further alleges that Loup District in 1955, and subsequent thereto, made demands upon the department to prevent diversions of water by junior appropriators unless payment be made by them as compensation for interference with its appropriation in lieu of condemnation. Hickman alleges that junior appropriators have been coerced into making payments of large sums of money to Loup District to obtain needed irrigation water when in truth and fact Loup District had no valid appropriation rights for the reasons hereinbefore stated. The contention is made that unless the purported appropriation by Loup District for power purposes is cancelled and annulled, Loup District will continue to demand and collect such payments as compensation for interference with its water supply.

The United States is made a party defendant because of a suit brought by it to condemn 260 cubic feet of water per second of time for irrigation purposes, the same being the first 260 cubic feet of water out of the 3,500 cubic feet of water per second of time alleged by Loup District to have been appropriated by it for the generation of power. It is alleged that the validity of the condemnation proceeding brought in the United States District Court for the District of Nebraska is

wholly dependent upon the validity of the appropriation of Loup District.

The Middle Loup District and the North Loup District, as well as its receiver, filed petitions in intervention in the proceeding, praying for the cancellation and annulment of Loup District's appropriation right with the priority date of September 15, 1932, for the same reasons set out in Hickman's petition.

By answer filed to the petition, Loup District admits that it has claimed the right to divert 3,500 cubic feet of water per second of time with a priority date of September 15, 1932, since March 23, 1934. It alleges a right superior to all appropriators whose applications for appropriative rights were filed subsequent to September 15, 1932, and that subsequent appropriators including Hickman may not interfere with the exercise of its rights except by formal condemnation proceedings or by an agreement for payment of compensation in lieu of condemnation, as provided by section 70-669, R. R. S. 1943. Loup District admits making demands upon the department to prevent interference with its appropriation by junior appropriators, that demands were made upon junior appropriators for compensation for interference in lieu of condemnation, and that it will continue to make such demands for compensation hereafter. Loup District alleges that it complied with all requirements of its granted application and that its appropriation is in all respects valid. It alleges that it entered into leases with Nebraska for the use of water for power purposes and paid the amounts due thereunder, all in accordance with section 46-236, R. R. S. 1943. Loup District alleges that for 19 years prior to 1958 it used all water of the Loup River available for diversion, except in times of flood and operational difficulties, during which time its appropriation rights were never assailed. It alleges the expenditure of $13,000,000 during this period of time in the construction of its hydroelectric plants and its auxiliary facilities, and the making

of long-term contracts with the users of electric power. It alleges that it borrowed large sums of money which remain unpaid, and which were loaned in reliance upon the validity of its appropriative right. It asserts that after 25 years, substantial evidence of facts and circumstances are no longer available. Based on these allegations, Loup District asserts estoppel, laches, and the statute of limitations as defenses.

As a further defense, Loup District alleges that by way of compromise it agrees that Hickman, without payment of compensation, may interfere with the appropriative right of Loup District to the extent of 1.28 cubic feet of water per second of time for all time in the future. Hickman refused to accept such compromise and insisted that Loup District's appropriative rights be cancelled and annulled. Loup District thereafter filed separate motions to dismiss Hickman's petition and the petitions of the interveners on the basis of Loup District's offer to Hickman to permit the latter's interference with Loup District's appropriative rights without compensation in lieu of condemnation to the extent of 1.28 cubic feet of water per second of time. The department sustained the motions of Loup District to dismiss. Motions for a new trial were timely filed and overruled by the department. Hickman and interveners have each perfected appeals to this court.

The contention is advanced by Loup District that this is not a class action irrespective of the fact that it is alleged in Hickman's petition to be such. The department has original exclusive jurisdiction to hear and adjudicate all matters pertaining to water rights for irrigation, power, or other useful purposes, except as specifically limited by statute. § 46-209, R. R. S. 1943. The authority thus granted necessarily includes the granting of appropriations of public waters, the adjudication of priorities, and the restriction or cancellation of approved applications for noncompliance with their terms or the statutory law of the state. Ainsworth Irr. Dist. v.

Harms, 170 Neb. 228, 102 N. W. 2d 429; Ainsworth Irr. Dist. v. Bejot, 170 Neb. 257, 102 N. W. 2d 416. The exercise of such powers by the department is quasi-judicial in character. North Loup River Public Power & Irr. Dist. v. Loup River Public Power Dist., 162 Neb. 22, 74 N. W. 2d 863. The statute does not provide the procedure to be followed in the exercise of the jurisdiction granted, except to provide that the department shall adopt rules governing matters coming before it. The department appears to have followed the civil code in the formulation of the issues and in dealing with the pleadings filed. It is not contended that any adopted rule of the department was violated. Under such circumstances the department may properly follow code provisions in dealing with matters before it. This necessarily implies the right in a proper case to entertain an action on the behalf of one and others similarly situated and to permit intervention by persons having the required interest in the litigation.

Loup District argues that the common relationship of junior appropriations is insufficient to permit an action by one junior appropriator and all others similarly situated. The statutory right to maintain a class action provides: "When the question is one of a common or general interest of many persons, or when the parties are very numerous, and it may be impracticable to bring them all before the court, one or more may sue or defend for the benefit of all." § 25-319, R. R. S. 1943. The only issue raised by Hickman is the question of the validity of the appropriation of the public waters of the Loup River by the Loup District. Each appropriator junior in point of time to the appropriation of Loup District has a common interest in the issue raised. A cancellation of Loup District's appropriation would have the effect of advancing the priority of each junior appropriator on the over-appropriated waters of the Loup River. It cannot be disputed that a holding for or against the Loup District would be a binding judg-

ment on all junior appropriators. The action is of a common and general interest of many persons. Their interests are identical. A class action in such a situation is authorized by section 25-319, R. R. S. 1943.

The Loup District also contends that Middle Loup District, North Loup District and the receiver, are not entitled to intervene in the action for the reason that they are barred by the time limitation contained in section 46-238, R. R. S. 1943. The applicable part of this statute provides: "Any application for an appropriative right which is deficient by reason of past failure to comply with any of the requirements of sections 46-233 and 46-238 for the perfection of an appropriative right, which application has not been dismissed or denied, is also hereby ratified and confirmed;. unless, within one year from September 20, 1957, a petition to vacate such an order granting an extension of time, or a petition to forfeit, cancel or otherwise invalidate such an application for an appropriative right, shall have been filed with the department by a person affected adversely thereby. All rights and defenses which heretofore shall have accrued in favor of the grantees of such an extension shall be preserved." The record shows that Hickman filed his petition prior to September 20, 1958, and Middle Loup District, North Loup District, and the receiver did not file their petitions in intervention until after such date.

It is clear from the foregoing statute that Middle Loup District, North Loup District, and the receiver lost any right they may have had to petition for the cancellation and annulment of the appropriation right of Loup District by failing to petition the department within the 1-year limitation. The question presently before the court is whether or not the Middle Loup District, the North Loup District, and the receiver, after a party adversely affected has within the 1-year limitation sought the cancellation and annulment of Loup District's appropriation right, are barred from intervention to assert the interest which they have in the litigation.

The rule in such cases is stated by an authoritative text as follows: "The general rule seems to be that where a community of interest or a privity of estate exists between an intervener and other plaintiffs, a suit commenced before the expiration of the statutory period inures to the benefit of the person who intervenes therein after the time when an action would be barred. The reason for this holding is that an intervention does not constitute a new cause of action." Annotation, 8 A. L. R. 2d § 42, p. 90. Although the rule appears to be one of first impression in this state, it is supported by a multitude of decisions from other jurisdictions which are cited in the footnotes to the foregoing quotation. See, Mauer v. Miller, 77 Kan. 92, 93 P. 596, 127 Am. S. R. 408, 15 Ann. Cas. 663; Russell v. People's Nat. Bank of Belton (Tex. Civ. App.), 2 S. W. 2d 961; Marsh v. United States, 97 F. 2d 327. We conclude that Middle Loup District, North Loup District, and the receiver were properly permitted to intervene.

The motions to dismiss the petition of Hickman and the interveners' petition were based on the pleaded offer of Loup District to permit interference with its water right in the future to the extent of 1.28 cubic feet of water per second of time. The sustaining of the motions to dismiss on this ground was erroneous.

The statutes of this state give a preferential use to waters for agricultural (irrigation) purposes over a use for power purposes. § 70-668, R. R. S. 1943. They also provide that no inferior right to the use of waters of this state shall be acquired by a superior right without just compensation therefor to the inferior user. § 70-669, R. R. S. 1943. It is further provided by section 70-672, R. R. S. 1943, that where the owner of a superior right seeks to acquire water being used for power purposes, and compensation to be paid cannot be agreed upon, the procedure to condemn property shall be exercised in the manner set forth in sections 76-704 to 76-724, R. R. S. 1943. We point out that Hickman has not

attempted to condemn any of the waters appropriated by Loup District. Neither has he agreed with Loup District on the amount of compensation to be paid in lieu of condemnation. The effect of the dismissals by the department is for the department to accept the offer of Loup District on behalf of Hickman and then to impose its terms upon Hickman against his will. The department is clothed with no such authority.

We point out that the issue between Hickman and Loup District is the validity or invalidity of Loup District's appropriation. The validity of Hickman's appropriation is not in issue. The offer of Loup District, which the department feels is sufficient to make the issues moot and require a dismissal, overlooks the fact that it is dealing with a subject not in issue under the pleadings. Hickman pleaded the validity of his appropriation right only to show that he was a person affected adversely and therefore entitled to bring the action in accordance with section 46-238, R. R. S. 1943. We point out also that in a class action the one bringing the action cannot dismiss the action for reasons personal to him over the objection of a person having a beneficial interest in the litigation who is in the position of one similarly situated when substantial rights of other parties have accrued and injustice would result from the dismissal. But where, as here, petitions in intervention have been filed before the disposition of the case, the nominal petitioner cannot dismiss the entire action. Consequently, if for some reason the department could properly dismiss Hickman from the case for reasons personal to Hickman, the right of interveners to proceed is not affected thereby. We point out further that the United States claims to have acquired the first 260 cubic feet of water per second of time of Loup District's appropriation. The United States was not a party to Loup District's unaccepted compromise offer. From all that can be determined from the pleadings, this situation could well have been a critical factor in the failure of the parties to

agree upon the compensation to be paid in lieu of condemnation. The disposition made does not take into consideration the right of Hickman to recover payments made by him to obtain necessary water for irrigation. The record shows that a tender of such amount was made in this court but not in the proceedings before the department. We do not pass upon the validity of the tender because, whenever and wherever made, it cannot have the effect of making the litigation moot so as to require the dismissal of the action. For the reasons stated, the dismissals of the petition and the petitions in intervention are reversed.

The department is vested by statute with original jurisdiction to adjudicate all matters pertaining to the granting and cancellation of water rights and priorities. North Loup River Public Power & Irr. Dist. v. Loup River Public Power Dist., *supra.* The limit of the jurisdiction of this court in the present appeal is to review the correctness of the department's dismissals of the petition and petitions in intervention. Having concluded that the department erred in sustaining the motions to dismiss, it remains for the department, in the exercise of its original jurisdiction, to determine the issues presented by the pleadings upon their merits. The orders sustaining the motions to dismiss are severally reversed and the cause is remanded to the department for further proceedings.

REVERSED AND REMANDED.

SIMMONS, C. J., participating on briefs.

MAX D. HICKMAN, APPELLANT, V. LOUP RIVER PUBLIC POWER DISTRICT ET AL., APPELLEES, MIDDLE LOUP PUBLIC POWER AND IRRIGATION DISTRICT ET AL., INTERVENERS-APPELLANTS.

113 N. W. 2d 624

Filed March 2, 1962. No. 35113.

APPEAL from the Department of Water Resources. *Reversed and remanded.*

John H. Evans, for appellant Hickman.

Monsky, Grodinsky, Good & Cohen, George A. Munn, Leo F. Clinch, and *Hotz, Hotz & Taylor,* for interveners-appellants.

Neighbors, Danielson & Van Steenberg and *Walter, Albert, Leininger & Grant,* for appellees.

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

CARTER, J.

This is a companion case to Hickman v. Loup River Public Power District, *ante* p. 428, 113 N. W. 2d 617. It is similar in all respects to that case except that it deals with appropriation No. 2573, which approved a different diversion point of a part of the appropriation approved in appropriation No. 2287 and a use for power purposes at a different place than authorized by appropriation No. 2287.

The transcript filed in the present case does not show a petition in intervention by the North Loup River Public Power and Irrigation District and its receiver, R. L. Cochran. The motions on file and the orders made by the Department of Water Resources of Nebraska indicate that the case was heard as if such petition in intervention were on file. In view of the result reached we shall not discuss this apparent defect in the record.

The issues raised are identical with the companion case and are controlled by our holdings therein. For the reasons therein stated, the orders of the department dismissing the petition and petitions in intervention are reversed and the cause is remanded to the department for further proceedings.

REVERSED AND REMANDED.

SIMMONS, C. J., participating on briefs.

JACK B. LEWIS, APPELLEE, V. ELBERT M. GALLEMORE, SR., APPELLANT, IMPLEADED WITH ELBERT M. GALLEMORE, JR., APPELLEE.

113 N. W. 2d 595

Filed March 2, 1962. No. 35152.

1. **Receivers: Appeal and Error.** An order confirming a sale by a receiver is a final order from which an appeal can be taken.
2. **Appeal and Error.** An order which is ministerial in nature and is made solely for the purpose of carrying out a previous order, and does not involve any new matter upon which any party is entitled to be heard, is not a final order from which an appeal can be taken.
3. ———. An order overruling a motion to reconsider a previous order, which was not a final order from which an appeal could have been taken, is not appealable.
4. **New Trial.** A motion for new trial filed out of time is a nullity.

APPEAL from the district court for Buffalo County: S. S. SIDNER, JUDGE. *Appeal dismissed.*

Kenneth H. Dryden, for appellant.

Dier, Barton & Barton and *Charles H. Beatty,* for appellee Lewis.

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

BOSLAUGH, J.

This is a second appeal in an action in equity in which Jack B. Lewis, the appellee, was the plaintiff, and

Elbert M. Gallemore, Sr., the appellant, was the defendant. Elbert M. Gallemore, Jr., was joined as a defendant in the district court but has made no further appearance in that court or in this court.

On the first appeal, the judgment of the district court finding that the plaintiff owned a 25 percent interest in a joint venture which owned and operated Radio Station KRNY at Kearney, Nebraska, was affirmed. Reference should be made to the opinion, reported *ante*, p. 211, 113 N. W. 2d 54, for a summary of the pleadings and evidence upon the first appeal.

The judgment rendered following the hearing on March 10, 1961, also found that the assets of the radio station should be placed in the hands of a receiver forthwith, and directed the sheriff to take charge of the assets of the radio station until the further order of the court. At the same time the court announced that Jac L. Bye was appointed receiver and his bond fixed at $5,000. The receiver filed an oath and bond on March 11, 1961. The bond was approved and letters of receivership were issued to the receiver that same day.

The letters of receivership directed the receiver to make an investigation and recommendation at an early date as to the advisability of the sale of the radio station. On March 16, 1961, the receiver filed a report recommending that the station be sold immediately. On March 18, 1961, the court ordered the receiver to offer the radio station for sale free and clear of all indebtedness and to advertise for sealed bids to be opened April 7, 1961. On April 11, 1961, the receiver filed a report stating that three sealed bids had been received and requesting that the court confirm the sale of the station to the highest bidder. On April 12, 1961, the report of the receiver was heard and considered. The sale of the radio station to the highest bidder was approved and confirmed, and the receiver was ordered to "convey said radio station to said purchaser by appropriate instruments upon their securing F.C.C. approval,

and payment of the balance of the purchase price."

The defendant filed a motion for new trial on March 16, 1961, and a "supplementory motion for new trial upon the confirmation of receivers sale" on April 14, 1961. Both motions were overruled on April 14, 1961. On May 12, 1961, the defendant filed a notice of appeal from the holding of the district court in "overruling motion for new trial on April 14, 1961." The first appeal then followed which resulted in the judgment rendered on March 10, 1961, being affirmed.

On August 11, 1961, the receiver and the purchaser filed motions for an order authorizing the receiver to issue a bill of sale to the purchaser and pay the amounts due the secured creditors from the balance of the purchase price. On August 14, 1961, the court sustained the motions and directed the receiver to complete the sale of the radio station.

On August 15, 1961, the defendant filed a motion asking the court to reconsider the action taken on August 14, 1961. This motion was overruled on August 23, 1961, and a notice of appeal was filed on September 14, 1961. This appeal is, therefore, limited to a review of the action of the district court on August 14, 1961, and August 23, 1961.

The bill of exceptions contains only the statements of counsel and the remarks of the court made at the hearing on the motion to reconsider on August 23, 1961.

The order of April 12, 1961, confirming the sale of the radio station to the highest bidder and directing the receiver to convey the radio station to the purchaser upon approval by the Federal Communications Commission and the payment of the balance of the purchase price was a final order and could have been reviewed upon the first appeal in this action. § 25-1090, R. R. S. 1943; Federal Farm Mtg. Corp. v. Ganser, 145 Neb. 589, 17 N. W. 2d 613. The failure of the defendant to present the order of April 12, 1961, for review upon the first appeal in this action prevented its review at that time. The

order has now become final and is not subject to review on appeal at this time.

The order entered August 14, 1961, directing the receiver to complete the sale of the radio station to the purchaser was ministerial in nature and was not a final order from which an appeal could be taken. It was intended solely for the purpose of carrying out the order of confirmation entered on April 12, 1961, and involved no new features on which the defendant had a right to be heard. See State ex rel. German Savings Bank v. Fawcett, 58 Neb. 371, 78 N. W. 636.

It necessarily follows that the order entered August 23, 1961, overruling the defendant's motion to reconsider the action taken August 14, 1961, is not a final order from which an appeal could be taken. A party cannot obtain the right to a review upon appeal of an order that is not otherwise a final order from which an appeal could be taken by the device of a motion to reconsider. To the extent that the motion to reconsider attempted to attack the validity of the receiver's sale which had been confirmed more than 4 months previously, it was a motion for new trial filed out of time and, therefore, a nullity. Ricketts v. Continental Nat. Bank, 169 Neb 809, 101 N. W. 2d 153.

There is no final order in this action which is subject to review upon appeal at this time. For that reason the appeal is dismissed. The other matters discussed in the defendant's brief do not require further consideration at this time.

APPEAL DISMISSED.

SIMMONS, C. J., participating on briefs.

GEORGE F. HOWELL, APPELLANT, V. ROBINSON IRON AND METAL CO., A PARTNERSHIP, APPELLEE.
113 N. W. 2d 584

Filed March 9, 1962. No. 35014.

1. **Negligence.** In an action for damages predicated on negligence the burden of proof is on the plaintiff to adduce evidence that the neglect charged either alone or in connection with other acts was the proximate cause of the damages.
2. ———. Negligence is never presumed, and it cannot be inferred from the mere fact that an accident happened.
3. **Evidence: Trial.** 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.
4. ———: ———. The burden of a plaintiff, relying on circumstantial evidence to sustain a cause of action for damages, does not require him to exclude the possibility that damages flowed from some cause other than the one on which he relies.
5. ———: ———. If circumstantial evidence is susceptible of any reasonable inference inconsistent with an inference of negligence on the part of the party charged, it is insufficient to sustain the charge or to require submission of the issue to a jury.
6. **Negligence: Trial.** In a case where reasonable minds may draw different conclusions as to whether or not acts of negligence charged have been proved, a question for determination by a jury is presented.

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

Cassem, Tierney, Adams & Henatsch and *Morris J. Bruckner,* for appellant.

Kennedy, Holland, DeLacy & Svoboda and *Robert A. Skochdopole,* for appellee.

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

YEAGER, J.

This is an action by George F. Howell, plaintiff and appellant, to recover damages from Robinson Iron and

Metal Co., a partnership, defendant and appellee, predicated on alleged negligence of the defendant through its agents and employees, which caused a fire which damaged and destroyed property, for the loss of which the plaintiff was entitled to recover from the defendant. The amount of the claimed damage was $7,925.

After issue was joined the case was tried to a jury. At the close of the evidence for the plaintiff the defendant made a motion in the alternative for a directed verdict or for dismissal of the action. This motion was sustained and the action was dismissed. A motion for new trial was filed by the plaintiff which was overruled. From the order overruling the motion for new trial and the judgment dismissing the action the plaintiff has appealed.

To the extent necessary to state here, it was alleged by the petition on which the case was tried that the plaintiff was the owner of a building situated at 3877 Leavenworth Street in Omaha, Nebraska; that in the building was an abandoned ice plant containing a lot of scrap iron; that about May 2, 1957, the plaintiff sold the scrap iron to the defendant which scrap iron, under agreement, was to be removed by the defendant; that for the purpose of removal the south end of the building in which the equipment was located was placed under exclusive control of the defendant; and that the employees of the defendant, for the purpose of removing the equipment, used cutting torches which were so negligently used as to set fire to and destroy the south end of the building.

The acts of negligence charged were 10 in number. In substance they were as follows: (1) In allowing sparks to settle in the wooden framework of the building; (2) in applying direct heat from an acetylene torch to wooden framework and combustible material; (3) in allowing sparks off metal to come into contact with wooden framework and combustible material; (4) in failing to use experienced personnel; (5) in failing to determine whether any sparks were still smoldering before the

employees left the premises; (6) in failing to use baffle plates to protect against direct heat coming from the acetylene torch; (7) in cutting over a wooden floor without having first swept the floor; (8) in failing to wet down the floor and combustible material on it before cutting over them; (9) in failing to keep a proper lookout for unarrested sparks; and (10) in failing to have adequate fire extinguishing equipment.

The effect of the judgment of the district court was to say that the plaintiff failed to adduce evidence sufficient upon which to submit to the jury the question of whether or not defendant in any of the respects charged was guilty of negligence which was the proximate cause of the fire and its consequences.

The record shows that there was a fire in the building described in the petition and that the part of it involved in the action was for all intents and purposes destroyed but not altogether consumed. The front of the building faced to the north on Leavenworth Street and was not of wooden construction. Attached on the south was a wooden structure built on two levels. The dimensions were about 45 by 60 feet. The floor was cement but almost in its entirety the rest was wood. Prior to 1943 this portion of the building was used as an ice-manufacturing plant. Thereafter it was used only for the storage of furniture. The ice-making equipment was, on May 2, 1957, sold to the defendant under an agreement for removal by the defendant. It was contemplated that the equipment, being metal, would require cutting by the use of acetylene torches for removal. Outside, at the southwest corner and immediately adjacent to the south wall, was a pit filled with rubbish which was there at the time the sale was made. There was a garage attached to the east side of the building, the south end of which was near the south end of the building. There were doors and windows in the building but their sizes and locations are not clearly stated. A large part of the interior of the building was covered with cardboard.

The facilities and equipment, except the metallic equipment used for ice making, were what may be regarded as inflammable. Prior to the start of removal of equipment, all furniture had been removed and the defendant had removed all rubbish, debris, and loose material in the building. There had however been no sweeping to remove an accumulation of dirt and dust. The work in removal was started possibly on May 7, 1957, and was carried on practically continuously from about 8 a.m., on May 8th. It was in the direct charge of one Frank Sillik. He had two helpers. The evidence indicates that for a large part of the day Sillik was engaged in cutting the metal with an acetylene torch. What the other two did is not disclosed except that while Sillik was operating the torch one of them was watching to see that no fires were started by sparks from the torch. These employees stopped work about 5 p.m. and left the premises about 10 minutes later. The fire was reported about 7:50 p.m. There is no direct evidence as to what caused the fire and none whatever as to the specific location of its beginning. One witness stated generally that it started in the south and west side and another that it started in the south and west corner.

There is no direct evidence to support seven of the alleged acts of negligence of the defendant. There is direct evidence in support of three, that is, that inexperienced personnel were used; that there was a failure to have adequate fire extinguishing equipment; and that no baffle plates were used; but, as is clear, no right of action may be based upon them unless this neglect alone or in connection with another act or acts amounted to proximate cause.

The burden of proof, and this nobody questions, was on the plaintiff to adduce evidence from which a jury could properly proceed to find in favor of the plaintiff. See, Fick v. Herman, 159 Neb. 758, 68 N. W. 2d 622; Christ v. Nelson, 167 Neb. 799, 95 N. W. 2d 128.

This burden may not rest on presumption. "Negli-

gence is never presumed, and cannot be inferred from the mere fact that an accident happened." Bixby v. Ayers, 139 Neb. 652, 298 N. W. 533. See, also, Halsey v. Merchants Motor Freight, Inc., 160 Neb. 732, 71 N. W. 2d 311.

In this case, in the light of the record, it must be said that this burden of proof has not been sustained unless it has been sustained by circumstantial evidence. This the plaintiff concedes in his brief in the following statement: "We call the court's attention to this proposition because the appellant had to rely on circumstantial evidence to prove the negligent cause of the fire."

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. See, Bixby v. Ayers, *supra;* In re Estate of Bingaman, 155 Neb. 24, 50 N. W. 2d 523; Halsey v. Merchants Motor Freight, Inc., *supra.*

In order to sustain his burden under the foregoing rule a plaintiff is not bound to exclude the possibility that the accident might have happened in some other way. Fonda v. Northwestern Public Service Co., 138 Neb. 262, 292 N. W. 712; Taylor v. J. M. McDonald Co., 156 Neb. 437, 56 N. W. 2d 610.

From the various pronouncements on this subject it appears that two guiding rules have emanated. One is as follows: "Negligence is a question of fact and may be proved by circumstantial evidence and physical facts. All that the law requires is that the facts and circumstances proved, together with the inferences that may be properly drawn therefrom, shall indicate with reasonable certainty the negligent act charged." Gilliland v. Wood, 158 Neb. 286, 63 N. W. 2d 147. See, also, Shields v. County of Buffalo, 161 Neb. 34, 71 N. W. 2d 701.

The other, which is found in Bedford v. Herman, 158

Neb. 400, 63 N. W. 2d 772, is the following: "In order for circumstantial evidence to be sufficient to require the submission of an issue of negligence to a jury it must be such that a reasonable inference of negligence arises from the circumstances established. If such evidence is susceptible to any other reasonable inference, inconsistent with the inference of negligence on the part of the party charged, it is insufficient to carry the case to the jury."

In this case it does not become necessary to consider affirmative evidence, either direct or circumstantial, that the fire was caused by acts of other than the defendant and its employees. No such evidence was presented. This leaves only the question of whether or not the evidence of facts and circumstances with their inferences was sufficient to require a jury to determine whether or not the defendant was guilty of negligence in one or more of the particulars charged which was the proximate cause of the fire.

It may well be said that there is no direct evidence in the record from which alone an inference of negligence could flow. If however there was circumstantial evidence which, coupled with the direct evidence of one or more of the acts charged, could be reasonably said to be proof of negligence, it must be said that the evidence was sufficient for submission of the issue to a jury.

The cutting was done with an acetylene torch and usually the heat generated for this purpose was from 5,000 to 7,000 degrees. Heat of 3,000 degrees however was regarded as sufficient with which to perform the operations involved. Sparks from such an operation could fly from 30 to 40 feet. In this instance, on one occasion, sparks were seen to fly about 9 feet. Baffle plates could be used to arrest sparks flying from the torch but none was used. The cutting was not localized but appears to have been carried on quite generally over the interior of the building. It was done over an unswept floor on which there was an accumulation of

dust which under the evidence could be regarded as combustible. There is no evidence that the floors and the combustible materials were wet down. There is no evidence that any effort was or was not made when work ceased to ascertain whether or not there were any live or unarrested sparks in the building.

A fair reflection of the evidence is that when the workmen left, the doors of the building were probably closed but there was at least one opening which was not barricaded. When the fire was discovered it was apparently so far advanced that it was impossible to ascertain the exact point of origin. No witness testified in point of fact as to the cause of the fire, and the trial court did not permit, on the basis of lack of foundation, any witness to give in evidence an opinion as to the cause.

There was no evidence that any persons other than the employees of the defendant had been on the premises. There was no evidence that there was any surrounding incident or condition which could have started the fire. Of course, in speculation, incendiarism or carelessness of a trespasser could have been the cause. There was no evidence however to reasonably support such an event.

On the other hand, from the activities and incidents which have been described, it is clear that this fire could have been caused by the negligence of the employees of the defendant. Logic inevitably points in that direction. This logic however is not controlling.

The true rule as applied to this case, as is made clear by the cases cited herein, is that if different minds may draw different conclusions or inferences from the adduced evidence as to whether or not it has been shown with reasonable certainty that the fire was caused by the negligent acts charged, the matter at issue must be submitted to a jury.

The conclusion reached is that on the basis of this rule and the evidence an issue was presented which

should have been submitted to a jury for determination.

The judgment of the district court is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

SIMMONS, C. J., participating on briefs.

CITY OF OMAHA, A MUNICIPAL CORPORATION, APPELLANT, v. ROBERT CUTCHALL ET AL., APPELLEES.
114 N. W. 2d 6

Filed March 9, 1962. No. 35087.

1. **Zoning: Municipal Corporations.** Where the provisions of a zoning ordinance, as to the uses of property which are permitted or which are prohibited in certain districts, are expressed in common words of everyday use, without enlargement, restriction, or definition, they are to be interpreted and enforced according to their generally accepted meaning.
2. **Zoning: Injunction.** A city may properly sue to enjoin carrying on a restaurant or commercial business in violation of a zoning ordinance.
3. **Zoning: Municipal Corporations.** The city of Omaha under its home rule charter has the power, by ordinance, to zone the city in the interest of public health, safety, morals, and the general welfare. Any such act of the city must however not be unreasonable, discriminatory, and arbitrary and it must bear some relationship to the purpose or purposes sought to be accomplished by the ordinance.
4. ———: ———. What is the public good as it relates to zoning ordinances affecting the use of property is, primarily, a matter lying within the discretion and determination of the municipal body to which the power and function of zoning is committed, and, unless an abuse of this discretion has been clearly shown, it is not the province of the courts to interfere.
5. **Municipal Corporations.** In determining the validity of a city ordinance regularly passed in the exercise of police power, the court will presume that the city council acted with full knowledge of the conditions relating to the subject of municipal legislation.
6. ———. To overturn a city ordinance on the ground that it is unreasonable and arbitrary or that it invades private rights, the evidence of such facts should be clear and satisfactory.
7. **Zoning: Equity.** A court of equity will not enforce a zoning

ordinance when its operation and effect will unreasonably and arbitrarily deprive the owner of the substantial use and value of his property and when the purpose of the zoning did not require the hardship to be inflicted.

APPEAL from the district court for Douglas County: JAMES M. PATTON, JUDGE. *Affirmed.*

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

Marks, Clare, Hopkins & Rauth, for appellees.

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

BROWER, J.

This is an action brought by the city of Omaha, as plaintiff and appellant, to enjoin the defendants and appellees from using the northerly portion of certain lots hereinafter described for commercial purposes.

The defendant Cutchall was the tenant in possession of the lots under lease from the defendants Demetrie C. Siampaus, Sophia I. Siampaus, and Stanley K. Komorski, the owners thereof.

Plaintiff's petition seeks to restrain the defendants from using Lots 4, 5, and 6, Block 9, Cloverdale Addition to the city of Omaha for commercial purposes except portions of those lots lying within 125 feet of the northeast property line of Saddle Creek Road. It sets out that the portions of the lots described were zoned by the city on March 1, 1945, in the sixth residential district and the regulations applying to said district as claimed by plaintiffs are set out in the petition. They provide in effect that a building or premises in such district shall be used only for residential purposes, either as a single-family or 2-family dwelling, except only for off-street parking where it adjoins commercial or industrial districts. The petition alleges that the premises were not used for parking of vehicles or for

commercial purposes on March 1, 1945, when the zoning ordinance became effective, but that some time thereafter defendants commenced using the same for commercial purposes in that vehicles were permitted on said property in order that their occupants could transact business from the vehicles so parked by ordering, paying for, and consuming food and beverages while on the premises; and that defendant Cutchall has used the premises for such purposes and the defendant owners have allowed the realty to be so used in violation of the ordinances of the city and the laws of the State of Nebraska. Plaintiff prays that the court enjoin the defendants from so using the premises.

The answer of the defendants contains a general denial and sets out that the defendants purchased the lots on separate dates, all on or prior to April 24, 1944. It further alleges that so much of said lots as were within a distance of 125 feet of Saddle Creek Road, which is the remainder of the lots, were by the zoning ordinance of March 1, 1945, placed in the second commercial district. It then alleged a nonconforming use antedating the passage of the purported zoning ordinance by reason of a popcorn stand on Lot 7 from which patrons were served popcorn, candy, gum, and soft drinks in cars parked on all of said lots in both zoned areas, which use was thereafter continued by occupants of a grocery store whose customers parked on all parts of said lots and, after 1951, by defendant Cutchall. The original ordinance permitting parking in the residential zone in areas adjoining commercial and industrial districts was pleaded. It varied somewhat from the one set out in plaintiff's petition. Defendants claimed the one set out in their answer authorized them to use the parking areas as they were doing.

The answer prayed the petition be dismissed. There was a cross-petition asking for a determination of defendants' nonconforming use as to the portion of the

lots placed in the sixth residential district, and for further equitable relief.

Plaintiff answered the cross-petition by general denial and the matter proceeded to trial without the filing of a reply to the answer.

On December 21, 1960, judgment was entered by the trial court, finding for the defendants and denying the injunction, but making no disposition of the cross-petition.

Plaintiff's motion for a new trial being overruled it has perfected an appeal to this court.

Plaintiff's assignments of error, insofar as they are discussed in its brief and need be considered by this court, are that the judgment is contrary to the law and the evidence.

The briefs of both parties discuss at length the matter of the rights of the defendants under the several zoning ordinances in regard to parking on that portion of the lots zoned for sixth residential district purposes. There is no question that the original ordinance of March 1, 1945, and the amendments passed and in force prior to and through 1951, allowed a "parking area" adjoining a commercial or industrial area. It is not disputed that the defendant Cutchall established his root beer drive-in in that year and has ever since served his customers in their cars in the parking area within the residential zone. The disputed question however, which is briefed by both parties, is what is meant by the words "parking area" with respect to the uses which are permitted thereon. The defendants claim that "parking" includes not only permitting customers to leave their cars on the lots and remain seated therein, but should be construed to permit their being there waited on by carhops and their taking of orders and acceptance of money, all as is the usual practice at drive-ins. The only uses permitted by the ordinance in the residential zone is a residential use or parking in areas adjoining the commercial and industrial area. This court has held that: "Where

the provisions of a zoning ordinance, as to the uses of property which are permitted or which are prohibited in certain districts, are expressed in common words of everyday use, without enlargement, restriction, or definition, they are to be interpreted and enforced according to their generally accepted meaning." Henke v. Zimmer, 158 Neb. 697, 64 N. W. 2d 458.

It would appear that parking should be construed as allowing car operators to leave their cars attended or unattended, or to remain seated therein when not in operation. Whether this would include commercial transactions when cars are parked in commercial districts is not before us as the area involved is residential. This permissive use of premises adjacent to the commercial districts appears to be for the purpose of permitting the residents in the sixth residential district area, and elsewhere, to leave their cars while they enter the second commercial zone adjoining to attend to business matters. This cannot be construed to allow those engaged in business in the commercial area to go upon the parking areas in the residential district and there conduct business where commercial enterprises are prohibited.

Defendants introduced evidence in support of their claim of a nonconforming use antedating the ordinance in 1945 by reason of the operation of the popcorn stand and plaintiff's offered testimony to the contrary. Without question a popcorn stand was brought there in the fall of 1944. It was moved at least once, and probably two or three times, from one portion of the lots to another in the commercial area. There is testimony that customers were served popcorn, gum, candy, and soft drinks in their cars in all, or parts of, the area now zoned as sixth residential district. However, there is evidence which tends to show that the business did not start until after March 1, 1945, and that such service to cars was either nonexistent or at least restricted to a very limited area of that involved. In view however of our deci-

sion it will be unnecessary for us to consider this matter further.

We now come to the consideration of what in our opinion is the controlling question in this case. That is the validity of the zoning ordinance as applied to that portion of the lots zoned in the sixth residential district.

This court has hitherto laid down certain rules in regard to actions with respect to zoning ordinances. In City of Omaha v. Glissmann, 151 Neb. 895, 39 N. W. 2d 828, some of them are stated as follows:

"The city of Omaha under its home rule charter has the power, by ordinance, to zone the city in the interest of public health, safety, morals, and the general welfare. Any such act of the city must however not be unreasonable, discriminatory, and arbitrary and it must bear some relationship to the purpose or purposes sought to be accomplished by the ordinance.

"In determining the validity of a city ordinance regularly passed in the exercise of police power, the court will presume that the city council acted with full knowledge of the conditions relating to the subject of municipal legislation.

"What is the public good as it relates to zoning ordinances affecting the use of property is, primarily, a matter lying within the discretion and determination of the municipal body to which the power and function of zoning is committed, and, unless an abuse of this discretion has been clearly shown, it is not the province of the courts to interfere.

"To overturn a city ordinance on the ground that it is unreasonable and arbitrary or that it invades private rights, the evidence of such facts should be clear and satisfactory."

In City of Lincoln v. Foss, 119 Neb. 666, 230 N. W. 592, a zoning ordinance of the city of Lincoln was held valid and in such a case it was held that a city may properly sue to enjoin the operation of a restaurant or commercial business in violation of a zoning ordinance.

It appears from these rules that the plaintiff's action may be maintained and the defendants enjoined from violating the ordinance by commercially using the parking areas in the sixth residential district unless the ordinance is clearly shown to be arbitrary and unreasonable with respect to the property involved.

It now becomes necessary for us to describe the premises involved, the nature of the surrounding property, and their location with respect to the zoned districts of the city. The premises owned by the defendants Siampaus and Komorski which were zoned by the plaintiff in 1945, consist of 6 contiguous lots located in that portion of the north half of Block 9, Cloverdale Addition to Omaha, Nebraska, which lies east of Saddle Creek Road. They were numbered from east to west, Lot 4 being the farthest east and Lot 9 being the farthest west. None of them were, or now are, corner lots, 3 lots in the half block being still farther east of Lot 4, and a filling station located to the west of Lot 9 on a tract which in the exhibits is not numbered. With the exception of Lots 8 and 9, which are not involved in this litigation, they are rectangular in shape. Exhibit 8 is a plat in evidence drawn to scale and shows the premises and their location. Lots 4, 5, 6, and 7 are approximately 150 feet long north and south. Each lot is 50 feet wide, east and west. In 1945, they were bounded on the north by Seward Street which has since been widened and is now known as Happy Hollow Boulevard. Their south end abuts a 20-foot alley. Slightly to the west of the lots involved in this litigation Saddle Creek Road extends through the area in a diagonal line running from the southeast to the northwest on a course approximately 55 degrees west of north.

In zoning this particular area the ordinance of 1945 placed the area within 125 feet of the northeasterly line of Saddle Creek Road in the second commercial district. All the premises beyond 125 feet to the east of Saddle Creek Road were zoned in the sixth residential district,

making the division between the two zones a line parallel to, and 125 feet easterly from, Saddle Creek Road. This line cuts diagonally through these premises.

The result of this line as it affects the portion of the lots involved that lie in the commercial zone becomes quite apparent from the plat. On Lot 4, being the farthest east, the diagonal line enters 8 feet north of the south end of the lot. It passes through the west boundary of Lot 4 and enters Lot 5, slightly more than 40 feet north of the south line. Extended northwesterly it enters Lot 6, approximately 44 feet north of the same line and leaves it as it enters Lot 7, 76 feet north thereof.

The root beer stand in question is located in the northerly portion of the commercial area in Lot 6, the stand extending west over the line into Lot 7. The area, zoned as commercial in Lots 5, 6, and 7, is obviously too small to build any commercial buildings of size even if there were no commercial setback provisions in the ordinance. The ordinance of March 1945 provided for a sideyard of not less than 5 feet adjoining a residential district and a rear yard of 35 feet but provided, where it adjoined a street or alley, one-half of the alley, which in this block is 20 feet wide, could be included as the rear yard. There are front yard requirements but it is questionable whether they would have any application to commercial building adjoining an alley as these do. It is clear that the small portions of the lots in the commercial area, having little depth and on one side a diagonal dimension, are of no substantial usage for commercial purposes. They can be utilized only for parking or small business structures and have been so used since 1951 at least.

Under the ordinance Lots 4 and 5 may have dwellings built thereon as the commercial area permits them also. However, the area about these lots from pictures and plats in evidence is clearly commercial in character. Lot 6 has on it the root beer stand. On Lots 7 and 8, immediately to the west of Lot 6, is a grocery store

owned by the defendants whose customers, according to the evidence, use at least part of the area for parking. West of this store is a filling station. Across the 20-foot alley is a commercial building called the Homy Bar. Adjoining it to its east is a filling station. Saddle Creek Road is shown to be commercial in character on both sides.

It is apparent that running the line between the two districts diagonally through these lots affected their use and value by including parts of them in commercial areas and parts of them in residential areas, each area in each lot being bounded on one side with a diagonal line. The commercial area thus zoned for practical purposes was of no substantial use aside from something similar to that to which it is now being used. The residential portion was immediately bounded by the commercial area in the lots themselves and the lots in turn directly joined the business district.

A picture of a good portion of these lots, taken in 1945 from the filling station about the time of the original zoning, was introduced in evidence by the plaintiff. It shows that the portion of the lots affected by this litigation was wholly unimproved. Seward Street was unpaved and the area along Seward Street appears unimproved except for one residence. No reason is given by the city for the necessity of zoning in this peculiar manner. Nothing is shown why it would advance the interest of the public health, safety, morals, or welfare. Though amendments have been made to the zoning ordinance, their requirements are substantially the same as originally.

Since 1945, residences have been built not far from this area. From the map, exhibit 17, it appears that those to the north are across Happy Hollow Boulevard which has been created by widening Seward Street and the plats show its width to be 230 feet. The homes on the east end of the block appear to face the east on Forty-ninth Street which is a cross-street. Some of the

witnesses for the plaintiff lived on the other side of Happy Hollow Boulevard and on Forty-ninth Street. They testified for the city, objecting to their proximity to the defendants' property because of the commercial use of the residential area. They claim to have built nice homes and the photographs so indicate. They were more favored by the zoning. The defendants' premises, if used as a residential area, would be for all practical purposes immediately against and on two sides surrounded by the business district.

It is true that zoning lines between areas must run somewhere, that the city is empowered to fix them, and that unless they are clearly shown to be unreasonable and arbitrary courts will not interfere with the discretion of the zoning authorities.

However zoning does consist of more than looking at a map and drawing lines thereon and in case a zoning ordinance acts towards an owner's property unreasonably and arbitrarily, they will not be upheld.

The general rule with respect to boundary lines as appears in 58 Am. Jur., Zoning, § 42, p. 967, is as follows: "A zoning ordinance may be held invalid as applied to particular property because of its inclusion thereof in a particular zone by an arbitrary, unreasonable, discriminatory, and unnatural running of boundary lines not in accord with a well-considered plan. This rule has been applied as to a boundary line running through parts of a single property, and a boundary line running across an intersection to include a corner lot. A zoning regulation has also been regarded as discriminatory where it affected property differently on adjoining blocks, or within the same block on opposite sides of the street."

Weber v. City of Grand Island, 165 Neb. 827, 87 N. W. 2d 575, is a case where the neighboring landowners brought an action for an injunction against the city of Grand Island to declare illegal and void an ordinance of the city based upon a report of its zoning commission

by which certain real estate which had been zoned in Class B residential was transferred to a Class B business district. The neighboring owners claimed there was no basis for the change and that it resulted in spot zoning. This court reversed the judgment of the district court which had sustained the rezoning. The rules set out in the cited case however are the same as those in the other cited cases. This court stated that on appeal the decision of the zoning board in granting a variation from the zoning ordinance would not be disturbed unless it was found to be illegal or, from the standpoint of fact, it is not supported by evidence, or is arbitrary and unreasonable, or clearly wrong. We held in the cited case that the action of the city was arbitrary, illegal, and discriminatory.

In Coulthard v. Board of Adjustment, 130 Neb. 543, 265 N. W. 530, this court in an action brought in the district court to reverse a decision of the board of adjustment of Neligh, Nebraska, held that the city council under a zoning ordinance cannot restrict the use of property in an unreasonable or arbitrary manner, and that to permit a filling station on one side of the main street and deny it to one across the same street was unreasonable and arbitrary.

The case of Peterson v. Vasak, 162 Neb. 498, 76 N. W. 2d 420, was an appeal from the district court for Douglas County which had sustained the action of the board of appeals of the City of Omaha. The board of appeals had refused to grant and issue a certificate of occupancy of the land involved authorizing the applicant to construct a single-family dwelling on certain designated land. The residence was sought to be built in that area which was zoned first residential district. The ordinance zoning the district required an area of 20,000 square feet per family. There were only 13,619 square feet in the tract. The regulations in regard to the front and rear yards and side yards further restricted building on the triangular tract involved. The court considered

the matter de novo and directed its attention to section 14-411, R. R. S. 1943. With respect to the board's ruling, this court stated that the board had abused its discretion, that its ruling was arbitrary, and that its action would be set aside on appeal. There was of course in the cited case no way in which the land could be used for building as it had been zoned.

In Standard Oil Co. v. City of Kearney, 106 Neb. 558, 184 N. W. 109, 18 A. L. R. 95, this court held that a municipal corporation could not, under the general welfare provisions of its charter, forbid the operation between designated points on its principal streets of a filling station for automobiles, to reach which cars must cross the curbs. In a suit brought by the owner of a filling station to enjoin the enforcement of the ordinance, the court in the cited case, stated: "In the exercise of police power delegated to a city, it is generally for the municipal authorities to determine what rules, regulations and ordinances are required for the health, comfort and safety of the people, but their action is not final and is subject to the scrutiny of the courts.

"To overturn a city ordinance as being arbitrary, unreasonable or discriminatory, the evidence of such facts should be clear and satisfactory."

Similar rules apply when the city, as in the case before us, seeks by injunction in a court of equity to enforce and perpetuate a zoning ordinance. A court of equity will not enforce a zoning ordinance when its operation and effect will unreasonably and arbitrarily deprive the owner of the substantial use and value of his property and when the purpose of the zoning did not require the hardship to be inflicted.

Further citation of authorities is unnecessary. It is apparent from the evidence that the zoning of the defendants' property by which the lots involved were placed in two zoning districts, one commercial and one residential, separated by a diagonal line drawn through them which rendered them generally unfit for use in

either zoning district, was unreasonable, arbitrary, and void. In such a case a court of equity will not by injunction enforce the purported action of the city.

The judgment of the district court under the evidence set forth was proper and should be affirmed.

AFFIRMED.

SIMMONS, C. J., participating on briefs.

IN RE ESTATE OF LEWIS E. LAFLIN, DECEASED.
MABEL O. WHITTEN ET AL., APPELLANTS, V. ROBERT D. LAFLIN ET AL., APPELLEES.
MABEL OLA WHITTEN ET AL., APPELLANTS, V. ROBERT D. LAFLIN ET AL., APPELLEES.
113 N. W. 2d 598

Filed March 9, 1962. No. 35122.

1. **Witnesses: Evidence.** A person having a direct legal interest in the result of a civil action, when the adverse party is the representative of a deceased person, is not competent to testify to any transaction or conversation had between the deceased person and the witness, under the provisions of section 25-1202, R. R. S. 1943, in the absence of waiver as provided in the statute.
2. **Executors and Administrators.** An action based upon a promise, express or implied, made by an executor after the death of his decedent, lies against the executor personally.
3. **Limitations of Actions.** An action for money had and received must be brought within 4 years from receipt of the money.

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

Raymond Morrissey, Thomas Morrissey, William L. Walker, and *Earl Ludlam,* for appellants.

Chambers, Holland, Dudgeon & Hastings, for appellees.

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

BOSLAUGH, J.

This is an appeal in a proceeding which was com-

menced by the filing of a claim in a proceeding to probate the will and administer the estate of L. E. Laflin, deceased, which was pending in the county court of Johnson County, Nebraska. The claimant, Mabel O. Whitten, guardian of Ronald James Edwards, a minor, is the appellant in this court. The appellees are Robert D. Laflin, Lewis E. Laflin, and Maree Laflin, executors of the estate of Lewis E. Laflin, deceased. For convenience, the appellant will be referred to as the guardian and the appellees as the executors.

The Western Surety Company, which is the surety on the guardian's bond, filed a separate claim in the county court and is an appellant in this court. The surety company has no interest in this proceeding other than the interest it may have because it is the surety on the guardian's bond. In disposing of the issues presented by this appeal it will not be necessary to make any further reference to the surety company.

The claim (denominated petition and application) which the guardian filed in the estate proceeding on December 16, 1958, alleged in substance that the deceased had represented the guardian as her attorney from the time of her appointment until his death; that pursuant to an order of the county court on April 21, 1951, directing the investment of the funds of the ward, the guardian executed and delivered to the deceased a check dated May 18, 1951, in the amount of $1,478.07 to be used to purchase government bonds; that the deceased failed and neglected to invest the proceeds of the check in government bonds but unlawfully appropriated and converted the funds to his own use; and that the funds delivered to the deceased by the guardian were trust funds and should be repaid from the assets of the estate. The claim further alleged that on November 13, 1954, the guardian executed and delivered to the deceased a check in the amount of $500 for the purchase of a bond; that after the death of the deceased, a $500 United States Savings Bond, No. D843698H, was deliv-

ered to the guardian by one of the executors who demanded payment therefor and represented that payment for the bond had not been made previously to the deceased; that the guardian executed and delivered to the executors a check for $500 dated April 18, 1956, which funds have been converted to the use and benefit of the estate; and that the court should declare that the estate holds $500 in trust for the guardian.

Objections to the claim of the guardian (denominated answer to petition and application of Mabel Ola Whitten) were filed by the executors. The objections admitted that the guardian was duly appointed, qualified, and acting; denied all allegations except those admitted; alleged that the deceased died February 13, 1956; that the guardian knew of his death, attended his funeral, and dealt with his executors; that an order barring claims was entered in the estate proceeding on July 14, 1956; that the guardian filed or asserted no claim until December 19, 1958; and that the claim of the guardian is barred by the statute of limitations and the statute of non-claim.

The county court found that the guardian had paid the sum of $1,478.07 to the deceased to be invested in bonds but that the deceased failed and neglected to invest the funds in bonds; that the executors hold the sum of $1,478.07 as trustees for the guardian; that the guardian had erroneously paid $500 to the estate; and that the executors should reimburse the guardian. The executors were ordered to pay the sums of $1,478.07 and $500, with interest, to the guardian. The executors then appealed to the district court.

The guardian filed a petition in the district court alleging the same facts as had been alleged in county court, and, in addition thereto, that on or about December 7, 1953, the guardian had delivered the sum of $146.93 to the deceased for the purpose of purchasing bonds or depositing it in a bank; that the deceased failed to purchase bonds, deposit the money in a bank, or return the

funds to the guardian; and that the funds delivered to the deceased were held by him in trust and should be repaid by his executors.

While the appeal from the county court was pending in the district court, the guardian and her surety commenced an independent action in the district court against the executors. Before trial this action was consolidated with the appeal from the county court and does not require further consideration except with reference to the $500 item.

The district court found generally in favor of the executors and against the guardian; that the decree of the county court in the estate proceedings should be reversed; and that the petition of the guardian in the action in district court should be dismissed with prejudice. The guardian's motion for new trial was overruled and she has appealed.

The claim of the guardian against the executors consisted of three separate items. In disposing of the appeal, each item of the claim will be discussed separately.

With respect to the item of $1,478.07, the evidence shows that on or about May 18, 1951, the guardian paid $1,478.07 to the deceased. The guardian attempted to testify that the money was paid to the deceased for the purchase of bonds and that she did not receive anything in return for it. This testimony was objected to as being incompetent under section 25-1202, R. R. S. 1943, and was not received. The objection was properly sustained because the guardian had a direct legal interest in the result of the action, the adverse parties were the representatives of a deceased person, and the testimony concerned a transaction and conversation between the deceased person and the witness. Olsen v. Best, 167 Neb. 198, 92 N. W. 2d 531.

There is other evidence that at about this time the deceased received $1,478.04 from the guardian for bonds which was deposited to the account of the deceased, and that he purchased and received for the guardian two gov-

ernment bonds for $1,478.01. There is no evidence as to what happened to the bonds. There is a complete failure of proof as to whether the bonds, or the money, were later delivered to the guardian. The evidence was not sufficient to sustain the allegations of the petition in regard to the $1,478.07 item. The finding of the district court against the guardian as to this item was proper.

With respect to the item of $500, the evidence shows that in November 1954, the guardian delivered to the deceased a check for $500 for the purchase of government bonds. After his death a manila folder or envelope containing government bonds and other papers relating to the guardianship was found in the office of the deceased. A little tin box containing a $500 government bond was also found. A girl helping in the office advised one of the executors that the bond in the tin box had been purchased by the deceased for the guardian but that the guardian had not paid the deceased for the bond. The executor then wrote to the guardian. Later the guardian came to the office and delivered a check for $500 to the executor. The executor then delivered the $500 bond and the contents of the manila folder or envelope to the guardian. The $500 check which the guardian delivered to the executors was dated April 18, 1956. It was deposited to the account of the executors and was paid April 21, 1956.

When the executors delivered to the guardian the $500 bond which the deceased had purchased for the guardian, any liability of the deceased to the guardian in respect to that transaction was discharged. The fact that the guardian at the same time by mistake may have paid $500 to the executors which she did not owe would not create any liability on the part of the deceased or his estate to the guardian, and could not be the basis for a claim against the estate.

"In all cases of promises, express or implied, made to or by an administrator, after the death of the in-

testate, the action lies for or against the administrator personally. Therefore, where money was paid to an administrator by mistake and he receipted as administrator, an action to recover it may be brought against him personally." 21 Am. Jur., Executors and Administrators, § 916, p. 886. See, also, Grier v. Huston, 8 Serg. & R. (Pa.) 402, 11 Am. D. 627; Cronan v. Cotting, 99 Mass. 334; Weeks v. Love, 19 Ala. 25. The liability of the executors to repay to the guardian the $500 which she has paid to them by mistake was their personal liability and not a liability in their representative capacity.

The petition filed by the guardian in the district court in June 1960, while the appeal from the county court was pending, contained the same allegations as the petition on appeal from the county court and described the defendants as executors. But even if that action should be considered to have been brought against the executors in their personal capacity, it was barred by the statute of limitations because the payment had been made in April 1956. An action for money had and received must be brought within 4 years from the receipt of the money. Murphy v. City of Omaha, 1 Neb. (Unoff.) 488, 95 N. W. 680. Thus, the finding of the district court against the guardian as to the $500 item was proper.

With respect to the item of $146.93, there was a complete failure of proof. The parties stipulated that the guardian had been found to be short in her accounts in that amount, and a check stub for that amount appears as an exhibit in the bill of exceptions. The exhibit, however, was not properly identified by the testimony of any witness and it was not offered in evidence by any of the parties. The finding by the district court against the guardian as to this item was also proper.

The judgment of the district court is correct and is affirmed.

AFFIRMED.

SIMMONS, C. J., participating on briefs.

MARGARET A. PETERSON, A MINOR, BY HELEN PETERSON, NEXT FRIEND, APPELLANT AND CROSS-APPELLEE, V. ALLEN C. SKILES ET AL., APPELLEES AND CROSS-APPELLEES, ROBERT SCHROEDER, APPELLEE AND CROSS-APPELLANT.

113 N. W. 2d 628

Filed March 9, 1962. No. 35127.

1. **Automobiles: Highways.** An automobile with a flat tire, being driven on a public road, is a disabled automobile within the purview of section 39-757, R. R. S. 1943.
2. ———: ———. It is the duty of a driver of a disabled automobile to take all reasonable precautions to protect the traveling public from injury by removing it from the main traveled portion of the road when it is practicable to do so.
3. ———: ———. When it is impractical to remove a disabled automobile from a public highway it is the duty of its driver to get it as nearly off the road as circumstances will reasonably permit, and whether or not the driver has done so is ordinarily a question for the jury.
4. ———: ———. Where the evidence is undisputed that a disabled automobile was stopped as far off the highway as the circumstances would reasonably permit, the trial court may properly find a want of negligence as a matter of law.
5. ———: ———. It is a violation of section 39-7,111, R. R. S. 1943, to stop an automobile beside any vehicle on the roadway, and such violation is evidence of negligence.
6. ———: ———. The words "park" or "leave standing" contained in section 39-757, R. R. S. 1943, mean something more than mere temporary stops on the road which are incident to travel.
7. **Negligence: Trial.** A jury may properly be instructed that certain facts are proper to be considered in determining whether or not there has been negligence, but whether or not the facts in evidence establish negligence is solely for the jury.
8. **Automobiles: Negligence.** In an action for negligence by a guest in one automobile against the driver of a second automobile, the guest may not recover where the negligence of the host driver is the sole proximate cause of the accident.
9. ———: ———. In such an action if the negligence of the defendant and the host driver combine to produce a single injury, they are jointly and severally liable for the injury so proximately caused, irrespective of the degree of negligent participation.
10. **Trial: Appeal and Error.** Where the evidence on the issue of negligence is in conflict, the question is one for the jury. This

court on appeal in such a case will not resolve conflicts in or weigh evidence.

11. ———: ———. The admission or rejection of photographs in evidence is largely within the discretion of the trial court. Error may not be predicated thereon in the absence of a showing of an abuse of discretion.

12. **Juries.** The question as to whether or not the failure of a juror to properly answer questions addressed to him on voir dire examination is primarily a matter within the discretion of the trial court, with which this court will not interfere unless an abuse of such discretion is shown.

13. **Infants.** The guardian ad litem of an infant litigant is entitled to an allowance of reasonable compensation for his services to be taxed as costs.

14. ———. An action by an infant must be brought by his guardian or next friend, who alone is liable for costs. The infant in such an action is not liable for costs.

APPEAL from the district court for Buffalo County: S. S. SIDNER, JUDGE. *Affirmed in part, and in part reversed and remanded with directions.*

Dier & Barton and *Raun & Samuelson,* for appellant.

Anderson, Storms & Anderson, Luebs, Elson & Tracy, and *Richard A. Huebner,* for appellees Skiles.

Munro, Parker & Munro, for appellee Robert Schroeder.

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

CARTER, J.

This is an action for damages for personal injuries resulting from an automobile accident. The trial court directed a verdict in favor of the defendants Robert Schroeder and Edward Schroeder. The jury returned a verdict in favor of the defendant Allen C. Skiles. Motions for a new trial were filed and overruled by the court. Plaintiff has perfected her appeal to this court.

The parties to this litigation and the primary witnesses at the trial attended a wedding at Riverdale, Nebraska, on June 7, 1959. Upon the departure of the bride

and groom from Riverdale by automobile following the wedding, a pursuit was undertaken in three automobiles. Immediately prior to the accident the car carrying the newly-weds was proceeding east on a graveled highway east of Riverdale. They were being pursued in the following order by the automobile driven by the defendant Robert Schroeder with Gerald A. Knapp as a passenger, the automobile driven by the defendant Allen C. Skiles with Barbara Miller as a passenger, and the automobile driven by Annette Henderson who was accompanied by Ann Chandler and Margaret Peterson. The action was commenced by Helen Peterson as next friend of Margaret Peterson, a minor. We shall refer to Margaret Peterson as plaintiff.

The road was graveled and 24 or 25 feet wide at the scene of the accident. The day was clear with some dust rising and blowing off the road. At approximately 4:15 p.m., as Schroeder drove over a small hill, he observed indications that a tire on his car was going flat. He coasted down the east side of the hill, pulled over to the right side, and stopped. The evidence is that he stopped with his right wheels over the south shoulder of the road and his left wheels against a small ridge of gravel at the edge of the highway. He and other witnesses testified that his automobile occupied about 2 feet of the graveled portion of the road. Skiles came over the hill and stopped alongside the Schroeder car about 2 feet from it. Some conversation occurred between the occupants of the two cars for a half minute or so when the automobile of Annette Henderson came over the hill, angled to the left, went into the north ditch a short distance to the rear of the Skiles car, ran down the ditch a short distance, struck the north bank of the north ditch, and rolled over one or more times, causing the injuries to Margaret Peterson for which the action was brought.

The evidence of Schroeder, Skiles, and Knapp is that the Henderson car came over the hill at a speed of 70

or more miles per hour, that it appeared to "rare up" as it came over the crest of the hill, and that the brakes were applied, causing its wheels to lock and skid to the left until the car went into the ditch on the left side of the road. These three witnesses testified that the Skiles car was on the right of the center of the road and that the Henderson car had more than 15 feet to the north of the Skiles car in which to pass. The Henderson car left skid marks on the road for 132 feet before it went into the north ditch. The distance from the point where the Henderson car left the road to the place where it came to rest was 141 feet.

Annette Henderson, the driver of the Henderson car, testified that she came over the hill and saw the two cars stopped side by side, that they seemed only a car-length in front of her, that she did not have room to get around them on the road, and that she drove her car into the ditch to avoid a collision with the two cars. She could give no estimate of her speed as she came over the hill. She did not know that the Schroeder and Skiles cars were ahead of her as she traveled east before the accident. The state patrolman who investigated the accident testified that he interviewed Annette Henderson the day after the accident and that she said she was driving between 65 and 70 miles per hour when she went over the crest of the hill.

Margaret Peterson testified that she was riding in the Henderson car. She was sitting between the driver, Annette Henderson, and Ann Chandler. She saw the two cars parked side by side part way down the hill. She said the Schroeder car was partly on the gravel road and the Skiles car 2 or 3 feet to the north of it. She estimated the speed of the Henderson car at 50 to 60 miles per hour as it came over the hill. She remembers the Henderson car going toward the ditch and remembers nothing that occurred thereafter. It is not disputed that Margaret Peterson suffered serious injuries in this accident.

The distance of the two cars as they stood on the road from the crest of the hill is in dispute. Knapp testified the Schroeder and Skiles cars stopped from 75 to 100 yards from the crest of the hill. Barbara Miller and Skiles estimated it as the same distance. Curtis Henderson, father of Annette Henderson, testified that he stepped the distance from the crest of the hill to a point fixed by Schroeder as the place where the cars stopped and found it to be 141 feet. Schroeder testified that he stopped across from a corner post in the south fence, a distance of 285 feet from the crest of the hill.

The applicable statute dealing with the parking or leaving of vehicles standing on a highway provides in part as follows: "No person shall park or leave standing any vehicle, whether attended or unattended, upon the paved or improved or main traveled portion of any highway, outside of a business or residence district, when it is practicable to park or leave such vehicle standing off the paved or improved or main traveled portion of such highway; * * *. The provisions of this section shall not apply to the driver of any vehicle which is disabled while on the paved or improved or main traveled portion of a highway in such manner and to such extent that it is impossible to avoid stopping and temporarily leaving such vehicle in such position." § 39-757, R. R. S. 1943.

It is the contention of the plaintiff that the trial court erred in directing a verdict in favor of the defendants Robert Schroeder and Edward Schroeder in view of the foregoing statutory provision. The evidence shows without dispute that the automobile operated by Robert Schroeder had a tire going flat as it went over the hill at the scene of the accident. He coasted down the hill and stopped, pulling his right wheels into the ditch and leaving his left wheels no more than 2 feet on the road. No other act of negligence is charged against him.

We think an automobile with a flat tire is a disabled automobile within the meaning of this statute. The

driving of an automobile in such condition is not safe. It could result in further damage to the car. A rule of reason requires the operator of such an automobile to take all reasonable precautions to protect the traveling public, but to bring it to a stop at a point reasonably safe under the circumstances is not a violation of the statute per se when it is not practical to remove it entirely from the road.

In LaFleur v. Poesch, 126 Neb. 263, 252 N. W. 902, this court quoted the following with approval from Grubbs v. Grayson, 165 Wash. 548, 5 P. 2d 1033: "The statutes are not violated if there is proper excuse or a necessity for stopping an automobile upon the highway, and a reasonable effort is made to get it entirely off the traveled portion of the road or as nearly so as circumstances will permit." The stopping of an automobile on a public highway to make necessary repairs is not a violation of section 39-757, R. R. S. 1943, as a matter of law. An automobile with a flat tire is disabled within the meaning of that section of the statute and if a reasonable effort is made to get it off the traveled portion of the highway, the statute is not violated. Whether or not a reasonable excuse for stopping existed and a reasonable effort made to remove the disabled automobile from the traveled portion of the highway, and reasonable precautions taken for the protection of highway traffic, is ordinarily a question for the jury. In the instant case, however, the acts of Schroeder in this respect are not in dispute. When his tire went down he turned his car to the right with its right wheels off the shoulder and his left wheels occupying approximately 2 feet of the 25-foot road. There was admittedly more than 15 feet of road for traffic to pass. It is clear that he acted reasonably under the circumstances shown. He was not in violation of the statute and he was guilty of no actionable negligence under the facts shown by the record. There is no evidence that he could have stopped his car off the road within a reasonable distance from the point

where he did stop it. The trial court, therefore, properly sustained the motion for a directed verdict as to Robert Schroeder and Edward Schroeder, the latter's purported liability being imputed under the family purpose doctrine.

The trial court submitted the issue of negligence as between plaintiff and Skiles to the jury. The trial court properly instructed the jury that any negligence on the part of Annette Henderson, the host driver, was not imputable to the plaintiff. The jury was also properly instructed that Skiles would be liable to plaintiff for all damages if his negligence was a contributing cause of the accident irrespective of any negligence on the part of Annette Henderson. The court also informed the jury that liability would not attach to Skiles if the negligence of Annette Henderson was the sole proximate cause of the accident.

The trial court instructed the jury as to the applicable statutory law as follows: "No person shall drive a vehicle on a highway at a speed greater than is reasonable and prudent under the conditions then existing. The following speed shall be prima facie lawful, but in any case when such speed would be unsafe, it shall not be lawful: fifty miles per hour upon any gravel, dirt, or other highway or road that is not hard-surfaced, except upon any highway that is a part of the state highway system outside of a city or village. The fact that the speed of a vehicle is lower than the foregoing prima facie limit shall not relieve the driver from the duty to decrease speed when approaching a hill crest.

"No person shall park or leave standing any vehicle, whether attended or unattended, upon the improved or main traveled portion of any highway outside of a business or residence district, when it is practicable to park or leave such vehicle standing off the improved or main traveled portion of such highway. In no event shall any person park or leave standing any vehicle, whether attended or unattended, upon any highway unless a

clear and unobstructed width of not less than fifteen feet upon the main traveled portion of said highway opposite such standing vehicle shall be left for free passage of other vehicles thereon, nor unless a clear view of such vehicle may be obtained from a distance of two hundred feet in each direction upon such highway.

"No person shall stop a vehicle beside any vehicle on the roadway."

The evidence is clear that Skiles violated the statutes of this state when he stopped his car beside the Schroeder car. It was clearly practicable for Skiles to have stopped his automobile, which was not disabled, off the main traveled portion of the road. The violation was evidence of negligence which the jury could consider, and the jury was so instructed. We cannot assume that the jury ignored the plain statutory provisions with reference to the use of the road. After a consideration of all the evidence the jury found that Skiles was either not negligent, or that his negligence was not the proximate cause or a concurring proximate cause of the accident. This was the province of the jury under the instructions given by the court.

The evidence shows that Annette Henderson drove her automobile over the hill at an excessive rate of speed. It is not disputed in the evidence that she was driving in excess of the maximum speed of 50 miles per hour fixed by statute. There is no evidence that she reduced her speed as she approached the crest of the hill, as the law requires. There is evidence that she came over the hill as fast as 70 or 80 miles per hour. There is evidence that the front of the car "rared up" as it came over the crest of the hill. There is some evidence that as she came over the hill she threw up her hands from the steering wheel, although she said she had her hands on the wheel at all times. She said the two cars appeared to be a car-length or less from her as she came over the hill, a fact disproved by many witnesses and the physical facts. The record shows that she applied

her brakes and left skid marks on the road for 132 feet before going into the north ditch. Her car proceeded down the ditch, struck the north bank, and rolled over one or more times within a distance of 141 feet from the point where it entered the ditch. She testified that there was no room to pass the Skiles car on the road and that she drove into the ditch to avoid hitting the Skiles car. Plaintiff corroborated her testimony in this respect. There is evidence that there was ample room for her to have passed the Skiles car on the road if she had had control of her car. Under the evidence in this record the jury could have properly found that Annette Henderson failed to reduce her speed as she approached the crest of the hill, that she came over the crest of the hill at high and excessive rate of speed, that she panicked and lost control of her car, that she was not driving in such a manner that she could stop in the range of her vision, and that her negligence was the sole proximate cause of the accident.

The issue was clearly one for the jury, which it resolved in favor of the defendant Skiles. The evidence was clearly sufficient to sustain the verdict of the jury. In fact, the state of the record is such that we doubt if any fair-minded jury could arrive at any other conclusion.

The plaintiff contends that the trial court improperly instructed the jury, with the result that she did not have a fair trial. The plaintiff contends that instruction No. 14 is erroneous in that it told the jury that section 39-757, R. R. S. 1943, did not prohibit momentary stops on the main traveled portion of a highway for a normal and reasonable purpose, - that momentary stops are incidental to the use of the highway. The question was determined by this court in Greyhound Corp. v. Lyman-Richey Sand & Gravel Corp., 161 Neb. 152, 72 N. W. 2d 669. The instruction given is consistent with the rule in that case. Under the holding in that case the terms "park" and "leave standing" do not include mo-

mentary stops incident to travel on a highway. It must be borne in mind that the violation of a statute is evidence of negligence only which the jury may consider in determining questions of negligence. Such violations do not have the effect of changing the general rules of negligence, but they constitute evidence of negligence which a jury may consider in determining questions of negligence under applicable rules. We find no error in instruction No. 14.

Plaintiff complains of instruction No. 15 in that, according to plaintiff, it singles out and states a group of facts and informs the jury that, if such facts are found to exist, negligence is established. A jury may be instructed that certain facts are proper to be considered in determining whether or not there has been negligence, but whether or not such facts as are in evidence establish negligence is solely for the jury. Missouri P. Ry. Co. v. Baier, 37 Neb. 235, 55 N. W. 913; Chicago, B. & Q. R.R. Co. v. Krayenbuhl, 65 Neb. 889, 91 N. W. 880, 59 L. R. A. 920. While the holdings of these cases are correct, the instruction being considered is not subject to the criticism directed to it. The instruction is not so drawn as to amount to an improper comment by the court upon the evidence. It states rules that are applicable to the evidence adduced and, they being correct, prejudicial error is not present. No attempt was made to recite the facts in the case. The relation of the rules to the facts shown in the evidence was left to the jury where the function belonged. We find no prejudicial error in the giving of instruction No. 15.

We have examined all the instructions given in the case, and the objections thereto, and we find that considered together they fairly submit the issues to the jury. We find no merit in the assignments of error dealing with the instructions.

Complaint is made of the refusal of the trial court to receive exhibit 3 in evidence. Exhibit 3 is a photograph taken at the scene of the accident a few days

after its occurrence. The conditions shown by the photograph were testified to by witnesses and do not appear to be in dispute. The admission or rejection of photographs in evidence is largely within the discretion of the trial court. In the absence of a showing of an abuse of discretion, error may not be predicated upon such ruling. Markey v. Hunter, 170 Neb. 472, 103 N. W. 2d 221; Zancanella v. Omaha & C. B. St. Ry. Co., 93 Neb. 774, 142 N. W. 190. No abuse of discretion is shown.

Plaintiff complains of misconduct on the part of a juror in that she failed to properly answer a question put to the entire panel. It is the contention of plaintiff that the jury panel was asked on voir dire examination if they or any members of their families had ever been in an automobile accident and had been sued with reference thereto, and on a request for a show of hands the prospective juror failed to raise her hand. The evidence shows that the prospective juror's husband had been in an automobile accident and had been sued as a result thereof. She was retained as a juror. The juror in question testified that she was asked if she had been in an automobile accident and whether or not she or any member of her immediate family had a suit pending as a result of an automobile accident. Since her husband's case was closed, she did not raise her hand in answer to this question. There was evidence that the claimed question was asked. The questions and answers on voir dire examination were not reduced to writing.

In such a situation the question as to whether or not the complaining party was prejudiced by the juror's failure to answer properly is a matter primarily within the discretion of the trial court. In the absence of a showing of an abuse of discretion the ruling of the trial court thereon will not be reversed. See Annotation, 63 A. L. R. 2d § 2, p. 1062. See, also, Dischner v. Loup River Public Power Dist., 147 Neb. 949, 25 N. W. 2d 813; Graves v.

Bednar, 171 Neb. 499, 107 N. W. 2d 12. No presumption of prejudice arises because the juror's husband was at one time involved in a suit arising out of an automobile accident. We find nothing to indicate that the trial court abused his discretion in overruling plaintiff's claim of misconduct on the part of the juror in question.

The defendant Robert Schroeder has cross-appealed. He assigns as error the denial of a fee to the guardian ad litem. The record shows that after service of summons upon Robert Schroeder he applied to the court for the appointment of a guardian ad litem for the reason that he was a minor 17 years of age. The court appointed Robert A. Munro as guardian ad litem. Subsequent to the trial of the case the guardian ad litem applied to the court for compensation to be taxed as costs in the action. The application was denied.

The defense of an infant must be by a guardian for the suit, who may be appointed by the court in which the action is prosecuted. § 25-309, R. R. S. 1943. It is the duty of an attorney to act as the guardian of an infant defendant in any suit pending against him when appointed by the court to do so. He is entitled to such compensation for such service as the court shall deem reasonable. § 7-113, R. R. S. 1943; Wood Realty Co. v. Wood, 132 Neb. 817, 273 N. W. 493; Copple v. Bowlin, 172 Neb. 467, 110 N. W. 2d 117. The guardian or next friend is liable for the costs of an action brought by him. § 25-308, R. R. S. 1943. An action by an infant must be brought by his guardian or next friend, who alone is liable for costs. The infant is not liable to a judgment for costs. Kleffel v. Bullock, 8 Neb. 336, 1 N. W. 250. The courts of this state are authorized by statute to tax as costs a reasonable fee for the services of a guardian ad litem. The litigant to whom the fee for services of a guardian ad litem shall be taxed as costs depends upon the circumstances of each particular case and the discretion of the court. Wood Realty Co. v. Wood, *supra*. An attorney acting under appointment as a guardian

ad litem must look only to the court for the amount of his compensation, to be taxed as a part of the costs of the proceedings and collected as such. Englebert v. Troxell, 40 Neb. 195, 58 N. W. 852, 42 Am. S. R. 665, 26 L. R. A. 177; Shelby v. Meikle, 62 Neb. 10, 86 N. W. 939.

In the instant case the action was commenced by Helen Peterson as the next friend of Margaret Peterson, a minor. Margaret Peterson is not liable for the costs of the unsuccessful litigation. Kleffel v. Bullock, *supra*. By statute, one who as next friend brings an unsuccessful suit on behalf of an infant is chargeable with the costs. § 25-308, R. R. S. 1943.

The trial court was in error in not fixing reasonable compensation for the guardian ad litem and taxing it as costs to Helen Peterson, the next friend, who brought the action.

The action of the trial court in directing a verdict in favor of defendants Robert Schroeder and Edward Schroeder is affirmed. The action of the trial court in entering a judgment on the verdict of the jury for the defendant Allen Skiles is affirmed. The judgment of the trial court denying the application of the guardian ad litem for compensation for services rendered is reversed and that portion of the case is remanded with directions to fix the compensation of the guardian ad litem, to be taxed as costs to Helen Peterson as the next friend of Margaret Peterson. The costs of this appeal, including compensation for the guardian ad litem in the amount of $100, are taxed to the plaintiff Helen Peterson.

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

SIMMONS, C. J., participating on briefs.